

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-002653-MR

GREGORY A. LINK

APPELLANT

v. APPEAL FROM GRANT CIRCUIT COURT
HONORABLE STEPHEN L. BATES, JUDGE
ACTION NO. 01-CR-00041

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * *

BEFORE: EMBERTON, CHIEF JUDGE; JOHNSON AND KNOFF, JUDGES.

JOHNSON, JUDGE: Gregory A. Link has appealed as a matter of right from a final judgment and sentence of the Grant Circuit Court entered on December 6, 2001. The trial court, following the jury trial in which Link was found guilty of assault in the first degree,¹ followed the jury's recommendation and sentenced Link to 18 years in prison. Having concluded that the trial

¹ Kentucky Revised Statutes (KRS) 508.010.

court erred in failing to give an extreme emotional disturbance instruction, we reverse and remand for a new trial.

At approximately 7:00 p.m. on April 4, 2001, Link went to the Silver Bullet Bar in Harrison County, Kentucky, to enter a pool tournament. According to the testimony of the bar's owner, Doug West, Link became angry when he was unable to enter the pool tournament, demanded a refund of his entrance fee, and left the bar. Link testified at his trial and denied being angry when he left the bar. West testified that shortly after Link left the bar, West felt the impact of a vehicle colliding with the outside wall of the bar. Link admitted hitting the outside wall of the bar with his pickup truck, but stated that he did so to avoid an accident with an oncoming car. Link further testified that when he left the Silver Bullet Bar, he had consumed four to five beers, but he did not feel as though he was intoxicated. West also testified that Link did not appear to be drunk when he left the bar.

After hitting the wall of the bar with his pickup truck, Link drove to Ivy's Bar, which was located approximately four miles from the Silver Bullet Bar. West and another individual followed Link to Ivy's Bar. According to West, when he confronted Link in the parking lot of Ivy's Bar about the incident at the Silver Bullet Bar, Link brandished a gun and pointed it at West. Link admitted pointing his shotgun in

West's direction, but testified that he did so because he felt threatened by West. Link further testified that he believed West was carrying a gun on the night in question, but West testified that he had no weapon with him when Link pointed the shotgun at him. After seeing Link's gun, West stated that he sought refuge in a hilly area until he heard what he believed to be the sound of Link leaving Ivy's Bar in his pickup truck. West then dialed 911 to report the incident to the Kentucky State Police.

At around 10:00 p.m. on the same night, Tim Link, Gregory Link's brother, received a telephone call from an unidentified person. The caller allegedly relayed messages from Gregory Link to Tim Link on the telephone, due to the fact that Gregory Link was unable to speak.² Tim testified that after the caller told him that Link had "got into some trouble" and was suicidal, he left his home to try to locate Link. After finding Link, Tim stated that he and Link discussed the events of the evening for around 45 minutes in Link's pickup truck. According to Tim, Link told him that he had "got into some trouble" and "wanted to die." Tim also testified that Link told him that

² Link had undergone a tracheotomy as part of his treatment for throat cancer and had lost his ability to speak.

Link would force the police to shoot him if necessary.³ Tim stated that he tried to persuade Link to go home with him to spend the night, but that Link suddenly took off in his pickup truck. Tim tried to follow Link in his own vehicle, but Link was able to elude him.

Link testified that around 3:00 a.m. the next morning on April 5, 2001, he drove to his cousin's farm to "fool around" with his beagle hunting dog. Link's cousin, Jeff Link, was alerted to the fact that someone had entered his property and called the Grant County Sheriff's Department. Grant County Sheriff Deputies Walter Cooley and Keith Newman were dispatched to Jeff's farm. After the deputies arrived at his farm, Jeff got into the back seat of Deputy Cooley's car, and the two deputies then drove their cruisers into Jeff's field to investigate. Jeff told the officers that although no one was supposed to be on his farm, the suspect might be "his cousin."⁴

As the deputies drove farther back into the field, they eventually spotted what turned out to be Link's truck and an individual walking away from the truck toward a wooded area. Jeff testified that he told Deputy Cooley that he recognized

³ Tim testified that he was able to communicate with Link by reading his lips, listening to Link's whispers, and by reading what Link had written down on a note pad.

⁴ Deputy Newman testified that Jeff did not at that time identify "his cousin" by name.

