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Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000090-MR
AND
NO. 2003-CA-000190-MR

CORENESTES — APPELLANT/CROSS-APPELLEE

V.

APPEAL AND CROSS-APPEAL FROM LOGAN CIRCUIT COURT
HONORABLE TYLER L. GILL, JUDGE
CIVIL ACTION NO. 00-CI-00341

CARPENTER COMPANY;
JIM GUTHRIE;
JOHNNY MEGUIAR;[1]
AND DOUG BULLOCK — APPELLEES/CROSS-APPELLANTS

OPINION
1. AFFIRMING DIRECT APPEAL NO. 2003-CA-000090-MR
2. DISMISSING CROSS-APPEAL NO. 2003-CA-000190-MR AS MOOT

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; MINTON AND VANMETER, JUDGES.

MINTON, JUDGE: Coren Estes appeals following a directed verdict entered in favor of his former employer, Carpenter Company

[1] Johnny Meguiar's name is misspelled as "McGuire" throughout the record.

("Carpenter"), as well as Jim Guthrie, Johnny Meguiar, and Doug Bullock (collectively "the appellees"). Estes was the victim of a series of bizarre assaults which he alleges were orchestrated by Bullock, another employee of Carpenter. Bullock's alleged involvement served as the basis for several theories of liability against Carpenter and its managers, Guthrie and Meguiar. The circuit court directed a verdict in favor of the appellees when it became convinced after two days of trial that there was no evidence connecting Bullock and the assaults. We are similarly convinced. So we affirm the dismissal.

THE SERIES OF ASSAULTS

Estes alleges that on three occasions, he was accosted[2] by one or two masked individuals[3] who brandished a gun and forced him to drink a liquid containing doxylamine[4] which caused him to lose consciousness. The first assault happened on Carpenter's premises on August 11, 1999, the day before Estes was to retire. The second and third assaults occurred after Estes's retirement

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[2] There was some dispute before trial about whether these assaults actually occurred. Our resolution of the issues on appeal assumes that these assaults did occur as Estes describes them, so this factual question is irrelevant for our purposes.

[3] Estes says there was one common assailant involved in all three assaults. There was also a second assailant who participated only in the first assault.

[4] Doxylamine is an antihistamine which causes drowsiness. It is used by itself as a sleep aid (under the brand name Unisom) or in combination with decongestants to treat cold symptoms.

on December 19, 2001, and March 18, 2002, at his home. Estes alleges that Bullock was somehow behind the assaults. He then builds upon that to allege liability on the part of Carpenter, based on theories of age discrimination, negligence, and *respondeat superior*.

THE EVIDENCE PROFFERED BY ESTES

The only evidence Estes proffered to connect Bullock to the assaults is three utterances[5] of the unknown assailants.[6] Estes says that during the first assault, he heard one assailant say to the other, "Go tell Dougie we have got him." Estes says that during the second assault, the assailant said, "Mr. Estes, Doug Bullock has sent you a Christmas present." During the third assault, the assailant said, "You know the drill." The admissibility of these specific utterances was challenged before trial in the appellees' motion *in limine*. It was discussed at length in a pretrial hearing, and Estes filed a memorandum

[5] We use the somewhat awkward term "utterances" rather than "statements" because "statement" is a term of art within the meaning of the Kentucky Rules of Evidence (KRE) regarding hearsay. *See* KRE 801(a). Whether these utterances are statements is an issue before this court.

[6] On appeal, Estes has barraged this Court with endless facts which are offered ostensibly to connect the assaults with Bullock. For example, the assailant wore the same jacket in two of the assaults, and a late 1970's to early 1980's model Chevrolet pickup was seen in front of Estes's house prior to the second and third assaults. While this type of evidence is relevant to showing a common assailant, none of it in any way implicates Bullock.

citing reasons in support of admitting these utterances into evidence at trial. Ultimately, the circuit court ordered that these utterances be excluded from trial on the grounds that they are hearsay not falling within any applicable exceptions. Because this specific evidentiary issue was fairly brought to the attention of the circuit court before trial, we find that it is preserved for appellate review.[7]

