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Supreme Court of Kentucky

2018-SC-000580-MR

BEN JESSIE WYATT

APPELLANT

V. ON APPEAL FROM ALLEN CIRCUIT COURT
HONORABLE JANET CROCKER, JUDGE
NO. 18-CR-00183

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Ben Jessie Wyatt was convicted by an Allen County jury of first-degree assault and sentenced to prison for twenty years. On appeal, he claims the trial court erred by denying an assault under extreme emotional disturbance (EED) instruction. Having reviewed the record, we conclude the trial court properly denied the instruction, and we affirm the Allen Circuit Court's judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Wyatt shot Simpson County Detective Eddie Lawson on March 10, 2016. One bullet shattered and displaced Lawson's right femur, while another bullet entered his right hip, and a third bullet grazed his left foot. Lawson required multiple surgeries and did not return to work for a year.

Wyatt was indicted for criminal attempt to commit murder of a police officer and assault in the first degree of a police officer.¹ The Allen Circuit Court directed a verdict on the criminal attempt charge, and the Commonwealth has not challenged that decision. The jury found Wyatt guilty of first-degree assault. Wyatt admitted to the assault, but he sought mitigation, claiming he acted under extreme emotional disturbance. The trial court denied the requested assault under EED jury instruction. The evidence Wyatt relied upon in support of his EED claim generally is as follows.

At trial, Wyatt testified to a four-year history involving the Simpson County Sheriff's Office, the Franklin City Police, the Department for Community Based Services (DCBS), and interactions with Lawson himself as a law enforcement officer, which led to his fear of Lawson. Wyatt stated he feared Lawson would not hesitate to try to take Wyatt's life based upon past run-ins.²

Wyatt testified that problems started when he and his girlfriend went to the Simpson County Sheriff's Office with evidence of sexual abuse of a child. The evidence was ignored, which made him mad. Lawson and another deputy were behind the counter during that visit to the sheriff's office, listening to their

¹ A Simpson County Grand Jury indicted Wyatt. The case was transferred to Allen Circuit Court because of publicity.

² This rendition of the facts is based on Wyatt's narrative of events he deemed pertinent to his EED claim. Lawson testified that he had never spoken to Wyatt until the day of the shooting.

complaint, but the officers decided there was not enough proof to investigate. That was Wyatt's first encounter with Lawson.

Wyatt also testified that he was later approached by a deputy while fixing a flat tire. He believed the officer planted marijuana in the bed of his truck. Furthermore, after placing a tree limb in the grill of his truck, the deputy accused Wyatt of leaving the scene of an accident.

Wyatt further testified that later, while renovating a house for his uncle, a deputy approached the house and asked why he and his girlfriend were there, asking for identification. A few days later, at that same residence, Wyatt observed Lawson peeking through the window. Lawson came to the door, knocked, and speaking only to his girlfriend, asked the same questions the other deputy asked previously. Wyatt also described a similar encounter a few days later when the police arrived at the place he and his girlfriend were staying and stated a missing person report had been filed regarding his girlfriend; Wyatt did not believe the report had been filed. Despite his girlfriend explaining she was not missing, the police returned again on a missing person report.

About a week later, a representative from DCBS came to the house Wyatt was renovating. He was not there at the time, but DCBS threatened to take his girlfriend's children. DCBS took no further action at that time. The preceding events occurred over a period of two to three months. Wyatt knew something was not right. Later, Wyatt received a message on his Facebook account that

Eddie Lawson “has followed you on Facebook,” meaning “he was keeping up with it.”

In early November 2012, shortly after Wyatt, his girlfriend, and her children moved to California, they were pulled over and informed that there was an open child abuse investigation of his girlfriend’s children. The children were taken and transported back to Kentucky. Wyatt testified that one of the children stated they were given intravenous drugs prior to being placed on the plane for the return trip. Wyatt and his girlfriend returned to Kentucky, but rather than living in Simpson County, lived in Bowling Green in Warren County. Wyatt believed Lawson was involved in the initiation of his girlfriend’s children being taken.

