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Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-002215-MR

JAMES HENRY JOHNSON

APPELLANT

v. APPEAL FROM MASON CIRCUIT COURT
HONORABLE JOHN W. McNEILL, III, JUDGE
ACTION NO. 05-CR-00046

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; GUIDUGLI AND JOHNSON, JUDGES.

JOHNSON, JUDGE: James Henry Johnson has appealed from a judgment entered on September 23, 2005, by the Mason Circuit Court following a jury conviction for assault in the first degree.¹ Having concluded that there was sufficient evidence to support a conviction for intentional assault and wanton assault, we affirm.

¹ Kentucky Revised Statutes (KRS) 508.010.

On April 23, 2005, Johnson and Steffon Cameron were visiting at a friend's house. As Cameron was leaving the residence, Johnson followed him down the steps and struck him in the head with a glass beer mug. Cameron sustained multiple lacerations to his head, requiring some 400 stitches and hospitalization.

On May 27, 2005, a Mason County grand jury indicted Johnson for assault in the first degree. At a jury trial held on August 22, 2005, the Commonwealth introduced testimony that there had been past tension between Johnson and Cameron prior to this incident. Frank Glover testified that he had been drinking with Johnson and Cameron and that there was a disagreement between Johnson and Cameron. Johnson also testified to a heated argument and admitted that he intended to strike Cameron in the head with the mug. Contrary testimony was presented by Cameron who testified that there had been no argument between Johnson and him and that Johnson struck him for no apparent reason. Valerie Jackson testified that Johnson had bragged to her about his assaulting Cameron.

At the close of all the proof, Johnson's motion for a directed verdict of acquittal was denied. The Commonwealth submitted jury instructions on assault in the first degree under the theories of intentional conduct and wanton conduct. The trial court overruled Johnson's objection to the instructions

which was based on his contention that the Commonwealth should elect which theory to submit to the jury. Both theories were presented to the jury in a combined instruction, which provided as follows:

INSTRUCTION NO. 1

FIRST-DEGREE ASSAULT

You will find the Defendant James Henry Johnson Guilty of First-Degree Assault under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

A.(1) That in this county on or about April 23, 2005 and before the finding of the Indictment herein, he intentionally caused a serious physical injury to Steffon Cameron by hitting him on the head with a mug thereby cutting him;

OR

(2) That in this county on or about April 23, 2005 and before the finding of the Indictment herein and under circumstances manifesting the extreme indifference to the value of human life he wantonly engaged in conduct which created a grave risk of death to Steffon Cameron and thereby caused serious physical injury to Steffon Cameron;

AND

B. That the mug was a dangerous instrument as defined under Instruction No. DEFINITIONS;

AND

C. That in so doing, the Defendant was not privileged to act in self-protection [emphasis added].

Following the jury's guilty verdict on assault in the first degree under this instruction, the Commonwealth agreed to the minimum prison sentence of ten years. The trial court accepted the sentencing plea agreement and sentenced Johnson on September 23, 2005. This appeal followed.

Johnson argues that there was insufficient evidence to support a finding that he acted either intentionally or wantonly in assaulting Cameron. He claims the trial court first erred by denying his motion for a directed verdict of acquittal, and then further erred by submitting to the jury the alternative theory of wanton assault. Since we conclude there was sufficient evidence to support Johnson's conviction under either theory, we affirm.

An appellate court's review of a trial court's denial of a motion for directed verdict of acquittal is set forth in Commonwealth v. Benham:²

On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

² 816 S.W.2d 186 (Ky. 1991).

On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal.³

The assault statute Johnson was charged under provides as follows:

- (1) A person is guilty of assault in the first degree when:
 - (a) He intentionally causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument; or
 - (b) Under circumstances manifesting extreme indifference to the value of human life he wantonly engages in conduct which creates a grave risk of death to another and thereby causes serious physical injury to another person.
- (2) Assault in the first degree is a Class B felony.⁴

The jury instructions included the above elements of intentional assault and wanton assault with the following definitions:

Intentionally—A person acts intentionally with respect to a result or to conduct when his conscious objective is to cause that result or to engage in that conduct.

