RENDERED: DECEMBER 21, 2001; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-001597-MR

TONY RAYMONT MADDOX — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NOS. 98-CR-001778, 98-CR-002845,
99-CR-001800 & 99-CR-002307

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: BUCKINGHAM, KNOPF, and McANULTY, JUDGES.

BUCKINGHAM, JUDGE: Tony Raymont Maddox appeals from a judgment of the Jefferson Circuit Court wherein he was convicted and sentenced to eight years in prison. He alleges two errors by the trial court in the jury instructions. We conclude that the trial court did not err and thus affirm.

Maddox engaged in a tumultuous off-and-on relationship with Darlene Williams over a period of time. As a result of an incident involving Williams which occurred on May 27, 1998, Maddox was indicted on charges of first-degree rape, first-degree burglary, and fourth-degree assault (third or subsequent

offense)[1]. As a result of an incident involving Williams which occurred between July 16, 1999, and July 18, 1999, Maddox was indicted on charges of first-degree burglary, second-degree assault, fourth-degree assault (third or subsequent offense), first-degree wanton endangerment, first-degree unlawful imprisonment, intimidating a witness, and terroristic threatening. He was later indicted on charges of second-degree burglary, theft by unlawful taking of property over $300, and receiving stolen property over $100 as a result of an incident involving Williams which occurred on May 3, 1999. Additionally, Maddox was indicted on other charges of intimidating a witness and terroristic threatening involving Williams on a different date. Finally, he was indicted on the charge of first-degree bail jumping when he failed to appear for his trial on other charges.

All charges were tried before a jury on March 28, 2000. Maddox was acquitted of numerous charges, but he was convicted of the following felony offenses: two counts of fourth-degree assault (third or subsequent offense), second-degree burglary, and first-degree bail jumping. Maddox waived sentencing by the jury and agreed with the Commonwealth to a sentence of five years on the burglary charge, two years on one count of fourth-degree assault, and one year on the other court of fourth-degree assault, to run consecutively for a total sentence of eight years. He further agreed to be sentenced to one year on the bail jumping charge, to run concurrently with the other sentences.

[1] See Kentucky Revised Statutes (KRS) 508.032.

Additionally, his sentences on various misdemeanor charges were to run concurrently with the eight-year sentence. On May 24, 2000, the trial court sentenced Maddox in the above manner to eight years in prison. This appeal followed.

Maddox's first argument on appeal is that the trial court erred in failing to give the jury self-defense instructions with the fourth-degree assault instructions. As we have noted, the first count of fourth-degree assault arose out of an incident on May 27, 1998, and the second count arose out of an incident on July 18, 1999. Concerning the first incident, Maddox testified that he hit Williams two times to get her off of him after she had begun to assault him. Concerning the second incident, Maddox testified that he "knocked her [Williams] in the head" to get her off of him after she had begun to assault him with a knife.

At some point prior to the case being submitted to the jury, Maddox's counsel tendered to the court proposed jury instructions which were filed in the record. The tendered instructions for each court of fourth-degree assault included as an element of the offense that Maddox "was not privileged to act in self protection[.]" Nevertheless, when the court discussed the jury instructions with counsel prior to the closing arguments, Maddox's attorney stated, "You gave what we asked for, your Honor, and I thank you." Maddox argues that his attorney preserved his objection to the instructions by tendering fourth-degree assault instructions which included the defense of self-protection. He further asserts that counsel and the court were discussing the proposed lesser included offense instructions

during the conversation on the record and that the request for a self-defense instruction had not been waived. On the other hand, the Commonwealth maintains that Maddox's attorney failed to object to the absence of a self-defense instruction and that the issue is not properly before this court.

The applicable procedural rule states as follows:

> No party may assign as error the giving or the failure to give an instruction unless the party's position has been fairly and adequately presented to the trial judge by an offered instruction or by motion, or unless the party makes objection before the court instructs the jury, stating specifically the matter to which the party objects and the ground or grounds of the objection.

RCr[2] 9.54(2). We agree with Maddox to the extent that his attorney offered a proposed instruction in accordance with the rule. However, it appears to us that the request was abandoned in light of the aforementioned statement made to the court on the record and in light of statements made by Maddox's attorney during his closing argument to the jury.

We have reviewed the lengthy closing argument made by Maddox's attorney to the jury. Therein, he focused on the rape charge and the credibility, or lack thereof, of Williams. The gist of the argument was that Maddox and Williams had engaged in a tumultuous, and frequently violent, relationship and that neither were victims. He characterized the relationship as one involving frequent fights, often followed by sex. Maddox's attorney acknowledged in his closing argument that Maddox had struck Williams but that he did so "in self-defense so to speak."

[2] Kentucky Rules of Criminal Procedure.

In light of this passing reference to self-defense, given in the face of evidence that Williams was battered and bloody after the first incident and jumped out a bedroom window with nothing on but her bra to escape Maddox after the second incident, we conclude that the defense of self-protection and the request for such an instruction was abandoned. Therefore, we further conclude that the trial court did not err in failing to give a self-defense instruction.

Maddox's second argument is that the trial court erred in failing to give the jury an instruction on the mitigating circumstance of extreme emotional disturbance concerning the two fourth-degree assault charges. Had the jury been instructed in that manner and had the jury found that Maddox acted under the influence of an extreme emotional disturbance when he assaulted Williams, then the assaults would have constituted Class B misdemeanors rather than Class D felonies. See KRS 508.040(2)(b). Maddox's proposed instructions did not include assault under extreme emotional disturbance nor did he otherwise object to the trial court's failure to give the instruction. Therefore, pursuant to RCr 9.54(2), he may not assign as error the failure to give the instruction.

Nonetheless, citing Manning v. Commonwealth, Ky., 23 S.W.3d 610, 614 (2000), Maddox asserts that the court was required to instruct on every theory of the case reasonably deducible from the evidence, including the theory that he acted under the influence of an extreme emotional disturbance. More specifically, he relies on Commonwealth v. Elmore, Ky., 831

S.W.2d 183 (1992), wherein the Kentucky Supreme Court upheld the giving of such an instruction where it was requested by the Commonwealth but not by the defendant. Id. at 184. In other words, Maddox argues that even though he did not preserve his objection as required by RCr 9.54(2), the trial court was nonetheless required to give the instruction because it was warranted under the evidence.

We reject Maddox's argument for two reasons. First, the Kentucky Supreme Court held in Huff v. Commonwealth, Ky., 560 S.W.2d 544 (1977), that the failure of the court to instruct the jury on extreme emotional disturbance was not error where the question had not been preserved for appellate review pursuant to RCr 9.54. Second, our review of the evidence indicates that Maddox was not entitled to such an instruction. His testimony at trial indicated that he struck Williams to get her off him, and the theory of his defense to the charges as a whole was that the parties frequently fought and then made up, not that he assaulted Williams while under the influence of extreme emotional disturbance. There was no proof that Maddox was under the influence of an extreme emotional disturbance when he struck Williams, and his attorney likewise did not argue such in the closing argument. In short, we conclude that the instruction was not warranted by the evidence. See also Fields v. Commonwealth, Ky., 44 S.W.3d 355, 359 (2001).

Therefore, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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