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Commonwealth of Kentucky

Court of Appeals

NO. 2025-CA-0778-MR

MATTHEW P. THOMPSON — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE SUSAN SCHULTZ GIBSON, JUDGE
ACTION NO. 23-CR-000561

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, A. JONES, AND MOYNAHAN, JUDGES.

COMBS, JUDGE: A Jefferson Circuit Court jury convicted Appellant, Matthew P. Thompson (Thompson) of second-degree assault against Luis Aju-Cottom[1] (Luis) and of fourth-degree assault against Norman Johnson (Norm).[2] Thompson contends that the trial court erred when it: (1) provided an erroneous instruction on

[1] Also referred to as Luis Aju in the trial court's instructions.

[2] Thompson's conviction for fourth-degree assault against Norman Johnson is not at issue on appeal.

imperfect self-protection and (2) failed to give an instruction on assault under extreme emotional disturbance (EED).

On March 20, 2023, a Jefferson County Grand Jury indicted Thompson on first-degree assault against Luis and fourth-degree assault against Norm. The case was tried in March 2025.

Testimony at trial established that on June 26, 2020, Thompson had gone to O'Shea's, a Louisville bar, and had a few shots. Thompson was outside waiting for his friend, Dewitt Thomas, who had agreed to drive Thompson home.

Luis; his brother, Manolo; and their friend, Norm, had also gone to O'Shea's that night. When they were ready to leave, they called a ride-hailing service and went outside.

Thompson testified that he observed two men (Luis and Manolo) who "were kind" of arguing back and forth.[3] Uninvited and unsolicited, Thompson walked up, interjected himself into the brothers' conversation, and suggested they needed to calm down and smoke some weed. Luis testified he thought that comment "was very awkward and not good." At first, Luis did not notice that Thompson was recording the encounter on his phone. When he did notice, Luis found it strange but did not say anything about it.

[3] According to Luis, this "arguing" consisted of Luis's concern that Manolo should not cross busy Bardstown Road to see if a pizza place was still open.

Luis recalled saying that people who smoke marijuana are losers. Thompson then asked if Luis was calling him a loser. Luis responded that he was. According to Luis, Thompson went off on a tangent about how marijuana helps people and that the government has brainwashed people. Luis, who was in the National Guard, pointed out that there are people who serve in the military so Thompson can have the freedom to express himself. The encounter escalated with the two men cursing and yelling at each other. Luis felt that Thompson was harassing and mocking him. Luis recalled asking Thompson how many people he had killed for his country. Luis testified he did not mean that comment as a threat.

According to Thompson, Luis pulled out his military ID, put it in Thompson's face and said "well what'd you do for your country?" Then, "how many people have you killed for your country?" Thompson testified that from that point, it "escalated a little bit further, as far as the conversation, voices begin to rise." Further, he claimed that Luis was "kind of aggressive. So it kind of put me [Thompson] in ... to where I was like coming back real strong, almost like he [Luis] was just trying to bully me out of the situation."

Thompson punched Luis. When asked why, Thompson testified that Luis had made these statements, that he was standing with his arms crossed over his chest, and that he was "jittery" with his hands. Thompson testified that growing up he had learned to watch for "certain things" and that Luis's movements

were "like he was almost hiding something in his hands." Thompson testified that Luis said, "'I'll kill this motherf. . . .' His exact words was, I'll kill this motherf. . . .' And I was just like, kill me?" That's when Thompson struck Luis. Thompson confirmed that he heard Luis say, "I'll kill this mother . . . ." According to Thompson, Luis's statement was not on the recording because Thompson had put his phone up.[4]

Asked what was going on in his mind when Luis allegedly said he was going to kill him, Thompson testified that he was in fear, that "in my head, like this guy [Luis] could have some PTSD or something, I don't know what he could do, but it definitely put me in the mode of defending myself . . . ."

Thompson explained that after he hit Luis (the first time), Norm came at him (Thompson) with his hands out. Thompson ducked. Manolo threw a punch over the back of Thompson's head. Thompson struck Norm, who hit the ground. Thompson then lined up with Manolo, swung at him, and missed. Out of his peripheral vision, Thompson saw Luis coming towards him, hands at his sides, Thompson testified that he did not know if Luis had anything in his hands. So, "I disregarded the guy in front of me [Manolo], squared up and punched him [Luis], because I thought he had something . . . stab me or anything at that point."

[4] Thompson called Ashley Gaither as a witness, who had met a friend at O'Shea's that night. She was outside and heard a commotion behind her. She heard someone say, "I'll kill you motherf . . . ." Gaither did not see who said it, but she testified that it was not Thompson's voice.

