

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000036-MR

BRODERICK HUGHES

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KEN M. HOWARD, JUDGE
ACTION NO. 17-CR-00199

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING

** ** * ** * **

BEFORE: LAMBERT, MAZE, AND TAYLOR, JUDGES.

MAZE, JUDGE: In a trifurcated trial, a Hardin County jury found Broderick Hughes guilty of fourth degree assault; assault of a member of an unmarried couple, third or subsequent offense; and with being a first-degree persistent felony offender. Hughes argues the trial court erred in the first phase of trial by denying

his *Batson*¹ challenge and permitting the introduction of hearsay. We hold that reversible error did not occur in the first phase of Hughes's trial and affirm his conviction for fourth degree assault. However, we agree with Hughes that the trial court erred in the second phase of trial because its jury instructions permitted the jury to find Hughes guilty of assault of a member of an unmarried couple, third or subsequent offense, if it found Hughes had a "child in common" with the victim; a theory which was not supported by the evidence. Hence, we reverse and remand for a new trial on Hughes's convictions for assault of a member of an unmarried couple, third or subsequent offense, and for being a first-degree persistent felony offender.

FACTS AND PROCEDURAL HISTORY

On June 10, 2016, Doris Edwards called police dispatch around 5:00 AM to report that she had been assaulted in her apartment by Hughes, who she alleged was still present and would likely assault her again if the police did not arrive quickly. Hughes left the apartment shortly afterwards. Sergeant Latham of the Elizabethtown Police Department then made contact with Edwards and accompanied her back to her apartment. While at Edwards's apartment, Sgt. Latham noticed men's clothes strewn about the apartment. Sgt. Latham took Edwards's statement and photographed several red marks and scratches on

¹ 476 U.S. 79 (1986).

Edwards's neck and thigh. Edwards and Hughes subsequently reconciled, and Edwards gave birth to Hughes's son, Taj. Taj was born on February 28, 2017, approximately nine months after Hughes's assault on Edwards.

In March of 2017, a Hardin County Grand Jury indicted Hughes for fourth-degree assault. The Commonwealth sought to enhance the potential penalty by invoking KRS² 508.032(1), which provides that:

If a person commits a third or subsequent offense of assault in the fourth degree under KRS 508.030 within five (5) years, and the relationship between the perpetrator and the victim in each of the offenses meets the definition of family member or member of an unmarried couple, as defined in KRS 403.720, then the person may be convicted of a Class D felony.

A member of an unmarried couple means “each member of an unmarried couple which allegedly has a child in common, any children of that couple, or a member of an unmarried couple who are living together or have formerly lived together[.]” KRS 403.720(5).

At Hughes's subsequent trial, the Commonwealth used one of its nine peremptory challenges to remove an African-American juror. Hughes challenged the peremptory as racially discriminatory and a violation of his due process rights under *Batson v. Kentucky*. The Commonwealth responded that the juror was removed not for his race but because he appeared inattentive and sleepy during

² Kentucky Revised Statutes.

voir dire. The trial court overruled Hughes's objection, finding the Commonwealth's explanation credible and a race-neutral.

Edwards did not appear at trial or even to cooperate with the prosecution's pretrial investigation. In an apparent attempt to explain her absence, the Commonwealth played to the jury several phone calls Hughes made from jail in which he urged Edwards not to cooperate with the Commonwealth. Specifically, he advised Edwards to say she lied about being abused and made allegations against him only after being pressured to do so by the police. Edwards was largely non-committal to Hughes's pleas, but their conversations did evidence a continued romantic relationship, with both saying "I love you" to the other.

The Commonwealth also called Patti Smith, the victim's advocate assigned to Edwards, to bolster its theory that Hughes persuaded Edwards not to cooperate. Smith testified that she made multiple telephone calls to Edwards to schedule an interview with the prosecutor, but Edwards claimed she was unavailable because she had moved to Alabama. Smith testified that a subsequent background check revealed that Edwards was residing at an Ohio address, convincing the Commonwealth she was lying about where she was living and did not intend to appear at trial.

Sergeant Latham testified about his response to Edwards's 911 call on June 10, 2016, and his investigation later that day. The prosecutor also asked Sgt.

Latham whether Hughes and Edwards had a “child in common,” and Sgt. Latham answered in the affirmative. Hughes’s counsel objected to this testimony, arguing that the pretrial discovery indicated the Commonwealth would attempt to prove Hughes and Edwards were an “unmarried couple” only under a theory that they lived together at the time of the alleged assault. Hughes contended that any reference to a child in common—a separate ground to find Hughes and Edwards were an unmarried couple under KRS 508.032—was unsupported by the evidence because Taj was born nine months after Hughes’s alleged assault on Edwards. The trial court overruled Hughes’s objection, concluding a potential child in common theory could be countered through cross-examination.