THE DIRECTED VERDICT BEFORE ESTES CLOSED HIS CASE

Estes asserts that the circuit court erred by excluding these three utterances which he believes ultimately led the circuit court to grant a directed verdict in error. The circuit court granted a directed verdict in the appellees' favor after two days of trial but before the end of Estes's proof. After the second day of trial, the circuit court called the lawyers to the bench for a conference. Noting that none of Estes's evidence presented thus far had connected the assaults to Bullock, the circuit court asked Estes's counsel if she believed, in good faith, that any of the remaining witnesses[8] could do so. Perceiving her answer in the negative, the circuit court entered a directed verdict in the appellees' favor. While it is unusual for a court to direct a verdict prior to the close

[7] Kentucky Rules of Evidence (KRE) 103; Tucker v. Commonwealth, Ky., 916 S.W.2d 181, 183 (1996).

[8] Estes had listed approximately fifty witnesses on his witness list.

of a party's evidence, a court may do so in the unique situation where "the evidence clearly and definitely discloses no cause of action."[9] Even if a court were to grant a directed verdict prematurely, the court's judgment may not be set aside if its ruling was harmless error.[10]

An appellate court reviewing a grant of a directed verdict must consider the evidence and all reasonable inferences and deductions drawn from the evidence which support the claim of the prevailing party.[11] After the trial court has heard evidence on an issue squarely presented before it and has made its decision, the reviewing court cannot substitute its judgment for that of the trial court unless the trial court's decision was clearly erroneous.[12]

DISCUSSION OF ESTES'S PROFFERD EVIDENCE

On appeal, Estes concedes that the utterances are hearsay but asserts that the trial court erred by not admitting them under KRE 804(3)[13] as statements against declarant's

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[9] Lambert v. Franklin Real Estate Co., Ky.App., 37 S.W.3d 770, 774-775 (2000).

[10] *Id*. at 775.

[11] Meyers v. Chapman Printing Co., Ky., 840 S.W.2d 814, 821 (1992).

[12] Davis v. Graviss, Ky., 672 S.W.2d 928, 933 (1984).

[13] Before trial, Estes also raised two other theories regarding why the utterances are admissible. He asserted that they are not hearsay because they are not offered for their truth but, rather, for their

interest. The definition of hearsay is familiar: "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[14] However, less attention is paid to the fact that "statement" is further defined as "(1) An oral or written assertion; or (2) Nonverbal conduct of a person, if it is intended by the person as an assertion."[15] KRE 801 closely parallels Rule 801 of the Federal Rules of Evidence.[16] The Advisory Committee Note on FRE 801(a) explains the importance of intent as follows: "The effect of the definition of 'statement' is to exclude from the operation of the hearsay rule all evidence of conduct, verbal or nonverbal, not intended as an assertion. The key to the definition is that nothing is an assertion unless intended to be one."[17] The Kentucky Supreme Court has also recognized that the focus under KRE 801(a) is on the intent of the speaker or actor.[18] With this definition in

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significance as verbal acts or to show his state of mind at the time of the assaults. Estes subsequently abandoned these arguments.

[14] KRE 801(c).

[15] KRE 801(a).

[16] Fed. Rules Evid. (FRE) 801(a)-801(c) and KRE 801(a)-801(c) are substantively identical, containing only subtle differences in punctuation and capitalization.

[17] Fed. R. Evid. 801, Advisory Committee Note to subdivision (a) (1973).

[18] ROBERT G. LAWSON, THE KENTUCKY EVIDENCE LAW HANDBOOK § 8.05[5] at 569-570 (4th ed. 2003) (*citing as an example*, Partin v. Commonwealth, Ky.,

mind, we will examine each of the three utterances to see if it meets the definition of hearsay[19] and, if so, whether it falls within the hearsay exception for statements against the declarant's interest. In the interest of convenience, we will not limit ourselves to addressing each in the chronological order in which it was made.

"MR. ESTES, DOUG BULLOCK HAS SENT YOU A CHRISTMAS PRESENT."

Estes asserts that during the second assault, which occurred shortly before Christmas, the assailant said, "Mr. Estes, Doug Bullock has sent you a Christmas present." The "Christmas present" referred to was the liquid containing doxylamine which Estes was then forced to drink. This utterance is a statement within the meaning of KRE 801(a) because the declarant[20] is asserting as a matter of fact that Doug Bullock has sent Estes the liquid containing doxylamine. The fact that the phrase "Christmas present" is sarcastically metaphorical,

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918 S.W.2d 219, 222 (1996)). All references to Lawson refer to the fourth edition of THE KENTUCKY EVIDENCE LAW HANDBOOK unless otherwise indicated.

