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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2006-CA-002294-MR

TASHA ALLISON

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BARRY WILLETT, JUDGE
ACTION NO. 06-CR-001306

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: ACREE AND NICKELL, JUDGES; LAMBERT,¹ SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: Tasha Allison was convicted of first-degree criminal trespass and second-degree assault. She contends that the trial court erroneously denied her motions for directed verdict and severance, and that she

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 KRS 21.580.

was denied a fair trial because the jury selection process was constitutionally defective. Upon review, we affirm.

The events leading to Allison's conviction occurred on February 26, 2006, and involved a physical altercation with Ciara Graves. Allison lived in an upstairs apartment in an apartment complex with her two children. Graves was a frequent visitor to her sister's downstairs apartment. According to Allison, Graves frequently visited her apartment and used her telephone, washer, and dryer, and she also borrowed food. During the summer of 2005, Graves allegedly sold Allison a bag of marijuana but did not receive payment from Allison because she could not make change at the time. Afterwards, Graves continued to use Allison's telephone, washer, and dryer. Because of this, Allison believed that her debt to Graves had been satisfied. Graves thought otherwise. The amount in dispute was fifteen dollars.

Late in the afternoon on the day of the incident, Allison was standing outside of the apartment complex with a friend. Jamal Gaines, Graves' former boyfriend, had gone to the store as a favor to Allison, but instead of returning her change, he gave it to Graves to pay the drug debt. An argument ensued, and Graves came outside to investigate.

From that point, Allison's and Graves' versions of events differ significantly. According to Allison, she and Graves began fighting in a hallway outside of the first-floor apartments, but this exchange lasted less than a minute. Allison contended that Graves threw the first punch and that she punched back

only in self-defense. Graves then went back into her sister's apartment and changed clothes before emerging again to attack Allison while she was lighting a cigarette outside of the apartment. Purported eyewitnesses testified that Graves attempted to throw Allison down a flight of stairs. A number of other witnesses testified that they were upstairs in Allison's apartment when they heard yelling and thumping from the downstairs hallway. They came outside to investigate and found Allison and Graves fighting in the hallway. Eventually the fight broke up. One of the witnesses noted that Allison had scratches and a knot on her face and a cut on her leg, while Graves was bleeding from her eye. Allison denied ever entering the apartment of Graves' sister during the fight. She also testified that she did not have a set of keys in her hand while she and Graves were fighting.

Graves' version is that she and Allison did not fight outside of the apartment complex. Instead, she indicated that after initially walking outside to investigate the argument between Allison and Gaines, she went back inside her sister's apartment because she believed that Allison wanted a fight. She also indicated that Aaron Hardin, Allison's boyfriend, was standing outside with Allison at the time. According to Graves, as she walked into the apartment and began to shut the door, she noticed "all of them" also walking into the apartment even though she had not given them permission to enter. At this point, a fight broke out between Graves and Allison. As the fight wore on, the parties moved deeper into the apartment. Graves indicated that Hardin held her hands down to restrain her and allowed Allison to strike her repeatedly in the face with her fist

while holding a set of keys. Eventually, the fight moved outside into the hallway before finally coming to an end.

Graves testified that once the altercation was over, she noticed that her face and head were hurting and that one of her fingernails had been ripped off. Later that night, she discovered that both of her eyes were black and swollen, with her right eye being swollen completely shut. She also had a cut under her left eye, and some of her hair had been ripped out. She soon began experiencing double-vision. Graves eventually learned that she had suffered a blow-out fracture of the orbit of her right eye that had caused the floor of the orbit to be pushed down into her maxillary sinus. On March 9, 2006, Graves underwent surgery to repair the damage. The contents of the orbit were pulled out of the sinus and kept in place by an implant.

On March 1, 2006, Graves filed a criminal complaint against Hardin and Allison. On April 19, 2006, the Jefferson County Grand Jury jointly indicted Hardin and Allison on one count of first-degree burglary, a Class B felony pursuant to KRS 511.020, and one account of second-degree assault, a Class C felony pursuant to KRS 508.020. Both Hardin and Allison pled “not guilty” to the charges.

