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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: NOVEMBER 23, 2005
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2003-SC-000639-MR

DATE 2-23-06 ELAGRAMPC

GREGORY HIGGINS — APPELLANT

V.

APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JOSEPH BAMBERGER, JUDGE
03-CR-00133

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

On July 24, 2003, Appellant, Gregory E. Higgins, was convicted by a Boone County jury of first degree robbery, third degree assault, and of being a second degree persistent felony offender (PFO). He was sentenced to twenty (20) years imprisonment on the robbery charge, enhanced to thirty (30) years due to his status as a PFO. He was also sentenced to five (5) years imprisonment on the assault charge, enhanced to seven (7) years imprisonment due to his status as a PFO. The two sentences were ordered to be served consecutively for a total of thirty-seven years imprisonment. This appeal comes before the Court as a matter of right.[1]

At around 1:00 a.m. on March 17, 2003, Higgins, wearing a black hat, camouflage mask, dark sweatpants, and a dark sweatjacket, hid in the bushes outside

[1] Ky. Const. § 110(2)(b).

of an Applebee's restaurant in Florence, Kentucly. When Steve Billups, an employee, arrived to return a set of keys, Higgins pointed a pistol at him and ordered him to get another employee to come to the door of the restaurant. A manager came to a side door to unlock it, and Higgins pushed both employees into the restaurant. A bartender was talking on the phone in the restaurant, and Higgins ordered the man to hang up. Higgins then proceeded to put the gun to the back of the bartender's head and question him about what he had said on the phone. Higgins ordered the entire restaurant staff, thirteen employees, to go into the restaurant's walk-in freezer. He collected their cell phones and had the manager lock the freezer door.

Higgins then directed the manager to open the safe in the restaurant office. The manager explained that she could not open the bottom part of the safe because it was time locked. Higgins told the manager that if she did not get the safe open, he would take a person out of the freezer one at a time and kill them in front of her. Ultimately unable to open the bottom of the safe, Higgins removed all of the cash from the top part of the safe, estimated to be about $4,000.00. Higgins took the manager back to the freezer and proceeded to lock her in. At some point during the robbery, an employee inside the freezer activated a silent alarm.

An officer with the Florence Police Department, Chad Irwin, was dispatched by police radio to the Applebee's after the alarm was tripped. When Irwin arrived and surveyed the restaurant, he saw Higgins walking toward him down the sidewalk with a cell phone, an Applebee's employee binder, and a hat in his hands. Irwin knew that a man matching the description of Higgins worked in the restaurant's cleaning crew. He asked Higgins if he was part of the crew, and Higgins nodded in the affirmative. Irwin informed Higgins that the alarm was going off, and that it needed to

be reset. Higgins asked if Irwin was a security guard, and Irwin identified himself as a Florence Police Officer.[2]

The two men proceeded to walk to the front entrance of the Applebee's. Higgins held the door open for Irwin and they entered the small foyer area. Officer Irwin walked over to the alarm panel to see why it was activated. At that point, Higgins dropped the binder on the floor and tackled Irwin around the waist. Once Higgins had his arms around Irwin's waist he tore the officer's portable radio out of its holder. As the scuffle continued, Higgins' .38 caliber loaded revolver fell out of his waistband and onto the floor between them. Irwin kicked it as far from Higgins' reach as he could. As Irwin kicked Higgins' gun away, he drew his own gun and tried to push Higgins down to the ground. Higgins stood up and grabbed the barrel of Irwin's gun with both of his hands. The two of them fought over Irwin's gun for a short time, and ultimately Higgins was subdued. The Officer sustained a scratch to his hand during the scuffle. Irwin searched Higgins after he was handcuffed and he discovered the stolen cash as well as a face mask on his person.

