

RENDERED: JULY 24, 2020; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2018-CA-001046-MR

JOHN R. CECIL, JR.

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE SUSAN SCHULTZ GIBSON, JUDGE  
ACTION NO. 15-CR-000418

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: ACREE, DIXON, AND JONES, JUDGES.

ACREE, JUDGE: Appellant, John R. Cecil, Jr., appeals the Jefferson Circuit Court's denial of his motion for a mistrial, its denial of his pre-trial motion to suppress the results of his breathalyzer test, and its decision to submit his case to the jury with an instruction on assault in the first degree. Following a careful review of the record, we affirm.

## **FACTS AND PROCEDURAL HISTORY**

On December 28, 2014, Caroline Fouts and her companions were making their way on foot from Gerstle's Pub, in Jefferson County, to Diamond Pub and Billiards, to play pool. While crossing the road, Cecil struck Fouts with his car. Cecil continued a few blocks with Fouts on the roof of his car, before pulling into a parking lot. The parties disagree as to the exact location of the accident.<sup>1</sup>

Cecil admitted he had five drinks prior to driving. A field sobriety test was not administered because the roads were too slippery as a result of heavy rains. Cecil was transported to Metro Corrections for a breathalyzer test. While waiting to take the test, Cecil stated to an officer his blood alcohol content would be very high, and he admitted he should not have been driving.<sup>2</sup> Cecil's breathalyzer results revealed his blood alcohol content to be .302. Fouts sustained numerous injuries due to the collision, including a broken right clavicle, humerus, ischium, and L5 vertebrae. She also shattered multiple bones in her elbow and tore her ACL.

Cecil was charged in a six-count indictment for assault in the first degree, wanton endangerment in the first degree, operating a motor vehicle while

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<sup>1</sup> Lexington Avenue merges into Frankfort Avenue in the vicinity between Gerstle's and Diamond Pub, which then turns into Shelbyville Road. Fouts asserted she was hit in the crosswalk on Lexington Avenue; Cecil asserted she was hit on Frankfort Avenue.

<sup>2</sup> These statements were recorded on the officer's body camera. Cecil challenged the admissibility of the statements and the trial court ruled them admissible.

license is revoked, failure to stop and render aid, no motor vehicle insurance, and operating a motor vehicle while under the influence. Prior to trial, Cecil moved to suppress the results of his breathalyzer test on the basis that the corrections officer did not observe him for the requisite twenty minutes prior to conducting the test as required by KRS<sup>3</sup> 189A.103(3)(a). Specifically, he said that during the twenty-minute wait, he was allowed to use the restroom and, while relieving himself, the officer turned his back. The trial court denied his motion.<sup>4</sup>

At trial, the Commonwealth presented testimony from the officer who administered the breathalyzer test. He said, “[I]n my personal and professional opinion, Mr. Cecil was too intoxicated to drive.” Cecil objected and moved for a mistrial. The trial court sustained the objection but denied Cecil’s motion for a mistrial. It admonished the jury to disregard the testimony.

The Commonwealth next presented expert testimony from Captain Chad Mills of the Kentucky State Police, an accident reconstructionist. He concluded Fouts was in the crosswalk on Lexington Avenue when Cecil ran a red light, hitting her. His opinion was partially based on Fouts’ statement that she entered the crosswalk on Lexington avenue while the “walking man” symbol was

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<sup>3</sup> Kentucky Revised Statutes.

<sup>4</sup> In the same order, the trial court also concluded the test was administered within the two-hour window provided by KRS 189A.010(2).

showing. During his testimony, Captain Mills stated he had no reason to disbelieve Fouts' statement that she was in the crosswalk at the time of the accident. Cecil objected on grounds of bolstering and, again, moved for a mistrial. The trial court sustained the objection, denied Cecil's motion for a mistrial, and once again admonished the jury to disregard the testimony.