His next encounter with DCBS occurred in May 2014, when his son was born. DCBS arrived at the hospital, questioning whether his son should be taken. DCBS continued to come to his house, leaving cards, and calling. Consequently, Wyatt and his girlfriend moved with their son back to Simpson County to live with his mother. In Spring 2015, when his child was about eight months old, DCBS came to the residence, but Wyatt told the representative to leave. There was no conflict with DCBS for about a year.

In January 2016, Wyatt and his mother got into an argument. His mother called the police and reported Wyatt was crazy and had bulletproof vests, rifles, and machine guns. Wyatt left the house because he felt that based upon his mother’s report, the officers would shoot first and ask questions later. About twelve officers from the sheriff’s office and the police

department responded; the officers were armed with assault rifles and wore body armor. Wyatt, from the woods, watched the officers' interaction with his girlfriend in the house. Wyatt saw an officer point his assault rifle at his crying son and was the maddest he had ever been.³ He was scared for his girlfriend and son. He also disliked an officer's treatment of his grandfather, the officer forcing his grandfather back into his truck and slamming the door in his face.⁴ Wyatt was unsure but felt it unlikely that Lawson was one of the responding officers.

About a week later, Wyatt and his girlfriend went to the sheriff's office so that his girlfriend could complain about her witness statement not being taken accurately. Wyatt, not trusting the officers, used his cellphone to video the interactions with them. When they first arrived, the sheriff grabbed Wyatt's hand, acting like the purpose was to speak into the phone. The officers disagreed that an incorrect statement was prepared and did not listen to complaints about the officers' improper behavior when responding to his mother's call. The sheriff later squeezed Wyatt's hand to the point of shutting the phone off, causing the battery to separate from it, and bruising his hand. The sheriff threatened to charge Wyatt and his girlfriend with trespassing if they returned to make any complaints. The officers also refused to return

³ Wyatt's girlfriend testified that an officer told her to shut the baby up and waved his gun around, but the officer did not point the gun at the child.

⁴ Wyatt's grandfather testified that when he pulled the latch of his truck door to open it, an officer kicked the door shut and told him to keep his ass in the truck, but the officer did not touch him.

Wyatt's identification, resulting in Wyatt being unable to secure a job for which he was in the process of applying. According to Wyatt, Lawson was behind the counter when the sheriff squeezed Wyatt's hand, and rather than doing anything about the assault, laughed about it.

Being unsuccessful at the sheriff's office, but because of the steady progression of more out-of-control things happening to his family, he sought help in stopping the harassment from the Simpson County Judge-Executive, the Kentucky State Police, the Kentucky Attorney General's Office, the Kentucky Bureau of Investigation (KBI), and the Kentucky State Police Commissioner. Most told him that they could not help. The most favorable treatment occurred when a state trooper watched the video from the visit to the sheriff's office and told Wyatt to return later, but upon return, troopers patted him down like a criminal and refused to watch the video. The troopers told him "to leave this alone, you've kicked a hornet's nest, there is more going on than you know about," which Wyatt took as a threat. When he called the Attorney General's Office, he told the representative that he felt he was dealing with a life or death situation. Wyatt, as then advised, called the KBI and explained his problem. After not receiving a call back, Wyatt called the KBI again. The KBI did not have a record of his prior call so he again explained his problem. At this point, Wyatt felt that no one cared and that the local officers were going to act as they wished toward him and his family.

Wyatt decided to document everything, feeling like his and his family's lives were in danger. During the first two weeks of February 2016, he created a

Twitter account describing the harassment by the police and named it, "I am about to be murdered." He also created another account with the same information and attached the video he made at the sheriff's office. He felt like he was about to be murdered because of the sheriff grabbing him and no one doing anything about it, and he was making a big stink, posting online that he was going to have something done about the harassment and that he had called the Attorney General's Office and the KBI.