Higgins told Irwin that all the employees were all right and they were all in the freezer. Higgins was arrested, taken to the police station, and Mirandized. He told the police that he wanted to seek counsel and they stopped questioning him. After Higgins was arrested, Detective Mike Elder of Nicholasville, Kentucky, was notified. Detective Elder interviewed Higgins regarding a robbery of the Applebee's in Nicholasville on March 4, 2003. Higgins admitted to this robbery, as well as to another in Boone County. Higgins explained that the reason he chose to rob Applebee's restaurants was because he had previously had a job at Applebee's and been fired. He

[2] Officer Irwin was wearing his mountain bike uniform, and this apparently led to the

told Detective Elder that he had a drug problem and he was committing the robberies for money to support his addiction.

Higgins asserts four errors on appeal. He first argues that his right to due process was violated when the trial court denied his motion for a directed verdict on the offense of assault in the third degree.[3] Before we address the merits of this issue, we first note that it is unpreserved. Appellant's motion at trial did not comply with the specificity required for a directed verdict motion. CR 50.01 states that, "[a] motion for a directed verdict shall state the specific grounds therefor." At trial, defense counsel simply stated that the Commonwealth presented insufficient evidence on assault in the third degree. This Court has applied CR 50.01 in criminal cases, and we have recognized a strict adherence approach to the "specific grounds" requirement.[4]

Additionally, the Court of Appeals addressed facts quite similar to the case at bar in Hicks v. Commonwealth.[5] In that case, the defendant moved for a directed verdict at both the close of the Commonwealth's case and the close of all evidence. His only basis for the motion was insufficient evidence as to each and every charge pending against him to submit the case to a jury. The Court of Appeals noted that this assertion was insufficient to preserve the error and we agree with that logic. Furthermore, in Gulf Oil Corp. v. Vance[6] we articulated the reasoning behind CR 50.01:

> The purpose of the rule is to apprise fairly the trial judge as to the movant's position and also to afford the opposing counsel an opportunity to argue each ground before the judge makes his ruling. The attention of the trial judge can

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confusion.

[3] KRS 508.025.

[4] Pate v. Commonwealth, 134 S.W.3d 593, 597-98 (Ky. 2004); Daniel v. Commonwealth, 905 S.W.2d 76, 79 (Ky. 1995). See also Hicks v. Commonwealth, 805 S.W.2d 144, 148 (Ky. App. 1990).

[5] 805 S.W.2d 144 (Ky. App. 1990), review denied.

[6] 431 S.W.2d 864 (Ky. 1968).

> thus be focused on possible reversible errors which might otherwise be obscure with only a general motion for a directed verdict.[7]

When a reviewing court is unaware of the grounds for the motion, it cannot determine if the trial court erred.[8] Higgins was required to outline the specific grounds for the directed verdict motion. A simple statement that there is insufficient evidence, without more, is inadequate to comport with CR 50.01.

Higgins, as did Hicks in the aforementioned case, failed to satisfy the specificity requirement in CR 50.01, and therefore the error is unpreserved. "The necessity of maintaining an orderly administration of justice by following such rules is justified despite the harsh results that may occasionally obtain."[9] Therefore, we will review this issue only for palpable error.[10]

Higgins asserts that there was insufficient evidence to convict under KRS 508.025, and as such a directed verdict of acquittal should have been required. However, our review of the record shows that this argument is without merit. Under KRS 508.025(1), a person is guilty of third degree assault when he "[r]ecklessly, with a deadly weapon or a dangerous instrument, or intentionally causes or attempts to cause physical injury to . . . [a] state, county, city or federal peace officer." Put more simply, an assault in the third degree involving a city police officer can be committed in one of three ways: (1) by recklessly causing physical injury to the officer, with a deadly weapon or dangerous instrument; (2) by intentionally causing physical injury to the officer; or, (3) by attempting to cause physical injury to the officer.[11]

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[7] Id. at 865 (citing Carr v. Kentucky Utilities Co., 301 S.W.2d 894 (Ky. 1957)).
[8] Whitesides v. Reed, 306 S.W.2d 249 (Ky. 1957).
[9] Gulf Oil Corp., 431 S.W.2d at 866.
[10] RCr 10.26.
[11] Robert G. Lawson & William H. Fortune, Kentucky Criminal Law §9-2(d)(2) (1998).

