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RENDERED: OCTOBER 29, 2009
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2007-SC-000751-MR

NOAH HICKS — APPELLANT

V.

ON APPEAL FROM BRECKINRIDGE CIRCUIT COURT
HONORABLE SAM MONARCH, JUDGE
NO. 06-CR-00078

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Noah Hicks, appeals his Breckenridge Circuit Court conviction of Kidnapping, Robbery in the Second Degree and Assault in the First Degree. The jury recommended, and the trial court imposed, a sentence of twenty-five (25) years for Kidnapping, and ten (10) years each for the robbery and assault, enhanced by Persistent Felony Offender (PFO) in the Second-Degree. The sentences were all to run concurrently for a total sentence of twenty-five (25) years. This appeal followed.

Facts

On June 17, 2006, at around 4:00 p.m., Appellant picked up Carroll Garvey in his car at Garvey's brother's house in Radcliffe, Kentucky. The two (2) men made plans to "hang out" that night. They discussed possible plans, including going to a friend's party and/or attending a hip-hop concert. During

the discussions, Garvey mentioned that he had $395.00 cash in his pocket, which he said was a gift from his mother, and agreed to buy Appellant's ticket if they went to the concert.

Ultimately, they drove to Terrance Banks' house in Gustin, in Meade County. As they turned onto Banks' road, they passed another car, driven by Erroll Rogers, who had Kyron Perks with him. They met on a nearby dead-end road and began talking. As the four (4) men were talking, Terrance Banks, who lived nearby, pulled up on an ATV. After Banks arrived, they were all talking, smoking marijuana,[1] and trying to decide what to do that night. Appellant then suggested that they all get in his car and go to his house to hang out. Everyone agreed, so Banks and Rogers parked their vehicles and they all piled into Appellant's car, headed to Appellant's trailer home.

Upon arrival, they decided to hang out at Appellant's trailer for awhile as it was raining. Appellant, Rogers, and Banks then went to a back room of the trailer where they were "tooting" some cocaine, which Garvey declined.

A while later, Rogers suddenly tackled Garvey. Banks also jumped on top of Garvey. Appellant and Rogers then "hog-tied" Garvey, tying his wrists and ankles together.

After tying him up, they took his cell phone, identification cards, and his $395.00, which he had not mentioned to anyone except Appellant. Appellant

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[1] Garvey testified that he did not smoke marijuana with the others because he recently applied for a job, had an interview in a few days, and did not want marijuana to show up in a urine test. He admitted, however, that he intended to drink alcohol that evening

then retrieved some sheets, taped a sheet over Garvey's head and another around the rest of Garvey's body so that Garvey could not move and could not see. He was then carried outside and placed in the trunk of the car.

Garvey began pleading with Rogers for his life. As he pleaded, he heard laughing and joking up front, until eventually the music on the radio was turned up to drown out his pleas. Scared, Garvey struggled against his restraints and eventually they loosened and he was able to untie himself. Although still trapped in the trunk, he was then able to see out of a little hole in the trunk.

The car eventually stopped and Garvey heard a door open and close. At trial, Perks testified that, at this stop, Appellant got out of the car, went into a house and got a pistol.

They then left and they eventually turned onto a hilly and winding country road deep in the woods. After a while, they stopped and got out of the car. Through the hole in the trunk, Garvey saw Appellant walk by the trunk wearing a black glove and carrying a handgun.

Appellant opened up the trunk, said something about Garvey being untied, and ordered Garvey to get out. As he got out, Garvey noticed they were in a wooded area, Appellant and Rogers were standing directly in front of him, and Appellant was holding the handgun and pointing it at Garvey's feet.