After the January 2016 incident with his mother, which resulted in a domestic violence order, DCBS visited his girlfriend, who was then living with her parents. DCBS took Wyatt's son and placed him in the custody of Wyatt's mother. Wyatt was unable to see his child. Wyatt stated that DCBS later changed its story and blamed his girlfriend's conduct as the reason for his son being taken.

Wyatt also described being harassed by the sheriff's office and police departments while walking around town. The officers would pull up and drive alongside him as he walked.

Besides being angry about all these events, Wyatt felt hopeless and every bad emotion. He lost his son, a job, three cars (sold for money to care for his girlfriend), an apartment and everything he cared about. The only things he did not lose were his girlfriend and his grandfather.

On the day of the March 2016 assault of Lawson, the maternal grandmother of Wyatt's child called the police to have Wyatt removed from her property. Detective Eddie Lawson responded to the call, planning to serve the

arrest warrant issued by the Simpson District Court two days earlier when Wyatt failed to appear in court.

Lawson testified that he arrived at the address in a cruiser that afternoon and saw Wyatt sitting in the carport. Lawson wore a polo shirt with the sheriff's office logo and his badge was attached to his belt. Lawson's firearm was holstered on one side of his belt, handcuffs and an extra magazine hung from the other side. Lawson recognized Wyatt from one time when Wyatt was in the sheriff's office lobby; at that time, Lawson was inside the office and the two, separated by glass, did not speak.⁵

Lawson approached Wyatt, called him by name, said he had a warrant for his arrest, and told Wyatt he was under arrest. Wyatt told Lawson he was not Ben Wyatt, to which Lawson replied he knew Wyatt's identity. Wyatt said "fuck you" and declared, "I'm not going to jail." Lawson then pulled a pepper spray canister from his left pocket and attempted to spray Wyatt. Wyatt produced a handgun at that point and started firing at him. Lawson then drew his firearm, returned fire and retreated behind a tree. Wyatt continued to fire shots at him, as Lawson fired back from behind the tree. After Lawson saw Wyatt run away, Lawson called on the radio for help.

According to Wyatt, he was sitting in the carport reading a book when Lawson arrived, and Wyatt was openly carrying a gun on his belt. He recognized Lawson as a deputy sheriff. Lawson got out of his vehicle and

⁵ Lawson testified that he had no other previous contact with Wyatt.

screamed, “Do you live here?” Lawson stomped up the drive, moving quickly. Because Lawson came alone and with no camera, as he approached, Wyatt thought “What are they going to do this time?” and feared Lawson would kill him. Lawson told Wyatt that he had a warrant for his arrest, but when Wyatt asked why he was under arrest, Lawson said it did not matter. Wyatt said “fuck you” and looked back at his book. Lawson said over his radio that he was going to have a problem, and he asked for backup. Lawson then pulled the pepper spray from his belt and sprayed Wyatt while he was still sitting. The spray did not burn Wyatt, instead it felt like water hitting his face; Wyatt attributed this reaction to the impact of adrenaline on him. Lawson put the spray back and then pulled out his gun. Wyatt especially feared Lawson when he pulled out his gun and stuck it in his face. Wyatt believed that Lawson was about to shoot him, and he lost it. He pulled out his handgun and fired shots in self-defense; Lawson ran away while pointing his gun back and firing at Wyatt. Wyatt was shot in the arm at some point. Wyatt was taken into custody about an hour after the shooting. He was found hiding in brush in a nearby field.

Other witnesses on Wyatt’s behalf were forensic psychologist Dr. Eric Drogin, and Wyatt’s girlfriend and grandfather. Dr. Drogin testified Wyatt was of above average intelligence but suffered from depression. Dr. Drogin opined that based on Wyatt’s conversations with him, Wyatt had a basis to argue for the condition of EED. Dr. Drogin described the feelings Wyatt conveyed to him which were consistent with EED. When Lawson approached and interacted

with him, Wyatt was feeling, “Here we go again.” Wyatt felt that it was really no surprise all this was happening, he described himself as being about as upset as you could be, and referring to Lawson said, “I remembered all the things he done to me. I was apprehensive that something else was about to happen. I felt I’d been living outside in the rain,⁶ they had taken everything I had, and I felt cheated, wronged, and violated.”

