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NOT TO BE PUBLISHED

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

NO. 2013-CA-000339-MR

BASS WEBB

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE KIMBERLY N. BUNNELL, JUDGE  
ACTION NO. 11-CR-00428

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CAPERTON, CLAYTON, AND NICKELL, JUDGES.

CLAYTON, JUDGE: Bass Webb appeals from his conviction for third-degree assault following a jury trial in Fayette Circuit Court. After the jury verdict, Webb pled guilty to the charge of persistent felony offender (hereinafter “PFO”) in the first degree. The trial court sentenced Webb to a five-year prison term enhanced

to ten years based on his status as a persistent felony offender. The sentence was to run consecutively with Webb's other sentences.

On appeal, Webb contends that the trial court erred when it denied its motion to strike a juror for cause; allowed the prosecutor to present evidence of a previous outburst by Webb at the facility; and, overruled his objections to the jury instruction for third-degree assault including his request to include an instruction on harassment, which is, according to him, a lesser included offense.

For the foregoing reasons, we affirm.

### BACKGROUND

Webb was an inmate at the Fayette County Detention Center. Detention Center employees routinely inspect inmates' rooms for items that might be used as weapons including, for example, broken CD's, razors, or sharpened toothbrushes. On February 2, 2011, officers of the facility were performing a routine check. Notwithstanding that the inspection was routine, the officers had information that Webb possessed a broken CD.

Webb became agitated during the inspection and was yelling at the officers and making threatening statements including that there would be an assault every day until the employees killed him or he killed them. At one point, he turned and spit in the face of Officer Roy Compston. After this incident, Webb was indicted by the Fayette County Grand Jury for one count of third-degree assault pursuant to Kentucky Revised Statutes (KRS) 508.025 and being a persistent felony offender.

Trial was held on January 23, 2013. The Commonwealth called as its last witness one of the nurses at the detention facility because medical personnel at the facility administered blood sugar checks and insulin to the inmates. He testified that Webb, who was diabetic, had his blood sugar checked twice a day and insulin administered as needed. Further, the nurse noted that Webb's blood sugar had been fluctuating during this time period likely because he was not eating appropriately. A symptom of blood sugar fluctuation is changes in mood.

During the trial proceedings, Webb indicated that he might use his medical condition and/or that he was mistreated in the jail as defenses. Having anticipated that Webb might use these defenses, that is, the spitting was accidental or a result of a medical condition, the Commonwealth requested that the court allow evidence of another incident involving Officer Compston during which Webb was violent and threw trays and milk. Initially, the trial court ruled that the evidence would only be allowed if relevant for this defense.

During *voir dire*, a juror approached the bench and stated that even though she did not know anyone involved in this particular case, her father-in-law was a retired sheriff and jailer and, further, her husband was a retired police officer. Nevertheless, upon questioning from the trial judge, the juror stated that she was independent, able to be impartial, and not under any pressure to find a defendant guilty because of family members. Later, the defense used a peremptory strike to remove this juror from the pool. Thereafter, the defense argued that since

the trial court did not remove this juror for cause, it had been unable to use this peremptory strike on other prospective jurors it wished to eliminate from the panel.

Lastly, the defense submitted and later filed jury instructions with the trial court. The proposed instructions included an instruction on harassment and another one with only the *mens rea* of intent for the assault instruction. The trial court, however, used instructions that articulated the *mens rea* as either intentional or wanton and only instructed on the third-degree assault, not harassment.

After the jury heard the evidence, the trial court's instructions, and the arguments of counsel, it retired to deliberate, and ultimately found Webb guilty of third-degree assault. Thereafter, Webb, upon advice of counsel, pled guilty to the crime of PFO first-degree. The trial court entered its judgment on February 12, 2013, and following the Commonwealth's recommendation, sentenced Webb to a prison term of five (5) years enhanced to ten (10) years by Webb's status as a persistent felony offender. Further, the trial court ordered that the sentence run consecutively with Webb's previous felony sentences. Webb now appeals from this guilty verdict and judgment.

On appeal, Webb contends that the trial court erred for its failure to excuse for cause the juror with connections to the jail and law enforcement; for allowing the admission of a prior bad act by Webb; and, for overruling objections to the jury instructions for assault third degree and not including an instruction on harassment. The Commonwealth counters that Webb is not entitled to relief for the trial court's denial of the motion to strike the juror; that the trial court properly

admitted evidence of the previous prison outburst by Webb; and, that the trial court properly instructed the jury. Additional facts will be provided as needed.

