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NOT TO BE PUBLISHED

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

NO. 2017-CA-000991-MR

DERRICK AKINS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE SUSAN SCHULTZ GIBSON, JUDGE  
ACTION NO. 14-CR-002926

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: KRAMER, D. LAMBERT, AND MAZE, JUDGES.

LAMBERT, D., JUDGE: Derrick Akins (Akins) appeals the Jefferson Circuit Court's judgment of conviction and sentence imposed following his conditional guilty plea to two counts of first-degree assault and one count of second-degree assault. Akins argues his statements to the police should have been suppressed as the product of a coercive interrogation. He also contends the indictment should have been dismissed because the Commonwealth knowingly presented misleading

testimony to the grand jury. Following a careful review, we affirm.

### **FACTS.**

Akins's convictions stemmed from three different altercations with his girlfriend, A.F.<sup>1</sup> In the first altercation, Akins strangled A.F. so hard her vision turned white and she defecated on herself. Three days later, another argument with A.F. turned violent, culminating with Akins knocking A.F. to the ground and cutting her on the side of the neck with a box cutter. Akins then fled the mobile home he shared with A.F., who sought medical treatment. The medical records produced by the Commonwealth described A.F.'s neck injury as a "superficial laceration" measuring four to five centimeters. After living outside for about three days, Akins confronted A.F. outside a gas station and stabbed her multiple times with a kitchen knife. He was arrested near the scene and taken into custody for questioning.

Akins was accompanied to the police station by Detective Omar Lee of the Louisville Metro Police Department (LMPD). On arrival, Akins informed Detective Lee that he had slept outside for the last two or three days and had nothing to eat or drink during this time. Detective Lee then gave Akins cheese, crackers, and water and left the interview room while Akins ate. Detective Lee

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<sup>1</sup> A.F. is a pseudonym used by the Commonwealth to protect the victim's identity. We continue to use that pseudonym in this opinion.

returned approximately twenty-five minutes later and read Akins his *Miranda* rights. Akins signed a form waiving his rights for that interview and proceeded to make several incriminating statements. He was subsequently indicted by a Jefferson County grand jury on two counts of first-degree assault for the strangulation and stabbing incidents and one count of second-degree assault for the neck laceration incident.

Akins then filed a motion to suppress his statements to Detective Lee. Although acknowledging the waiver of his *Miranda* rights, Akins contended his statements were involuntary because his will to remain silent was overborne solely because of his tired and famished condition. The trial court held a hearing on the matter, in which Detective Lee was the only witness. Detective Lee testified Akins was coherent and cooperative during questioning and did not exhibit any signs of being tired or intoxicated. The trial court determined there was no evidence of coercive police activity and denied the motion to suppress.

Several months later, Akins moved to dismiss the indictment. In support of this motion, Akins quoted LMPD Detective Amanda Tolle's testimony to the grand jury in support of the second-degree assault charge. During this testimony, Detective Tolle described the neck laceration incident by stating Akins "got on top of her [A.F.] and sliced her throat with a box cutter." Akins argued this testimony was knowingly misleading when the Commonwealth was in

possession of medical records describing A.F.'s neck injury as a "superficial laceration" on the side of the neck. The trial court denied the motion, finding Detective Tolle's testimony that Akins "sliced her [A.F.'s] throat" was immaterial. The trial court reasoned the grand jury would have had sufficient basis to indict for second-degree assault even with Adkins's preferred characterization of A.F.'s injury as a "cut" on the neck.

Akins then entered a conditional guilty plea reserving his right to appeal the adverse rulings on his motions to suppress and to dismiss the indictment. Akins was sentenced to serve a total of ten years' imprisonment on the three assault charges consistent with the terms of his plea deal. This appeal follows.

### **ANALYSIS.**

Akins argues on appeal that his interrogation was coercive because it occurred while he was in a "state of extreme hunger and thirst"; therefore, the trial court erred by finding his statements to Detective Lee were voluntary. Regarding his motion to dismiss, Akins contends the Commonwealth inappropriately influenced the grand jury's decision to indict by mischaracterizing A.F.'s injury as a "sliced throat."

