RENDERED: October 1, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001673-MR

MELVIN CLEO TAYLOR, JR. — APPELLANT

v.

APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE THOMAS O. CASTLEN, JUDGE
ACTION NO. 03-CR-00001

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: JOHNSON, TAYLOR, AND VANMETER, JUDGES.

VANMETER, JUDGE: This is an appeal from a judgment entered by the Daviess Circuit Court after a jury found appellant Melvin C. Taylor guilty of assault in the second degree and of being a persistent felony offender (PFO) in the second degree. Appellant alleges that the trial court erred by failing to strike a prospective juror for cause and by failing to enter a directed verdict of acquittal on the charge of assault in the second degree. For the reasons stated hereafter, we affirm.

On November 13, 2002, Franklin Barnes was visiting his two children when the children's mother, Ginger Bellamy, returned home accompanied by appellant, her boyfriend at the time. Because animosity existed between appellant and Barnes and the two had fought before, Bellamy entered the home alone. When Bellamy returned outside, Barnes followed her and walked toward appellant. A fight began when appellant pushed Barnes and Barnes threw a beer bottle at appellant. Appellant hit Barnes in the throat, allegedly with a pocketknife.[1] Barnes testified that he then felt a burning sensation, he could not breathe well, and blood flowed from his throat.

Appellant, who had received a cut on his head, left the scene. Bellamy's mother called an ambulance, but Barnes ultimately walked approximately three blocks to the hospital emergency room, where he was taken into surgery. Barnes, who stayed at the hospital for six days, including time in intensive care, testified at trial that he still could not swallow his food normally.

Appellant was indicted on January 6, 2003, for assault in the second degree and for being a PFO in the first degree.

[1] Barnes testified that he noticed a shiny object in appellant's hand just before appellant struck his throat. Further, Bellamy stated that appellant usually carried a pocketknife, that she had seen appellant with a knife earlier that day, and that appellant asked her after the fight to tell the police he had thrown part of the bottle back at Barnes. Appellant instead testified that he did not have a pocketknife but threw part of the broken bottle back at Barnes.

Appellant pled not guilty to the charges, and the matter proceeded to trial. During voir dire, defense counsel asked the venire members whether they thought interracial dating was inappropriate, due to the fact that appellant and Barnes were both black men and Bellamy was a white woman. Prospective juror Wayne Shelton indicated that he thought interracial dating was inappropriate, and defense counsel moved that he be struck for cause. The trial court denied the motion after questioning Shelton and determining that his belief would not affect his ability to make an impartial judgment. Defense counsel proceeded to use all nine of its peremptory strikes, including one against Shelton. The jury found appellant guilty of assault in the second degree and of being a PFO in the second degree. In its July 29, 2003, judgment and sentence, the court followed the jury's recommendation and ordered appellant to serve ten years in the penitentiary. This appeal followed.

First, appellant alleges that the trial court erred by failing to strike Shelton for cause. We disagree. As noted above, defense counsel asked the venire members during voir dire whether they thought interracial dating was inappropriate, due to the fact that appellant and Barnes were both black men and Bellamy was a white woman. When Shelton indicated that he thought interracial dating was inappropriate, he was called to the bench, where he stated further:

> I just don't think that God intended people of different races to mingle, I mean, to intermarry. I'm not prejudiced. I have friends, black friends, the bailiff is a friend of mind, several black friends. But, some of those don't believe there should be intermarriage. But I just don't believe it's right.

The judge followed up by asking Shelton whether his belief would affect his ability to render an impartial decision as to defendant's guilt, and Shelton responded that it would not. The judge then overruled defense counsel's motion to strike Shelton for cause, finding that Shelton was not prejudiced, that he had friends of both of the races involved in the case, and that his disapproval of interracial relationships would not affect his ability to render a fair judgment in the case. Defense counsel subsequently used one of its peremptory strikes to strike Shelton.

A criminal defendant "is entitled to be tried by a fair and impartial jury composed of members who are disinterested and free from bias and prejudice, actual or implied or reasonably inferred." *Alexander v. Commonwealth*, Ky., 862 S.W.2d 856, 864 (1993), *overruled on other grounds*, *Stringer v. Commonwealth*, Ky., 956 S.W.2d 883 (1997). Thus, pursuant to RCr 9.36(1), "[w]hen there is reasonable ground to believe that a prospective juror cannot render a fair and impartial verdict on the evidence, that juror shall be excused

as not qualified." Further, "[w]hether a juror should be excused for cause is a matter within the sound discretion of the trial court. The trial court's decision will not be disturbed absent a clear abuse of discretion." *Foley v. Commonwealth*, Ky., 953 S.W.2d 924, 931 (1997) (internal citations omitted).

We disagree with appellant's argument that *Alexander* and *Gamble v. Commonwealth*, Ky., 68 S.W.3d 367 (2002), compel us to hold that the trial court erred by not striking Shelton for cause. In *Gamble*, the court reversed a black defendant's conviction of murder and robbery because the trial court failed to exclude, for cause, a prospective juror who stated that he was racially biased and was offended by interracial relationships. *Id.* at 373. More specifically, the prospective juror had "specifically stated that he felt that people who were involved in such relationships were low class, and that low class people were more likely to commit crimes." *Id.* at 373.

