NO. 07CI10806

JEFFERSON CIRCUIT COURT
DIVISION THIRTEEN (13)
FREDERIC J. COWAN, JUDGE

JESSICA COSBY — PLAINTIFF

V.

ORDER AND OPINION

JOSEPH WHITE, ET AL — DEFENDANTS

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This matter is before the Court on the defendants' motion for a mistrial and, implicitly, a new trial, made immediately after the jury returned its verdict against the defendants' but after the jurors had been discharged by the Court. The basis for the motion is a claim by the defendants that the Court's bailiff improperly communicated with some of the jurors by making a comment to them in a recess of the trial immediately before closing arguments were delivered and prior to their being instructed by the Court and before deliberations began. After a careful consideration of the evidence of record, the memoranda submitted by the parties, and pertinent law, the Court **DENIES** the defendants' motion.

FACTS.

This case involved an action for battery brought by the plaintiff, a dancer in an adult entertainment club, against the individual defendant owner of the club and the corporation of which he is the owner. The plaintiff presented evidence that the defendant had physically beaten her one evening over a pay dispute. The defendant argued that he was acting in self-defense. Upon due deliberations, the jury returned a verdict in favor of the plaintiff for $4,171.00 for medical expenses, $50,000 in physical and mental pain and suffering, and $380,000 in punitive damages. Ten jurors signed the verdict forms in favor of the plaintiff.

The Court accepted the verdict, read it in open court and discharged the jury. Within minutes after the jury was discharged, counsel for the defendants asked the Court to go back on the record. Counsel, after reporting that he had just been informed by a juror that the Court's bailiff had made an improper comment to one or more jurors during the trial, moved for a mistrial. The juror who reported the information, Juror No. 26323, was still available, and the Court requested that he brought forward to testify. Upon questioning on the record and under oath by the Court, the juror reported that the Court's bailiff, who was ill on the final day of trial but performing his duties, made a comment in the course of general conversation with the jurors to the effect that "he would probably feel better if he could beat on the defendant." Juror 26323, who did not sign any of the verdict forms supporting the plaintiff's recovery, testified that he thought the comment was inappropriate and that he asked during deliberations if anyone else had heard the comment. He testified that other jurors said they had heard the comment but when asked whether it had affected the deliberations, he said "not at all."

Thereafter, since the other jurors sitting on the case were still on jury duty,[1] the Court requested that each juror return to the Court for questioning under oath by the Court. In this way, the Court was able to question all except one of the jurors who actually deliberated in the case, as well as the alternate juror who may have heard the comment but who did not participate in the deliberations. Seven of these jurors stated that they did hear the comment or part of it. Although the precise comment made by the bailiff was reported slightly differently, all of the jurors agreed that the comment involved the bailiff's reference to

[1] In Jefferson County, jurors are asked to serve in two-week rotations. After the trial of this case was completed, the jurors remained on duty.

"beating up" on the defendant. Several also indicated that the comment was made jokingly and that some of the jurors laughed when the comment was made. Several of the jurors indicated that it had been discussed in deliberations but only to the extent that someone had said the comment was inappropriate. A couple of the jurors indicated that the question of the inappropriateness of the comment came up after the jurors had reached their verdict and were getting ready to return to the courtroom. All of the jurors who were asked whether the comment had any effect on their deliberations stated that it had no effect. Thereafter, the Court asked that the parties file memoranda stating their positions. In essence, the Court conducted a post-trial evidentiary hearing to determine whether the jury was improperly influenced by an outside party. *Cf., Lay v. Adley,* 2004 WL 2201192 (Ky.App.)[2]

STANDARD OF LAW.

Generally speaking, Kentucky courts have applied the rule that jury testimony is incompetent to impeach a verdict. *Previs v. Dailey,* 180 S.W.3d 435, 439 (2005); *Brown v. Commonwealth,* 174 S.W.3d 421, 429 (Ky.2005); *Gall v. Commonwealth,* 702 .S.W2d 37, 44 (Ky.1985). According to Professor Lawson, "there is a strong, deeply-rooted policy against subjecting jury verdicts to challenge on the basis of information provided by jurors who have rendered those verdicts...The policy is most clearly manifested in a broad prohibition against impeachment of the validity of verdicts by use of information from the jurors who rendered those verdicts. R. Lawson, *Kentucky Evidence Law Handbook,* §3.15[2], p. 233 (4th ed. 2003). If jurors could impeach their own verdicts, full and frank discussion in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople would all be undermined by a barrage of post-verdict scrutiny of juror conduct. *Tanner v. U.S.,* 483 U.S. 107, 120 (1987). As the old Kentucky Court of Appeals said in *Ruggles v. Com.,* 335 S.W.2d 344, 346 (Ky.1960), "the dangerous

[2] Cited pursuant to CR 76.28(4)(c).

tendency of receiving testimony of the jurors for such a purpose (that is, rendering their verdict nugatory) is too obvious to require comment. It would open a door so wide, and present temptations so strong for fraud, corruption, and perjury, as greatly to impair the value of, if not eventually to destroy, this inestimable form of trial by jury."

