

RENDERED: June 16, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-000258-MR

SAMANTHA WINDHAM

APPELLANT

v. APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE JOHN L. ATKINS, JUDGE
ACTION NO. 01-CR-00212

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: GUIDUGLI, HENRY, AND TACKETT,¹ JUDGES.

GUIDUGLI, JUDGE: Samantha Windham appeals from a judgment and sentence of the Christian Circuit Court reflecting a jury verdict of guilty on two counts of third-degree assault and one count each of resisting arrest and disorderly conduct. Windham argues that the evidence did not support the assault conviction, that she was denied due process of law when a deponent was not present to testify at trial, and that she did not receive a fair trial because the jury did not represent a cross section of her

¹ Judge Julia K. Tackett concurred in this opinion prior to her retirement effective June 1, 2006.

community. For the reasons stated below, we affirm the judgment on appeal.

On May 25, 2001, Windham was indicted by the Christian County grand jury on two counts of third-degree assault, one count of resisting arrest, and one count of disorderly conduct. The indictment arose from an incident occurring on February 18, 2001, when officers of the Oak Grove police department were dispatched to investigate a report of a fight. The officers located two men believed to be involved in the disturbance, then searched for a female who allegedly was involved.

The officers approached Windham's residence and knocked on the door. Windham answered, but was not cooperative and wanted the police to leave. The record indicates that when Windham attempted to leave, an officer tried to detain her, at which point she pushed the officer across the room. As officers tried to detain Windham, a fight ensued and Windham ran out the front door. She was then pepper sprayed and taken into custody. During the altercation, officer David Kitchens received a large cut on his leg, and officer Chad Shaw received a wrist injury that resolved in about three days.

The matter proceeded to trial in September, 2003, where the deposition of Melvin Hubbard was read into the record.² Hubbard, a married man, stated in a deposition that he met

² Hubbard apparently was not subpoenaed to testify at trial.

Windham at a bar a few days before the incident that led to Windham's arrest. Windham invited Hubbard to her house when Hubbard's wife was out of town. While Hubbard was at Windham's house, Windham's current or former boyfriend, Kenneth Ivey, arrived. Ivey's arrival resulted in the disturbance and Windham's subsequent arrest.

At the conclusion of the trial, the jury returned guilty verdicts on all counts. Windham was sentenced to a total of one year in prison and was fined \$500. This appeal followed.

Windham first argues that the evidence did not support a conviction for third degree assault. She notes that she is a disabled veteran with diabetes and a heart condition, and claims that there is no evidence in the record that she intentionally assaulted either officer or that either officer was injured.

We find no error on this issue. A motion for a directed verdict at the close of the evidence is required to support a judgment of acquittal. As the Commonwealth properly notes, Windham did make a motion for a directed verdict at the close of the Commonwealth's evidence, but did not state the basis for that motion. Furthermore, nothing in the record reveals whether Windham renewed her motion at the close of the evidence, and Windham cites to nothing in the record on this issue. This fact, taken alone, is a sufficient basis for affirming the trial court on this issue.

Arguendo, even if this matter were properly preserved, the record refutes Windham's contention that no evidence exists to support her conviction for third-degree assault. The officers at the scene testified that Windham intentionally shoved them for the purpose of causing them injury. And contrary to Windham's claim that no evidence was tendered that the officers were injured, Kitchens testified that he received a cut on his leg and Shaw testified that he injured his wrist.

As the parties are aware, Commonwealth v. Benham³ sets forth the standard for reviewing motions for a directed verdict. It states that,

On motion for 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.

On appellate 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 the defendant is entitled to a directed verdict of acquittal.

³ 816 S.W.2d 186, 187 (Ky. 1991).

Upon reviewing the evidence as a whole, it was not clearly unreasonable for the jury to find that Windham committed third-degree assault. Accordingly, we find no error on this issue.

Windham next argues that she was denied due process of law when Hubbard was not present to testify. Her argument, consisting of three sentences unburdened with any citation to case law or statutory law, is not preserved for appellate review. Even if it were preserved, the trial court ruled that Windham's counsel failed to obtain Hubbard's presence at trial with the issuance of a valid subpoena. Windham does not challenge this ruling, and there is no basis for finding error on this issue.

Windham's final argument is that she was not availed of a fair and impartial trial because the jurors did not represent a cross section of her community. Specifically, Windham's counsel notes that Windham is a black female and that all of the jury members were white. She appears to argue that this is prima facie evidence of a lack of impartiality, and seeks to have the judgment reversed and the matter remanded for a new trial.

The United States Supreme Court has ruled that an allegation of racial discrimination must be raised by a timely objection to the opposing party's peremptory challenge so that a

hearing on the issue may be undertaken.⁴ To establish such a case, a defendant must first show that 1) he or she is a member of a cognizable racial group; 2) that the prosecution has exercised peremptory challenges to remove from the venire members of the defendant's race; and 3) that the facts and any other relevant circumstances raise an inference that the prosecution used that practice to exclude those persons from the petit jury on account of their race.⁵

Windham does not cite to any Batson challenge raised by her, and our search of the record has uncovered none. Windham must complain of the jury's racial composition, if at all, in a timely manner allowing the trial court to take corrective action. Our duty is to examine allegations that the trial court committed errors of law.⁶ Since Windham neither alleges nor offers any proof that the trial court erred, and as this issue does not rise the level of palpable error, there is nothing for us to review on this issue.

For the foregoing reason, we affirm the judgment of the Christian Circuit Court.

ALL CONCUR.

⁴ Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

⁵ Id.

⁶ City of Louisville v. Allen, 385 S.W.2d 179 (Ky. 1964).

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