Commonwealth of Kentucky
Kentucky Supreme Court

File No. 2013-SC-000467

JEREMY RUSSELL BREWER **APPELLANT**

v.

Appeal from Fayette Circuit Court
Hon. James D. Ishmael, Jr., Judge
Indictment No. 11-CR-622

COMMONWEALTH OF KENTUCKY **APPELLEE**

Brief for Commonwealth

Respectfully Submitted,

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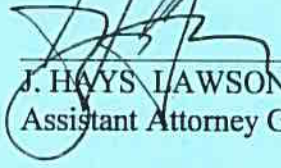
CERTIFICATE OF SERVICE

I certify that the record on appeal has been returned to the Clerk of this Court and that a copy of the Brief for Commonwealth has been mailed this 30th day of June, 2014 to Hon. James D. Ishmael, Jr., Judge, Fayette Circuit Court, 551 Robert F. Stephens Courthouse, 120 N. Limestone, Lexington KY 40507; electronically mailed to Hon. Ray Larson, Commonwealth's Attorney, 116 N Upper Street, Lexington KY 40507; mailed State Messenger Mail to Hon. Brandon Neil Jewell, Department of Public Advocacy, STE 302, 100 Fair Oaks Lane, Frankfort KY 40601.



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INTRODUCTION

Appellant entered a conditional guilty plea to one count of Assault, Fourth Degree, Domestic Violence, Third or Greater Within Five Years. Appellant was sentenced to two and half years in prison, which sentence was probated for five years.

STATEMENT CONCERNING ORAL ARGUMENT

The Commonwealth does not request oral argument.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On June 3, 2011, a Fayette County Grand Jury indicted Appellant on one count of Assault, Fourth Degree, Domestic Violence, Third or Greater Within Five Years, a Class D Felony. TR at 15. On October 21, 2011, the Commonwealth filed a "Notice of KRS 404(b) Evidence," which evidence was "to be presented in addition to what the Commonwealth is required to prove under KRS 508.032 according [under] *Lisle v. Commonwealth.*" *Id.* at 32. Appellant objected. *Id.* at 38-45. After a hearing on the Notice, the trial court entered an Order granting in part and denying in part. *Id.* at 54-55. In light of the trial court's order, Appellant moved to withdraw his plea of not guilty and to enter a conditional guilty plea. *Id.* at 67-69. The plea reserved the right to appeal the following: the trial "court's ruling on [the] Commonwealth's 404(b) Motion. Particularly, [the] court's ruling on admission of details of two prior convictions & convictions themselves in CW case in chief." *Id.* at 68.

The Court of Appeals affirmed the trial court. This Court subsequently granted discretionary review.

Galloway v. Commonwealth

In the order granting discretionary review in this case, the Court ordered the parties to discuss the application of *Galloway v. Commonwealth*, 424 S.W.3d 921 (Ky. 2014) to this case.

The issue in *Galloway* relevant to this case was whether the trial court erred in denying Galloway's motion for directed verdict on his conviction under KRS 508.032 for assault, fourth degree, third or subsequent offense within five years. *Id.* at 925. This Court explained the issue thusly:

> For a criminal defendant to be convicted of fourth-degree assault, third offense, the Commonwealth must prove that the defendant had two prior assault convictions involving family members or members of an unmarried couple within five years. Kentucky Revised Statute (KRS) 508.032. On appeal, Galloway argues that his motion for a directed verdict as to this charge should have been granted because the evidence supplied by the Commonwealth was insufficient for a jury to conclude beyond a reasonable doubt that he had been previously convicted of assault of a family member or a member of a an unmarried couple.

Id.

Agreeing with Galloway, this Court reversed Galloway's conviction under KRS 508.032 on grounds that the Commonwealth failed to introduce evidence that the victims of Galloway's prior assaults fell under KRS 403.720's definition of "family member" or "member of an unmarried couple." *Id.* at 926. But the question of whether the victims in Appellant's prior convictions met the definition of "family member" or "member of an unmarried couple" under KRS 403.720 is not issue in this case. Defense counsel conceded that the assault victim fell under KRS 403.720's definition of "family member" or "member of an unmarried couple." VR; 11/02/11; 2:19:45. And Appellant does not argue otherwise on appeal.

Rather, Appellant argues that neither the prior assault convictions nor the identity of the assault victims were admissible in the Commonwealth's case in chief. Appellant argues that instead of being admitted in the case in chief, the convictions and victims' identities should be admitted in a separate proceeding, which would only be held *if and only if* the jury found him guilty of fourth degree assault in the Commonwealth's case in chief. Appellant

argues that this is required under *Galloway*, which approved of the trifurcated[1] proceedings held in that case. *Galloway*, 424 S.W.3d at 925.