Link and his truck, but that Deputy Cooley did not say anything in response. Deputy Cooley and Deputy Newman parked their cruisers and pointed their spotlights towards the woods where Link had been spotted. Both deputies exited their vehicles, but Jeff stayed in the back seat of Deputy Cooley's cruiser.⁵

Deputy Newman testified that upon exiting his vehicle, Deputy Cooley told him that Jeff had identified the suspect in the woods as his cousin, Link. Deputy Cooley also testified that after he exited his vehicle, he noticed that Link was carrying a gun. According to the testimony of both deputies, Deputy Cooley twice asked Link to put down his gun. Both deputies also testified that in his second warning, Deputy Cooley identified himself and Deputy Newman as being with the Grant County Sheriff's Department. Link testified that he heard someone asking him to drop his weapon, but that the person never identified himself as a police officer. Shortly after this second request went unheeded, Deputy Cooley stated that he observed Link raise his gun to his shoulder and fire one shot. Deputy Newman was hit by this shotgun blast in his face, chest, and shoulder.⁶ Deputy Cooley returned fire and hit Link in his legs. After several other officers arrived at the scene in

⁵ Jeff testified that he tried to get out of the car, but was unable to do so because he was locked in the back seat.

⁶ Deputy Newman survived the gunshot wounds, but had to undergo emergency surgery to remove shotgun pellets that had lodged dangerously close to major arteries in his neck.

response to Deputy Cooley's call for assistance, Link was eventually arrested and taken to the hospital to be treated for his injuries.

On April 11, 2001, a Grant County grand jury indicted Link on one count of assault in the first degree. Link entered a plea of not guilty and the case proceeded to trial. A jury trial was held on October 31 and November 1, 2001, in which the jury found Link guilty of assault in the first degree. The trial court entered a judgment of guilty on November 15, 2001. After a pre-sentence investigation was completed, the trial court followed the jury's recommendation and sentenced Link to 18 years in prison. This appeal followed.

Link claims that the trial court erred (1) in admitting evidence of Link's "prior bad acts," i.e., the events leading up to the shooting of Deputy Newman; (2) in admitting improper hearsay statements into evidence during Tim Link's testimony; (3) by denying Link's motion to allow the jury to visit the scene where the shooting took place; (4) in permitting the jury to view photographs of Deputy Newman's injuries; and (5) by failing to give the jury an extreme emotional disturbance instruction. We conclude that the trial court's rulings on the first four issues were proper, but that it committed reversible error by failing to give the jury an extreme emotional disturbance instruction.

Link first argues that the trial court erred by admitting evidence of Link's activities leading up to the shooting of Deputy Newman. Specifically, Link argues that evidence regarding the incident at the Silver Bullet Bar in which Link hit the outside of the building with his truck, and his subsequent confrontation with West at Ivy's Bar, was inadmissible under KRE⁷ 404(b). We disagree.

While evidence of so-called "prior bad acts" is generally inadmissible to prove the crime charged, KRE 404(b) provides several exceptions to the general rule. KRE 404(b)(2) states that "other crimes, wrongs or acts" are admissible:

(2) If so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party.

If the proffered evidence falls under the KRE 404(b)(2) exception, it is admissible if its probative value outweighs any prejudicial effect.⁸

In Norton v. Commonwealth,⁹ this Court previously explained the purpose behind KRE 404(b)(2):

As further pointed out by Lawson,¹⁰ the case law from which the language utilized in KRE

⁷ Kentucky Rules of Evidence.

⁸ See KRE 403; and Eldred v. Commonwealth, Ky., 906 S.W.2d 694, 703 (1994).

⁹ Ky.App., 890 S.W.2d 632, 638 (1994).

¹⁰ See Robert G. Lawson, The Kentucky Evidence Law Handbook, § 2.25, p. 96 (3d. ed. 1993).

404(b)(2) is extracted suggests "that the rule is intended to be flexible enough to permit the prosecution to present a complete, unfragmented, unartificial picture of the crime committed by the defendant, including necessary context, background and perspective." See also, Stanford v. Commonwealth, Ky., 793 S.W.2d 112 (1990), citing both Lawson and Smith v. Commonwealth, Ky., 366 S.W.2d 902 (1962), in which it was stated:

. . . [T]he rule [is] that all evidence which is pertinent to the issue and tends to prove the crime charged against the accused is admissible, although it may also approve or tend to prove the commission of other crimes by him or to establish collateral facts.