Hardin and Allison were tried together. The trial began on August 16, 2006, and concluded on August 22, 2006. The jury ultimately found Allison guilty of second-degree assault, first-degree criminal trespass, and also guilty of fourth-degree assault under an “imperfect self-defense” instruction. She was acquitted of

the burglary charges. The trial judge questioned the jury foreman and concluded that it was the jury's belief that self-defense was not a factor in the case. He therefore treated the fourth-degree assault count as surplusage. Allison ultimately agreed to waive jury sentencing and accepted a five-year sentence of imprisonment. She was later granted shock probation. This appeal followed.

Allison first argues that she was denied due process and a fair trial because Jefferson County's methods for summoning individuals to the jury pool resulted in white persons being more than twice as likely as African-Americans to be called as jurors. Allison is African-American. As she points out, of the 59 members of the jury pool present on the day of her trial, only five were African-Americans. Moreover, only one of the fourteen jurors ultimately seated as a juror in Allison's trial was African-American, but this juror was designated as an alternate.

It is well-established that a defendant is entitled to a jury drawn from "a fair cross section of the community." *Taylor v. Louisiana*, 419 U.S. 522, 527, 95 S.Ct. 692, 696, 42 L.Ed.2d 690 (1975); *Partee v. Commonwealth*, 652 S.W.2d 89, 90 (Ky. 1983). This right is derived from the Sixth and Fourteenth Amendments to the United States Constitution. Accordingly, "jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof." *Taylor*, 419 U.S. at 538, 95 S.Ct. at 702. In order to

establish a *prima facie* violation of the fair-cross-section requirement, a defendant must show:

(1) that the group alleged to be excluded is a “distinctive” group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Duren v. Missouri, 439 U.S. 357, 364, 99 S.Ct. 664, 668, 58 L.Ed.2d 579 (1979).

There is no dispute that African-Americans make up a “distinctive” group in the relevant community, so the first prong of the *Duren* test has been met. However, to satisfy the second prong of this test, a defendant “must demonstrate the percentage of the community made up of the group alleged to be underrepresented, for this is the conceptual benchmark for the Sixth Amendment fair-cross-section requirement.” *Id.* A defendant must also provide evidence of systematic exclusion in order to satisfy the third prong of the test. *See Dickerson v. Commonwealth*, 174 S.W.3d 451, 462-63 (Ky. 2005). Allison failed to meet either of these requirements. This failure is fatal to her argument. *See id.*; *Commonwealth v. McFerron*, 680 S.W.2d 924, 927 (Ky. 1984); *Ford v. Commonwealth*, 665 S.W.2d 304, 308 (Ky. 1983). Allison offered the trial court only a general assertion that the percentage of African-Americans in the jury pool grossly underrepresented the African-American community. She did not provide the trial court with specific evidence to support her contention and it must fail. *See Blakemore v. Commonwealth*, 497 S.W.2d 231, 234 (Ky. 1973).

Allison also raises an equal protection claim with respect to the composition of the jury pool. To establish that an equal protection violation has occurred in the context of jury selection, a defendant “must show that the procedure employed resulted in substantial underrepresentation of his race or of the identifiable group to which he belongs.” *Castaneda v. Partida*, 430 U.S. 482, 494, 97 S.Ct. 1272, 1280, 51 L.Ed.2d 498 (1977). To make this showing, a defendant must satisfy a three-part process by: (1) establishing “that the group is one that is a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied”; (2) proving the degree of underrepresentation “by comparing the proportion of the group in the total population to the proportion called to serve as [] jurors, over a significant period of time”; and (3) establishing discriminatory intent, which may be satisfied by showing that the selection procedure “is susceptible of abuse or is not racially neutral.” *Id.* Once again, Allison failed to present evidence to meet this burden. Consequently, this argument must also fail. Allison’s remaining arguments in this context are too vague to permit analysis or are unpreserved for review.

