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Commonwealth of Kentucky
Court of Appeals

NO. 2006-CA-002365-MR

ROBERT L. FIELDS APPELLANT

APPEAL FROM LETCHER CIRCUIT COURT
v. HONORABLE SAMUEL T. WRIGHT III, JUDGE
ACTION NO. 05-CR-00075

COMMONWEALTH OF KENTUCKY APPELLEE

AND NO. 2006-CA-002406-MR

MICHAEL TERRANCE FUGATE APPELLANT

APPEAL FROM LETCHER CIRCUIT COURT
v. HONORABLE SAMUEL T. WRIGHT III, JUDGE
ACTION NO. 05-CR-00076

COMMONWEALTH OF KENTUCKY APPELLEE

AND NO. 2006-CA-002578-MR

DAVID LLOYD LUCAS APPELLANT

APPEAL FROM LETCHER CIRCUIT COURT
v. HONORABLE SAMUEL T. WRIGHT III, JUDGE
ACTION NO. 05-CR-00078

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING
* * * * *

BEFORE: VANMETER AND WINE, JUDGES; LAMBERT,¹ SENIOR JUDGE.

VANMETER, JUDGE: Robert Fields, Michael Fugate, and David Lucas were tried together by a jury in the Letcher Circuit Court, and each was convicted of complicity to commit second-degree assault and complicity to commit first-degree sexual abuse. The defendants' three separate appeals from their convictions were subsequently consolidated. For the following reasons, we affirm as to each.

I. Facts

Coy McClain was arrested on December 2, 2004, and was taken to the Letcher County Jail. McClain testified that after arriving at the jail, he informed the jail staff that he had conflicts with inmates Ricky Bates and appellant Robert L. Fields.² Still, McClain was placed in a cell with Fields, appellants Michael Fugate and David Lucas, and Frank Campbell. The cell was comprised of a common area and four "lockdown" cells, each containing two bunks.

McClain further testified that on December 5, he stepped into a lockdown cell with Fugate, Lucas, and Campbell to inquire about a possible card game since the men had previously played cards together in the jail. Lucas closed the cell door, locking it, and Fugate and Lucas began hitting McClain. Lucas

¹ 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.

² McClain's jail admission form lists only Bates as a person who may want to harm him.

pulled down McClain's pants and threatened to sodomize him. Further, Campbell sat on his bunk with his penis exposed and talked about McClain fellating him, while Fugate and Lucas pushed McClain's head toward Campbell's penis. At some point, McClain's face touched Campbell's penis. Meanwhile, Fields, who was in the common area, turned up the television's volume and made other noise, and he pointed and laughed at McClain. McClain testified that he screamed "to the top of his lungs" for help but that he was not able to exit the lockdown cell for three to four hours. The men would not permit McClain to alert the guards, threatening to kill him if he did so.

Nevertheless, some time later McClain returned to the lockdown cell to get his dropped cigarettes. Someone again closed the door, and Fields hit McClain, rubbed his penis across McClain's face, and tried to force McClain to fellate him. Some four hours later, McClain exited the lockdown cell and told the guards that he had been beaten.³

McClain was taken to the hospital where facial x-rays revealed that nothing was broken; he was then taken back to jail. After he was released on bail, McClain saw other doctors who informed him that he had a fractured and dislocated condyle, a hinge-like bone structure at the upper end of the jaw near the ear. McClain subsequently underwent surgery in which a titanium plate and screws were used to secure the bone.

³ We note that the sum of the guards' testimony was that while they did not hear or see any signs of a fight, McClain had redness and/or bruising on his face. Further, McClain did not inform them of any sexual assault.

Fields, Fugate, and Lucas were eventually indicted for attempted first-degree sodomy and complicity to commit second-degree assault. The matter proceeded to trial where McClain testified as set forth above. Additionally, Lucas, jail personnel, and treating doctors testified. The jury found all three men guilty of complicity to commit second-degree assault, and complicity to commit first-degree sexual abuse. Fields, Fugate, and Lucas were sentenced, respectively, to a total of fifteen, fifteen, and ten years' imprisonment. These appeals followed.

II. Fourth-Degree Assault

First, all three appellants argue that the trial court erred by failing to instruct the jury on complicity to commit fourth-degree assault.⁴ We disagree.

Again, all three appellants were convicted of complicity to commit second-degree assault. A person is guilty of second-degree assault when he, *inter alia*, “intentionally causes serious physical injury to another person[.]” Kentucky Revised Statutes (KRS) 508.020(1)(a). “Serious physical injury” is defined as “physical injury which creates a substantial risk of death, or which causes serious and prolonged disfigurement, prolonged impairment of health, or prolonged loss or impairment of the function of any bodily organ[.]” KRS 500.080(15).