Hughes’s counsel then sought to clarify that he did not have a child with Edwards at the time of the alleged assault. The following exchange occurred during cross examination:

Defense counsel: In June 10, 2016, was there a child in common?

Sgt. Latham: There was not.

Defense counsel: At any time, in June 10, 2016, did Ms. Edwards tell you she was pregnant?

Sgt. Latham: She did not.

...

Defense counsel: To your knowledge, the child in

common, would have been prior, I mean subsequent, to June the 10th of 2016?

Sgt. Latham: I'm not sure what you're asking.

Defense counsel: June the 10th of 2016, was the child born?

Sgt. Latham: No.

Hughes testified in his own defense and alleged he was in a “friends with benefits” style relationship with Edwards at the time of the alleged assault. Hughes denied living with Edwards on this date or being aware Edwards was pregnant at the time. Hughes also denied assaulting Edwards and fleeing the scene. Instead, he alleged that he attempted to leave Edwards’s apartment following a heated argument and was forced to push past her after she attempted to block the door. The jury was unconvinced and found Hughes guilty of fourth-degree assault and fixed his sentence at 100 days in jail. In the second phase of the trifurcated trial, the jury found Hughes guilty of assaulting a member of an unmarried couple, third or subsequent offense. As a result, his sentence for fourth-degree assault was enhanced to four years, six months’ imprisonment, which was enhanced further to sixteen years, six months’ imprisonment after he was found guilty of being a first-degree persistent felony offender. The trial court sentenced Hughes consistent with the jury’s recommendation. This appeal follows. Additional facts will be developed as necessary.

ANALYSIS

I. Batson Violation

“Challenging prospective jurors on the basis of race violates the Equal Protection Clause.” *Washington v. Commonwealth*, 34 S.W.3d 376, 378-79 (Ky. 2000). In *Batson*, the United States Supreme Court outlined a three-step process for evaluating such claims. *Id.* at 379. First, the defendant must make a *prima facie* showing that the prosecution has exercised peremptory challenges on the basis of race. *Id.* The burden then shifts to the prosecution to articulate a clear and specific race-neutral reason for the peremptory strike at issue. *Id.* The burden then shifts to the trial court to determine the credibility of the prosecutor’s proffered race-neutral justifications. *Id.* The judge must conclude that the justifications are both neutral and reasonable and not a pretext to discrimination. *Id.* “As with the state of mind of a juror, evaluation of the prosecutor’s state of mind, as well as the proffered reasons for the peremptory challenge, lies peculiarly within a trial judge’s province.” *Id.* (internal quotations and citations omitted). Thus, the “trial court’s ultimate decision on a *Batson* challenge is akin to a finding of fact, which must be afforded great deference by an appellate court, and so will not be disturbed unless clearly erroneous. *Roe v. Commonwealth*, 493 S.W.3d 814, 827 (Ky. 2015) (internal quotations and footnotes omitted).

The prosecutor’s explanation for excluding the African-American juror—that he appeared inattentive and sleepy—has been recognized as a permissible race-neutral explanation for excluding a juror. *McCurdy v. Montgomery County, Ohio*, 240 F.3d 512, 521 (6th Cir. 2001). The prosecution supported this explanation with a note from Sgt. Latham, seated at the prosecutor’s desk, that Spencer “may have been nodding or very sleepy.” The trial court also had the opportunity to observe the juror and noted that he “appeared to be struggling to pay attention.” Given the trial court’s unique ability to evaluate the demeanor of both jurors and prosecutors, its finding that the Commonwealth did not exclude a juror solely on the basis of race was not clearly erroneous.

II. Hearsay

Hughes argues that Edwards’s statements in the jail phone calls and Smith’s reference to her statements constituted inadmissible hearsay. Because Hughes did not make a contemporaneous hearsay objection, we reverse only if the admission of this evidence amounted to palpable error. “A palpable error must be so grave in nature that if it were uncorrected, it would seriously affect the fairness of the proceedings. Thus, what a palpable error analysis ‘boils down to’ is whether the reviewing court believes there is a ‘substantial possibility’ that the result in the case would have been different without the error.” *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006) (footnote omitted).

The purpose of playing Hughes's jail phone calls to Edwards was to establish that Hughes was coaching Edwards on what to tell the authorities. This could have been established through Hughes's statements alone, which were admissible under KRE³ 801A(b)(1). Edwards statements were merely responsive and did not introduce any facts that were not permissibly admitted at some other point in the trial. Smith's testimony about her conversation with Edwards only marginally bolstered the Commonwealth's theory that Hughes dissuaded Edwards from cooperating with the prosecution. Even if Edwards's statements amounted to hearsay, we are confident that there is not a substantial probability the result at trial would have been different had they been excluded. Accordingly, there is no basis to reverse Hughes's conviction for fourth-degree assault. We next turn to alleged errors occurring in the enhancement phase (2nd) phase of Hughes's trial.

