

RENDERED: SEPTEMBER 29, 2017; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2015-CA-001311-DG

JANESHA GARTH

APPELLANT

DISCRETIONARY REVIEW FROM JEFFERSON CIRCUIT COURT
v. HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 15-XX-000030

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: ACREE, JOHNSON, TAYLOR, JUDGES.

JOHNSON, JUDGE: Janesha Garth (“Garth”), brings this appeal of an order of the Jefferson Circuit Court affirming the final Judgment of Conviction and Sentence of the Jefferson District Court adjudging Garth guilty of Harassment with

Physical Contact.¹ After reviewing the record in conjunction with the applicable legal authorities, we AFFIRM the Jefferson Circuit Court.

BACKGROUND

Garth's appeal originates from an initial charge of Assault in the Fourth Degree² resulting from an incident on July 28, 2014. The jury was presented with evidence that Garth threw a drink in Takisha Stoner's ("Victim") face, grabbed Victim by her hair and threw her up against a gate, struck Victim with her fists, and kicked Victim in her stomach. Victim was approximately five months pregnant at the time of this alleged attack.

Prior to the jury trial in this matter, Garth filed a motion *in limine* requesting there not be any mention that the Department of Public Advocacy ("DPA") was providing her legal representation. The motion was unopposed by the Commonwealth and the trial court entered an order granting Garth's motion.

The jury trial was held in the Jefferson District Court on May 7 and 8, 2015. During the trial, Garth called an investigator employed by the DPA to testify on her behalf. Upon cross-examination by the Commonwealth, the first question posed to her was, "Just to clarify, you do work for the Public Defender's Office, is that correct?" Defense counsel objected, but the trial court found that Garth "opened the door by bringing in an employee" and overruled the objection. Following the presentation of evidence, the court provided the jury with an

¹ Kentucky Revised Statutes (KRS) 525.070, a Class B misdemeanor.

² KRS 508.030, a Class A misdemeanor.

instruction on Assault in the Fourth Degree and an instruction on Harassment with Physical Contact as a lesser-included offense. The jury found Garth not guilty of Assault in the Fourth Degree but guilty of Harassment with Physical Contact and set her punishment at ninety days' incarceration and a \$250.00 fine.

The Jefferson District Court entered its Judgment of Conviction and Sentence, which held Garth guilty of Harassment with Physical Contact in line with the jury's verdict and ordered that she pay a fine of \$250.00 and serve thirty days in jail with the remaining sixty days to be conditionally discharged after two years. Garth then appealed the conviction and sentence to the Jefferson Circuit Court.

The Jefferson Circuit Court affirmed the Jefferson District Court's Judgment in its Opinion and Order on July 28, 2015. The circuit court rejected Garth's appeal for a new trial based on her allegations that the lesser-included offense instruction of Harassment with Physical Contact was improperly given and that the Commonwealth violated the trial court's order prohibiting any mention of her representation by the DPA. Garth argues that each alleged error constitutes reversible error. We granted Discretionary Review on January 24, 2016.

STANDARD OF REVIEW

Garth first objects to a lesser-included offense jury instruction in this matter. "Appellate review of jury instructions is a matter of law and, thus, *de novo*." *Reece v. Dixie Warehouse & Cartage Co.*, 188 S.W.3d 440, 449 (Ky. App.

2006). Since Garth objected to the lesser-included offense instruction to the trial court before the instructions were tendered to the jury, the issue was properly preserved for appellate review per Kentucky Rules of Criminal Procedure (RCr) 9.54(2).

Garth's second issue on appeal is the trial court's decision to allow the Commonwealth to admit testimony that Garth was represented by the DPA. Our standard when reviewing a question of admissibility of evidence is whether the trial court abused its discretion. *Johnson v. Commonwealth*, 105 S.W.3d 430, 438 (Ky. 2003). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). "[P]reserved evidentiary and other non-constitutional errors will be deemed harmless [error] . . . if we can say with fair assurance that the judgment was not substantially swayed by the error." *Ordway v. Commonwealth*, 391 S.W.3d 762, 774 (Ky. 2013).

ANALYSIS

The Kentucky Supreme Court has consistently found that "a trial court is required to instruct the jury on every theory of the case that is reasonably deducible from the evidence" and that "[t]his applies to lesser-included offenses[.]" *Fredline v. Commonwealth*, 241 S.W.3d 793, 797 (Ky. 2007) (internal citations omitted). Further, the court has stated, "In a criminal case, it is the duty of the

court to prepare and give instructions on the whole law. This general rule requires instructions applicable to **every** state of [the] case covered by the indictment and **deducible from or supported to any extent by the testimony.**” *Manning v. Commonwealth*, 23 S.W.3d 610, 614 (Ky. 2000) (emphasis added).

Next, we turn to a cursory examination of the relevant portions of the initial charge in this matter, the eventually added lesser-included offense, and the lesser-included offense statute. Pursuant to KRS 508.030(1)(a), a person is guilty of Assault in the Fourth Degree when he intentionally or wantonly causes physical injury to another person. A person is guilty of Harassment with Physical Contact when with intent to intimidate, harass, annoy, or alarm another person he strikes, shoves, kicks, or otherwise subjects him to physical contact, per KRS 525.070(1)(a). The relevant portion of the lesser-included offense statute, KRS 505.020(2)(a), states “[A properly tendered lesser-included offense instruction can be] established by proof of the same or less than all the facts required to establish the commission of the offense charged[.]”

