

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001037-MR

KENYATTA MOORE

APPELLANT

v.

APPEAL FROM LYON CIRCUIT COURT
HONORABLE C.A. WOODALL III, JUDGE
ACTION NO. 15-CR-00053

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: COMBS, DIXON AND MAZE, JUDGES.

DIXON, JUDGE: Appellant, Kenyatta Moore, appeals from a judgment of the Lyon Circuit Court, following a jury trial, convicting him of four counts of third-degree assault and sentencing him to a total of sixteen and one-half years' imprisonment. Finding no error, we affirm.

Appellant is an inmate at the Kentucky State Penitentiary. On March 22, 2015, Correctional Officer Corey Kindred went to Appellant's cell to pick up

his lunch tray. Appellant said that he needed to speak with Kindred and, as Kindred bent down to peer through the tray slot to see what Appellant needed, Appellant reached through the slot and grabbed Kindred's shirt, attempting to pull him closer to the cell. Kindred was able to break free when his shirt pocket ripped. Kindred then radioed his lieutenant that he had been assaulted by Appellant. As a result, the penitentiary's "Use of Force Team" (team) was assembled to move Appellant to another cell. Apparently, Appellant was uncooperative and initially used his mattress to block the cell door. Four officers were eventually able to enter the cell. Appellant knocked the shield and helmet from the first officer and punched him in the face. A struggle then ensued between Appellant and the other officers, during which two other officers received leg injuries. Although there was no interior camera in Appellant's cell, one member of the team had a handheld video camera and was able to document Appellant's removal from the cell.

On January 5, 2017, Appellant was indicted in the Lyon Circuit Court on six counts of third-degree assault. Appellant pled not guilty and the matter proceeded to trial on May 18, 2017. One count was dismissed on the morning of trial and Appellant was found not guilty on a second count. The jury found Appellant guilty on the four other counts and recommended a total sentence of sixteen and one-half years' imprisonment. The trial court sentenced Appellant

accordingly and he now appeals to this Court as a matter of right. Additional facts are set forth as necessary.

In this Court, Appellant first argues that he was entitled to a directed verdict on each count of third-degree assault. Appellant contends that there was no evidence of an actual assault because none of the officers testified that they suffered “substantial physical pain or any impairment of physical condition” as is required by KRS¹ 508.025.

Before turning to the merits of Appellant’s argument, however, we must necessarily address the Commonwealth’s assertion that this issue was not properly preserved for appellate review. The Commonwealth argues that Appellant’s motion for a directed verdict failed to meet the specificity requirement. *Pate v. Commonwealth*, 134 S.W.3d 593, 597-98 (Ky. 2004); CR² 50.01.

Appellant responds that the issue is sufficiently preserved but alternatively requests that we review this issue under the palpable error standard set forth in RCr³ 10.26.

For sufficient preservation on appeal, a motion “must state specific grounds for relief and should identify which elements of the alleged offense the Commonwealth has failed to prove.” *Commonwealth v. Jones*, 283 S.W.3d 665,

¹ Kentucky Revised Statute.

² Kentucky Rule of Civil Procedure.

³ Kentucky Rule of Criminal Procedure.

669 (Ky. 2009). Non-specific motions, such as moving summarily for a directed verdict or making a general assertion of insufficient evidence, do not satisfy the specificity requirement. *Pate*, 134 S.W.3d at 597; *Potts v. Commonwealth*, 172 S.W.3d 345, 348 (Ky. 2005).

At the close of the Commonwealth's case, defense counsel made a motion for a directed verdict based on the evidence presented to the jury. Counsel's motion excluded any reference to a specific count or challenge to a specific element of the alleged crime. The renewal of the motion at the close of evidence was equally as vague. Therefore, the motion lacked the particularity necessary to allow the trial court "the opportunity to pass on the issue in light of all the evidence." *Baker v. Commonwealth*, 973 S.W.2d 54, 55 (Ky. 1998).