[19] Because there is no question that all three utterances were made out of court, we need not address that part of the definition.

[20] Just as using the term "statement" presupposes that the utterance in question is intended to make an assertion, using the term "declarant" presupposes that the speaker in question is making a statement. *See* KRE 801(a), (b). Therefore, we will use the generic term "speaker" where there is a question about whether the utterance is a statement.

rather than literal, does not alter the assertive nature of the utterance since its meaning is easily discernible.[21] The admissibility of this out-of-court statement depends on the purpose for which it is offered. Estes sought to introduce this statement to show that Bullock sent the assailant to his door with the drug (and presumably the orders to forcibly administer the drug). This is the truth of the matter asserted, the very use of hearsay which is forbidden.[22]

Estes asserts that this statement falls under the hearsay exception KRE 804(b)(3) as a statement against declarant's penal interest. In its order ruling on the motion *in limine* to exclude all three utterances, the circuit court employed the following analysis of KRE 804(b)(3), which we adopt, at least with respect to the statement, "Mr. Estes, Doug Bullock has sent you a Christmas present":

> Under this exception two requirements must be met. The first is meant to establish the necessity of the proffered testimony and the second is to establish its trustworthiness.
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> Under this rule the declarant must be:
>
> 1) "unavailable" as a witness as defined by KRE 804(a). Under this rule, "unavailability as a witness" includes the situation in which the declarant [the only possible applicable subsection is

[21] JOHN W. STRONG, MCCORMICK ON EVIDENCE § 250, at 112 n.29 (5th ed. 1999).

[22] *See* KRE 801, 802.

KRE 804(a)(5)]: "is absent from the hearing and the proponent of the statement has been unable to procure the declarant's attendance by process or other reasonable means."

AND,

2) the statement must be: "A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability . . . that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement. A statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement." KRE 804(b)(3).

Can someone whose identity is absolutely unknown be declared "unavailable" as a witness? If [he] can, can the statements attributable to the anonymous person, made while he was in the process of committing a crime, be admitted under the second requirement?

Although highly dubious, the answer to the first question is, arguably, yes. Cases interpreting this requirement seem to turn on the good faith of the proponent in attempting to secure the attendance of the

> witness.[23] At this point in the proceedings, the Court has no reason to question [Estes's] good faith in his allegations concerning the assailants or his efforts to ascertain their identity or obtain their testimony for trial.
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> The theory of the second requirement is that people don't usually make false statements which put them in jeopardy civilly or criminally. When people make personally incriminating statements, the theory goes that the statements are more likely to be true.
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> In this case the statements do not put the unknown assailant in any additional jeopardy. He is in the process of committing a crime. Statements tending to show who may have employed him or may be a co-conspirator add little or nothing to his potential jeopardy. The fact that the identity of the declarant(s) remains anonymous and that two statements were made pointing to "Dougie" during separate assaults detracts from the trustworthiness of all of the statements. Assuming that the facts are precisely as stated by [Estes], why should anyone believe that the statements of the anonymous assailants are true? What are their indicia of reliability? There are no corroborating circumstances clearly indicating the trustworthiness of the statements. The Court concludes that this hearsay exception is inapplicable.

On appeal, Estes points to the deposition of Willis Shores as providing the corroborating circumstances required by KRE 804(b)(3). Shores stated that he was on the telephone with Estes during the second attack when he heard someone ring

[23] *See, e.g.,* ROBERT G. LAWSON, THE KENTUCKY EVIDENCE LAW HANDBOOK § 8.45 IV (3rd ed. 1993) (citation format altered from parenthetical citation in original).

