

RENDERED: OCTOBER 29, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000234-MR

DOMINIC ANDRE GALES

APPELLANT

v. APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE ANDREW SELF, JUDGE
ACTION NO. 07-CR-00647

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON AND MOORE, JUDGES; BUCKINGHAM,¹ SENIOR JUDGE.

CAPERTON, JUDGE: Dominic Andre Gales appeals from his conviction of Assault in the First Degree, for which he was sentenced to ten years. On appeal, Gales argues that the trial court committed three errors. First, it denied his *Batson*

¹ Senior Judge David C. Buckingham, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110 (5)(b) of the Kentucky Constitution and the Kentucky Revised Statutes (KRS) 21.580.

motion. Second, it denied his motion for a directed verdict based on the failure of the Commonwealth to prove that the injury was caused by the use of a dangerous instrument. Third, Gales argues that the court erred in admitting out-of-state hospital records without a proper foundation. The Commonwealth disagrees. After our review of the parties' arguments, the record, and the applicable law, we affirm.

The facts in the case *sub judice* were testified to at Gales' jury trial on September 22, 2008, by Gales, his step-daughter Rashiyah, and Dr. Lisa Piercy, the director of the child abuse team at Vanderbilt Medical Center.

Gales and Mindy Carmona, his wife and the victim's mother, lived together with their infant son and with Mindy's two daughters, Rashiyah, age seven, and Ahniyah, age four. On July 13, 2007, Gales woke Mindy and the children up so that Mindy could go to work. Gales discovered that Ahniyah had wet the bed so Mindy instructed Gales to put Ahniyah in "time out" when they got back from dropping Mindy off at work. When Gales and the children returned, Ahniyah was put into "time out" and was placed in the corner of the living room. However, Ahniyah kept attempting to watch the TV, so she was placed in "time out" in her room. Gales proceeded to get ready for work the next day by ironing his uniform.

Gales then testified that he heard a bump in the other room but did not pay attention to the sound. When he walked back to his bedroom, the door to Ahniyah's room was open a crack; Gales opened the door and saw Ahniyah lying

on the floor. He told Rashiyah to take the dog outside for a walk. Gales then attempted to revive Ahniyah by placing her into the bathtub and running cold water over her. When Rashiyah came back, Gales told her to go to the neighbors to call an ambulance. Ahniyah was taken to the local hospital and then to Vanderbilt Children's Hospital in Nashville, Tennessee.

Rashiyah testified that Gales had ironed his clothes or washed dishes at the sink. Thereafter, he told her to go outside and walk one of the dogs.

Ahniyah was in her room because she was in trouble. After the walk, Rashiyah went back into the house and knocked on the bathroom door. Gales could be heard smacking Ahniyah and telling her to wake up. A couple of minutes later Rashiyah knocked on the door again and Gales carried Ahniyah out of the bathroom, wet and with her clothes on, and told Rashiyah to go to the neighbors and call for help. Ahniyah's eyes were shut and she was not able to talk, nor has she been able to talk since then.

Dr. Lisa Piercy, director of the child abuse team at Vanderbilt Medical Center, testified for the Commonwealth as an expert. Ahniyah was unconscious when she arrived at Vanderbilt and was immediately taken in for neurosurgery. She was unresponsive, with one pupil fixed and dilated, and the left-side of her face was bruised with a black eye and bruising across the nose. A vertebra in the middle of her back was broken. Her skull was not fractured; however, there was pressure and swelling in the brain with a herniation at the base of her skull. To relieve the pressure, doctors cut away part of her skull.

Dr. Piercy testified that the injuries were non-accidental based on the facts of the case. First, because the magnitude of Ahniyah's injuries were similar to those that she would have suffered from a multi-story fall or a high-speed car crash. Second, after examining pictures of the contents of Ahniyah's room, Dr. Piercy found that Ahniyah could not have been injured by any objects falling upon her from within the room, as none of the objects in the room were taller than three feet.