Although the issue was insufficiently raised and improperly preserved for our review, Appellant nevertheless requests that this Court undertake a palpable error analysis. Under RCr 10.26, an unpreserved error is palpable if it "affected the defendant's substantial rights and resulted in manifest injustice." *Barker v. Commonwealth*, 341 S.W.3d 112, 114 (Ky. 2011) (quoting *Commonwealth v. Pace*, 82 S.W.3d 894, 895 (Ky. 2002)). A Court will only grant relief if the error so seriously affected the fairness and integrity of the proceeding as to be "shocking or jurisprudentially intolerable." *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006).

As for the merits of Appellant’s claim, when evaluating a motion for a directed verdict on appeal, “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[.]” *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991) (citing *Commonwealth v. Sawhill*, 660 S.W.2d 3 (Ky. 1983)). In that review, the Court draws all fair and reasonable inferences in favor of the Commonwealth and assumes that the Commonwealth’s evidence is true. *Id.* Even if we disregard the lack of proper preservation and review the issue under the palpable error standard, it is evident that the trial court herein did not err in denying Appellant’s motion for a directed verdict.

KRS 508.025 provides, in relevant part:

(1) A person is guilty of assault in the third degree when the actor:

(a) Recklessly, with a deadly weapon or dangerous instrument, or intentionally causes or attempts to cause physical injury to:

...

2. An employee of 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[.]

KRS 500.080(13) defines “physical injury” as “substantial physical pain or any impairment of physical condition[.]” Further, this Court has interpreted “impairment of physical condition” to mean any injury. *Covington v. Commonwealth*, 849 S.W.2d 560, 564 (Ky. App. 1992) (citing *Meredith v. Commonwealth*, 628 S.W.2d 887, 888 (Ky. App. 1982))

During the trial herein, three team members testified as to the injuries they received while trying to restrain and remove Appellant from his cell. Officer Beeler, the first to enter Appellant’s cell, testified that Appellant punched him in the face with a closed fist, busting his lip open. Officer Brandenburg testified that he suffered bruises on his knees as a result of Appellant kicking him. Officer Revelett stated that he suffered knee abrasions when they struck the floor during his attempt to place shackles on Appellant’s legs. Photographs of the officers’ injuries were introduced at trial. With respect to Officer Kindred, there was no testimony that he suffered any physical injury. However, we believe there was more than sufficient evidence that Appellant “attempt[ed] to cause physical injury” to Officer Kindred when he grabbed him with enough force to rip the officer’s shirt as he pulled him toward the cell. Accordingly, we believe there was sufficient evidence to support each count of third-degree assault and, thus, a directed verdict

was not warranted. Since Appellant's motion was properly denied, there can be no palpable error.

Appellant next takes issue with the trial court's denial of his motion to strike for cause a juror who ultimately served on the jury. Specifically, Lee Wilson is the Lyon County Attorney and was called during the jury selection herein. During voir dire questioning, Lee acknowledged that he knew both the prosecution and defense counsel but believed he could be fair to both sides and render a decision based upon the evidence presented. The trial court allotted each side nine peremptory strikes. Prior to exercising his strikes, Appellant moved to strike two jurors for cause, neither being Wilson. Further, Appellant did not use a peremptory strike to remove Wilson from the panel nor did he indicate on the strike sheet any other juror he wished to exercise a peremptory strike on beyond the nine strikes permitted. However, after both sides submitted their strike sheets, Appellant moved to remove Wilson for cause, arguing that his position as county attorney created a conflict of interest and that prejudice should be presumed. The trial court denied the motion. Appellant now complains that the trial court's refusal to remove Wilson denied him the right to a fair and impartial jury. We disagree.