Higgins argues that he should have received a directed verdict because there was no dangerous instrument used, Irwin did not receive a serious physical injury, and he did not intend to cause physical injury to Irwin. We find these arguments unpersuasive. The evidence is undisputed that Higgins tackled a police officer who was in performance of his official duties, and attempted to subdue him. On appellate review, the test for a directed verdict is properly stated as follows:

> On motion for directed verdict, the trial court 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 the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.[12]

Under this standard, a jury could have found that Higgins had the necessary intent to cause physical injury, and that he did in fact attempt to cause that injury. Whether an actual physical injury occurred is of no consequence with respect to our analysis of this unpreserved question. We note that under KRS 508.025 no injury need occur in order to support a conviction.[13]

Higgins was desperate to avoid capture, and he violently assaulted a police officer during a botched robbery. Whether he intended or attempted to cause injury when he assaulted the officer was for the jury. We have held that "intent may be inferred from actions because a person is presumed to intend the logical and probable consequences of his conduct . . . ."[14] Very simply, there was ample evidence to convict

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[12] Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991).
[13] See Lawson & Fortune, supra, §9-2(d)(1).
[14] Stopher v. Commonwealth, 57 S.W.3d 787, 802 (Ky. 2001).

Higgins of attempting to cause injury to Irwin by physical attack. There was no palpable error in the trial court's failure to direct a verdict.

Higgins' next argues that the instructions in this case failed to include "essential elements" of the offense of assault in the third degree. Appellant concedes that this error is likewise unpreserved. However we will examine the issue under the palpable error standard.[15] The instruction on assault in the third degree given in the instant case was as follows:

> INSTRUCTION NO.4
> Count Two: Third-Degree Assault
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> You will find the Defendant guilty of Third-Degree Assault under this instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:
>
> A. That in this county on or about March 17, 2003 and before the finding of the Indictment herein, ***he recklessly caused or attempted to cause physical injury to Officer Chad Irwin by physical attack***; and
> B. That Officer Chad Irwin was a city peace officer acting in the course of his official duties and the Defendant knew he was acting in the course of such official duties.
>
> If you find the Defendant guilty under this Instruction, you will not fix his punishment but shall indicate in your verdict only that you have found him guilty of this offense and return the verdict to the Court without deliberating on the question of punishment at this time. You shall use Verdict Form No. 3 in reaching your verdict under this Instruction.

(emphasis added). Higgins contends that the instruction omitted the requirement that any recklessly inflicted injury be caused "by means of" a deadly weapon or dangerous instrument. However, KRS 508.025(1)(a) has no such language, and only uses the phrase "[r]ecklessly, *with* a deadly weapon or dangerous instrument." (emphasis added). Significantly, the other assault statutes in KRS 508 do have the "by means of"

[15] RCr 10.26.

language.[16] We are doubtful that this difference was a mistake by the General Assembly. When there is an obvious deviation in the language utilized by the legislature in otherwise similar statutes, we interpret the difference to be purposeful. In our view, the General Assembly sought to impose harsher penalties upon persons who are in possession of a dangerous instrument or deadly weapon, and who cause a reckless injury to a police officer. Under this statute, the dangerous instrument or deadly weapon need not be used to inflict the injury; it only needs to be in the possession, custody, or control of the person causing the injury.

Higgins had a loaded pistol when he attacked Irwin. Even though the pistol likely did not cause the injury to Irwin's hand, the fact that Higgins had the weapon on his person is sufficient to impose liability under KRS 508.025. Furthermore, KRS 508.025 provides that a physical injury is required with respect to recklessness, not necessarily a serious physical injury. The scratch to Irwin's hand is sufficient to satisfy this requirement.

