

# Commonwealth of Kentucky

## Court of Appeals

NO. 2005-CA-001757-MR

JOHN DAY

APPELLANT

v. APPEAL FROM HARRISON CIRCUIT COURT  
HONORABLE ROBERT W. MCGINNIS, JUDGE  
ACTION NO. 04-CR-00018

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: KELLER AND VANMETER, JUDGES; GUIDUGLI,<sup>1</sup> SENIOR JUDGE.

VANMETER, JUDGE: John Day appeals from the Harrison Circuit Court's judgment sentencing him to ten years' imprisonment after a jury found him guilty of committing first-degree assault against Terry Hope. Day argues on appeal that the trial court erred by failing to grant a directed verdict in his favor. For the following reasons, we affirm.

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<sup>1</sup> Senior Judge Daniel T. Guidugli, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Hope testified at trial that on January 30, 2004, he went to Danny Morningstar's house to obtain the title to a truck he was purchasing from Day and Roger Soard. Hope had known Morningstar for many years but he did not know Day, who was renting an upstairs room from Morningstar. Day yelled for Hope, Soard, and David Justice to come upstairs to talk about the truck title. After they complied, Justice sat on a gun located on one of the couches in the upstairs room. Day took the gun and said, "Nobody touch my gun." Day walked out of the room, walked downstairs, and then gave Hope the truck title.

After the transaction, Day got out a pint of whiskey which he, Hope, and Soard shared. When the bottle was empty, Hope wanted more. Day got out a larger bottle of whiskey, which Hope and Soard said they would buy. After they gave Day some money, Day refilled the pint bottle, which the men shared. They also talked about the truck title. Then the men walked downstairs since Justice and Soard were leaving. Morningstar and Day asked Hope to stay and drink more whiskey.

Day and Hope went back upstairs, drank more whiskey, and again talked about the truck title. When the bottle was empty, Day asked Hope for more money, and Hope expressed that he thought he had already bought the bottle. Day picked up his gun and shot Hope three times in the shoulder, paused, and then shot him two more times in the head.

Day testified, by contrast, that he did not invite anyone back into Morningstar's house after Justice, Soard, and Hope left. Instead, he fell asleep watching

television in a chair with his gun under his leg. He was awakened by a man hitting the space heater. The man yelled, as he quickly approached Day, "I will do anything and take anything I want to take!" Day, who testified that he had limited functioning in his legs due to illness, shot the man until he fell. Day then called his estranged wife, Rose Day, and asked her to pick him up from Morningstar's home. Day did not know who the man was until a police officer told him.

Rose testified that Day called and asked her to pick him up and take him home, where it was safe and he could rest. When she arrived at Morningstar's house, Day was intoxicated and shaken up. Rose went upstairs at Day's request, and she found Hope on the couch covered in lots of blood. She went downstairs and called 911.

Based upon this and other evidence, the jury found Day guilty of first-degree assault. The trial court thereafter sentenced him to ten years' imprisonment in accordance with the jury's recommendation. This appeal followed.

First, Day essentially argues that Hope's testimony was insufficient to withstand his motion for a directed verdict. We disagree.

As the Kentucky Supreme Court has explained,

[o]n motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

*Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991). Further, on appeal, a defendant is entitled to a directed verdict of acquittal only if, under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt. *Id.*

Day relies upon Hope's intoxication at the time of the incident when arguing that "no fair and reasonable inference could be drawn that the event happened as Mr. Hope claimed." He also points out that while Hope testified that he could recall the events clearly, emergency personnel testified that Hope was incoherent and combative at the scene, and that he stated he could not remember what had happened. Day also argues that Hope's testimony was incredible as only Hope testified 1) that Day walked downstairs when Justice and Soard were leaving, and 2) that Morningstar and Day invited Hope back into the house for more drinks. Day further emphasizes that he could not get around well at the time of the incident, and the fact that shell casings were found in different areas of the room is inconsistent with Hope's testimony that he sat in a single location in the room as Day shot him.

Ultimately, these flaws in Hope's testimony are not "so incredible or improbable or so at variance with natural laws or common human experience as to be patently untrue" so as to compel a directed verdict of acquittal. *Bussey v. Commonwealth*, 797 S.W.2d 483, 484 (Ky. 1990) (quoting *Holland v. Commonwealth*, 272 S.W.2d 458, 459 (Ky. 1954)). In order "to survive a motion for directed verdict, it is not necessary that every fact related by the victim be reasonable and probable. It is sufficient if the victim's testimony taken as a whole could induce a reasonable belief by

the jury that the crime occurred.” *Id.* Any flaws in Hope’s testimony, or inconsistencies among the witnesses’ testimonies, were matters for the jury. *Benham*, 816 S.W.2d at 187 (questions as to the credibility and weight to be given the testimony are reserved for the jury).

Next, Day argues that the trial court erred by failing to grant a directed verdict of acquittal because the Commonwealth did not prove that he acted intentionally rather than in self-defense. We disagree.

KRS 508.010(1)(a) provides that a person is guilty of first-degree assault when he “intentionally causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument[.]”<sup>2</sup> Pursuant to KRS 501.020(1), a “person acts intentionally with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause that result or to engage in that conduct.” Further, “[i]ntent may be inferred from actions because a person is presumed to intend the logical and probable consequences of his conduct and a person's state of mind may be inferred from actions preceding and following the charged offense.” *Parker v. Commonwealth*, 952 S.W.2d 209, 212 (Ky. 1997) (regarding a homicide). From the circumstances here, a jury could reasonably conclude that Day intentionally caused Hope serious physical injury.

Moreover, a defendant who relies upon self-defense is rarely entitled to a directed verdict. *West v. Commonwealth*, 780 S.W.2d 600, 601 (Ky. 1989). “Only in the

<sup>2</sup> We recognize that a person may also be guilty of first-degree assault under different circumstances pursuant to KRS 508.010(1)(b); however, the Commonwealth proceeded in this matter under KRS 508.010(1)(a).

unusual case in which the evidence conclusively establishes justification and all of the elements of self-defense are present is it proper to direct a verdict of not guilty.” *Id.* Here, although the evidence certainly supported the self-protection instruction given to the jury, it did not conclusively establish self-defense. Rather, from Hope’s testimony, the jury could reasonably conclude that Day did not believe that force was necessary to protect himself against “death, serious physical injury, kidnapping, sexual intercourse compelled by force or threat, felony involving the the use of force, or under those circumstances permitted pursuant to KRS 503.055.” *See* KRS 503.050(2) (use of physical force in self-protection). Indeed, the jury could reasonably conclude that Day did not believe Hope posed any threat to him. As such, the trial court did not err by failing to direct a verdict in Day’s favor.

The Harrison Circuit Court's judgment is affirmed.

ALL CONCUR.

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