

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-000535-MR

JERRY W. LONG

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE MARY C. NOBLE, JUDGE
ACTION NO. 00-CR-00693 & 00-CR-01297

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: GUIDUGLI, MILLER, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is an appeal from a judgment convicting appellant of first-degree assault. Appellant argues that there was insufficient evidence of first-degree assault under the instructions as submitted. We disagree and affirm.

On April 21, 2000, the victim, Jacob Gallimore, his brother, Richard Gallimore, and three friends were hanging out at the Preakness Apartment Complex in Lexington, Kentucky. At some point, the five young men decided to walk to the residence of Joey Lee. They proceeded to walk across a field and through the Sugar Mill Apartment Complex. In so doing, three of the boys, including the victim, scaled a fence surrounding the pool area at

the Sugar Mill Apartments. As they were cutting through the pool area, the apartment complex's maintenance man, David Osborne, and his guest, Jerry Long, spotted the boys from a second floor balcony, and Osborne yelled at the boys to get off the property. He and Long then ran after the boys to make sure they immediately left the premises. Osborne eventually caught up with Richard Gallimore and informed him that he should not be on the premises. When Osborne was talking with Richard Gallimore, Long ran past them to confront the other boys who had already left the property. Osborne, Richard Gallimore, and Tommy Bullock then followed Long and when they caught up with him, discovered him assaulting Jacob Gallimore. Richard and Tommy testified that they witnessed Long kicking, punching, and stomping on Jacob Gallimore. Richard testified that at one point Jacob was lying helplessly on the ground while Long was stomping his head against the pavement. Long next began attacking Richard Gallimore and punched him in the face several times. Osborne and Long fled the scene only after Osborne's brother told them the police were on the way.

As a result of the assault, Richard was left with only minor injuries to his face. Jacob, however, was rendered unconscious by the attack. The evidence at trial established that Jacob suffered several facial fractures around his right eye, possible nerve damage to the right eye, swelling of the brain, and numerous other cuts, scrapes, and bruises. As a result of the injuries, Jacob was hospitalized for three days and was unable to complete the school semester. There was also

evidence that Jacob continued to have trouble after the discharge and had to return to the emergency room a few days thereafter.

Long was indicted for first-degree assault as to Jacob Gallimore and fourth-degree assault as to Richard Gallimore, as well as for being a persistent felony offender (PFO) in the second degree. Pursuant to a jury trial, Long was found guilty of assault in the second degree as to Jacob and assault in the fourth degree as to Richard. Long then waived his right to be sentenced by the jury and entered a guilty plea to PFO in the second degree. Long received a sentence of five years on the second-degree assault conviction, which was enhanced to ten years due to the PFO 2nd. Long now appeals only the second-degree assault conviction.

Long first argues that the jury's verdict was not unanimous since all three of the alternative statutory theories for second-degree assault were presented to the jury in one instruction. Hence, appellant maintains that certain jurors may have found appellant guilty under one theory while other jurors may have found him guilty under the other theories. Appellant does not point to where in the record said issue was raised and we do not see that the issue was brought before the trial court. See CR 76.12(4)(c)(iv); RCr 10.12; Turner v. Commonwealth, Ky., 460 S.W.2d 345 (1970). In any event, it has been held that a defendant is not deprived of a unanimous verdict if all the theories of the case submitted to the jury in one instruction are supported by the evidence. Wells v. Commonwealth, Ky., 561

S.W.2d 85 (1978). The second-degree assault instruction in the present case stated as follows:

If you do not find the Defendant guilty under Instruction No. 2, you will find the Defendant guilty of Second-Degree Assault under this instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

A. That in this county on or about the 21st day of April, 2000, he inflicted an injury upon Jacob Gallimore by applying force with his foot and shoe onto Gallimore's head against the pavement;

AND

B. (1) That in so doing:

(a) The defendant intentionally caused serious physical injury to Jacob Gallimore;

OR

(b) The Defendant intentionally caused physical injury to Jacob Gallimore and the Defendant's foot and shoe in conjunction with the pavement was a dangerous instrument as defined under Instruction No. 1;

OR

(2) That in so doing, the Defendant wantonly caused a serious physical injury to Jacob Gallimore and the Defendant's foot and shoe in conjunction with the pavement was a dangerous instrument as defined under Instruction No. 1.

Given the three alternate theories for commission of the offense as submitted to the jury, the Commonwealth had to present evidence that Jacob's injury was a "serious physical injury", that his foot together with the pavement constituted a "dangerous instrument"; and that Long acted wantonly in stomping Jacob's head into the ground. The appellant did raise the issue

that the Commonwealth did not present sufficient evidence of the above in the context of a directed verdict motion. Accordingly, we will review the issue.

