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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002140-MR

DAVID LEE COFFMAN — APPELLANT

v.

APPEAL FROM CASEY CIRCUIT COURT
HONORABLE JAMES G. WEDDLE, JUDGE
ACTION NO. 03-CR-00107

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DYCHE, KNOPF, AND TACKETT, JUDGES.

TACKETT, JUDGE: David Coffman appeals from the judgment of the Casey Circuit Court convicting him of second-degree assault and tampering with physical evidence. Coffman argues that the trial court erred in denying his motions for directed verdict due to insufficiency of the evidence to prove intentional conduct on his part or serious injury to the victim. We disagree and affirm the trial court.

Coffman was charged with second-degree assault, wanton endangerment, and tampering with physical evidence after he shot his four-year-old cousin in the head with a BB gun. After all the evidence was presented, the trial court dismissed the wanton endangerment charge. The jury was instructed on tampering with physical evidence, second degree assault and the lesser included charge of fourth-degree assault. Coffman was convicted of tampering with physical evidence and second-degree assault and received a total sentence of seven years. This appeal followed.

On appeal, Coffman argues that the trial court erroneously failed to grant directed verdicts of not guilty on both charges. The test for a directed verdict is whether it was clearly unreasonable for the jury to find the defendant guilty as a result of the evidence introduced at trial. Baker v. Commonwealth, 973 S.W.2d 54 (Ky. 1998). Benham v. Commonwealth, 816 S.W.2d 186 (Ky. 1991). Kentucky Revised Statute (KRS) 508.020(1) defines second-degree assault as follows:

> (1) A person is guilty of assault in the second degree when:
> (a) He intentionally causes serious physical injury to another person; or
> (b) He intentionally causes physical injury to another person by means of a deadly weapon or a dangerous instrument; or
> (c) He wantonly causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument.

The jury instructions in this case allowed Coffman to be found guilty under subsection (b) or subsection (c). Coffman contends

that there was no evidence he intended to shoot Cody; nor was there evidence that Cody suffered a serious physical injury as a result of the BB lodged in his brain.

KRS 508.020(1)(b) required the jury to believe that Coffman acted intentionally when he shot the victim in the forehead. The evidence indisputably showed that Coffman, who was twenty-three, had taken his sixteen-year-old brother, Elzie King, and his four-year-old cousin hunting with a BB gun borrowed from a friend. At some point during the day, Coffman pulled the trigger and shot his cousin in the forehead. Beyond these facts, accounts of the events vary widely from person to person with Elzie and Coffman giving multiple, contradictory accounts. Elzie was interviewed by a state trooper that night and said Coffman was pointing the gun at the boy and threatening to shoot him. Immediately before the shooting, Elzie asked Coffman whether the gun was loaded, and Coffman told him it was not. He then momentarily turned his back and heard the gun discharge. At trial, Elzie initially testified that he had no idea what had happened because his back was turned at the time. He also stated that Coffman had been pointing the gun away from the four-year-old and that Coffman had not talked to him about the events of the day. When reminded of his interview with the state trooper, Elzie reluctantly changed his testimony and stated that Coffman told him to lie about what happened. Both

Elzie and Coffman agreed that the gun had to be loaded, pumped, cocked, and have the trigger pulled before it would discharge.

Coffman himself told several different stories. He gave a taped interview to state police the day of the shooting and first stated that he was firing at birds in the air and the BB fell out of the sky and penetrated the four-year-old's forehead. Next, Coffman told police the gun had discharged accidentally as he was climbing through a fence with his brother and cousin. Finally, he admitted pointing the gun at the four-year-old and pulling the trigger. He denied knowing that it was loaded, but stated that he had placed a large number of BBs in the gun and had no way of knowing whether it was empty. In addition, Coffman said the gun had been pumped ten times before he fired it. He also blamed the shot on a ricocheting BB at one time.

At trial, Coffman first testified that he did not remember pointing the gun at his cousin and then that he did not intentionally do so. He claimed that he never told his cousin he was going to shoot him, but changed his story on cross-examination to state that he was joking when he said it. Coffman blamed his final account to police, which closely matched Elzie's statement when he was interviewed, on being pressured by the state trooper who had evidently told him that his brother's account of events did not match his own. The

four-year-old was determined to be incompetent to testify to anything beyond the fact that Coffman shot him and was, therefore, not called as a witness.

