

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2009-CA-000286-MR

CHARLES RANDELL DEBERRY

APPELLANT

v.

APPEAL FROM KNOX CIRCUIT COURT  
HONORABLE GREGORY A. LAY, JUDGE  
ACTION NO. 08-CR-00097

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: LAMBERT AND STUMBO, JUDGES; WHITE,<sup>1</sup> SENIOR JUDGE.

WHITE, SENIOR JUDGE: Charles Deberry appeals from his Knox Circuit Court conviction for first-degree wanton endangerment. Deberry claims that he was entitled to a judgment notwithstanding the verdict and a directed verdict. Further, Deberry claims that his conviction violates public policy. After carefully

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<sup>1</sup> Senior Judge Edwin M. White sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

reviewing the arguments of counsel and the appellate record, we disagree with each claim.

Deberry and Toy Ferguson are neighboring land owners in Knox County. In 2000, Deberry and his wife sued Ferguson in Knox Circuit Court over a boundary dispute. After hearing evidence from both parties, the Circuit Court found in favor of Ferguson. Deberry appealed the ruling. On April 4, 2006, our Court affirmed the Knox Circuit Court's judgment.<sup>2</sup>

On April 12, 2008, Deberry was arrested on the charge of first-degree wanton endangerment after Ferguson filed a criminal complaint against him. The complaint stemmed from an incident that occurred earlier that day. Ferguson and Dewayne Woolum, Ferguson's employee, were building a fence on the property that was previously the subject of the boundary dispute. Deberry thought the men had parked heavy equipment on his property, so he drove his ATV to the property and began taking photographs of Ferguson and Woolum.

With his shovel still in his hand, Ferguson threatened to break the camera if Deberry did not stop taking pictures.<sup>3</sup> Deberry pulled out a pistol and pointed it at Ferguson. While still holding the gun, Deberry stated, "It won't bother me a bit to kill you. I will kill you right now . . . ." Deberry directed Ferguson to put down the shovel, which he did. Holding the strap of the camera, Deberry repeatedly swung it toward Ferguson. Then Deberry left the property.

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<sup>2</sup> *Deberry v. Ferguson*, 2006 WL 955462 (Ky. App. 2006) (2004-CA-002224-MR).

<sup>3</sup> Although Deberry claims that Ferguson raised his shovel, the other testimonies at trial indicate that he did not.

On December 9, 2008, Deberry was convicted of first-degree wanton endangerment. He was sentenced to one-year imprisonment probated for four years. Following his conviction, Deberry moved the court to enter a judgment notwithstanding the verdict or a new trial. Deberry alleged that the trial court erroneously failed to instruct the jury on the defense of property. The trial court denied his motion. This appeal follows.

First, we will address Deberry's claim that the trial court's failure to instruct the jury on a defense of property entitled him to a judgment notwithstanding the verdict. "In a criminal case, it is the duty of the trial judge to prepare and give instructions on the whole law of the case, and this rule requires instructions applicable to every state of the case deducible or supported to any extent by the testimony." *Taylor v. Commonwealth*, 995 S.W.2d 355, 360 (Ky. 1999). We must review a trial court's refusal to give a jury instruction for abuse of discretion. *Williams v. Commonwealth*, 178 S.W.3d 491, 498 (Ky. 2005).

After reviewing the record, we conclude that the facts of the case do not support a defense of property instruction. KRS 503.080 provides:

(1) The use of physical force by a defendant upon another person is justifiable when the defendant believes that such force is immediately necessary to prevent:

(a) The commission of criminal trespass, robbery, burglary, or other felony involving the use of force, or under those circumstances permitted pursuant to KRS 503.055, in a dwelling, building or upon real property in his possession or in the possession of another person for whose protection he acts; or

(b) Theft, criminal mischief, or any trespassory taking of tangible, movable property in his possession or in the possession of another person for whose protection he acts.

(2) The use of deadly physical force by a defendant upon another person is justifiable under subsection (1) only when the defendant believes that the person against whom such force is used is:

(a) Attempting to dispossess him or his dwelling otherwise than under a claim of right to its possession; or

(b) Committing or attempting to commit a burglary, robbery, or other felony involving the use of force, or under those circumstances permitted pursuant to KRS 503.055, of such dwelling; or

(c) Committing or attempting to commit arson of a dwelling or other building in his possession.

(3) A person does not have a duty to retreat if the person is in a place where he or she has a right to be.

Further, Deberry did not present sufficient evidence to warrant a defense of property instruction. In order to justify the use of deadly force to protect his camera, Deberry must have shown that Ferguson was “[c]ommitting or attempting to commit a burglary, robbery, or other felony involving the use of force, or under those circumstances permitted pursuant to KRS 503.055[.]” A protection of property defense may have been applicable to this case if Deberry had established that he acted to protect his camera from felonious criminal

mischievous. KRS 512.020(1) provides the following description of criminal mischief:

A person is guilty of criminal mischief in the first degree when, having no right to do so or any reasonable ground to believe that he has such a right, he intentionally or wantonly defaces, destroys or damages any property causing a pecuniary loss of \$1,000 or more.

Deberry bore the burden of proving the elements of his affirmative defense. Our review of the record indicates that Deberry failed to present any evidence of the camera's value or perceived value. Because he failed to establish that his actions were used against someone committing a felony involving the use of force, a protection of property instruction was not warranted.

Next, we will address Deberry's claim that he was entitled to a directed verdict. "[T]he 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." *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991). Further, the evidence must be reviewed in a light most favorable to the Commonwealth. *Commonwealth v. Sawhill*, 660 S.W.2d 3, 4 (Ky. 1983). "The basis for the guideline lies in the belief that the weight and value given to the evidence is for the jury to decide. If it is reasonably possible the jury should decide the matter." *Id.*

KRS 508.060(1) provides:

A person is guilty of wanton endangerment in the first degree when, under circumstances manifesting extreme indifference to the value of human life, he wantonly

engages in conduct which creates a substantial danger of death or serious physical injury to another person.

At trial, three witnesses, including Deberry, testified that Deberry pointed a gun at Ferguson and threatened to kill him. In a light most favorable to the Commonwealth, these testimonies are sufficient to withstand a motion for directed verdict.

However, Deberry claims the facts clearly establish that he acted in defense of property. As previously mentioned, Deberry failed to show the elements necessary for his claim. In addition, Deberry failed to show that his actions were immediately necessary to protect his camera. Because testimony existed to support the wanton endangerment charge, the trial court properly denied Deberry's motion for a directed verdict.

Finally, we firmly disagree with Deberry's claim that his conviction violates public policy. Public policy and Kentucky law have long supported the rights of self-protection and property protection. However, neither the law nor public policy encompasses the facts of this case.

Accordingly, we affirm the Knox Circuit Court's conviction.

ALL CONCUR.

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