Estes's doorbell and say, "Mr. Estes" and "sent you a Christmas present." This was followed by shuffling noises, Estes saying loudly, "Get out of here," and finally a dial tone. Shores's testimony does not supply the corroborating circumstances required for a statement against penal interest. The similar requirement of "corroborating circumstances [that] clearly indicate the trustworthiness of the statement" for the admissibility of hearsay statements against penal interest[24] under FRE 804(b)(3) has generally been interpreted to require corroboration of the truthfulness of the declarant's statement rather than the veracity of the witness relaying the statement.[25] We hold that this is also the appropriate interpretation of KRE 804(b)(3). "As a matter of standard hearsay analysis, the credibility of the in-court witness regarding the fact that the statement was made is not an appropriate inquiry."[26] This is because the witness relaying the declarant's statement is available for cross-examination, which will presumably reveal

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[24] Unlike KRE 804(b)(3), FRE 804(b)(3) requires corroborating circumstances only where the statement tending to expose the declarant to criminal liability is offered to exculpate the accused.

[25] *See* United States v. Seely, 892 F.2d 1, 2-3 (1st Cir. 1989); United States v. Brainard, 690 F.2d 1117, 1124-1125 (4th Cir. 1982); and United States v. Katsougrakis, 715 F.2d 769, 775 (2d Cir. 1983). *See also* Massachusetts v. Drew, 489 N.E.2d 1233, 1240-1241 (Mass. 1986) (applying Massachusetts common law which adopted the principles of FRE 804(b)(3).

[26] McCORMICK ON EVIDENCE § 319 at 328.

any lack of credibility, memory, or perception on the part of the witness,[27] while the declarant is not available for cross-examination.[28] At most, Shores can corroborate that Estes accurately reported what the declarant said. But Shores's testimony offers no support for the truthfulness of the declarant's statement, which is what is required under KRE 804(b)(3). Thus, we affirm the circuit court's ruling that this hearsay statement cannot be admitted as a statement against penal interest because it lacks the required corroboration.[29]

"YOU KNOW THE DRILL."

Estes alleges that during the third assault, the assailant told him, "You know the drill." This meets the first requirement of hearsay; it is a statement within the meaning of KRE 801(a) because it is an oral assertion. If this statement were to be offered for its truth—to show that Estes was familiar with the routine of the assaults—it would be inadmissible. However, Estes sought to offer this statement as circumstantial evidence showing a common assailant based on the assailant's

[27] *Id*. n.28.

[28] As noted, KRE 804(b)(3) only applies if the declarant is unavailable, as defined by KRE 804(a).

[29] Estes does not challenge the circuit court's conclusion that the assailant's statement also fails the first component of the test for admissibility as a statement against interest in that it does not expose the assailant to any additional jeopardy. Therefore, we affirm on this basis, as well.

knowledge that Estes had been assaulted in a similar fashion on previous occasions. This is a non-hearsay use. Therefore, we find that the circuit court erred in deeming the statement, "You know the drill," as hearsay and, consequently, excluding it. Because it is not hearsay, it is presumptively admissible. However, the directed verdict was entered against Estes because he could not link the assaults in any way to Bullock. Merely being able to show a common assailant in all three assaults would not help Estes establish this connection. Therefore, we find that the exclusion of the statement, "You know the drill," to be harmless error.

"GO TELL DOUGIE WE HAVE GOT HIM."

Estes asserts that during the first assault, one assailant said to the other, "Go tell Dougie we have got him." This utterance is a command, an instruction. Some treatises assert that commands, like questions, cannot be statements within the meaning of FRE 801(a), or presumably KRE 801(a), because they make no assertion of fact or opinion.[30] But this categorical approach has been rejected by many courts and legal

[30] *See, e.g.*, DAVID F. BINDER, HEARSAY HANDBOOK § 2.02 at 18-19 (3d ed. 1991). *But see* Wisconsin v. Kutz, 671 N.W.2d 660, 676 (Wis. Ct. App. 2003) (noting that cases relied upon for these treatises often do not entirely rule out the possibility of an assertive directive or question).

scholars as artificial and unduly formalistic.[31] We also find this approach inconsistent with the focus placed on the intent of the speaker under KRE 801(a). It is illogical to make the grammatical form of an utterance—whether it is a declarative sentence, command/instruction, or question—dispositive in determining whether the speaker intended to make an assertion within the meaning of KRE 801(a).[32]

Any assertion contained in the command, "Go tell Dougie we have got him," is necessarily indirect or implicit. The Kentucky courts have not specifically addressed whether "assertion" in the definition of "statement" in KRE 801(a) is broad enough to include an implicit assertion.[33] As previously noted, intent is the touchstone for whether an utterance is a

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[31] McCORMICK ON EVIDENCE § 250 at 112 n.29; Kutz, 671 N.W.2d at 564-566.

