

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-002159-MR

ROBERT DARRELL BRYANT

APPELLANT

v. APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE JOHN DAVID CAUDILL, JUDGE
ACTION NOS. 00-CR-00088 AND 00-CR-00088-001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING

** ** * * *

BEFORE: JOHNSON, SCHRODER, AND TACKETT, JUDGES.

SCHRODER, JUDGE. Robert Darrell Bryant appeals from a judgment and sentence following a jury trial in the Floyd Circuit Court where he was convicted of unlawful imprisonment in the first degree, persistent felony offender in the second degree, unlawful transaction with a minor in the third degree (as to a second victim), and terroristic threatening (as to a third victim). Having determined that the circuit court committed

reversible error by refusing to instruct the jury on the lesser offense of unlawful imprisonment in the second degree, we reverse in part and remand for a new trial on the charge of unlawful imprisonment in the first degree, and vacate the persistent felony offender sentence pending the new trial.

The convictions in this case arise from events occurring on the evening of June 18, 2000. Lindsey Johnson was visiting the home of Chester Hunter when Mr. Bryant's daughter, Kayla, arrived. Lindsey Johnson and Kayla Bryant, each fourteen years old, were acquaintances but both testified that they did not get along. Although what occurred in the following moments is disputed, it is uncontroverted that a fight eventually ensued between Lindsey Johnson and Kayla Bryant in the front yard of the Hunter home. Lindsey testified that Kayla, who weighed nearly 100 pounds more than Lindsey, easily pinned her and repeatedly beat her head against the ground.

At some point, Mr. Bryant and his wife arrived at the scene of the fight. Lindsey Johnson and several eyewitnesses testified that, during the fight, Mr. Bryant and his wife surrounded the two girls in such a way as to prevent the several onlookers from stopping the fight. Lindsey further testified that Mr. Bryant kicked her with a boot several times and on one occasion hit her with his cane, more in an attempt to keep her from leaving than to commit an assault.

Kayla sustained minor bruising and scratches from the fight, which occurred on a piece of the yard that contained rocks, patches of grass, and pieces of broken asphalt. Lindsey sustained more serious injuries and was taken to the hospital by ambulance. Her injuries included bruising and scratches on her back and upper arms, contusions to the back of the head and along the spinal cord, and contusions in both eye orbits. She was treated at the hospital and released, but complained at trial of continuing back pain.

The jury received the case on instructions for unlawful imprisonment in the first degree, unlawful transaction with a minor in the third degree, misdemeanor assault, and misdemeanor terroristic threatening. The jury convicted the appellant on all counts except the misdemeanor assault charge. With the verdict, the jury recommended a sentence of eleven months and 29 days on the misdemeanor charges. During the penalty phase of the trial, the appellant received the maximum five-year sentence from the jury on the unlawful imprisonment charge. Furthermore, the jury determined the appellant to be a persistent felony offender in the second degree and recommended the maximum sentence of ten years for that charge. Mr. Bryant now raises eight issues on appeal.

Among other errors, Mr. Bryant asserts that the trial court erred in refusing to instruct the jury on the lesser-

included offense of unlawful imprisonment in the second degree, pursuant to KRS 509.030. Because this issue disposes of the case, we will address it first.

"A defendant is not entitled to an instruction on a lesser-included offense unless the evidence is such as to create a reasonable doubt as to whether the defendant is guilty of the higher or lower degree." Rowe v. Commonwealth, Ky. App., 50 S.W.3d 216, 218 (2001), citing Jones v. Commonwealth, Ky. App., 737 S.W.2d 466 (1987). Here, the trial court refused to instruct the jury on unlawful imprisonment in the second degree, and would only give the instruction on unlawful imprisonment in the first degree.

KRS 509.020 (1) sets out the following elements of unlawful imprisonment in the first degree: "A person is guilty of unlawful imprisonment in the first degree when he knowingly and unlawfully restrains another person under circumstances which expose that person to a risk of serious physical injury." KRS 509.030 (1) provides the following elements for unlawful imprisonment in the second degree: "A person is guilty of unlawful imprisonment in the second degree when he knowingly and unlawfully restrains another person."

The issue in this case is whether the jury could reasonably have concluded, based on the evidence presented, that no risk of serious physical injury to Lindsey Johnson existed.

Serious physical injury is defined at KRS 500.080 (15) as "physical injury which creates a substantial risk of death, or which causes serious and prolonged disfigurement, prolonged impairment of health, or prolonged loss or impairment of the function of any bodily organ".

The paramedic who arrived at the scene of the fight testified that Lindsey Johnson had suffered contusions to both eye orbits, a swollen lower lip, contusions to the back of the head, contusions to the anterior chest, and abrasions and contusions to the back of the rib cage. Ms. Johnson was transported to the McDowell Regional Hospital in a neck brace, secured to a back board. She was treated at the McDowell Regional Hospital and released the same evening, with instructions to ice the wounded areas to prevent swelling.