“In Kentucky, the right to an impartial jury is protected by § 11 of the Kentucky Constitution, as well as the Sixth and Fourteenth Amendments to the

U.S. Constitution.” *Fugett v. Commonwealth*, 250 S.W.3d 604, 612 (Ky. 2008); *see also Fugate v. Commonwealth*, 993 S.W.2d 931, 939 (Ky. 1999). RCr 9.36(1) provides that the trial court shall excuse a juror for cause when “there is reasonable ground to believe that a prospective juror cannot render a fair and impartial verdict on the evidence” The established test for determining whether a juror should be stricken for cause is “whether, after having heard all of the evidence, the prospective juror can conform his views to the requirements of the law and render a fair and impartial verdict.” *Mabe v. Commonwealth*, 884 S.W.2d 668, 671 (Ky. 1994). The trial court must make that determination “based on the entirety of [the juror’s] responses[,]” and assess “both the content of all of the juror’s responses, as well his demeanor and candor.” *Little v. Commonwealth*, 422 S.W.3d 238, 242 (Ky. 2013) (internal citations omitted). Kentucky courts have “long recognized that ‘a determination as to whether to exclude a juror for cause lies within the sound discretion of the trial court, and unless the action of the trial court is an abuse of discretion or is clearly erroneous, an appellate court will not reverse the trial court’s determination.’” *Fugett*, 250 S.W.3d at 613 (quoting *Pendleton v. Commonwealth*, 83 S.W.3d 522, 527 (Ky. 2002).

If an alleged error is properly preserved, we will presume prejudice when a trial court’s erroneous failure to strike a juror for cause requires a defendant to expend a peremptory challenge that he otherwise would have used to

remove another member. However, “[t]o properly preserve error based on a trial court’s failure to strike a juror for cause, a defendant must at the very least challenge the juror for cause.” *Sluss v. Commonwealth*, 450 S.W.3d 279, 284 (Ky. 2014). “[T]he defendant must also move to excuse that juror and exhaust all of his peremptory challenges.” *Id.* In *Gabbard v. Commonwealth*, 297 S.W.3d 844 (Ky. 2009), the Kentucky Supreme Court enunciated an additional requirement that “to complain on appeal that he was denied a peremptory challenge by a trial judge’s erroneous failure to grant a for-cause strike, the defendant must identify on his strike sheet any additional jurors he would have struck.” *Id.* at 854. Our Supreme Court has held compliance with *Gabbard* to be strictly required. *Hurt v. Commonwealth*, 409 S.W.3d 327, 330 (Ky. 2013).

Following *Gabbard* and its progeny, it is clear that even if an abuse of discretion is found in failing to strike a juror for cause, the trial court will not be reversed unless “the party had to use a peremptory challenge to strike the juror and, in fact, used all his peremptory challenges” *Fugett*, 250 S.W.3d at 613 (citing *Stopher v. Commonwealth*, 57 S.W.3d 787, 796 (Ky. 2001)). Our Supreme Court has held that this requirement of exhausting one’s peremptory challenges “is predicated on the idea that peremptory strikes are a substantial right given to the defendant” because, “if the defendant had to use all of his peremptory strikes to remove a juror that should have been stricken for cause, a juror that he otherwise

would have stricken would have been impaneled on the jury.” *King v. Commonwealth*, 276 S.W.3d 270, 279 (Ky. 2009) (citing *Shane v. Commonwealth*, 243 S.W.3d 336, 341(Ky. 2007)). For this reason, “the jury could never be completely fair to the defendant since he was not able to effectively exercise his right to choose jurors.” *Id.*

The Commonwealth herein argues that Appellant’s argument is inadequately preserved because he did not use a peremptory strike to remove Wilson nor did he even challenge him for cause until after the strike sheets were tendered. We agree, although this certainly is not the manner in which a failure to strike a juror for cause issue usually arises. Typically, a defendant will move to strike a juror for cause, lose that motion, and then use a peremptory strike to remove said juror. As previously noted, under that scenario a defendant must use all of his peremptory strikes and identify which juror he would have removed through a peremptory strike but for the court’s failure to grant his motion to remove for cause. If the defendant fails to identify which juror he would have otherwise removed, he fails to preserve the issue, and we will not reverse the trial court even if the court abused its discretion. *See Ordway v. Commonwealth*, 391 S.W.3d 762, 781 (Ky. 2013).