Rogers then told Garvey to pull his shirt over his face so he would not have to watch them shoot him. Garvey pretended he was going to pull his shirt

over his head, but then took off running towards the woods. He heard three (3) gunshots in short order and heard bullets go whizzing by his head. Garvey took quick, zig-zagging steps to avoid being hit by the bullets. Garvey later testified that he took about five (5) quick steps before he heard the shots.[2] One bullet struck Garvey in the back of his right arm, exiting through the front of his shoulder.[3]

The bullet knocked Garvey down but he immediately got back up and continued running. At the time, he heard someone yell "he's alive!!!," as in disbelief. As Garvey ran, his shoe flew off and, as he made it to the tree line, the others got back into Appellant's car and drove off.

Unbeknownst to Garvey, he was shot on Edgar Basham Road, a rural country road in Breckinridge County, near Mystics, Kentucky. After the car left, Garvey took off his shirt and used it as a tourniquet for his shoulder. He began walking beside the road toward a building he had seen earlier through the hole in the trunk.

Along the way, he passed out several times from blood loss. When he regained consciousness, he continued walking, eventually arriving at Albert and Jennifer Heckman's home, located about two hundred (200) yards off of Edgar Basham Road. Mr. Heckman noticed the bloody shirt wrapped around

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[2] At trial, Appellant's trial attorney asked Garvey to run six (6) steps for the jury, and about one (1) second elapsed.

[3] The bullet that struck Garvey was a hollow point bullet which shattered the bone in his arm. Doctors at the University of Louisville Hospital were required to place a metal rod and plates in his arm and shoulder to replace the lost bone. At trial, Garvey showed the jury sizeable and permanent scars on his arm and shoulder resulting from the bullet.

Garvey's shoulder and helped Garvey to a chair and tightened the tourniquet at Garvey's request. Mr. Heckman then went inside to get help from his wife, who works in a doctor's office.

Mrs. Heckman was troubled by Garvey's pale, grey skin color when she first saw him. She then examined the wound, saw the bullet hole, and called 911. Due to the remoteness of the location, it took more than an hour before the ambulance arrived. Garvey was ultimately flown by helicopter to the University of Louisville hospital, where he remained for over a week.

Before going to the hospital, Garvey provided the police with the names of his attackers, and specifically named Rogers and Appellant as responsible for his injuries. The police then executed a search warrant at Appellant's home and, although they did not find anything, Appellant confirmed that the gun was at Rogers' house. The police executed a search warrant at Rogers' home, and found the gun, a loaded 9 mm Glock 17 handgun and an extra clip, hidden in Rogers' bathroom under some laundry. They also located the crime scene on Edgar Basham Road and recovered two (2) 9 mm shell casings on the side of the road as well as Garvey's lost tennis shoe.

Later, the Breckinridge Co. Sheriff interviewed Appellant, at which time Appellant signed a written waiver of rights. During the interrogation, Appellant admitted he picked up Garvey[4] and took him to Appellant's home. He admitted Garvey was jumped and tied up at his house. He admitted that he grabbed a

[4] Appellant did not call Garvey by his name, he instead referred to him as the "Asian kid" or "Asian boy." Banks also referred to Garvey in the same terms.

belt and extension cord to tie up Garvey. He admitted that he helped put Garvey in the trunk of his car and they drove around for one and one-half to two (1 ½ to 2) hours. He also admitted that he had the gun in his hand when Garvey got out of the trunk, as well as firing the gun when Garvey started running away. Appellant said that he was at the rear of the vehicle when he fired the gun and that Garvey was running last time he saw him.

Appellant, Banks, and Rogers were tried jointly. Appellant was found guilty of 1) Kidnapping (with serious physical injury); 2) Second-Degree Robbery; and 3) First-Degree Assault, enhanced by a finding of Second-Degree Persistent Felony Offender ("PFO"). The trial court accepted the jury's recommendation and sentenced Appellant to twenty-five (25) years imprisonment for the Kidnapping conviction, ten (10) years for the PFO-enhanced Second-Degree Robbery conviction, and twenty-five (25) years for the PFO-enhanced First-Degree Assault conviction, all to be served concurrently for a total term of twenty-five (25) years.

