

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: SEPTEMBER 22, 2005
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2003-SC-000260-MR

JOSEPH JAMAR SHERRILL

APPELLANT

V. APPEAL FROM McCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
NO. 02-CR-00088

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

The Appellant, Joseph Jamar Sherrill, was convicted of violating a domestic violence order (DVO), first degree burglary, and intentional first degree assault. He received two twenty-year sentences to run consecutively for the burglary and assault charges. He was sentenced to twelve months and fined \$500.00 for violating the DVO, the twelve months to run concurrently with the other two sentences, for a total sentence of forty years.

Sherrill appeals to this court as a matter of right, contending that there was insufficient evidence to support his conviction of intentional first degree assault. Additionally, he avers that his rights of equal protection and due process were violated when the court allowed him, an African-American, to be tried by an all white jury.

Sherrill's insufficiency claim is properly preserved but his equal protection and due process claims are not.

The material facts of the case were not disputed at trial. Sherrill shot his long-time on-and-off girlfriend after he became suspicious that another man, James Franklin, was in her residence. He broke into her residence through a window, went upstairs to the victim's bedroom where he found the victim watching television. After some questioning of her about the man, Sherrill shot her six times.

KRS 508.010 provides that a person is guilty of first-degree assault when his intentional or wanton conduct causes serious physical injury to another person. The trial court gave the jury two separate instructions, one based on intentional conduct and the other based on wanton conduct. The jury found Sherrill guilty of first-degree assault based on his intentional conduct. KRS 508.010 (1)(a) provides:

A person is guilty of assault in the first degree when (h)e intentionally causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument.

Sherrill contends that the Commonwealth's evidence was insufficient to show that his conduct was intentional. Specifically, he asserts that he did not intend to shoot the victim, but he simply lost control and started shooting.

It is undisputed that, "a person is presumed to intend the logical and probable consequences of his actions and thus 'a person's state of mind may be inferred from actions preceding and following the charged offense.'"¹ Sherrill argues that the evidence that he was a "slow learner" and suffered from ADHD called into question his ability for logic, making it incumbent upon the Commonwealth to establish

¹ Harper v. Commonwealth, 43 S.W.3d 261, 265 (Ky. 2001) (quoting Parker v. Commonwealth, 952 S.W.2d 209, 221 (Ky. 1997)).

his ability for logic before allowing any inferences as to Sherrill's intent. Sherrill asserts that "not even a scintilla of evidence was presented to refute the low intellectual functioning and ADHD suffered by Joseph [Appellant]." Evidence that Sherrill was a "slow learner" or that he suffered from ADHD does not automatically negate his ability to know the logical and probable consequences of his actions. In his reply brief to this court, Appellant cites the Diagnostic and Statistical Manual IV-R in an attempt to support his argument that ADHD may have affected his ability to logically consider the possible consequences of his actions. However, the Manual was not placed in evidence, nor was such an argument made to the jury. Sherrill presented a defense based on extreme emotional disturbance (EED), not ADHD, and the trial court gave an EED instruction. The jury rejected Appellant's defense.

In reviewing a claim of insufficiency of evidence, our inquiry is whether the trial court should have directed a verdict in the defendant's favor. "On a motion for directed verdict of acquittal, the trial judge must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that a defendant is guilty, a directed verdict should not be given."²

In the instant case, the evidence showed that Sherrill broke into the victim's house in violation of a domestic violence order. The prosecution presented a videotape of an interview that the police conducted with Sherrill a few short hours after the incident. In this interview, Sherrill recounts in detail the events leading up to the shooting, the shooting, and his struggle with the victim's gentleman friend, Franklin, afterwards. Sherrill's testimony at trial, though less detailed, was consistent with the

² Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991)

information he had given during the interview. His version of events was corroborated by Franklin's testimony at trial.

Franklin testified that when he and the victim heard someone trying to break into the residence, the victim asked him to go into the next room. Thus, by the time Sherrill ran upstairs and located the victim, Franklin was not in sight. Nevertheless, Sherrill proceeded to shoot the victim six times, lacerating her liver, shattering her right arm, injuring her bowels and severing her spinal cord, which paralyzed her. He then went into the other bedroom where Franklin, by this time, had sought refuge in the closet. When Sherrill approached the closet door, Franklin swung the closet door open and attacked Sherrill with a baseball bat. After a struggle, Sherrill fled from the residence but Franklin chased and tackled him. Police officers testified that when they arrived, the two men were running out of the residence and they saw Franklin catch up with Sherrill and restrain him. The officers then arrested Sherrill and secured the crime scene. The victim also testified. During her testimony a "911" audiotape was played for the jury which captured the shooting and the victim's pleas for help. When this evidence is viewed in a light most favorable to the Commonwealth, we must conclude that the trial judge properly denied the motion for a directed verdict of acquittal.

Sherrill also contends that he was denied due process and equal protection of the laws because he is an African-American who was tried by an all-white jury. However, after the jury was empanelled, defense counsel asked the court to see the Commonwealth's peremptory strikes because there were no African-Americans on the jury. The court asked defense counsel if she was making a Batson challenge. Upon further inquiry, the court and counsel realized that defense counsel had stricken two African-Americans and the Commonwealth had stricken only one African-American.

Thus, defense counsel explicitly declined to make a Batson challenge. Accordingly, the issue is not preserved for our review.

Nonetheless, Sherrill contends that the trial court should have sua sponte conducted a hearing once defense counsel alerted it to the fact that Sherrill was about to be tried by an all-white jury. However, the jurisprudence Sherrill relies on to support his contention deals with a defendant's competence to waive his rights and is therefore inapplicable. Thus, in the instant case, the trial court was not required to sua sponte conduct a hearing. Sherrill did not request a hearing nor did he make a Batson challenge. Accordingly, there is no merit to this assignment of error.

Thus, we affirm Appellant's conviction.

Lambert, C.J., and Cooper, Graves, Johnstone, Roach, Scott, and Wintersheimer, JJ., concur.

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