

RENDERED: SEPTEMBER 26, 2008; 2:00 P.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2007-CA-002024-MR

GARY CUNNINGHAM

APPELLANT

v. APPEAL FROM MASON CIRCUIT COURT  
HONORABLE LEWIS D. NICHOLLS, JUDGE  
ACTION NO. 07-CR-00004

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CAPERTON AND WINE, JUDGES; LAMBERT,<sup>1</sup> SENIOR JUDGE.

WINE, JUDGE: Gary Cunningham (“Cunningham”) appeals his jury conviction in the Mason Circuit Court for one count of resisting arrest. The jury found Cunningham not guilty of a separate count, third-degree assault. Per the jury’s

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<sup>1</sup> Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (“KRS”) 21.580.

recommendation, the trial court sentenced Cunningham to eight months' incarceration and a fine of \$500.00. Finding no error, we affirm.

The charges arose from a November 26, 2006, incident which occurred outside a movie theater in Maysville, Kentucky. Witness and theater employee, Aaron Caskey ("Caskey"), testified that Cunningham was pacing in front of the theater yelling threats that he would kill all of the employees. Caskey further testified that Cunningham's girlfriend, Erica Chambers ("Chambers"), also an employee at the theater, was trying to calm Cunningham. Caskey testified that, at some point, Cunningham physically struck Chambers.

Officer Colin Thomas ("Officer Thomas"), a Maysville police officer, worked part-time security for the cinema. While on duty, Officer Thomas received a call on his personal cellular phone from a theater employee. Upon arriving at the cinema, Officer Thomas spoke to the manager who told him that Cunningham and Chambers were involved in a domestic dispute. According to the trial testimony from the Commonwealth's witnesses, Cunningham "went ballistic" when Officer Thomas approached him. Cathy Warder ("Warder"), a shopper at a nearby K-Mart, testified that Cunningham "went off" and began hitting and slugging at the officer. Officer Thomas told the jury that Cunningham was cussing and threatening to kill him when he was not on duty. Cunningham and Officer Thomas struggled. Cunningham struck Officer Thomas with an elbow. Officer Thomas also injured his wrist.

On the other hand, Chambers' testimony was quite different than that of the Commonwealth's witnesses. She testified that she and Cunningham were not fighting with each other that afternoon. Chambers stated that when Officer Thomas arrived, he told Cunningham he was going to jail and to place his hands on the car. Chambers testified that Cunningham asked why he was being arrested and Officer Thomas punched him in the face. Chambers stated that she never saw Cunningham hit Officer Thomas and she did not think that he could have because he was in handcuffs.

Cunningham's cousin, Marcus Breckenridge ("Breckenridge"), who accompanied Cunningham that afternoon, testified that Officer Thomas sprung out of his cruiser and told Cunningham that he was going to jail. Similarly, Cunningham testified that he drove to the theater to confront Stephanie Dickerson, and to tell her to stop spreading rumors that he was cheating on Chambers. He denied hitting Chambers. Cunningham testified that he only resisted Officer Thomas because he felt that he was being assaulted and wanted to know why he was under arrest. Like Chambers and Breckenridge, Cunningham testified that Officer Thomas attempted to arrest him immediately upon arriving at the scene. Cunningham further claimed he never hit Officer Thomas but in fact, Officer Thomas hit him in the jaw. An ambulance was called to the scene but Cunningham refused treatment.

On appeal, Cunningham argues the trial court erred when it allowed the Commonwealth to compel Chambers to comment on the credibility of the

Commonwealth's witness, Aaron Caskey. During the cross-examination of Chambers, the following questioning occurred:

Commonwealth: You said there was no arguing; are you aware that Mr. Caskey testified that he saw Mr. Cunningham strike you in the face?

Chambers: I was not aware that he had said that.

Commonwealth: Would he have any reason to lie about that?

Defense counsel objected, maintaining that the line of questioning was improper.

The trial court sustained the objection and asked the Commonwealth to rephrase.

The following exchange then occurred:

Commonwealth: Is there anything in your relationship with Mr. Caskey that would cause him to say that he slapped you, that he saw Gary Cunningham slap you if he didn't?

Chambers: He shouldn't have reason. I never did anything wrong to him.

It is undisputed that Cunningham's claim of error is unpreserved as defense counsel did not object after the prosecutor rephrased the question. In the alternative, Cunningham asserts that this improper questioning should be reviewed under the palpable error standard. We disagree.

The former Court of Appeals set forth the standard for cross-examination in *Howard v. Commonwealth*, 227 Ky. 142, 12 S.W.2d 324, 329 (1928):

Although to aid in the discovery of the truth reasonable latitude is allowed in the cross-examination of

witnesses, and the method and extent must from the necessity of the case depend very largely upon the discretion of the trial judge, yet, where the cross-examination proceeds beyond proper bounds or is being conducted in a manner which is unfair, insulting, intimidating, or abusive, or is inconsistent with the decorum of the courtroom, the court should interfere with or without objection from counsel. The court not only should have sustained the objections to this character of examination, but should have admonished counsel against such improper interrogation.

In *Howard*, the questions at issue involved the Commonwealth's Attorney asking the defendant about the testimony of other witnesses, in one instance asking, "I am asking you if what Maud Denton swore is a lie." *Id.* The Court in *Howard* concluded that the lower court "not only should have sustained the objections to this character of examination, but should have admonished counsel against such improper interrogation." *Id.* at 329. The Kentucky Supreme Court reaffirmed this holding in *Moss v. Commonwealth*, 949 S.W.2d 579, 583 (Ky. 1997).

In this case, however, the trial court sustained Cunningham's objection to the question and admonished the prosecutor to rephrase the question. The Commonwealth rephrased the question asking, "Is there anything in your relationship with Mr. Caskey that would cause him to say that he [Cunningham] slapped you, that he saw Gary Cunningham slap you if he didn't?" As rephrased, the question does not go to the credibility of another witness as prohibited by *Howard* and *Moss*, but rather inquires about any bias that might exist between Chambers and Caskey. A question to illicit bias is perfectly acceptable on cross-

examination. Thus, even if the issue was properly preserved, the trial court did not err by allowing the question.

Accordingly, we affirm the conviction of the Mason Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Erin Hoffman Yang  
Assistant Public Advocate  
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway  
Attorney General of Kentucky

Heather M. Fryman  
Assistant Attorney General  
Frankfort, Kentucky