A trial court's rulings on the admission of evidence and whether to dismiss an indictment are both reviewed for abuse of discretion. *Commonwealth v.*

*Parker*, 409 S.W.3d 350, 352 (Ky. 2013); *Commonwealth v. Grider*, 390 S.W.3d 803, 817 (Ky. App. 2012). “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). The trial court’s findings of fact will not be disturbed unless clearly erroneous, and its conclusions of law are reviewed *de novo*. *Jackson v. Commonwealth*, 187 S.W.3d 300, 305 (Ky. 2006).

The Due Process Clause of the Fourteenth Amendment to the United States Constitution prohibits the admission of involuntary confessions. *Bailey v. Commonwealth*, 194 S.W.3d 296, 300 (Ky. 2006). The “ultimate test” for the voluntariness of a confession is whether the confession is “the product of an essentially free and unconstrained choice by its maker[.]” *Id.* (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 225, 93 S.Ct. 2041, 2047, 36 L.Ed.2d 854 (1973)). Both the characteristics of the accused and the details of the interrogation are considered when determining voluntariness. *Id.* However, coercive police activity is necessary before a statement will be found involuntary within the meaning of the Fourteenth Amendment. *Id.* (citing *Colorado v. Connelly*, 479 U.S. 157, 167, 107 S.Ct. 515, 522, 93 L.Ed.2d 473 (1986)). “The three criteria used to assess voluntariness are 1) whether the police activity was objectively coercive; 2) whether the coercion overbore the will of the defendant; and 3) whether the

defendant showed that the coercive police activity was the crucial motivating factor behind the defendant's confession." *Henson v. Commonwealth*, 20 S.W.3d 466, 469 (Ky. 1999) (internal quotations omitted).

Like the trial court, we discern no grounds to find objectively coercive police activity that overcame Akins's will to remain silent. Detective Lee provided food, water, and time to eat after learning Akins had not eaten in two or three days. Detective Lee's testimony that Akins was coherent throughout the interrogation and did not appear to be tired or intoxicated was uncontroverted. Without evidence that Akins's statements were involuntary within the meaning of the Fourteenth Amendment, the trial court appropriately denied the motion to suppress.

We also hold the trial court did not abuse its discretion by denying Akins's motion to dismiss the indictment. There is a strong presumption of regularity that attaches to grand jury proceedings. *Commonwealth v. Baker*, 11 S.W.3d 585, 588 (Ky. App. 2000). However, a trial court may use its inherent supervisory authority to dismiss an indictment for "nonconstitutional irregularities," such as when a prosecutor "knowingly or intentionally presents false, misleading or perjured testimony to the grand jury that results in actual prejudice to the defendant." *Id.* Both flagrant abuse of the grand jury process and actual prejudice are required before a court may dismiss an indictment. *Id.* This

requires the defendant demonstrate that the government knowingly presented perjured or misleading testimony that “resulted in both actual prejudice and deprived the grand jury of autonomous and unbiased judgment.” *Id.*

Even if we were inclined to find Detective Tolle’s testimony misleading, we agree with the trial court that it caused Akins no prejudice. The neck laceration incident led to an indictment for second-degree assault, which requires the Commonwealth prove a defendant caused “physical injury” with a “dangerous instrument.” Kentucky Revised Statutes (KRS) 508.020(1)(b). Akins has not attempted to argue a box cutter is not a dangerous instrument. Physical injury means “substantial physical pain or any impairment of physical condition[.]” KRS 500.080(13). Akins’s preferred characterization of A.F.’s injury is within the statutory definition of second-degree assault, and there is no reason to believe the grand jury proceedings would have been different if Detective’ Tolle’s testimony regarding a “sliced throat” was omitted.

Based on the foregoing, the Jefferson Circuit Court’s judgment of conviction and sentence is affirmed.

ALL CONCUR.

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