

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-000574-MR

SHANNON LUMPKINS

APPELLANT

v. APPEAL FROM JOHNSON CIRCUIT COURT
HONORABLE DANIEL REID SPARKS, JUDGE
INDICTMENT NO. 00-CR-00018

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: COMBS, GUIDUGLI, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: Shannon Lumpkins appeals from a final judgment and sentence of imprisonment entered by the Johnson Circuit Court following a jury trial in which he was convicted of assault in the first degree. The trial court sentenced Lumpkins to twelve years' imprisonment. Finding no error, we affirm.

Lumpkins was arrested on September 13, 1999, and charged with assault in the first degree. At the time of his

arrest, Lumpkins was seventeen (17) years old. This arrest stemmed from events occurring while Lumpkins was being held in the juvenile wing of the Johnson County Detention Center.¹

During the evening of September 12, 1999, Charlotte Parsons was working as the juvenile supervisor at the detention center. Lumpkins and Steven Davidson were, at this time, juvenile inmates of the detention center and shared a cell with three other juvenile males. As cellmates, Lumpkins and Davidson formulated a plan to escape from the detention center by assaulting a guard and taking the keys to the jail.

As was normal custom, Parsons allowed Lumpkins to exit his cell so that he could retrieve sleeping mats from the hallway. While moving the mats into the cell, Lumpkins turned around and struck Parsons' face with his fists. Lumpkins then jumped on top of Parsons and struck her repeatedly until she lost consciousness. Davidson joined this assault by kicking Parsons in the hips. While Lumpkins was striking Parsons, Davidson grabbed her keys and ran to unlock a door.

At this point, Corrections Officer Frank Jude heard Parsons scream and rushed over to the juvenile wing. Upon entering the juvenile wing, Jude witnessed Lumpkins strike Parsons on her head with his bare fists. Corrections Officer

¹ The record does not disclose the reason why Lumpkins was being detained in the Johnson County Detention Center.

Robert Salyer arrived at the scene and assisted Jude in detaining Lumpkins and Davidson. Lumpkins informed Salyer that he hit Parsons. Officials from the detention center immediately contacted the local ambulance service. Emergency Medical Technician Mike Conley transported Parsons to Paul B. Hall Regional Medical Center with major trauma around her face. Conley noted that the trauma was located around Parsons' eyes.

A hearing was held on September 16, 1999, in the juvenile division of the Johnson District Court. At this hearing, the Commonwealth stated that it would seek certification of Lumpkins as an adult. During this hearing, Lumpkins' counsel admitted that his client was on probation because of a recent felony conviction in Tennessee.

On February 4, 2000, the juvenile court, as required by KRS 635.020(3), held a hearing to determine whether Lumpkins should be transferred to the Johnson Circuit Court for trial as a youthful offender pursuant to KRS 640.010. At this hearing, the Commonwealth moved to amend the charge from assault in the first degree to assault in the second degree. The Commonwealth introduced evidence that Lumpkins executed a plea agreement in Tennessee concerning a felony charge. The Commonwealth, however, provided no final judgment for this Tennessee felony charge. After hearing extensive testimony from Parsons concerning her injuries, the juvenile court found probable cause

that Lumpkins committed assault in the second degree and ordered him transferred to circuit court.

Following his transfer to circuit court, Lumpkins filed a motion requesting release from custody pursuant to Kentucky Rules of Criminal Procedure (RCr) 5.22 because he had been detained for over sixty (60) days without being indicted. The Commonwealth asserted that it had not been able to present its case to the grand jury due to the illnesses of the investigating officer's father and the investigating officer. On April 6, 2000, the trial judge signed an order releasing Lumpkins from custody and dismissing this matter without prejudice. Fourteen (14) days later, the grand jury indicted Lumpkins for assault in the first degree and first-degree attempted escape in complicity with others.²

Lumpkins' jury trial was held in January 2001. At trial, the major issue in dispute was the extent of Parsons' injuries. Dr. Loey Kousa testified that Parsons suffered no serious injuries as a result of this incident. According to Dr. Kousa, Parsons sustained no fractures, blurred vision, double vision or had any unilateral sensory complaints. Dr. Douglas Lamppin, an ear, nose and throat specialist, testified that there were no nasal blockages and he detected no serious

² The attempted escape in complicity with others charge was eventually dismissed by the trial court.

injuries resulting from this assault. Dr. Gregory Baker, however, testified that Parsons suffered from headaches, numbness in her cheeks and nasal obstruction. Dr. Baker also noted that Parsons suffered a fractured cheekbone, emphysema, and hypertension as a result of this attack.

