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Commonwealth Of Kentucky

Court of Appeals

NO. 2006-CA-002447-MR

DAVID FERNANDEZ APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 05-CR-002579 AND 05-CR-002888

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, KELLER, AND MOORE, JUDGES.

MOORE, JUDGE: David Fernandez appeals from a judgment of conviction from the Jefferson Circuit Court in which he was convicted of wantonly committing assault in the first degree and was sentenced to serve ten years in prison. On appeal, Fernandez insists that the trial court erred when it refused to instruct the jury regarding assault under extreme emotional disturbance (EED) and assault in the fourth degree. Finding no error, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

In June 2005, Fernandez was dating Marie Perry. Prior to dating Fernandez, Perry dated and lived with Osiel Mazariegos. During Perry and Mazariegos's relationship, they bought a car together. On June 18, 2005, around 1:00 pm, Fernandez and Perry went to Mazariegos's apartment to convince Mazariegos to accompany Perry to the car dealership in order for both to sign paperwork to return the car. Mazariegos, who was drunk at the time, refused to ride in Fernandez's car. According to Fernandez's trial testimony, Mazariegos called several friends attempting to secure a ride to the dealership but all refused. Fernandez attested that while Mazariegos was on the phone, Mazariegos called Fernandez insulting names in Spanish.

Later that evening, Fernandez went back to Mazariegos's apartment with a loaded pistol. According to Fernandez, he arrived sometime after dark and knocked on the door. Mazariegos invited Fernandez to enter. At this time, Fernandez had the pistol tucked inside the waistband of his pants, so Mazariegos was unaware that he was armed. Fernandez insisted that, although he went to Mazariegos's apartment with a loaded weapon, he only wanted to talk to Mazariegos and to convince Mazariegos to stop interfering with Perry and Fernandez's relationship.

Despite Fernandez's insistence that he only wanted to talk, Fernandez testified at trial that he and Mazariegos began to argue. According to Fernandez, Mazariegos ran suddenly into the bathroom. Fernandez testified that he followed Mazariegos and that he saw Mazariegos searching through the drawers in the bathroom. According to Fernandez, the two began to struggle. And, despite the fact that Mazariegos was smaller than Fernandez and drunk at the time, Mazariegos pushed Fernandez to the

floor. Fernandez testified that Mazariegos then turned his back on Fernandez and continued rummaging through the drawers. Fernandez then pulled out his pistol and, while holding the pistol's butt with his finger on the trigger, he hit Mazariegos twice in the back of the head with the pistol. According to Fernandez, Mazariegos fell. Fernandez insisted that he then fell on top of Mazariegos. Even though Fernandez was behind Mazariegos when Mazariegos fell, Fernandez claimed that he and Mazariegos were still fighting and he speculated that perhaps they had grabbed one another causing Fernandez to lose his balance and fall on Mazariegos. According to Fernandez's testimony, when he fell on Mazariegos, the pistol accidentally discharged.

After the pistol discharged, Fernandez claimed that he observed Mazariegos bleeding from the mouth. At trial, Fernandez claimed he thought that Mazariegos had hit his mouth on the bathroom sink. Fernandez testified that he did not think he had shot Mazariegos. Fernandez then left Mazariegos's apartment.

During the time Fernandez was in Mazariegos's apartment, Jesse McFall was staying at his sister's apartment across the hallway. McFall testified at trial that he heard a gunshot on the night in question. After hearing the shot, McFall looked through the apartment door's peephole and observed Fernandez standing outside of Mazariegos's apartment with a pistol in his hand. McFall attested that he observed Fernandez tuck the pistol into the waistband of his pants and then Fernandez used his shirt tail to wipe off the doorknob of Mazariegos's apartment. After Fernandez left, McFall entered Mazariegos's apartment and found Mazariegos standing in his bathroom, bleeding profusely. In a panic, McFall fled the apartment complex by car, eventually finding an off-duty police officer.

Mazariegos testified that on the night in question, Fernandez came to his apartment. And, when he opened the door, Fernandez charged into the apartment, forced him into the bathroom and shot him in the head. According to Mazariegos, the bullet entered behind his right ear, traveled downward through his mouth and exited from his jaw.

