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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000463-MR

JANICE HASCH — APPELLANT

v.

APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE RODNEY BURRESS, JUDGE
ACTION NO. 08-CR-00185

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING

** ** ** ** **

BEFORE: DIXON AND NICKELL, JUDGES; LAMBERT,[1] SENIOR JUDGE.

DIXON, JUDGE: Appellant, Janice Hasch, was convicted in the Bullitt Circuit Court of reckless homicide and sentenced to two years' imprisonment. She appeals to this Court as a matter of right. For the reasons stated here, we reverse

[1] Senior Judge Joseph Lambert 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.

Appellant's conviction and sentence.

On April 14, 2008, Appellant shot and killed her husband, Jerald Hasch, in their Bullitt County home. During a video statement given to police shortly after the shooting, Appellant maintained that she was a victim of domestic violence and that she shot Jerald in self-protection. During the interview, Bullitt County Detective Scott McGaha repeatedly asked Appellant if she could have fled the house, thus avoiding the necessity to use deadly force.

In June 2008, Appellant was indicted by a Bullitt County Grand Jury for murder. She thereafter moved to dismiss the indictment on immunity grounds under KRS 503.085 and requested an evidentiary hearing. In addition, she moved to suppress or redact her video interview to omit the questioning regarding her duty to retreat.[2] The trial court denied both motions.

During the February 2008 jury trial, the Commonwealth's theory was that Appellant intentionally shot and killed Jerald after becoming angry with him. In her defense, Appellant took the stand and testified that Jerald had physically and mentally abused her for a number of years. Appellant explained that on the day of the incident, she had been cleaning a bedroom closet when she discovered a handgun on the floor that Jerald had been missing. Appellant said that when she showed Jerald the gun, still unloaded and zipped in its carrying pouch, he reacted violently. Appellant claimed that Jerald kept coming toward her, demanding the gun. A struggle broke out in the kitchen and Jerald pushed Appellant to the floor

[2] We would observe that Deputy McGaha questioned Appellant about her ability to leave twelve times during the twenty-seven minute statement.

causing her to hit her head on the refrigerator. Appellant testified that she was afraid that if Jerald got the gun from her he would kill her.

Appellant continued that she was able to get to another part of the house but Jerald kept coming toward her repeatedly chanting, "Give me the gun. If you intend to shoot that you better shoot to kill. Shoot me between the eyes." Appellant then removed the gun from the pouch, loaded the clip and pointed the gun at Jerald, demanding that he back away from her. Appellant stated that she asked Jerald to let her leave the house but that he had installed keyed dead bolts on the doors and kept possession of the keys. Despite Appellant's pleas, Jerald kept approaching and when he lunged at her, she fired the gun. She testified that she was determined that "she was not going to die" and that if she didn't shoot him she knew he would kill her.

At the close of evidence, the defense requested instructions on intentional murder and self-protection. However, over defense objection, the trial court also instructed the jury on wanton murder, a wanton or reckless belief qualification to self-protection (otherwise known as "imperfect self-defense"), second-degree manslaughter and reckless homicide. The jury returned a verdict finding Appellant guilty of reckless homicide and recommended two years' imprisonment. The trial court entered judgment accordingly and this appeal ensued.

On appeal, Appellant argues that the trial court erred by (1) failing to grant a pretrial hearing to determine immunity under KRS 503.085; (2) admitting

the medical examiner's report as an exhibit; (3) refusing to redact her video interview wherein police repeatedly asked her whether she could have left the residence; (4) excluding the testimony of two witnesses; (5) instructing the jury as to lesser-included offenses not supported by the evidence; and (6) erroneously instructing the jury during the penalty phase. As we conclude that the guilt phase instructions were indeed erroneous and require reversal we need not reach the evidentiary issues.

As previously noted, Appellant argued that the evidence only supported instructions on intentional murder and self-protection. Nevertheless, the trial court instructed the jury on several lesser-included offenses. The instruction under which Appellant was convicted provided:

> INSTRUCTION NO. 5
> RECKLESS HOMICIDE
>
> If you do not find Defendant guilty under Instruction No. 4, you will find the Defendant guilty of Reckless Homicide under this instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:
>
> A. That in this county on or about April 14, 2008 and before the finding of the Indictment herein, she killed Jerald Hasch by shooting him with a handgun.
>
> AND
>
> B. That in so doing, she was acting recklessly or as described in paragraph C.(2) of this Instruction;
>
> AND
>
> C. That in so doing,

(1) She was not privileged to act in self-protection;

