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RENDERED: OCTOBER 26, 2023
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2021-SC-0558-MR

JOHN GILES — APPELLANT

V.

ON APPEAL FROM GRAVES CIRCUIT COURT
HONORABLE KEVIN D. BISHOP, JUDGE
NO. 19-CR-00385

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

John Giles was convicted by a Graves Circuit Court jury of first-degree assault and being a first-degree persistent felony offender. Giles was sentenced to thirty years in prison consistent with the jury's recommendation and he now appeals as a matter of right. After review, we affirm the judgment.

FACTS AND PROCEDURAL HISTORY

A.T.[1] began dating John Giles in early 2019. They maintained an unstable relationship, in part due to both parties' substance abuse. On August 30, 2019, A.T. and Giles were at Giles's house and A.T. planned to move out soon. Both parties used drugs that day and things were generally good, until a sheriff's deputy came to Giles's house to perform a welfare check on A.T.

[1] To protect her identity, we refer to the victim by her initials.

because her family had not heard from her recently. A.T. told the deputy she was okay, and after the deputy left Giles became angry because there was a cop at his house. He accused A.T. of being a "cop caller," "a narc," and accused her of "working undercover." As a result, A.T. left, planning to come back for the rest of her belongings later.

A.T. walked to her friend Andrea's house. Andrea testified that A.T. asked for a phone to call Giles as soon as she showed up at her house. A.T. stated that when she arrived at Andrea's house, Giles began sending A.T. messages, asking her to return to his house so they could have sex. She obliged and decided to walk back to Giles's house. At some point, Giles accused A.T. of putting something in his syringe to try to kill him. She denied doing anything and told him to inject her with it to prove that she was not trying to kill him. Giles complied, and eventually calmed down.

Giles fell asleep. Later, A.T. woke him up to ask if he wanted anything from Walmart. According to A.T., Giles looked for his wallet for two seconds, immediately got angry, and accused A.T. of stealing his wallet. A.T. denied his accusation but nevertheless left his residence. She forgot her purse, so she went back to the residence to retrieve it. She also asked for a flashlight because it was very dark outside. She knocked on the door and Giles would not give her a flashlight, but he threw her purse at her.

A.T. testified that as she was walking down the driveway, Giles came out of the trailer and said "Hey, I got something for you." She asked him what he had, to which he responded, "Do you want to die tonight?" As A.T. started to

walk away, Giles hit her in the back of the head with what she believed to be a hammer. A.T. got down and covered her head with her arms. At some point, she rolled over onto her side. Giles struck A.T. repeatedly, hitting her at least five times in the head as well as stomping and kicking her. She testified that Giles was screaming "You're gonna die tonight!" and that she was screaming, crying, and begging Giles to stop.

She eventually got up and ran to Giles's grandmother's house which was located nearby. Once inside, she locked the front and back doors out of fear that Giles was going to come after her. Giles's grandmother insisted that Giles did not hurt A.T. and had not done anything wrong. Eventually, Giles's grandmother gave A.T. a ride back to Andrea's house but Andrea was not home. A nearby resident let A.T. in his house where she changed her clothes because she urinated on herself during the attack. She cowered in the neighbor's kitchen until police arrived.

Police took her to the hospital where she was examined by Dr. Joseph Payant, an emergency medicine physician. Dr. Payant testified that A.T. was upset and appeared to be in pain. Dr. Payant discussed A.T.'s injuries, including that she suffered a hematoma, and had bruising in her hairline and on her chest, all of which he opined were consistent with blows from a hammer. While A.T. did not suffer any skull fractures, Dr. Payant stated it was possible that A.T. suffered a concussion, although he could not say definitively whether she had. Importantly, Dr. Payant acknowledged that blows to a person's head from a hammer could create a substantial risk of death. He also

recognized the severe nature of the attack, stating "I see assaults every . . . month, and in the whole time I've ever been practicing, I've never seen anything like this. This is absolutely the most horrendous thing I have ever seen one human body inflict on somebody else."

A.T. also described her injuries during her trial testimony. She testified that she "knew" she had a concussion because she "could see [her] forehead out of the top of [her] eyes," and because she had experienced several concussions in her life and was familiar with "what it felt like" to have one. Additionally, she noted a scar on her forehead, "knots" on the back of her head, a black eye, and bruising. When A.T. left the hospital, a family member transported her to her mother's house and took photos of her injuries.

At some point after the attack, A.T. obtained a no-contact protective order against Giles. As is not unusual in domestic violence cases, eventually she sought to amend that order to a no violent contact order. In her motion to amend, A.T. stated that Giles never tried to kill or harm her in any way. She also stated that she was hallucinating at the time of the alleged incident due to taking a mind-altering substance. During trial, she explained that she sought to amend the protective order because she loved Giles and wanted to be with him. In fact, A.T. moved back in with Giles and at some point, he was arrested again. While he was incarcerated, A.T. wrote him love letters and "put money on his books" so that he could buy food and other necessities. She explained her actions by stating that she was willing to do anything for Giles and wanted him to be free so they could be together.

Ultimately, the jury acquitted Giles of attempted murder but found him guilty of first-degree assault. During the penalty phase, the jury recommended a thirty-year sentence for that charge, which was enhanced by Giles's status as a first-degree persistent felony offender. Accordingly, the trial court imposed a thirty-year sentence.