This appeal followed with Appellant alleging error in: 1) the trial court denying him the right to confront a witness against him, 2) denying him an instruction on Second-Degree Assault, and 3) ordering his witness to show a tattoo to the jury during his testimony.

For reasons set out below, we affirm Appellant's convictions.

I. The Right to Confront a Witness

Appellant first argues the trial court improperly limited his cross-examination of the victim, Garvey, by not permitting Appellant to question Garvey about his misdemeanor probationary status that prevented him from using illegal drugs. However, a review of the trial record reveals that the request to pursue such cross-examination was made by Banks' attorney, Steven Reed, rather than by Appellant.

According to the record, during Garvey's cross-examination, Appellant began inquiring as to why Garvey had $395.00 on his person. After a few inferential questions, the trial court excused the jury and requested a private meeting with counsel in chambers.

During this meeting, the trial court said he was unsure of where Appellant was going with those questions and was starting to get uncomfortable, as six (6) months prior to trial the trial court had advised the defendants that he would not permit evidence and testimony to the effect that "Garvey was a drug dealer who needed to be shot." The court said it was proper to ask Garvey about whether he had $395.00, but it was impermissible for Appellant to ask Garvey if he had the money to buy drugs. Appellant acknowledged that that was indeed his next line of questioning but acquiesced in the court's ruling.

The meeting was about to conclude and Appellant's trial counsel was headed out the door when Banks' attorney argued that the aforementioned line

of questioning should be permitted because Garvey was on probation for a misdemeanor. Banks' attorney argued that since Garvey's probation could be revoked for using illegal drugs, he had a motive to lie about using illegal drugs with the other defendants.

After this objection, a lengthy discussion followed but the record does not reflect that Appellant also objected to the trial court's ruling prohibiting cross-examination about Garvey's misdemeanor probationary status. This absence is critical because "[t]he objection of an attorney for one co[-]defendant will not be deemed to be an objection for the other co[-]defendant unless counsel has made it clear that in making the objection it is made for both defendants." Brown v. Commonwealth, 780 S.W.2d 627, 629 (Ky. 1989); see also, Rice v. Commonwealth, 199 S.W.3d 732, 738 (Ky. 2006). Accordingly, we find this issue is not properly preserved. Appellant, however, requests review under the palpable error standard set forth in RCr 10.26.

RCr 10.26 provides that, "[a] palpable error which affects the substantial rights of a party may be considered . . . by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error."

Thus, under RCr 10.26, an unpreserved error may be reviewed on appeal if the error is "palpable" and "affects the substantial rights of a party." Even then, relief is appropriate only "upon a determination that manifest injustice

has resulted from the error." Id. "Manifest injustice" means that "a substantial possibility exists that the result of the trial would have been different." Brock v. Commonwealth, 947 S.W.2d 24, 28 (Ky. 1997). An error is "palpable," only if it is clear or plain under current law. Brewer v. Commonwealth, 206 S.W.3d 343 (Ky. 2006). Generally, a palpable error "affects the substantial rights of a party" only if "it is more likely than ordinary error to have affected the judgment." Ernst v. Commonwealth, 160 S.W.3d 744, 762 (Ky. 2005).

That being said, the trial court's decision to exclude evidence of Garvey's misdemeanor probationary status was not error at all. It is well-settled that "[t]he presentation of evidence as well as the scope and duration of cross-examination rests in the sound discretion of the trial judge. This broad rule applies to both criminal and civil cases." Moore v. Commonwealth, 771 S.W.2d 34, 38 (Ky. 1988). Moreover, under KRE 611, a trial court is vested with sound judicial discretion as to the scope and duration of cross-examination and may limit such examination when "limitations become necessary to further the search for truth, avoid a waste of time, or protect witnesses against unfair and unnecessary attack." Derossett v. Commonwealth, 867 S.W.2d 195, 198 (Ky. 1993).