The instruction in this case was taken verbatim from a widely used treatise on Kentucky jury instructions.[17] The treatise rightly explains that the instruction here under review should only be given if the dangerous instrument used is a deadly weapon as a matter of law.[18] A "deadly weapon" is defined by statute, and that definition encompasses a pistol.[19] Therefore, as a matter of law Higgins was armed with a deadly weapon at the time of the attack. There was no need to instruct the jury on the definition of a deadly weapon or dangerous instrument, as this was a question of

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[16] See, e.g., KRS 508.010; KRS 508.020; KRS 508.030.
[17] 1 Cooper, Kentucky Instructions to Juries (Criminal) § 3.48 (4th ed. Anderson 1999).
[18] Id.
[19] KRS 500.080.

law, not fact.[20] Nor was it necessary to include the "by means of" language, because that requirement is not included in the statute. The instruction given in this case complied with the statutory framework for assault in the third degree, and there was no instructional error as to Higgins' conviction.

As Higgins' third assertion of error, he claims that he was denied due process of law and the presumption of innocence when he was tried in his prison clothing, in a courtroom in which there was a large police presence. Once again, we note that this error is unpreserved, and we will review it only for palpable error.

At trial, Higgins wore standard issue prison attire, consisting of a khaki shirt and khaki pants. He contends that he was forced to stand trial in his prison clothing. However, the only evidence of this alleged compulsion relates to what Higgins characterizes as an "indication" in the record that he did not choose to stand trial in his prison clothes. To support this proposition Higgins notes a conversation during voir dire between his trial counsel and a juror. The juror stated that her daughter's house had been broken into the month prior to trial. When asked if she could put that experience aside, the juror laughed and stated that she knew Higgins hadn't broken into her daughter's house because he wasn't out of jail then. The juror stated she was just guessing because it looked like they were keeping a pretty close eye on him. Higgins now claims that this demonstrates that he was forced to wear his prison clothing at trial. However, during this exchange and during the subsequent trial there was no mention of Higgins' attire. As no objection was made, this Court has no way of knowing if Higgins' was ordered to stand trial in his prison clothes, or if he did so as a matter of trial strategy.

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[20] Hicks v. Commonwealth, 550 S.W.2d 480, 481 (Ky. 1977).

The United States Supreme Court dealt with the issue of prison attire in Estelle v. Williams.[21] In that case, the defendant asked an officer at the jail for his civilian clothes when he found out he was going to trial. The request was denied. As a result, the defendant appeared at trial in clothes that were distinctly marked as prison issue. Neither the defendant nor his counsel raised an objection to the prison attire at any time. When reviewing the issue, the Court stated:

> Accordingly, although the State cannot, consistently with the Fourteenth Amendment, compel an accused to stand trial before a jury while dressed in identifiable prison clothes, the failure to make an objection to the court as to being tried in such clothes, for whatever reason, is sufficient to negate the presence of compulsion necessary to establish a constitutional violation.[22]

When a defendant appears before a jury in prison clothes there is an implication of harm to that defendant's presumption of innocence. There is no reason to compel a defendant to wear prison clothes at trial, and we note that the standard practice throughout the Commonwealth is in line with this observation. Of course a defendant can choose to wear his prison attire in order to garner sympathy from the jury, or for some other trial strategy purpose. In this case there simply is no indication in the record that Higgins was ordered to wear his prison clothes. For these reasons we hold that there was no error regarding Higgins' prison attire. This issue, along with the two issues already addressed, underscores the need to preserve any claims of error at the trial level to enable appellate review.