Appellants argue that McClain’s injury was not a “serious physical injury” as a matter of law; rather, the jury could have found that McClain suffered merely a “physical injury,” which is defined at KRS 500.080(13) as “substantial

⁴ Appellants do not challenge the complicity aspect of the jury instructions, so we will not address the instructions in that regard.

physical pain or any impairment of physical condition[.]” As such, appellants argue that the jury should have been instructed on fourth-degree assault, which occurs when a person, *inter alia*, “intentionally or wantonly causes physical injury to another person[.]” KRS 508.030(1)(a).

Appellants rely upon *Rowe v. Commonwealth*, 50 S.W.3d 216 (Ky.App. 2001), as support for their argument. In *Rowe*, the defendant struck the victim in the mouth with his forearm and/or elbow, causing four of the victim’s “lower, front teeth to be knocked back at approximately a 45-degree angle and the teeth had to be reset by using an arch bar.” *Id.* at 218. The victim testified that

his chin was broken, and that in order for his teeth to be reset properly it was necessary for his mouth to be wired and for him to wear an arch bar for six weeks. [The victim] also testified that his injury required stitches; that he could not eat solid foods for some time; and that he experienced severe pain.

Id. at 219. One of the victim’s doctors testified that the prognosis for the victim’s teeth and fracture was extremely good. *Id.* at 220. This court held that the trial court erred by failing to instruct the jury on fourth-degree assault as a lesser-included offense of second-degree assault,⁵ as the jury reasonably could have concluded from the proof that the victim suffered either a physical injury or a serious physical injury.

⁵ A criminal defendant is entitled to an instruction on a lesser-included offense “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).

Here, McClain's fracture required surgery and the use of a titanium plate and screws to secure his bone. McClain testified that it took him 14 to 15 months to recover from the surgery, and further that at the time of trial, he was still in pain, his jaw was still not properly aligned, he had trouble eating properly, and he was facing the possibility of more surgery.

Since the jail guards testified that they saw merely redness and/or bruising on McClain's face after the fight, and doctors initially opined that nothing in McClain's face was broken, appellants argue that McClain's more complicated injuries were not a result of any assault. However, they produced no evidence in support of this argument, merely arguing that McClain is litigious in nature. On the other hand, medical testimony was presented to show that fractures like McClain's are often hidden and missed, that a dislocation such as McClain's may not occur immediately due to the surrounding muscles and ligaments, and that an injury such as McClain's requires the application of "considerable" force, such as the impact from a high-speed car crash, from being hit with a bat or fists, or from the jaw being stomped. Under these circumstances, we do not believe that the jury could have found that the assault caused McClain to suffer an injury other than a serious physical injury. Thus, the trial court did not err by failing to instruct on complicity to commit fourth-degree assault.

III. Sexual Abuse Instruction

The trial court instructed the jury as follows with regard to Fields⁶ and sexual abuse:

[Y]ou will find the Defendant Robert Fields guilty of First Degree Sexual Abuse under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

A. That in the county on or about December 5, 2004 and before the finding of the Indictment herein, the Defendant while acting alone or in complicity with David L. Lucas, and/or Michael Terrance Fugate and/or Frank Stephen Campbell, subjected Coy McClain to sexual contact;

AND

B. That he did so while acting alone or in complicity with the above named Defendants by means of forcible compulsion.

If you find the Defendant guilty under this Instruction you shall so indicate on the verdict form provided to you with these Instructions and nothing more.

A. Mental State

All three appellants argue that the trial court erred by failing to include the requisite mental state in its instructions to the jury on complicity to commit first-degree sexual abuse. Appellants acknowledge that this error is unpreserved but urge us to review it for palpable error under RCr⁷ 10.26.

⁶ The trial court's instructions for the other appellants were identical, except the names in each instruction were changed as appropriate.

⁷ Kentucky Rules of Criminal Procedure.

As is applicable here, one is guilty of first-degree sexual abuse when he “subjects another person to sexual contact by forcible compulsion[.]” KRS 510.110(1)(a). Further, as is relevant here, the statute regarding complicity provides:

(1) A person is guilty of an offense committed by another person when, with the intention of promoting or facilitating the commission of the offense, he:

(a) Solicits, commands, or engages in a conspiracy with such other person to commit the offense; or

(b) Aids, counsels, or attempts to aid such person in planning or committing the offense[.]

