RENDERED: March 11, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2004-CA-000220-MR

KAREN BEASON — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARTIN F. McDONALD, JUDGE
ACTION NO. 02-CR-002761

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; DYCHE AND KNOPF, JUDGES.

KNOPF, JUDGE: Karen Beason appeals from an amended judgment of the Jefferson Circuit Court, entered February 6, 2004, convicting her of second-degree assault[1] and sentencing her to five years' probation in lieu of five years' imprisonment. Among numerous allegations of error, Beason contends that her trial was rendered unfair when the trial court erroneously

[1] KRS 508.020.

refused to instruct the jury on the defense of extreme emotional disturbance. We agree with Beason that this error entitles her to a new trial. We shall comment briefly on the other alleged errors only to the extent that the issues are apt to recur.

The Jefferson County grand jury indicted Beason for first-degree assault following a fight between Beason and Selena Baker that occurred at Beason's brothers' apartment on Magazine Street in Louisville in October 2002. Apparently Beason, her two brothers, Baker, and Baker's husband had engaged in an evening of socializing that included considerable drinking. At some point in the evening Beason had promised to give Baker a ride home, but in the early hours of the next morning she refused Baker's demand for the ride and a fight ensued. In the course of the fight, Baker suffered a cut below her left eye that required fifteen stitches and left an indefinite scar. The physician who treated her testified that the cut, which had clean rather than jagged edges, was probably caused by a sharp implement, such as a knife, rather than a blunter one, such as a key, although he stated that a key could not be ruled out.

Beason and Baker both testified. Baker claimed that she had paid Beason in advance for a ride from her home in the Newburg section of Louisville to downtown and back. When late in the evening Beason responded to her request for a ride home by saying that she was too intoxicated to take her, Baker had

asked for some of her money back to pay for a cab. Beason refused to return the money, whereupon the two women exchanged angry words, threw drinks at one another, and finally came to blows. Beason's brothers had separated them. With one of the brothers still holding Baker, Beason took a small knife from her key chain and slashed Baker's cheek.

During her testimony, Beason admitted that she had promised Baker a ride home, but denied that Baker paid her. Late in the evening Baker had wanted to go home, but by then Beason was too intoxicated to take her. She offered Baker ten dollars for a cab, but Baker demanded twenty dollars, and when Beason refused Baker grew angry. After Baker threw a pot and knocked over a lamp, Beason's brothers led her and her husband out of the apartment, but a few minutes later one of the brothers let them back in. As Baker was crossing the room next to the chair where Beason sat, she suddenly struck Beason in the mouth and about her head. Beason raised her left hand in an attempt to ward off Baker's blows, and Baker bit one of Beason's fingers. Frightened and angered by Baker's attack, Beason struck out with her right hand in which she was holding her key ring, and a key or one of the many trinkets on the ring apparently cut Baker's cheek.

Beason claimed to have acted in self defense, but at the close of proof she also requested that the jury be

instructed, if it rejected her defense, to determine whether she had acted under extreme emotional disturbance (EED), a mitigating circumstance recognized by KRS 508.040. Pursuant to that statute, a defendant who can show by a preponderance of the evidence that she committed first- or second-degree assault Aunder the influence of extreme emotional disturbance@ is punished for a Class D felony rather than the Class B or C felonies, respectively, otherwise attached to those crimes. In arguing against an EED instruction, the Commonwealth contended that EED is reserved for episodes of uncontrollable rage, the old heat-of-passion idea, whereas here the jury could assess Beason's alleged fear and anger under the self-defense instruction. In denying Beason=s request the trial court seems to have agreed that KRS 508.040 did not contemplate the emotions, however extreme, aroused by a fight. We disagree.