The facts herein are different from the typical scenario in that Appellant did not use a peremptory strike to remove Wilson nor did he challenge

him for cause until after the strike sheets were tendered. Nevertheless, we believe the same logic applies. If Wilson was as tainted as Appellant now claims, he should have moved to strike him for cause and then used a peremptory challenge to remove him. He then could have identified another potential juror he would have removed through a peremptory challenge, thereby preserving this issue.

Appellant argues that because his motion to remove Wilson for cause was made after the peremptory strikes sheets had been submitted, compliance with *Gabbard* was not required. Rather, citing to *Nunley v. Commonwealth*, 393 S.W.3d 9 (Ky. 2013), he asserts that “[t]he situation in the case at bar should be treated as one of those times when it becomes necessary to excuse a juror during the course of a trial because the parties had already submitted their strike sheets when defendant counsel made the motion.” We disagree. Unlike *Nunley*, where it was necessary to remove a juror during the trial, the jury herein had not even been sworn in at the time Appellant finally moved to remove Wilson for cause. We are of the opinion that Appellant was required to comply with *Gabbard*, which he failed to do.

Finding this issue to be preserved merely because Appellant now claims that he was prejudiced by Wilson’s inclusion on the jury panel would effectively eviscerate the holding in *Gabbard*. Our approach would be different if Appellant had used all of his peremptory strikes to remove jurors to whom he

objected for cause and was forced to accept Wilson because he had exhausted his peremptory strikes. But because Appellant did not follow the procedure set forth in *Gabbard*, he did not properly preserve this issue for review. Furthermore, “[a]bsent 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). Appellant has not asked this court for palpable error review, and under the facts of this case we will not do so sua sponte. *Hurt*, 409 S.W.3d at 330.

Finally, Appellant argues that the trial court erred in refusing to allow the jury to hear the audio portion of the video depicting the team’s removal of Appellant from his cell. Appellant contends that a major portion of his defense was that he did not have time to assault any of the members of the use of force team as they rushed in to his cell and that his movements were just part of the general commotion. As such, Appellant claims that the audio was relevant to demonstrate what Appellant was saying to the officers during the incident.

An appellate court reviews a trial court’s evidentiary ruling for abuse of discretion. *Anderson v. Commonwealth*, 231 S.W.3d 117, 119 (Ky. 2007). “Abuse of discretion occurs when the trial court’s decision in allowing or disallowing the introduction of evidence was arbitrary, unreasonable, unfair or

unsupported by sound legal principles.” *Boyd v. Commonwealth*, 439 S.W.3d 126, 129 (Ky. 2014) (citing *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)).

During the trial, defense counsel announced his intent to play the video of the team entering Appellant’s cell to restrain and remove him. The Commonwealth objected to the video, noting that, because of the position of the officers, the actual assaults are not visible in the video. Nevertheless, the trial court granted permission to play the video but ruled that the accompanying audio was not relevant. Defense counsel did not actually raise any objection to only the video being played until Appellant himself spoke up and told the trial court that the audio was important because it supported his defense that he was not resisting the officers. It was only then that defense counsel formally objected to the exclusion of the audio.

We have reviewed the video and are inclined to agree with the Commonwealth that it was not relevant and should not have been played for the jury. The Commonwealth is correct that Appellant is not visible in the video and thus, there is no actual footage of him assaulting the officers. However, we also are of the opinion that any juror watching the video could have reasonably concluded that, based on the commotion and movement in the cell, Appellant was obviously fighting the team’s attempts to restrain him. It was not until it appeared

that the team had Appellant down on the floor that he can be heard repeatedly saying “I am not resisting.” The video simply belies Appellant’s claim he was not resisting. Further, we agree with the Commonwealth the sound of the team deploying the taser in an attempt to subdue Appellant would have been prejudicial and would only serve to inflame the jury. As such, while we disagree with the trial court that the video was relevant in any respect, admission of the video without the audio was not an abuse of discretion. No error occurred.

For the reasons set forth herein, the judgment and sentence of the Lyon Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Kathleen K. Schmidt
Department of Public Advocacy

Brandon Neil Jewell
Assistant Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear
Attorney General of Kentucky

Joseph A. Beckett
Assistant Attorney General
Frankfort, Kentucky