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NOT TO BE PUBLISHED

Commonwealth of Kentucky  
Court of Appeals

NO. 2007-CA-000982-MR

STEVEN R. LESTER

APPELLANT

v. APPEAL FROM PULASKI CIRCUIT COURT  
HONORABLE DAVID A. TAPP, JUDGE  
ACTION NO. 06-CR-00202

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: ACREE, DIXON AND TAYLOR, JUDGES.

ACREE, JUDGE: Steven R. Lester appeals from a judgment of the Pulaski Circuit Court convicting him of third-degree assault and sentencing him to five years in prison. We affirm.

On April 10, 2006, Officer Bruce Blevins responded to a 911 call from the Lester residence. Lester and his mother complained that they were being

harassed by their neighbors, Ricky Branum and Bernice Young. Blevins informed the Lesters that he would speak with their neighbors.

As Blevins was talking to Branum and Young he observed Lester coming across the street toward the property. Blevins instructed Lester to return home. Lester responded by cursing at him and stating that he knew Blevins was going to side with Branum and Young. Lester proceeded to cross the street. Blevins cautioned Lester that he could be arrested for disorderly conduct and directed him to lower his voice. Lester responded with additional cursing and proclaimed that he was not going to jail. At that point, Blevins told Lester he was under arrest for disorderly conduct.

When Blevins approached Lester to take him into custody Lester shoved him and then struck him with his fist in a downward motion. Lester struck Blevins three or four times. Blevins was able to break free of Lester and restrain him to get him into the police cruiser. In the cruiser, Lester apologized and asked if he was going to be charged. When Blevins responded in the affirmative, Lester became irate and struck the back glass and cage. Blevins pulled the cruiser over and pepper sprayed Lester. Lester calmed down and was taken to jail.

Lester was charged with third-degree assault and third-degree criminal trespass. A jury trial was held on March 20, 2007. Lester was found not guilty of third-degree criminal trespass, but guilty of third-degree assault and sentenced to five years imprisonment. This appeal followed.

Lester's first claim of error is that his motion for a directed verdict as to the assault charge should have been granted because there was no "physical injury" as defined by KRS 500.080(13). We disagree.

In ruling on a motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth to determine if the evidence is sufficient to induce the jury to believe beyond a reasonable doubt that the defendant is guilty. *Penman v. Commonwealth*, 194 S.W.3d 237, 247 (Ky. 2006). On appeal, the test is "if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt" then the defendant is entitled to a directed verdict. *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991).

To convict Lester of third-degree assault, the Commonwealth had to prove that he either intentionally caused or intentionally attempted to cause a physical injury to Blevins. *See* Kentucky Revised Statute (KRS) 508.025(1)(a). Three witnesses testified that they saw Lester shove and strike Blevins and photographs of bruises on Blevins' head were introduced into evidence. Blevins, as well, testified to the incident and stated his head hurt for several days afterwards and he also suffered bruises on his hands from where he tried to block Lester's blows.

In *Stopher v. Commonwealth*, 57 S.W.2d 787, 802 (Ky. 2001), the Kentucky Supreme Court stated that "intent may be inferred from actions because a person is presumed to intend the logical and probable consequences of his

conduct[.]” The testimony of Blevins and the other witnesses was sufficient to prove the element of intent.

Lester argues that he could not be found guilty of third-degree assault because he did not cause any injury to the officer. However, KRS 508.025 provides that a person is guilty of assault in the third degree when they intentionally cause *or attempt to cause* physical injury to a peace officer. Regardless, contrary to Lester’s claim, the evidence in this case clearly supports a finding that Lester injured Blevins by repeatedly hitting him on the head.

Next, Lester requests review of the jury instructions arguing that the third-degree assault instruction allowed the jury to render a verdict that was not unanimous. The jury instruction on the charge of third-degree assault read as follows:

You will find the Defendant guilty 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 April 10, 2006, he intentionally caused or attempted to cause injury to Bruce Blevins by hitting him with his fist;

AND

B. That Bruce Blevins was a Burnside Police Officer acting in the course of his official duties and the Defendant knew he was acting in the course of such official duties.

Lester correctly notes that when alternative grounds for finding guilt are presented in an instruction, each theory must be supported by the evidence to

assure unanimity. *See Boulder v. Commonwealth*, 610 S.W.2d 615 (Ky. 1980), *overruled on other grounds, Dale v. Commonwealth*, 715 S.W.2d 227 (Ky. 1986). However, this is not a situation as in *Boulder* and Lester's argument in reliance of unanimity is misguided.