In the case sub judice, we conclude that the incident at the Silver Bullet Bar and Link's subsequent confrontation with West were so "inextricably intertwined" with the other evidence presented to render it admissible under KRE 404(b)(2).

The Commonwealth introduced evidence tending to show that Link became upset at the Silver Bullet Bar when he was unable to enter the pool tournament. Link admitted that he ran into the outside of the bar with his pickup truck after he left the bar. The incident at the Silver Bullet Bar led to the confrontation between Link and West at Ivy's Bar, in which Link admitted to pointing a gun at West. The Commonwealth further presented evidence tending to show that because of these two incidents, Link became both frightened and suicidal, and

allegedly told his brother that he would force the police to shoot him if necessary. Hence, this evidence provided the "necessary context, background, and perspective" to help explain why Link may have retreated to Jeff Link's field, and why he may have fired his gun in the direction of the deputies. Accordingly, this evidence was properly admitted and the trial court did not abuse its discretion in determining that the probative value of the evidence outweighed any danger of undue prejudice.¹¹

Next, Link argues that the trial court erred by permitting the Commonwealth to introduce inadmissible hearsay testimony at trial. In particular, Link points to two instances during Tim's testimony where Link claims that improper hearsay evidence was admitted over his objection, namely, (1) Tim's recitation of what Link allegedly told him during their conversation in Link's pickup truck; and (2) Tim's testimony regarding statements allegedly made by Link to the unidentified caller, who then relayed the statements to Tim.

First, during their conversation in Link's pickup truck, Tim testified that Link told him that he "got into some trouble" earlier in the evening and that he was feeling

¹¹ See Johnson v. Commonwealth, Ky., 105 S.W.3d 430, 438 (2003) (holding that a trial court's decision as to whether the probative value of any proffered evidence is outweighed by the danger of undue prejudice is reviewed under an abuse of discretion standard).

depressed and suicidal. An out-of-court statement is not excluded by the hearsay rules if the statement is offered against a party to the proceeding and is the party's own statement.¹² Further, a statement regarding the declarant's "then existing state of mind, emotion, sensation, or physical condition" is admissible and not excluded by the hearsay rules.¹³ Clearly, Link's own statements wherein he admitted that he "got into some trouble" at the bar, and his statements that he was feeling depressed and suicidal were admissible under the above exceptions to the hearsay rule. Therefore, the trial court did not err in admitting this testimony into evidence.

Second, we conclude that Tim's testimony regarding what the unidentified caller told him over the telephone, i.e., that Link had "got into some trouble" and that he "want[ed] to commit suicide," was admissible not for the purpose of proving the truth of the matter asserted in those statements, but for the purpose of explaining why Tim got dressed and went looking for Link after receiving this late-night phone call.¹⁴

¹² KRE 801(A)(b)(1). See also Thurman v. Commonwealth, Ky., 975 S.W.2d 888, 893 (1998)(holding that a defendant's out-of-court statements were admissible as admissions of a party).

¹³ KRE 803(3).

¹⁴ See Young v. Commonwealth, Ky., 50 S.W.3d 148, 167 (2001)(holding that "[a] police officer may testify about information furnished to him by an absent witness only if that information tends to explain the action that was taken by the police officer as a result of the information and the taking of that action is an issue in the case. If so, the out-of-court statement is not hearsay, because it is not offered to prove the truth of the matter asserted

Accordingly, these statements were not hearsay and the trial court did not err in admitting this testimony.

Next, Link claims that the trial court erred by denying his request to allow the jury to visit the crime scene. Specifically, Link argues:

[Allow[ing] the jury to visit the scene at night . . . would have allowed them to fairly judge what [] Link and the [deputies] could or could not have seen and this understanding was fundamental in order for the jury to make the required legal and factual determinations.

Under KRS 29A.310(3), if a trial court deems it necessary, the jury may be permitted to "view the place in which the offense is charged to have been committed." The determination of whether such a viewing is "necessary" "lies within the sound discretion of the trial court," and an appellate court will not disturb the trial court's ruling absent an abuse of that discretion.¹⁵ We find no abuse of discretion under the facts of the case at bar.

Our review of the record shows that no fewer than 45 photographs of the scene of the shooting were admitted into evidence at trial. In addition to showing the approximate

but to explain why the officer acted as he did" [citations omitted] [emphasis original]).

