

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-001837-MR

WANDA SEVIER

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE KATHLEEN S. LAPE, JUDGE
ACTION NO. 16-CR-01087

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: GOODWINE, JONES, AND NICKELL, JUDGES.

JONES, JUDGE: The Appellant, Wanda Sevier, was found guilty of second-degree assault by a Kenton County jury. Following the jury's guilty verdict, the Kenton Circuit Court sentenced Sevier to ten years of imprisonment. On appeal, Sevier asserts: (1) the trial court erred when it denied her motion for directed

verdict; and (2) the Commonwealth misstated the law during closing argument.

For the reasons set forth below, we affirm.

I. BACKGROUND

Sevier and the victim, Deborah Wilson, were next-door neighbors.

During Sevier's trial, witnesses testified that there was a long-standing feud between Sevier and Ms. Wilson. Ms. Wilson testified that on September 27, 2016, she went outside her house to bring her trash cans back from the curb. When she turned to go back inside, Ms. Wilson heard Sevier scream at her and throw something, which hit her in the back of her head. Ms. Wilson partially lost consciousness, fell, hit her face below her eye on the step and started bleeding. When the police arrived at Ms. Wilson's residence, they found her lying on the porch amidst glass with a cut on the back of her head. She was described as being "disoriented" and injured. Ms. Wilson later identified pictures of broken glass and a close-up of a glass candle holder as the object thrown at her.

When interviewed by police, Sevier admitted the candle holder belonged to her. Sevier never directly admitted guilt in response to the investigator's questions; however, after the investigator left the interview room and while the audio recorder was still running, Sevier uttered, "Oh God I shouldn't have done that."

To establish that Sevier was guilty of second-degree assault, the Commonwealth was required to prove that Sevier intended to physically injure Ms. Wilson by using a dangerous instrument. At the close of the Commonwealth's case, Sevier moved for a directed verdict, arguing the Commonwealth presented no evidence that the candle holder was a dangerous instrument as it was used in this case. The trial court denied Sevier's motion, and counsel delivered their closing arguments the next morning. During closing arguments, Sevier's counsel again argued the Commonwealth could not prove Sevier used the candle holder as a dangerous instrument. In response, the Commonwealth argued that the candle holder could be a dangerous instrument as used in this instance, stating a "candle holder can become a dangerous instrument when its thrown at the back of someone's head from fifteen feet away." The Commonwealth also stated:

But let's look at this candle holder and the circumstances that this candle holder was used. Let's start with the fact that the candle holder is made of glass. Is glass readily capable of causing a serious physical injury? Serious physical injury is defined as prolonged disfigurement or permanent impairment or disfigurement, under the law a scar is permanent disfigurement.

Sevier objected to the latter part of the Commonwealth's statement, arguing that a scar is not *always* permanent disfigurement. The Commonwealth argued that a scar *can be* permanent disfigurement. The trial court overruled Sevier's objection, and the Commonwealth continued, this time telling the jury a

scar *can* be permanent disfigurement. The Commonwealth further argued that a candle holder, when thrown at a victim's head, could cause serious physical injury if it struck her in the face or put an eye out.

The jury was instructed on second-degree assault and fourth-degree assault. Both instructions require intent and physical injury, which were defined in the instructions presented to the jury. Second-degree assault additionally requires the instrument used to commit the assault was a dangerous instrument. The jury found Sevier guilty of second-degree assault.

II. ANALYSIS

On direct appeal, Sevier makes two arguments: (1) the trial court erred in denying her motion for directed verdict; and (2) the Commonwealth committed reversible error by misstating the law on what constitutes a dangerous instrument and permanent disfigurement during closing argument.

A. Directed Verdict on Second-Degree Assault

At the close of the Commonwealth's case, Sevier moved for a directed verdict on the second-degree assault charge. She argued that the Commonwealth had failed to prove that she intended to physically injure Ms. Wilson by means of a dangerous instrument. "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. Benham*, 816 S.W.2d 186, 187 (Ky. 1991) (citing *Commonwealth v. Sawhill*, 660 S.W.2d 3 (Ky. 1983)). The Commonwealth must submit “more than a mere scintilla of evidence.” *Id.* at 188. The trial court “must consider the evidence as a whole, presume the Commonwealth’s proof is true, draw all reasonable inferences in favor of the Commonwealth, and leave questions of weight and credibility to the jury.” *Acosta v. Commonwealth*, 391 S.W.3d 809, 816 (Ky. 2013) (citing *Benham*, 816 S.W.2d at 187-188).

Sevier argues the Commonwealth did not meet its burden to prove the elements of second-degree assault. KRS¹ 508.010(1) provides in pertinent part: “A person is guilty of assault in the second degree when . . . [h]e intentionally causes physical injury to another person by means of a . . . dangerous instrument[.]” “Dangerous instrument” is defined as “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[.]” KRS 500.080(3). “‘Physical injury’ means substantial physical pain or any impairment of physical condition[.]” KRS 500.080(13). “‘Serious physical injury’ means physical injury which creates a substantial risk of death, or which causes serious and prolonged disfigurement, prolonged impairment of health, or prolonged loss or impairment of the function of any bodily organ.” KRS

¹ Kentucky Revised Statutes.