[32] *See* Kutz, 671 N.W.2d at 677-678.

[33] By using the term "implicit assertion," we seek to distinguish this matter from the common law concept of "implied assertion." Under the common law, some courts treated the inferences drawn from nonverbal conduct, which the actor did not necessarily intend to be assertive, as hearsay, relying on the action's so-called "implied assertion." The consensus among most legal scholars is that an inference arising from such nonassertive, nonverbal conduct is no longer treated as hearsay under the modern rules of evidence but, rather, as circumstantial evidence of a fact in issue. BINDER, § 2.05, McCORMICK ON EVIDENCE, § 250 at 111-113. *But see*, Wheeler v. Commonwealth, Ky., 121 S.W.3d 173, 183 (2003) (assuming, without any analysis of the eyewitness's intent, that a police officer's reference to an eyewitness's lack of hesitation in identifying the defendant's photograph in a photo pack is hearsay because of the implied assertion that the eyewitness was positive of the identification). Because this case does not involve nonassertive, nonverbal conduct, the law on "implied assertion" has no bearing.

statement within the meaning of KRE 801(a). Can one intend to assert a matter of fact or opinion indirectly or implicitly? Some courts considering this issue have merely assumed that a so-called implicit assertion cannot be an intentional assertion and, thus, cannot be a hearsay statement.[34] However, we join the majority of state courts,[35] as well as the United States Court of Appeals, Sixth Circuit,[36] in rejecting this proposition. We reject this too-narrow definition of "assertion." Its plain meaning encompasses more than merely communicating through simple, declarative sentences. One who states, "It will stop raining in an hour," asserts, or intentionally communicates, the message that it is raining now as clearly as if that person had said, "It is raining now, but it will stop in an hour."[37] Thus, it would be absurd to treat only the latter and not the former

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[34] *E.g.*, United States v. Zenni, 492 F.Supp. 464, 469 (E.D. Ky. 1980); United States v. Lewis, 902 F.2d 1176, 1179 (5th Cir. 1990).

[35] *See* Kutz, 671 N.W.2d at 678 n.21 (listing various state positions on this issue). The Kutz case in general presents a scholarly, thorough, and well-written analysis on the issue of implicit verbal assertions, ultimately holding that implicit verbal assertions may be hearsay statements under Wisconsin's evidentiary rules. *Id*. at 673-681.

[36] Lyle v. Koehler, 720 F.2d 426, 432-435 (1983).

[37] McCORMICK ON EVIDENCE, § 250 at 111-112 n.29 (noting that the utterance, "it will stop raining in an hour," is hearsay when it is offered to prove that it is raining because, "the fact to be proved is a necessary implication of the utterance.") *See also* Tennessee v. Land, 34 S.W.3d 516, 526 n.5 (Tenn. Crim. App. 2000).

statement as hearsay when offered to prove the truth that it is raining now.

This leads to the following questions: how to determine whether a speaker intends to make an implicit assertion and, if so, how to determine what that implicit assertion is. In answering these questions, the Michigan Court of Appeals[38] found guidance in the following framework, suggested by the Advisory Committee Note on FRE 801(a) on how to determine whether nonverbal conduct is intended as an assertion:

> When evidence of conduct is offered on the theory that it is not a statement, and hence not hearsay, a preliminary determination will be required to determine whether an assertion is intended. The rule is so worded as to place the burden upon the party claiming that the intention existed; ambiguous and doubtful cases will be resolved against him and in favor of admissibility. The determination involves no greater difficulty than many other preliminary questions of fact.

We agree with the Wisconsin court that this framework also addressed the appropriate way to determine whether an utterance contains an implicit statement. Moreover, it is consistent with the approach that the Kentucky Supreme Court has already taken with respect to nonverbal conduct.[39] For example, in the case of

[38] Kutz, 671 N.W.2d at 679-680.

[39] LAWSON § 8.05[5] at 570.