Cecil also presented expert testimony. Sonny Cease, an accident reconstructionist, opined the Commonwealth's expert had the collision occurring in the wrong place. He concluded Fouts had deviated from the crosswalk and was hit on Frankfort Avenue where Fouts' boots, jacket, and the bezel from Cecil's car were found.<sup>5</sup> He testified Cecil told him the light was green, but he could not confirm this statement. At the end of trial, Cecil moved for a directed verdict and objected to instructing the jury on assault in the first degree. The trial court denied his motion and submitted the case to the jury. The jury convicted Cecil of assault in the first degree and operating a motor vehicle while under the influence. He was acquitted of all other charges. The jury recommended an eleven-year sentence. Cecil appeals.

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<sup>5</sup> Although not described further by the parties, we conclude this refers to the ring that secures the headlight. The boots, jacket, and bezel were found near the curb on Frankfort Avenue.

## ANALYSIS

Cecil asserts the Jefferson Circuit Court erred by: (1) failing to grant a mistrial; (2) submitting his case to the jury with an instruction on assault in the first degree; and (3) denying his pre-trial motion to suppress the results of his breathalyzer test. We address each challenge in turn.

### ***The Trial Court Properly Denied Cecil's Motion for a Mistrial***

Cecil asserts improper testimony by the Commonwealth's witnesses could not be purged by admonition and, therefore, a mistrial was warranted. We "review a trial court's refusal to grant a mistrial for an abuse of discretion." *Shabazz v. Commonwealth*, 153 S.W.3d 806, 811 (Ky. 2005). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (citations omitted).

"A jury is presumed to follow an admonition to disregard evidence and the admonition thus cures any error." *Johnson v. Commonwealth*, 105 S.W.3d 430, 441 (Ky. 2003). But, there are two circumstances where this presumption is overcome:

(1) when there is an overwhelming probability that the jury will be unable to follow the court's admonition *and* there is a strong likelihood that the effect of the inadmissible evidence would be devastating to the defendant . . . or (2) when the question was asked without a factual basis *and* was "inflammatory" or "highly prejudicial."

*Jacobsen v. Commonwealth*, 376 S.W.3d 600, 610 (Ky. 2012) (quoting *Johnson*, 105 S.W.3d at 441).

Cecil has not shown either exception applies in this case. In response to Cecil's objections to the two prosecution witnesses, the trial court properly admonished the jury to disregard the testimony and reminded the jury of its function. This was sufficient to remedy the improper testimony. Cecil has "failed to show that the jury based its decision on something other than the established evidence and that the admonition was unsuccessful in removing any potential prejudice created by the contested testimony." *Butler v. Commonwealth*, 367 S.W.3d 609, 615 (Ky. App. 2012). Cecil had a blood alcohol content of .302 and admitted to an officer, on camera, he should not have been driving. Accordingly, we find no error with the trial court's refusal to grant a mistrial.

### ***The Trial Court Properly Submitted the Case to the Jury***

Cecil alleges the trial court erred by denying his motion for directed verdict and submitting his case to the jury with instructions for assault in the first degree. His argument is two-fold: (1) the Commonwealth's evidence was insufficient to prove he acted wantonly under circumstances reflecting extreme indifference to the value of human life; and (2) he did not cause serious physical injury to Fouts.

“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.” *McCargo v. Commonwealth*, 551 S.W.3d 439, 442 (Ky. App. 2017) (quoting *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991)). The Commonwealth must present more than a mere scintilla of evidence of guilt. *Acosta v. Commonwealth*, 391 S.W.3d 809, 816 (Ky. 2013). When determining whether the trial court gave jury instructions not supported by the evidence, “the appropriate standard for appellate review is whether the trial court abused its discretion.” *McCargo*, 551 S.W.3d at 442 (quoting *Sargent v. Shaffer*, 467 S.W.3d 198, 203 (Ky. 2015)).

A person is guilty of assault in the first degree when, “[u]nder circumstances manifesting extreme indifference to the value of human life he wantonly engages in conduct which creates a grave risk of death to another and thereby causes serious physical injury to another person.” KRS 508.010(1)(b). “A person who creates . . . a risk but is unaware thereof solely by reason of voluntary intoxication also acts wantonly[.]” KRS 501.020(3).

