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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: SEPTEMBER 20, 2012
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2011-SC-000604-MR

STEVEN L. TURNER — APPELLANT

V.

ON APPEAL FROM BELL CIRCUIT COURT
HONORABLE ROBERT COSTANZO, JUDGE
NO. 10-CR-00280

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

REVERSING

On August 5, 2010, Freddie Westfelt was riding in a car with Dominic Carton, Demetrice Osborne, and Appellant, Steven Turner. Carton was driving the vehicle. Westfelt and Turner had been drinking and taking drugs throughout the afternoon. An argument ensued among the men. Westfelt was beaten and left on the side of the road. He was later given a ride home by a passerby.

Westfelt went to the emergency room that evening. His face was swollen and bruised, and tests revealed that he had suffered three broken facial bones. He was not admitted to the hospital, but sent home with pain medication, steroids, and a referral to an ear, nose and throat specialist in Lexington. He never went to the specialist.

The following day, Westfeld went to the Bell County Sheriff to report the assault. He gave a recorded statement in which he claimed that Appellant, Carton, and Osborne all participated in the beating. He said he escaped by running some distance from the car and diving over a hill. When he returned to the scene, the other men were gone and he could not find his wallet, which contained over $800.

Based on this statement, Carton, Osborne, and Appellant were each arrested. Eventually, Appellant was indicted on charges of robbery in the first degree and being a persistent felony offender in the first degree. On the morning of trial, the robbery charge was amended down to assault in the second degree.

Just before the trial began, Westfelt informed the Commonwealth that he no longer wanted to testify because Appellant was "family." Nonetheless, he took the stand and gave testimony that differed sharply from the statement given at the sheriff's office. He testified that Osborne had started hitting him, and that Carton joined in the attack. When Westfelt asked Appellant for help, Appellant told Osborne to stop attacking him. Upon being confronted with the statement he had provided the day after the attack, Westfelt claimed that he had been high on drugs.

Osborne testified that Appellant had initiated the attack on Westfelt because he believed that Westfelt had been drinking his beer without paying for it. Osborne testified that he and Carton had stopped the assault by pulling

Appellant off of Westfelt. Carton testified at trial, also stating that Appellant alone had beaten Westfelt.

Appellant was found guilty of second-degree assault and being a persistent felony offender ("PFO") in the first degree. The Bell Circuit Court followed the jury's recommended ten-year sentence, which was enhanced to twenty years by virtue of the PFO conviction. This appeal followed.

Appellant argues that he was entitled to an instruction on the lesser-included offense of fourth-degree assault. The issue is preserved by defense counsel's oral motion. RCr 9.54(2); *Hall v. Commonwealth*, 337 S.W.3d 595, n. 46 (Ky. 2011). We agree that the trial court erred in refusing to deliver the requested instruction.

The trial court must instruct the jury on the whole law of the case, including any charge which is supported to any extent by the evidence. *Holland v. Commonwealth*, 114 S.W.3d 792, 802 (Ky. 2003). A defendant is entitled to an instruction on a lesser-included offense if, considering the totality of the evidence, "the jury might have a reasonable doubt as to the defendant's guilt of the greater offense, and yet believe beyond a reasonable doubt that he is guilty of the lesser offense." *Houston v. Commonwealth*, 975 S.W.2d 925, 929 (Ky. 1998).

Appellant was convicted of second-degree assault, which requires that a person "intentionally cause[] serious physical injury to another person." KRS 508.020(1)(a). Serious physical injury is an 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). A person is guilty of fourth-degree assault when he "intentionally or wantonly causes physical injury to another person." KRS 508.030(1)(a). Physical injury is "substantial physical pain or impairment of physical condition." KRS 500.080(13).

We agree with Appellant that the extent of Westfelt's injuries was a question for the jury to determine. Westfelt testified that three bones in his face were broken during the attack. He was treated at the emergency room and given a prescription for pain medication. According to the attending nurse, his injuries were not life-threatening. Westfelt also testified that he was fully healed within "a couple of weeks" without further care, and that he suffered no further impairment from the injuries.

By denying the fourth-degree assault instruction, the trial court necessarily concluded that Westfelt's injuries constituted "serious physical injuries" as a matter of law. We disagree with this characterization of the injuries. *Cf. Trent v. Commonwealth*, 606 S.W.2d 386 (Ky. App. 1980) (fourth-degree assault instruction not warranted where victim was shot, underwent five surgeries, and lost movement in his fingers); *Jones v. Commonwealth*, 737 S.W.2d 466 (Ky. App. 1987) (fourth-degree assault instruction properly denied where victim lost his eye in attack). Whether Westfelt suffered "serious physical injury" was a proper question for the jury to determine. *See Rowe v. Commonwealth*, 50 S.W.3d 216 (Ky. App. 2001) (defendant was entitled to fourth-degree assault instruction where victim's chin was broken and teeth

were knocked out of place, resulting in severe pain and victim's mouth being wired shut for six weeks). The trial court erred in refusing to deliver a fourth-degree assault instruction. Failure to give a necessary lesser-included offense instruction cannot be deemed harmless. *Commonwealth v. Swift*, 237 S.W.3d 193, 196 (Ky. 2007).

Because we must reverse and remand this matter due to the aforementioned error, we only briefly address those claims of error that are likely to recur if the evidence presented at retrial is substantially similar. *St. Clair v. Commonwealth*, 174 S.W.3d 474, 485 (Ky. 2005). The evidence presented by the Commonwealth was sufficient to overcome Appellant's motion for a directed verdict on the second-degree assault charge. *See Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991). As explained above, there was a legitimate jury question as to the extent of Westfelt's injuries. Further, Osborne and Carton testified that Appellant inflicted those injuries. The trial court did not err in denying the motion.

Further, Appellant was not entitled to an instruction on facilitation to commit second-degree assault. Defense counsel argued that a facilitation instruction was warranted because the jury might have believed that Appellant was too high or drunk to stop the assault. This argument fails for several reasons.

KRS 506.080(1) requires that the alleged facilitator "engage[] in conduct which knowingly provides" the principal actor with the "means or opportunity for the commission of the crime." Assuming as true that Appellant was too

intoxicated to stop the attack, there was no evidence that he became so intoxicated in order to provide Osborne and Carton the opportunity to assault Westfelt. Moreover, there is no evidence that Appellant's intoxication did, in fact, aid in the commission of the assault. The evidence presented at trial supported only two reasonable conclusions: that Appellant attacked Westfelt, or that he was an innocent, albeit extremely inebriated, witness to an attack carried out by Catron and Osborne. The trial court did not err in refusing to deliver the instruction.

For the foregoing reasons, the judgment of the Bell Circuit Court is reversed and the case is remanded for further proceedings consistent with this opinion.

All sitting. All concur.

COUNSEL FOR APPELLANT:

Samuel N. Potter
Department of Public Advocacy
Assistant Public Advocate
100 Fair Oaks Lane, Suite 302
Frankfort, KY 40601

COUNSEL FOR APPELLEE:

Jack Conway
Attorney General

Perry Thomas Ryan
Assistant Attorney General
Office of Attorney General
Criminal Appellate Division
1024 Capital Center Drive
Frankfort, KY 40601-8204