Allison next argues that the trial court erred in denying her motion for a directed verdict because the jury’s verdict of guilty was not supported by the evidence. “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 the defendant is entitled to a directed verdict of acquittal.” *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991). In determining whether a directed

verdict is proper, a “trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth.” *Id.* Moreover, for purposes of ruling on the motion, the trial court “must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.” *Id.*

In support of her directed verdict claim, Allison complains that Graves’ testimony was unreliable and therefore not credible because of various inconsistencies in her testimony and in her statements to police. For example, the police report claimed that Graves had reported that she had been held down on a couch by Hardin. Graves admitted that this was incorrect but blamed the error on the officer taking the report. Allison also alleges that Graves was forgetful of multiple key details of the case. For example, she could not recall the basis for the fifteen-dollar debt or who had thrown the first punch in the fight. Allison also notes that Graves vacillated on how many times that Allison and Hardin had entered her sister’s apartment, and Allison alleges that Graves was on Percocet at the time of the incident. Consequently, she reasons that because the Commonwealth’s case relied predominantly upon Graves’ allegedly non-credible testimony, a directed verdict was appropriate.

Allison’s argument must fail because our case law is clear that matters of credibility and of the weight to be given to a witness’s testimony are solely within the province of the jury. Therefore, an appellate court cannot substitute its judgment on such matters for that of the jury. *See Benham*, 816 S.W.2d at 187; *see*

also *Brewer v. Commonwealth*, 206 S.W.3d 313, 319 (Ky. 2006). Moreover, the fact that parts of Graves' testimony were arguably inconsistent or conflicting does not require a directed verdict since "[d]etermining the proper weight to assign to conflicting evidence is a matter for the trier of fact and not an appellate court." *Washington v. Commonwealth*, 231 S.W.3d 762, 765 (Ky. App. 2007); see also *La Vigne v. Commonwealth*, 353 S.W.2d 376, 379 (Ky. 1962) ("[T]his Court may not reverse the judgment merely because the proof is inconsistent, even though either court, if it had sat as a jury in that particular case, would have acquitted the defendant.") The trial court was required to assume that the Commonwealth's version of events – *i.e.*, that to which Graves testified – was true in considering Allison's motion for a directed verdict. *Benham*, 816 S.W.2d at 187. In light of this, we cannot conclude that the trial court erred in denying Allison's motion.

Allison also notes that she presented multiple witnesses to corroborate her version of events while the Commonwealth offered none to support Graves' testimony. However, our courts have long held that a jury is free to believe the testimony of one witness over that of multiple other witnesses. See *Adams v. Commonwealth*, 560 S.W.2d 825, 827 (Ky. App. 1977). Indeed, the testimony of a single witness is enough to support a conviction. See *Gerlaugh v. Commonwealth*, 156 S.W.3d 747, 758 (Ky. 2005); *La Vigne*, 353 S.W.2d at 378-79. Accordingly, we must reject Allison's contention that the trial court erred in denying her motion for a directed verdict.

Allison next raises a related argument that the Commonwealth failed to prove that Graves had suffered “serious physical injury,” a required element for a conviction of second-degree assault pursuant to KRS 508.020(1)(a).² KRS 500.080(15) defines “serious physical injury” 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.” Allison contends that Graves suffered only “physical injury,” which is defined by KRS 500.080(13) as “substantial physical pain or any impairment of physical condition.”

After considering the arguments presented by both parties, we conclude that the question of whether Graves’ injury created a “prolonged impairment of health” and therefore constituted a “serious physical injury” for purposes of KRS 508.020(1)(a) was properly before the jury since reasonable persons could differ as to the answer. The evidence reflected that as a result of the fight, Graves suffered an orbital blowout fracture that at first rendered her unable to see out of her right eye. As time went on, she could not completely look up or down, she could not read, her vision was unclear, and she experienced double vision. Even after reparative surgery, Graves continued to occasionally experience double vision more than six months after the fight. Applying the directed verdict standard, we conclude that a reasonable jury could find that Graves suffered a “prolonged impairment of health.” *See Clift v. Commonwealth*, 105 S.W.3d 467,

² KRS 508.020(1)(a) provides that a person is guilty of second-degree assault when she “intentionally causes serious physical injury to another person[.]”