Partin v. Commonwealth,[40] the Kentucky Supreme Court seemed to place the burden of trying to prove that nonverbal conduct contained an implicit assertion on the party seeking to have the nonverbal conduct deemed a hearsay statement and, hence, presumptively inadmissible.[41] We think that the burden lies with the party claiming that an utterance contains an implicit assertion to show that the speaker intended to and did make a particular expression of fact, opinion, or condition.[42] This is consistent with the policy embodied in the Kentucky Rules of Evidence "to tilt the law toward admission over exclusion."[43] The trial court should then determine the admissibility of the utterance containing the alleged implicit assertion.[44] Sometimes it will be clear from the utterance itself that the speaker must

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[40] Ky., 918 S.W.2d 219, 221-222 (1996).

[41] The evidence at issue concerned a witness's testimony, based on personal observation that the victim acted afraid of the defendant, which was offered to show that the victim feared the defendant. The defendant sought to exclude this on the grounds that it was the equivalent of letting the witness testify that the victim had said, "I am afraid of the defendant." The court rejected the defendant's argument because there was no evidence that the victim intended to make such an assertion through her actions. *Id.*

[42] *Id*. at 680. *See also*, United States v. Jackson, 88 F.3d 845, 848 (10th Cir. 1996).

[43] LAWSON § 8.05[5] at 570.

[44] Kutz at 680; Land, 34 S.W.3d at 526 (noting that "[w]hen an utterance is offered on the theory that it is not a statement, and hence, not hearsay, a preliminary determination is required to determine whether an assertion is intended").

have intended an implicit assertion.[45] For example, the implicit assertion in "Joe, why did you steal that car?" is apparent. But "when evidence of surrounding circumstances is needed to resolve the issue, the party claiming an implicit assertion must present that evidence to the trial court."[46]

An example of a situation in which the implicit message within an utterance is only revealed by evidence of surrounding circumstances is found in the case of Brown v. Virginia.[47] The defendant in this rape case twice asked a police officer at the police station after his arrest, "Does Peggy [the rape victim] know I'm here?"[48] The court held that through these questions the defendant intended to make the implicit assertions that he and Peggy had a personal relationship.[49] However, the court reached this conclusion, in part, based on the fact that the speaker's defense was that he and the victim were involved in a relationship and had engaged in consensual sex.[50] This was in sharp contrast to the victim's story that the defendant was a

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[45] *Id.*; Jackson, 88 F.3d at 848.

[46] Kutz at 680, Jackson at 848. *See also* Brown v. Virginia, 487 S.E.2d 248, 251 (Va. Ct. App. 1997) (stating that "the extent to which the question may or may not contain an implied assertion depends on the nature of the question and the circumstances.")

[47] 487 S.E.2d 248.

[48] Brown, 487 S.E.2d at 251.

[49] *Id.* at 252.

[50] *Id.* at 250-252.

stranger who broke into her home and raped her.[51] The court interpreted the defendant's questions as implicitly assertive, in part, because they appeared to be attempts to bolster his defense theory.[52]

We must now consider whether the particular utterance, "Go tell Dougie we have got him," makes an implicit assertion and, if so, what it is. The implicit assertion that "we [the assailants] have got him [Estes]," appears to be an obvious and intentional assertion by the speaker. However, Estes did not seek to offer this statement for its truth, to show that the assailants had control over him. The exclusion of this particular implicit statement as hearsay was erroneous. But because this statement does not assist Estes in establishing the needed link between Bullock and Carpenter, it is harmless error.

Estes asserts that the assailant's reference to "Dougie," as in "Go tell Dougie . . . ," is the equivalent of the assailant stating that "Dougie sent us." The circuit court seems to have accepted this as true. It held that the statement was inadmissible because it was offered for the truth asserted, to show that Doug Bullock was behind the attack. The conclusion that this passing reference to Dougie was intended by the speaker to implicitly assert that Bullock was behind the attack

[51] *Id*. at 250-251, 253.

[52] *Id*. at 252.

is by no means a foregone one. Some courts have held that a speaker's reference to another's name does not ordinarily demonstrate intent on the part of the speaker to identify or introduce that other person.[53] However, we note that the meaning of this particular utterance must be considered in light of all the surrounding circumstances. Estes asserts that the same assailant spoke all three utterances at issue. Given the commonality of the attacks, and the fact that the speaker was allegedly the same in each instance, it is not illogical to examine the other utterances for any light that they may shed on the speaker's intent in referring to "Dougie" in the first assault. During the second assault, the assailant expressly tried to place blame on Bullock, saying, "Mr. Estes, Doug Bullock has sent you a Christmas present." In light of this demonstrated intent to implicate Doug Bullock, it is possible to interpret the same assailant's words in the first assault, "Go tell Dougie we got him," as revealing the same intent. While we might not have reached the same conclusion, under these circumstances, we cannot say that the circuit court's conclusion——that the assailant uttering, "Go tell Dougie we got