## ANALYSIS

### *Failure to strike juror for cause*

We begin our analysis by considering Webb's assertion that the trial court committed reversible error when it failed to excuse a prospective juror for cause. In Kentucky, a trial court's decision whether to strike a juror for cause must be reviewed for abuse of discretion. *Adkins v. Commonwealth*, 96 S.W.3d 779 (Ky. 2003). Consequently, the decision whether to strike a potential juror for cause is within the trial court's discretion. *Grider v. Commonwealth*, 404 S.W.3d 859, 860 (Ky. 2013)(citation omitted). "The test for an abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Anderson v. Commonwealth*, 231 S.W.3d 117, 119 (Ky. 2007)(citations omitted.)

Under Kentucky Rules of Criminal Procedure (RCr) 9.36(1), a juror must be excused for cause, "[w]hen there is reasonable ground to believe that a prospective juror cannot render a fair and impartial verdict on the evidence[.]" In making such a determination, the trial court must consider the "totality of the circumstances and not on a response to any one question." *Fugett v. Commonwealth*, 250 S.W.3d 604, 613 (Ky. 2008). Further, the trial court must weigh the probability of bias or prejudice based on the entirety of the juror's responses and demeanor. *Shane v. Commonwealth*, 243 S.W.3d 336, 338 (Ky.

2007). Finally, “[i]t is within the trial court's discretion to excuse a juror for cause, and great deference is afforded that decision in the absence of an abuse of discretion.” *Mills v. Commonwealth*, 95 S.W.3d 838, 842 (Ky. 2003).

A review of the video record of the case herein shows that the trial judge and trial counsel did a thorough and thoughtful *voir dire* examination of the juror in question. It began when the Commonwealth asked whether anyone in the panel had a special connection to the jail. The juror then approached the bench and told the court that although she did not know anyone involved in this particular case, her father-in-law was a retired sheriff and jailer, her husband was a retired police officer, and another family member was a deputy sheriff.

During subsequent questioning from the trial judge, she stated that she was independent, able to be impartial, and would not be under any pressure from family members to find the defendant guilty. Later, when defense counsel questioned her, she answered that she could not say for certain that her family experience would not impact her. Yet, at no time did she indicate that she could not be fair, impartial, and independent.

Our review confirms that pursuant to the strictures of RCr 9.36(1), the defense has not established here that the judge did not have a reasonable basis to believe that this juror could be fair and impartial. Given the totality of the circumstances, the juror's statements and demeanor supported the trial court's decision to seat her. *McDaniel v. Commonwealth*, 341 S.W.3d 89, 94 (Ky. 2011). The juror's statement that she was not 100% sure if information she heard from

family members would not influence her decision did not, in itself, compromise her ability to be impartial and objective.

In sum, giving due deference to the opportunity of the trial court to observe the demeanor of the prospective juror and understand the substance of her answers to *voir dire* questions, we find no error. *Stopher v. Commonwealth*, 57 S.W.3d 787, 797 (Ky. 2001).

*Admission of prior bad acts*

Next, we consider Webb's argument that the trial court erred when it allowed the Commonwealth to present evidence of a previous incident at the jail, which included an outburst by him. As previously explained, Webb was charged with third-degree assault because he allegedly spat on Officer Compston, an employee of the Fayette County Detention Center. Prior to the trial, the Commonwealth filed a motion to introduce Kentucky Rules of Evidence (KRE) 404(b).

The motion alleged that on January 6, 2011, which was approximately one month before the incident, Webb threw dinner trays with food and milk cartons at Officer Compston. On that occasion, Webb damaged property; threw items out of the food flap; attempted to hit officers, including Officer Compston, with the food trays and milk cartons; and threatened them. The Commonwealth argued that this previous incident helps to establish motive and intent in the case at hand. Further, it revealed plan and opportunity while rebutting any claim the spitting at Officer Compston was accidental. The Defense responded in writing

that the date of the earlier incident was not only too remote but also too prejudicial and, thus, no exception to KRE 404(b) existed.

A hearing on the matter was held the day before the scheduled trial. The trial court judge ruled that although the prior incident was similar in character and nature because the victim and the physical interaction were the same, its prejudicial impact would outweigh any probative value. Consequently, the trial court entered an order precluding the Commonwealth from introducing the evidence. However, the trial court did not prohibit the Commonwealth from revisiting the issue.