Dr. Drogin opined that the assault could be explained based upon Wyatt’s subjective response to the combination of the March 2016 events and Wyatt’s self-report of the long history of harassment perpetrated on him by Lawson. Wyatt’s girlfriend and his grandfather testified that Wyatt did not think like other people, feared law enforcement, and thought they were out to get him.

ANALYSIS

Wyatt was convicted of assault in the first degree, a Class B felony, and was sentenced to the maximum penalty of twenty years in prison. KRS⁷ 508.010, KRS 532.020. The jury was instructed on assault in the first degree, assault in the second degree, and on self-protection. Wyatt contends the trial court erred by refusing to instruct the jury that when he assaulted Lawson, he was acting under extreme emotional disturbance. If found guilty under that instruction, Wyatt would have been guilty of a Class D felony carrying a sentence of one to five years. KRS 508.040, KRS 532.020.

⁶ According to Wyatt, he had been living, with permission, in the carport.

⁷ Kentucky Revised Statute.

The trial court must give the jury an instruction applicable to every state of the case deducible from or supported to any extent by the testimony. *Thomas v. Commonwealth*, 170 S.W.3d 343, 347 (Ky. 2005) (citations omitted). Because the issue is whether there was evidence to warrant an instruction on assault under extreme emotional disturbance, we must consider the evidence in the light most favorable to Wyatt. *Id.* On review, we consider whether the trial court erred by refusing to give a lesser-included offense instruction under the “reasonable juror standard.” Under that standard, the proponent is entitled to the instruction if the evidence would permit a reasonable juror to make the finding the instruction authorizes. *Springfield v. Commonwealth*, 410 S.W.3d 589, 594 (Ky. 2013). In this case, we review whether a reasonable juror would have been able to convict Wyatt of assault under extreme emotional disturbance based upon the evidence presented. *See id.* at 595.

When a defendant is prosecuted under KRS 508.010, assault in the first degree, for intentionally causing serious physical injury to another by means of a deadly weapon or a dangerous instrument, the defendant may establish in mitigation that he acted under the influence of extreme emotional disturbance. KRS 508.040. To establish a reduced criminal responsibility, the defendant must show that when he committed the assault, he “acted 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.” KRS 508.040, KRS 507.020(1)(a). *McClellan v.*

Commonwealth, 715 S.W.2d 464, 468-69 (Ky. 1986), defines extreme emotional disturbance as follows:

Extreme emotional disturbance is 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.

A necessary element of EED is a sudden and uninterrupted triggering event, which may or may not be contemporaneous with other adequate provocation and other circumstances inducing the crime. *Benjamin v. Commonwealth*, 266 S.W.3d 775, 782-83 (Ky. 2008) (citations omitted). The adequate provocation or triggering event for extreme emotional disturbance may come from a single event which festers in the mind, *Springer v. Commonwealth*, 998 S.W.2d 439, 452 (Ky. 1999), or from the cumulative impact of a series of related events, *Fields v. Commonwealth*, 44 S.W.3d 355, 359 (Ky. 2001) (citing Lawson and W. Fortune, *Kentucky Criminal Law* § 8-3(b)(3), at 342 (Lexis 1998) (citing *California v. Wharton*, 809 P.2d 290 (1991), and *Pennsylvania v. Whitfield*, 380 A.2d 362 (1977))). However, an intervening cooling-off period between the provocation and the crime may be sufficient to conclude that the provocation was not adequate. *Fields*, 44 S.W.3d at 359. Furthermore, "it is wholly insufficient for the accused defendant to claim the defense of extreme emotional disturbance based on a gradual victimization

from his or her environment, unless the additional proof of a triggering event is sufficiently shown.” *Foster v. Commonwealth*, 827 S.W.2d 670, 678 (Ky. 1991). The victim may or may not be the perpetrator of the provocation. *Fields*, 44 S.W.3d at 358.