ANALYSIS

Giles raises three issues on appeal: (1) the first-degree assault conviction resulted in manifest injustice because there was insufficient evidence of a serious physical injury; (2) the exclusion of relevant testimony of a defense witness inhibited Giles's constitutional right to present a defense; and (3) the prosecutor improperly inserted himself as a witness. Finding no errors, we affirm the judgment of the Graves Circuit Court. We address each alleged error in turn.

I. The trial court properly instructed the jury on first-degree assault.

Giles argues that the jury should not have been instructed on first-degree assault, and that he preserved his objection to the inclusion of this lesser included offense by moving for a directed verdict as to the greater offense of attempted murder. We disagree.

The parties engaged in much discussion regarding whether this issue is properly preserved for our review, and even filed supplemental briefing to discuss *Ray v. Commonwealth,* 611 S.W.3d 250 (Ky. 2020), in which this Court clarified the requirements of preserving a directed verdict issue for appellate

review. *Ray* explicitly delineates the requirements for preserving a directed verdict issue for appeal:

> [W]e now hold that in order to preserve an alleged directed verdict issue for appeal, criminal defendants must: (1) move for a directed verdict at the close of the Commonwealth's evidence; (2) renew the same directed verdict motion at the close of all the evidence, unless the defendant does not present any evidence; and **identify the particular charge the Commonwealth failed to prove, and must identify the particular elements of that charge the Commonwealth failed to prove.** Criminal defendants may move for directed verdict on one count of a multiple count indictment without rendering the alleged error unpreserved; defendants are not required to move for directed verdict on any lesser included offenses to a particular charge in order to preserve the issue; and, nor are they required to object to instructing the jury on that particular charge to preserve the alleged directed verdict error.

611 S.W.3d at 266 (emphasis added).

Here, Giles moved for a directed verdict at the close of the Commonwealth's case and at the close of all evidence, as required. However, Giles merely stated that the Commonwealth failed to prove the elements of attempted murder. In renewing his motion at the close of all evidence, Giles simply renewed his objection on the "same grounds." Giles did not provide any further detail or explanation as to which specific elements the Commonwealth failed to prove. As such and based on the clear and concise rule set forth in *Ray,* Giles's motion for directed verdict was insufficient to preserve this issue for appellate review. We further note that a proper directed verdict argument under the unique facts of this case also would have likely touched upon the fundamental issue we now face, i.e., whether A.T. suffered serious physical injury.

Because this alleged error is unpreserved, we will only review for palpable error. "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." Rule of Criminal Procedure (RCr) 10.26. The error must be "so manifest, fundamental and unambiguous that it threatens the integrity of the judicial process." *Martin v. Commonwealth*, 207 S.W.3d 1, 5 (Ky. 2006). "A palpable error must be so grave that, if uncorrected, it would seriously affect the fairness of the proceedings." *Davis v. Commonwealth*, 620 S.W.3d 16, 30 (Ky. 2021).

When presented with a motion for a 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.

Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991). On appeal, "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." *Id.*

Turning to the jury instruction given on the lesser included offense of first-degree assault, to obtain a conviction, the Commonwealth had to prove Giles intentionally caused serious physical injury to A.T. by means of a dangerous instrument. KRS 508.010(1)(a). A serious physical injury is statutorily defined as a "physical injury which creates a substantial risk of

death, or which causes serious and prolonged disfigurement, prolonged impairment of health, prolonged loss or impairment of the function of any bodily organ . . . ." KRS 500.080(18).

In *Dixon v. Commonwealth,* 263 S.W.3d 583, 584-85 (Ky. 2008), the victim was working alone when Dixon entered the store. Dixon's co-defendant struck the victim in the back of her head with a hammer. *Id.* at 585. The two men drug the victim to the back of the store and Dixon held the victim down while the co-defendant raped her. *Id.* Before the two men left the store, one told the victim to "kiss her ass goodbye" and struck her on the head with the hammer for a second time. *Id.* Doe suffered two head wounds: a complex depressed skull fracture and a gaping laceration on the back of her head. *Id.*

A jury convicted Dixon of first-degree assault, first-degree robbery, and first-degree rape. *Id.* On appeal, Dixon argued that the simultaneous convictions for rape and assault violated the prohibition against double jeopardy. *Id.* at 588. In concluding that no violation occurred, the Court explained that

> reasonable jurors could have concluded that Dixon was guilty of both first-degree assault and first-degree rape simply because **Doe suffered two serious physical injuries to her head from a blow of the hammer delivered at different times during her ordeal at the store.** In other words, since Doe was struck on the head with a hammer when the assailants first entered the store and was struck again after she was raped, **a jury could have found that either blow to the head alone constituted the basis for the assault conviction**.

Id. at 592 (emphasis added). Therefore, the *Dixon* Court concluded that a head laceration from being struck by a hammer constituted a serious physical injury.

