

# Commonwealth of Kentucky

## Court of Appeals

NO. 2006-CA-000438-MR

MICHAEL THOMAS

APPELLANT

v. APPEAL FROM ROWAN CIRCUIT COURT  
HONORABLE BETH LEWIS MAZE, JUDGE  
ACTION NO. 05-CR-00062

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS, CHIEF JUDGE; NICKELL AND WINE, JUDGES.

WINE, JUDGE: Michael Thomas appeals from a final judgment of the Rowan Circuit Court following a jury verdict of guilty on one count each of assault in the second degree and being a persistent felony offender. Thomas claims that the trial court erred in failing to instruct the jury on voluntary intoxication. For the reasons stated below, we affirm the judgment on appeal.

On March 18, 2005, Thomas was indicted for attempted murder. The charges arose from a March 1, 2005 altercation which Thomas had with Frank Prince in

Rowan County, Kentucky. The two men were arguing over whether or not Prince owed Thomas money. After a brief physical altercation where Prince eventually pulled a knife, Prince then went outside to retrieve a gun from his truck. That is when Thomas, fearing for his life, emptied four rounds of bird shot into Prince's truck, penetrating the windshield and injuring Prince. As such, Thomas did receive an instruction on self-protection.

When the police arrived, Thomas told Detective Sherman Royse that he emptied his shotgun into Prince's vehicle intending to kill Prince. Thomas further indicated that once his shotgun was empty, he tossed it aside and went to Prince's truck with a knife to cut Prince's throat, but Prince had already run off.

Thomas contends he drinks about a fifth of Ancient Age 100-proof whiskey and at least a twelve-pack of beer a day. The day of the shooting was no exception. At trial, Dr. Eric Engum, a clinical psychologist, and Dr. Candace Walker, a psychiatrist at the Kentucky Correctional Psychiatric Center, indicated that Thomas has severe alcoholism and is alcohol dependent.

A jury trial was conducted in January 2006. The trial court instructed the jury on the offense of attempted murder and the lesser-included offenses of attempted manslaughter, first-degree assault, second-degree assault, and fourth-degree assault. The jury returned a guilty verdict on the lesser offense of assault in the second degree and persistent felony offender in the second degree. Thomas received a total sentence of

fifteen years in prison. The judgment of conviction and sentence was entered on February 3, 2006. This appeal followed.

Thomas's only issue on appeal is that the trial court erred in failing to instruct the jury on voluntary intoxication. Thomas relies in part on a Kentucky Supreme Court opinion holding that a "voluntary intoxication instruction is justified . . . when there is evidence that the defendant was so drunk that he did not know what he was doing, or when the intoxication [negates] the existence of an element of the offense." *Nichols v. Commonwealth*, 142 S.W.3d 683, 688 (Ky. 2004), quoting *Rogers v. Commonwealth*, 86 S.W.3d 29, 44 (Ky. 2002). Thomas notes that the charge against him was an "intentional" offense, thereby entitling him to an instruction on voluntary intoxication.

We find no error on this issue. KRS 501.080 states:

Intoxication is a defense to a criminal charge only if such condition either: (1) Negatives the existence of an element of the offense; or (2) Is not voluntarily produced and deprives the defendant of substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.

As the Commonwealth properly notes, no evidence was adduced at trial that Thomas's intoxication removed his ability to form intent. In fact, Thomas made numerous statements to the police immediately following the commission of his offenses which evidenced his intent to commit the offenses. According to the testimony, Thomas made statements to the police that he was "shooting to kill." Further, Thomas also told the police that after shooting Prince he put his shotgun away and returned to Prince's truck

with his knife in order to cut Prince's throat. Further, Thomas added that if he got twenty years for his crime, he did not "give a damn."

In support of his defense of voluntary intoxication, Thomas merely asserts that he had been drinking heavily that day, but does not point to any evidence to support his contention that he lacked the capacity to form the required intent. In the absence of any such evidence, Thomas was not entitled to an instruction on the defense of voluntary intoxication.

Accordingly, we must conclude that the trial court acted properly in refusing to instruct the jury on the defense of voluntarily intoxication. Thus, we affirm the judgment of the Rowan Circuit Court.

ALL CONCUR.

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