The mitigation allowed due to extreme emotional disturbance requires proof of both objective and subjective elements. First, there must be evidence supporting an objective determination as to whether there was a reasonable explanation or excuse for the emotional disturbance. The objective test is: “Is there a ‘reasonable explanation or excuse’ for the mental or emotional disturbance? But, in making that determination, the triers of fact are required to place themselves in the actor’s position as he believed it to be at the time of his act.” *Gall v. Commonwealth*, 607 S.W.2d 97, 108 (Ky. 1980), *overruled on other grounds by Payne v. Commonwealth*, 623 S.W.2d 867 (Ky. 1981). Thus, when an excuse offered for the emotional state is unreasonable, it will not warrant mitigation. Or stated another way, if the circumstances provoked an understandable loss of self-control, mitigation may be warranted. Second, there must be evidence that the actor was actually influenced by an extreme emotional disturbance, or actually lost self-control. If the evidence fails to support either objective or subjective aspect, the defendant is not entitled to an EED instruction. *See Spears v. Commonwealth*, 30 S.W.3d 152, 155 (Ky. 2000).

Wyatt puts forth two theories under which he believes the jury could have reasonably concluded that he was acting under the influence of EED

when he shot Lawson three times. He suggests that Lawson pepper spraying and pointing a gun at him was adequate provocation to provide a reasonable explanation or excuse for Wyatt's inflamed state of mind. Alternatively, he claims that the cumulative impact of his long history of harassment by Lawson, other law enforcement, and DCBS, and the confrontation with Lawson on the carport, serving as the instant triggering event, was adequate provocation. Perceiving that there was no triggering event under either scenario, the trial court concluded that the evidence did not support the EED instruction. Based on our review of the record, we conclude the trial court did not err when denying the assault under EED instruction.

The trial court carefully recounted the evidence and analyzed, as Wyatt now argues before this Court, whether Wyatt's confrontation with Lawson as Lawson served the arrest warrant, or whether that event in conjunction with Wyatt's feelings of harassment by Lawson particularly or harassment by local law enforcement and DCBS generally over a four-year period, served as a triggering event. The trial court first concluded that Wyatt being sprayed and Lawson's pulling his gun, in isolation, were not triggering events. We agree with the trial court. While it may be "possible for *any event, or even words*, to arouse extreme mental or emotional disturbance," *Spears*, 30 S.W.3d at 155, the impact on the defendant is not so broadly construed. "The event must be so dramatic as to render the mind temporarily uncontrollable and provoke 'an explosion of violence.'" *Luna v. Commonwealth*, 460 S.W.3d 851, 883 (Ky. 2015) (quoting *Baze v. Commonwealth*, 965 S.W.2d 817, 823 (Ky. 1997)). A

reasonable jury could not conclude that a law enforcement officer's use of pepper spray and drawing his weapon to restrain an arrestee constitute an adequate provocation to cause an extreme emotional, inflamed state of mind. Such techniques are commonly known by the public as measures available to officers and used as needed when dealing with a non-cooperative, threatening, armed person upon whom an arrest warrant is being served.

The trial court next concluded that Wyatt's feelings of harassment and victimization by Lawson, other law enforcement, and DCBS, in conjunction with Lawson pepper-spraying him and pulling his gun, could not be viewed as reasonably provoking extreme emotional disturbance. The trial court ruled that general paranoia against law enforcement and gradual victimization by the environment is not an extreme emotional disturbance. We agree with the trial court that a reasonable jury could not find that Wyatt suffered from EED as a result of the cumulative impact of a series of related events. As described in *Pennsylvania v. McCusker*, 292 A.2d 286, 289–90 (1972), the case underlying the recognition of cumulative impact of related events in *Fields*, 44 S.W.3d at 359, the events Wyatt described could not be reasonably viewed as related and causing a compounding of extreme emotion provoking one to lose self-control.

