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RENDERED: JANUARY 20, 2011
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2009-SC-000681-MR

CHARLES H. WHALEY, III — APPELLANT

V.

ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
NO. 08-CR-001678

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

On the morning of April 15, 2008, Appellant, Charles H. Whaley, III, entered the Oaks Smokes Tobacco store in Louisville, Kentucky. Appellant, wearing a hoodie sweatshirt, walked to the back of the store to get a soft drink. Moments later, Appellant went to the counter and asked the cashier, Sheryl Rourke, for a package of Swisher Sweets blunts. After placing the blunts on the counter, Appellant asked Rourke for the money in the register. At first, Rourke refused to open the cash register, but did so after Appellant pointed a handgun at her. Appellant then took approximately $150 from the register and left the building. Rourke immediately called the police.

Four days later, on April 19, 2008, Appellant returned to the Oaks Smokes Tobacco store. Appellant, brandishing a handgun, entered the building and yelled at Rourke: "Bitch, get on your knees." Appellant then walked behind the counter, put the handgun to Rourke's head, and cocked the weapon. Rourke reached up and opened the register. As Appellant left the store with approximately $400, he stated: "This is what you get for being a smart ass the first time."

On the evening of April 30, 2008, Appellant entered Waldman's Liquor store in Louisville, Kentucky. Bruce Dansby, an employee, was stocking shelves when he felt a handgun being placed to his side. Appellant then demanded that Dansby walk to the register and give him the cash. Appellant took approximately $275-$300, as well as several bottles of liquor.

Approximately three weeks later, on May 21, 2008, Appellant entered Oak Street Hardware in Louisville, Kentucky. Appellant asked Sally Taylor, the cashier, if she could give him change for a dollar. After Taylor opened the register, Appellant walked around the counter and sat on a stool next to her. Seconds later, Appellant shot Taylor in the leg and took approximately $80 from the register.

Appellant was arrested on May 22, 2008, and a three-day jury trial commenced on July 6, 2009. Appellant was convicted in the Jefferson Circuit Court of four counts of first-degree robbery, one count of first-degree assault, and one count of first-degree wanton endangerment. The jury recommended a sentence of ten years for each robbery conviction, twelve years for the assault

conviction, and one year for the wanton endangerment conviction. The jury recommended that the sentences for three of the robbery counts and the wanton endangerment count be served concurrently with one another. The jury also recommended that the sentences for the remaining count of robbery and the assault charge be served concurrently with one another. Both sets of sentences were ordered to be served consecutively to one another for a total of twenty-two years imprisonment. Appellant now appeals the final judgment entered as a matter of right. Ky. Const. § 110(2)(b).

Appellant raises six allegations of error on appeal: (1) the trial court erred in denying his request for an instruction on assault in the second-degree based on wanton conduct; (2) a directed verdict should have been granted on the first-degree assault charge; (3) identifications should have been suppressed due to the unduly suggestive identification procedure; (4) the trial court erred in denying an instruction on eyewitness identification; (5) his statements to the police following his arrest should have been suppressed; and (6) the trial court erred in denying his request to introduce additional portions of his statement to the police.

Additional facts will be set out as necessary later in this opinion.

Instruction on second-degree assault for wanton conduct

Appellant argues that the trial court erred in failing to submit to the jury an instruction he tendered for second-degree assault based upon wanton conduct. According to Appellant, the jury could have reasonably believed from the evidence that his actions were not intentional. Specifically, Appellant

points to the fact that Sally Taylor never saw the gun, that the location of her wound was not typical for robbery, and that it was consistent with the robber "fooling around" and the gun accidentally discharging. Additionally, Appellant argues that his mental state was based entirely upon circumstantial evidence and, thus, the trial judge should have instructed on every possible mental state for an assault-type offense.

Kentucky law requires instructions "applicable to every state of case covered by the indictment and deducible from or supported to any extent by the testimony." *Commonwealth v. Collins*, 821 S.W.2d 488, 491 (Ky. 1991) (quoting *Lee v. Commonwealth*, 329 S.W.2d 57, 60 (Ky. 1959)). *See also* RCr 9.54(1). A defendant is entitled to an instruction on any lawful defense that he has, including the defense that he is guilty of a lesser included offense of the crime charged. *Slaven v. Commonwealth*, 962 S.W.2d 845, 856 (Ky. 1997). An instruction on a lesser included offense is required if the evidence would permit the jury to rationally find the defendant not guilty of the primary offense, but guilty of the lesser offense. *Commonwealth v. Wolford*, 4 S.W.3d 534, 539 (Ky. 1999). A trial court's rulings on instructions are reviewed under an abuse of discretion standard. *Ratliff v. Commonwealth*, 194 S.W.3d 258, 274 (Ky. 2006) (citing *Johnson v. Commonwealth*, 134 S.W.3d 563, 569-70 (Ky. 2004)).

