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ACTION.**

# Supreme Court of Kentucky

2015-SC-000370-MR

JOSEPH WILLIAMS

APPELLANT

V. ON APPEAL FROM CHRISTIAN CIRCUIT COURT  
HONORABLE JOHN L. ATKINS, JUDGE  
NOS. 14-CR-00388 AND 15-CR-00092

COMMONWEALTH OF KENTUCKY

APPELLEE

## MEMORANDUM OPINION OF THE COURT

### AFFIRMING

Appellant, Joseph Wayne Williams, appeals from a judgment of the Christian Circuit Court convicting him of first degree assault and being a persistent felony offender (PFO). His twenty-year sentence for the assault conviction was enhanced to forty years as a result of the PFO conviction. On appeal, he asserts the trial court erred 1) by denying his *Batson* challenge to the Commonwealth's use of a preemptory strike to remove an African-American juror; 2) by refusing to instruct the jury on the lesser offense of second degree assault, and 3) by excluding evidence of the victim's drug abuse. For the reasons stated below, we affirm Appellant's convictions.

### I. FACTUAL AND PROCEDURAL BACKGROUND

Appellant and Stephanie Wells lived together, enduring for twenty years a tumultuous relationship that included having a seventeen-year-old son. According to Wells' testimony, the couple had a disagreement at home that

escalated to the point of violence. Wells testified that Appellant beat her with his fist, striking her in the eye and on the back of her head. She also testified that he kicked her shoulder and the side of her face with his foot, and then left the residence. Conscious of her need for medical attention, Wells sent a text message to Appellant asking for his help. He returned to the residence, but instead of coming to her aid, Appellant resumed his assault on Wells, hitting her again, causing her to fall and strike the back of her head. While she was on the ground, Appellant stomped on her face with his foot. Eventually, Wells managed to call 911. She told the 911 operator that her injuries occurred when she fell on her porch steps. Paramedics found her lying unconscious and unresponsive on the porch; they called the police.

Appellant denied assaulting Wells. A neighbor who was drunk at the time of the alleged assault told the police that he saw Wells fall off the porch.

Wells' injuries included an epidural hematoma, which required brain surgery and treatment by neurologists and other brain specialists. The emergency room physician who examined Wells had served as a military physician and had experience dealing with head trauma. He testified that it was not likely that a fall down the porch steps onto concrete caused the hematoma. Instead, he opined that the force that caused Wells' hematoma was significant, comparable perhaps to a fall from a distance of twice one's height. Wells is now completely physically disabled.

## II. ANALYSIS

### A. Jury selection at Appellant's trial was not marred by a *Batson* violation.

During jury selection the Commonwealth used peremptory strikes to remove four African-American jurors from the panel. Appellant objected to all four strikes as racially-biased in violation of *Batson v. Kentucky*, 476 U.S. 79, 96-98 (1986). On appeal, he challenges only one of the strikes.

*Batson* requires a three-step process for evaluating whether a jury is improperly constituted due to the purposeful racially-biased use of peremptory challenges. First, the party challenging the removal of the juror must make a prima facie showing of racial discrimination in the peremptory strike. Second, upon that showing, the party striking the juror must present a plausible race-neutral reason for striking the juror. Third, the trial court must determine if purposeful discrimination has occurred, primarily by evaluating the credibility of the race-neutral reason(s) offered for the strike. *Washington v. Commonwealth*, 34 S.W.3d 376, 379 (Ky. 2000). A trial court's ruling on a *Batson* challenge will not be disturbed unless it is clearly erroneous. *Mash v. Commonwealth*, 376 S.W.3d 548, 555 (Ky. 2012).

The Commonwealth offered these reasons for striking the juror: the juror appeared to be uninterested and was not receptive to questions posed by either the Commonwealth or Appellant (the "demeanor reasons"); and there was no juror qualification form on that juror, and the prosecutors did not otherwise know the criminal history of the juror or those with whom she resided (the "criminal history reasons"). Appellant questioned the Commonwealth's claim

that the juror's disinterested affect prompted the strike, pointing out that a similarly apathetic white juror was not stricken. Appellant did not articulate a response to the Commonwealth's criminal history reasons for striking the juror. Without offering a specific explanation, the trial court found that the Commonwealth had acted with racially-neutral motives for dismissing the juror and denied the *Batson* challenge.

