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Supreme Court of Kentucky

2012-SC-000210-MR

GIOVANNI WRIGHT

APPELLANT

V.

ON APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
NO. 11-CR-00283-002

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART, REVERSING IN PART AND REMANDING

Giovanni Wright appeals as a matter of right from a judgment of the Kenton Circuit Court sentencing him to a twenty-year prison term after he was found guilty of first-degree robbery, second-degree assault, tampering with physical evidence, second-degree fleeing and evading police, and being a second-degree persistent felony offender. Ky. Const. § 110(2)(b). Wright raises four errors on appeal. First, Wright claims that the trial court erred when it failed to direct a verdict of acquittal on the second-degree assault charge. Second, Wright argues that the trial court erred when it declined to give a jury instruction on theft by unlawful taking. Third, Wright alleges that the trial court erred when it denied his motion to suppress witness identifications made as a result of an inherently suggestive show-up procedure. Finally, Wright asserts the jury panel did not represent a fair cross-section of his community.

FACTS

On the evening of February 19, 2011, Clifton Fowler and Raquita Coley joined friends Daysha Sprawl, Beverly Sprawl, Anastasia Benefield, and Amber Barnes at a bar in Covington, Kentucky. Around 2:30 a.m., the group left the bar and returned to Benefield's car in a nearby parking lot. As the group conversed around the vehicle, two males, later identified as Appellant Giovanni Wright and Buddy Eaton, approached. Wright produced a handgun and demanded that Fowler give him his property. Assuming that the man was a friend of Fowler's who was joking around, Coley shoved Wright, who in turn fired the weapon towards the ground exclaiming, "This ain't no game!" Shrapnel from the bullet struck Beverly in the lower leg. Fowler then began to surrender various items to the men, including a pendant necklace, a bracelet, earrings, his wallet, and his cell-phone. The men began to leave, but briefly returned to take Fowler's hat and glasses. They then fled on foot.

Nearby police officers on patrol heard the gunshot and moved towards Fowler and the rest of the group. Officer Brian Steffen and Officer David Griswold witnessed two men running down an alley adjacent to the scene. When the men ignored the officers' command to stop, they pursued the suspects. Eaton discarded a handgun into a garbage can before being apprehended by Officer Steffen. Meanwhile, Officer Griswold witnessed Wright throw an object which he assumed was a handgun onto the pavement as he fled. Wright was arrested after climbing into the backseat of an unlocked car

as he attempted to evade police. A search incident to the arrest of Wright uncovered Fowler's property.

Wright and Eaton were jointly indicted by a Kenton County grand jury for robbery in the first degree, assault in the second degree, tampering with physical evidence, and fleeing or evading police in the first degree. Wright was also indicted for persistent felony offender in the second degree. Eaton entered a plea of guilty, while Wright proceeded to trial. The jury found Wright not guilty of first-degree fleeing and evading, but convicted him of the lesser included offense of second-degree fleeing and evading. He was found guilty of all other charges. The jury recommended an enhanced sentence of twenty years for first-degree robbery, fifteen years for second-degree assault, and five years for tampering to be served concurrently for a total sentence of twenty years' imprisonment. The trial court sentenced Wright accordingly. This appeal followed.

ANALYSIS

I. The Evidence Did Not Support a Second-Degree Assault Conviction.

At trial, the Commonwealth presented evidence of Beverly Sprawl's injuries. The shrapnel from the bullet struck Sprawl's left calf, causing bleeding and a burning sensation. The medical personnel who arrived on the scene used tweezers to remove the shrapnel from Sprawl's leg. She required no further medical treatment or care following the incident.

Wright asserts that the trial court erred to his substantial prejudice when it denied his motion for a directed verdict of acquittal on the second-

degree assault charge. Wright argues that the Commonwealth failed to prove beyond a reasonable doubt that Sprawl suffered serious physical injury. The Commonwealth responded to Wright's motion by arguing that the scar on Sprawl's leg constituted prolonged disfigurement sufficient to constitute serious physical injury. Wright moved for a directed verdict on his second-degree assault charge at the close of the Commonwealth's case in chief, and renewed that motion at the close of his case.