In this case, the evidence included the testimony of A.T.'s treating emergency room physician, Dr. Payant, who explained that A.T. suffered from a hematoma and bruising in her hairline and on her chest. He also testified that A.T.'s injuries were consistent with her account, i.e., the injuries could have been caused by a hammer. Dr. Payant, an emergency room doctor for approximately twenty-five years, also acknowledged the severe nature of the attack, saying "I see assaults every . . . month, and in the whole time I've ever been practicing, I've never seen anything like this. This is absolutely the most horrendous thing that I have ever seen one human body inflict on somebody else."

The EMT who transported A.T. to the hospital testified at trial and, through his testimony, the Commonwealth entered the ambulance report as evidence. That report gives a detailed description of what it labeled her "extensive list of injuries" including three possible fractures of the left hand/fingers, **laceration** and bruising on the right hand and wrist, **laceration** and bruising on the left wrist, hematoma on the forehead, cut on the hairline on left forehead, **two occipital scalp lacerations**, multiple blows/hematomas on the back of the head, **laceration on left elbow, six lacerations/bruising on the back**, and bruising on legs/knees. In addition to the ambulance report,

the EMT testified and recounted most of these injuries from his report for the jury and described A.T. as having "lacerations all over the body."

"Although medical testimony may be the preferred method of proving the serious physical injury requirement," *Brooks v. Commonwealth,* 114 S.W.3d 818, 824 (Ky. 2003), "the victim was competent to testify about [her] own injuries." *Commonwealth v. Hocker,* 865 S.W.2d 323, 325 (Ky. 1993). In addition to the medical testimony, A.T.'s testimony provided important information about the extent of her injuries. She testified that she "knew" she had a concussion because she "could see [her] forehead out of the top of [her] eyes," and because she had several concussions in her life, so she is familiar with the feelings associated with having a concussion. A.T. also explained that she had other injuries as well, including a scar on her forehead, "knots" on the back of her head, and a black eye.

The trial court should grant a motion for directed verdict "if the prosecution produces no more than a mere scintilla of evidence." *Benham,* 816 S.W.2d at 188. Additionally, "an appellate court should not reverse unless it would be clearly unreasonable for a jury to find guilt." *Commonwealth v. Goss,* 428 S.W.3d 619, 625-26 (Ky. 2014) (quotation and citation omitted). The evidence presented at trial was sufficient to allow a reasonable juror to determine that A.T. suffered a serious physical injury, and thus sustain a conviction of first-degree assault. As such, Giles was not entitled to a directed verdict and there was no error, much less palpable error.

II. The trial court properly excluded the testimony of two defense witnesses.

Next Giles argues that the trial court erred by excluding the testimony of two witnesses. This issue is preserved for appellate review because Giles ultimately offered testimony by avowal. *Commonwealth v. Ferrell,* 17 S.W.3d 520, 523 (Ky. 2000). We review a trial court's decision to admit or exclude evidence for an abuse of discretion, determining whether the trial court's "decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English,* 993 S.W.2d 941, 945 (Ky. 1999).

Giles called Adriana Giles, his daughter, and Nancy LaRocca, his mother, as witnesses to testify about the dynamics of his relationship with A.T. First, Giles called Adriana who testified that Giles and A.T. had a "crazy relationship" and described A.T. as controlling and jealous. Shortly thereafter, the Commonwealth objected to the relevance of this testimony. The trial court permitted Giles to present the rest of Adriana's testimony by avowal.

By avowal, Adriana testified that A.T. accused Giles of infidelity. She also testified that A.T. would get mad at Giles and break his phone, and that she saw a box of approximately twenty broken phones She also testified that she personally saw A.T. break at least one phone, and that the box of broken phones did not exist prior to the start of Giles's relationship with A.T.

LaRocca's trial testimony involved information about occurrences closer in time to the incident that led to trial, and Giles was able to elicit important details surrounding that event – that LaRocca went to Giles's house about a

week before the incident, she did not see any injuries on A.T. at the time, the police came to Giles's house on that occasion and there were no "charges brought." She also said Giles asked her to come to his house a few times because he needed help getting A.T. out of his house. Through LaRocca's testimony, defense counsel introduced gravel from Giles's driveway to support his theory that A.T. fell in the driveway and sustained her injuries.

By avowal, LaRocca added that the relationship between A.T. and Giles started out "okay," but a combination of A.T.'s drug use and mental state created a rocky relationship between the two. LaRocca testified that on approximately five occasions, she had to go to Giles's house to help get A.T. to leave and that Giles wanted A.T. to move out for a long time. LaRocca recounted one specific instance where she went to Giles's house and Giles was locked in his bedroom while A.T. tried to kick down the door, resulting in a visit from the police.

Giles argues that he was prevented from presenting a defense because of the exclusion of this testimony. He argues that the testimony was relevant because it supported his defense that he wanted A.T. out of the house for a while and that she could be aggressive towards him while refusing to leave his house. He also asserted that A.T. was hallucinating on meth and while he tried to control her, she sustained her injuries by falling in the gravel driveway.

KRE 401 defines relevant evidence as "evidence 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."

Adriana's avowal testimony was not relevant. The history of the relationship between A.T. and Giles had little bearing on whether Giles attempted to kill or assault A.T. on the particular occasion at issue. These women were not present for the events that transpired, and their impressions of the relationship or experiences with A.T. would not tend to make the existence of a fact of consequence more or less probable. In sum, the trial court did not abuse its discretion in excluding this testimony.

