

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-002960-MR

DARINEL GONZALES-PEREZ

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE SHEILA R. ISAAC, JUDGE
ACTION NO. 00-CR-00448

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: GUIDUGLI, MILLER, AND SCHRODER, JUDGES.

MILLER, JUDGE: Darinel Gonzales-Perez brings this appeal from a Final Judgment and Sentence of Imprisonment entered upon a jury verdict in the Fayette Circuit Court on December 12, 2000. We affirm.

On Sunday night, February 27, 2000, an altercation erupted in a Lexington bar between Daniel Gonzales-Perez and one Rudolfo Bravo. The combatants had been drinking. The altercation flowed outside the bar and onto the sidewalk. Bravo was severely beaten, requiring extensive treatment and hospitalization.

On April 25, 2000, the Fayette County Grand Jury returned an indictment against Gonzales-Perez for the offense of assault in the first degree. Kentucky Revised Statutes (KRS) 508.010.

The matter came on for trial before a jury on December 8, 2000. After hearing evidence, the jury returned a verdict finding Gonzales guilty of assault in the second degree. KRS 508.020. From the judgment imposed thereon, this appeal ensues.

The record reveals this to be an ordinary assault case growing out of mutual combat. The jury was instructed on assault first through the fourth degree. As to assault in the first and second degree, the jury was rendered an instruction pertaining to extreme emotional disturbance. Additionally, the jury was rendered a self-protection instruction. After hearing the evidence, the jury opted to convict appellant of assault in the second degree. In the punishment phase, the jury clearly stated that the six years imposed was pursuant to a finding of guilt of assault in the second degree.

The second degree assault instruction provided as follows:

If you do not find the Defendant guilty under Instruction No. 3, 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 27th day of February, 2000, he inflicted an injury upon Rudolfo Bravo by beating him;
- B. That in so doing:

(1) The Defendant intentionally caused a serious physical injury to Rudolfo Bravo;

OR

(2) The Defendant intentionally caused a physical injury to Rudolfo Bravo and the instrument used was a dangerous instrument.

AND

C. That in so doing, the Defendant was not intoxicated or privileged to act in self-protection.

The appellant complains that the jury instruction upon second degree assault was so ambiguous as to not reveal whether or not the verdict was the result of unanimous agreement. Specifically, he notes that the instruction permitted a conviction upon separate sets of facts, and thus the verdict may not have been unanimous upon any particular set. We reject this contention under the authority of Halvorsen v. Commonwealth, Ky., 730 S.W.2d 921 (1986). We think the rule enunciated in that decision is broad enough to be dispositive. Where the evidence permits a conviction upon more than one set of facts, it is not required that the jury be unanimous upon either.

The appellant insists the self-protection instruction, so far as it provided for the amelioration of the offense, is inconsistent with the assault instruction. We think not. The self-protection instruction was rejected in its entirety by the jury.

We have examined the instructions herein, and are of the opinion that the verdict does not reflect confusion on the part of the jury.

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

ALL CONCUR.

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