

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000823-MR

EUNA FAYE RICHARDSON

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE REBECCA M. OVERSTREET, JUDGE
ACTION NO. 02-CR-00017

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: JOHNSON, KNOPF AND McANULTY, JUDGES.

JOHNSON, JUDGE: Euna Faye Richardson has appealed from the final judgment and sentence of imprisonment entered by the Fayette Circuit Court on March 26, 2002, which convicted her of assault in the third degree¹ and alcohol intoxication.² Having concluded that Richardson's level of intoxication was a factual issue for the jury to resolve and that any error on the part of the trial court was harmless, we affirm.

¹ Kentucky Revised Statutes (KRS) 508.025.

² KRS 222.202.

The underlying facts of this case are not in dispute. On October 21, 2001, at approximately 11:20 p.m., Officer Richard Rice of the Lexington Metro Police Department (LMPD) was assisting a fellow officer with a traffic stop at the corner of Seventh Street and Harry Alley in Lexington, Kentucky, when a bystander informed him that a woman was passed out in the street around the corner. Shortly thereafter, Officer Rice found Richardson sitting in the street at the intersection of Seventh and Limestone. Officer Rice approached Richardson and asked her to move out of the street, which she refused to do. Consequently, Officer Rice grabbed Richardson by the arm and placed her on the sidewalk. Officer Rice then attempted to obtain Richardson's name and address, which she refused to provide. According to Officer Rice, Richardson was very belligerent and combative. Suspecting that Richardson might be intoxicated, Officer Rice administered a preliminary breath test which indicated that Richardson had a blood alcohol content of .126. At this point, Richardson was handcuffed, placed under arrest, and transported to the Fayette County Detention Center.

Once they arrived at the detention center, Officer Rice escorted Richardson to a small holding room located within the detention center.³ Officer Rice instructed Richardson to

³ The holding room serves as a vestibule to the triage or intake area of the detention center. Arrestees are placed in the holding room while the arresting officer completes the necessary paperwork. After this process is

take a seat on a metal bench located within the room while he completed the necessary paperwork. Officer Rice then proceeded through an open door to a separate room directly adjacent to the holding room, at which time he began filling out his report. Richardson, however, refused to cooperate and demanded that Officer Rice take her directly to jail. Richardson refused to remain seated and she began yelling at Officer Rice. At this point, Officer Glenna Baker, an employee of the detention center, opened the door to the holding room and asked Officer Rice if he was finished filling out his report. Officer Rice informed Officer Baker that he had a few more questions for Richardson. Richardson then proceeded through the door that led to the triage area and informed Officer Baker that she was ready to go to jail. Officer Baker told Richardson that she needed to return to the holding room until Officer Rice completed his report. Richardson responded, "What do you want me to do? Do you want me to go back out there and suck that nigger's dick?" Officer Baker again told Richardson, who was still handcuffed, that she needed to return to the holding room until Officer Rice completed his report. At first, Richardson appeared to comply, however, she abruptly turned around and kicked Officer Baker in

completed, the arrestee is escorted through a door which leads to the triage area. At this point, the arrestee is transferred to a detention center officer, patted down, and a booking record is compiled.

the stomach. Richardson was then subdued and placed in a holding cell.⁴

On January 8, 2002, Richardson was indicted by a Fayette County grand jury for assault in the third degree and alcohol intoxication. On January 18, 2002, Richardson was arraigned and pled not guilty to the charges. Richardson's case was tried before a Fayette County jury on February 28, 2002.

Prior to the presentation of the Commonwealth's case in chief, but after the jury was impaneled and sworn, Richardson filed a motion in limine to suppress the racial epithet concerning Officer Rice. Richardson claimed the statement was irrelevant and unduly prejudicial. The Commonwealth argued that the statement went to Richardson's state of mind since it was so close in time to the alleged assault. The trial court denied the motion in limine but agreed to admonish the jury not to consider the statement as evidence of Richardson's guilt.

Officers Rice, Baker, Estes, and Tringali testified on behalf of the Commonwealth. Each officer described in detail the events that transpired at the detention center on the evening of October 21, 2001, and the early morning hours of October 22, 2001. In sum, Officer Baker testified that Richardson was hostile and verbally combative from the moment she arrived at the detention center. Officer Baker recounted

⁴ Officer Ben Estes and Officer Gina Tringali, both employees of the detention center, assisted Officer Baker in subduing Richardson.

her instructions for Richardson to return to the holding room and Richardson's lewd, racially derogatory comment.⁵ Officer Baker then went on to testify that when she told Richardson to return to the holding room for the second time, Richardson abruptly turned around and kicked her in the stomach. Officers Rice, Estes, and Tringali all testified that they witnessed Richardson kick Officer Baker in the stomach. Each officer also stated that Richardson appeared to be intoxicated when she was brought into the detention center.⁶ After the Commonwealth rested its case, Richardson moved for a directed verdict of acquittal based on insufficiency of the evidence, which was summarily denied.