Our Supreme Court has held that an EED instruction is appropriate whenever there is sufficient evidence that the defendant acted under the immediate influence of emotions strong enough temporarily to overcome her judgment and in circumstances, as understood by the defendant, that provide a reasonable explanation for the triggering of such a strong emotional reaction.[2] An EED instruction is not necessarily

[2] Fields v. Commonwealth, 44 S.W.3d 355 (Ky. 2001) (citing McClellan v. Commonwealth, 715 S.W.2d 464 (Ky. 1986)).

incompatible with a self-defense instruction. In Engler v. Commonwealth,[3] a case involving a stabbing during a fight, our Supreme Court held that an EED instruction should have been given in addition to a self-defense instruction and explained that

> in this case it would not have been unreasonable for a juror to believe beyond a reasonable doubt that [the defendant] was **not** acting in self-protection . . . yet still believe that he **was** acting in a state of Aextreme emotional disturbance for which there was a reasonable justification or excuse under the circumstances as he believed them to be.@ There can be little doubt that not only [the defendant] (who was 18 years of age) but all of the participants in the fray were emotionally excited during the heat of battle. Whereas self-protection requires justification for the injurious act itself, the element of extreme emotional disturbance requires reasonable justification only **for the emotional disturbance,** this distinction being the ground for the fact that one calls for an acquittal and the other merely reduces the degree of the offense.[4]

Here, similarly, it would not have been unreasonable for a juror to believe beyond a reasonable doubt that, although Beason had not acted justifiably in self defense, having been unexpectedly punched and bitten she had acted under the temporary influence of emotions powerful enough to rob her of her judgment, in circumstances, as she understood them, that

[3] 627 S.W.2d 582 (Ky. 1982).

[4] *Id.* at 584 (emphasis in the original).

reasonably justified or excused such an emotional disturbance. We agree with Beason, therefore, that she was entitled to an EED instruction.

We further agree that the error cannot be deemed harmless. Although the jury declined an opportunity to convict Beason of fourth-degree assault, a misdemeanor, it did recommend that she be given the shortest possible sentence for unmitigated second-degree assault. We cannot say that the jury would not have chosen mitigated second-degree assault and a lesser sentence if that had been an option, as it should have been.

Turning briefly to Beason's other claims of error, she correctly notes that she was entitled to impeach Baker's testimony for possible bias by showing that Baker was on probation at the time of Beason's trial.[5] The trial court did not err, however, by disallowing questions concerning the nature and circumstances of the underlying crime, because those details added nothing to Baker's alleged motive to testify falsely.[6] Nor did the court err by excluding evidence of Baker's alleged assault against her husband. As impeachment evidence, the dismissed assault charge and the alleged violation of a protective order were merely cumulative evidence of bias. And as substantive evidence tending to support Beason's claim of

[5] Weaver v. Commonwealth, 955 S.W.2d 722 (Ky. 1997).

[6] *Id.*

self defense, the alleged assault was a prior bad act not admissible to prove either that Baker had a propensity to assault or that she was in the habit of hitting and biting people who frustrated her wishes.[7] Spontaneous hitting and biting are not admissible under KRE 404(b) as evidence of a scheme or plan.

Beason is correct that she is not to be punished for having invoked her right to remain silent during the police investigation.[8] But the Commonwealth is not precluded from introducing impeachment evidence of that invocation if Beason testifies inconsistently with it.[9]

The trial court did not err by introducing the instruction for each authorized offense with the standard formula, "you will find the defendant guilty under this instruction if and only if you believe . . . ." We agree with the trial court that Beason's alternative--"You will find the defendant not guilty unless you believe . . ."--is not substantially different.

The evidence included Baker's allegations that Beason had punched her after the two women had exchanged insults and

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[7] Burchett v. Commonwealth, 98 S.W.3d 492 (Ky. 2003); Commonwealth v. Maddox, 955 S.W.2d 718 (Ky. 1997).

[8] Hall v. Commonwealth, 862 S.W.2d 321 (Ky. 1993).

[9] Combs v. Coyle, 205 F.3d 269 (6th Cir. 2000).

thrown drinks at each other. Baker also testified that an inebriated Beason had swung a knife at her and lashed her cheek near her eye. This evidence supported the inclusion of an initial aggressor qualification to Beason's claim of self-defense[10] and the inclusion in the second-degree assault instruction of the theory that Beason wantonly caused serious physical injury with a dangerous instrument.[11]

In sum, the conflicting evidence concerning this unfortunate altercation permitted the jury to find that Beason assaulted Baker, but did so under the influence of an extreme emotional disturbance. Because the Jefferson Circuit Court erred by failing to instruct the jury accordingly, we must reverse its February 6, 2004, judgment and remand for a new trial.

ALL CONCUR.

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[10] Stepp v. Commonwealth, 608 S.W.2d 371 (Ky. 1980).

[11] Burnett v. Commonwealth, 31 S.W.3d 878 (Ky. 2000).