KRS 502.020(1).⁸ As the Kentucky Supreme Court has explained, “a person can be guilty of ‘complicity to the act’ under KRS 502.020(1) only if he/she possesses the *intent* that the principal actor commit the criminal act.” *Tharp v. Commonwealth*, 40 S.W.3d 356, 360 (Ky. 2000).

While the jury instructions here did not include the word “intent” in the actual instruction, several words in the instruction were defined in a separate “Definitions” instruction. Among the defined terms was “complicity,” which incorporated the “intentional” aspect of complicity in accordance with KRS 502.020(1)(a) and (b) as set forth above. The separate instructions were not improper, as the element of intent is often “satisfied by giving a separate

⁸ KRS 502.020(2) governs when a person can be found guilty of “complicity to the result.” *Brumley v. Commonwealth*, No. 2004-CA-843-MR, slip op. at 8 (Ky.App. Sept. 9, 2005). In *Brumley*, this court held that sexual abuse is not a “result” crime and thus is not governed by KRS 502.020(2). *Id.* at 12. While *Brumley* is an unpublished decision, we agree with and adopt its reasoning on this issue.

instruction defining complicity.” *Crawley v. Commonwealth*, 107 S.W.3d 197, 200 (Ky. 2003). We also note that the trial court’s instructions followed the model instruction found in 1 Cooper, *Kentucky Instructions to Juries (Criminal)* § 10.08 (Rev. 4th ed. 1999) (Principal or accomplice (alternative form)). Accordingly, appellants are not entitled to relief on this ground.

B. Unanimous Verdict

Next, appellants argue that the trial court erred by instructing the jury that it could find that appellants committed sexual abuse either “alone or in complicity.” Appellants argue that these instructions deprived them of unanimous verdicts. Again, appellants urge us to conduct a review for palpable error under RCr 10.26.

Kentucky law provides that “where evidence is sufficient to support a conviction as either an accomplice or as a principal, an instruction in the alternative is proper.” *Pate v. Commonwealth*, 243 S.W.3d 327, 334-35 (Ky. 2007) (citing *Campbell v. Commonwealth*, 732 S.W.2d 878, 880 (Ky. 1987)). Here, as the evidence was sufficient to convict each appellant as either an accomplice or a principal, the trial court did not err by instructing in the alternative. With regard to Fields, evidence was produced to suggest that while he was not in the lockdown cell during the first conflict, he made noise in an effort to keep the guards unaware of the conflict. Accordingly, there was evidence to support a finding that Fields was an accomplice to sexual abuse. Further, there was evidence to support a finding that Fields alone committed sexual abuse during

the second conflict, by hitting McClain, rubbing his penis across McClain's face,

and trying to force McClain to fellate him. With regard to Fugate and Lucas,

evidence was presented to show that during the first conflict they hit McClain and

pushed his head towards Campbell's uncovered penis as Campbell talked about

McClain fellating him. Such conduct could subject Fugate and Lucas to either

accomplice or principal liability. Further, evidence was presented that Fugate and

Lucas helped lock McClain in the lockdown cell during the second conflict. Given

this evidence, it is clear that appellants are not entitled to relief on the ground that

they were deprived of unanimous verdicts. And we again note that the trial court's

instructions followed the model instruction found in 1 Cooper, *Kentucky*

Instructions to Juries (Criminal) § 10.08 (Rev. 4th ed. 1999) (Principal or

accomplice (alternative form)).

IV. Previous Escape Attempt

Next, all three appellants argue that the trial court erred by permitting

the Commonwealth to question a deputy jailer regarding a previous, unrelated

incident when inmates attempted to escape from the Letcher County Jail. We

disagree.

During the trial, the Commonwealth called a deputy jailer to testify.

On cross-examination, he testified that if an inmate screamed, kicked a cell door,

or turned a television up loudly, the deputy jailers would hear and address the

situation. However, no deputy jailers heard McClain's periodic screaming and

kicking of bars, and they were unaware of the assault until after the fact.

On redirect, the Commonwealth asked the witness whether the deputy jailers were ever unaware of things which occurred in the jail. When the deputy jailer responded in the negative, the court permitted the Commonwealth to question him, over appellants' objections, about an incident when the jail staff was unaware that inmates were planning to escape. More specifically, the deputy jailer testified that he was aware of a time when four inmates obtained metal grating from the ceiling, made it into a "shank," overpowered a guard, stabbed a guard in the hand, and almost got into the control booth. The deputy jailer acknowledged that this feat probably took some time to complete and made a lot of noise, and that the guards would have stopped the inmates if they had noticed the behavior. Such evidence, which was relevant to show that an assault might not have been heard by the deputy jailers, was not prejudicial since the Commonwealth specifically stated that appellants were not involved in the previous escape attempt.