In a criminal trial, the Commonwealth has the burden of proving every element of the charged offense beyond a reasonable doubt. Kentucky Revised Statute ("KRS") 500.070(1). The test for a directed verdict has been established by long-standing precedent in Kentucky:

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. On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal.

Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991). See also *Commonwealth v. Sawhill*, 660 S.W.2d 3 (Ky. 1983).

To withstand a motion for a directed verdict, the Commonwealth must submit evidence of substance, and the trial court may direct a verdict in favor of the defendant if the Commonwealth produces a "mere scintilla of evidence."

Sawhill, 660 S.W.2d at 5. The elements of second-degree assault are prescribed in KRS 508.020, which provides in pertinent part:

- (1) A person is guilty of assault in the second degree when:
 - (a) He intentionally causes serious physical injury to another person; or
 - (b) He intentionally causes physical injury to another person by means of a deadly weapon or dangerous instrument; or
 - (c) He wantonly causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument.

At trial, the trial court presented the following second-degree assault instruction to the jury:

- A. That in Kenton County on or about February 20, 2011, and before the finding of the Indictment herein, [Giovanni Wright] caused a physical injury to Beverly Sprawl by shooting her with a handgun;
- AND
- B. That in so doing he wantonly caused a serious physical injury to Beverly Sprawl and the handgun was a deadly weapon as defined in Instruction No. 3.

When we examine the second-degree assault instructions and the language of KRS 508.020, it is apparent that the trial court instructed the jury specifically on subsection (c). However, when considering the propriety of a motion for directed verdict “the issue is not whether the instruction conformed to the evidence introduced at trial, but whether the Commonwealth presented sufficient evidence of second-degree assault to avoid a directed verdict of acquittal.” *Barth v. Commonwealth*, 80 S.W.3d 390, 400 (Ky. 2001), *Murphy v. Commonwealth*, 50 S.W.3d 173, 179 (Ky. 2001); see also *Benham*, 816 S.W.2d at 187. Though Wright asserts that reversal is warranted due to insufficient evidence, an issue that was preserved by his motions for a directed verdict, the essence of his argument concerns the jury instruction on second-degree

assault, to which he did not object. Nevertheless, every element of second-degree assault must be examined to determine if the Commonwealth failed to meet the burden of proof.

The instructions defined 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[.]”¹ The bulk of Wright’s argument against the denial of his motion focuses on the evidence necessary to prove *serious physical injury* beyond a reasonable doubt, implicating KRS 508.020(a) and (c). Certainly the Commonwealth did not attempt to prove that Sprawl’s injury created a substantial risk of death, prolonged impairment of health, or loss or impairment of body function. Therefore, Wright maintains that the only element remaining is prolonged disfigurement, and that the Commonwealth’s proof of that element fails under our decision in *Anderson v. Commonwealth*, 352 S.W.3d 577 (Ky. 2011).

In *Anderson*, this Court concluded that a small scar on the victim’s jaw did not constitute “serious and prolonged” disfigurement that would support a charge of first-degree assault.² 352 S.W.3d at 582. The injury observed in *Anderson* was a “cut [on] the side of [the victim’s] face, on the jaw line, with a straight razor, inflicting a laceration that was one inch deep and bleeding.” *Id.* Noting that although a scar does constitute a disfigurement, this Court

¹ This definition is consistent with KRS 500.080(15).

² The statutory definition of “serious physical injury” is the same for both first-degree and second-degree assault. See KRS 500.080(15).

ultimately determined that the victim's injury in *Anderson* did not constitute "serious and prolonged" disfigurement sufficient to establish "serious physical injury" under the assault statute. *Id.*; KRS 500.080(15).