Though Appellant cites the Confrontation Clause in support of his right to cross-examine Garvey as to his misdemeanor probationary status:

> it is . . . well established that the right to cross-examination is not absolute and the trial court retains

> the discretion to set limitations on the scope and subject: "the Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish."

Capshaw v. Commonwealth, 253 S.W.3d 557, 566-67 (Ky. App. 2007) (citing Davenport v. Commonwealth, 177 S.W.3d 763, 768 (Ky. 2005)).

In other words, the trial courts "retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." Capshaw, 253 S.W.3d at 567.

Thus, although KRE 607 permits a witness' credibility to be questioned, the right to explore witness bias is not unlimited, even when considered in the context of the Confrontation Clause. As Capshaw held, "[d]efendants cannot run rough-shod, doing precisely as they please, simply because cross-examination is underway. So long as a reasonably complete picture of the witness' veracity, bias and motivation is developed, the judge enjoys [the] power and discretion to set appropriate boundaries." Id.

Here, although Banks' attorney argued Garvey's misdemeanor probationary status was relevant as his probation could be revoked for using illegal drugs, the trial court deemed Garvey's probationary status was irrelevant. This was because Garvey had already admitted sufficient facts to revoke his probation since he intended to get drunk on the day at issue, which

was prohibited by the terms of his probation. As the trial court noted, Garvey's probation could not be revoked any more for smoking marijuana.

Moreover, when the trial court asked Appellant's trial counsel what was the specific purpose for which he wanted to ask Garvey about his probationary status, Appellant's trial counsel essentially argued that the evidence of probation would prohibit Garvey from using controlled substances, and this evidence would discredit his testimony that he did not use controlled substances and his testimony that he possessed the $395.00 to buy alcohol. However, it is clear by implication that Appellant wanted the jury to believe that Garvey was using illegal drugs, that he intended to spend the $395.00 on the purchase of illegal drugs, and that he must be a drug dealer to purchase that many drugs.

Yet, the only relevance of such evidence would have been to impeach Garvey's testimony as to why he did not smoke marijuana with the other co-defendants. Therefore, evidence of Garvey's probationary status is, at best, only marginally relevant because the issue of whether or not Garvey smoked marijuana had nothing to do with, and provided no motivation for, Garvey to lie about being robbed, kidnapped and shot.

Accordingly, given the trial court's power to limit the scope of cross-examination, the trial court did not abuse its discretion in refusing to permit Appellant to ask Garvey about whether his misdemeanor probationary status prevented him from using illegal drugs at the time that Appellant robbed,

kidnapped, and shot him.

II. Second-Degree Assault Instruction

Appellant next argues the trial court erred in refusing to give a jury instruction for Second-Degree Assault as a lesser-included offense of the First-Degree Assault charge. At issue is the magnitude of Garvey's injuries. We must determine whether as a matter of law the Commonwealth proved that the injury Garvey suffered as a result of being shot by Appellant constituted a "serious physical injury," as is required to sustain a First-Degree Assault charge, but not a "physical injury," which would require an instruction on Second-Degree Assault.

We begin by reiterating the maxim that although a judge is required to instruct the jury on the whole law of the case, including any lesser included offenses, a judge does not have a duty to instruct on a theory with no evidentiary foundation. Gabow v. Commonwealth, 34 S.W.3d 63, 72 (Ky. 2000) (citing Houston v. Commonwealth, 975 S.W.3d 925, 929 (Ky. 1998)).