Dr. Piercy testified that the compression fracture in Ahniyah's spine is very rare and usually results from a child being slammed on his or her behind. As to the brain injuries, they could be caused either from blunt-force trauma to the head or whiplash. Dr. Piercy opined that whiplash was more probable because of the lack of either a knot on Ahniyah's head or a skull fracture, the lack of either indicating that blunt force trauma was not the cause of the injuries. Dr. Piercy opined that Ahniyah's injuries could have occurred if shaken vigorously allowing her head to be whipped back and forth hitting her back and chest.

After hearing the testimony from the aforementioned witnesses, the jury convicted Gales of Assault in the First Degree and sentenced him to ten years. Gales now appeals to this Court. On appeal Gales presents three arguments, which he claims require reversal. First, Gales argues that the trial court erred when it denied his *Batson* motion. Second, Gales argues that the trial court erred when it denied his motion for a directed verdict based on the failure of the Commonwealth to prove the injury was caused by the use of a dangerous instrument. Third, Gales

argues that the court erred in admitting out-of-state hospital records without a proper foundation.

The Commonwealth disagrees and instead argues that the trial court properly denied Gales' *Batson* challenge and Gales' directed verdict motion. The Commonwealth also argues that the evidentiary issues concerning the out-of-state hospital records is not properly before this Court, nor was it error to admit the medical records. With these arguments in mind, we turn to Gales' claimed error concerning his *Batson* motion.

After the parties had exercised their peremptory strikes, defense counsel moved "pursuant to *Batson* for the Commonwealth to disclose if they struck any African-American jurors and provide race-neutral reasons if they did so."² Thereafter, the Commonwealth informed the trial court that it had struck Juror Swift because she lived in Oak Grove, the same town where the crime had occurred, and because of her potential exposure to the police officers, defendant, or the victim's family. The Commonwealth also informed the trial court that it had struck Juror Bacon because of facial expressions he gave during voir dire. The trial court then determined that the Commonwealth had provided race-neutral reasons and denied Gales' *Batson* motion. With this in mind, we turn to the applicable law.

² See the video record, 9/22/08 at 9:56.

In *Commonwealth v. Snodgrass*, 831 S.W.2d 176 (Ky. 1992), the Kentucky Supreme Court applied the three-step process set forth in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712 (U.S. 1986):

In *Batson*, the U.S. Supreme Court outlined a three-step process for evaluating claims that a prosecutor has used peremptory challenges in a manner violating the Equal Protection Clause. *Id.* at 96-98, 106 S.Ct. at 1722-24. First, the defendant must make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race. *Id.* at 96-97, 106 S.Ct. at 1722-23. Second, if the requisite showing has been made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question. *Id.* Finally, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination. *Id.* at 98, 106 S.Ct. at 1724.

Snodgrass at 178.

In applying *Batson*, the Court in *Snodgrass* noted:

The sole determination by the trial court when it holds a *Batson* hearing is whether the prosecutor exercised a peremptory challenge on a venireman because of his race. *Batson* gives great deference to the trial court in determining whether the prosecutor's strike is racially motivated. A trial court should give appropriate weight to the disparate impact of the prosecutor's criterion in its decision, but this factor is not conclusive in the preliminary race-neutral inquiry. *Hernandez, supra* at 1863. The trial court may accept at face value the explanation given by the prosecutor depending upon the demeanor and credibility of the prosecutor. *Stanford v. Commonwealth, Ky.*, 793 S.W.2d 112 (1990). No additional inquiry or evidentiary hearing is required under *Batson*.

Snodgrass at 179.

Thus, in the matter *sub judice*, we must determine if the trial court erred in applying *Batson*, which we review under the clearly erroneous standard. *Gray v. Commonwealth*, 203 S.W.3d 679, 691(Ky. 2006) (“The trial court's decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference, and must be accepted unless they are clearly erroneous.”) (Internal citations omitted).

We find that the trial court did not commit clear error in finding that the Commonwealth had provided race-neutral reasons under *Batson* for striking the two jurors. First, in the matter *sub judice*, the defendant moved pursuant to *Batson* for the Commonwealth to provide race-neutral reasons for striking any African-Americans from the jury. The Commonwealth responded by stating it struck one juror due to location of residence and the other because of facial expressions during voir dire. The trial court then immediately undertook an analysis of the third step in the *Batson* analysis. This obviated the need for the court to consider first, whether the defendant had made a prima facie showing that the prosecutor had exercised peremptory challenges on the basis of race and second, having the prosecutor to articulate a race-neutral explanation for striking the jurors in question.