Recently our Supreme Court decided *Olson v. Commonwealth*, 2005-SC-000592-MR (March 20, 2008) and in its unpublished opinion, noted:

[M]uch of the case law on unanimity deals with instructions that erroneously include alternative mental states (i.e. intentionally or wantonly). *See, e.g., Hayes v. Commonwealth*, 625 S.W.2d 583, 584-85 (Ky. 1981) (jury instruction allowing the defendant to be found guilty of murder under alternative theories of either intent or wantonness denied him his right to a unanimous verdict under Section 7 of the Kentucky Constitution, where the evidence did not allow an inference that the shooting was anything but intentional); *Burnett v. Commonwealth*, 31 S.W.3d 878, 881-84 (Ky. 2000) (jury instruction on first-degree trafficking in a controlled substance denied the defendant his right to a unanimous verdict, where the instruction permitted the jury to find guilt on theories that were not supported by the evidence, e.g., that he possessed the cocaine with intent to manufacture it).

In *Olson*, the defendant was charged with complicity to commit murder. *Id.* Olson's mother was found stabbed to death and Olson's boyfriend and another man were accused of the murder. *Id.* The theory of the case was that Olson and the two men plotted to kill her mother. *Id.* In an attempt to reverse her conviction, Olson argued that the complicity instruction permitted the jury to find her guilty as an accomplice if they believed she plotted with only one of the two men or both of them to kill her mother, giving the jury three theories under which

they could convict her. *Id.* She further argued that only one theory, that she plotted with both men to kill her mother, was supported by the evidence. *Id.*

However, the Supreme Court found that this was not a scenario in which “alternative mental states” were put before the jury. *Id.* The instruction allowed the jury to find her guilty under a single theory - that she plotted, with the intent that her mother would be killed. *Id.* The Court further found no precedent holding that a defendant is deprived of his right to a unanimous verdict under such circumstances. *Id.*

Accordingly, we find no error in the instructions provided to Lester’s jury. The assault instruction contained only one mental state to be decided by the jury – whether Lester *intended* to injure Blevins. As such, we affirm on this issue.

Lester next contends that the trial court erred by failing to instruct the jury on the whole law of the case when it failed to give instructions on resisting arrest, harassment, and second-degree disorderly conduct.

Lester contends the jury should have been instructed on resisting arrest as a lesser-included offense. “An instruction on a lesser-included offense is appropriate if and only if on the given evidence a reasonable juror could entertain reasonable doubt of the defendant's guilt on the greater charge, but believe beyond a reasonable doubt that the defendant is guilty of the lesser offense.” *Skinner v. Commonwealth*, 864 S.W.2d 290, 298 (Ky. 1993).

Lester continues to argue that Blevins was not injured by his repeated blows and asserts that the evidence did not support a charge of third-degree assault.

However, Lester points to no evidence that would have permitted a rational jury to only find him guilty of resisting arrest, and we can find none. Accordingly, Lester was not entitled to a charge on the lesser-included offense of resisting arrest.

Likewise, harassment and second-degree disorderly conduct instructions were not warranted in this case. The fact that the evidence might support a guilty verdict on a separate uncharged offense does not entitle a defendant to an instruction on that offense. We conclude the trial court did not err in denying these instructions.

Finally, Lester argues that the testimony elicited during the trial that he had previously struck a man was evidence of prior bad acts, which is inadmissible under Kentucky Rules of Evidence (KRE) 404(b). It is undisputed that Lester never objected to this testimony at trial. Hence, this issue was unpreserved. Kentucky Rules of Criminal Procedure (RCr) 9.22; *Conover v. Commonwealth*, 473 S.W.2d 825 (Ky. 1971). Nevertheless, Lester urges us to review the issue for palpable error under RCr 10.26 .

The record indicates that Lester's mother testified to his quiet and non-violent personality. Having solicited an opinion as to his good character, a defendant opens the door to cross examination which impeaches the credibility of that opinion even if the impeachment takes the form of a specific instance of defendant's bad conduct. *Commonwealth v. Higgs*, 59 S.W.3d 886 (Ky. 2001), citing KRE 405(b). The resulting testimony was proper in the context of what preceded it, and we find no error on this issue.

For the foregoing reasons, the judgment of the Pulaski Circuit Court is affirmed.

DIXON, JUDGE, CONCURS.

TAYLOR, JUDGE, CONCURS IN RESULT ONLY.

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