

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-002946-MR

MICHAEL B. JONES

APPELLANT

v. APPEAL FROM LOGAN CIRCUIT COURT
HONORABLE TYLER L. GILL, JUDGE
ACTION NO. 97-CR-32

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: GARDNER, JOHNSON, AND KNOPF, JUDGES.

GARDNER, JUDGE: Michael Jones (Michael) appeals from his judgment of conviction in Logan Circuit Court for third-degree assault and resisting arrest. On appeal, he argues that there was insufficient evidence in the record to support his assault conviction and that the trial court improperly instructed the jury. After reviewing the record below, this Court affirms.

Michael's conviction stems from events occurring on March 25, 1997. Deputy Sheriff Travis Harris (Harris) received a call regarding a car accident on Highway 178 in Logan County, Kentucky. Harris had an abandoned car removed from a culvert

beside the road and ran a license check which showed that the car belonged to Brad Jones, Michael's father.

Harris, along with Officer Joe Higgins (Higgins) of the Russellville Police Department, went to Brad Jones's residence to further investigate the matter. The officers approached the residence, and Harris walked up the stairs to the house and knocked on the door. Michael came to a side door and talked to Harris through an open door. Higgins waited at the bottom of the steps leading to the door. Michael told the officers that he knew nothing about the abandoned car. Harris asked to speak with Michael's father, but Michael refused to wake his father. After some more discussion, Michael hit Harris in the face with the back of his hands. Harris fell back on the steps, into Higgins. Higgins then told Michael that he was under arrest for assaulting a police officer. Michael went into the house as he was pursued by the officers. As the officers grabbed him, Michael struck Higgins in the face. The officers finally arrested Michael.

In April 1997, a grand jury indicted Michael on two counts of third-degree assault and resisting arrest. Michael received a jury trial, and he was found guilty of one count of third-degree assault and resisting arrest. Michael received a sentence of one year for the assault conviction and twelve months for resisting arrest, said sentences to run concurrently. Michael has now brought this appeal.

Michael argues that insufficient evidence exists in the record below to support his conviction for third-degree assault. He maintains that the Commonwealth introduced no evidence proving

that he used a deadly weapon or dangerous instrument, and that there was no evidence that Harris or Higgins suffered any physical injury or serious physical injury. Ample evidence was presented in the trial court to support Michael's conviction. His arguments regarding a dangerous instrument, deadly weapon and serious physical injury are misplaced.

Kentucky Revised Statute (KRS) 508.025(1) states,

A person is guilty of assault in the third-degree when the actor:

(a) Recklessly, with a deadly weapon or dangerous instrument, or intentionally causes or attempts to cause physical injury to:

1. A state, county, city or federal peace officer. . . .

The assault statutes do not contain a definition of physical injury. Covington v. Commonwealth, Ky. App., 849 S.W.2d 560, 564 (1992). KRS 500.080(13) defines physical injury as "substantial physical pain or impairment of physical condition." Id. This Court has interpreted impairment of physical condition to mean any injury. Id. By enacting KRS 508.025(1), the General Assembly sought to protect those individuals who serve this Commonwealth in law enforcement capacities. Wyatt v. Commonwealth, Ky. App., 738 S.W.2d 832, 834 (1987).

Pursuant to the clear words of KRS 508.025(1), the Commonwealth need not show a dangerous instrument or deadly weapon was used in order to prove that Michael intentionally caused or attempted to cause physical injury to a state, county, or city peace officer. The instrument or weapon requirement only applies in situations where a defendant acted recklessly. The

Commonwealth presented ample evidence that Michael intentionally caused or attempted to cause physical injury to Officers Harris and Higgins. He struck Harris in the face causing him to fall back on the steps, ultimately bumping into Higgins. He also later struck Higgins in the face. Even if the evidence was not as strong to show a physical injury received by Harris, there was plain evidence that Michael attempted to cause physical injury. It was within the jury's prerogative to hear the evidence and decide whether Michael had engaged in the prohibited conduct. We decline to disturb the verdict.¹

Michael in this case also argues that he was substantially prejudiced by the trial court's alleged failure to instruct the jury regarding the use of a deadly weapon or dangerous instrument. This argument is misplaced because we have already concluded that the Commonwealth did not have to prove these elements under the theory it pursued at trial and on which Michael was convicted.

For the foregoing reasons, this Court affirms the judgment of the Logan Circuit Court.

ALL CONCUR.

¹Michael in his reply brief argues that he was not indicted under the provision of the statute for which he was convicted. The indictment shows inartful drafting as it mixed the alternative theories of reckless and intentional for third degree assault; however, it apprised Michael of the charges against him, and he cannot argue surprise especially since there was ample evidence presented at trial to support the Commonwealth's theory. See Johnson v. Commonwealth, Ky. App., 709 S.W.2d 838, 839 (1986). Further, he has not shown whether this issue was preserved. In order for alleged defects in the indictment to be considered on appeal, they must be preserved for appellate review. Id.

BRIEF FOR APPELLANT:

Jeffrey A. Reed
Bowling Green, Kentucky

BRIEF FOR APPELLEE:

A. B. Chandler III
Attorney General

Shawn C. Goodpaster
Assistant Attorney General
Frankfort, Kentucky