In considering the explanations offered by the Commonwealth, we take guidance from the Court in *Snodgrass, supra*, which found “no due process or equal protection violation by the prosecutor in striking a juror who lives nearby or in the same neighborhood as the defendant.” *Id.* at 179. As to the facial

expressions of the other juror during voir dire, we believe that facial expressions may reveal underlying thoughts and beliefs. Moreover, the trial court may accept at face value the explanation given by the Commonwealth based upon the demeanor and credibility of Commonwealth.³ *Id.* Thus, we cannot say that the trial court was clearly erroneous in finding that Gales had not carried his burden of proving purposeful discrimination. *Snodgrass* at 179. There was no error in denying Gales' *Batson* motion.⁴

We now turn to Gales' second claimed error that the trial court erred when it denied his motion for a directed verdict based on the failure of the Commonwealth to prove that the injury was caused by the use of a dangerous instrument. The law regarding directed verdicts is well-established. In *Commonwealth v. Benham*, 816 S.W.2d 186 (Ky. 1991), the Kentucky Supreme Court stated:

On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose 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.

³ See also *Gray* at 691, "Because the trial court is the best "judge" of the Commonwealth's motives in exercising its peremptory strikes, great deference is given to the court's ruling."

⁴ We find Gales' argument that the trial court impermissibly combined steps two and three of a *Batson* analysis to be meritless. In the matter *sub judice* all three steps were undertaken; if Gales wished for more specific findings, he should have so moved. See CR 52.04.

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. Sawhill*, 660 S.W.2d 3 (Ky. 1983).

Benham at 187.

In support of Gales' argument that the trial court erred when it denied his motion for a directed verdict based on the failure of the Commonwealth to prove the injury was caused by the use of a dangerous instrument, Gales argues that the Commonwealth could not definitively state how the injury was caused, nor was there evidence that a deadly weapon or dangerous instrument was used. KRS 508.010(1) states as follows:

- 1) A person is guilty of assault in the first degree when:
 - (a) He intentionally causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument; or
 - (b) Under circumstances manifesting extreme indifference to the value of human life he wantonly engages in conduct which creates a grave risk of death to another and thereby causes serious physical injury to another person.

Furthermore, KRS 500.080(3) defines "dangerous instrument" as used in KRS 508.010(1) as:

- (3) "Dangerous instrument" means 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;

Gales relies on *Roney v. Commonwealth*, 695 S.W.2d 863 (Ky. 1985), wherein the Kentucky Supreme Court held that fists and feet do not constitute dangerous instruments. However, in *Roney* the Court explicitly relied on the rule of lenity in its determination, as the Court was unsure “if the General Assembly intended that fists be considered to be a dangerous instrument as that term is used in K.R.S. 508.010.” *Roney* at 864. At the time, KRS 500.080(3) defined dangerous instrument “to mean any instrument, 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.” *Roney* at 864.

Gales’ reliance on *Roney* is misplaced as the General Assembly later amended KRS 500.080(3) to explicitly include “parts of the human body when a serious physical injury is a direct result of the use of that part of the human body...” We have interpreted the revised KRS 500.080(3) in conjunction with KRS 508.101 to include situations when an adult severely injures a child with nothing more than their hands, by beating, squeezing, and dropping the child. *See Johnson v. Commonwealth*, 926 S.W.2d 463, 465 (Ky.App. 1996). *Johnson* noted that “We believe the inclusion of parts of the human body as dangerous instruments depends on the facts of the case and the capability of the body part to “cause death or serious physical injury”. *Id.* at 465.