Lesser included offense instructions should be given if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater. Luttrell v. Commonwealth, 554 S.W.2d 75, 78 (Ky. 1977). In other words, a lesser included instruction is only appropriate if, given the evidence, a reasonable juror could entertain a reasonable doubt of the defendant's guilt on the greater charge, but believe beyond a reasonable doubt that the defendant is guilty of the lesser charge. Thompkins v. Commonwealth,

54 S.W.3d 147, 151 (Ky. 2001) (quoting Skinner v. Commonwealth, 864 S.W.2d 290, 298 (Ky. 1993)). When the evidence does not warrant a finding of guilty on the instruction, the trial court does not have a duty to instruct on the lesser included offense. Churchwell v. Commonwealth, 843 S.W.2d 336, 338 (Ky. App. 1992). The duty to instruct on lesser included offenses does not require the trial court to instruct on theories without evidentiary support. Thompkins, 54 S.W.3d at 151 (citing Houston, 975 S.W.2d at 929).

Here, Appellant concedes that sufficient evidence was presented from which a jury could find serious physical injury, a necessary element for First-Degree Assault. However, Appellant argues that, upon the same evidence, the jury could determine Garvey's injuries were moderate enough to sustain a conviction on the lesser included Second-Degree Assault charge which requires only a "physical injury" and argues the trial court erred by not issuing a Second-Degree Assault instruction. We disagree.

KRS 500.080(15) defines "serious physical injury" as "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[.]" In contrast, KRS 500.080(13) defines "physical injury" as "substantial pain or any impairment of physical condition." Thus, at issue is the magnitude of Garvey's injury.

Garvey was shot in the back. Gunshots, by their very nature, cause substantial, prolonged pain. Garvey had a bullet travel through and out his

shoulder and arm, causing bone fragments to explode out of the exit wound, fragments that he will never recover. After being shot, Garvey lost so much blood he passed out on multiple occasions before being rescued. He had to stay in the hospital for over a week.

Garvey testified that he still felt pain during trial, sixteen (16) months after the shooting. Even after six (6) weeks of painful rehabilitation therapy, Garvey was still laboring under impairments to the functioning of his arm and shoulder at trial. The missing bone fragments were replaced by hunks of metal. He also has large scars on the back of his arm and shoulder.

In Parson v. Commonwealth, 144 S.W.3d 775 (Ky. 2004), we noted:

> [the victim's] injuries resulted not only in headaches and neck pain, but also muscle spasms causing decreased range of neck motion, and numbness of her right arm. The numbness continued at least until her treatment by Dr. Zhou, which did not begin until five [(5)] months after the assault. . . . A jury could [] believe that [the victim] was still suffering from the effects of her injuries on the day of trial, nineteen months after the assault, and that the duration of those effects constituted a "prolonged impairment of health."

Id. at 787. We further held that pain is an "impairment of health," and that prolonged pain constitutes a "serious physical injury." Id.

In Clift v. Commonwealth, 105 S.W.3d 467, 470-472 (Ky. App. 2003), the Court of Appeals held that a reasonable juror could find that significant impairment of an eleven (11)-month-old's use of his arm for four (4) weeks due to a broken humerus is either a "prolonged impairment of health" or a

"prolonged loss or impairment of the function of [a] bodily organ" under KRS 500.080(15) and, therefore, constitutes a "serious physical injury."

The injuries sustained by the victims in Parson and Clift were less severe than those suffered by Garvey. Therefore, here, the evidence introduced at trial demonstrated Garvey suffered an injury that was either a "prolonged impairment of health" or "a prolonged loss or impairment of the function of [a] bodily organ." Thus, the Commonwealth proved, as a matter of law, that the injury Garvey suffered as a result of being shot by Appellant constituted a "serious physical injury." In light of this evidence, a reasonable juror could not entertain a reasonable doubt that Garvey received only a physical injury; accordingly, no lesser instruction for Second-Degree Assault was warranted. See, Thompkins, 54 S.W.3d at 151; Gabow, 34 S.W.3d at 72; Houston, 975 S.W.2d at 929. Thus, the trial court did not err in refusing to grant Appellant's request for a Second-Degree Assault instruction.

III. Requiring Witness to Show Tattoo

Finally, Appellant argues that the trial court erred by requiring Appellant's witness, Ryan Spence, to take off his shirt and show an alleged swastika tattoo to the jury. We agree, but conclude that the error was harmless.