LaRocca's avowal testimony further indicated the tumultuous nature of the relationship between A.T. and Giles, but most of the testimony elicited at trial before the jury also supported that assertion. We recognize Giles's right to present a defense but disagree that the exclusion of either of these witnesses "significantly undermin[ed] fundamental elements of the defendant's defense." *Harris v. Commonwealth,* 134 S.W.3d 603, 608 (Ky. 2004) (quoting *United States v. Scheffer*, 523 U.S. 303, 315 (1998)). Giles characterized his defense as him wanting A.T. out of the house for a long time and that A.T. could be aggressive towards him while refusing to leave. LaRocca testified that she went to Giles's residence on multiple occasions because he needed help getting A.T. to leave. Adriana testified that A.T. was jealous and controlling and maintained that A.T. and Giles had a crazy relationship. Therefore, the jury heard some testimony by these witnesses in support of his defense. Given the substance of the avowal testimony, the trial court's decision to exclude this

testimony was not "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *English,* 993 S.W.2d at 945.

III. The prosecutor did not improperly insert himself as a witness during A.T.'s testimony.

For his final argument, Giles asserts that the Commonwealth's Attorney improperly inserted himself into the proceedings as a witness. Giles acknowledges that this issue is unpreserved,[2] and requests palpable error review pursuant to RCr 10.26. On appellate review, we will grant relief "upon a determination that manifest injustice has resulted from the error." "A palpable error must be so grave that, if uncorrected, it would seriously affect the fairness of the proceedings." *Davis*, 620 S.W.3d at 30.

Trial testimony indicated that at certain points between the attack and trial, A.T. was reluctant to seek prosecution of Giles. A.T. initially sought a protective order, but then filed a motion to amend it so she and Giles could be together. In addition, she wrote out a victim impact statement that refuted her trial testimony. During cross-examination of A.T., defense counsel asked whether she talked to the Commonwealth about the events forming the basis of this case. When A.T. met with the Commonwealth at one point prior to trial,

[2] During cross-examination, defense counsel initially asked A.T. whether she "met with the Commonwealth several times" to discuss this incident. Therefore, the Commonwealth asserts that this constitutes an invited error. "Generally, a party is estopped from asserting an invited error on appeal." *Kelly v. Commonwealth,* 554 S.W.3d 854, 866 (Ky. 2018) (quoting *Quisenberry v. Commonwealth,* 336 S.W.3d 19, 37 (Ky. 2011)). However, whether the topic of the Commonwealth's meeting with A.T. was appropriately referenced by the Commonwealth on re-direct has no bearing on the character of the Commonwealth's questions or whether the prosecutor improperly inserted himself as a witness. Therefore, we proceed with conducting palpable error review.

she tried to protect Giles by claiming he was innocent. At the meeting, the Commonwealth played her recordings of phone calls featuring Giles talking to other women. In her trial testimony, A.T. denied that she decided to change her story because of hearing those calls and instead testified that she was "still on his side for a long period of time."

Giles argues that during these portions of testimony, the prosecutor improperly inserted himself into the narrative and asked leading questions, such as referencing a meeting at the Commonwealth's Attorney's office, reminding A.T. that it was their first meeting, and confirming that the office picked her up for the meeting. In addition, the Commonwealth asked, "But you were still hesitant about us trying to prosecute him?" and "So it wasn't just hearing the phone calls between [Giles] and Wendy that's the reason you're sitting here today?"

Giles argues that the prosecutor crossed an ethical line by inserting himself into the proceedings as a witness and employed leading questions regarding events he witnessed to elicit specific responses from A.T. Again, we note that this issue is unpreserved. While Giles made a few objections to hearsay, he never lodged an objection claiming the prosecutor asked leading questions or improperly inserted himself into the proceedings.

In *Holt v. Commonwealth*, 219 S.W.3d 731, 733 (Ky. 2007), the prosecutor called a witness who had been incarcerated with Holt. The prosecutor attempted to elicit testimony from the witness about Holt's commission of the crimes in the case based on a prior conversation between

the prosecutor and the witness in which the witness revealed that Holt admitted the crimes to the witness. *Id.* The prosecutor pressed the witness repeatedly, asked leading questions, and asserted, despite the witness's denial of the substance of the statements, on at least four occasions that the witness had previously told her that Holt admitted to the crime. The Court stated that "[f]rom the tenor of [the prosecutor's] leading questions to [the witness], there is no doubt that she put the very words [the witness] refused to say in his mouth." *Id.* at 734. This placed the prosecutor's credibility before the jury and firmly gave the jury the impression that [the witness] told her Holt committed the crime. *Id.*

The *Holt* Court found reversible error because the prosecutor's questioning, which implied that Holt had in fact confessed to the crime, might have contributed to his conviction. *Id.* at 733-34, 738. "[A]ssertions of fact from counsel as to the content of prior conversations with witnesses have the effect of making a witness of the lawyer and allowing his or her credibility to be substituted for that of the witness." *Id.* at 737.