Appellant asserts on appeal that *Batson*'s second and third steps were not met. Citing *Washington v. Commonwealth*, 34 S.W.3d at 379, he contends striking a juror for her purported lack of interest is simply a self-serving artifice which, like those based merely upon a prosecutor's intuition, is insufficient to provide a race-neutral basis for striking an African-American juror. Appellant further argues, based on *Purkett v. Elem*, 514 U.S. 765, 769 (1995), that the trial court did not adequately assess the Commonwealth's proffered explanations and articulate distinct findings on the credibility of those reasons as required by the third and final step of the *Batson* analysis.

We find no error under *Batson*'s second step. The Commonwealth provided a race-neutral reason for the peremptory challenge by articulating a reason which is not inherently discriminatory or is race-neutral on its face. *Hernandez v. New York*, 500 U.S. 352, 360 (1991); *Purkett*, 514 U.S. at 767–768. The juror's demeanor revealing an apparent lack of interest and her unknown criminal history are not race-based reasons; they are not inherently indications of racial discrimination. See *Mash*, 376 S.W.3d at 556 (demeanor); *United States v. Beverly*, 369 F.3d 516, 527 (6th Cir. 2004) (criminal history).

Although Appellant suggests otherwise, the Commonwealth's failure to discover the juror's criminal history by asking her about it does not invalidate the racial-neutrality of that reason for exercising a peremptory strike of that juror. *Chatham v. Commonwealth*, 241 S.W.3d 799, 804 (Ky. 2007) ("[T]he fact that the Commonwealth did not directly engage in a colloquy with Juror C regarding [a prior arrest of the juror or a member of his household and his failure to answer a question posed by the Commonwealth] in no way negates the facially race-neutral reason given by the Commonwealth for exercising its peremptory challenge.").

We also find no error under *Batson*'s third step, which requires the trial court to determine if the race-neutral reasons stated for the peremptory strike were based on good faith or were, instead, pretexts for racial discrimination. *Hernandez*, 500 U.S. at 359. Although the trial court articulated no distinct findings on the credibility of striking the juror for demeanor related reasons, we cannot find that under the facts of this case that the trial court's ruling that the Commonwealth's reasons for striking the juror were race-neutral, and consequently not pretextual, was clearly erroneous.

*Snyder v. Louisiana*, 552 U.S. 472 (2008), provides a similar fact pattern. In *Snyder*, the prosecutor offered two reasons for peremptorily striking an African-American juror, one being the juror's nervous demeanor and one being the juror's concerns for missing college classes. The trial judge rejected the *Batson* challenge without any explanation.

The *Snyder* Court reviewed only the academic scheduling reason provided for the strike for compliance with *Batson*'s third prong because that reason alone would support the prosecutor's decision to strike the juror and it was unclear whether the trial court had actually relied upon the demeanor reason when it affirmed the prosecutor's strike. As in *Snyder*, it is not clear how much credence the trial court placed upon the demeanor reasons, but it is certain that the lack of a juror qualification form attesting to the juror's criminal history (or lack thereof) is a credible, racially-neutral basis for using a peremptory challenge. Moreover, unlike *Snyder*, the record in this case provides no indication that the criminal history reason proffered by the Commonwealth was pretextual.

Appellant did not rebut the Commonwealth's criminal history reason for striking the juror. We do not fault the trial court for failing to find pretext in that reason when the Appellant offered nothing to suggest that the criminal history reason was contrived to conceal racial bias. "[T]he ultimate burden of showing unlawful discrimination rests with the challenger." *Rodgers v. Commonwealth*, 285 S.W.3d 740, 758 (Ky. 2009) (citing *Chatman*, 241 S.W.3d at 804). Appellant has not demonstrated that the trial court erred in failing to find improper racial bias during the jury selection phase of his trial.

**B. Appellant was not entitled to a jury instruction on second degree assault.**

Appellant asserts that the trial court erred by instructing the jury only upon the elements of first degree assault and refusing to give his tendered jury

instruction on the lesser included offense of second degree assault. The trial court instructed the jury with respect to first degree assault as follows:

You will find [Appellant] guilty of first degree assault . . . if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

- A. [Appellant] intentionally caused serious physical injury to Stephanie Wells by striking her about her head and face with his hands and feet; AND
- B. That his hands and feet are dangerous instruments . . . .