Richardson testified in her own defense and denied having any recollection of the events that transpired at the detention center on the evening of October 21, 2001, and the early morning hours of October 22, 2001. Richardson claimed that she started drinking tequila when she woke up on October 21, 2001. Richardson stated that she proceeded to Al's Bar, which is located in Lexington, sometime between 12:00 and 1:00

⁵ At this point, defense counsel requested an admonition. The trial court admonished the jury as follows:

The testimony that the defendant made a racial comment shall not be used to draw an inference that the defendant is guilty of the charged offenses on account of whatever her views on race might be.

⁶ When asked if Richardson seemed very intoxicated, Officer Tringali responded in the negative.

p.m. that afternoon. According to Richardson, she left Al's Bar sometime prior to 4:00 p.m. and proceeded to the Waterin' Hole Saloon, another Lexington bar. Richardson stated that she started drinking double shots of tequila once she arrived at the Waterin' Hole. Richardson testified that the last thing she remembered was playing pool at the Waterin' Hole around 4:00 p.m. that afternoon. Richardson further testified that she woke up in the detention center the following morning with a hangover and absolutely no recollection of the events that transpired the night before. After resting her case, Richardson again moved for a directed verdict of acquittal based on insufficiency of the evidence, which was also denied.

The jury found Richardson guilty of assault in third degree and alcohol intoxication. The jury instructions read, in relevant part, as follows:

INSTRUCTION NO. 2

THIRD DEGREE ASSAULT

You will find the Defendant guilty of Third-Degree Assault under this Instruction, if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

A. That in this county on or about the 21st day of October, 2001 and before the finding of the Indictment herein, she intentionally inflicted a physical injury upon Glenna Baker;
AND

B. That Glenna Baker was an employee of Fayette County Detention Center.⁷

. . .

INSTRUCTION NO. 3

THIRD DEGREE ASSAULT

If you do not find the Defendant guilty under Instruction No. 2, you will find the Defendant guilty of Third-Degree Assault under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

A. That in this county on or about the 21st day of October, 2001 and before the finding of the Indictment herein, she wantonly inflicted physical injury upon Glenna Baker;

AND

B. That Glenna Baker was an employee of the Fayette County Detention Center and the Defendant was a person confined in that facility.⁸

. . .

INSTRUCTION NO. 4

If you do not find the Defendant guilty under Instruction No. 2 or 3, you will find the Defendant guilty of Fourth-Degree Assault under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

A. That in this county on or about [the] 21st day of October, 2001 and within 12 months before the finding of the Indictment

⁷ See KRS 508.025(1)(a).

⁸ See KRS 508.025(1)(b).

herein, she wantonly caused physical injury to Glenna Baker by kicking her.⁹

. . .

INSTRUCTION NO. 5

INTOXICATION DEFENSE

Even though the defendant might otherwise be guilty of Intentional Third-Degree Assault under Instruction No. 2, you shall not find her guilty under those instructions if at the time she committed the offense (if she did so), she was so intoxicated that she did not form the intention to commit the offense.

. . .

INSTRUCTION NO. 7

DEFINITIONS

Intentionally--A person acts intentionally with respect to a result or to conduct when her conscious objective is to cause that result or to engage in that conduct.

. . .

Wantonly--A person acts wantonly with respect to a result or to a circumstance when he is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. A person who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts wantonly with respect thereto.

⁹ See KRS 508.030.

The jury found Richardson guilty under Instruction No. 2.

On March 26, 2002, the trial court sentenced Richardson to an indeterminate term of confinement not to exceed 23 months.¹⁰ This appeal followed.

Richardson argues on appeal that the trial court erred by not granting her motion for a directed verdict of acquittal. Richardson's argument in this regard is two-fold. First, Richardson claims the Commonwealth failed to prove that she possessed the requisite degree of intent required under KRS 508.025(1)(a). Second, Richardson claims the trial court erroneously instructed the jury that she could be found guilty under KRS 508.025(1)(b).

The standard of review for a trial court's denial of a motion for a directed verdict of acquittal is well established.

In Commonwealth v. Benham,¹¹ our Supreme Court stated:

On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the

¹⁰ Richardson was ordered to pay a \$25.00 fine for the alcohol intoxication conviction.