We must determine whether there was "a reasonable possibility that the evidence complained of might have contributed to the conviction." *Id.* at 738 (quoting *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963). The prosecutor's statements and questions in this case were very different from the statements exchanged in *Holt.* In *Holt,* the prosecutor's statements were directly contrary to the witness's testimony because the witness persistently denied sharing Holt's confession with the prosecutor. Further, the exchange in this case likely

contributed little to the jury's ultimate conviction of Giles. The prosecutor's complained-of statements here reiterated that A.T. tried to have her protective order against Giles lifted, wrote love letters to Giles while he was incarcerated, and even contributed money to his prison accounts. Additionally, the prosecutor noted that A.T. submitted a victim impact statement that refuted her trial testimony. As such, there was no reasonable possibility that the prosecutor's statements contributed to the conviction, and there was no error.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the Graves County Circuit Court.

All sitting. VanMeter, C.J.; Bisig, Keller, Lambert, and Nickell, JJ., concur. Thompson, J., dissents in part, concurs in part, and concurs in result only in part by separate opinion in which Conley, J., joins.

THOMPSON, J., DISSENTING IN PART, CONCURRING IN PART, AND CONCURRING IN RESULT ONLY IN PART: I dissent from the majority opinion's ruling that upholds John Giles's conviction for first-degree assault because I believe our law as written is designed to punish offenders, not based on what they intended or what their actions could have wrought, but on the actual effects of their actions.

The relevant inquiry regarding whether the trial court should have directed a verdict on Giles's charge of first-degree assault is not about what *could* have occurred had another victim been struck in the same manner or if this same victim had been struck in a more vulnerable area. "Ultimately, a

finding of first-degree assault is dependent on the seriousness of the resulting injury, not the *potential* of the act to result in 'serious physical injury.'" *McDaniel v. Commonwealth*, 415 S.W.3d 643, 658 (Ky. 2013) (emphasis added). "[T]he question is not what *could* have happened, but rather what *did* happen." *Anderson*, 352 S.W.3d at 583. *See State v. Alvarez*, 240 Or. App. 167, 169–71, 246 P.3d 26, 27-28 (2010) (in accord, agreeing that the important consideration in determining whether a serious bodily injury was inflicted was the wound inflicted rather than the damage the blows could have inflicted).

"[N]ot every bloody wound is a 'serious physical injury' . . . [n]o matter how brutal the attack or how gruesome the wound appear[s]" as its appearance "is insignificant. Rather than its awful *appearance*, it is the awful *effect* of the wound in creating a substantial risk of death, serious and prolonged disfigurement, prolonged impairment of health, or prolonged loss or impairment of the function of a bodily organ that determines its legal status." *Hammond v. Commonwealth*, 504 S.W.3d 44, 53 (Ky. 2016) (footnote omitted).

Therefore, in *Anderson*, while the Court acknowledged that "[s]lashing at someone's face and neck area with a straight razor certainly could cause 'serious physical injury'" it ultimately concluded that the Commonwealth had not proved that a "serious physical injury" had occurred, resulting in manifest injustice and requiring reversal. 352 S.W.3d at 583.

The evidence presented as to what happened to A.T. is that she had wounds, bruises, possibly suffered a minor concussion, did not have any

broken bones, and just needed to heal from the attack.[3] A.T. was in the emergency room for four hours but was not admitted. The only "treatment" she received was a computed tomography (CT) scan which revealed no fractures and no sign of a concussion. There was no testimony that she received any medication, any stitches, any bandaging or even any cleansing of her wounds. By any objective measure, A.T. did not suffer any type of serious physical injury.

Therefore, the speculative, leading questioning of Dr. Payant about what would or could have happened from these sorts of blows based on the external *appearance* of A.T.'s wounds was irrelevant as those questions were about what potentially could have occurred, not what did. The majority opinion omits that Dr. Payant clarified that as to these potential outcomes, the blows "could" have caused those things but "[A.T.] wasn't to that point."

I do not doubt that hammer blows to a victim's head could cause serious physical injury. For example, in *Arnold v. Commonwealth*, 192 S.W.3d 420, 427 (Ky. 2006), a single blow to the head was upheld as causing a serious physical injury to the victim but the resulting injury was much more substantial than what was suffered by A.T. In *Arnold*, the blow caused the victim blood loss, required five staples to close and "caused a permanent dent in the victim's head." *Id.* at 427. More importantly, the blow resulted in a concussion which

[3] The Commonwealth does not argue that the small scar to A.T.'s forehead or any remaining lumps to her head constituted "serious and prolonged disfigurement."

"substantially incapacitated [the victim] for two weeks," "[f]ifteen months after the attack, the victim continued to suffer periodic vertigo and/or dizziness when getting up, moving her head, and reaching her arms over her head[,]" and a doctor confirmed this condition "is consistent with a blow to the head" and "was likely permanent." *Id.*

Similarly, beating someone with various blunt objects can result in serious bodily injury. *See Commonwealth v. Hocker*, 865 S.W.2d 323, 325 (Ky. 1993) (upholding jury's verdict for first-degree assault as a "substantial risk of death" could be established "from the skull fracture, hemorrhaging, and blood clotting suffered by [the victim] which required a minimum of two days' round-the-clock observation and monitoring in the intensive care unit, the highest degree of care a hospital can render" based on hospital records and testimony from the victim and his mother).