Appellant requested the following jury instruction charging second degree assault:

You will find Mr. Williams guilty of second degree assault if and only if you believe from the evidence beyond a reasonable doubt . . . *that Mr. Williams intentionally caused a serious physical injury to Ms. Wells by kicking her in the head.*

(Emphasis added.)

The jury must be instructed on the whole law of the case, RCr 9.54(1), and on all offenses supported by the evidence. *Clark v. Commonwealth*, 223 S.W.3d 90, 93 (Ky. 2007) (citation omitted). A lesser-included offense instruction is appropriate only when, based upon the evidence presented, a reasonable juror could reasonably doubt the defendant's guilt of the greater offense, but believe beyond a reasonable doubt that the defendant is guilty of the lesser offense. *Taylor v. Commonwealth*, 995 S.W.2d 355, 362 (Ky. 1999).

A person is guilty of first degree assault under KRS 508.010(1)(a) if he "intentionally causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument." A person is guilty of second degree assault under KRS 508.020(1)(a) if he "intentionally causes serious physical



injury to another person[.]”<sup>1</sup> The only difference between the two degrees of assault is that first degree assault requires the use of a deadly weapon or dangerous instrument whereas second degree assault does not. An instruction on second degree assault would be required only if, based upon the evidence, a juror could reasonably believe beyond a reasonable doubt that Appellant intentionally inflicted serious physical injury upon Wells but also entertain a reasonable doubt about whether he used a deadly weapon or a dangerous instrument when he inflicted the injury.

Neither party contests the fact that Wells sustained a serious physical injury,<sup>2</sup> and no argument is made to suggest that Appellant used a “deadly weapon” as defined by KRS 500.080(4). There is no evidence to indicate that Appellant struck Wells with anything other than his hands and feet. Given those circumstances, the dispositive difference in this case between first degree assault and second degree assault is whether Appellant’s hands and feet, as used to inflict injury upon Wells, were “dangerous instruments.”

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<sup>1</sup> The statutes defining first degree assault and second degree assault each provide for the commission of the offense when the assailant acts without a specific intent to cause serious physical injury, but instead acts wantonly. See KRS 508.010(1)(b) and 508.020(1)(c). The Commonwealth did not allege wanton conduct and Appellant’s requested jury instruction did not present a charge of second degree assault based upon wanton conduct. Accordingly, we confine our analysis to intentional assault and regard as waived any argument that could be made with respect to wanton assault.

<sup>2</sup> KRS 500.080(15) defines “serious physical injury” as a “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(3) defines a dangerous instrument to be

any instrument, *including parts of the human body when a serious physical injury is a direct result of the use of that part of the human body . . . [and] under the circumstances in which it is used . . . is readily capable of causing death or serious physical injury.*<sup>3</sup>

(Emphasis added.)

As reflected in Appellant's proffered jury instruction and in the arguments he presents on appeal, Appellant's theory of the case is that the jury could reasonably believe that he intentionally inflicted serious physical injury with his foot (by "kicking [Wells] in the head"), but that his foot was not a dangerous instrument.<sup>4</sup>

Appellant contends that the evidence in this case supported three possible verdicts: 1) not guilty because Wells was injured when she fell off the porch; 2) guilty of first degree assault because Appellant intentionally inflicted serious physical injury upon Wells using his foot and fists as dangerous

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<sup>3</sup> Prior to 1990, KRS 500.080(3) defined "dangerous instrument" as "any instrument, article, or substance which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or serious physical injury." Based upon that definition, *Roney v. Commonwealth*, 695 S.W.2d 863, 864 (Ky. 1985), held that a fist was not a dangerous instrument. *Roney* stated, "[I]t is simply not clear whether the general assembly intended that fists be considered to be a dangerous instrument as that term is used in K.R.S. 508.010. In such cases, we follow the rule of lenity which is to give to the appellant the benefit of the doubt." After *Roney*, the General Assembly amended the statute to clarify that body parts such as hands and feet could qualify as "dangerous instrument" when used in ways that were "readily capable of causing death or serious physical injury."