In this case, in order to convict Wright of second-degree assault under KRS 508.020 (a) or (c), the Commonwealth needed to prove that Wright either *intentionally* or *wantonly* caused "serious physical injury" to Beverly Sprawl. We agree with Wright that the scar on Sprawl's leg, much like the jaw-line scar on the victim in *Anderson*, "is not of sufficient severity to support a finding of 'serious physical injury' under the second prong of KRS 500.080(15)." 352 S.W.3d at 582. Therefore, we must examine whether the Commonwealth produced evidence of substance proving that Wright's conduct met the statutory requirement of subsection (b), specifically that he intentionally caused "physical injury to [Sprawl] by means of a deadly weapon or a dangerous instrument." KRS 508.020(b).

Physical injury is defined by KRS 500.080 (13) as "substantial physical pain or any impairment of physical condition." This Court has held that when a deadly weapon or dangerous instrument is involved in the commission of an assault the statutory requirements of second-degree assault are met when "any injury results, as the words 'impairment of physical condition' used in the KRS 500.080(13) definition, simply mean 'injury.'" *Doneghy v. Commonwealth*, 410 S.W.3d 95, 111 (Ky. 2013) (*quoting Commonwealth v. Potts*, 884 S.W.2d 654 (Ky. 1994)). Here, the gun was fired into the ground, causing shrapnel to strike Sprawl in the calf. The shrapnel caused bleeding, a burning sensation, and

scarring. Pieces of the bullet had to be removed by medical personnel. It is undisputable that Sprawl suffered a “physical injury” as a result of Wright’s actions. However, we cannot say that the Commonwealth offered evidence that proved that Wright *intentionally* caused Sprawl’s injury. Trial testimony established that Sprawl was seated in the back seat of the vehicle when Wright and Eaton approached. Wright then demanded that Fowler surrender his property, firing the handgun into the ground after Coley shoved him.

The Commonwealth did not provide any evidence to suggest that Sprawl was the intended target of the robbery, that either Wright or Eaton separately approached Sprawl, or that the weapon was ever pointed at Sprawl during the robbery. The evidence does not support the conclusion that Wright intentionally caused physical injury to Sprawl by firing the handgun into the ground. In sum, we agree that the Commonwealth failed to prove beyond a reasonable doubt that Wright intentionally caused serious physical injury to Sprawl, intentionally caused physical injury to Sprawl by means of a deadly weapon or dangerous instrument, or wantonly caused serious physical injury to Sprawl by means of a deadly weapon or a dangerous instrument. The trial court erred when it failed to direct a verdict of acquittal as to Wright’s second-degree assault charge. Accordingly, we reverse Wright’s second-degree assault conviction.

II. Theft By Unlawful Taking Jury Instruction Was Not Supported By the Evidence.

At trial, Christopher Fowler described one of the items taken by Wright as a pendant-style necklace adorned with rubies and diamonds. When defense

counsel asked Fowler how much he had paid for the necklace, the Commonwealth objected. At the ensuing bench conference, the Commonwealth asserted that the value of the necklace was irrelevant. Wright's counsel responded that he intended to ask for a jury instruction on theft and therefore needed to establish the item's value. The court allowed the question, and Fowler answered that he paid more than \$500.00 for the necklace. At the close of the Commonwealth's case, defense counsel again informed the trial court of his desire for a theft instruction, adding that he intended to call a witness to testify about the necklace's value. When the trial court asked how the theft instruction fit the evidence, defense counsel explained that Fowler was never scared during the incident. The Commonwealth challenged that assertion, maintaining that Fowler submitted to the show of force once the gun was fired. The trial court overruled Wright's request for a theft instruction, and declined to allow Wright's witness to testify about the value of the necklace.