However, even being shot does not necessarily constitute a serious physical injury, depending on the result. *See McDaniel*, 415 S.W.3d at 658–61 (Ky. 2013) (no serious bodily injury from prolonged health impairment from a "through-and-through" gunshot wound to the hand which was sutured with the victim sent home the same night which required a couple of months therapy to regain strength and victim was off work for a couple of months).

The situation that occurred in *Anderson*, 352 S.W.3d at 582-83, which did not constitute a serious physical injury, compared with the cases discussed therein where serious physical injuries were established by the evidence are instructive. There was no serious injury to Anderson being cut on the side of

the face with a straight razor "inflicting a laceration that was one inch deep and bleeding" resulting in him being sutured and sent home, being off work for a while, occasionally having sharp pains, and needing no subsequent medical treatment. *Id.* at 582. In contrast, the Court in *Anderson* indicated that in *Brooks v. Commonwealth,* 114 S.W.3d 818, 824 (Ky. 2003), the victim suffered a serious physical injury due to a substantial risk of death "where the victim had two long crossing slashes on his neck, stab wounds on the right side of his face and neck, and multiple defensive wounds on both upper extremities . . . , a large amount of blood was pooled in his lap and he required close observation after treatment." *Anderson*, 352 S.W.3d at 582. Similarly, in *Commonwealth v. Hocker,* 865 S.W.2d 323 (Ky.1993), there was a "substantial risk of death" "where the victim sustained a skull fracture, hemorrhaging, and blood clots, which required at least two days of continuous observation and monitoring in the intensive care unit (ICU), followed by six additional days of hospitalization." *Anderson*, 352 S.W.3d at 582. Simply put, A.T.'s injuries fit more closely with the type of wounds suffered in *Anderson*, compared to those of *Brooks* and *Hocker*; A.T. did not require hospitalization or much treatment at all because she did not suffer a serious physical injury.

I disagree with the majority opinion that *Dixon v. Commonwealth*, 263 S.W.3d 583 (Ky. 2008), is on point. First, that case involved a double jeopardy challenge with Dixon arguing that "his convictions for rape and assault violate[d] the prohibition against double jeopardy because the same serious physical injury underlies each conviction." *Id.* at 585–86. Dixon did not

challenge whether the particular injuries the victim suffered met the definition for "serious physical injury" contained in Kentucky Revised Statutes (KRS) 500.080(18). Therefore, the assumption was made that these were serious injuries.

In rejecting Dixon's double jeopardy challenge, the Court concluded that his two convictions satisfied the *Blockburger v. United State*s, 284 U.S. 299, 304 (1932), test but then went on to explore whether they were satisfactory under *Sherley v. Commonwealth*, 558 S.W.2d 615, 617-18 (Ky. 1977), *overruled by Dixon*, 263 S.W.3d at 593, which would have merged the two crimes. *Dixon*, 263 S.W.3d at 591. In exploring this issue, the Court noted that

> under the facts of today's case, reasonable jurors could have concluded that Dixon was guilty of both first-degree assault and first-degree rape simply because Doe suffered two serious physical injuries to her head from a blow of the hammer delivered at different times during her ordeal at the store. In other words, since Doe was struck on the head with a hammer when the assailants first entered the store and was struck again after she was raped, a jury could have found that either blow to the head alone constituted the basis for the assault conviction.

Id. at 592. However, this was not the Court's holding or ultimate conclusion. The Court in fact overruled *Sherley* and "[held] that the prohibition against double jeopardy is not violated when a defendant is convicted of first-degree assault and first-degree rape (involving a serious physical injury to the victim), even if the same serious physical injury to the victim is used to support each conviction." *Id.* at 593.

Second, even assuming the *dicta* in *Dixon* is correct that either injury could constitute a serious physical injury, the type of head injuries inflicted on

the victim Doe were each categorically more serious than those inflicted on A.T. As the majority opinion recounts, as was stated in *Dixon*, Doe suffered a "complex depressed skull fracture and a gaping laceration on the back of her head." *Id.* at 585. There is absolutely no indication that A.T. suffered a wound equivalent to either wound that Doe received. A.T. was never diagnosed with having a skull fracture, let alone a depressed one. There is also absolutely no indication that any of A.T.'s lacerations (a fancy medical word for "[a] tear in the skin"[4]) were gaping. A.T. did not require any stitches, staples or even any bandaging. She just had hematomas (otherwise known as bruises[5]). While A.T. may have received a mild concussion, and had numerous small wounds, none of her injuries required any treatment. Even if we interpret the evidence, which included A.T. opining that she did have a concussion as she knew what one felt like and could see the lump on her head when she looked up at her forehead, as establishing that A.T. did have a mild concussion, this is not enough to constitute a serious physical injury.

Perhaps it could be said that Giles was lucky that he did not happen to hurt A.T. worse, but our laws in general punish conduct with worse outcomes more severely. We do not punish attempts the same as completed crimes and we should not punish assaults that result in more minor wounds the same as

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[4] *Laceration*, *Medical Dictionary of Health Terms: J-P*, Harvard Health Publishing, Harvard Medical School, https://www.health.harvard.edu/j-through-p#L-terms (Dec. 13, 2011).