At the trial, Dr. William Cheatle also testified regarding Mazariegos's injuries. According to Dr. Cheatle, the gunshot ripped Mazariegos's throat and tongue, severed a major facial nerve, shattered his jaw and blew out several of his teeth. According to the surgeon, emergency surgery was performed to prevent Mazariegos from bleeding to death. Surgeons performed numerous operations to repair the damage caused by the gunshot.

In August 2005, Fernandez was indicted on one count of assault in the first degree. Subsequently, in September 2005, Fernandez was indicted on one count of criminal attempt to commit murder and one count of burglary in the first degree. At the end of August 2006, Fernandez proceeded to trial where he was convicted of wantonly committing assault in the first degree. The jury recommended that Fernandez serve ten years' imprisonment, and the trial court sentenced Fernandez according to the jury's recommendation.

II. STANDARD OF REVIEW

It is well settled in the Commonwealth that the trial court has the responsibility to instruct the jury on the whole law of the case, giving instructions that are applicable to every state of the case that is deducible from or supported to any extent by the evidence adduced at trial. *Lawson v. Commonwealth,* 85 S.W.3d 571, 574 (Ky. 2002).

III. ANALYSIS

At trial, Fernandez submitted an instruction regarding assault under extreme emotional disturbance; however, the trial court refused to instruct the jury on this. On appeal, Fernandez points out that he testified at trial that he argued and fought with Mazariegos prior to the shooting and argues that this altercation was sufficient to constitute a triggering event for extreme emotional disturbance. Furthermore, Fernandez avers that at trial he claimed that, during the altercation, he was angry and that he continually thought about the events that took place earlier that day and continually thought about what Perry told him.[1] According to Fernandez, his testimony constituted sufficient evidence to support an instruction regarding assault under EED.

According to KRS 508.040(1), if a defendant is being prosecuted for assault in the first degree where the elements of the offense are intentional infliction of serious physical injury, the defendant is permitted to present evidence in mitigation of the crime that he was acting under the influence of extreme emotional disturbance. According to the Supreme Court of Kentucky,

> [e]xtreme emotional disturbance may reasonably be defined as follows: Extreme emotional disturbance is a temporary

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[1] At trial, Perry testified that she had told Fernandez that, during her relationship with Mazariegos, he had been both verbally and physically abusive to her.

> state of mind so enraged, inflamed, or disturbed as to overcome one's judgment, and to cause one to act uncontrollably from the impelling force of the extreme emotional disturbance rather than from evil or malicious purposes. It is not a mental disease in itself, and an enraged, inflamed, or disturbed emotional state does not constitute an extreme emotional disturbance unless there is a reasonable explanation or excuse therefor, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under circumstances as defendant believed them to be.

McClellan v. Commonwealth, 715 S.W.2d 464, 468-469 (Ky. 1986).

Thus, in order for Fernandez to have received an instruction for EED, the evidence adduced at trial must have demonstrated that Fernandez experienced such rage or mental disturbance that his judgment was overborne, and this rage or disturbance caused him to act uncontrollably. Turning to the record, we find that, at trial, Fernandez testified that, prior to and during the fight, he was angry due to what had happened earlier that day. Fernandez did not clarify whether he was angry over Mazariegos's refusal to accompany Perry to the dealership, angry over Mazariegos's allegedly insulting comments or both. Fernandez testified that he was angry because of all the things Perry told him. Presumably, Fernandez was referring to Perry's allegations that Mazariegos had verbally and physically abused her, however, he did not clarify this either. Regardless, Fernandez's testimony was not sufficient to warrant an EED instruction. The evidence does not demonstrate that he was enraged, inflamed or disturbed. Fernandez merely claimed to be angry. "Evidence of mere 'hurt' or 'anger' is insufficient to prove extreme emotional disturbance." *Talbott v. Commonwealth,* 968 S.W.2d 76, 85 (Ky. 1998). In addition, Fernandez's testimony fails to demonstrate that he acted uncontrollably. In fact, the evidence adduced at trial does not demonstrate that

Fernandez ever acted uncontrollably. As a result, the evidence does not support an instruction regarding EED. Therefore, the trial court properly denied Fernandez's request for such an instruction.