Consequently, *Galloway* is only relevant to this case as to the question of whether the trial court erred in ruling that the Commonwealth–in its case in chief–could (and must under *Lisle v. Commonwealth*, 290 S.W.3d 675, 679 (Ky. App. 2009)) introduce evidence of the prior assaults and the relationship of the victims of those assaults to Appellant. That is, *Galloway* only applies here to the question of whether the trial court should have ordered his trial trifurcated.

ARGUMENT

Appellant was indicted for his violation of KRS 508.032 for assault, fourth degree, third or subsequent offense within five years, which provides:

> (1) If a person commits a third or subsequent offense of assault in the fourth degree under KRS 508.030 within five (5) years, and the relationship between the perpetrator and the victim in each of the offenses meets the definition of family member or member of an unmarried couple, as defined in KRS 403.720, then the person may be convicted of a Class D felony. If the Commonwealth desires to utilize the provisions of this section, the Commonwealth shall indict the defendant and the case shall be tried in the Circuit Court as a felony case. The jury, or judge if the trial is without a jury, may decline to assess a felony penalty in a case under this section and may convict the

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[1]As the Commonwealth understands the trifurcated proceeding in *Galloway*, "during the first phase, the jury convicted Galloway of fourth-degree assault. During the second phase, the jury convicted Galloway of fourth-degree assault, third offense based on two prior convictions of fourth-degree assault" *Galloway,* 424 S.W.3d at 925. Presumably, the third phase was the penalty phase of the trial.

> defendant of a misdemeanor. The victim in the second or subsequent offense is not required to be the same person who was assaulted in the prior offenses in order for the provisions of this section to apply.
>
> (2) In determining the five (5) year period under this section, the period shall be measured from the dates on which the offenses occurred for which the judgments of conviction were entered by a court of competent jurisdiction.

Consistent with this statute, the Indictment charges:

> On or about the 20th day of October 2010, in Fayette County, Kentucky, the above named Defendant committed the offense of Assault Fourth Degree/Domestic Violence Third or Greater Such Offense Within Five Years when he intentionally or wantonly caused physical injury to H.H.T., having previously committed and been convicted of Assault Fourth Degree by final judgment of the Fayette District Court the 17th of August 2010 and Assault Fourth Degree by final judgment of the Shelby District Court the 28th of May 2009, H.H.T. being the victim in all cases and being a member of an unmarried couple with the Defendant.

TR at 15.

The trial court's order at issue here provides in pertinent part:

> The Commonwealth's Motion to Introduce 404(b) evidence is Sustained in part and Denied in part as follows:
>
> 1. The two prior convictions are Admissible under *Lisle v. Commonwealth*, 290 S.W.3d 675 (Ky. App. 2009);
>
> 2. The three uncharged crimes are Inadmissible.
>
> . . .
>
> 3. The drug and narcotic activities of the Defendant are Inadmissible.

TR at 54

A. <u>The Trial Court's Correctly Followed *Lisle*</u>

At issue in *Lisle* was whether the trial court erred in denying the appellant's motion for a directed verdict on his "conviction for fourth-degree assault, third offense, violation of a domestic violence order ("DVO")." *Lisle*, 290 S.W.3d at 677. The appellant

> argue[d] that a directed verdict should have been granted on the charge because the prior assaults requisite for the crime were not supported by the evidence. Specifically, he contends that the documentary evidence supplied by the Commonwealth was insufficient for a jury to conclude beyond a reasonable doubt that he had previously been convicted of assault of a family member.

Id. at 679.

In reviewing this argument, the *Lisle* Court had to decide whether KRS 508.032 was "a mere 'enhancement' statute for which the prior convictions involving spouses or family members are just 'sentencing factors' or if they are 'elements' which must be proven beyond a reasonable doubt by the Commonwealth." *Id.* at 678. The court concluded that the statute included substantive elements that the Commonwealth was required to prove in the guilt phase of the trial in order to get a conviction under KRS 508.032.

In particular *Lisle* holds:

> In addition to the elements necessary to prove fourth-degree assault [under KRS 508.030], KRS 508.032 **requires: (1)** proof of prior conviction(s); **(2)** proof that the prior conviction(s) occurred within the past five years; *and* **(3)** proof that the prior victim(s) were a family member or member of an unmarried couple.

Id. at 679 (bolding added).

So the trial court correctly ruled that, under *Lisle*, the Commonwealth not only could but was required to prove that Appellant had two prior convictions for Fourth Degree

Assault, that these convictions occurred within the past five years, and that Appellant committed the assault against a victim who was either a "family member" or "member of an unmarried couple," as defined by KRS 403.720.