Although the prosecution in a criminal case has the burden of proving every element of the defendant's guilt beyond a reasonable doubt, we have long held that *mens rea*, specifically intent, may be inferred from circumstances. *McClellan v. Commonwealth*, 715 S.W.2d 464, 466 (Ky. 1986); *Commonwealth*

v. Phillips, 655 S.W.2d 6 (Ky. 1983), *Wilson v. Commonwealth*, 601 S.W.2d 280 (Ky. 1980). In the instant case, the Commonwealth offered evidence that Appellant told Taylor he would shoot her, thus informing her that he possessed a handgun; and that he subsequently fired that handgun, resulting in an injury to her leg. The fact that Taylor may not have seen the weapon does not necessarily change the *mens rea* to a lesser degree than intentional. No testimony was offered at trial that Appellant accidentally discharged his weapon. Instead, testimony from defense witnesses consistently maintained that Appellant was not at the hardware store at the time of the robbery. Simply put, there was no evidentiary foundation for the requested instruction. *See Houston v. Commonwealth*, 975 S.W.2d 925, 929 (Ky.1998).

Based upon the evidence presented in this case, we do not believe the trial court abused its discretion in denying Appellant's request for an instruction on assault in the second-degree based on wanton conduct.

Directed verdict on first-degree assault

Appellant tendered a motion for a directed verdict on the first-degree assault count, claiming that the evidence was insufficient as a matter of law to support the statutory elements set out in KRS 508.010. Specifically, Appellant contends that the Commonwealth failed to prove that the injury suffered by Sally Taylor constituted a "serious physical injury."

On motion for a directed verdict, the trial judge must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. *Commonwealth v. Benham*, 816 S.W.2d 186 (Ky. 1991). The standard for

appellate review of a denial of a motion for a directed verdict based on insufficient evidence is if, under the evidence as a whole, it would be clearly unreasonable for a jury to find the defendant guilty, then he is entitled to a directed verdict of acquittal. *Commonwealth v. Sawhill,* 660 S.W.2d 3 (Ky. 1983).

KRS 508.010(1)(a) provides that a person is guilty of first-degree assault when "[h]e intentionally causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument." "Serious physical injury" is defined under KRS 500.080(15) 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." "KRS 500.080(15) sets a fairly strict level of proof which must be met by sufficient evidence of injury, medical and/or non-medical . . . ." *Prince v. Commonwealth,* 576 S.W.2d 244, 246 (Ky. App. 1978). The seriousness of a physical injury depends upon the nature of the injury, as well as the victim's characteristics. *See, e.g., Johnson v. Commonwealth,* 926 S.W.2d 463 (Ky.App. 1996); *Cooper v. Commonwealth,* 569 S.W.2d 668 (Ky. 1978).

According to Appellant, the gunshot wound sustained by Taylor did not create a substantial risk of death, as no major blood vessels were injured and she was released from the hospital after only nine hours. While we agree that the wound did not create a substantial risk of death, Taylor testified that, due to her injury, she now feels "shooting pains" in her leg and has developed

problems walking. In order to alleviate some of this pain, Taylor has been prescribed medication. As this Court stated in *Parson v. Commonwealth*, 144 S.W.3d 775, 787 (Ky. 2004), "[i]f the pain is substantial, but not prolonged, it constitutes a 'physical injury;' but if it is prolonged, then it is a 'serious physical injury.'" At trial, Taylor indicated that these symptoms have persisted. Thus, the pain that Taylor felt had continued for at least a period of one year when the trial began.

In *Parson*, it was held that prolonged headaches, numbness, and neck pain were sufficient to constitute "serious physical injury" pursuant to KRS 500.080(15). *Id.* at 786-87. When considering the evidence from this case in the light most favorable to the Commonwealth, it seems clear that the jury could have reasonably inferred that the partial loss of functionality in her leg, as well as the shooting pains Taylor described, and the duration of those effects for at least a period of one year, constituted a "prolonged impairment of health." Accordingly, we find no error by the trial court.

Suppression of identifications

On May 22, 2009, a suppression hearing was conducted in response to Appellant's motion to suppress the out-of-court identifications and to exclude any evidence based upon those "tainted" identifications. Specifically, Appellant argued that the photo-pack used by Detective Steven Presley was unduly suggestive. The trial court subsequently denied his motion.

Our standard of review of a decision of the trial court on a suppression motion following a hearing is twofold. First, the factual findings of the trial

court are conclusive if they are supported by substantial evidence. RCr 9.78; *Canler v. Commonwealth*, 870 S.W.2d 219, 221 (Ky. 1994). Second, when the findings of fact are supported by substantial evidence, the question then becomes whether the rule of law as applied to the established facts is violated. *Adcock v. Commonwealth*, 967 S.W.2d 6, 8 (Ky. 1998). Thus, we conduct a *de novo* review to determine whether the court's decision was correct as a matter of law. *Roberson v. Commonwealth*, 185 S.W.3d 634, 637 (Ky. 2006).