At the close of evidence, a motion was heard in chambers concerning the inclusion of unlawful imprisonment in the second degree in the jury instructions. Citing the weight difference between the two girls and the asphalt upon which Kayla was beating Lindsey, the Commonwealth argued that, as a matter of law, Lindsey Johnson was at risk of serious physical injury. The trial court agreed, ruling that the only reasonable finding the jury could make was that Lindsey Johnson was at risk of serious physical injury, although the court noted that no such injury actually resulted.

We opine that the issue of whether Lindsey Johnson was at risk for serious physical injury was a proper question for the jury. Cases involving a determination of whether risk of serious physical injury existed as a matter of law are few. In Lawson v. Commonwealth, Ky., 85 S.W.3d 571 (2002), the defendant had fled police in a stolen car at speeds between 100 and 125 miles per hour on Interstate 75. The Supreme Court concluded that the defendant's driving created a risk of serious physical injury as a matter of law, even though no injury actually resulted. The risk of serious physical injury is not so clear in the present case. Reasonable minds could differ as to whether a fight between two fourteen-year-old girls creates a risk amounting to serious physical injury. Thus, we hold that it was reversible error for the trial court to refuse instructions on unlawful imprisonment in the second degree. Therefore, we reverse and remand Darrell Bryant's conviction for unlawful imprisonment in the first degree, as well as the persistent felony offender sentence enhancement, and remand the matter for a new trial.

Mr. Bryant raises several other issues on this appeal, which we will address as they are likely to recur in a second trial. Mr. Bryant first argues that the trial court erred in prohibiting the defense from introducing evidence of medications Ms. Johnson was taking at the time of the event in question. A

pretrial motion in limine was made concerning the introduction of testimony concerning Ms. Johnson's alleged use of the prescription drug Zoloft at the time of the event. We affirm the holding of the trial court because the appellant failed to preserve this issue for appeal.

Rule 9.52 sets forth the procedures by which the objecting party may enter otherwise excluded evidence onto the record in order to preserve the issue for appeal. The appellant asserts the issue is available for review simply because counsel for the appellant objected; by this reasoning, a Rule 9.52 avowal would be a mere formality. On the contrary, an avowal is necessary so that the substance of any excluded testimony is preserved for review. At the hearing, the appellant objected to the Commonwealth's motion by stating what effects Ms. Johnson's medication *may* have had on her perception or ability to accurately recall the incident. Because no avowal was made, there is nothing in the record to demonstrate how Ms. Johnson *actually* would have answered questions on cross-examination as to the effects of her medication. As such, this issue was not properly preserved for review and exclusion of such testimony was proper. See Mills v. Commonwealth, Ky., 95 S.W.3d 838, 843 (2003).

The appellant next argues that the trial court erred in denying his motion for a mistrial after a potential juror

made an improper comment. During voir dire, the following interaction between Juror #88, Mr. Callihan, and the court occurred:

By the Court: "Anyone else? All right. Mr. Callihan, I knew you couldn't stand it without saying something."

Juror #88: "That's right Judge. I know the Bryants, but not personally. I have met them."

By the Court: "Yes, sir."

Juror #88: "And you know where I met them."

This same juror had previously stated that he was an employee of the county jail. The appellant now argues that some, if not all, of the potential jurors understood that Juror #88 knew of the appellant from the jail, which unfairly prejudiced the appellant at trial.

The appellant improperly relies on Tabor v. Commonwealth, Ky., 948 S.W. 2d 569 (1997), to assert that the trial court should have granted a mistrial in response to Juror #88's comment. In Tabor, this Court granted a new trial where a potential juror, during voir dire, commented that she had seen the defendant while visiting a relative at the Western Kentucky Correctional Center. This Court agreed that common sense would have led any other potential juror on the panel to conclude that the defendant previously had been incarcerated. However, in

granting a new trial, the Court stated: "Since Tabor testified in his own defense, he was subject to impeachment if he had any prior felony convictions. However, since Tabor's conviction for bail jumping was on appeal and not final, he could not be impeached based on that conviction." Id. at 572. In the present case, although Juror #88's comment may have prejudiced the jury, the error was harmless. Appellant's prior felony convictions were final and thus admissible for purposes of impeachment. In fact, the appellant did ultimately take the stand and was properly impeached by the Commonwealth attorney. Furthermore, it should be noted that appellant's counsel made no attempt during the remainder of voir dire to correct the error by either questioning the potential jurors as to their understanding of Juror #88's comments or their ability to decide the case fairly despite the revelation of Mr. Bryant's prior incarceration. See Davis v. Commonwealth, Ky., 899 S.W.2d 487, 490 (1995), overruled on other grounds by Merriweather v. Commonwealth, Ky., 99 S.W.3d 448 (2003).

