

Commonwealth of Kentucky

Court of Appeals

NO. 2002-CA-001411-MR

WARD CARLOS HIGHTOWER

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE LAURANCE B. VANMETER, JUDGE
ACTION NO. 02-CR-00105

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: EMBERTON, CHIEF JUDGE; BAKER and HUDDLESTON, JUDGES.
EMBERTON, CHIEF JUDGE. Ward Carlos Hightower appeals from a judgment finding him guilty of assault, third degree, resisting arrest and disorderly conduct. The issues raised are (1) whether a wanton belief in the need for self-protection is a defense to third-degree assault upon a police officer; (2) whether the trial court abused its discretion in permitting the police officers to testify that other individuals were arrested on the same occasion as Hightower; and (3) whether the trial

court abused its discretion in striking a juror for cause. We affirm.

Officers Aaron Adams and Donovan Stewart of the Lexington Police Department, in separate cruisers, were on patrol in the area of Carlisle Avenue when they noticed five to seven men on the sidewalk. At approximately 1:58 a.m., the officers stopped their cruisers to investigate believing the men to be juveniles out after curfew. Although some of the men fled, Hightower and a companion were detained and questioned. The officers testified that during the questioning, Hightower, who lived across the street from where he was detained, became progressively loud, uncooperative. He began to bark like a dog and call for his mother.

Officer Stewart warned Hightower that if he persisted in screaming he would be arrested. After ten or fifteen minutes of continuous disruption, Officer Stewart testified, Hightower was placed under arrest and ordered to stand. Although Hightower denies that he was informed that he was under arrest, he testified that when he refused to stand Officer Stewart forcibly picked him up by the back of his jacket causing him to choke and dropped him to the ground. Hightower then claims he was struck by the officer and placed in a headlock. While on the ground, with Officer Adams straddling his body, Hightower, with a free hand, struck Officer Adams. Hightower presented

witnesses, including neighbors and family members who saw the incident to corroborate his story.

Hightower's first complaint is with the jury instructions, which read as follows:

INSTRUCTION NO. 2
COUNT ONE
THIRD DEGREE ASSAULT

You will find the defendant guilty of Third-Degree Assault under this Instruction, if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

- A. That in this county on or about the 11th day of December, 2001, he intentionally caused or attempted to cause physical injury to Officer Aaron Adams;
- B. That Officer Aaron Adams was a city peace officer acting in the course of his official duties and the defendant knew that he was acting in the course of his official duties;

AND

- C. That in so doing, he was not privileged to act in self-protection.

INSTRUCTION NO. 3
COUNT ONE
SELF-PROTECTION

Even though the defendant might otherwise be guilty of intentional Assault under Instruction No. 2, if at the time the defendant struck Officer Adams (if he did so), he believed that Officer Adams was then and there about to use more physical force

upon him than was reasonably necessary under the circumstances, he was privileged to use such physical force against Officer Adams as he believed to be necessary to protect himself against it.

Provided, however, if you believe from the evidence beyond a reasonable doubt that:

- (1) Officer Aaron Adams was a police officer acting under his apparent authority as such and was attempting to arrest the defendant;
- (2) The defendant recognized Officer Adams to be so acting and knew that Officer Adams was attempting to arrest him;
- (3) Officer Adams was not using any more force than was reasonable necessary to effect the arrest;

AND

- (4) The defendant was resisting arrest.

Then the defendant was not so privileged and is not entitled to the defense of self-protection set forth in this instruction.

Hightower contends that under KRS¹ 503.120(1) he was entitled to an instruction on qualified self-protection because he held a wanton belief in his need for self-protection. We disagree.

¹ Kentucky Revised Statutes.

KRS 503.120(1) defines "imperfect self-defense" and is generally applicable where the actor has a mistaken belief as to the need for self-protection.² The statute states:

When the defendant believes that the use of force upon or toward the person of another is necessary for any of the purposes for which such belief would establish a justification under KRS 503.050 to 503.110 but the defendant is wanton or reckless in believing the use of any force, or the degree of force used, to be necessary or in acquiring or failing to acquire any knowledge or belief which is material to the justifiability of his use of force, the justification afforded by those sections is unavailable in a prosecution for an offense for which wantonness or recklessness, as the case may be, suffices to establish culpability.

Notably absent in KRS 503.120(1) is any reference to its availability when, during the course of resisting arrest, the actor uses physical force upon an officer. However, KRS 503.060 specifically addresses this situation and is controlling. KRS 503.060(1) provides that the use of physical force is not justified when:

The defendant is resisting arrest by a peace officer, recognized to be acting under color of official authority and using no more force than reasonably necessary to effect the arrest, although the arrest is unlawful;
. . . .

² Commonwealth v. Hager, Ky., 41 S.W.3d 828 (2001).

In Baze v. Commonwealth,³ the court rejected the contention that the accused was justified in using deadly force against an officer in the course of an arrest. Noting that KRS 503.060 prohibits the use of any force on a police officer for the sole purpose of resisting arrest the court held:

Even though a defendant may believe that deadly physical force is necessary to protect himself against unlawful force by another, the use of such force is not justifiable when the defendant is resisting arrest by a police officer recognized to be acting under color of official authority and using no more force than reasonably necessary to effect the arrest even though the arrest is unlawful.⁴

The holding in Baze was reiterated in Stopher v. Commonwealth,⁵ where the court upheld Stopher's convictions for murder of a deputy sheriff and third-degree assault on four other officers when the court stated unequivocally that "[t]here is no right to use self-defense during an arrest."⁶

The language of KRS 503.060(1) precludes the application of KRS 503.120(1) to situations where a police officer used no more force than reasonably necessary to arrest

³ Ky., 965 S.W.2d 817 (1997).

⁴ Id. at 822.

⁵ Ky., 57 S.W.3d 787 (2001).

⁶ Id. at 803.

and the defendant was aware that he was being placed under arrest. In this case, the jury was properly instructed and found that Hightower's conduct did not justify the use of physical force against the officer. We find no error.

Hightower objects to the admission of testimony concerning the arrests of others in the vicinity at the time of his arrest. Officer Stewart testified on direct that several people were arrested as a result of their disorderly conduct during Hightower's initial detention. Although during his testimony defense counsel objected on the basis of Officer Stewart's lack of knowledge regarding the charges against the individuals, counsel did not, as now alleged, make a specific hearsay or relevancy objection.⁷

There is no error. Evidence pertaining to the circumstances of the crime and arrest are relevant and admissible.⁸ Particularly where, as here, the defendant relies on the use of force by an officer as a defense, the circumstances of the arrest are central to the issue of guilt. Additionally, counsel for defense solicited much of the testimony regarding the arrests. We find no error.

⁷ See Gabow v. Commonwealth, Ky., 34 S.W.3d 63, 75 (2001).

⁸ Matthews v. Commonwealth, Ky., 709 S.W.2d 414, 418-19 (1985).

Finally, there was no error in the striking a juror for cause who had a previous arrest for disorderly conduct and indicated only that he "thought" he could be fair and impartial. The trial court is in the best position to render decisions regarding the demeanor and voir dire answers of potential jurors, thus the decision lies within its sound discretion.⁹ Having reviewed the juror's responses to the questions asked and deferring to the trial court's discretion, we find no error.

The judgment is affirmed.

ALL CONCUR.

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⁹ Pendleton v. Commonwealth, Ky., 83 S.W.3d 522 (2002).