500.080(15). The trial court instructed the jury in accordance with these provisions.

Sevier contends that the Commonwealth presented no evidence that the candle holder she threw at Ms. Wilson constitutes a dangerous instrument.

Generally, the jury determines whether an object constitutes a dangerous instrument,

unless it is undisputed from the evidence that the instrument employed on the occasion in question is one [capable of causing death or physical injury] and that *it was in fact* used or attempted or threatened to be used in such a manner[.]

Commonwealth v. McCombs, 304 S.W.3d 676, 681 (Ky. 2009) (alterations original) (quoting *Commonwealth v. Potts*, 884 S.W.2d 654, 656 (Ky. 1994)) (internal quotation marks and emphasis omitted). The Supreme Court of Kentucky has concluded that an object similar to the candle holder at issue here, when thrown at a victim, can constitute a dangerous instrument. In *Binion v. Commonwealth*, 891 S.W.2d 383, 384 (Ky. 1995), the defendant threw a glass ashtray at a store clerk during a robbery. Although the ashtray missed the victim, it “crashed into the wall and shattered.” *Id.* at 387. The Supreme Court of Kentucky held that “[a]lthough a glass ashtray should not be considered a dangerous instrument per se,” under the circumstances, the defendant’s “action placed the victim in danger of suffering a serious physical injury if it had struck her head or a

glass fragment had become embedded in an eye.” *Id.* Thus, the Court concluded the glass ashtray thrown at the victim constituted a dangerous instrument as defined by KRS 500.080(3). *Id.*

The glass candle holder at issue here is substantially similar to the glass ashtray in *Binion*. Ms. Wilson testified that she went outside to bring her trash cans back when she saw Sevier standing in her yard. Ms. Wilson stated that when she turned to go back into her house, she heard Sevier scream at her and throw something at her, which hit her in the back of the head. During trial, Ms. Wilson identified pictures of broken glass and a close-up image of a glass candle holder as the object thrown at her. Here, Ms. Wilson sustained a laceration that required three staples, and, in theory, she could have sustained a more severe injury. The object and use at issue here are similar to those circumstances under which our Supreme Court determined a glass ashtray was a dangerous instrument. Thus, we hold the trial court correctly denied Sevier’s motion for directed verdict and submitted the factual question of whether the candle holder was a dangerous instrument to the jury.

B. Misstatement of the Law during Closing Arguments

Next, Sevier argues the Commonwealth committed reversible error by misstating the law regarding what constitutes permanent disfigurement during its closing argument. “Counsel may, during closing arguments, discuss the law

applicable to the case as instructed by the court. Counsel may not, however, misstate the law or make comments on the law inconsistent with the court's instructions." *Padgett v. Commonwealth*, 312 S.W.3d 336, 351 (Ky. 2010) (citing *East v. Commonwealth*, 249 Ky. 46, 52-53, 60 S.W.2d 137, 140 (1933)). During closing argument, while discussing whether the candle holder was a dangerous instrument, the Commonwealth stated that a scar *is* permanent disfigurement and, thus, is a serious physical injury.

Sevier's counsel objected, arguing that the Commonwealth misled the jury by misstating the law because the Supreme Court of Kentucky has ruled that a scar, by itself, is not physical injury. *See McDaniels v. Commonwealth*, 415 S.W.3d 643, 659 (Ky. 2013). The Commonwealth argued a scar can be permanent disfigurement under Kentucky law. *See, e.g., Smith v. Higgins*, 819 S.W.2d 710, 712 (Ky. 1991). The trial court overruled Sevier's objection. When the Commonwealth continued closing argument, the attorney rephrased her statement and said that a scar *can be* permanent disfigurement.

In *Padgett*, the appellant objected, arguing "the prosecutor misled the jury by misstating the standard for extreme emotional disturbance." *Padgett*, 312 S.W.3d at 351. When the appellant "objected to the prosecutor's misstatement, the trial court allowed the prosecutor to correct her error. The prosecutor then described the appropriate standard." *Id.* During deliberations, "the jury asked the

court a question about extreme emotional disturbance[.]” *Id.* The appellant argued that the jury was still confused due to the prosecutor’s misstatement, but the Supreme Court of Kentucky concluded that the jury’s question “was contrary to the standard as initially misstated by the prosecutor.” *Id.* at 352. The Supreme Court of Kentucky held “the prosecution’s misstatements were not prejudicial, and thus they [did not] constitute reversible error.” *Id.*

Here, although the trial court overruled Sevier’s objection, the prosecutor rephrased her statement to correctly state that a scar could be a permanent disfigurement. There is no indication that the jury was confused, as the record does not indicate that the jury asked the court a question about permanent disfigurement, serious physical injury, or dangerous instruments. The jury instructions correctly define dangerous instrument, serious physical injury, and physical injury. As discussed above, in light of *Binion*, we conclude that the jury independently determined that the candle holder was a dangerous instrument and found Sevier guilty of second degree assault. We have no doubt that the jury acted on the court’s instructions and not the prosecutor’s slight misstatement made prior to her self-correction. As such, we conclude reversal is unwarranted.

III. CONCLUSION

For the foregoing reasons, we affirm the judgment of the Kenton Circuit Court.

ALL CONCUR.

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