Mr. Bryant's fourth point of error concerns comments made by the Commonwealth attorney during closing arguments. Mr. Bryant alleges that the Commonwealth attorney attempted to coerce or cajole the jury by essentially asking the jury to "send a message" to bullies like Darrell Bryant. However, in reviewing these comments in the context of the Commonwealth

attorney's entire closing argument, it is apparent that no improper statements were made to the jury. The Commonwealth attorney did not attempt to persuade the jury to convict Mr. Bryant simply to send a message to future felons or to stop a crime wave; rather, the Commonwealth attorney's closing argument was based on matters within the record and reasonable deductions therefrom. "The Commonwealth's Attorney is allowed reasonable latitude in argument to persuade the jurors the matter should not be dealt with lightly." Lynem v. Commonwealth, Ky., 565 S.W.2d 141, 145 (1978). We find no error in the trial court's refusal to grant a mistrial based on the Commonwealth attorney's closing arguments.

Mr. Bryant next claims that the trial court erred in requiring the appellant to register as a sex offender and that, furthermore, the reporting requirements contained in KRS 17.510 are unconstitutional. Mr. Bryant was not required to register as a sex offender; he was required to register as an offender committing a crime against a victim who is a minor as designated by the 'Judgment of Registration Designation' executed by the court at the time of sentencing. What Mr. Bryant is objecting to is the heading of the trial court's notice form. KRS 17.510 (3) requires any person subject to the reporting requirements to be informed of the duty to register by the court at the time of sentencing. The acknowledgment form that Mr. Bryant signed was

titled "Sex Offender Duty to Register" where it should more accurately be titled "Duty to Register as Adult Who Has Committed a Crime Against a Minor". However, the trial court did not err when it entered the judgment requiring registration pursuant to KRS 17.510.

We do not address Mr. Bryant's additional arguments concerning the constitutionality of KRS 17.510 as they were not properly preserved for appellate review. KRS 418.075(2) requires:

In any appeal to the Kentucky Court of Appeals or Supreme Court or the federal appellate courts in any forum which involves the constitutional validity of a statute, the Attorney General shall, before the filing of the appellant's brief, be served with a copy of the pleading, paper, or other documents which initiate the appeal in the appellate forum.

Mr. Bryant concedes that proper notice was not given to the Attorney General as required by KRS 418.075, but argues that actual notice was afforded the Attorney General by virtue of the fact that the Attorney General's office has handled this appeal on behalf of the Commonwealth. This argument is without merit. The Kentucky Supreme Court, in Brashers v. Commonwealth, Ky., 25 S.W. 3d 58, 65 (2000), stated that the notice requirement applies "even when the Commonwealth is a party to the action." Therefore, Mr. Bryant's arguments as to the constitutionality of

the registration requirements of KRS 17.510 were not properly preserved.

Mr. Bryant next claims error where the trial court refused to dismiss the unlawful imprisonment in the first degree based upon the exemption provision contained in KRS 509.050. KRS 509.050 prohibits a conviction of unlawful imprisonment where the restraint on the victim's liberty is incidental to the commission of another offense which is the objective of his criminal purpose and does not exceed the time which is ordinarily incident to the commission of that other offense. Mr. Bryant now claims that the Commonwealth could not prosecute him for assault and first-degree unlawful imprisonment as any restraint on Lindsey Johnson's liberty was incidental to any assault on her. However, it is clear from the record and from Lindsey Johnson's testimony that the opposite is true. When Mr. Bryant kicked Lindsey Johnson and struck her with his cane, he did so in an attempt to keep her from getting away. In other words, any assault upon Lindsey Johnson was committed in furtherance of Mr. Bryant's main objective, which was to prevent Ms. Johnson from leaving the fight. "Application of the exemption is determined on a case-by-case basis by the trial court." Murphy v. Commonwealth, Ky., 50 S.W.3d 173, 180 (2001). The trial court did not err in rejecting the appellant's motion

for dismissal of the unlawful imprisonment in the first degree charge as the exemption statute does not apply in this case.

Finally, Mr. Bryant requests a new trial on the grounds that the trial judge should have recused himself from the case because a former law partner of the trial judge had represented Mr. Bryant in an unrelated worker's compensation claim in 1990. This issue was not properly preserved for review because Mr. Bryant failed to present the information to the trial court prior to seeking appellate review. See Heucker v. Clifton, Ky., 500 S.W.2d 398, 404 (1973). Furthermore, looking to the basis of this assertion, Mr. Bryant's claim is without merit. KRS 26A.015(2)(b) requires a judge to recuse himself where the judge, or a former law partner of the judge, had previously served as a lawyer in the matter in controversy. Mr. Bryant's worker's compensation claim arising in 1990 is wholly unrelated to the present criminal convictions. Thus, the trial judge was under no duty to recuse himself.

For the foregoing reasons, we affirm in part, reverse in part, and remand for retrial of the charge of unlawful imprisonment in the first degree and set aside the persistent felony offender sentence, with directions to also instruct the jury on the lesser-included offense of unlawful imprisonment in the second degree.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jerry A. Patton
Prestonsburg, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler, III
Attorney General

Gregory C. Fuchs
Assistant Attorney General
Frankfort, Kentucky