KRS 500.080(15) defines "serious physical injury" as "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." The evidence regarding Jacob's injury was presented through the testimony of Jacob and his mother and through medical records.¹ This undisputed evidence established that Jacob suffered facial fractures, nerve damage to his eye, swelling of the brain, and numerous other cuts and bruises. It was further undisputed that Jacob was knocked unconscious by the assault, and suffered from headaches and vomited for days after the assault. In our view, the fact that the assault knocked Jacob unconscious and caused his brain to swell is sufficient evidence that the head injury suffered by Jacob created a substantial risk of death. Accordingly, the instruction regarding "serious physical injury" was not in error. The next issue before us is whether Long's foot together with the pavement constituted a "dangerous instrument" within the meaning of the statute when Long was stomping Jacob's head into the ground. "Dangerous instrument" is defined in KRS 500.080(3) as:

¹To the extent appellant argues that it was error for the trial court to allow the Commonwealth to reopen its case to admit the medical records prior to appellant's case being presented, we adjudge that it was not an abuse of discretion since appellant was not prejudiced thereby. Appellant had the opportunity to refute those records and appellant himself used the medical records to cross-examine certain witness testimony.

any instrument, including parts of the human body when a serious physical injury is a direct result of the use of that part of the human body, article, or substance which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or serious physical injury.

Long argues that his foot could not be considered a dangerous instrument because there was no evidence that Long had any blood on his foot or shoe after the assault and because Jacob had no injury to the side of his face which was allegedly stomped into the ground. We do not see the lack of blood on appellant's foot and shoe or the lack of injury to the side of Jacob's face as significant. The serious physical injury caused by Long stomping Jacob's head into the ground was the head injury which knocked him unconscious and caused his brain to swell and which would not always produce blood. In any event, Jacob testified that his head was bleeding after the assault.

As to Long's claim that there was insufficient evidence that he ever stomped on Jacob's head when he was on the ground, we must disagree. As stated earlier, both Richard Gallimore and Tommy Bullock testified that they witnessed the act. Jacob himself testified that Long repeatedly stomped his head into the pavement. Even Osborne testified that, although he did not witness the act, it appeared to him that Long was getting ready to stomp on Jacob's head.

In Commonwealth v. Potts, Ky., 884 S.W.2d 654, 656-657 (1994), it was held that the defendant's steel-toe work shoes were a dangerous instrument as a matter of law since they were used to kick the victim in a manner that could be reasonably

calculated to produce great bodily injury or death. See also Jones v. Commonwealth, Ky., 256 S.W.2d 520 (1953). In the instant case, while there was no evidence that appellant was wearing steel-toe shoes, the appellant's feet in conjunction with the pavement did cause a serious physical injury when they were used to stomp the victim's head into the pavement. KRS 500.080(3) specifically provides that a body part can be a dangerous instrument if it is capable of causing and does cause a serious physical injury. It cannot be denied that stomping a person's head into a hard surface with the full weight of one's body is capable of causing a serious physical injury. Accordingly, there was sufficient evidence that Long's feet together with the pavement was a dangerous instrument.

The next issue before us is whether there was evidence that Long acted wantonly in assaulting Jacob. Long maintains that from the evidence, it was clearly unreasonable to find that his actions were anything other than intentional. KRS 501.020(3) states that:

A person acts wantonly with respect to a result or to a circumstance when he is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such a nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.

KRS 501.020(1) defines "intentionally" as follows:

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.

Although Long clearly acted intentionally in hitting and stomping on Jacob, the evidence is not clear as to whether Long intended to cause serious physical injury to him. We agree with the trial court that under the facts of the case, a jury could find that Long acted wantonly. As the trial court noted, it is possible that he simply lost his temper and could not stop hitting or stomping on Jacob, disregarding the risk of causing serious physical injury, while not intending to cause serious physical injury. The jury is to be instructed on every state of the case supported by the evidence presented. Commonwealth v. Duke, Ky., 750 S.W.2d 432 (1988). Accordingly, it was not error for the court to instruct the jury on a mental state of wantonness.

The remaining argument before us is that it was error for the court to include the definition of "dangerous instrument" in the instructions. Long contends that such was an issue of law. In Commonwealth v. Potts, 884 S.W.2d at 656, the Court stated, "[i]t is true that ordinarily the question of whether an instrument or object is a 'dangerous instrument' is a question of fact for the jury to determine, depending upon the manner and circumstances in which it is used." The Court goes to say that the only time it is a question of law is if it is undisputed from the evidence that the object was a dangerous instrument. In the instant case, we believe the court correctly submitted the issue for the jury's determination, as it was not undisputed that the appellant's feet were dangerous instruments.

For the reasons stated above, the judgment of the
Fayette Circuit Court is affirmed.

ALL CONCUR.

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