Parsons also testified concerning the injuries she sustained during Lumpkins' attack. Parsons testified that she has difficulty breathing during cold weather. Further, Parsons stated that, after being assaulted, she is extremely nervous around people, has nightmares, and suffers from headaches and numbness in her face.

Lumpkins was convicted of first-degree assault. The jury recommended a sentence of twelve years' imprisonment. On March 13, 2001, the trial court sentenced Lumpkins in accordance with the jury's recommendations. The trial court denied Lumpkins' motion for shock probation. This appeal follows.

On appeal, Lumpkins presents eight arguments for our review. First, Lumpkins argues that the Johnson District Court erred when it based the decision to transfer him to circuit court on a pending adjudication that was not final. We find this argument to be totally without merit. During his first appearance in juvenile court, Lumpkins' trial counsel admitted that he was convicted of a felony in Tennessee and was on probation for that crime. Moreover, at trial, Lumpkins' trial

attorneys stipulated that the conviction from Tennessee was properly certified, showing that Lumpkins was convicted of a class C felony in Claiborne County, Tennessee. The law is clear that admissions made to a court by counsel relative to issues are binding on the client. Bell County Board Of Education v. Howard, 248 Ky. 766, 59 S.W.2d 982, (1933). Since trial counsel openly admitted that Lumpkins had, in fact, been convicted of a felony in Tennessee and was on probation for such crime, Lumpkins is bound by that action. See Jones v. Phillips, Ky., 243 S.W.2d 890 (1951). Accordingly, we find no error concerning the district court's consideration of the conviction Lumpkins accepted from our sister state.

Next, Lumpkins argues that the trial court erred by transferring him to the circuit court without properly finding that the Commonwealth failed to sufficiently demonstrate all elements necessary for such transfer to occur. We disagree.

KRS 640.010(2)(c) clearly states that, if the court, after a preliminary hearing, finds "that two (2) or more of the factors specified in paragraph (b) of this subsection are determined to favor transfer, the child may be transferred to Circuit Court." The factors enumerated in KRS 640.010(2)(b) are as follows: the seriousness of the alleged offense; whether the offense was against persons or property; the maturity of the child as determined by his environment; the child's prior

record; the best interest of the child and community; the prospects of adequate protection of the public; the likelihood of reasonable rehabilitation of the child through the resources of the juvenile justice system; and evidence of a child's participation in a gang.

Here, the videotape of the February 4, 2000, hearing shows that the district court considered all of the factors listed in KRS 640.010(2)(b). The district court found that the assault charge against Lumpkins was a serious offense against a person. Additionally, the district court found that Lumpkins possessed an extensive criminal record in both Kentucky and Tennessee. Further, the court determined that both Lumpkins and the community were best served with Lumpkins being tried as an adult because of the seriousness of the incident at issue. Finally, the trial court openly doubted that Lumpkins could be rehabilitated through the juvenile justice system. All of these findings are clearly supported by the evidence received at the preliminary hearing. With at least six of the required factors sufficiently proven at the February 4, 2000, hearing, the trial court properly entered an order transferring Lumpkins to the Johnson Circuit Court as a youthful offender.

Lumpkins further argues that the district court should have made its findings pursuant to KRS 640.010(2)(b) in writing. The district court's docket notation, rather than making

specific findings of reasonable cause, merely orders Lumpkins transferred to circuit court for trial as an adult. The docket notation also states, "Court has stated reasons why Juv. is a youthful Defender [sic] on a taped record." While we believe that the district court's written order, standing alone, is not sufficient to vest jurisdiction in the circuit court, the videotape of this hearing reveals that the district court provided a detailed analysis of its findings. We note that this Court has recognized that a district court may orally provide rulings supporting its findings to transfer jurisdiction.

Harden v. Commonwealth, Ky. App., 885 S.W.2d 323, 324-25 (1994).

Thus, since the district court, via the videotaped record, provided a detailed analysis of its findings, we find no error concerning the district court's lack of written findings.

Third, Lumpkins asserts that the circuit court erred by making him stand trial for first-degree assault even though the district court did not find probable cause for that offense. We reject this argument.

The Kentucky Supreme Court recently addressed this issue in Osborne v. Commonwealth, Ky., 43 S.W.3d 234 (2001). In Osborne, the defendant was transferred to circuit court and charged with two murders, first-degree arson, and first-degree robbery. Id., at 238. Following this transfer, the grand jury indicted Osborne on the transferred charges, as well as first-

degree burglary. Id. Osborne argued that the circuit court possessed no jurisdiction to hear the burglary charge since the district court did not transfer that offense to circuit court. The Supreme Court rejected this argument, holding that "under the statutory scheme for youthful offenders, it is the offender that is transferred to circuit court, not the offense." Id. Thus, it appears the grand jury may indict a juvenile defendant for additional or different offenses as long as the new charges involve the same victim and arise from the same conduct.