Wright now argues that the trial court erred in declining to instruct the jury on the lesser-included offense of theft by unlawful taking. He maintains that there was evidence that the witnesses could have been mistaken as to whether Wright or Eaton fired the handgun, and therefore he was entitled to the theft instruction. The Commonwealth asserts that Wright's appeal on the grounds that the witnesses may have been mistaken as to the identity of the shooter is unpreserved for appellate review. Indeed, Wright posited before the trial court that the basis for his request for the theft instruction was that Fowler was not fearful during the encounter with Wright and Eaton, implying that Fowler did

not feel threatened by Wright's actions. To the extent that Wright now objects to the trial court's election not to instruct the jury on theft as a lesser-included offense based on a potential misidentification, the argument is unpreserved. Wright has asked this Court to apply palpable error review to analyze this unpreserved argument. Pursuant to the Rules of Criminal Procedure ("RCr") 10.26, "[a]n appellate court may consider an issue that was not preserved if it deems the error to be a palpable one which affected the defendant's substantial rights and resulted in manifest injustice." *Barker v. Commonwealth*, 341 S.W.3d 112, 114 (Ky. 2011) (citing *Commonwealth v. Pace*, 82 S.W.3d 894 (Ky. 2002)).

As declared by this Court, "[a]n instruction on a lesser included offense is appropriate only when the state of the evidence is such that a juror might entertain reasonable doubt as to the defendant's guilt of the greater offense, and yet believe beyond reasonable doubt that the defendant is guilty of the lesser offense." *Billings v. Commonwealth*, 843 S.W.2d 890, 894 (Ky. 1992) (citing *Luttrell v. Commonwealth*, 554 S.W.2d 75 (Ky. 1977)). When a trial court's denial of a request for a lesser-included offense instruction is raised on appeal, "[t]he propriety of such an instruction must rest upon a case-by-case examination of the totality of the evidence introduced." *Muse v. Commonwealth*, 551 S.W.2d 564, 567 (Ky. 1977).

A theft by unlawful taking is committed when a person "[t]akes or exercises control over movable property of another with intent to deprive him thereof; or [o]btains immovable property of another or any interest therein with

intent to benefit himself or another not entitled thereto.” KRS 514.030. First-degree robbery occurs when a person, “in the course of committing theft, [uses] or threatens the immediate use of physical force upon another person with intent to accomplish the theft,” and also “[c]auses physical injury to any person who is not a participant in the crime; or [i]s armed with a deadly weapon, [u]ses or threatens the immediate use of a dangerous instrument upon any person who is not a participant in the crime.” KRS 515.020. Theft by unlawful taking is a lesser-included offense of both first-degree and second-degree robbery. *Oakes v. Commonwealth*, 320 S.W.3d 50, 58 (Ky. 2010).

The trial court did not abuse its discretion when it declined to instruct the jury on theft by unlawful taking because the evidence did not permit a finding that Wright did not threaten Fowler and the others with the use of force, contrary to Wright’s argument to the trial court. Certainly, discharging a handgun into the ground whilst demanding property and money is a sufficient show of force to constitute “use or [threat of] the immediate use of physical force.” KRS 515.020. This Court has held that in certain circumstances, the mere use of menacing or threatening gestures may be enough to satisfy the threat element of KRS 515.020. *See Lawless v. Commonwealth*, 323 S.W.3d 676 (Ky. 2010), *Tunstall v. Commonwealth*, 337 S.W.3d 576 (Ky. 2011). In the present case, Wright not only produced a weapon to invoke fear in the victims, but he *fired* the weapon into the ground when they would not comply with his demands, physically injuring Beverly Sprawl. There was simply no evidence

produced at trial to suggest that he did not brandish and fire a gun in the course of the theft.

Neither is reversal warranted under Wright's mistaken identity theory posed on appeal. Raquita Coley testified that Eaton may have also had a handgun, and a handgun was in fact recovered from Eaton upon his arrest. Police never recovered a handgun from Wright. However, no witnesses identified Eaton as the shooter or suggested that Eaton fired his weapon during the course of the robbery. Multiple witnesses testified that Wright fired the handgun into the ground. The witnesses described Wright and Eaton as a "black male" and a "white male," identifying the "black male" as the shooter. As Officer Griswold pursued Wright, he witnessed Wright throw something that he thought was a handgun. A trial court is not required to instruct on a theory of guilt that is not supported by the evidence. *Tunstall*, 337 S.W.3d at 583 (citing *Payne v. Commonwealth*, 656 S.W.2d 719, 721 (Ky. 1983)). Under these facts, Wright would be entitled to the theft instructions *only* if there was evidence to support the theory that Eaton was in fact the shooter. Such facts were not presented, and we cannot say that the trial court's appropriate refusal to instruct the jury on theft by unlawful taking constituted an abuse of discretion, much less palpable error.