Spence was Appellant's only witness. Spence said he knew Appellant but only as an acquaintance.[5] Spence was in jail with Rogers after Rogers' arrest

[5] The day before Spence was supposed to testify, Rogers' trial counsel, by private meeting, advised the trial court that Rogers had learned of allegations that Appellant was offering to pay two (2) other prisoners, Spence and David Welker, to testify on his

for his participation in Garvey's shooting. While in jail, Rogers and Spence played basketball together and might have gone to church together.

At trial, during direct examination, Spence admitted that he was a convicted felon and testified that, while incarcerated in the Breckinridge Detention Center, he came to know Rogers and Appellant. Spence said that when other prisoners asked Rogers what he had done to be in jail, he heard Rogers say that he "shot an Asian kid and put him in the trunk."

During cross-examination, the prosecutor asked Spence to take off his shirt in order to show the jury a swastika tattoo on the back of his arm.

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behalf. Rogers alleged that Appellant wanted them to testify that they heard Rogers say that he had shot the gun. Welker supposedly provided this information to Rogers in the presence of yet another prisoner, Chris Ditto.

Learning of these allegations, the trial court requested the Sheriff to assign a deputy to go to the Detention Center and investigate the matter. The deputy investigated the allegations and, later that afternoon, reported his findings to the trial court. Welker confirmed that Appellant had offered to put money "on my books" and take care of him if he testified for Appellant. Ditto confirmed that he heard Welker tell Rogers that Appellant had offered $1,000 to three (3) people, Welker, Spence, and an unidentified 3rd person, if they would testify on his behalf. Spence, however, told the deputy that he was testifying on his own free will. Upon receipt of the deputy's findings, the trial court advised all of the defendants and attorneys in chambers, since they potentially constituted exculpatory information to which the defendants were entitled under Brady v. Maryland, 373 U.S. 83 (1963).

The next morning, during Appellant's case-in-chief, Appellant's trial counsel requested another private meeting with the trial court. Appellant's trial counsel advised the court that Appellant still desired Spence to testify and he wanted the record to reflect that Appellant understood some of the problems with that decision. However, Appellant alleged that he had a "falling out" with Welker and Welker's allegations were not true.

The trial court explained to Appellant that if he called Spence, Spence's testimony could be nullified by Welker's and Ditto's contrary testimony and that a jury might also think that Appellant must be guilty if he tried to bribe witnesses. Nonetheless, Appellant still wanted Spence to testify. Appellant's trial counsel stated that he believed it was ethically proper for him to call Spence as a witness since he did not actually "know" who was telling the truth and the trial court agreed.

Spence refused. A bench conference was held in chambers and the prosecutor explained that the swastika tattoo was relevant as to Spence's credibility since, in addition to the bribery allegations, his testimony might additionally be motivated by racial bias, as Rogers was African-American and Spence and Appellant were white. Appellant, on the other hand, contended that the tattoo alone did not mean that Spence actually harbored racial prejudice. Over Appellant's objections, the trial court ordered Spence to take off his shirt and show his tattoo to the jury,[6] but cautioned that they were to view the evidence only as it bore on Spence's credibility for "testimony that appears to be non-favorable to an African-American.[7]" Notwithstanding the admonishment, Appellant now argues the trial court's decision to order Spence to show the jury his tattoo amounted to reversible error.

We begin by noting that, generally, a trial judge's ruling on an admissibility issue, if supported by substantial evidence, is dispositive of the question. Harris v. Commonwealth, 793 S.W.2d 802 (Ky. 1990); Halvorson v. Commonwealth, 730 S.W.2d 921 (Ky. 1986); RCr 9.78. Therefore, the trial court's decision to admit evidence of Spence's swastika tattoo is reviewed for an abuse of discretion. See Partin v. Commonwealth 918 S.W.2d 219 (Ky. 1996);

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[6] The argument presumes the existence of a swastika tattoo. Appellant objected at trial, saying that the record should reflect that Spence did not have a swastika because he did not see one. The trial court acknowledged that he did not see a swastika either. The prosecutor argued the tattoo was a swastika, but Spence insisted the tattoo had been modified into an iron cross.