V. Photographs

Next, Fields and Fugate argue that the trial court erred by admitting into evidence post-surgical photographs of McClain, taken some ten days after the altercations at the jail. Fields and Fugate argue that the photographs were inadmissible because rather than showing McClain's injuries which resulted from the altercations, they demonstrate McClain's injuries as exacerbated by surgery as well as the lapse of time. We disagree.

To be admissible, a photograph must be relevant. *Chestnut v. Commonwealth*, 250 S.W.3d 288, 302 (Ky. 2008). Relevant evidence is that which

has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” KRE⁹ 401. Here, evidence of the nature of McClain’s injuries was clearly relevant to prove second-degree assault under KRS 508.020(1)(a), which requires the occurrence of a “serious physical injury.” While these photographs may have, as Fields and Fugate argue, “displayed post-operation swelling,” that was a proper matter for cross-examination.

Also to be admissible, a photograph’s

prejudicial effect must not substantially outweigh its probative value. KRE 403. Mere prejudice alone will not exclude a relevant photograph; the prejudicial effect must be substantial. In this regard, a trial judge has broad discretion in determining the admissibility of photographic evidence. *Woodall v. Commonwealth*, 63 S.W.3d 104, 130 (Ky. 2001). The general rule is that relevant pictures are not rendered inadmissible even when the photographs depict gruesome or heinous images of a crime. E.g., *Brown v. Commonwealth*, 558 S.W.2d 599 (Ky. 1977).

250 S.W.3d at 302. The photographs at issue here are not gruesome or heinous in the least, and the trial judge did not err by permitting them to be admitted into evidence.

VI. KRE 404(b) Evidence¹⁰

⁹ Kentucky Rules of Evidence.

A. Fields

After he was released from jail, McClain informed the Letcher County Attorney about the events that transpired in jail. The Letcher County Attorney testified at trial that during this meeting, McClain stated that Fields threatened to kill him when Fields was released from jail. While Fields acknowledges that the trial court admonished the jury to disregard and not consider this evidence, he argues that the trial court erred by failing to declare a mistrial after this evidence of other crimes, wrongs, or acts was presented in violation of KRE 404(b). We disagree.

As juries are presumed to follow judicial admonitions to disregard evidence, such admonitions are presumed to cure any error. *Combs v. Commonwealth*, 198 S.W.3d 574, 581 (Ky. 2006). This presumptive efficacy falters when “there is an overwhelming probability that the jury will be unable to follow the court’s admonition and there is a strong likelihood that the effect of the inadmissible evidence would be devastating to the defendant[.]” *Id.* at 581-82. As Fields did not make this showing here, “there was no manifest necessity for a mistrial and the trial court did not abuse its discretion by denying the motion[.]” *Greene v. Commonwealth*, 244 S.W.3d 128, 138 (Ky.App. 2008).

B. Fugate

¹⁰ KRE 404(b) provides that “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith[.]”

Fugate argues that the trial court erred by permitting the Commonwealth to introduce evidence of a previous fight he had with another inmate in violation of KRE 404(b). We disagree.

On direct examination, Lucas asked Tommy VanOver, an inmate at the Letcher County Jail, about a fight he had seen at the jail and the jail staff's response to it. On cross-examination, the Commonwealth elicited from VanOver that this fight was between Fugate and another inmate named Tom, and that the fight was broken up after one or two punches. When the Commonwealth asked who broke up the fight, Fugate objected, and the trial court overruled Fugate's objection. We hold that the trial court did not err in doing so, because the Commonwealth was merely delving into a subject Lucas addressed on direct examination, i.e., the jail staff's response to a previous fight.

VanOver testified further that the guards broke up the fight and then removed Tom from the cell. When the Commonwealth asked VanOver whether Fugate was charged for the incident, Fugate again objected, and the trial court sustained Fugate's objection. No error occurred in this regard, because Fugate did not move the trial court for further action, *i.e.*, a mistrial or an admonition to the jury.

VII. Cumulative Error

Finally, Fields argues that the cumulative effect of the claimed errors resulted in an unfair trial. However, in support of this argument, Fields essentially

argues that the weight of the evidence raises doubts about whether an eight-hour beating or sexual threats occurred. Simply put, the jury could have concluded, based upon McClain's testimony, that appellants assaulted McClain and subjected him to sexual contact.

VIII. Conclusion

The Letcher Circuit Court's judgments are affirmed.

ALL CONCUR.

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