[53] *See, e.g.*, Little v. United States, 613 A.2d 880, 882 (D.C. 1992) (holding that defendant who shouted, "No, Marvin," when his co-defendant moved to shoot a security guard did not intend to identify his codefendant as Marvin or make any assertion; thus, the utterance was not a statement for purposes of hearsay and was presumptively admissible). *See also* BINDER § 2.02 at 18-19.

him," intended to assert that "Dougie [Doug Bullock] sent us"——is clearly erroneous. Given this fact, we find that the circuit court properly excluded this statement as inadmissible hearsay since Estes sought to offer it for the truth of the matter, as proof that the assailants were sent by Doug Bullock.

Because Estes fails to establish any connection to Bullock, his claims that Carpenter should be liable for Bullock's role in orchestrating the assaults similarly fails. Carpenter cannot be liable for something (here, Bullock's involvement in the assaults) that has no evidence to support it. The liability of the other individual defendants also seems to be premised on Bullock's role in the assaults, so the claims against these defendants similarly fail.

THE REST OF ESTES'S CLAIMS

Our lengthy analysis above has not resolved all of Estes's claims. We must, therefore, separately address his claims regarding Carpenter's own liability, insofar as we can determine what those allegations are despite Estes's briefs. Estes alleges that Carpenter failed to investigate sufficiently the first assault and take corrective action in order to prevent the second and third assaults. The circuit court correctly ruled that to the extent Estes employed any theories of liability based on negligence, for example, negligent hiring of

Bullock, negligent supervision of Bullock, and a negligent failure to provide a safe workplace, Estes's avenue of relief is limited to workers' compensation by the exclusive remedy provision of KRS 342.690(1).[54]

Estes seeks to avoid operation of the exclusive remedy provision by recasting his claim as one alleging prohibited age discrimination.[55] However, contrary to his assertion on appeal, he fails to establish a *prima facie* showing of prohibited discrimination. Estes correctly asserts that according to Reeves v. Sanderson Plumbing Products, Inc.,[56] he is required to show that (1) he is a member of a protected class (here, over age 40); (2) he was otherwise qualified for the position; (3) he received an adverse employment action; and (4) he was replaced by a younger person. But Estes fails in his showing of an adverse employment action. He argues that the assault he suffered at Carpenter satisfies this element. However, in order for the assault to be considered an adverse employment action, more is required than simply that it occurred while he was

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[54] *See also* Adkins v. R & S Body Co., Ky., 58 S.W.3d 428, 430 (2001); Fireman's Fund Ins. Co. v. Sherman & Fletcher, Ky., 705 S.W.2d 459, 462-464 (1986).

[55] KRS 344.040.

[56] 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed2d. 105 (2000). Reeves deals with the federal Age Discrimination in Employment Act. However, because there are few cases interpreting KRS 344.040, and the Kentucky statute was modeled after the federal statute, it is appropriate to resort to federal interpretation.

working. He has to show some connection between the assault and his employer. As explained above, Estes has not demonstrated any such connection. Absent any evidence to connect the assault to Carpenter, it cannot be considered an adverse employment action for the purpose of an age discrimination claim.

DISPOSITION OF ESTES'S APPEAL

The circuit court was correct to direct a verdict in favor of the appellees in this legal quagmire. Its judgment is affirmed.

DISPOSITION OF THE CROSS-APPEAL

Our affirmance of the trial court's judgment renders the issues raised on cross-appeal moot. So the cross-appeal is dismissed as such.

VANMETER, JUDGE, CONCURS.

COMBS, CHIEF JUDGE, CONCURS IN RESULT ONLY.

BRIEFS AND ORAL ARGUMENT FOR APPELLANT/CROSS-APPELLEE:	BRIEFS AND ORAL ARGUMENT FOR APPELLEES/CROSS-APPELLANTS:
Nancy Oliver Roberts Bowling Green, Kentucky	Douglas W. Becker Deborah H. Patterson Louisville, Kentucky