In examining a pre-trial identification, we must "first determine whether the confrontation procedures employed by the police were 'suggestive.'" *Wilson v. Commonwealth*, 695 S.W.2d 854, 857 (Ky. 1985). If we conclude that the procedures were not suggestive, then the analysis ends. *King v. Commonwealth*, 142 S.W.3d 645, 649 (Ky.2004). If we conclude that the procedures were suggestive, then we must determine "whether under the totality of the circumstances the identification was reliable even though the confrontation procedure was suggestive." *Neil v. Biggers*, 409 U.S. 188, 199 (1972) (internal quotations omitted).

We do not believe that the photo-pack used in this case was "unduly suggestive." According to the testimony of Detective Presley, in creating the photo-pack, the officers took the identifiers of Appellant; namely, age, height, weight, and skin color, and placed that information into the Mugs Plus computer program. This program gives the officers other mug shots to select from based on the similarity of the physical traits to those of the suspect. Five such similar mug shots are then placed with the suspect's photo to create the

photo-pack, and the photos themselves are identified by number. Additionally, the three witnesses were separated when the identifications took place.

Appellant claims that the photo-pack was unduly suggestive for three reasons: (1) Appellant is the only individual shown with a scar on his lip; (2) Appellant appears to be slimmer than any of the other individuals; and (3) the victims were told that the photos were taken from the Mugs Plus system, thereby making it more likely that the victims would make an identification. Upon extensive review of the photo array, we can find no error by the trial judge in his decision that the photo-pack was not unduly suggestive. All six photos are of African-American males; all are pictured in substantially similar surroundings; and it is clear that all were in custody at the time the photographs were taken. In addition, the police officers expressly informed the victims that the suspect may or may not be in the photo-pack, and that it was okay if they could not make a proper identification.

As to Appellant's argument that no other individual from the photo-pack had a scar above his lip, we do not believe that this alone is sufficient to make the pack unduly suggestive. The men in the photographs do not closely resemble one another, but all loosely fit the description the victims gave the detective. Nothing distinguishes one individual from another, except for the differing facial features. Each of the victims had an opportunity to observe Appellant in good light and each selected his photograph from the photo-pack. In a situation such as this, the accuracy of the witness's identification must be assessed by a jury. *Stephens v. Commonwealth*, 489 S.W.2d 249 (Ky. 1972).

The photographic line-up was not made impermissibly suggestive merely because the individuals in the photo-pack did not closely resemble one another. Therefore, we hold that the trial court did not err in denying Appellant's motion to suppress the victims' identifications of him.

Instruction on eyewitness identification

Appellant next argues that the trial court erred in denying his instruction on the questions surrounding the reliability of eyewitness testimony. We disagree. As this Court made clear in *Evans v. Commonwealth*, 702 S.W.2d 424 (Ky. 1986) (internal citations omitted):

> An instruction on eyewitness identification is not required in Kentucky. Such an instruction would give undue emphasis to a particular aspect of the evidence. The substance of the requested instruction was encompassed by the reasonable doubt instruction given by the trial court.

Here, Appellant had the opportunity to offer evidence of the problems inherent in eyewitness testimony in the form of expert opinion. Appellant chose instead to insist that the trial judge instruct the jury about the risks of such evidence. The trial judge refused to grant Appellant's request for this instruction. This decision was proper and we will not disturb the trial judge's ruling.

Suppression of Appellant's statements to police following arrest

Appellant next argues that the trial court erred in failing to suppress his statements given to police following his arrest. According to Appellant, these

statements were involuntary and the product of coercive techniques on the part of the police.

At the suppression hearing on July 6, 2009, Detective Lawrence Zehnder testified that Appellant was informed of his *Miranda* rights prior to questioning, and that Appellant signed a waiver of those rights. Detective Zehnder indicated that he interviewed Appellant for approximately ninety minutes, and at no point did Appellant request an attorney or that the questioning cease. Detective Zehnder stated on cross-examination that other detectives questioned Appellant throughout the night, but he was unable to recall which officers did the questioning or how long the questioning continued. Appellant claims the police used sleep deprivation as a tactic to coerce statements from him.

As noted earlier, on appellate review of an order denying a motion to suppress evidence, we first review the trial court's findings of fact under the clearly erroneous standard, and then we review *de novo* the application of the law to those facts. *Welch v. Commonwealth*, 149 S.W.3d 407, 409 (Ky. 2004). The trial court found Appellant's statements to have been voluntarily made. After a review of the record, we find no evidence to substantiate Appellant's claims concerning sleep deprivation, nor any evidence that the questioning was in any way coercive. The trial court properly denied Appellant's motion to suppress.

Introduction of additional portions of Appellant's statement

As to Appellant's final argument, we find this issue to be without merit. Appellant maintains that the trial court erred in not allowing evidence

contained within his statement to police after his arrest. Appellant alleges he consistently denied being involved in the events giving rise to the current charges. After reviewing the record, it is clear that Appellant's denial of involvement was elicited during an avowal made by Detective Zehnder, as well as during defense counsel's cross-examination of that witness. Defense counsel specifically asked Detective Zehnder if Appellant ever admitted to engaging in these actions, to which Detective Zehnder replied in the negative. Therefore, the jury was fully aware of Appellant's defense. Accordingly, we find no error, harmless or otherwise.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is hereby affirmed.

All sitting. All concur.

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