

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002334-MR

TYREECE LAMONT MORRIS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN P. RYAN, JUDGE
ACTION NO. 99-CR-000492

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: GUDGEL, CHIEF JUDGE, BARBER, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is an appeal from a conviction for second-degree assault. As appellant was not entitled to an instruction on assault under extreme emotional disturbance, we affirm.

On February 23, 1999, appellant, Tyreece Lamont Morris, was indicted by the Jefferson County Grand Jury on one count of first-degree assault as a result of the shooting of Rontele Shepherd (Shepherd) on September 7, 1998. A jury trial was held on July 16, 1999. At trial, the victim, Shepherd, testified for the Commonwealth. Shepherd testified that on September 7, 1998 he was talking to another man on Clay Street in the Clarksdale neighborhood in Louisville. Two men on bikes went by, at whom

shots were fired by appellant's cousins, Dashawn Morris (Dashawn), and Troy Morris (Troy). Shepherd went over to Dashawn and Troy and confronted them, angry because they could have shot him. Shepherd left, and returned later to a porch where Dashawn, Troy, and appellant were with a group of people who were shooting dice. Some angry words were exchanged, and Shepherd left and went to a porch next door. Shepherd then started walking back to the porch where appellant and his cousins were, at which point appellant came off the porch and met him halfway. Appellant and Shepherd then started fighting. Shepherd testified that he (Shepherd) was doing most of the swinging, that appellant "folded up", and that he (Shepherd) was getting the best of appellant in the fight.

Shepherd testified he then saw Dashawn on the porch with a gun, at which point Shepherd backed up. Appellant went on the porch and told Dashawn to give him the gun, and Dashawn handed the gun to appellant who started shooting at Shepherd. Shepherd hid behind a tree but appellant started walking toward him. Troy tried to grab appellant, at which point Shepherd began to run away. Shepherd then got shot in the back, after which his legs went numb and he fell. The police were called, and Shepherd was taken to the University of Louisville Hospital. Shepherd recovered, but the doctors were unable to remove the bullet lodged in his back.

The Commonwealth also presented testimony from retired Louisville Police Officer James Hart, who was employed as a police officer at the time of the shooting, and was the first

officer on the scene. Officer Hart testified that when he arrived on the scene, he found Shepherd lying on the ground, shot in the back. Officer Hart testified that Shepherd told him that Tyreece Morris had shot him when he was running away. Officer Hart further testified that seven spent shell casings were collected at the scene, but that the casings were never matched with any gun, and that a gun was not recovered.

The defense presented two witnesses, Troy Morris and James Morris (James), who is also appellant's cousin. Troy testified that, on September 7, 1998, he and Dashawn were outside on a corner when they saw two men on bikes go by. The two men started shooting at them, after which Shepherd came up and asked Troy and Dashawn why they were shooting. They told Shepherd it wasn't them shooting. Later that night, Troy, Dashawn, and others were shooting dice on a porch, and Shepherd came up to the porch to complain about the earlier shooting. Shepherd then went to the porch next door. As Shepherd came back towards their porch a second time, appellant came off the porch. Shepherd then started beating up on appellant, knocking out his tooth. Troy testified that Shepherd was mad because he thought appellant had shot at him earlier. Troy testified that after the fight ended, he (Troy), appellant, James, and Dashawn sat around for a few minutes and then walked away, at which time they heard gunshots. Troy testified that Dashawn didn't have a gun, and that appellant did not shoot Shepherd.

James testified that he was standing around near the porch where people were shooting dice, and that as Shepherd came

up to the porch, appellant went off the porch and Shepherd started to hit him for no reason, knocking out appellant's tooth. James testified that appellant asked Shepherd why he was hitting him. After the fight, James testified that he heard shots as he and appellant walked away. James testified that appellant did not shoot Shepherd.

Appellant did not testify. The jury received instructions on first-degree assault and second-degree assault, finding appellant guilty of second-degree assault. On July 22, 1999, appellant filed a motion for new trial or, in the alternative, a motion for judgment notwithstanding the verdict. The motion was denied on August 27, 1999. In an order entered on August 30, 1999, dated August 27, 1999, appellant was sentenced to seven years' imprisonment. This appeal followed.

On appeal, appellant argues that the trial court erred by failing to instruct the jury on assault under extreme emotional disturbance. Appellant argues that there was evidence presented at trial from which the jury could have inferred the existence of extreme emotional disturbance, as the jury could have believed that if appellant was the shooter, the shooting was the result of appellant's overwhelming fear or anger.

Appellant was convicted of assault in the second degree. KRS 508.020. Assault under extreme emotional disturbance, found at KRS 508.040, allows a defendant to establish in mitigation that he acted under the influence of extreme emotional disturbance. Commonwealth v. Elmore, Ky., 831 S.W.2d 183 (1992). The parameters of extreme emotional

disturbance are found at KRS 507.020(1)(a) as "act[ing] under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be."

McClellan v. Commonwealth, Ky., 715 S.W.2d 464, 468-69 (1986), cert. denied, 479 U.S. 1057, 107 S. Ct. 935, 93 L. Ed. 2d 986 (1987) defines extreme emotional disturbance as:

[A] temporary 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.

To be entitled to the requested instruction, "there must be evidence of extreme emotional disturbance" and "a reasonable justification or excuse under the circumstances as the defendant believe[d] them to be." Thomas v. Commonwealth, Ky. App., 587 S.W.2d 264, 266 (1979).

Our review of the record indicates that the trial court did not err in refusing to instruct the jury on assault under extreme emotional disturbance. No evidence was presented to indicate that appellant was "so inflamed or disturbed that he acted uncontrollably" at the time of the shooting. McClellan,

715 S.W.2d at 469. In fact, no evidence whatsoever was presented regarding appellant's emotional state at the time of the shooting. Appellant did not testify at trial, and the defense's theory of the case was that appellant did not shoot Shepherd.

Further, there was no evidence presented which would provide a "reasonable explanation or excuse for such an emotional state". Id. All that can be inferred from the evidence regarding the "circumstances as [appellant] believed them to be" is that appellant was on the losing end of a fistfight. Id. Evidence of mere hurt or anger is insufficient to impel an instruction on extreme emotional disturbance. Talbott v. Commonwealth, Ky., 968 S.W.2d 76 (1998). Additionally, there was no evidence to indicate that appellant was overwhelmed by fear or feared for his life, nor did the shooting occur in the "heat of battle". See, Engler v. Commonwealth, Ky., 627 S.W.2d 582 (1982). Knowing that Shepherd was angry, appellant came off the porch to meet Shepherd as he approached. There was no evidence that Shepherd was armed. Further, Shepherd testified that he stopped fighting when he saw Dashawn with the gun, and that he was running away when appellant shot him.

A trial court is required to instruct on every theory of the case reasonably deducible from the evidence. Callison v. Commonwealth, Ky. App., 706 S.W.2d 434 (1986). However, the instructions must have a source within the framework of the evidence introduced at trial. Smith v. Commonwealth, Ky., 599 S.W.2d 900 (1980). Having determined that there was no evidence presented which would support an instruction on extreme emotional

disturbance, the trial court did not err in refusing to give this instruction.

The judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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