Despite this strong language, however, there are limited exceptions to the rule. If the jury is subject to an improper *outside influence*, juror testimony may be considered to impeach its own verdict. *Brown v. Commonwealth, supra,* 174 S.W.3d at 429, *citing, Jones v. Commonwealth,* 450 S.W.2d 812, 814 (Ky.1970). Jurors may also impeach their own verdict if it is appropriate to apply the "appearance of evil" doctrine. Under this doctrine, as expressed in cases such as *Juett v. Calhoun,* 405 S.W.2d 946, 950 (Ky.1966), Dillard *v. Ackerman,* 668 S.W.2d 560, 562 (Ky.1984), and *Young v. State Farm Mutual Automobile Ins. Co.,* 975 S.W.2d 98 (Ky.1998), juror testimony may be considered when "patently improper conduct" occurs and a verdict may be set aside even though no prejudice has been shown.

It is important to note, however, that there is no prohibition under Kentucky law for the admissibility of juror testimony *in support* of a verdict. R. Lawson, *supra, citing, e.g., Tate v. Shaver,* 152 S.W.2d 259 (Ky.1941) and *Gregorich v. Jones,* 386 S.W.2d 955 (Ky.1965).

DISCUSSION.

In this case, a number of jurors presented testimony that the bailiff had made a comment clearly expressing the bailiff's opinion about the defendant. The jurors who overheard the comment reported it in a variety of ways, but the consistent theme of the comment appears to be that the bailiff would like to physically harm the defendant in some way. The evidence is that the comment was made in a light or joking manner in the midst of general conversation with the jurors while the bailiff was preparing the jurors to come back

into the Courtroom to receive the Court's instructions and hear closing arguments. The additional evidence from the jurors, all but one of whom testified post-trial, is that the comment did not influence their deliberations.

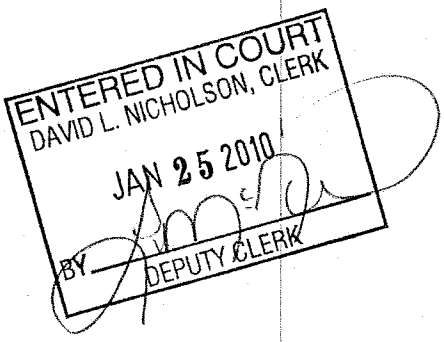
The testimony that was given, therefore, was all in support of the verdict, even by those who did not support it. Accordingly, the Court finds as a matter of law that the testimony of each of the jurors is admissible for the Court's consideration. *Id.* The testimony is also admissible because it relates to the assertion of an improper outside influence. *Brown v. Commonwealth, supra.*

From the Court's perspective, the issue facing it is whether the bailiff's improper comment presented such an "appearance of evil" that the Court should set aside the verdict and grant a new trial. Based upon its review of the case law and applying that law to the facts of this case, the Court believes that it should not. While it is clear that the bailiff made an inappropriate comment, that comment does not rise to the level of coercion or "intimidation" shown in *Dillard v. Ackerman, supra,* or the improper directive given to the jurors by the bailiff in *Young v. State Farm Mutual Automobile Ins. Co., supra.* The bailiff expressed an opinion here, which he should have kept to himself, but he did so in a manner that was not designed to impress or influence. His comment did not even rise to the level of the sheriff's answering questions such as those indicated in *Ruggles v. Commonwealth,* 335 S.W.2d 344, 346 (Ky.1960).

Although the "appearance of evil" doctrine requiring no showing of prejudice to impeach a verdict may still have force in Kentucky, this case may be more akin to *Johnson v. Commonwealth,* 12 S.W. 3d 258, 266 (Ky.2000), in which the Court held that "[t]he true test is whether the misconduct has prejudiced the defendant to the extent that he has not received a fair trial" *citing, Talbott v. Commonwealth,* 968 S.W.2d 76, 86 (Ky.1998). In *Johnson*, the Court interpreted *Young v. State Farm Mut. Ins. Co., supra,* as requiring a new trial because

it was clear that the jurors had erroneously been denied their right to have testimony reread in open court because of inaccurate information given to them by the bailiff. Here, there was no misleading or inaccurate information delivered to the jury. In addition, the Court repeatedly admonished the jury not to consider any statements in its deliberation that were not evidence in the case, and all the jurors testified that the bailiff's comment did not affect their verdict. See, *Dalby v. Cook*, 434 S.W. 2d 35, 37 (Ky. 1968).

For all these reasons, the defendants' motion for a mistrial and new trial is **DENIED** and the Court this day shall by separate order enter Judgment consistent with the jury's verdict.



FREDERIC J. COWAN, JUDGE
JEFFERSON CIRCUIT COURT

1-25-10

DATE

cc: Vanessa Cantley, Counsel for Plaintiff
Kyle Burden, Counsel for Defendant

NO. 07-CI-10806

JEFFERSON CIRCUIT COURT
DIVISION THIRTEEN (13)
JUDGE FREDERIC COWAN

JESSICA COSBY — PLAINTIFF

vs.