The trial court's ruling is also consistent with this Court's holding in *Galloway.*

B. <u>Appellant's Arguments on Appeal were Not Preserved for Review</u>

Under both *Lisle* and *Galloway*, both Appellant's prior assault convictions *and* the identity of the assault victims had to be admitted during the guilt phase of Appellant's trial because these were elements of the offense. At no time did Appellant's counsel ever request that the trial court trifurcate the proceedings as Appellant argues on appeal. Rather, defense counsel suggested to the trial court that the evidence should be admitted at sentencing in a manner akin to DUI sentencing enhancement. VR; 11/02/11; 02:12:15. But this is contrary to the plain holding of both *Lisle* and *Galloway*, which make clear that the prior assault convictions *and* the assault victim's identity are elements of the offense that must be proven beyond a reasonable doubt in the guilt phase. The law is just as clear that "prior DUI convictions are not elements necessary to determine guilt." *Commonwealth v. Ramsey*, 920 S.W.2d 526, 528 (Ky. 1996). Rather, after a guilty verdict is reached, the Circuit Court has the authority to conduct a penalty phase, pursuant to KRS 532.055, in which the prior [DUI] convictions may be introduced and the appropriate sentence determined." *Id.*

So as argued to the trial court, Appellant's position was that evidence of the prior assault convictions and the victim's identity should be introduced at sentencing. But even defense counsel conceded that, under *Lisle*, these were elements of the offense that had to

be admitted during the guilt phase. VR; 11/02/11; 02:13:00; 02:15:00 ("that's my reading of *Lisle*").

Consequently, because the arguments before the trial court were whether the evidence of the prior assault convictions and the victim's identity should be admitted during the Commonwealth's case in chief or in the penalty phase of the trial, the trial court without question made the correct ruling based on a plain reading of *Lisle.* This brings us to Appellant's argument that the trial court erred by failing to expressly rule that the trial would be trifurcated such that the evidence of the prior assault convictions and the victim's identity would be admitted in a separate proceeding *if and only if* the jury first found Appellant guilty of Fourth Degree Assault.

Because defense counsel never argued trifurcation, this argument is not preserved for review. More importantly, a review of the video record of th November 2, 2011 hearing strongly indicates that the trial court would have been amenable to trifurcation had it been suggested as an option. After concluding that *Lisle* required proof evidence of the prior assault convictions and the assault victim's identity because they were elements of the offense,[2] the trial court expressly noted that the manner and method of proving these elements were left to be determined. *Id.* at 02:15:15. So Appellant essentially argues for a do over–a chance to propose a method of proof on appeal that was neither considered nor presented to the trial court below. Therefore, Appellant's issues on appeal unpreserved and subject to palpable error review.

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[2]Defense counsel expressly acknowledged that she had the same "reading of *Lisle*." VR; 11/02/11; 2:15:00.

C. **There was No Palpable Error**

While this Court approved trifurcation in *Galloway*, *Galloway* does not mandate trifurcation in for a trial for violation of KRS 508.032. for assault, fourth degree, third or subsequent offense within five years. (And of course *Galloway* was decided *after* the trial court ruled in this case). Moreover, the trial court's ruling is consistent with the plain reading of *Lisle*. So there is no authority on which to even find error much less palpable error.

"This Court reviews unpreserved claims of error on direct appeal only for palpable error. To prevail, one must show that the error resulted in 'manifest injustice.'" *Martin v. Com.*, 207 S.W.3d 1, 3 (Ky. 2006). *Martin* further explains that "[t]o discover manifest injustice, a reviewing court must plumb the depths of the proceeding, as was done in *Cotton,* to determine whether the defect in the proceeding was shocking or jurisprudentially intolerable." *Id.* Here, a review of the proceeding in question reveals that the trial court very thoughtfully reviewed *Lisle* and carefully explained its understanding of the case to the parties. Moreover, the trial court denied the bulk of the evidence that the Commonwealth sought to introduce under KRE 404(b). There is nothing shocking or intolerable about a trial court carefully reading controlling precedent and applying that precedent according to the arguments of counsel presented to the court.

CONCLUSION

For the reasons set forth above, the Court should AFFIRM the decision of the Court of Appeals.

Respectfully submitted,

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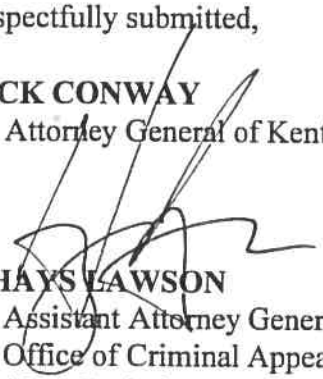

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