<sup>4</sup> It is worth noting that neither Appellant nor the Commonwealth mentions whether Appellant was wearing footwear at the time of the alleged assault. Given that omission, we presume it makes no difference in this case, but we can easily envision other circumstances in which kicking or stomping another person with a bare foot or light slippers would be materially different than kicking or stomping with a heavy shoe or boot.

instruments; or 3) guilty of second degree assault because Appellant intentionally inflicted serious physical injury upon Wells by kicking her with his foot, but under the circumstances in which it was used, his foot was not a “dangerous instrument.”

We disagree with Appellant because the statutory definition of dangerous instrument forecloses his third alternative. If the jury believed beyond a reasonable doubt, as set forth in his tendered instruction for second degree assault, that Appellant intended to inflict serious physical injury upon Wells by kicking her in the head with his foot, then the jury necessarily had to believe that Appellant’s foot was, under the circumstances in which he used it, “readily capable of causing death or serious physical injury,” and thus a “dangerous instrument,” because it readily did just as he intended. It would be irrational for the jury to believe beyond a reasonable doubt that Appellant intended to inflict serious physical injury by using his foot against Well’s head, and at the same time believe that Appellant’s foot was not readily capable of causing the very injury that Appellant intended it to produce.

In other words, the evidence allows for no rational conclusion that the foot which severely injured Wells’ head was used in any manner *other* than one that was readily capable of causing serious physical injury. It is inconceivable that an assailant could succeed in his intention to inflict serious injury with an object that was not readily capable of producing the intended effect.

The evidence presented allows for only two possible verdicts: Appellant is not guilty because Wells received serious physical injury by falling off the

porch; or Appellant is guilty of first degree assault because he inflicted serious physical injury upon Wells using his hands or feet, or both, in a manner readily capable of causing serious physical injury, thus making them “dangerous instruments” under the statute. The trial court did not commit error by declining Appellant’s proffered second degree assault instruction.

We do not hold, and we do not intend to suggest, that in every assault resulting in a serious physical injury, the instrument of attack, whether it be a hand, a foot, or some other object, is conclusively a “dangerous instrument,” and thus a first degree assault. But, where an assailant with the specific intent to cause serious physical injury succeeds in producing that injury, the proof is self-evident that the object employed to inflict that injury was “readily capable” of producing the expected result.

**C. Evidence of Wells’ prior drug test result was properly excluded.**

Appellant complains that he was not permitted to introduce evidence that two weeks before the alleged assault Wells tested positive for the drug oxycodone, an opiate drug more powerful than the one prescribed for her as part of her ongoing health care regimen. Appellant’s theory is that Wells’ excessive use of opioids made it more likely that she fell off the porch, and thus more likely that she injured herself that way. The trial court ruled that her drug test was too far removed from the alleged assault to have probative value. We review a trial court decision to exclude otherwise relevant evidence for an abuse of discretion. *Love v. Commonwealth*, 55 S.W.3d 816, 822 (Ky. 2001) (citations omitted).

Relevant evidence is “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.” KRE 401. Although otherwise admissible, relevant evidence may be excluded when, in the exercise of the trial court’s discretion, “its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.” KRE 403. “Error may not be predicated upon a ruling which . . . excludes evidence unless a substantial right of the party is affected.” KRE 103.

Wells’ physical stability at the time of her injury was certainly relevant to Appellant’s defense, but it is not nearly so certain that her abuse of an opioid two weeks prior to the injury added any probative information to support that defense. The admission or exclusion of the evidence was within the trial court’s discretion. We are not persuaded that the exclusion of the proffered evidence was “arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

The emergency room physician who treated Wells’ injuries testified that an excessive use of opioids could make a person appear drunken and sluggish, and that the side effects of opioids include dizziness. The jury heard evidence that Wells had opiates in her system on the day of the assault and that she had been taking opiates for approximately seven years. In light of this evidence of opiate use that was presented to the jury, the exclusion of the two-week-old

drug test evidence did not undermine the defendant's defense. The trial court did not abuse its discretion by excluding the drug test.

### **III. CONCLUSION**

The judgment of the Christian Circuit Court convicting Appellant of first degree assault and being a persistent felony offender is affirmed.

All sitting. All concur.

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