In this matter herein, Lumpkins was transferred after the district court found probable cause to believe that he committed second-degree assault. The grand jury, however, chose to indict Lumpkins for first-degree assault using evidence predicated on his actions against Parsons. Thus, under Osborne, Lumpkins was properly transferred to circuit court, leaving the grand jury free to indict him for first-degree assault since that charge arose from the same facts and involved the same victim as the transferred charges.

For his fourth assertion of error, Lumpkins argues that the circuit court erred when it did not return jurisdiction of him to the district court after the grand jury failed to indict him in March 2000. In support of this argument, Lumpkins asserts that the trial court entered an order dismissing this charge without prejudice on April 6, 2000. By entering an order

of dismissal, Lumpkins believes the circuit court terminated all proceedings against him. Accordingly, Lumpkins argues that the Commonwealth is required to recertify its case before the district court prior to obtaining another indictment. While Lumpkins has presented an interesting argument, it is clear from the record that he raises this argument for the first time on appeal. By failing to raise this issue in the circuit court, Lumpkins waived this argument. Hence, this issue is not properly before us for review.³ Commonwealth v. Davis, Ky., 80 S.W.3d 759, 760 (2002), citing Commonwealth v. Thompson, Ky., 697 S.W.2d 143 (1985).

Lumpkins next argues that the cumulative effect of the errors raised thus far constitutes a denial of due process and requires a reversal of his conviction. We disagree. Based on our conclusions to this point, we need not address this argument. See McQueen v. Commonwealth, Ky., 721 S.W.2d 694, 701

³ Even if Lumpkins had properly objected, we cannot accept his argument. KRS 635.020(3) limits the jurisdiction of the district court to act any further following its determination of probable cause. This line of reasoning is supported by Commonwealth v. Halsell, Ky., 934 S.W.2d 552 (1996). In Halsell, the Supreme Court found that, following a determination of reasonable cause to believe a child over age 14 has been charged with a felony wherein a firearm was used to commit the offense, KRS 635.020(4) operates to limit the jurisdiction of the district court to act any further. The Supreme Court also noted that Section 112(5) of the Kentucky Constitution vested the circuit court with jurisdiction as to that particular class of offenders. Thus, nothing in KRS Chapter 635 or KRS Chapter 640 requires the Commonwealth to recertify its case against Lumpkins in district court before seeking another indictment.

(1986), cert. denied, 481 U.S. 1059, 107 S. Ct. 2203, 95 L. Ed. 2d 858 (1987).

Sixth, Lumpkins argues that the circuit court erred by denying his motion for a mistrial after inadmissible evidence was placed before the jury. Again, we disagree.

During cross-examination, Corrections Officer Robert Salyer testified that Lumpkins admitted to assaulting Parsons during his attempt to escape from the Johnson County Detention Center. Lumpkins immediately objected to this testimony pursuant to KRS 610.200 because this admission was made outside of the presence of his parents or counsel.⁴ Lumpkins also moved for a mistrial. The trial court sustained the objection to Salyer's testimony concerning this admission, but overruled the motion for a mistrial. At this point, the trial court admonished the jury as follows:

[T]he statement given by the Defendant in the absence of counsel at some later point in time is not to be considered by you as evidence in this case, because it is an admission made, allegedly, without proper admonitions being given to this young man. . .

A mistrial is appropriate only where the record reveals "a manifest necessity for such an action or an urgent or

⁴ KRS 610.200(1) requires an officer who takes a juvenile into custody to "immediately inform the child of his constitutional rights and afford him the protections required thereunder." The Commonwealth does not dispute that Lumpkins was not advised of his constitutional rights prior to admitting his guilt to Salyer.

real necessity." Skaggs v. Commonwealth, Ky., 694 S.W.2d 672, 678 (1985), cert. denied, 476 U.S. 1130, 106 S. Ct. 1998, 90 L. Ed. 2d 678 (1986) (quoting Wiley v. Commonwealth, Ky. App., 575 S.W.2d 166 (1979)). When an admonition is given, it is ordinarily presumed that the admonition controls the jury and removes the prejudice that brought about the admonition. Clay v. Commonwealth, Ky. App., 867 S.W.2d 200, 204 (1993). The trial court immediately admonished the jury not to consider Salyer's testimony concerning any admission of guilt Lumpkins may have provided. With an immediate admonition, we do not believe that the trial court had an urgent or real necessity to declare a mistrial. Lumpkins has not overcome the presumption that the admonition cured any resulting prejudice. In the absence of evidence to the contrary, we must assume that the admonition achieved the desired effect. Id. A trial court has discretion in deciding whether to declare a mistrial, with that decision not being disturbed absent an abuse of discretion. Jones v. Commonwealth, Ky. App., 662 S.W.2d 483 (1983). We find no abuse of discretion.