¹⁵ Clark v. Fawcett, Ky., 450 S.W.2d 528, 530 (1970)(holding that "[t]he view authorized by KRS 29.301 lies within the exercise of the sound discretion of the trial court").

locations of the vehicles on the night in question, the photographs also contain markers designating locations where certain activities allegedly took place. Further, numerous witnesses, including Link himself, testified regarding the lighting conditions on the night in question and what each witness was or was not able to see. Accordingly, the trial court did not abuse its discretion in denying Link's request to permit the jury to view the scene of the shooting.

Link next argues that the trial court erred in permitting the jury to view the photographs of Deputy Newman, which show the wounds he sustained in the shooting. Link claims that since he did not contest the fact that Deputy Newman had been shot, the photographs served no probative purpose and were "inflammatory cumulative evidence." We disagree.

In Barnett v. Commonwealth,¹⁶ our Supreme Court stated:

Appellant further argues that his offer to stipulate to the seriousness of Harding's injury would have eliminated the possibility of undue prejudice, and made the admission of the photographs unnecessary. Generally, however, the prosecution is permitted to prove its case by competent evidence of its own choosing, and the defendant may not stipulate away the parts of the case that he does not want the jury to see [citation omitted]. Moreover,

It is no answer to say that defense counsel offered to stipulate the essential

¹⁶ Ky., 979 S.W.2d 98, 102-03 (1998).

facts . . . hence they were unnecessary. The Commonwealth has a right to prove its case to the jury even when the defendant pleads guilty. The defendant is not entitled to erase the ugly parts of the picture and substitute words in their place. In order for a jury to be able to size up a case fairly and wisely it must be allowed to gain a reasonable perspective, and that can best be done by permitting it to see an unadulterated picture.¹⁷

In the case sub judice, the jury found Link guilty of assault in the first degree. Under KRS 508.010, a person is guilty of assault in the first degree when, inter alia, the victim suffers "serious physical injury." Contrary to Link's assertion that the photographs "failed to serve any probative purpose," we conclude that the photographs depicting Deputy Newman's injuries were relevant to show the seriousness of his injuries. Accordingly, we cannot say that the trial court abused its discretion in finding that the photographs' probative value outweighed the danger of any undue prejudice.¹⁸

¹⁷ Id. (quoting Gall v. Commonwealth, Ky., 607 S.W.2d 97, 107 (1980) cert. denied 450 U.S. 989, 101 S.Ct. 1529, 67 L.Ed.2d 824 (1981) overruled on other grounds Payne v. Commonwealth, Ky., 623 S.W.2d 867 (1981)).

¹⁸ See Lewis v. Commonwealth, Ky., 42 S.W.3d 605, 610 (2001)(holding that in an appeal of a conviction for assault in the first degree, the trial court did not abuse its discretion in permitting the victim's wife to testify regarding the seriousness of her husband's injuries in order to show that he had suffered a "serious physical injury").

Finally, Link claims that the trial court erred by failing to give the jury an extreme emotional disturbance instruction.¹⁹ In particular, Link argues:

[T]he Commonwealth itself presented extensive proof attempting to show that [Link] may have been [in] an intoxicated, angry, suicidal state of mind at the time of the accident. This same evidence supported the defense requested instruction on assault under extreme emotional distress.

We agree with Link that the evidence presented at trial warranted an extreme emotional disturbance instruction.

In Thomas v. Commonwealth,²⁰ this Court previously explained what must be shown before a defendant is entitled to an extreme emotional disturbance instruction:

In order to be entitled to the instruction requested by appellant there must be two separate factors presented by the evidence. First, there must be evidence of extreme emotional disturbance. This can be deduced from the conduct of the defendant and not merely by his own testimony [citations omitted].

Second, there must be a reasonable justification or excuse under the circumstances as the defendant believes them to be.

¹⁹ See KRS 507.020(1)(a)(defining extreme emotional disturbance as a disturbance "for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be").

²⁰ Ky.App., 587 S.W.2d 264, 265-66 (1979).

In addition, Kentucky case law has required that there be a "triggering event" which leads to the extreme emotional disturbance.²¹

With respect to the first element, that is, the presence of an extreme emotional disturbance, our Supreme Court has defined such a disturbance as "a temporary state of mind so enraged, inflamed, or disturbed as to overcome one's judgment, and to cause one to act uncontrollably from the impelling force of the extreme emotional disturbance rather than from evil or malicious purposes."²² In the instant case, we conclude that there was sufficient evidence presented at trial upon which the jury could have found that there was a "triggering event" which led Link to act under the influence of an extreme emotional disturbance.