On cross-examination, Thompson testified that as he was facing Manolo, that he could see Luis approaching from the side, and that he did not know if Luis had anything in his hands. Thompson took the punch from Manolo because "I was scared what was happening from the side and that's why I turned and swung and hit Luis . . . a quick reaction." Thompson knew he was about to get hit -- that Manolo "was standing in front of me with his hands up." Thompson testified that he "wasn't even mad at that point," but "I had to save myself, I have kids . . . to get home to."

A wholly different version of the encounter emerged as Luis testified. Luis denied that he threatened Thompson. Asked if he ever said he was going to kill Thompson, Luis testified "absolutely not." With respect to Thompson's punching him, Luis explained that he was completely annoyed by this man with his camera phone. Luis had his arms crossed when he felt a punch in his face, and he did not see it coming. He did not recall moving towards Thomspon. Luis did not remember getting hit a second time and that the next thing Luis remembered was being at the hospital.

Luis sustained a traumatic and brutal injury: namely, a subdural hematoma. Dr. Brian Williams, Luis's neurosurgeon, testified. Dr. Williams performed a craniotomy, which involved removal of a portion of the skull. Several months later, Luis underwent a second surgery for a prosthetic insert. He also

required physical, occupational, and speech therapy. Luis testified that it took him about two and one-half years to feel like himself again.

The jury convicted Thompson of second-degree assault against Luis and fourth-degree assault against Norm. The trial court sentenced Thompson in accordance with the jury's recommendation of five years for the second-degree assault charge and 180 days for the fourth-degree assault charge.

Thompson now appeals. He first argues that the trial gave an erroneous instruction on imperfect self-protection for the charge of second-degree assault against Luis.[5] "While we evaluate the trial court's decision to instruct on a specific claim for an abuse of discretion, the substantive content of the jury instructions will be reviewed *de novo*." *Gribbins v. Commonwealth*, 483 S.W.3d 370, 373 (Ky. 2016). Although erroneous jury instructions are presumed to be prejudicial, that presumption can be successfully rebutted by showing that the alleged error did not affect the verdict or judgment. *Harp v. Commonwealth*, 266 S.W.3d 813, 818 (Ky. 2008).

The self-protection statute, KRS[6] 503.050, provides in relevant part as follows:

[5] As noted in Appellant's brief, Thompson was acquitted on the charge of first-degree assault and only discusses the self-protection instruction for second-degree assault.

[6] Kentucky Revised Statutes.

> (1) The use of physical force by a defendant upon another person is justifiable 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.
>
> (2) The use of deadly physical force by a defendant upon another person is justifiable under subsection (1) only when the defendant believes that such force is necessary to protect himself against death, [or] serious physical injury . . . .

"The justification is also available when there is a mistaken belief in the existence of use or imminent use of unlawful physical force by another." *Lickliter v. Commonwealth*, 142 S.W.3d 65, 71 (Ky. 2004); KRS 503.120(1). "[I]f a defendant was wanton or reckless in his belief that force was necessary for self-defense, he would be entitled to an instruction on a lesser-included offense under a theory of imperfect self-defense." *Gribbins*, 483 S.W.3d at 374.

In the case before us, the court provided the following instruction on self-protection for the charge of second-degree assault:

> **INSTRUCTION 2-A**
> **SELF-PROTECTION**
>
> Even though the Defendant, Matthew Thompson, might otherwise be guilty of Assault in the Second Degree under Instruction No. 2, if at the time the Defendant assaulted Luis Aju, he believed that Luis Aju was then and there about to use physical force upon him, he was privileged to use such physical force against Luis Aju as he believed to be necessary in order to protect himself against it, including the right to use deadly physical force in so doing, **but only if he believed it to**

be necessary in order to protect himself from death or serious physical injury at the hands of Luis Aju.

A person who is not engaged in an unlawful activity and who is attacked in a place where he has a right to be has no duty to retreat and has the right to stand his or her ground and meet force with force, including deadly force if he reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or another or to prevent the commission of a felony involving the use of force, and subject to this qualification:

Regardless of what the Defendant, Matthew Thompson, then believed, if you believe from the evidence beyond a reasonable doubt the following:

A. That it was not in fact necessary for him to use any physical force against Luis Aju in order to protect himself from death or serious physical injury, **or if it was, he used more than was actually necessary to protect himself from death or serious physical injury:**

   AND

B. That his belief to the contrary and the action he took against Luis Aju in reliance upon that belief amounted to:

   (1) Wanton Conduct as the term is defined in Instruction No. 5 or Reckless Conduct as defined in Instruction No. 5, then he was not so privileged to use self-protection, and you will find him guilty of Assault in the Fourth Degree on Verdict Form 2.