OR

(2) Though otherwise privileged to act in self protection, the Defendant was mistaken in her belief that it was necessary to use physical force against Jerald Hasch in self protection, or in her belief in the degree of force necessary to protect herself and that when she killed Jerald Hasch, she failed to perceive a substantial and unjustifiable risk that she was mistaken in that belief, and that her failure to perceive that risk constituted a gross deviation from the standard of care that a reasonable person would have observed in the situation

The first part of the above instruction is essentially a standard reckless homicide instruction requiring a finding that Appellant, in shooting Jerald, acted recklessly as the term was defined in the instructions and was not privileged to act in self-protection. Subsection C.(2) is a restatement of the reckless belief qualification to self-protection. As stated in KRS 503.120(1),

> When the defendant believes that the use of force upon or toward the person of another is necessary for any of the purposes for which such belief would establish a justification under KRS 503.050 to 503.110 but the defendant is wanton or reckless in believing the use of any force, or the degree of force used, to be necessary in acquiring or failing to acquire any knowledge or belief which is material to the justifiability of his use of force, the justification afforded by those sections is unavailable in a prosecution for an offense for which wantonness or recklessness, as the case may be, suffices to establish culpability.

The purpose of KRS 503.120 is to limit the effect of the subjective belief provisions of KRS 503.050 and the other KRS Chapter 503 justifications to

the extent that a belief which is so unreasonable that it rises to the level of wantonness or recklessness with respect to the circumstance then being encountered by the defendant, e.g., whether he needed to act in self-protection, does not result in acquittal, but rather in conviction of a lesser offense for which wantonness or recklessness is the culpable mental state, such as second-degree manslaughter or reckless homicide. *Elliott v. Commonwealth*, 976 S.W.2d 416, 420 (Ky. 1998). However, as reiterated by our Supreme Court in *Commonwealth v. Hager*, 41 S.W.3d 828, 841 (Ky. 2001), "a mistaken belief in the need to act in self-protection does not affect the privilege to act in self-protection unless the mistaken belief is *so unreasonably held as to rise to the level of wantonness or recklessness* with respect to the circumstance then being encountered by the defendant." (Emphasis added). Furthermore, because the language of KRS 503.120(1) "limits its application to whether the defendant was wanton or reckless with respect to a circumstance, e.g., whether he needed to act in self-protection, it has no application to whether he was wanton or reckless with respect to the result of his conduct, e.g., whether his act would cause the death of another person." *Elliott,* 976 S.W.2d at 420.

In finding Appellant guilty of reckless homicide under Instruction No. 5, the jury had to conclude that Appellant's conduct was reckless and she was not privileged to act in self-protection at the time she shot and killed Jerald, or that her mistaken belief in the need for self-protection was "so unreasonably held as to rise to the level of wantonness or recklessness with respect to the circumstance then

being encountered by the defendant." *Hager*, 41 S.W.3d at 841. Our review of the record and trial video leads to the inescapable conclusion that there was simply no evidence to support such instruction.

As previously noted, the Commonwealth's theory was that Appellant intentionally shot and killed her husband. At trial and in its brief to this Court, however, the Commonwealth maintains that Appellant's ability to leave the home at the time of the incident was relevant to whether she was mistaken in her belief in the need for self-protection. Specifically, citing to *Rodgers v. Commonwealth,* 285 S.W.3d 740 (Ky. 2009), the Commonwealth argues that the "absence of a legal duty to retreat does not make retreat/no retreat irrelevant. . . . [R]etreat remains a factor to be considered among the totality of the circumstances . . . ."

We believe the Commonwealth has misconstrued the holding of *Rodgers*. In discussing its prior opinion in *Hilbert v. Commonwealth*, 162 S.W.3d 921 (Ky. 2005), the Court noted that "as enacted in 1975 the Penal Code incorporated the pre-code rule that while Kentucky does not condition the right of self-defense on a duty to retreat, retreat remains a factor amidst the totality of circumstances the jury is authorized to consider." Importantly, however, the Court specifically held that *Hilbert* and the pre-code rule were not applicable to conduct occurring after July 12, 2006, the effective date of Senate Bill 38 providing that the right to use force, including deadly force, in self-defense is not contingent upon a duty to retreat. *See* KRS 503.050(4). Thus, we are of the opinion that whether Appellant was or was not able to retreat did not go to whether she was mistaken in

her belief in the need for self-protection. The record is simply devoid of any evidence that Appellant's belief in the need for self-protection was mistaken, much less that any mistake was so "unreasonably held as to rise to the level of wantonness or recklessness with respect to the circumstance then being encountered." *See Hager*, 41 S.W.3d at 841.