Similarly to *Johnson*, medical testimony in the case *sub judice* established that the victim’s injuries were not accidental and the injuries were likely caused by shaking the victim severely, by a blow to the head, or a

combination thereof. *See Johnson* at 465 (“Medical testimony is the preferred method of proving the serious physical injury requirement.”). Thus, the jury was properly presented the question of whether Gales was guilty of Assault in the First Degree.⁵ We do not find error in the trial court’s denial of Gales directed verdict motion, as when viewing the evidence as a whole, it would not be clearly unreasonable for a jury to find guilt.⁶

We now turn to Gales’ last argument that the court erred in admitting out-of-state hospital records without a proper foundation. During the course of Dr. Piercy’s testimony, the Commonwealth moved to introduce the medical records of the victim from Vanderbilt Children’s Hospital in Nashville, Tennessee. Gales objected and the trial court overruled the objection and admitted the certified medical records of the victim. The Commonwealth argues in response that the claimed errors concerning the records were not properly preserved for appellate review, that the records were properly authenticated with the attached certification of the medical records custodian, and that accordingly, admission of the records was proper.

⁵ Our Courts have repeatedly stated that “Even circumstantial evidence may form the basis for a conviction so long as the evidence is sufficient to convince a reasonable jury of guilt.” *Crossland v. Commonwealth*, 291 S.W.3d 223, 235 (Ky. 2009).

⁶ Gales also argues that the jury was improperly instructed on both wanton assault and intentional assault based on use of a dangerous instrument for Assault in the First Degree; however, Gales has failed to cite to the record where this issue was raised to the trial court. This Court is not obliged to scour the record on appeal to ensure that an issue has been preserved. *See Phelps v. Louisville Water Co.*, 103 S.W.3d 46, 53 (Ky. 2003); *Jewell, infra*, and *Shelton, infra*. Therefore, we decline to address this argument.

In addressing this issue, we note that evidentiary rulings are reviewed for abuse of discretion. “The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000) citing *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). Further, no evidentiary error shall be grounds for reversal unless it affects the substantial rights of the parties. CR 61.01 and KRE 103. We review the arguments of the parties with these standards in mind.

A review of the record reveals that Gales made a general objection to the trial court. No specific arguments were offered. On appeal, Gales argues that the records were hearsay; that the records were not properly authenticated because the Commonwealth did not present a live witness to establish proper foundation; and the admission of them was in error and violated Gales’ due process rights.⁷ These arguments all focus on the admissibility of the records. If the records were properly admitted, then all these objections are without basis.

⁷ In the reply brief, Gales argues that the Commonwealth failed to provide ample notice of its intent to introduce the records under KRE 902(11)(B); Gales gives no citation to the record showing this error was preserved. As to alleged error concerning Gales’ due process rights, Gales again fails to provide citation to the record where this error was preserved. We decline to address these specific arguments as we are unclear if these arguments were presented to the trial court. *See Jewell v. City of Bardstown*, 260 S.W.3d 348, 350-351 (Ky.App. 2008)(“the circuit court did not address any of these issues in reaching its decision. We only review decisions of the lower courts for prejudicial error, consequently, without a ruling of the lower court on the record regarding a matter, appellate review of that matter is virtually impossible.”) and *Shelton v. Commonwealth*, 992 S.W.2d 849, 852 (Ky.App. 1998)(“[a]n appellate court will not consider a theory unless it has been raised before the trial court and that court has been given an opportunity to consider the merits of the theory.”).

We believe Gales' general objection was insufficient to preserve error as to the admissibility of the records. A general objection is not sufficient to preserve specific challenges to admissibility unless the specific objection is apparent from the context. KRE 103.⁸ The specific grounds argued by Gales now, namely, hearsay and improperly authentication, were not apparent from the context; thus, the alleged error in admitting the evidence is not preserved for our review. Further, Gales did not request a palpable error analysis under RCr 10.26. "Absent extreme circumstances amounting to a substantial miscarriage of justice, an appellate court will not engage in palpable error review pursuant to RCr 10.26 unless such a request is made and briefed by the appellant." *Shepherd v. Commonwealth*, 251 S.W.3d 309, 316 (Ky. 2008) (internal citations omitted). Accordingly, we decline to review the alleged error in the admission of the medical records.

In light of the aforementioned analysis, we affirm the Christian Circuit Court.

ALL CONCUR.

⁸ We note that KRE 103 was amended in 2007 to require a party to timely make "specific" rather than "general" objection when the party desires exclusion of offered evidence unless the ground for the objection is apparent from the context.

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