471-72 (Ky. App. 2003); *Rowe v. Commonwealth*, 50 S.W.3d 216, 221 (Ky. App. 2001).

However, even if we were to assume that Graves' injury did not satisfy the requirements of KRS 500.080(15) and 508.020(1)(a), one can also be convicted of second-degree assault if she "intentionally causes physical injury to another person by means of a deadly weapon or a dangerous instrument." KRS 508.020(1)(b). A "dangerous instrument" is defined as:

any instrument, including parts of the human body when a serious physical injury is a direct result of the use of that part of the human body, article, or substance which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or serious physical injury.

KRS 500.080(3). Graves testified that Allison repeatedly struck her in the face while holding a set of keys and while Graves' arms were being held. Under these circumstances, a jury could conclude that the keys were a "dangerous instrument" for purposes of KRS 500.080(3) and 508.020(1)(b). In sum, the trial court did not err in denying Allison's motion for a directed verdict on grounds that Ciara Graves' injuries did not satisfy the requirements of KRS 508.020.

Allison finally argues that the trial court erred by denying her motion for a separate trial. The basis for this motion was media attention given to her co-defendant, Aaron Hardin. As a teenager, Hardin shot and killed his younger brother during a fight over a video game. This incident, along with Hardin's

ensuing trial and conviction for wanton murder,³ caused significant attention from the local news media, and Hardin attained considerable notoriety in the Louisville area. During *voir dire*, approximately eighteen potential jurors acknowledged that they recognized Hardin and/or expressed some familiarity with the earlier incident. The case at hand also received media attention because of Hardin's history, and a few jurors were also familiar with that news coverage. Allison contends that her "[a]ssociation with Hardin at trial was the death knell for [her] defense" because of his reputation.

"As a general rule, persons jointly indicted should be tried together." *Bratcher v. Commonwealth*, 151 S.W.3d 332, 340 (Ky. 2004). Our Supreme Court has expressed a "strong preference" for joint trials in such cases. *Id.* Accordingly, Kentucky Rule of Criminal Procedure (RCr) 9.16 provides that a defendant's motion for a separate trial shall be granted only if the defendant shows that he "will be prejudiced by a joinder of offenses or of defendants in an indictment, information, complaint or uniform citation or by joinder for trial[.]"

"A criminal defendant is not entitled to severance unless there is a positive showing prior to trial that joinder would be unduly prejudicial." *Humphrey v. Commonwealth*, 836 S.W.2d 865, 868 (Ky. 1992); *see also Dishman v. Commonwealth*, 906 S.W.2d 335, 340 (Ky. 1995) ("Severance is not automatic and a defendant must prove that joinder is prejudicial so as to be unfair or unnecessarily or unreasonably hurtful.") A trial court is vested with considerable

³ At the time of the subject incident, Hardin was out of custody because he had been granted shock probation.

discretion in ruling on such a motion. *Humphrey*, 836 S.W.2d at 868.

Consequently, we cannot reverse a court's denial of a defendant's motion to sever "unless we are clearly convinced that prejudice occurred and that the likelihood of prejudice was so clearly demonstrated to the trial judge as to make his failure to grant severance an abuse of discretion." *Rachel v. Commonwealth*, 523 S.W.2d 395, 400 (Ky. 1975).

The grounds given by Allison in support of her argument amount to nothing more than a generalized fear that she would be tainted by her association with Aaron Hardin. There was no evidence of antagonistic defenses or of any other related concern that might prove prejudicial to her. Consequently, we cannot say that the trial court abused its discretion in denying her motion to sever. *See Skinner v. Commonwealth*, 864 S.W.2d 290, 294 (Ky. 1993); *Brown v. Commonwealth*, 914 S.W.2d 355, 357 (Ky. App. 1996).

Accordingly, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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