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Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001485-MR

FELIX SANTOS VELEZ APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE MARTIN J. SHEEHAN, JUDGE
ACTION NO. 11-CR-00748

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, DIXON AND STUMBO, JUDGES.

DIXON, JUDGE: Felix Santos Velez appeals from a judgment entered by the Kenton Circuit Court convicting him of first-degree assault and sentencing him to twelve and one-half years' imprisonment. Velez contends the trial court erroneously refused to instruct the jury on the defense of self-protection and

improperly instructed the jury on wanton first-degree assault. After careful review, we affirm.

In August 2011, Appellant and his girlfriend, Katie, lived in the Austinburg area of Covington, Kentucky. Jimmy Hutton and his family lived down the street from Appellant. One evening, Katie started an argument with Hutton's daughter, Crystal, outside the Hutton home. As the argument escalated, a crowd from the neighborhood gathered around the women. Appellant encouraged Katie not to back away from the fight, and Katie took a swing at Crystal. Hutton intervened in the scuffle, pulling Crystal away from the street and into their yard. As Hutton ushered his younger children inside the house, Katie's brother, Brandon, rattled the chain-link fence and yelled for Hutton to come back to the street. When Hutton turned around, Appellant ran into the yard and struck Hutton in the head with a large tree limb, lacerating his scalp. Appellant then dropped the limb and ran down the street to his apartment. The blow knocked Hutton unconscious, and EMS transported him to a trauma hospital in Cincinnati. Hutton underwent emergency surgery for head and brain injuries. Police arrested Appellant and Brandon later that evening.

At trial, the Commonwealth presented testimony from several witnesses, including Hutton, his daughters, a neighbor, and police officers. Appellant failed to appear for the second day of trial, and a bench warrant was issued for his arrest. The defense did not present any witnesses. The court instructed the jury on first-degree assault (either intentional or wanton) and second-

degree assault. The jury found Appellant guilty of first-degree assault and recommended a sentence of twelve and one-half years' imprisonment. The court rendered a judgment pursuant to the verdict and this appeal followed.

Appellant first contends that he was entitled to a jury instruction on self-defense and that the court improperly relied on Appellant's decision not to testify as the basis for refusing the instruction.

In opening statements, defense counsel opined that Appellant struck Hutton in self-defense; however, once the proof was closed, the trial court rejected the self-defense instruction. The court explained that there was no evidence to support the instruction since all of the testimony established that Hutton was in his yard tending to his younger children when Appellant hit him. The court pointed out that Appellant had neither testified nor called any witnesses to present evidence of self-defense.

"[T]he doctrine of self-protection turns upon a defendant's subjective belief of the need to use force[.]" *Hatcher v. Commonwealth*, 310 S.W.3d 691, 700 (Ky. App. 2010). The court must instruct the jury on an affirmative defense when a juror could reasonably conclude from the evidence that the defense exists; however, the court must reject the instruction if it is not supported by the evidence. *Harris v. Commonwealth*, 313 S.W.3d 40, 50 (Ky. 2010). Pursuant to Kentucky Revised Statutes (KRS) 503.050(1), a defendant is justified in using physical force against another person "when the defendant believes that such force is necessary to protect himself against the use or imminent use of unlawful physical force by the

other person." As Appellant points out, in *Hilbert v. Commonwealth*, 162 S.W.3d 921, 925 (Ky. 2005), the Court explained,

> the evidence supporting Appellant's belief in the need for the use of force was not strong, nor free from contradiction. However, such evidence need only raise the issue, for an instruction on self-defense is necessary once sufficient evidence has been introduced at trial which could justify a reasonable doubt concerning the defendant's guilt.

However, the Court further noted that,

> In general, where circumstantial or indirect evidence fails to raise the issue of self-protection, the fact that a defendant must testify or forgo this defense does not implicate the Fifth Amendment. The defendant's choice between complete silence and presenting a defense has never been thought an invasion of the privilege against compelled self-incrimination.

Id. (internal citation and quotation marks omitted).

Appellant fails to cite any specific evidence that could support a reasonable inference that he was entitled to a self-defense instruction. He simply asserts that, since the testimony indicated a large crowd had gathered in the street and people were fighting, the instruction was warranted.

Based upon our review of the record, we find no evidentiary basis to support a self-defense instruction. The witnesses testified that Hutton broke up the fight between Katie and Crystal. Hutton took Crystal into their yard and the crowd began to disperse. Hutton was in his yard when Appellant struck him with the limb. We reiterate that "[a]ll instructions must be supported by the testimony and evidence presented at trial." *Parker v. Commonwealth*, 952 S.W.2d 209, 211 (Ky.

1997). In light of the evidence, we conclude that the trial court properly rejected the self-defense instruction.

Appellant also asserts the court erred by instructing the jury on intentional and wanton theories of first-degree assault. Appellant contends the evidence did not support a finding of guilt based on wanton conduct, denying him the right to a unanimous verdict.

"An instruction of an alternative nature is proper only when either theory (intentional/wanton) is reasonably supported by the evidence." *Hudson v. Commonwealth*, 979 S.W.2d 106, 109 (Ky. 1998). In the case at bar, the first-degree assault instruction allowed the jury to find the Appellant guilty if he "intended to cause serious physical injury[,]" or if he "wantonly engage[ed] in conduct which created a grave risk of death to another and thereby injured Jimmy Hutton under circumstances manifesting extreme indifference to the value of human life."

KRS 501.020(3), which defines wanton conduct, states in relevant part:

> A person acts wantonly with respect to a result or to a circumstance described by a statute defining an offense when he is 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.

The jury is free to draw reasonable inferences from the evidence, including inferences regarding state of mind, “from the act itself and the surrounding circumstances.” *Commonwealth v. Suttles*, 80 S.W.3d 424, 426 (Ky. 2002). There was no direct evidence of Appellant’s state of mind. The evidence indicated that there was no blood on the tree limb and that Appellant dropped the limb after striking Hutton. Appellant immediately ran from the scene and changed clothes. Officer James Lawrence testified that he arrested Appellant. At the jail, Appellant expressed concern to Officer Lawrence regarding Hutton’s condition. When Officer Lawrence advised Appellant of the seriousness of Hutton’s injuries, Appellant replied that he did not think he had hit Hutton that hard. In light of the evidence, a juror could have reasonably inferred that, by swinging the limb at Hutton’s head, Appellant’s conduct created a grave risk of death to Hutton and constituted an extreme indifference to the value of human life. There was sufficient evidence to support wanton first-degree assault; consequently, Appellant was not denied a unanimous verdict.

For the reasons stated herein, we affirm the judgment of the Kenton Circuit Court.

ALL CONCUR.

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