Cecil first asserts his conduct did not manifest an extreme indifference to the value of human life. The evidence shows, and Cecil does not contest, he was intoxicated, visibility was reduced by the rain, he was driving at night, the pavement was wet, and he continued driving for one or two blocks with Fouts on

the roof of his car. Moreover, the Commonwealth's expert determined Cecil ran a red light and hit Fouts in the crosswalk. He essentially urges us to disregard this expert testimony, claiming it was based on faulty logic. However, questions of weight and credibility of the evidence are left to the jury. *Acosta*, 391 S.W.3d at 816.

Cecil next argues he did not cause serious physical injury to Fouts. “‘Serious physical injury’ means 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.” KRS 500.080(15). In the case at hand, the Commonwealth presented testimony from two medical experts who stated Fouts would have died from her injuries without medical intervention. Serious physical injury can be established by medical or non-medical evidence. *Prince v. Commonwealth*, 576 S.W.2d 244, 246 (Ky. App. 1978). We find this evidence sufficient for a jury to conclude there was a substantial risk of death.

Likewise, Fouts suffered prolonged impairment of health. An equivalency of prolonged impairment of health is substantial, prolonged pain. *Parson v. Commonwealth*, 144 S.W.3d 775, 787 (Ky. 2004). The Court in *Parson* concluded there was serious physical injury where the victim suffered from headaches, neck pain, muscle spasms causing decreased range of neck motion, and



numbness of her right arm. *Id.* Medical testimony revealed Fouts would have arthritis and continued impairment for the rest of her life. Additionally, Fouts testified she needed a walker or cane for five to six months after the collision and, at the time of trial, she was still in pain and unable to walk or jog for extended periods. Upon review of the evidence presented by the Commonwealth, it was not clearly unreasonable to submit this case to the jury upon an instruction of assault in the first degree.

***The Trial Court Properly Denied Cecil's Motion to Suppress***

“When reviewing a trial court’s denial of a motion to suppress, we utilize a clear error standard of review for factual findings and a *de novo* standard of review for conclusions of law.” *Greer v. Commonwealth*, 514 S.W.3d 566, 568 (Ky. App. 2017) (quoting *Jackson v. Commonwealth*, 187 S.W.3d 300, 305 (Ky. 2006)). The applicable law says:

Tests of the person’s breath, blood, or urine, to be valid pursuant to this section, shall have been performed according to the administrative regulations promulgated by the secretary of the Justice and Public Safety Cabinet, and shall have been performed, as to breath tests, only after a peace officer has had the person under personal observation at the location of the test for a minimum of twenty (20) minutes.

KRS 189A.103(3)(a).

The trial court found the corrections officer began the twenty-minute observation of Cecil at 2:19 a.m. At some point during the observation period, Cecil was allowed to use the restroom. The officer accompanied him, but turned his back while Cecil was relieving himself. The officer testified Cecil was not out of his presence at any time during the observation period. At 2:41 a.m., the breathalyzer test was administered.

Because the term “observation” is not defined by the statute, the trial court relied on the definition provided by Merriam-Webster: “the act of careful watching and listening: the activity of paying close attention to someone or something in order to get information.” Applying this definition, it denied Cecil’s motion, concluding the officer was “never out of earshot” of Cecil and was in his immediate presence “during the entire 20-minute period, and had an unbroken opportunity to both see and hear [Cecil] and his activities.” Additionally, it concluded there was no evidence of Cecil belching or regurgitating.

Personal observation requires the officer to have “control of the person by present sense impression for at least twenty minutes prior to the test[.]” *Commonwealth v. Roberts*, 122 S.W.3d 524, 528 (Ky. 2003). “[T]his court expressed in dicta that ‘the operator need not stare at the arrestee for 20 minutes.’” *Hadaway v. Commonwealth*, 352 S.W.3d 600, 603 (Ky. App. 2011) (quoting *Tipton v. Commonwealth*, 770 S.W.2d 239, 242 (Ky. App. 1989), *abrogated on*

*other grounds by Hoskins v. Maricle*, 150 S.W.3d 1 (Ky. 2004). The testimony of the corrections officer constitutes substantial evidence to support the trial court's conclusion that Cecil was properly observed in accordance with KRS 189A.103(3)(a).

### **CONCLUSION**

Cecil's claims of error are without merit. The rulings of the Jefferson Circuit Court are therefore affirmed.

ALL CONCUR.

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