III. The Suggestive Show-Up Procedure Produced a Reliable Identification.

Less than one hour after Fowler surrendered his property to the unknown males, officers brought Fowler, Coley, and Amber Barnes to identify the possible suspects. They were shown one black male and one white male,

Wright and Eaton. Both were handcuffed; Wright was seated in a police cruiser and Eaton was standing outside of another police cruiser. Fowler, Coley, and Barnes independently identified the two men as the suspects. Prior to trial, Eaton moved to suppress the witnesses' identifications on the grounds that they were suggestive and unreliable. Wright joined the motion. The trial court conducted a suppression hearing where Fowler, Coley, Barnes,³ and police officers testified. The trial court found that while the show-up procedures were suggestive, the identifications were reliable. The suppression motion was denied. Wright now challenges the denial of the suppression motion.

On appellate review, a two-part test is applied to analyze a trial court's suppression motion. First, the trial court's factual findings are reviewed for clear error. RCr 9.78; *Adcock v. Commonwealth*, 967 S.W.2d 6, 8 (Ky. 1998). Findings of fact supported by substantial evidence are considered conclusive. *Id.* If the findings of fact are supported by substantial evidence, the trial court's application of the law to the facts is reviewed *de novo*. *Peyton v. Commonwealth*, 253 S.W.3d 504, 514-515 (Ky. 2008).

The trial court entered extensive and detailed findings of fact following the suppression hearing. The findings set forth by the trial court are supported by substantial evidence, and are therefore conclusive. RCr 9.78. We must now scrutinize the trial court's application of the law to the facts.

³ Amber Barnes did not testify at the trial.

This Court has declared that “[a] single-person-showup [sic] identification is inherently suggestive, which requires the court to assess the totality of the circumstances surrounding the identification to consider the likelihood of an irreparable misidentification by the witness.” *Rodriguez v. Commonwealth*, 107 S.W.3d 215, 218 (Ky. 2003) (citing *Merriweather v. Commonwealth*, 99 S.W.3d 448, 451 (Ky. 2003)) (internal quotations omitted). The United States Supreme Court’s decision in *Neil v. Biggers*, 409 U.S. 188 (1972) sets forth five factors to be considered when assessing the reliability of an inherently suggestive show-up: (1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the criminal, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation.

The trial court properly concluded that the show-up procedure wherein the witnesses were presented with only one black male and one white male to identify constituted an inherently suggestive show-up. *See Rodriguez*, 107 S.W.3d at 218. Accordingly, we must apply the *Biggers* factors to the facts to assess the reliability of the identification.

According to the witnesses who provided testimony at the suppression hearing, the robbery took anywhere from 1 ½ minutes to fifteen minutes. The encounter took place in a parking lot at 2:30 a.m. The suspects stood within full view of all of the witnesses, and within close proximity. Barnes testified that she was slightly intoxicated, while Fowler and Coley were not. The

witnesses observed the suspects' clothing and height as well as other features, including a black tattoo on the white male's neck, and distinctive facial features on the black male. Coley believed that black male was wearing a bullet-proof vest underneath a half-zipped hooded jacket. While Fowler dedicated his primary focus to the gun, he nevertheless was able to observe the black male's distinctive features and his clothing. The witnesses did not recall offering descriptions to the officers prior to the show-up. Fowler identified Wright and Eaton approximately twenty-five minutes after the initial police call, and Coley made her identification shortly after that. An hour passed before Barnes identified the suspects. All three were completely confident when they identified Wright and Eaton as the robbers.