[5] Harvard Medical School defines a "hematoma" as "[b]lood that leaks out of blood vessels and collects in the body." *Hematoma*, *Medical Dictionary of Health Terms: D-I*, Harvard Health Publishing, Harvard Medical School, https://www.health.harvard.edu/d-through-i#H-terms (Dec. 13, 2011). In common parlance that is a "bruise."

those that result in serious physical injuries. I believe the wounds to A.T. simply do not rise to the level of creating a substantial risk of death, and the majority opinion is instead upholding the punishment of conduct that is the type of action that *could* result in a substantial risk of death, rather than actually *did* result in a substantial risk of death, here.

In considering the dividing line between serious physical injury and physical injury, it is helpful to compare our sister state, New York, which has similar statutory provisions to ours,[6] categorizes similar injuries.

With its large urban center in New York City and large population, New York courts have repeatedly had to address whether blows with a hammer constituted serious bodily injury. As in Kentucky, it depends on the end result of such blows rather than the intent with which they were inflicted. I agree with New York that where an appellant repeatedly struck the victim in the head and body with a claw hammer and the injuries included a wound to the forehead which required 55 stitches and caused scarring, that a conviction for first-degree assault was appropriate. *People v. Barnish*, 72 A.D.3d 1551, 1551–52, 899 N.Y.S.2d 511, 512 (2010).

I also agree with New York's approach that if a person intended to inflict a serious physical injury but did not succeed, that there are two possible

[6] *See* N.Y. Penal Law § 120.10 ("A person is guilty of assault in the first degree when: 1. With intent to cause serious physical injury to another person, he causes such injury to such person or to a third person by means of a deadly weapon or a dangerous instrument"); N.Y. Penal Law § 10.00(10) ("'Serious physical injury' means physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ.").

convictions that are appropriate: attempted first-degree assault or second-degree assault. I believe either crime fits what Giles did to A.T.

The Court explained in *People v. Ekwegbalu*, 131 A.D.3d 982, 984, 15 N.Y.S.3d 847, 849–50 (2015), addressing an unpreserved argument that the evidence was legally insufficient to convict the appellant of first degree assault because serious physical injury had not occurred, that where "the evidence presented at trial established beyond a reasonable doubt that the defendant acted with the intent to inflict serious physical injury and came 'dangerously near' to committing the completed crime" the appropriate conviction is to "attempted assault in the first degree[.]" Therefore, in *People v. Gill*, 168 A.D.3d 1140, 1141, 90 N.Y.S.3d 392, 394–95 (2019), the appellant was appropriately convicted of attempted first degree assault where he "suddenly approached the victim from behind and struck him four to five times in the back of the head with a hammer" and "the victim had a large lump and numerous lacerations on his head that had resulted in significant bleeding."

Alternatively, a conviction for second degree assault for bodily injury through use of a dangerous weapon may be appropriate. *See People v. Holmes*, 9 A.D.3d 689, 691, 780 N.Y.S.2d 96, 98 (2004) (upholding second-degree assault when victim was beaten on the head with a metal tool that was either a hammer or screwdriver, blood was observed "gushing" from the victim's head after he was struck, the victim testified that his wound required four staples at the hospital and officers observed blood in the hallway, bedroom and outside); *People v. Trichilo*, 230 A.D.2d 926, 930–31, 646 N.Y.S.2d 898, 902 (1996)

(upholding second-degree assault when appellant along with others acted in concert to beat victim up with hammers, resulting in the victim having "black and blue marks all over his arms, back and head" and "suffer[ing] a massive hemorrhage, headache, dizziness and bleeding in several places, and "requir[ing] 14 staples for one laceration"); *People v. DeLarosa*, 172 A.D.2d 156, 156–57, 568 N.Y.S.2d 47, 48 (1991) (upholding second-degree assault where victim was beaten over the head with a hammer resulting in a bloody lump on her head).

If our General Assembly wishes to punish conduct which *could* have caused serious bodily injuries to an equal extent to conduct which *did* cause serious bodily injuries, there are several statutory options that our sister states have adopted to do just that. For example, in Pennsylvania, Vermont, and Maryland, an attempt to cause serious bodily injury and causing serious bodily injury both constitute aggravated assault.[7] In Alaska, first degree assault can be committed by either recklessly causing serious physical injury by means of a dangerous instrument or through repeated assaults using a danger instrument "even if each assault individually does not cause serious physical

[7] *See* 18 Pa. Stat. and Cons. Stat. Ann. § 2702(a) (emphasis added) ("A person is guilty of aggravated assault if he: (1) *attempts to cause* serious bodily injury to another, *or causes* such injury intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life"); Vt. Stat. Ann. tit. 13, § 1024(a) (emphasis added) ("A person is guilty of aggravated assault if the person: (1) *attempts to cause* serious bodily injury to another, *or causes* such injury purposely, knowingly, or recklessly under circumstances manifesting extreme indifference to the value of human life"); Md. Code Ann., Crim. Law § 3-202(b)(1) ("A person may not intentionally cause or attempt to cause serious physical injury to another.").