JUDGMENT

JOSEPH WHITE, ET AL. — DEFENDANTS

This matter having been tried by jury on November 12 and 13, 2009 and the jury having returned its verdict on November 13, 2009 in favor of the Plaintiff, Jessica Cosby, as follows:

INSTRUCTION NO. 2

You will find for the Plaintiff, Jessica Cosby, if you are satisfied from the evidence:

(a) that Defendant Joseph White struck his head, fist, or foot at Ms. Cosby with the intention of actually striking her or with the intention of putting her in fear of being struck;

AND

(b) that Jessica Cosby was actually struck or was put in fear of being struck by Defendant's head, fist, or foot.

UNLESS you are also satisfied from the evidence that upon the occasion in question:

(a) The Defendant, Joseph White, had reasonable grounds to believe and in good faith did believe that he was in immediate danger of bodily harm or physical indignity about to be inflicted upon his person by the Plaintiff;

AND

(b) The Defendant, Joseph White, did not use any more force than was necessary, or appeared to him in the exercise of a reasonable judgment to be necessary, to protect himself from such harm or indignity or apparent harm or indignity; in which event, you will find for the Defendants, Joseph White and C&L Enterprises, Inc.;

PROVIDED, however, that you shall NOT find for the Defendants under this instruction if you are further satisfied from the evidence that the Defendant, Joseph White, himself brought on the difficulty by first striking or attempting to strike the Plaintiff, Jessica Cosby, while not then acting in what reasonably appeared to him as necessary self-defense.

Words alone do not justify an assault or battery, and neither Plaintiff, Jessica Cosby, nor Defendant, Joseph White, had the right to strike or attempt to strike the other because of any words used by either.

Verdict Form A reading: "We, the jury, find for the Plaintiff, Jessica Cosby, under Instruction No. 2" and 10 out of 12 jurors agreeing to the above verdict; and

INSTRUCTION NO. 3

You will determine from the evidence the sum or sums of money that will fairly and reasonably compensate Plaintiff, Jessica Cosby, for the element of damages listed below as you believe from the evidence she has sustained by reason of the motor vehicle accident.

(a) Reasonable expense incurred for pharmacy, hospital and medical services, not to exceed $4,171.00: **$4,171.00**

And 10 out of 12 jurors agreeing to the above verdict; and

INSTRUCTION NO. 4

You will determine from the evidence the sum or sums of money that will fairly and reasonably compensate Plaintiff, Jessica Cosby, for the element of damages listed below as you believe from the evidence she has sustained by reason of the motor vehicle accident.

(b) Physical and mental pain and suffering, not to exceed $100,000.00 **$50,000.00**

And 10 out of 12 jurors agreeing to the above verdict; and

INSTRUCTION NO. 5

If you have found for Plaintiff, Jessica Cosby, and awarded her a sum or sums in damages under Instruction No. 3 or Instruction No. 4, and if you are further satisfied from the evidence that Defendant White's conduct toward Ms. Cosby was in reckless disregard for the lives, safety, and property of others, including Ms. Cosby, you may in your discretion award punitive damages against Defendants Joseph White and C&L Enterprises, Inc. in addition to the damages awarded under Instruction No. 3 or Instruction No. 4.

Your discretion to determine and award an amount, if any, of punitive damages is limited to the following factors:

(a) the harm to Ms. Cosby as measured by the damages you have awarded under Instruction No. 3 and/or Instruction No.4 caused by Defendants' conduct toward Ms. Cosby;

(b) the degree, if any, you have found from the evidence that Defendants' conduct toward Ms. Cosby was reprehensible, considering;

i. the harm caused was physical as opposed to economic; or

ii. the degree to which Defendants' conduct evinced an indifference to or a reckless disregard of the health or safety of others.

"Punitive damages" are damages awarded against the Defendants for the purpose of punishing them for their misconduct in this case and deterring them and others from engaging in similar conduct in the future.

If you award punitive damages, they must be fixed with calm discretion and sound reason, and must never be either awarded, or fixed in amount, because of any sympathy, or bias, or prejudice with respect to any party in the case.

Verdict Form B reading: "We, the jury, find for the Plaintiff, Jessica Cosby, under Instruction No. 5," hereby award punitive damages against the Defendants, Joseph White and C&L Enterprises Inc. in the amount of **$380,000.00**. 9 out of 12 jurors agreeing to the above verdict; and the Court, having accepted the verdict,

THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED pursuant to the jury's verdict that the Plaintiff, Jessica Cosby, shall recover from the Defendants, Joseph White and C&L Enterprises, Inc. the total amount of **$434,171.00.**

This is a final and appealable Judgment and there is no just cause for delay.

ENTERED IN COURT
DAVID L. NICHOLSON, CLERK
JAN 25 2010
BY _____ DEPUTY CLERK

JUDGE

DATE: 1-25-10

Vanessa Cantley, Counsel for Plaintiff
Kyle A. Burden, Counsel for Defendant