In *McCusker*, the defendant murdered his wife. To establish sufficient provocation the defendant relied on three events. First, "his awareness within the last month before the crime that his wife had entered into a meretricious relationship with his step-brother." *Id.* at 289–90. Second, "his knowledge within minutes of the crime that his wife was perhaps pregnant with his step-

brother's child." *Id.* at 290. And third, "his wife's threat immediately before the crime that she was going to leave defendant and take with her his only child." *Id.*

We see no comparison between the related, clearly passionate events described in *McCusker* and the loose string of events over four years which Wyatt described as harassment through DCBS's involvement with his girlfriend and her children, and then DCBS's involvement with his child, and harassment and disrespect by law enforcement. Although Wyatt views harassment as a common thread across the described events, and undoubtedly negative emotions would have been stirred by the events as described, there is no evidence tying all of these events together. Some of them did not even directly involve Wyatt or law enforcement. The four-year history of loosely-related events was not such that a reasonable juror could understand the events festering in Wyatt's mind and causing an emotional explosion of violence.

As to Lawson individually, Wyatt's testimony indicated that Lawson was present during his two visits to the sheriff's office, and he saw Lawson peeking through the window of the home being renovated for his uncle; there was no testimony that Wyatt interacted directly with Lawson. On one visit to the sheriff's office, Wyatt perceived Lawson to be laughing when the sheriff squeezed his hand to the point Wyatt's phone battery separated from the phone. Wyatt only speculated that Lawson played a role in DCBS removing his girlfriend's children from her care. Based upon Wyatt's testimony, his

interaction with Lawson alone could not be reasonably viewed as creating an extreme emotional disturbance.

As to the events involving law enforcement, including Lawson, and DCBS, and the emotions aroused, the timing of the events is also pertinent to the EED analysis. All events were followed by a cooling-off period such that a reasonable juror could not have found they were adequate provocation and precipitated an extreme emotional disturbance within Wyatt when Lawson arrived to arrest him. The last event described by Wyatt prior to the shooting occurred two weeks before, that being DCBS taking custody of his child.

Feelings of victimization due to an accumulation of negative life experiences is not a reasonable excuse to commit an assault under our EED jurisprudence. As this Court expressed in *Foster*, because “the event which triggers the explosion of violence on the part of the criminal defendant must be sudden and uninterrupted” a defendant may not rely on proof showing duress or a gradual victimization from his environment unless the additional proof of a triggering event is shown. 827 S.W.2d at 678 (citation omitted). We conclude that a reasonable juror could not find that the events described by Wyatt, in conjunction with Wyatt’s March 2016 confrontation with Lawson, would reasonably explain an extreme emotional disturbance which temporarily inflamed Wyatt’s mind so that he lost self-control and assaulted Lawson. Simply put, Wyatt did not present sufficient evidence to warrant an instruction on EED under the rule expressed in *Foster* and our subsequent cases.

Lastly, Wyatt presents an unpreserved argument that his due process rights were implicated when the trial court prevented him from asserting his EED defense, essentially gutting his defense, by denying the assault under EED jury instruction. Wyatt contends we should review the trial court's refusal to give the jury instruction as a constitutional error impairing his right to present a defense, citing *Daugherty v. Commonwealth*, 467 S.W.3d 222, 236 (Ky. 2015), *Beaty v. Commonwealth*, 125 S.W.3d 196, 206-09 (Ky. 2003), and *McGregor v. Hines*, 995 S.W.2d 384, 388 (Ky. 1999). However, we must decline palpable error review. *Martin v. Commonwealth*, 409 S.W.3d 340, 345 (Ky. 2013). When a party alleges the trial court erred by failing to give an instruction, review is limited to the grounds specifically presented to the trial court. *Id.* at 346; RCr⁸ 9.54.

CONCLUSION

For the foregoing reasons, the Allen Circuit Court's judgment is affirmed.

All sitting. All concur.

⁸ Rule of Criminal Procedure.

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