III. Unanimous Verdict

Hughes contends he was denied a unanimous verdict during the enhancement phase because the trial court's jury instructions permitted a finding of guilt for assaulting a member of an unmarried couple, third or subsequent offense, on a theory he had a child in common with Edwards. Because Hughes failed to object to the trial court's jury instructions, we reverse on this matter only if it

³ Kentucky Rules of Evidence.

amounts to palpable error. RCr⁴ 10.26; *Kingrey v. Commonwealth*, 396 S.W.3d 824, 831 (Ky. 2013). The instruction at issue in this case, stated, in relevant part, that:

You will find the defendant guilty of Fourth-Degree Assault, Third or Subsequent Offense Within 5 Years if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

A. That prior to June 10, 2016, the Defendant was convicted of Fourth-Degree Assault by final Judgment of the Hardin District Court 14-M-583 on September 9, 2014; AND that prior to committing the Fourth-Degree Assault for which he was convicted on September 9, 2014, he was convicted of Fourth Degree Assault by final judgment of the Hardin District Court 13-M-2581 on February 14, 2014;

AND

B. That the victim of the present offense, the victim of the conviction on September 9, 2014, and the victim of the conviction on February 14, 2014 were “family members[s]” or “member[s] of an unmarried couple” as those terms are defined for you under Instruction No. 1[.]

The definitions section of the jury instructions stated that “Member of an unmarried couple – means each member of an unmarried couple which allegedly has a child in common, any children of that couple, or a member of an unmarried couple who are living together or have formerly lived together.” Thus, the jury

⁴ Kentucky Rules of Criminal Procedure.

instructions permitted a finding of guilt under two theories: if he and Edwards had ever lived together *or* had a child in common. The Commonwealth contends these instructions were not erroneous because they correctly state the definition of “unmarried couple” under KRS 403.720(5). However, jury instructions are proper only when they accurately state the law *and* they protect a defendant’s right to a unanimous verdict.

“Where a jury instruction includes multiple theories of a crime, unanimity is an issue since some jurors might find guilt under one theory, while others might find guilt under another.” *Kingrey*, 396 S.W.3d at 830. If there is sufficient evidence to find guilt under either theory, then unanimity is satisfied. *Id.* However, “superfluous instructing on theories insufficiently supported by evidence is error.” *Travis v. Commonwealth*, 327 S.W.3d 456, 463 (Ky. 2010).

Hughes argues the inclusion of the “child in common” language was not warranted based on the proof presented in this case. We agree. There was no evidence Hughes and Edwards had a child together who has born before the June 10, 2016 assault, or that anyone was even aware Edwards was pregnant on this date. There was, at most, evidence Edwards could have been a few weeks pregnant with Taj when the assault occurred. The Commonwealth does not even attempt to argue that a defendant and victim could be considered to have a “child in common” under such circumstances. The language regarding a “child in

common” in the jury instructions was superfluous based on the evidence presented at trial.

However, “such flawed instructions only implicate unanimity if it is reasonably likely that some members of the jury actually followed the erroneously inserted theory in reaching their verdict.” *Travis*, 327 S.W.3d at 463. “[I]f there is no reasonable possibility that the jury actually relied on the erroneous theory—in particular, where there is no evidence of the theory that could mislead the jury—then there is no unanimity problem.” *Id.* In this case, the evidence presented at trial could have mislead the jury into convicting Hughes on a child in common theory.

At trial, the Commonwealth presented proof that Taj was Hughes’s child. This evidence supported the Commonwealth’s theory that Hughes’s relationship with Edwards made her susceptible to his pleas not to cooperate with the prosecution. However, this evidence became problematic when Sgt. Latham testified Hughes and Edwards had a child in common. The date Taj was born was also revealed during trial testimony, permitting the jury to infer Edwards was pregnant on the day of the assault. Although cross-examination revealed Taj was born after the alleged assault, it was never explained to the jury that Taj did not qualify as a child in common for KRS 403.720(5) purposes. Moreover, the evidence that Hughes was guilty under a theory he was living with Edwards on the

day of the assault was far from overwhelming. The prosecutor also invited the jury to speculate about what constituted a child in common, stating during the Commonwealth's closing that "*only you can define what living together is and what a child in common is.*" These proceedings do not instill much confidence that the jury's guilty verdict was based on the evidence Hughes and Edwards lived together rather than Sgt. Latham's statement that they had a "child in common."