Lumpkins next argues that the trial court erred by permitting the introduction of hearsay evidence concerning his culpability. Specifically, Lumpkins complains that a portion of the testimony of the investigating officer, Paintsville Police Officer Paul Witten, was improperly admitted into evidence.

Officer Witten testified that Lumpkins and Davidson were both charged with assault in connection with the attack on Parsons. However, Witten noted that the Johnson County Attorney sought to have Lumpkins, but not Davidson, transferred to circuit court because of Lumpkins' age⁵ and the severity of the victim's injuries. Officer Witten also testified as follows:

Q 24: Well, let me ask you this. After taking the statements, the involvement between the two Defendants in the commission of the offense, was that a factor in any way?

A: That has something to do with it. I based my investigation on what evidence I had and what statements I had and what I saw. . . the injuries of the victim.

Q 25: And the defendant's involvement?

A: Yes.

Q 26: Between the two Defendants involved?

A: Yes.

Lumpkins asserts on appeal that this line of questioning was improper investigative hearsay or improperly bolstered the Commonwealth's case. Unfortunately, Lumpkins failed to enter a contemporaneous objection to this questioning during his trial.⁶ Thus, this issue was not properly preserved

⁵ The assault on Parsons occurred approximately three (3) months prior to Lumpkins turning eighteen (18) years of age.

⁶ In his brief, Lumpkins states that this issue was preserved by an objection. However, in reviewing the trial transcript, Lumpkins' objection was based upon whether Officer Witten could

for our review. Renfro v. Commonwealth, Ky., 893 S.W.2d 795, 796 (1995). See also RCr 9.22.

Moreover, even if we addressed this argument under the palpable error rule as set out in RCr 10.26, we find no error. A palpable error is an error affecting the substantial rights of a party and relief may be granted only upon a determination that a manifest injustice has resulted from the error. Partin v. Commonwealth, Ky., 918 S.W.2d 219, 224 (1996). In other words, this Court, upon consideration of the whole case, must conclude that a substantial possibility exists that the result would have been different in order to grant relief. Id. Here, a review of the record clearly refutes any contention that the outcome of this trial would have been different absent the allegedly improper questioning by the Commonwealth. In light of the overwhelming evidence of Lumpkins' guilt contained in the record, we are convinced that any error occasioned by the allegedly improper questions was at best harmless. Thus, any possibility of a different outcome was, at best, remote.

Finally, Lumpkins argues that the trial court erred by not granting his motion for a directed verdict. Lumpkins believes that he was entitled to a directed verdict since the

testify that the Johnson County Attorney elected to transfer Lumpkins, but not Davidson, to circuit court. Lumpkins failed to object to any testimony by Officer Witten concerning his investigation of the September 1999, assault on Parsons.

Commonwealth produced no evidence that Lumpkins used his hands or feet as dangerous instruments resulting in serious physical injury to Parsons. We disagree.

A directed verdict is warranted only where the Commonwealth's evidence fails to establish guilt. Butler v. Commonwealth, Ky., 516 S.W.2d 326 (1974). On 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 is the defendant entitled to a directed verdict of acquittal. Commonwealth v. Benham, Ky., 816 S.W.2d 186 (1991); Trowel v. Commonwealth, Ky., 550 S.W.2d 530 (1977). A defendant is not entitled to a directed verdict of acquittal if it would not be unreasonable for a jury to find him guilty. Yarnell v. Commonwealth, Ky., 833 S.W.2d 834 (1992); Commonwealth v. Sawhill, Ky., 660 S.W.2d 3 (1983).

KRS 500.080(3) defines a "dangerous instrument" as:

[A]ny instrument, including parts of the human body when a serious physical injury is a direct result of the use of that part of the human body, article, or substance which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or serious physical injury.