Garth attempts to make a “strict statutory elements” argument, that Harassment with Physical Contact’s provision of “intent to intimidate, harass, annoy, or alarm” necessarily removes it from consideration for a lesser-included offense of Assault in the Fourth Degree. The Kentucky Supreme Court has repeatedly rejected this argument, including in the case of *Hall v. Commonwealth*, 337 S.W.3d 595 (Ky. 2011), stating:

We are aware of arguments that a *Blockburger*-type strict statutory elements approach should govern questions of which offenses a trial court may properly instruct the jury on as lesser-included offenses of charged offenses. But we decline to adopt such a strict statutory elements approach

We acknowledge a strict statutory elements approach to deciding lesser-included instruction issues might seem more consistent with our use of that same approach to determining lesser-included offenses for purposes of double jeopardy. We also recognize a strict statutory elements approach might appear to offer more certainty and judicial economy.

But a strict statutory elements approach has its own disadvantages. Most importantly, that approach may deprive a defendant of an opportunity for a desired lesser-included offense instruction because of differences in statutory elements even **where the defendant is willing to concede that additional elements of uncharged offenses are not really at issue in the case**. So we decline to adopt a strict statutory elements approach to determining whether a trial court can properly instruct a jury on an uncharged offense as a lesser-included offense of a charged offense.

Id. at 607 (internal citations omitted) (emphasis added).

There is ample evidence in the record to confirm the trial court's decision to tender an instruction of Harassment with Physical Contact as a lesser-included offense instruction of Assault in the Fourth Degree. While Victim was transported to the hospital, no medical records were tendered as evidence. In comparing the two charges, Harassment with Physical Contact was appropriately tendered as a lesser-included offense of Assault in the Fourth Degree because Garth subjected Victim to physical contact but that physical contact did not cause Victim physical injury, constituting the difference between the initial charge and the lesser-included offense in this case. In other words, Harassment with Physical

Contact could be established by proof of the same **or less than** all the facts required to establish the elements of Assault in the Fourth Degree with the only difference between the two charges being the “physical injury” component of Assault in the Fourth Degree. Additionally, we find persuasive that the Kentucky Instructions to Juries manual states, “Harassment, which may be a lesser included offense of intentional Fourth-Degree Assault, when physical contact occurs but no physical injury.” 1 Cooper, *Kentucky Instructions to Juries (Criminal)* § 3.54 (rev. 6th ed. 2017).

Garth’s second issue on appeal is that the Commonwealth violated the trial court’s order not to make reference to her representation by the DPA and the trial court committed reversible error when it overruled Garth’s objection to the Commonwealth’s violation. One of Garth’s witnesses, Trisha Combs (“Combs”), was the investigator employed by the DPA. The Commonwealth objected to Combs’ testimony during the trial because it believed there was a conflict of interest. The court indicated there was no conflict of interest, but that the Commonwealth could deal with any perceived bias on cross-examination. In order to curtail the Commonwealth’s expressed concern about bias, Garth’s counsel asked Combs on direct examination whether she did investigation work for his office. Combs admitted that she did. Despite this admission, and without first approaching the court to alert Garth and the court that it was about to violate the motion *in limine*, the Commonwealth’s first question posed to Combs was, “Just to clarify, you do work for the Public Defender’s Office, is that correct?” Garth’s

counsel immediately objected to the question and the court overruled the objection on the basis that Garth “opened the door by bringing in an employee.”

We conclude that the trial court erred in overruling Garth’s objection because it was in violation of the court’s own order and it was irrelevant pursuant to Kentucky Rules of Evidence (KRE) 401. Garth’s own counsel readily made it crystal clear for the jury that the witness in question, Combs, was employed by his office. The alleged goal of demonstrating potential bias was accomplished via Garth’s questioning of the witness. There was no “opening of the door” by Garth to permit the violation of the trial court’s *in limine* order because the fact that Combs worked for the DPA added nothing to the case.

Despite the error, however, we have previously found, “[t]he test for harmless error is whether there is any reasonable possibility that, absent the error, the verdict would have been different.” *Romero-Perez v. Commonwealth*, 492 S.W.3d 902, 907 (Ky. App. 2016) (internal citations omitted). Regardless of the violation of the *in limine* order by the Commonwealth, this error, revealing that Garth was represented by the DPA, was ultimately harmless. The Kentucky Supreme Court has ruled that “there [is] no identifiable prejudice to Appellant resulting from his attorney being ‘unmasked’ as a public defender. **There is nothing inherently prejudicial about having an attorney who is a public defender.**” *Barnett v. Commonwealth*, 317 S.W.3d 49, 62 (Ky. 2010) (emphasis added). The *Barnett* case indicates that there was no real reason for the *in limine* order in the first place. Further, there is nothing in the record to indicate that the

jury being made aware of Garth's representation by the DPA swayed them at all in reaching their verdict or that their verdict would have been different had they **not** been aware that Garth was represented by the DPA. Therefore, the error was harmless and there was no abuse of discretion.

CONCLUSION

Based upon the foregoing, the Jefferson Circuit Court's Order is
AFFIRMED.

ALL CONCUR.

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