As we discussed earlier, the Commonwealth introduced evidence tending to show that Link left the Silver Bullet Bar angered over the fact that he was unable to enter the pool tournament. The jury could have found that Link's anger led him to intentionally hit the outside of the bar with his pickup truck, which in turn led to his pointing a gun at West in the parking lot of Ivy's Bar. The Commonwealth also proffered the

²¹ Whitaker v. Commonwealth, Ky., 895 S.W.2d 953, 954 (1995)(holding that there must be an event triggering an explosion of violence on the part of the defendant).

²² McClellan v. Commonwealth, Ky., 715 S.W.2d 464, 468-69 (1986).

testimony of Link's brother, Tim, who stated that Link told him that he was depressed and "wanted to die" because of the events that had transpired earlier in the evening, and that he would force the police to shoot him if necessary.²³ Hence, we conclude that a jury could have found that Link was "so disturbed" over the "triggering events" of the evening, that his judgment was overcome, thereby causing him to act under the influence of an extreme emotional disturbance.²⁴

With respect to the second element, i.e., the reasonableness of the justification for the behavior, while Link's conduct may not appear to be "reasonable" in the objective sense of the word, in Creamer v. Commonwealth,²⁵ this Court stated that in determining whether there was reasonable justification for the emotional disturbance, the question is normally one for the jury to decide by viewing the facts from the perspective of the defendant as he believed them to be:

²³ The fact that Link testified that he was not angry when he left the Silver Bullet Bar and that he was not suicidal does not preclude him from arguing that an extreme emotional disturbance instruction should have been given. See Thomas, 587 S.W.2d at 265 (holding that "[t]he position of the appellant is correct when he states that it is of no consequence which witnesses place into evidence the circumstances justifying an instruction on extreme emotional disturbance. Even though the appellant denies such mitigation or defense as drunkenness, insanity, extreme emotional disturbance, etc., if the evidence as a whole, from any source, warrants an instruction embodying such a defense or mitigation, that instruction must be given").

²⁴ See Spears v. Commonwealth, Ky., 30 S.W.3d 152, 155 (2000)(stating that "[i]t is for a jury to decide whether a triggering event has occurred and whether a defendant acted under the influence of [an extreme emotional disturbance]").

²⁵ Ky.App., 629 S.W.2d 324, 325 (1981).

On the second factor, it is clear that the reasonableness of the excuse or justification must be viewed through the eyes of the accused. As set out in Thomas, supra, it must ordinarily be submitted to a jury. Under the evidence of this case, where the victim testified that appellant, while hitting her, brought up past acts, was filled with hatred, anger and confusion, there was additional evidence of emotional disturbance. Although the removal of the dog and the ensuing slap would not seem reasonable justification to this court,²⁶ the jury should have been permitted to examine this excuse through the eyes of a man who doctors and the trial judge agree was disturbed to the extent that he was confined to an institution shortly after the occurrence. The appellant was entitled to an instruction on his theory of the case and, as Justice Stephenson said in Mishler v. Commonwealth, Ky., 556 S.W.2d 676, 680, "No matter how preposterous . . . it raises an issue for the jury. It is not for us to decide this issue."²⁷

Therefore, we conclude that the issues of whether there was a triggering event which led Link to act under the influence of an extreme emotional disturbance, and whether there was a reasonable justification for his conduct were issues for the jury to decide under the appropriate instructions. The failure of the trial court to give an extreme emotional

²⁶ Under the facts of Creamer, the defendant was convicted of assault in the second degree based on an incident in which his mother removed his dog from their home against his wishes. The defendant became angry, he and his mother exchanged slaps to the face, and he proceeded to beat, kick, and strangle his mother.

²⁷ See also Gall, 607 S.W.2d at 108 (holding that any event, including mere words, can lead to an extreme emotional disturbance within the meaning of the statute and that the jury determines the reasonableness from the defendant's point of view, rather than from an objective standard).

disturbance instruction when warranted constitutes reversible error.²⁸ Accordingly, the failure of the trial court to grant Link's request for such an instruction warrants a reversal of his conviction.

Based on the foregoing, the judgment of the Grant Circuit Court is reversed and this matter is remanded for a new trial in a manner consistent with this Opinion.

ALL CONCUR.

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²⁸ See Springer v. Commonwealth, Ky., 998 S.W.2d 439, 452-53 (1999).