In addition to the issue of EED, Fernandez argues that the trial court should have instructed the jury regarding recklessly-committed assault in the fourth degree. At trial, Fernandez submitted such an instruction, but the trial court refused to so instruct the jury. On appeal, Fernandez points out that he explained at trial that he intended to hit Mazariegos, but he was unaware of the risk that the pistol would discharge and harm Mazariegos because he knew that the pistol's safety was engaged. Relying on the commentary to COOPER, WILLIAM S., COOPER'S KENTUCKY INSTRUCTIONS TO JURIES, CRIMINAL § 3.52 (5th ed. 2006), Fernandez argues that if there is evidence that the mental state of a criminal defendant charged with assault in the first degree was either intentional or wanton, then recklessly-committed assault in the fourth degree could be a lesser-included offense of assault in the first degree. Relying on the commentary, Fernandez argues that it is irrelevant whether the victim suffered serious physical injury or physical injury. According to Fernandez, the only relevant factor to be considered is the defendant's mental state. Fernandez argues that in light of his testimony, the jury could have concluded that he acted recklessly when he hit Mazariegos; thus, he reasons that the trial court should have instructed the jury regarding assault in the fourth degree.

Regarding jury instructions, the Supreme Court has held that a trial court should only instruct on a lesser-included offense if, considering the totality of the evidence, the jury may have a reasonable doubt as to the defendant's guilt regarding the

greater offense but, based on the same evidence, be convinced beyond a reasonable doubt that the defendant is guilty of the lesser offense. *Lawson,* 85 S.W.3d at 574. In other words, a criminal defendant is only entitled to a lesser-included offense instruction when the evidence has created a reasonable doubt as to whether the defendant is guilty of the greater offense. *Rowe v. Commonwealth,* 50 S.W.3d 216, 218-219 (Ky. App. 2001).

According to KRS 508.010, a person has committed assault in the first degree if

> (a) He intentionally causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument; or
> (b) Under circumstances manifesting extreme indifference to the value of human life he wantonly engages in conduct which creates a grave risk of death to another and thereby causes serious physical injury to another person.

In comparison, a person has committed assault in the fourth degree when "(a) [h]e intentionally or wantonly causes physical injury to another person; or (b) [w]ith recklessness he causes physical injury to another person by means of a deadly weapon or a dangerous instrument." KRS 508.030. Thus, for Fernandez to be entitled to an instruction on assault in the fourth degree as a lesser-included offense of assault in the first degree, the jury must have had a reasonable doubt that the evidence adduced at trial did not establish the elements of assault in the first degree. Yet, the jury would have to have believed beyond a reasonable doubt that the same evidence established the elements of assault in the fourth degree.

Turning to the evidence, we find that Mazariegos testified that Fernandez barged into his apartment, forced him into his bathroom and shot him. In contrast, Fernandez testified that he first argued with Mazariegos then fought with him in the

bathroom. According to Fernandez, while he was behind Mazariegos, he twice hit Mazariegos in the head with a loaded pistol and, while doing so, he had his finger on the pistol's trigger. However, Fernandez insisted that he knew that the pistol's safety was engaged. Based on this evidence, the jury obviously had a reasonable doubt about the element of intent having found Fernandez guilty of wantonly assaulting Mazariegos, rather than intentionally assaulting him. However, given the evidence, it is not possible that the jury harbored a reasonable doubt about the element of wantonness given that Fernandez testified that he twice struck Mazariegos in the head with a loaded pistol with his finger on the trigger, despite his insistence that he thought the safety was on. Such behavior manifested an "extreme indifference to the value of human life" and created "a grave risk of death."

In addition to the element of wantonness, the jury apparently did not have a reasonable doubt regarding the element of serious physical injury. According to the record, Dr. Cheatle, a surgeon, explained that Fernandez's bullet ripped Mazariegos's throat and tongue, severed a major facial nerve, shattered his jaw and blew out several of his teeth. The surgeon explained that emergency surgery was necessary to save Mazariegos's life. Additionally, Dr. Cheatle testified that numerous surgeries were performed on Mazariegos to repair the damage caused by the gunshot. According to 500.080(15), "'Serious physical injury' means 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[.]" Given the surgeon's testimony, the jury obviously did not have a reasonable doubt that Mazariegos suffered anything less than a serious physical injury as defined by

KRS 500.080(15). Because the jury did not have a reasonable doubt regarding the elements of wantonness and serious physical injury, Fernandez was not entitled to an instruction on assault in the fourth degree as a lesser-included offense of assault in the first degree. Therefore, the trial court correctly denied Fernandez's request for such an instruction.

Finding no errors with the jury instructions, we affirm the judgment of conviction against Fernandez.

ALL CONCUR.

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