Higgins also claims that an overbearing police presence in the courtroom severely undermined his right to be presumed innocent. Higgins contends this

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[21] 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976).
[22] Id. at 512-13.

prejudice is evident because of the aforementioned comment by the juror, where she said it looked like the sheriffs were keeping a "close eye on him." Our review of the record shows no such overbearing presence. While a deputy sheriff sat behind Higgins throughout most of the trial, the police presence was not overbearing. Higgins was neither in shackles nor handcuffs, and at one point during the trial, there was no deputy sheriff anywhere in sight.

We held in Hodge v. Commonwealth[23] that armed policemen in the courtroom do not amount to prejudice per se.[24] In Hodge we cited with favor a United States Supreme Court case addressing police presence in the courtroom, and we reiterate the quoted passage below because of its applicability to the present case.

> [T]he presence of guards at a defendant's trial need not be interpreted as a sign that he is particularly dangerous or culpable. Jurors may just as easily believe that the officers are there to guard against disruptions emanating from outside the courtroom or to ensure that tense courtroom exchanges do not erupt into violence. Indeed, it is entirely possible that jurors will not infer anything at all from the presence of the guards. If they are placed at some distance from the accused, security officers may well be perceived more as elements of an impressive drama than as reminders of the defendant's special status. Our society has become inured to the presence of armed guards in most public places; they are doubtless taken for granted so long as their numbers or weaponry does not suggest particular official concern or alarm.[25]

A deputy sheriff sitting in a courtroom can be seen to be as commonplace as the bailiff himself. Jurors, especially those serving for the first time, have no way of knowing whether a deputy sheriff in a courtroom is unusual or routine. As Higgins was on trial for assaulting a police officer, a moderate amount of police presence would be

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[23] 17 S.W.3d 824 (Ky. 2000).
[24] Id. at 839.
[25] Id. (quoting Holbrook v. Flynn, 475 U.S. 560, 569 (1986)).

expected. For these reasons, we hold that there was no prejudicial effect and find no error.

Finally, Higgins asserts that the trial court erred to his substantial prejudice and denied him due process of law, when it denied his motion for a continuance. This issue was properly preserved. Higgins was arrested on March 17, 2003, and his jury trial began on July 23, 2003. The morning of the trial, Higgins' asked for a continuance. The grounds stated for the continuance were to permit Higgins to be evaluated for his drug addiction and to "see whether or not that has any possible bearing on why the crime occurred." The trial court noted that Higgins had been indicted on April 15, 2003, and that Higgins had been in front of the court on at least three prior occasions. The trial court then overruled the motion.

"The court, upon motion and sufficient cause shown by either party may grant a postponement of the hearing or trial."[26] "The granting of a continuance is in the sound discretion of a trial judge, and unless from a review of the whole record it appears that the trial judge has abused that discretion, this court [sic] will not disturb the findings of the court."[27] The factors that a trial court are to consider when exercising its discretion to grant or deny a continuance include: (1) the length of delay, (2) previous continuances, (3) inconvenience to the parties and to the court, (4) whether the delay is purposeful or is caused by the accused, (5) availability of other competent counsel, (6) the complexity of the case, and (7) the prejudice of denying the delay.[28] "Whether a

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[26] RCr 9.04.
[27] Williams v. Commonwealth, 644 S.W.2d 335, 336-37 (Ky. 1982).
[28] Snodgrass v. Commonwealth, 814 S.W.2d 579, 581 (Ky. 1991) (*overruled on other grounds by* Lawson v. Commonwealth, 53 S.W.3d 534 (Ky. 2001)).

continuance is appropriate in a particular case depends upon the unique facts and circumstances of that case."[29]

The trial court concluded that the purpose of the requested continuance was delay. The amount of evidence against Higgins was massive. He was caught red-handed and identified by several eyewitnesses. Any continuance would have only delayed the inevitable, and we are quite sure the trial judge recognized this fact. We hold that there was no abuse of discretion, and affirm the trial court's ruling.

For the foregoing reasons, we affirm the trial court's final judgment.

All concur, except Cooper, J., who concurs in result only.

[29] Id.

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