

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2004-CA-000727-MR

MICHAEL W. HAYS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE DENISE CLAYTON, JUDGE  
ACTION NO. 03-CR-001667

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: GUIDUGLI AND MINTON, JUDGES; EMBERTON, SENIOR JUDGE.<sup>1</sup>

GUIDUGLI, JUDGE: Michael William Hays appeals from a judgment of the Jefferson Circuit Court reflecting a jury verdict of guilty on charges of fourth-degree assault - third or subsequent offense, and second-degree persistent felony offender. For the reasons stated below, we affirm.

On March 7, 2003, Hays drove a vehicle to Moore High School in Jefferson County, Kentucky, where he picked up his

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<sup>1</sup> Senior Judge Thomas D. Emberton, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 100(5)(b) of the Kentucky Constitution and KRS 21.580.

girlfriend Tara Cassidy Brown. According to Brown, Hays seemed agitated and stopped the car several times to "cool off". After making additional stops and purchasing beer, Hays struck Brown several times in the face causing injury.

Brown exited Hays' vehicle and walked to her place of employment, where her mother came and picked her up. Shortly thereafter, Brown obtained a protective order against Hays. Approximately 10 days later, Hays sent Brown a threatening letter warning her not to come to court.

On June 30, 2003, the Jefferson County grand jury indicted Hays on one count each of fourth-degree assault - third or subsequent offense, intimidating a witness in the legal process, and for being a second-degree persistent felony offender. A jury trial was conducted beginning on January 16, 2004, at the conclusion of which Hays was found guilty of the assault and PFO offenses. On March 8, 2004, a judgment reflecting the verdict was rendered against Hays and he was sentenced to a term of 10-years in prison. This appeal followed.

Hays now argues that the trial court erred in failing to sustain his motion for a directed verdict of acquittal. He contends that the Commonwealth failed to prove that Brown was a member of an unmarried couple as defined in KRS 403.720, and that it failed to prove the two prior requisite domestic

assaults with competent and admissible evidence. These are both elements of a felony conviction for fourth-degree assault under KRS 508.032. Hays maintains that since the Commonwealth failed to prove these elements with competent evidence, he should at most be convicted of a misdemeanor charge of fourth-degree assault. He seeks an order reversing the conviction and remanding for entry of an order dismissing the assault and PFO charges.

We find no error on this issue. As the parties are aware, Commonwealth v. Benham<sup>2</sup> 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.[<sup>3</sup>]

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<sup>2</sup> 816 S.W.2d 186 (Ky. 1991).

<sup>3</sup> Id. at 187.

Under the evidence as a whole, it was not clearly unreasonable for the jury to find that Brown was a member of an unmarried couple as defined in KRS 403.720. Brown testified that she dated Hays for approximately 18 months and that she had lived with him at his mother's house and at an Economy Inn. She went on to state that she paid for the lease at the Economy Inn and lived there for several weeks. While she also gave conflicting testimony on this issue, pursuant to Benham the trial court was required to draw all fair and reasonable inferences in favor of the Commonwealth. Since competent evidence exists in the record upon which the trial court denied the direct verdict on this issue, we find no error.

Similarly, evidence was tendered at trial that Hays had committed two prior fourth-degree assaults against a family member or member of an unmarried couple within the past five years. The Commonwealth produced evidence that Hays previously had pled guilty to fourth-degree assault/domestic violence, and was later convicted on a separate charge of fourth-degree assault against another victim who, according to court records, was either living with Hays or formerly had lived with him. Again, when presented with Hays' motion for a directed verdict, the trial court was bound to view the evidence in a light most favorable to the Commonwealth. In so doing, it properly denied his motion for a directed verdict.

Hays next argues that the trial court erred in permitting the Commonwealth to introduce irrelevant and prejudicial photographs of Brown's injuries. Though the defense conceded that Brown suffered physical injuries and did not object to the introduction of two photographs of Brown showing those injuries, it did object to four additional photographs, which it characterized as cumulative and prejudicial. He now contends that the trial court's failure to bar the introduction of the four photographs resulted in the denial of Hays' right to a fair trial and due process of law.

KRS 401 provides that relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. The trial court is charged with the duty of determining whether the evidence is relevant and, if so, if the probative value outweighs any prejudicial effect.<sup>4</sup> This determination rests largely in the discretion of the trial court.<sup>5</sup> While Hays disagrees with the introduction of the four photographs, he has not shown that the trial court abused its discretion in sustaining the Commonwealth's motion to admit them into evidence. This is the determinative factor on this issue, and as such we find no error.

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<sup>4</sup> KRE 401; KRE 403.

<sup>5</sup> Green River Elec. Corp. v. Nantz, 894 S.W.2d 643 (Ky.App. 1995).

Hays' final argument is that the trial court committed reversible error by refusing to strike a juror for cause. The juror initially remained quiet when the prospective jurors were asked if any of them had been victims of domestic violence. She later approached the bench and stated that she had observed domestic violence against her mother and had been a victim of it as well. She went on to state that she believed she could be an impartial juror. Hays sought to have the juror dismissed for cause. When the trial judge denied the motion, Hays used a peremptory challenge to remove the juror. He now argues that the trial court erred in denying the dismissal for cause.

When there are reasonable grounds to believe that a prospective juror cannot render a fair and impartial verdict on the evidence, that juror shall be excused as not qualified.<sup>6</sup> However, the mere fact that a prospective juror has been the victim of a similar crime is insufficient to mandate that he or she be excused for cause.<sup>7</sup> And finally, the trial court is vested with "considerable discretion" in deciding whether a juror should be excused for cause,<sup>8</sup> and a party must show prejudice in order to obtain a reversal on appeal.<sup>9</sup>

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<sup>6</sup> RCr 9.36.

<sup>7</sup> Bowling v. Commonwealth, 942 S.W.2d 293 (Ky. 1997).

<sup>8</sup> Humble v. Commonwealth, 887 S.W.2d 567 (Ky.App. 1994); Moss v. Commonwealth, 949 S.W.2d 579 (Ky. 1997).

<sup>9</sup> Commonwealth v. Lewis, 903 S.W.2d 524 (Ky. 1995).

In the matter at bar, the juror in question stated that she had been a victim of domestic violence, but also stated that she believed she could be impartial. The trial judge's view of the juror's demeanor and apparent candor must be duly considered.<sup>10</sup> Since the trial judge was able to judge the juror's demeanor and candor and was vested with considerable discretion in determining whether the juror could be impartial, we have no basis for concluding that the trial court erred in refusing to dismiss the juror for cause, or that any prejudice resulted. As such, we find no error on this issue.

For the foregoing reasons, we affirm the judgment of the Jefferson Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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<sup>10</sup> Mabe v. Commonwealth, 884 S.W.2d 668 (Ky. 1994).