¹¹ Ky., 816 S.W.2d 186, 187 (1991).

jury questions as to the credibility and weight to be given to such testimony.

On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal [citation omitted].

Richardson contends that the trial court should have granted a directed verdict of acquittal in her favor because the Commonwealth failed to prove the requisite degree of intent required under KRS 508.025(1)(a), which reads, in relevant part, as follows:

(1) A person is guilty of assault in the third degree when the actor:

(a) Recklessly, with a deadly weapon or dangerous instrument, or intentionally causes or attempts to cause physical injury to:

. . .

2. An employee of a detention facility[.]

In order to obtain a conviction under KRS 508.025(1)(a), the Commonwealth was required to prove that Richardson acted intentionally.¹² Voluntary intoxication is a defense to a criminal charge only when it "negatives the

¹² See, e.g., Robert G. Lawson and William H. Fortune, Kentucky Criminal Law, § 9-2(d)(2) at 377 (1998).

existence of an element of the offense.'"¹³ "If the posture of the evidence is such that an issue of fact is raised showing intoxication to such a degree that the defendant was unable to form the requisite intent where the charge is for a specific intent crime, then the defendant is entitled to an instruction on this defense[.]"¹⁴

There was evidence at trial that Richardson was extremely intoxicated when the assault occurred. Thus, Richardson properly received a jury instruction on this issue. Richardson was not, however, entitled to a directed verdict of acquittal. The testimony elicited at trial demonstrates that Richardson's level of intoxication was disputed. Simply put, "[Richardson's] alcohol intoxication may have been at a level to support being arrested for public intoxication but still not to a level where she did not know what she was doing."¹⁵ There was sufficient evidence to induce a reasonable juror to believe beyond a reasonable doubt that Richardson was so intoxicated that she did not form the intent to assault Officer Baker, but

¹³ Rogers v. Commonwealth, Ky., 86 S.W.3d 29, 44 (2002) (quoting Mishler v. Commonwealth, Ky., 556 S.W.2d 676, 679 (1977)). See also Kentucky Criminal Law, supra § 2-6(b)(1) at 86.

¹⁴ Mishler, supra at 680.

¹⁵ Foster v. Commonwealth, Ky., 827 S.W.2d 670, 677 (1991). See also Meadows v. Commonwealth, Ky., 550 S.W.2d 511, 513 (1977); and Jewell v. Commonwealth, Ky., 549 S.W.2d 807, 812 (1977), overruled on other grounds, Payne v. Commonwealth, Ky., 623 S.W.2d 867, 870 (1981), cert. denied, 456 U.S. 909, 72 L.Ed.2d 167, 102 S.Ct. 1758 (1982). "Mere drunkenness will not raise the defense of intoxication." Id.

there was also sufficient evidence to support a finding that she acted intentionally in assaulting Officer Baker. Thus, the question of whether Richardson was so intoxicated that she was incapable of forming intent as required under the statute was a factual issue for the jury to resolve.¹⁶

Richardson next argues that the trial court erroneously instructed the jury that she could be found guilty under KRS 508.025(1)(b),¹⁷ which reads, in relevant part, as follows:

(1) A person is guilty of assault in the third degree when the actor:

(b) Being a person confined in a detention facility . . . inflicts physical injury upon . . . an employee of the facility.¹⁸

Richardson contends that KRS 508.025(1)(b) only applies to "prison inmates." Richardson asserts that she was not an "inmate" because she had not been booked into the detention center database when the assault occurred. We reject

¹⁶ See Estep v. Commonwealth, Ky., 957 S.W.2d 191, 193 (1997). "[Q]uestions of credibility and weight of the evidence are jury matters." Id. See also Schwachter v. United States, 237 F.2d 640, 644 (6th Cir. 1956). "[A] trial judge in a criminal case cannot weigh the evidence or judge the credibility of witnesses and take from the jury a controverted question of material fact, no matter how strongly he may be of the opinion that the evidence established the fact beyond a reasonable doubt" [citations omitted]. Id.

¹⁷ This argument is rendered moot in light of our conclusion that Richardson's level of intoxication was a factual issue for the jury to resolve. Nevertheless, for the sake of clarity, we will address this issue so as to eliminate any doubt as to the validity of Richardson's conviction.

¹⁸ KRS 508.025(1)(b) does not expressly designate a culpable mental state. In Covington v. Commonwealth, Ky.App., 849 S.W.2d 560, 562 (1992), this Court held that KRS 508.025(1)(b) requires a mens rea of intentionally or wantonly.

this argument. KRS 508.025(1)(b) draws no distinction between arrestees who have yet to be booked and "inmates." The statute applies to all persons "confined in a detention facility."