Then, during *voir dire*, the defense attorney asked the jury panel whether anyone had diabetes. After posing this question, the prosecutor inquired as to the purpose of this query. The defense attorney articulated that because the February 2, 2011 incident occurred in the late afternoon before Webb's dinner, his blood sugar may have been low, which can make a person with diabetes irritable and prone to outburst.

At this point, the prosecution consented to a nurse for the detention center testifying about Webb's diabetes and renewed its KRE 404(b) motion. It claimed that the earlier incident was relevant to Webb's motive and intent in the later incident. Again, the trial court denied the prosecution's motion but suggested that if the defense continued this line of questioning, the trial court's decision could change.

Next, the defense attorney during cross examination asked the detention center nurse several questions about Webb's blood sugar at the time of the incident and the possible effects of fluctuating blood sugar on a diabetic. The prosecution then renewed its KRE 404(b) motion. After discussion among the parties, the trial court noted that the evidence of the prior incident supported the proposition that Webb's actions were intentional or wanton and disputed that his medical condition was responsible for his actions. Furthermore, the trial court opined that the evidence of the prior act was relevant to counter defense's implication that Webb's spit was airborne because he was yelling and not specifically directed toward Officer Compston. Finally, the trial court determined that the probative value of the evidence outweighed its prejudicial effect. Hence, the trial court overruled the defense's objection to the prosecution presenting evidence of the prior incident involving Webb and Officer Compston.

Accordingly, Officer Compston was called during rebuttal. He testified that about a month earlier, during dinner, Webb threw some food trays and milk cartons at him. The officer was only struck by the food. Apparently, Webb was upset because the menu included milk rather than juice. After throwing the food and trays, the officer stated that Webb went into the day room, kicked the phone off the wall, and swung it around.

We review a trial court's evidentiary ruling for abuse of discretion. *Anderson*, 231 S.W.3d at 119. To resolve the propriety of the trial court's decision concerning admission of the prior incident requires us to analyze KRE 404(b).

Pursuant to KRE 404(b) “[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.” However, KRE 404(b) provides that such evidence may be admissible “[i]f offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”

Based on the language of the rule and case law, KRE 404(b) permits exceptions to its prohibition against admission of prior crimes or prior bad acts. As noted in *Lambert v. Commonwealth*, 835 S.W.2d 299 (Ky. App. 1992), “evidence of the commission of other crimes is not admissible to prove that an accused is a person of criminal disposition, but an exception exists if the evidence is offered to prove motive, intent, knowledge, identity, plan or scheme, or absence of mistake or accident.” *Id.* at 302.

Here, the prosecution elicited the evidence of Webb’s prior act to establish that the acts pertinent to this charge of third-degree assault were not the result of accident, mistake, or medical condition. The prosecution contended that this evidence is permitted by KRE 404(b) since such evidence is permitted if offered to “prove motive, intent, knowledge, plan or scheme, or absence of mistake[.]” In the case at hand, the testimony regarding the prior incident was relevant to prove Webb’s intent and the absence of any mistake regarding whether Webb accidentally or purposely spit at Officer Compston.

“‘Relevant evidence’ means evidence having 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.” KRE 401. Additionally, “[r]elevance is established by any showing of probativeness, however slight.” *Springer v. Commonwealth*, 998 S.W.2d 439, 449 (Ky. 1999). Under KRE 403, relevant evidence may be excluded “if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury . . . .”

Since the previous incident may support that the spitting incident was intentional and not the result of an accident, we conclude that it is clearly relevant and has probative value. Bolstering this analysis is the fact that an element of third-degree assault is intentional or wanton actions. Thus, because under KRE 404(b) such evidence is permissible if it proves the absence of mistake or accident, we do not believe that the trial court abused its discretion in deciding that the probative value of the evidence outweighed any prejudicial impact in the case at bar.

#### *Jury Instructions*

The third claim of error by Webb challenges the legal merit of the jury instructions. He objects to the proffered instructions for two reasons. First, Webb maintains that the instructions for the charge of third-degree assault pursuant to KRS 508.025(1)(b) had an intentional and a wanton mental state and, therefore, the trial court incorrectly instructed the jury regarding this charge. Second, Webb maintains that the trial court should have provided a jury instruction on harassment – physical contact as a lesser offense.