injury[.]"[8] In Georgia, aggravated assault can be committed by assaulting with the intent to murder, rape or rob, *or* by use of a deadly weapon or an object likely to cause serious bodily injury.[9] *See* 6A C.J.S. Assault § 97.[10] The fact that our statutes do not contain similar wording is an indication that our General Assembly does not intend to punish the intent to cause serious

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[8] The Alaska statute specifies these as two of five methods for committing assault in the first degree: "(1) that person recklessly causes serious physical injury to another by means of a dangerous instrument; . . . (4) that person recklessly causes serious physical injury to another by repeated assaults using a dangerous instrument, even if each assault individually does not cause serious physical injury[.]" Alaska Stat. Ann. § 11.41.200(a). *See* Alaska Stat. Ann. § 11.81.900(59) ("'serious physical injury' means (A) physical injury caused by an act performed under circumstances that create a substantial risk of death; or (B) physical injury that causes serious and protracted disfigurement, protracted impairment of health, protracted loss or impairment of the function of a body member or organ, or that unlawfully terminates a pregnancy").

[9] The Georgia statute provides: "A person commits the offense of aggravated assault when he or she assaults: (1) With intent to murder, to rape, or to rob; (2) With a deadly weapon or with any object, device, or instrument which, when used offensively against a person, is likely to or actually does result in serious bodily injury[.]" Ga. Code Ann. § 16-5-21(a).

[10] The C.J.S. explains such statutes as follows:

> Under various statutes, an assault with the intent to inflict great bodily harm is an aggravated assault, and constitutes a specific offense. To constitute the offense there must be an assault which must be unlawful and coupled with a present ability to injure. However, battery or injury need not occur. Nevertheless, the infliction of great bodily harm is an essential element of the offense of aggravated battery. Since the intent of the accused and not the act committed determines the character of the assault, provided of course the act alleged constitutes an assault, the assault may be committed with an unloaded firearm, the intent being present, as where the assailant believes a weapon to be loaded.
>
> The means employed for the commission of an offense of this character must be such as are calculated to inflict great bodily injury. However, it is unnecessary that a dangerous or deadly weapon be employed. The real injury inflicted is not material except insofar as it may tend to show that the means were calculated to inflict serious bodily injury.

Id. (footnote citations omitted).

physical harm the same as the result of causing serious physical harm. We should not engage in re-writing our statutes by legislating from the bench.

Giles argues that whether or not he properly preserved this issue, "a conviction obtained where the government failed to prove every element beyond a reasonable doubt is an error of Constitutional magnitude, and thus constitutes a palpable error." I agree.

"It is now elementary that the burden is on the government in a criminal case to prove every element of the charged offense beyond a reasonable doubt and that the failure to do so is an error of Constitutional magnitude." *Miller v. Commonwealth*, 77 S.W.3d 566, 576 (Ky. 2002). "The Commonwealth's failure to prove an essential element of a crime is necessarily palpable because the Due Process Clause protects a criminal defendant against conviction except upon proof beyond a reasonable doubt of each fact necessary to prove all the elements of a crime." *Lisle v. Commonwealth*, 290 S.W.3d 675, 680 (Ky. App. 2009).

Therefore, in *Anderson v. Commonwealth*, 352 S.W.3d 577, 581 (Ky. 2011), where the appellant claimed "there was insufficient proof of a 'serious physical injury' to convict him of assault in the first degree" and failed to properly preserve this issue, the Court reviewed the matter pursuant to RCr 10.26 for manifest injustice, explaining that the failure of the Commonwealth to "prove every element of the charged offense beyond a reasonable doubt" would "violate the accused's right to Due Process."

The trial court should have granted Giles a new trial limited to the charge of second-degree assault. While the Commonwealth established that A.T. suffered a physical injury, it did not establish any basis under which the jury could properly conclude that she had suffered a serious physical injury. Given the failure of proof as to this element, manifest injustice was established, and reversal is warranted.

I agree with the majority opinion that Giles was not prevented from presenting his defense by the trial court agreeing with the Commonwealth that the testimony of two of Giles's witnesses, his daughter Adriana Giles and his mother Nancy LaRocca, was not relevant or was more prejudicial than probative. I believe the trial court properly acted within its discretion by excluding such evidence.

I disagree with the majority opinion that the Commonwealth Attorney did not improperly insert himself into the proceedings as a witness. I concur in result only on this issue because reversal on this ground would not have been warranted as the error was not preserved and is not palpable. Nevertheless, this prosecutor acted improperly in answering A.T.'s questions while she was testifying and leading her testimony via allusions to his personal knowledge of their meetings.

Commonwealth Attorneys should refrain from any conduct in which they are acting as witnesses. Conduct that does not go as far as that condemned in *Holt v. Commonwealth*, 219 S.W.3d 731, 734-39 (Ky. 2007), and the cases cited therein may nevertheless be improper and unprofessional. Prosecuting

attorneys should seek to act appropriately and not skirt close to any lines set to ensure that defendants receive a fundamentally fair process.

Accordingly, although I agree with part of the majority opinion, I would reverse and remand because the trial court should have directed a verdict on first degree assault. The Commonwealth failed to prove that A.T. suffered a serious bodily injury and, accordingly, Giles could only have been convicted for attempted first-degree assault or second-degree assault.

Conley, J. joins.

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