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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-002008-MR

JERRY LOUIS JOHNSON — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE SHEILA R. ISAAC, JUDGE
ACTION NO. 08-CR-00345

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, MOORE AND STUMBO, JUDGES.

DIXON, JUDGE: Appellant, Jerry Louis Johnson, was convicted in the Fayette Circuit Court of second-degree assault, alcohol intoxication and for being a first-degree persistent felony offender. He received an enhanced sentence of twelve years' imprisonment and appeals to this Court as a matter of right. Finding no error, we affirm.

Appellant's convictions stem from an incident that occurred in February 2008. Apparently, Appellant and his girlfriend, Tonya Willis, had been drinking at a friend's apartment for most of the day when the two began arguing. Eventually, they were asked to leave the apartment and, after they had walked outside, Appellant pushed Willis to the ground and began kicking her in the head. A friend of Willis' intervened and Appellant walked away leaving Willis unconscious on the ground. She was subsequently transported to a hospital and admitted into intensive care with bleeding from the vessels in her brain. Upon locating

Appellant, he admitted to police that he had caused Willis' injuries and, in fact, still had blood on his right shoe. Officers noted that Appellant appeared intoxicated and smelled of alcohol, but was able to respond to questioning and gave a detailed account of the incident.

On March 31, 2008, Appellant was indicted for second-degree assault, alcohol intoxication, and for being a first-degree persistent felony offender. Following a trial in September 2008, a jury convicted Appellant on all charges and recommended a sentence of twelve years' imprisonment. The trial court entered judgment accordingly, and this appeal ensued.

Appellant argues that the trial court erred in instructing the jury on wanton assault after the Commonwealth proceeded at trial on the theory that Appellant intentionally caused Willis' injuries by kicking her in the head. Thus,

Appellant complains he had no notice that he would have to defend against wanton assault. We disagree.

It is the duty of the trial court to instruct the jury as to "the whole law of the case and this rule requires instructions applicable to every state of the case deducible or supported to any extent by the testimony. *Taylor v. Commonwealth*, 995 S.W.2d 355, 360 (Ky. 1999); *Lee v. Commonwealth*, 329 S.W.2d 57, 60 (Ky. 1959). The determination of what issues to submit to the jury must be made based upon the totality of the evidence. *Rice v. Commonwealth*, 472 S.W.2d 512 (Ky. 1971).

KRS 508.020 provides, in pertinent part:

> 1) A person is guilty of assault in the second degree when:
>
> (a) He intentionally causes serious physical injury to another person; or
>
> (b) He intentionally causes physical injury to another person by means of a deadly weapon or a dangerous instrument; or
>
> (c) He wantonly causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument.

The indictment herein charged Appellant with second-degree assault under KRS 508.020 by "causing serious physical injury to Tonya Willis" without any reference to intent.

Appellant's defense at trial was voluntary intoxication. "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." *Rogers v. Commonwealth*, 86 S.W.3d 29, 44 (Ky. 2002) (footnotes and internal quotation marks omitted). The trial court found, and the Commonwealth agreed, that the evidence supported the requested instruction for involuntary intoxication. Thus, under Appellant's theory of the case, the jury reasonably could have concluded that he was intoxicated and could not have formed the requisite *mens rea* for intentional assault. However such mitigation by voluntary intoxication creates a wanton state of mind. KRS 501.020(3).

We would note that when the trial court overruled defense counsel's objection to the wanton assault instruction, it did grant counsel's request to delineate within the instruction the two states of mind and the required elements for each. The second-degree assault instruction given to the jury stated as follows:

> 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 February 16, 2008 and before the finding of the Indictment herein, he inflicted an injury upon Tonya Willis by kicking her;
>
> AND
>
> B. That in doing so:
>
> (1) He intentionally caused a serious physical injury to Tonya Willis;
>
> OR

> (2) He wantonly caused a serious physical injury to Tonya Willis and that the Defendant's foot and shoe were dangerous instruments as defined under Instruction No. 2.

Clearly, under the instruction, the jury had to believe that Appellant either (1) intentionally caused a serious physical injury or (2) wantonly caused a serious physical injury with a dangerous instrument. The Commonwealth bore the burden of proving each element of the offense. However, contrary to Appellant's claim, wanton assault is not a lesser-included offense of intentional assault. KRS 508.020 brings together two distinct culpable mental states and punishes them equally under specified circumstances. "Either mental state will support a conviction of assault in the [second] degree . . . . The legal effect of the alternative conclusions is identical." *Wells v. Commonwealth*, 561 S.W.2d 85, 88 (Ky. 1978).

Appellant was on notice that KRS 508.020 includes both intentional and wanton states of mind, and it was within the Commonwealth's discretion to proceed under either or both theories. Certainly, once Appellant raised the defense of voluntary intoxication, it was the trial court's obligation to instruct the jury as to both theories. *Taylor*, 995 S.W.2d at 360. We are of the opinion that the jury could have believed either theory where both interpretations were supported by the evidence, and the proof of either beyond a reasonable doubt constituted the same offense. *Wells.* Thus, the jury instruction for second-degree assault was proper, and no error occurred.

The judgment and sentence of the Fayette Circuit Court are affirmed.

ALL CONCUR.

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