Based on these facts, we agree with the trial court's conclusion that the identifications were reliable. Despite the brief encounter between Wright and Fowler, Barnes, and Coley, the witnesses were very attentive and capable of recalling distinct details about the suspects. The witnesses were given a second opportunity to view Wright when he briefly returned to take Fowler's hat and glasses. *See King v. Commonwealth*, 142 S.W.3d 645 (Ky. 2004) (a suspect who attempted to use a stolen credit card at a convenient store only to return later to attempt to use the card again enhanced the witness's opportunity to view the suspect). Even Fowler, who admitted to being focused on the gun during the robbery, was able to identify Wright's facial features and clothing. *See Rodriguez*, 107 S.W.3d at 218 (heightened witness attentiveness may be inferred during an armed robbery). Furthermore, the fact that Fowler's

property was found on Wright's person during the search incident to his arrest certainly bolsters the reliability of the witnesses' identifications. The majority of the *Biggers* factors weigh in favor of the reliability of the identifications. The trial court properly denied Wright's motion to suppress.

IV. Wright Failed to Prove a Violation of the Fair Cross-Section Requirement.

Wright contends that the trial court erred when it overruled his objection to the jury panel, specifically his argument that the panel did not represent Wright's community. After the clerk of the trial court called names from the jury pool to assemble the jury panel, Wright objected to the composition of the panel. Specifically, Wright asserted that all twenty-eight members of the selected panel were Caucasian, although the racial make-up of Kenton County was "less than 100% Caucasian." The trial court overruled Wright's objection on the basis that there was no discrimination in the method in which the panel was selected from the jury pool.

The Sixth Amendment, as applied to the states through the Fourteenth Amendment, guarantees the right to an impartial jury "drawn from a source fairly representative of the community." *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975). One example of a "fair cross-section requirement" violation is the absence of African-Americans from a jury panel. *See Batson v. Kentucky*, 476 U.S. 79, 85 (1986) ("Exclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure."). In order to successfully challenge the composition of a jury panel, the criminal defendant must show: "(1) that the group alleged to be

excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process." *Duren v. Missouri*, 439 U.S. 357, 364 (1979).

The Commonwealth concedes, and we agree, that Wright has met his burden in satisfying the first element of the *Duren* test, as it is well recognized that African-Americans constitute a distinctive group in the community. *Mash v. Commonwealth*, 376 S.W.3d 548, 552 (Ky. 2012), *Rodgers v. Commonwealth*, 285 S.W.3d 740, 759 (Ky. 2009). Concerning the second and third prongs, Wright simply asserts that the complete absence of African-Americans from the panel is necessarily unfair and unreasonable in relation to the number of African-Americans in the Kenton County community, which is "less than 100% Caucasian," and that any process that would result in the complete exclusion of African-Americans is systematic. This Court has interpreted the second element of *Duren* as requiring "data about the number of members of the excluded group in the community." *Mash*, 376 S.W.3d at 552. However, mere references to census data will not satisfy this requirement. *Id.* (citing *Miller v. Commonwealth*, 394 S.W.3d 402 (Ky. 2011)). Even if this Court were to accept Wright's reasonable estimation that Kenton County is less than 100% Caucasian in its racial composition without any corroborating census data, this information is insufficient to satisfy the second prong of *Duren* because "[i]t is not enough to merely allege a particular jury failed to represent the

community.” *Id.* Similarly, Wright fails to offer *any* proof of a systematic exclusion of African-Americans from the jury panel. Having failed to establish a prima facie violation of the fair cross-section requirement, we agree that the trial court properly overruled Wright’s objection to the composition of the jury panel.

CONCLUSION

For the reasons stated herein, we reverse Wright’s second-degree assault conviction and remand for further proceedings consistent with this Opinion. Wright’s convictions for first-degree robbery, tampering with physical evidence, second-degree fleeing and evading police, and being a second-degree persistent felony offender are affirmed.

All sitting. All concur.

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