Webb was charged with third-degree assault under KRS 508.025(1)(b), which reads that a person is guilty of the offense when:

Being a person confined in a detention facility, or state residential treatment facility or state staff secure facility for residential treatment which provides for the care, treatment, or detention of a juvenile charged with or adjudicated delinquent because of a public offense or as a youthful offender, inflicts physical injury upon or throws or causes feces, or urine, or other bodily fluid to be thrown upon an employee of the facility.

Webb was charged with third-degree assault because while confined in the Fayette County Detention Center, he spat upon Officer Compston.

The statute, on its face, does not designate the appropriate *mens rea* for such an offense. Case law, however, has explained that KRS 508.025(1)(b) must be read in conjunction with KRS 501.040. *Covington v. Commonwealth*, 849 S.W.2d 560 (Ky. App. 1992). The statute provides:

Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of such offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such culpable mental state.

KRS 501.040.

In *Covington*, wherein the facts involved a physical attack on a corrections officer, the only issue was the defendant's *mens rea* with respect to the conduct. Citing KRS 501.040, the Court of Appeals held that, under the facts of that case, a defendant could be found guilty of third-degree assault only if he or she

acted intentionally or wantonly when inflicting physical injury on a prison employee. *Id.* at 562.

Webb argues that because he spat upon Officer Compston rather than inflicted physical injury the analysis in *Covington* is not applicable. He maintains that the inclusion of “wanton” was erroneous because it precluded Webb from presenting a defense to the jury that his spit accidentally hit Officer Compston because he was yelling.

Notably, KRS 508.025(1)(b) says that an inmate may be charged with third-degree assault if he or she “inflicts physical injury upon or throws or causes feces, or urine, or other bodily fluid to be thrown upon an employee of the facility.” This language is included because such actions are serious and may cause physical injury—such as the spread of a bodily-fluid-borne disease. *Mullikan v. Commonwealth*, 341 S.W.3d 99, 106 (Ky. 2011). Moreover, for purposes of public policy and common sense, officers who work in corrections facilities should be free from the dangers of having bodily fluids thrown at them.

We are not persuaded by Defense counsel’s intimation that the *Covington* analysis does not adequately address the mental state necessary for a third-degree assault and should be overruled. It was rendered in 1992, and has been controlling case law in the Commonwealth for approximately 22 years. Since KRS 508.025(1)(b), under which Webb was prosecuted, does not expressly designate a culpable mental state for the offense, the issue was addressed and answered in *Covington*. Furthermore, the doctrine of *stare decisis* requires this

Court to follow precedent set by prior cases. *Saleba v. Schrand*, 300 S.W.3d 177, 183 (Ky. 2009). We depart from established case law only when sound reasons to the contrary exist. *Id.* No such reasons have been provided and, therefore, the trial court did not err when it instructed on the necessary *mens rea* for third-degree assault.

With regard to Webb's second contention that the trial court should have provided a jury instruction on harassment with physical contact as a lesser offense, we also concur with the trial court judge and deem that it was not necessary to include this jury instruction. Simply put, harassment is not a lesser included offense of third-degree assault under KRS 508.025(1)(b).

Harassment has distinct elements that are very different from the elements of third-degree assault. It is set forth in KRS 525.070, and the pertinent part for our discussion is that "[a] person is guilty of harassment when, with intent to intimidate, harass, annoy, or alarm another person, he or she: (a) Strikes, shoves, kicks, or otherwise subjects him to physical contact[.]" The differences between this offense and third-degree assault are that it has a distinct *mens rea* and does not have the specific action or victim as required in third-degree assault. Third-degree assault, as charged here, clearly entails the infliction of bodily fluid upon an employee of a detention facility.

In addition, the Kentucky Supreme Court has emphasized that "[t]he fact that the evidence would support a guilty verdict on a lesser uncharged offense does not establish that it is a lesser included offense of the charged offense."

*Houston v. Commonwealth*, 975 S.W.2d 925, 929 (Ky. 1998). Rather, a lesser included offense is one which “is established by proof of the same or less than all the facts required to establish the commission of the offense charged.” KRS 505.020(2)(a). “[I]f the lesser offense requires proof of a fact not required to prove the greater offense, then the lesser offense is not included in the greater offense, but is simply a separate, uncharged offense.” *Colwell v. Commonwealth*, 37 S.W.3d 721, 726 (Ky. 2000). Therefore, because the elements of third-degree assault and harassment have different *mens rea* and actions, one is not the lesser included offense of the other. The trial court did not err by its refusal to instruct the jury on harassment.

#### CONCLUSION

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

ALL CONCUR.

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