We acknowledge that the Kentucky Supreme Court, in Roney v. Commonwealth, Ky., 695 S.W.2d 863 (1985), declared that a human fist is not a "dangerous instrument" within the meaning

of the first-degree assault statute. However, in Johnson v. Commonwealth, Ky. App., 926 S.W.2d 463 (1996), a panel of this Court held that the inclusion of parts of the human body as "dangerous instruments" depends upon the facts of the case as well as the capability of the particular body part at issue to cause death or serious injury. Applying this holding, the panel in Johnson determined that a defendant was properly charged with assault in the first degree after he admitted striking a two-month-old infant in the forehead with his hand, causing the infant to sustain a life threatening skull fracture.

In this matter herein, we believe the facts presented at trial, as well as Lumpkins' apparent attempt to use his fists to cause injury, require his fists to be included as "dangerous instruments." It is undisputed from the trial record that Lumpkins intended to repeatedly strike any corrections official with his fists in order to escape from custody. Lumpkins found an opportunity to orchestrate his escape plans by striking Parsons with his fists while retrieving sleeping mats for the cell. By intentionally using his fists to physically incapacitate Parsons and facilitate his escape, we believe that the trial court, in this case, correctly included fists as "dangerous instruments."

"Serious physical injury" is defined in KRS 500.080(15) as follows:

[P]hysical injury which creates a substantial risk of death, or which causes serious and prolonged disfigurement, prolonged impairment of health, or prolonged loss of impairment of the function of any bodily organ.

In this matter, the record contains evidence that Parsons sustained serious physical injuries as a result of Lumpkins striking her face with his fists. Specifically, Parsons testified that, as a result of Lumpkins' strikes to her head, a portion of her face still experiences numbness. Moreover, Parsons stated that her headaches and recurring nightmares about this incident have persisted and that she continues to have difficulty breathing in cold weather. We believe that, through Parsons' testimony, the Commonwealth submitted proof that Lumpkins caused prolonged impairment of Parsons' health by hindering her ability to breathe. Accordingly, the question of whether Parsons sustained a "serious physical injury" was a proper question of fact for the jury.

In making his argument, Lumpkins points out that the medical evidence submitted to the jury fails to prove that any prolonged impairment occurred. In fact, medical evidence submitted at trial from Dr. Kousa and Dr. Lamppin suggests that Parsons did not sustain any permanent impairment from the September 1999, incident. Lumpkins also reminds us that this Court has previously held that medical testimony is the

preferred method of proving "serious physical injury." Johnson 926 S.W.2d at 465.

While Lumpkins does present a strong argument that the medical testimony refutes Parsons' testimony concerning the seriousness of her injuries, Parsons' testimony was properly presented to the jury. Even though medical testimony is the preferred method of proving serious physical injury, medical proof is not an absolute requisite to prove serious physical injury. Key v. Commonwealth, Ky. App., 840 S.W.2d 827, 829 (1992). A victim is competent to testify about her own injuries. Ewing v. Commonwealth, Ky., 390 S.W.2d 651, 653 (1965). Thus, a victim's testimony concerning her physical injuries may be considered by the jury. Johnson, 926 S.W.2d at 465. In addition, some medical evidence supported Parsons' testimony concerning her injuries. Dr. Baker testified that he treated Parsons for headaches, numbness in her cheeks, and nasal obstruction. Additionally, Dr. Baker stated that Parsons sustained a fractured cheekbone, emphysema, and hypertension as a result of this attack. Dr. Baker also noted that he performed surgery on Parsons to fix a deviated septum.⁷ Finally, Dr. Baker testified that, while Parsons did not sustain a life-threatening injury or prolonged disfigurement as a result of the injuries

⁷ Dr. Baker described a deviated septum as a sign of significant nasal trauma.

she suffered during the September 1999, incident, she did sustain a prolonged impairment of her health. It appears that the jury considered all of the evidence, both medical and lay testimony, brought before it. The jury obviously gave the testimony of Parsons and Dr. Baker more attention, as it was entitled to do. See Matherly v. Commonwealth, Ky., 436 S.W.2d 793 (1968). Since the entire record reveals that it was not clearly unreasonable for the jury to find Lumpkins guilty under these facts, we find no error in the trial court's denial of Lumpkins' motion for a directed verdict.

We are also aware that whether the victim's injury is a "serious physical injury" is often a matter of the application of a jury's common sense. Commonwealth v. Hocker, Ky., 865 S.W.2d 323 (1993). Here, we believe that Parsons' testimony provided sufficient evidence to induce a reasonable juror to believe beyond a reasonable doubt that Parsons' injuries constituted "serious physical injury" in the statutory sense. Benham, 816 S.W.2d at 187.

For the aforementioned reasons, the judgment of the Johnson Circuit Court is affirmed.

ALL CONCUR.

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