Similarly, in *Alexander* the court reversed a black defendant's conviction of rape and sodomy, partially because the trial court erred by failing to strike prospective juror Woods for cause. At the bench the following colloquy took place:

> ***Woods:*** Is this a mixed marriage? ... I have a distaste for that. Now, I'm mature enough to know that my dislike for something like that doesn't necessarily make the man guilty or innocent. I just want that to be known.

Judge: If evidence is introduced that Mr. Alexander's wife is white do you feel that that character ...

Woods: No, no. I just want it to be known that I have a dislike for it. I have been around a long time and I know what is fair and what isn't fair. And I believe what's right is right and what's wrong is wrong and that wouldn't enter into it.

. . . . .

Judge: Would the fact that Mr. Alexander is African-American and the child is a bi-racial child ...

Woods: No it wouldn't. I mean that doesn't, no, I don't firmly believe it would.

Defense Counsel: Debbie Alexander is a white woman and she's married to Earl [appellant]. She might testify in this case. Do you think in the back of your mind, while you're listening to the testimony, you might be thinking what kind of woman is this? Maybe judging her credibility a little bit differently than, say, if she was a black woman?

Woods: I have to be honest, I probably would. A degree of difference would probably be there, yes.

Defense Counsel: So you don't think that you could necessarily look at her testimony as the same as you would, say, a different witness?

Woods: No, no. Testimony, that would be a different matter. Now you were talking about whether I would feel what kind of woman that is. Maybe a degree, but her testimony would be something else.

Defense Counsel: Would you use that maybe as a factor to decide if she is a credible

> witness, whether maybe she should be believed?
>
> ***Woods:*** No. A person's preference doesn't mean they're not honest about something.
>
> ***Defense Counsel:*** So you wouldn't use that in any way?
>
> ***Woods:*** I don't believe I would.
>
> . . . . .
>
> ***Commonwealth:*** If you're selected as a juror in this case, can you listen to the evidence, make a decision of guilt or innocence and be fair about it?
>
> ***Woods:*** Yes.
>
> ***Commonwealth:*** Certain?
>
> ***Woods:*** Yes.

Alexander, 862 S.W.2d at 863-64.

The facts in the matter now before us are distinguishable from those in both *Gamble* and *Alexander*. Unlike *Gamble*, where the prospective juror affirmatively stated his belief that the defendant was low class and therefore predisposed to commit crimes because of his involvement in an interracial relationship, or *Alexander*, where the prospective juror indicated that he probably would discount the credibility of a witness who was involved in such a relationship, here the prospective juror did not demonstrate that he should be struck for cause because of the great "probability of bias or prejudice." *Alexander*, 862 S.W.2d at 864. Instead, Shelton

merely expressed that he did not believe that there should be interracial marriages: in no way did he indicate that his belief would hinder his ability to be an impartial juror.

Further, we are not persuaded by appellant's claim that Shelton was a clearly biased juror whom the court improperly attempted to rehabilitate by use of the so-called "magic question." Our review of the record indicates that the court's questions to Shelton merely aided the court in assessing the totality of the circumstances. Based on the responses to those questions, the court concluded that Shelton's disapproval of interracial relationships would not affect his ability to render a fair judgment and did not subject him to disqualification for bias. We therefore conclude that the trial court did not abuse its discretion by failing to strike Shelton for cause.

Next, appellant argues that the trial court erred by failing to enter a directed verdict of acquittal on the charge of assault in the second degree. In support, appellant alleges that the Commonwealth failed to prove that Barnes suffered a serious physical injury. We disagree.

A defendant is entitled to a directed verdict of acquittal "if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt." *Commonwealth v. Benham*, Ky., 816 S.W.2d 186, 187 (1991). Here, appellant was charged

with assault in the second degree under KRS 508.020, which provides as follows:

> (1) A person is guilty of assault in the second degree when:
>
> (a) He intentionally causes serious physical injury to another person; or
>
> (b) He intentionally causes physical injury to another person by means of a deadly weapon or a dangerous instrument; or
>
> (c) He wantonly causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument.[2]

Moreover, "serious physical injury" is defined in 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."

Here, the record shows that Barnes testified that as soon as appellant struck him in the neck, he became unable to breathe well and blood began flowing from his throat. Although Barnes walked three blocks to the hospital rather than waiting for the ambulance which had been called, the lead investigating officer testified that he was able to follow a blood trail from the scene of the fight to the hospital. Moreover, Barnes' injury required surgery and six days in the hospital, including time in the intensive care unit. Barnes' doctor testified that

[2] Taylor was found guilty under KRS 508.020 (1)(c).

if Barnes' injuries had gone untreated he would have died. Finally, at the time of trial Barnes testified that he still could not eat normally. Thus, under the evidence as a whole, it was not clearly unreasonable for the jury to find that appellant caused Barnes "serious physical injury" either by creating a substantial risk of death, or by causing prolonged impairment of Barnes' health, and that appellant was guilty of assault in the second degree.

The court's judgment is affirmed.

ALL CONCUR.

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