

RENDERED: FEBRUARY 22, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

MODIFIED: MARCH 7, 2008; 10:00 A.M.

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001311-MR

KEVIN FARLEY

APPELLANT

v.

APPEAL FROM HARLAN CIRCUIT COURT
HONORABLE RON JOHNSON, JUDGE
ACTION NO. 05-CR-00212

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: THOMPSON, JUDGE; BUCKINGHAM AND HENRY, SENIOR JUDGES.¹

HENRY, SENIOR JUDGE: Kevin Farley was found guilty by a jury of two counts of assault in the second degree and was sentenced to serve ten years on each count with the time to run concurrently for a total sentence of ten years. He brings two issues to our

¹ Senior Judges David C. Buckingham and Michael L. Henry, sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

attention: whether the trial court improperly interfered in the plea bargaining process prior to trial, and whether a police officer provided improper hearsay testimony requiring a new trial. After a careful and complete review of the record, we affirm the judgment of the Harlan Circuit Court.

Joy Renee Johnson, who was deceased at the time of the trial, maintained relationships with Phillip Thomas, Kevin Farley and a third man. Markedly dissimilar versions of the facts were presented at trial. Farley testified that after returning home from work on the day the incident occurred, he went to a neighbor's house to celebrate her birthday. He fell asleep and awoke to find his friend sitting on the porch with another neighbor. Phillip Thomas walked up to the group and Farley began to question him about an act of vandalism. Farley testified he told Phillip that if there was a problem between them because of a woman, they should talk about it. The two started arguing and Phillip left saying he was going to go get members of his family. A few minutes later, Farley started walking toward his house. It was after one o'clock in the morning and Farley thought it strange when he noticed lights on at the home of one of Phillip Thomas's relatives. Farley testified further that as he passed the home of another relative of Thomas, he noticed that person standing in the doorway appearing to be getting dressed.

When he got near his home, Farley stated that Phillip's brother Hobart Thomas came out of his house and began making threats and accusations. Farley told Hobart he did not want to fight. As Farley was entering his home, someone threw a rock that struck the door, just missing his head. He then decided he needed to protect himself and retrieved an aluminum baseball bat. He claimed he hit Hobart Thomas with the bat because he saw a knife in his hand. His testimony was that the knife cut him on the

elbow yet he did not say anything about it at the time he was arrested because he did not realize he had been cut. Hobart crawled across the road and Phillip was standing there. Farley could not see what was in Phillip's hand and so he also struck him with the bat. He then returned to his house and sat on the porch until the police arrived.

According to the Thomas brothers' version, both men were unarmed and were struck multiple times with the bat by Farley. Phillip Thomas testified that as Farley walked past his house, Hobart Thomas was sitting on the front porch and Farley dared him to fight. Farley then went into the house. Alvin Gross, who was Farley's relative and lived in the same building as Farley, came out with a gun and Farley then came out carrying the aluminum baseball bat. Farley charged Hobart and hit him with the bat. Hobart claimed he tried to shield himself from further blows but was struck multiple times. Phillip testified that when he ran to help his brother Farley hit him several times with the bat.

Police officer George Young testified that when he arrived, he first encountered Alvin Gross who said there had been a fight. He handed an unloaded firearm to Officer Young. People were milling about and the officer called for backup. The police eventually restored calm to the area, approached Farley and ordered him into the squad car.

Farley first argues that the trial court improperly interfered in the plea bargaining process. We disagree. Farley was originally indicted for one count of assault in the first degree and a second count of assault in the second degree as well as for being a persistent felony offender in the second degree. In exchange for Farley's agreement to plead guilty, the Commonwealth offered to amend the charges to two counts of assault in

the second degree and to dismiss the persistent felony offender charge. The Commonwealth additionally offered to recommend a sentence of eight years on each count to run concurrently and to recommend probation for a period of five years. Farley accepted that offer and went before the trial court in order to plead guilty in accordance with the Commonwealth's recommendation.

During the course of the guilty plea colloquy, Farley admitted he struck both Hobart and Phillip Thomas with the baseball bat, but he tried to portray the situation as one in which he was defending himself. The trial court refused to accept the plea because Farley did not enter a plea of guilty but “instead put forward self-defense.” The case then went to trial.

This alleged error was not preserved, but Farley asks us to review the matter pursuant to Kentucky Rules of Criminal Procedure (RCr) 10.26 to determine whether palpable error occurred. We will grant relief in situations where we determine that error occurred which results in a manifest injustice. *Brock v. Commonwealth*, 947 S.W.2d 24, 28 (Ky. 1997). The error must “seriously affect the fairness, integrity or public reputation of judicial proceedings.” *United States v. Atkinson*, 297 U.S. 157, 160, 56 S.Ct. 391, 392, 80 L.Ed 555 (1936).

The trial court may refuse to accept a plea of guilty. RCr 8.08; *Hoskins v. Miracle*, 150 S.W.3d 1, 23 (Ky. 2004). A trial judge's “discretion to accept or reject [plea bargains] is limited only by the requirement that it independently review each bargain placed before it, and set forth in the record both the prosecutor's reasons for forming the bargain and the court's justification for rejecting it.” *Id.* (internal citation omitted).

This was not a situation in which the trial court rejected a plea agreement. In this case it was Farley's own dogged insistence that he acted in self defense rather than any defect in the plea bargain that caused the court to reject Farley's plea. Such insistence clearly indicated to the trial judge that Farley's guilty plea was not voluntary. There was no error.

Farley next suggests that improper investigative hearsay testimony was introduced at trial and that the introduction of this testimony, besides being improper as hearsay, violated Farley's right to confrontation. This issue is also not preserved for review. We will however again examine the record for palpable error sufficient to affect Farley's substantial rights. RCr 10.26.

Officer Young testified that he arrived on the scene after the end of the altercation and so did not personally witness any of the fight. He testified that based on the statements taken from the witnesses, he believed the fight was a result of Farley being upset because Joy Johnson was involved in a relationship with Phillip Thomas and that Farley's behavior "enticed" Hobart Thomas to come off of the porch and confront Farley.

Farley himself testified concerning the relationship between Joy Johnson and Phillip Thomas. Phillip Thomas testified that Farley dared Hobart Thomas to fight. Each of the victims testified that Farley was the aggressor in the altercation. Given that the record contains substantial evidence from other sources on this issue, any error from allowing Officer Young's testimony was harmless. *See* RCr 9.24. That testimony did not result in a manifest injustice requiring a new trial. We affirm the judgment, convictions and sentences as determined by the Harlan Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Julia K. Pearson
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Wm. Robert Long, Jr.
Assistant Attorney General
Frankfort, Kentucky