Although the trial court's jury instructions mimicked a model instruction provided in *Brewer v. Commonwealth*, 478 S.W.3d 363, 379 (Ky. 2015), the jury instructions in every case must be based on the evidence actually presented at trial and not merely parrot statutory language permitting guilt under multiple theories. *See, e.g., Mason v. Commonwealth*, 331 S.W.3d 610, 621 (Ky. 2011). Sgt. Latham's testimony created a real possibility that jurors found that Hughes had a "child in common" with Edwards on the day of the assault but did not actually live with her. Accordingly, Hughes's conviction for assault of a member of an unmarried couple, third or subsequent offense, and his conviction for being a first-degree persistent felony offender must be reversed and remanded for a new trial. On remand, the jury instructions should be worded so that a finding of guilt under KRS 508.032 is permissible only if the jury finds beyond a reasonable doubt Hughes and Edwards were members of an "unmarried couple who are living together or have formerly lived together."

IV. Details About Past Convictions

Hughes's final claim of error is that he was unfairly prejudiced when unnecessary details about his prior assault convictions were revealed to the jury. Because this issue may reoccur on remand, we will address it briefly. In the enhancement phase of trial, the Commonwealth was required to prove that Hughes had two prior convictions for assault in which the victim met the definition of family member or member of an unmarried couple under KRS 403.720(5). To prove the prior assaults, the Commonwealth introduced certified records of Hughes's February 2014 guilty plea to fourth-degree assault and his September 2014 guilty plea to a separate fourth-degree assault charge. To prove his relationship to the victim, the Commonwealth introduced the citation for each conviction. For the February 2014 assault, the citation stated that:

Above subject got into a verbal altercation with his children's mother regarding finances. When the mother, Anastasia Cecil, attempted to leave for work without rectifying the problem, the above subject got upset and pushed Cecil down to the ground. Once Cecil was on the ground the above subject struck her multiple times with both closed fists and his feet. Cecil was able to get up and then contacted the police. Cecil had a visible minor injury to her right elbow area, and had redness to the left side of her face.

The citation for the September 2014 assault stated that:

Officers responded to Hardin Memorial Hospital on the report of an assault. HMH had stated that a female had come in for treatment after being assault by her

boyfriend. Once officers were on the scene, they met with Anastasia Cecil, who had visible injuries to the inside of her lip. Anastasia's lip was swollen and still bleeding. Anastasia stated that she was with her boyfriend, Broadrick Hughes, traveling in their vehicle when a verbal argument began. At some point, Broadrick became upset and struck Anastasia with a closed fist, causing injury to her lip that Anastasia thought was severe enough to require medical treatment. Broadrick are dating and have two kids in common. Both juvenile children were present during the assault.

The Kentucky Supreme Court held that although proof of a defendant's prior convictions are necessary under KRS 508.032, trial courts must be "diligent in ensuring detailed facts of prior convictions are kept from the jury." *Brewer*, 478 S.W.3d at 376. The Commonwealth should only "present the nature of the offenses and any proof needed for the jury to find the defendant's prior convictions were within the statutorily prescribed time period and indeed for fourth-degree assault." *Id.* at 378.

Most of this proof was provided by the certified records of Hughes's guilty pleas. The citations were relevant to show the victim's relationship with Hughes, but we agree that more detail than necessary was provided to the jury. The citations—provided they are relied upon on remand to prove Hughes's relationship with the victim—should be redacted. The February 2014 citations would be satisfactory if it read as follows: "Above subject got into a verbal altercation with his children's mother regarding finances. When the mother,

Anastasia Cecil, attempted to leave for work without rectifying the problem, the above subject got upset and pushed Cecil down to the ground.” The remaining information in this citation regarding the post-arrest complaint should be redacted. The September 2014 citation would be satisfactory if it were redacted so it read as follows:

Officers responded to Hardin Memorial Hospital on the report of an assault. [REDACTED]

[REDACTED] Once officers were on the scene, they met with Anastasia Cecil [REDACTED]

[REDACTED] Anastasia stated that she was with her boyfriend, Broadrick Hughes, traveling in their vehicle when a verbal argument began. At some point, Broadrick became upset and struck Anastasia with a closed fist [REDACTED]

[REDACTED] Broadrick are dating and have two kids in common. [REDACTED]

V. Conclusion

Hughes’s conviction for fourth-degree assault is affirmed. His convictions for assault of a member of an unmarried couple, third or subsequent offense and being a first-degree persistent felony offender are reversed and remanded for a new trial. On remand, the jury instructions should be revised so that the jury could find Hughes guilty only if it finds he and Edwards lived together or formerly lived together. The citations may be introduced to prove his

relationship with the victim of his prior assaults provided they are redacted as specified above.

ALL CONCUR.

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