(Emphases added.)

Thompson concedes that the instruction on the defense of self-protection was a proper recitation of the law, but he contends that "[t]he issue lies in how the imperfect self-protection instruction is recited. . . . As written, it suggests that any force used by [Thompson] must stem from his belief that Luis . . . would use deadly force against him, rather than just force." Thompson speculates that the "instructions could be confusing: imperfect self-defense would be available . . . only if the jury believed that Luis was about to use deadly force, and unavailable if [Thompson] believed Luis would use less force."

The Commonwealth responds that the instruction as written accurately reflects the facts of the case as presented by defense counsel and that if there were any error, it was harmless. The Commonwealth explains that all of the defense's evidence was an attempt to persuade the jury that Thompson reacted so violently because he believed Luis posed a deadly threat or one of serious physical injury. Thus, the Commonwealth argues that the only conclusion the jury could have reached (if it had believed Thompson) "would have fit within the imperfect self-protection instruction as written." However, the "jury did not apply the imperfect self-protection defense because it did not believe that Thompson was defending himself." We agree with the Commonwealth's assessment and conclude that any purported error in the instruction was at most harmless.

Next, Thompson argues that the trial court erred when it failed to give an instruction on assault under EED. Where "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 Appellant." *Thomas v. Commonwealth*, 170 S.W.3d 343, 347 (Ky. 2005).

KRS 508.040 provides in relevant as follows:

> (1) In any prosecution [for first-or second-degree assault] in which intentionally causing physical injury or serious physical injury is an element of the offense, the defendant may establish in mitigation that he acted under the influence of extreme emotional disturbance . . . .
>
> (2) An assault committed under the influence of extreme emotional disturbance is:
>
> > (a) A Class D felony when it would constitute an assault in the first degree or an assault in the second degree if not committed under the influence of an extreme emotional disturbance[.]

In discussing jury instructions, defense counsel argued Thompson was entitled to an EED instruction as part of the instructions for first-degree and second-degree assault. The trial court explained that Thompson testified that he never intended to hurt Luis; that there was no real triggering event; and that this was not a case where, for example, they were in a bar and the victim started hitting on Thompson's wife or girlfriend. Having looked at the caselaw, the trial court was not persuaded an EED instruction was warranted "under the facts of this case."

The trial court's duty is to instruct the jury on the whole law of the case consistent with the evidence presented at trial. *Taylor v. Commonwealth*, 995 S.W.2d 355, 360 (Ky. 1999). Defendants are entitled to an instruction on any defense that is supported by the evidence. *Hayes v. Commonwealth*, 870 S.W.2d 786 (Ky. 1993). . . .

This Court has defined extreme emotional disturbance as:

> 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.

McClellan v. Commonwealth, 715 S.W.2d 464, 468-69 (Ky. 1986). An EED defense is essentially the adoption by the legislature of the concept of a "crime of passion." *Driver v. Commonwealth*, 361 S.W.3d 877, 888 (Ky. 2012). A necessary component to EED is adequate provocation, a concept often referred to as a "triggering event." *Foster v. Commonwealth*, 827 S.W.2d 670, 678 (Ky. 1991). The event that triggers the violence must be sudden and uninterrupted. *Id.* And yet the triggering event must be based on some "definite, non-speculative evidence." *Padgett v. Commonwealth*, 312 S.W.3d 336, 341 (Ky. 2010).

Cavanaugh v. Commonwealth, 671 S.W.3d 17, 22–23 (Ky. 2022). "[T]he mere fact that a defendant claims to have acted in self-defense does not mean that he was acting under the influence of EED . . . . However, a claim of self-defense does not necessarily negate an alternative claim of EED **if the evidence . . . would support both theories.**" *Thomas*, 170 S.W.3d at 349 (emphasis added).

Thompson contends that the triggering event for the first punch was hearing the alleged threat, "I'll kill this motherf . . .," which overcame Thompson's character and caused him to act out of an enraged state.

The Commonwealth responds that even if the jury believed that Luis threatened to kill Thompson, it did not reasonably enrage him to the extent his judgment was overcome:

> what Thompson described was a calculation. He was watching Luis carefully and closely throughout the entire encounter. And when Thompson decided that Luis might attack him, [Thompson] decided -- using logic and reasoning, not blind panic -- to attack [Luis] first. That is the opposite of EED.

We concur with the assessment by the Commonwealth.

Accordingly, we affirm.

ALL CONCUR.

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