There is no dispute that the Fayette County Detention Center is a detention facility.¹⁹ Moreover, Richardson was clearly confined within the detention center when the assault occurred.²⁰ Thus, the trial court properly instructed the jury that Richardson could be found guilty under KRS 508.025(1)(b) if she acted wantonly. Furthermore, since Richardson was found guilty under Instruction No. 2, there was no need for the jury to even consider Richardson's guilt under Instruction No. 3.

Richardson next contends that the trial court committed reversible error when it failed to exclude the racial epithet concerning Officer Rice. We disagree.

First and foremost, this issue is unpreserved.

RCr 9.22 imposes upon a party the duty to make "known to the court the action he desires the court to take or his objection to the action of the court" Failure to comply with this rule renders an error

¹⁹ In Fulton v. Commonwealth, Ky.App., 849 S.W.2d 553, 556 (1992), this Court held that the booking area of a jail fell within the statutory definition of detention facility as it appears in KRS 520.010(4). We find the same reasoning applicable to the case sub judice.

²⁰ Richardson argues that she was not confined in the detention center because she was still in the custody of Officer Rice when the assault occurred. We find no merit in this contention. Richardson was clearly "confined" when the assault occurred. The statute does not require the defendant to be in the custody of an employee of the detention facility at the time of the assault. The statute simply requires the defendant to be "a person confined in a detention facility."

unpreserved. Bowers v. Commonwealth, Ky., 555 S.W.2d 241 (1977). If a party claims entitlement to a mistrial, he must timely ask the court to grant him such relief. Jenkins v. Commonwealth, Ky., 477 S.W.2d 795 (1972). Further, we have held that failure to move for a mistrial following an objection and an admonition from the court indicates that satisfactory relief was granted. "It is well within the realm of valid assumption that counsel was satisfied with the court's admonition to the jury." Hunter v. Commonwealth, Ky., 479 S.W.2d 4, 6 (1972). From the foregoing it is clear that a party must timely inform the court of the error and request the relief to which he considers himself entitled. Otherwise, the issue may not be raised on appeal.²¹

As previously discussed, Richardson requested an admonition, which she received. Richardson did not, however, request a mistrial. "[F]ailure to move for a mistrial following an objection and admonition from the court indicates satisfactory relief was granted."²² Stated otherwise, "[i]t was incumbent on [Richardson], if [she] felt that the admonition was inadequate, to move the trial court for a further admonition or to move for a mistrial" [citation omitted].²³

Notwithstanding, any error on the part of the trial court in this respect was clearly harmless in light of the overwhelming evidence against Richardson. Officer Baker

²¹ West v. Commonwealth, Ky., 780 S.W.2d 600, 602 (1989).

²² Derossett v. Commonwealth, Ky., 867 S.W.2d 195, 197 (1993). See also Robert G. Lawson, The Kentucky Evidence Law Handbook, § 1.10 at 3 (3d ed. 1993 and Supp. 2002).

²³ Lewis v. Charolais Corp., Ky.App., 19 S.W.3d 671, 676 (1999).

testified that Richardson kicked her in the stomach. Furthermore, Officers Rice, Estes, and Tringali all testified that they witnessed Richardson kick Officer Baker in the stomach. Thus, we cannot say "there is any reasonable possibility that absent the error, the verdict would have been any different" [citations omitted].²⁴

Finally, Richardson alleges that the prosecutor incorrectly stated the law regarding intent in his closing argument. This issue is also unpreserved as Richardson failed to object during the Commonwealth's closing argument.²⁵ Nevertheless, Richardson urges us to review her argument under RCr 10.26, which provides as follows:

A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

After a thorough review of the prosecutor's closing argument, we were unable to conclude that a palpable error occurred. When the prosecutor's entire argument is considered, it can be reasonably argued that he did not misstate the law

²⁴ Renfro v. Commonwealth, Ky., 893 S.W.2d 795, 797 (1995). See also Harman v. Commonwealth, Ky., 898 S.W.2d 486, 489 (1995); and RCr 9.24.

²⁵ RCr 9.22.

regarding intent. Thus, whether any error occurred during the prosecutor's closing argument is debatable and certainly not palpable.²⁶

Based upon the foregoing reasons, the judgment of conviction and sentence of imprisonment entered by the Fayette Circuit Court is affirmed.

ALL CONCUR.

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²⁶ United States v. Henning, 286 F.3d 914, 920 (6th Cir. 2002).