Coffman claims that there was no evidence to show that he intentionally caused physical injury to his cousin by shooting him. Nevertheless, a person may be presumed to intend the natural consequences of his actions. Quarels v. Commonwealth, 142 S.W.3d 73 (Ky. 2004). If the jurors concluded that Coffman intended to shoot his cousin, then they could infer that he also intended the injury caused by the BB penetrating the boy's brain. Thus, our inquiry as to whether Coffman was entitled to a directed verdict under KRS 508.020(1)(b) begins and ends with the question of whether it was clearly unreasonable for a jury to find that Coffman intended to shoot his cousin. Coffman argues that his denial that he intended the shooting resolves the question; we disagree. The evidence of his threat to shoot the boy, coupled with the numerous stories he told to cover up how the shooting occurred, and his own brother's reluctant acknowledgment that Coffman instructed him to lie about what he saw that day provide enough evidence of Coffman's intent to submit the case to the jury.

Next, Coffman argues that there was no evidence that his cousin suffered a serious physical injury as a result of being shot. After he was shot, the four-year-old began to bleed

profusely and Coffman carried him back home. The child's mother immediately drove him to the nearest hospital while Coffman stayed behind to turn off the stove and lock the trailer. Coffman's cousin was airlifted to the University of Kentucky Hospital where he remained for a day and a half. Coffman points out that the child was treated by administering Tylenol and placing a bandage over the wound, described as a little, red spot. The Commonwealth introduced medical records showing that fragments of the child's skull were embedded in his frontal lobe and the BB penetrated deep into his brain, coming to rest at the head of the caudate nucleus, where it remains. 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." Whether an injury creates a serious or substantial risk of death depends on the unique factors of each case. Cooper v. Commonwealth, 569 S.W.2d 668 (Ky. 1978). We are unpersuaded that firing a projectile deep into the brain of a four-year-old child did not create a substantial risk of death, however less severe the consequences turned out to be.

Coffman also argues that he was entitled to a directed verdict on the tampering with physical evidence charge. KRS 524.100(1) defines the offense as follows:

> 1) A person is guilty of tampering with physical evidence when, believing that an official proceeding is pending or may be instituted, he:
> (a) Destroys, mutilates, conceals, removes or alters physical evidence which he believes is about to be produced or used in the official proceeding with intent to impair its verity or availability in the official proceeding. . . .

According to Coffman, he did not believe he would be charged with a crime for shooting his cousin and he threw the gun in the river because he did not want to look at it anymore. Once again, Coffman contends that we must accept his self-serving testimony as the only evidence of his intent. However, he also testified at trial that he sat on the porch thinking for several minutes before walking at least a mile to dispose of the gun. Further, police were unable to recover the gun, even after dragging the water with a special magnet. The way in which he disposed of the gun provides sufficient evidence to allow a jury to determine whether Coffman's intent was as innocent as he claimed.

Next, Coffman requests review of an unpreserved error in the form of the jury instructions pursuant to Kentucky Rule of Criminal Procedure 10.26. The jury instruction on the charge of second-degree assault read as follows:

> You will find the Defendant guilty of Assault in the Second Degree under this Instruction, if and only if, you believe

from the evidence beyond a reasonable doubt all of the following:

A. That in this county on or about October 16, 2003 and before the finding of the Indictment herein, he inflicted injury upon [C.V.] by shooting him with a B.B. gun;

AND

B. That in so doing:

1. The Defendant intentionally caused physical injury to [C.V.];

OR

2. The Defendant wantonly caused serious physical injury to [C.V.]

Both the Commonwealth and Coffman agreed to the wording of the instruction. Nevertheless, Coffman now argues that the instruction allowed the jury to render a verdict that was not unanimous because some jurors may have believed he intentionally injured his cousin, while others may have believed he acted wantonly, but caused serious physical injury. Although a defendant cannot be convicted of a crime without a unanimous verdict, an instruction containing alternate theories of liability does not deprive a defendant of a unanimous verdict if each theory is supported by the evidence. Miller v. Commonwealth, 77 S.W.3d 566 (Ky. 2002). As we have already discussed above, there was evidence supporting separate instructions under KRS 508.020(1)(b) and (c); therefore, no palpable error occurred.

Coffman's final argument concerns the admission of irrelevant evidence over his objection. We find no prejudice in the admission of the complained of evidence.

For the foregoing reasons, the judgment of the Casey Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Astrida L. Lemkins
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

James C. Shackelford
Assistant Attorney General
Frankfort, Kentucky