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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000356-MR

DANIEL LYNN CALDWELL

APPELLANT

V. APPEAL FROM BELL CIRCUIT COURT
HONORABLE JAMES L. BOWLING, JR., JUDGE
INDICTMENT NO. 02-CR-00110

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** **

BEFORE: MINTON AND TACKETT, JUDGES; HUDDLESTON, SENIOR JUDGE.¹

MINTON, JUDGE: A circuit court jury convicted Daniel Lynn Caldwell of assaulting Michael Gambrel by shooting him in the head with a handgun at close range. And the court sentenced Caldwell to a maximum of seven years in prison. On direct appeal from that judgment, Caldwell asserts two trial errors

¹ Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

that call for reversal. Specifically, he argues that the trial court erred by allowing into evidence a single photograph that Gambrell described as showing a spot where one of the bullets Caldwell fired at him struck an exterior wall of Gambrell's house. He also argues that the trial court erred by failing to direct a verdict of acquittal on its own motion. We find no merit in either of Caldwell's arguments. So we affirm the judgment.

Michael Gambrel suffered a gunshot to the right side of the head resulting in a three-inch diameter wound and a skull fracture. He was driven to the local hospital before being flown by helicopter to the University of Tennessee Hospital where he remained in treatment in the intensive care unit for the next five days. As a result of the gunshot, he now suffers memory loss and chronic headaches. He remains under doctor's care, and he can no longer work at his customary occupation.

The grand jury indicted Caldwell charging him with first-degree assault² for having caused serious physical injury to Gambrel by use of a deadly weapon. At trial, the Commonwealth presented the testimony of two eyewitnesses to the shooting, Gambrel and his wife, who knew Caldwell and who identified him as the person who shot Gambrel in the head. At the conclusion of the Commonwealth's proof, Caldwell did not

² Kentucky Revised Statutes (KRS) 508.010.

move for a directed verdict of acquittal but proceeded with the defense of his case. At the close of all of the evidence, again Caldwell failed to move for a directed verdict of acquittal. The court then instructed the jury, the attorneys argued the case, and it was submitted to the jury for a decision. In the end, the jury returned a verdict finding Caldwell guilty of the lesser offense of second-degree assault³ and fixed punishment at seven years. The trial court imposed sentence accordingly.

Caldwell asserts that the trial court erred by allowing the Commonwealth to introduce as a trial exhibit a photograph of a bullet hole in the exterior wall on the front porch of Gambrel's house. While Gambrel was on the stand, he was shown the photograph, Trial Exhibit 4. He identified it as having been taken at his home by stating, "This is where one of the bullets had hit my porch." The Commonwealth next asked, "Okay, and this side of the porch, what does that face?" Gambrel replied, "That faces the road." Then the Commonwealth asked, "And is that the same roadway down by the building where you were shot?" Gambrel replied, "Yes." At that point, the Commonwealth moved for the introduction of the photograph into evidence. Caldwell's counsel made this objection: "Judge, I would object to them, upon the grounds that he cannot explain them." The trial judge overruled the objection, stating, "I

³ KRS 508.020.

don't see anything objectionable. They will be marked and admitted." The photographs were then shown to the jury.

Caldwell states that the objection stated at trial preserved for appeal the issues of improper authentication of the tendered photograph and the lack of relevance of the photograph. We disagree that the issue of relevance has been preserved for appeal by trial counsel's objection, and we question the adequacy of the preservation of the issue of authentication. Specific objections are not required by KRE⁴ 103(a), and no grounds were requested here by the trial court. But counsel volunteered "he cannot explain them" as grounds for her objection to the introduction of the photograph in question. "[W]hen grounds for an objection are given in the absence of a request by the court, those grounds as stated are binding."⁵ This objection simply did not preserve a relevancy issue for appeal.⁶

Construing trial counsel's objection liberally to encompass the issue of authenticity of the photograph, we conclude that the trial court's ruling was correct: Trial Exhibit 4 was a properly authenticated photograph through

⁴ Kentucky Rules of Evidence.

⁵ Wright v. Premier Elkhorn Coal Co., 16 S.W.3d 570, 571 (Ky.App. 1999).

⁶ See Harrison v. Commonwealth, 858 S.W.2d 172, 177 (Ky. 1993).

Gambrel's testimony. Abuse of discretion is the proper standard of review of a trial court's evidentiary rulings.⁷

A photograph, like other tangible proof, must be authenticated under KRE 901 before being admitted into evidence. That is, it must be shown by "sufficient evidence to support a finding" that it is what it is claimed to be. Such authentication is routine when a photograph is offered as a "graphic portrayal" of a witness' description of [a] [] crime scene []. In this situation, the photograph must simply be verified testimonially as a fair and accurate portrayal of the scene [] that it is supposed to represent.⁸

Gambrel testified that after being shot, he got up and ran toward his house and that Caldwell continued to shoot at him as he ran toward the porch. As Gambrel viewed the photograph, he identified it as depicting a spot where one of the bullets being fired at him struck the house under the porch. Under the circumstances in which this exhibit was offered, Gambrel's testimony was sufficient to authenticate that the photograph fairly and accurately depicted the crime scene.

The second issue Caldwell raises on appeal is that the trial court erred by failing to grant a directed verdict on the assault charge. Caldwell argues that he was entitled to a

⁷ Goodyear Tire and Rubber Co. v. Thompson, 11 S.W.3d 575, 577 (Ky. 2000).

⁸ Robert G. Lawson, THE KENTUCKY EVIDENCE LAW HANDBOOK § 11.05[2] (4th ed. 2003).

directed verdict on the basis that the evidence offered by the Commonwealth's two eyewitnesses lacked credibility to such an extent that we should consider that the Commonwealth failed to prove beyond a reasonable doubt that he committed the charged offense. But Caldwell concedes that this issue is not properly preserved because trial counsel failed to move for a directed verdict at the conclusion of all the evidence. He requests that we review this argument as palpable error under RCr⁹ 10.26. In Commonwealth v. Benham,¹⁰ the court stated the standard for a directed verdict, as follows:

On a 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.¹¹

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 is the defendant entitled to a directed verdict of acquittal.¹²

From the evidence as a whole, we conclude that it was not clearly unreasonable for the jury to find that

⁹ Kentucky Rules of Criminal Procedure.

¹⁰ 816 S.W.2d 186 (Ky. 1991).

¹¹ *Id.* at 187.

¹² *Id.*

Caldwell committed the offense of second degree assault. Caldwell challenges the credibility of the Commonwealth's eyewitness identification. But the jury decides the credibility of witnesses, draws reasonable inferences from the circumstances, and decides how much weight to give to the evidence. Accordingly, the trial court did not err when it did not direct a verdict of acquittal on its own motion.

For the reasons discussed in this opinion, we affirm the trial court's judgment.

ALL CONCUR.

BRIEF FOR APPELLANT:

Lisa Bridges Clare
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Natalie Lewellen
Assistant Attorney General
Frankfort, Kentucky