Wantonly—A person acts wantonly with respect to a result or to a circumstance when he is

³ Benham, 816 S.W.2d at 187.

⁴ KRS 508.010.

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 nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. [A person who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts wantonly with respect thereto.]

Having reviewed the evidence in the case before us in the light most favorable to the Commonwealth, we conclude that a reasonable juror could believe that when Johnson swung the mug at Cameron's head, his conscious objective was to strike Cameron, thereby causing serious physical injury. Johnson admitted that he intended to strike Cameron in the head with the mug, but claimed he did not intend to cause such serious physical injury. However, his conscious objective of striking Cameron in the head with the mug alone is sufficient to meet the mens rea requirement of intentional assault since "a person is presumed to intend the logical and probable consequences of his conduct[.]"⁵ Further, since "[i]ntent to kill can be inferred from the extent and character of a victim's injuries[,]"⁶ intent to injure can also. The seriousness of Cameron's resulting injury is not disputed. Thus, there was sufficient evidence that Johnson intentionally caused serious physical injury to

⁵ Hudson v. Commonwealth, 979 S.W.2d 106, 110 (Ky. 1998) (citing Parker v. Commonwealth, 952 S.W.2d 209, 212 (Ky. 1997)).

⁶ Id.

Cameron, and the trial court correctly denied the motion for a directed verdict of acquittal and properly instructed the jury on intentional assault in the first degree.

As to the elements of wanton assault, the evidence supported a finding that when Johnson swung the mug at Cameron's head, he manifested extreme indifference to the value of human life and consciously disregarded a substantial and unjustifiable risk that Cameron could have been killed. Such conduct was a gross deviation from the standard of conduct a reasonable person would observe in that situation. Johnson does not dispute that the degree of force with which he struck Cameron was sufficient to cause serious physical injury requiring numerous stitches to Cameron's head. Common sense dictates that an adult's swinging of a glass beer mug and striking a person's head with such force as to seriously injure the person, show an extreme indifference to the value of human life and a conscious disregard of a substantial and unjustified risk of death. At the time Johnson struck Cameron from behind with the mug, Cameron was leaving the apartment. Any argument was over, but Johnson continued to follow Cameron outside the apartment. Thus, the evidence demonstrates Johnson's conduct was totally unjustified and a gross deviation from how a reasonable person would have acted. Therefore, the trial court properly denied the motion for

directed verdict of acquittal and correctly instructed the jury on wanton assault.⁷

Our affirmance as to the sufficiency of the evidence regarding the alternative theories of assault also disposes of Johnson's second argument since the Commonwealth has shown "that it has met its burden of proof under all alternate theories[.]"⁸ In Wells v. Commonwealth,⁹ the Supreme Court of Kentucky stated:

KRS 508.010 brings together two distinct culpable mental states (intent and wantonness manifesting extreme indifference to the value of human life) and punishes them equally under specified circumstances. Either mental state will support a conviction of assault in the first degree and punishment for such crime. The legal effect of the alternative conclusions is identical. . . . We hold that a verdict can not be successfully attacked upon the ground that the jurors could have believed either of two theories of the case where both interpretations are supported by the evidence and the proof of either beyond a reasonable doubt constitutes the same offense [emphasis added].

As previously stated, in the case before us a reasonable juror could infer that Johnson intended to cause serious physical injury to Cameron or, that under circumstances

⁷ While we find no reversible error in the trial court's instructions to the jury, we must note that the combined intentional and wanton instruction is not preferred in this Commonwealth. It is preferred practice to include a form, which requires the jury to report which theory the conviction is based upon. See Hudson, 979 S.W.2d at 110.

⁸ Burnett v. Commonwealth, 31 S.W.3d 878, 883 (Ky. 2000). See also Wells v. Commonwealth, 561 S.W.2d 85 (Ky. 1978).

⁹ 561 S.W.2d 85, 88 (Ky. 1978).

manifesting extreme indifference to the value of human life, he created a grave risk of death to Cameron and thereby caused serious physical injury to him. Thus, in viewing the evidence as a whole, it was not unreasonable for a jury to find Johnson guilty of either intentional assault or wanton assault in the first degree.

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

ALL CONCUR.

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