

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001751-MR

DARAH ISRAEL

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NO. 06-CR-00749

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON AND STUMBO, JUDGES; BUCKINGHAM, □ SENIOR JUDGE.

BUCKINGHAM, SENIOR JUDGE: Darah Israel appeals from a final judgment of the Kenton Circuit Court wherein he was convicted of third-degree assault for assaulting a police officer and was sentenced to one year in prison. Israel, whose sentence was probated for two years, contends that the trial court erred by not

granting his motion for a directed verdict because there was insufficient proof and because the witnesses who testified against him lacked credibility. We affirm.

On September 4, 2006, one of Israel's neighbors, Margaret Miser, was hosting a cookout at her residence. Israel was raking leaves in his yard nearby. One of Miser's guests noticed that Israel had parked his van so close to the car of another guest that Israel's bumper was actually resting above the bumper of the other vehicle. The police were called to the scene, and Officer Michael Wright of the Elsmere Police Department responded to the call.

When Officer Wright approached Israel and his wife, Israel became agitated. Miser testified that she observed Israel push the officer and that Israel appeared to punch the officer in the face when the officer reached for his radio on his shoulder. Miser further testified that she then left her window and called 911 and returned to witness Israel continue to swing violently at the officer. Miser stated that she did not approach Israel herself to resolve the incident before the police were called because she was scared of him. Other party guests testified consistently with Miser's testimony. Those witnesses included Amy Grant and Kathryn Henry. Grant testified that she did not care for Israel, but that she would not lie about the incident. Henry testified that she likewise had a negative opinion of Israel.

Chelsey Masey, a neighbor who was not present at the cookout, also testified. She stated that she was in her home playing with her daughter when she observed the officer arrive and park next to Israel's van. She testified that Israel

started moving toward the officer while saying things like “What are you going to do about it?!” Masey further stated that the officer at first backed up and that Israel raised his hands as if he were going to strike the officer. According to Masey, the officer responded with pepper spray and Israel became even more agitated and violent. She testified that the officer appeared to lean into his radio as if to call for help, while Israel continued to charge him. When the officer pulled his baton for use in self defense and to subdue Israel, Israel yelled to the officer to “shoot me”.

Officer Wright testified that he had requested insurance and license information from Israel and his wife in order to do an accident report. Wright stated that Israel insisted that there was no problem and that he was entitled to park his vehicle by making contact with other vehicles. Wright further testified that Israel became aggressive and struck his hand and note pad. Wright stated that Israel kept moving toward him as he backed up. At that point, Wright pulled his pepper spray and used it while Israel continued to advance.

As a result of the incident, a grand jury indicted Israel with the felony offense of third-degree assault. Third-degree assault is a Class D felony. As it pertains to this case, a person is guilty of third-degree assault when he “intentionally causes or attempts to cause physical injury” to a peace officer. Kentucky Revised Statutes (KRS) 508.025. A jury found Israel guilty of the

offense, and the court sentenced him to one year in prison. The court probated the sentence for a two-year period on various conditions. This appeal followed.¹

The indictment charged that Israel “intentionally caused or attempted to cause physical injury to Officer Wright by striking him in the head.” Israel first argues that he did not strike the officer in the head and that the officer admitted that in his testimony. Israel maintains that the only contact he made with the officer was with the officer’s hand and note pad. Israel further maintains that this contact was accidental and occurred when he was gesturing. He summarizes his argument by stating that the Commonwealth never proved that he caused or attempted to cause physical harm to the officer.

We conclude that the testimony of the witnesses, including Wright, was sufficient to prove that Israel attempted to cause physical injury to the officer. Witnesses testified that Israel advanced toward the officer and swung repeatedly at him. While Israel admitted that he struck the officer in the hand, other witnesses testified that Israel struck the officer in the head. Further, even if Israel did not strike the officer in the head, there was testimony that he at least attempted to strike the officer. Such evidence was sufficient to warrant submitting the case to the jury despite the language in the indictment referring to the officer being stricken in the head. *See Washington v. Commonwealth*, 6 S.W.3d 384, 386-87 (Ky.App. 1999).

¹ Israel was also indicted for a second count of third-degree assault. That charge arose as a result of an incident that occurred after Israel had been arrested and transported to the detention center. The jury found Israel not guilty of that charge.

Israel also argues that it “was unreasonable for the jury to reach any conclusion that Mr. Israel assaulted or attempted to assault Officer Wright based upon the incredulous and biased testimony of Mr. Israel’s neighbors and the police officers who also had preconceived beliefs and bias against Mr. Israel.” In support of this argument, Israel notes that some of the witnesses admitted that they had unfavorable opinions of him prior to the incident and that Officer Wright also admitted that he had a negative impression of Israel before investigating the incident based on earlier police reports indicating that he was uncooperative and combative. Israel points to the fact that while neighbors testified that he struck the officer in the head, the officer himself testified that he did not.

The credibility of witnesses is within the sole province of the jury. *Ratliff v. Commonwealth*, 194 S.W.3d 258, 269 (Ky. 2006). Here, Israel’s attorney had the opportunity to cross-examine the witnesses as to any bias. The matter of potential bias was brought to the attention of the jury. Nevertheless, the jury chose to believe the witnesses’ testimony. Such was within its discretion. *See id.*

“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 is the defendant entitled to a directed verdict.” *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991). In ruling on Israel’s directed verdict motion, the trial court was required to draw all fair and reasonable inferences in favor of the Commonwealth. *See id.* Under this standard, we cannot say that the trial court erred in denying Israel’s directed verdict motion. Several witnesses testified that

Israel attempted to assault Officer Wright. Some of the witnesses testified that they saw Israel actually strike the officer in the head. We conclude that this testimony was sufficient to overcome Israel's directed verdict motion.

The judgment of the Kenton Circuit Court is affirmed.

ALL CONCUR.

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