[7] The trial court admonished the jury as follows: [i]f it exists, I'm not saying whether it does or not, you saw what you saw. If it exists, it's relevant only to the extent that it bears on his credibility as a witness who is giving testimony which would appear to be non-favorable to an African-American."

Jarvis v. Commonwealth, 960 S.W.2d 466 (Ky. 1998); Commonwealth v. English, 993 S.W.2d 941 (Ky. 1999). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." English, 993 S.W.2d at 945.

Here, we hold that the trial court abused its discretion in ordering Spence to display his tattoo for the jury. While, in general, it is true that "[w]itness credibility is always at issue," King v. Commonwealth, 276 S.W.3d 270, 275 (Ky. 2009) (quoting Commonwealth v. Maddox, 955 S.W.2d 718, 721 (Ky. 1997)), it is equally true that evidence must be relevant, defined as "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." KRE 401. In this instance, the stated relevancy of Spence's swastika tattoo was that its presence on his person was tantamount to his racial bias towards African Americans. Though, by and large, that may often be the inference, we simply cannot say that it was the appropriate inference here because *no other evidence* was presented – either direct or circumstantial in character – which tended to show what Spence's swastika tattoo meant to him, why he chose to have it placed on his body, or whether he had any particular feelings, negative or positive, towards African-Americans or any ethnic group at all. In this way, the relevancy of the tattoo, defined as evidence of Spence's racial bias, depended, at least in part, "upon the fulfillment of a condition of fact," and the independent evidence presented was

so patently lacking as to be insufficient to support that finding.[8] See KRE 104(b).

Nevertheless, because we cannot say that "'the error itself had substantial influence'" upon Appellant's trial such that it "substantially swayed" his conviction, we hold that the error was harmless and does not warrant a new trial. Winstead v. Commonwealth, 283 S.W.3d 678, 688-89 (Ky. 2009) (quoting Kotteakos v. United States, 328 U.S. 750, 765 (1946)); see also RCr 9.24. In light of the fact that Welker subsequently testified that Appellant offered to pay him and Spence, his cellmate, for favorable testimony, independent evidence strongly suggested that Spence's credibility was suspect for reasons other than racial bias. Moreover, the Commonwealth's evidence overwhelmingly pointed to Appellant's guilt, which evidence included not only Garvey's testimony and corroborating physical evidence, but also: Appellant's admission to picking up Garvey and taking him to his home; Appellant's admission that Garvey was attacked, bound, and placed in the truck of his car; Appellant's admission that he held the gun and shot it at Garvey as Garvey was fleeing into the woods; and, Perks' testimony that Appellant bound Garvey, placed him in his trunk, and shot at him as he fled.

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[8] The Commonwealth contends that because this Court has acknowledged the proper admission of similar demonstrative evidence in the past, we should likewise do so here. See Riley v. Commonwealth, 620 S.W.2d 316, 319 (Ky. 1981). Riley, however, involved the use of such evidence for purposes of *identifying* an accused, not as evidence of witness credibility. Id. at 318. As such, the relevance of Spence's tattoo turns upon very different considerations – namely, the connection between the tattoo's meaning and the witness who wears it.

Conclusion

For the foregoing reasons, we affirm Appellant's convictions for Kidnapping, Robbery in the Second Degree and Assault in the First Degree.

Minton, C.J.; Abramson, Cunningham, Schroder, Scott, and Venters, JJ., concur. Noble, J., dissents in part by separate opinion.

NOBLE, J., DISSENTING IN PART: I concur with the majority except that I do not think admission of the tattoo was harmless.

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