Nor do we find any merit in the Commonwealth's and the trial court's belief that because Appellant closed her eyes when she fired the gun she acted recklessly. Appellant indeed testified that she shut her eyes when she pulled the trigger. However, when questioned as to why she did so she stated, "I shut my eyes because I could not bear to see what was about to happen." Appellant had previously testified that she was experienced with guns and that she intentionally loaded the handgun, pointed it at Jerald, and fired the weapon when he lunged at her. That is plainly not evidence of reckless conduct.

The trial court has a duty to instruct upon the whole law applicable to the case: "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); *see also* RCr 9.54(1). An instruction on a lesser included offense is not required unless the evidence is such that a reasonable juror could doubt that the defendant is guilty of the crime charged, yet conclude that he is guilty of a lesser included offense. *Webb v. Commonwealth*, 904 S.W.2d 226, 229 (Ky. 1995). Based upon the

evidence presented at trial, we agree with Appellant that only instructions as to intentional murder and self-protection were supported by the evidence. We cannot conclude that any evidence was introduced that Appellant acted wantonly or recklessly in her conduct, or that she was wanton or reckless in her belief in the need for self-protection. As such, the lesser-included instructions were clearly erroneous.

As a general rule, retrial after reversal of a conviction is not barred by double jeopardy principles. *McGinnis v. Wine*, 959 S.W.2d 437, 438 (Ky. 1998). However, there are two exceptions to this rule. First, 'the double jeopardy clause precludes retrial 'once the reviewing court has found the evidence legally insufficient' to support the conviction." *Id.* at 438 (*quoting Burks v. United States*, 437 U.S. 1, 18, 98 S.Ct. 2141, 2150-51, 57 L.Ed.2d 1 (1978). Second, "the conviction of a defendant of a lesser-included offense constitutes an acquittal of all higher degrees of the offense. Accordingly, if the conviction of the lesser-included offense is reversed on appeal, the defendant cannot be retried upon any other higher degrees of the offense." *Smith v. Commonwealth*, 737 S.W.2d 683, 688 (Ky. 1987) (*citing Green v. United States*, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957). Herein, by finding Appellant guilty of reckless homicide, the jury obviously did not believe she was guilty of murder. While we cannot discern from the verdict whether the jury believed Appellant acted recklessly in shooting Jerald or whether she was reckless in her belief in the need for self-protection, our

determination that the instruction was erroneous necessarily requires acquittal of the higher offenses. Thus, Appellant cannot be retried on such offenses.

Although Appellant's argument regarding the trial court's error in denying an evidentiary hearing on the immunity issue is rendered moot by our decision herein, we feel it necessary to address the issue. In denying Appellant's motion for a pretrial hearing, the trial court ruled,

> Defendant argues that the plain language of [KRS 503.085] entitles her to dismissal if she can establish the use of force permitted in KRS 503.050. The Defendant maintains that she is entitled to a pre-trial hearing to determine if she is entitled to invoke the immunity provisions of that statute.
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> . . .
>
> The effect of Defendant's motion is to request that this Court substitute its judgment in determining whether there was sufficient evidence to justify an indictment in this action. To do so this Court would be required to consider evidence tendered to the Grand Jury and determine if the evidence supported the indictment given the Defendant's alleged immunity from prosecution.
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> . . .
>
> The stage of the proceeding where the court has authority to dismiss under these circumstances is not in a pretrial proceeding.

KRS 503.085, enacted in 2006, grants immunity to those who justifiably use self-defense. The statute provides in relevant part:

> (1) A person who uses force as permitted in KRS 503.050, 503.055, 503.070, and 503.080 is justified in using such force and is immune from criminal prosecution and civil action for the use of such force,

> unless the person against whom the force was used is a peace officer, as defined in KRS 446.010, who was acting in the performance of his or her official duties and the officer identified himself or herself in accordance with any applicable law, or the person using force knew or reasonably should have known that the person was a peace officer. As used in this subsection, the term "criminal prosecution" includes arresting, detaining in custody, and charging or prosecuting the defendant.
>
> (2) A law enforcement agency may use standard procedures for investigating the use of force as described in subsection (1) of this section, but the agency may not arrest the person for using force unless it determines that there is probable cause that the force that was used was unlawful.

The statute is "purely procedural, and by prohibiting prosecution of one who has justifiably defended himself, his property or others, it in effect creates a new exception to the general rule that trial courts may not dismiss indictments prior to trial." *Rodgers v. Commonwealth*, 285 S.W.3d at 753.

Recently, the Kentucky Supreme Court addressed the difficulty in the procedural implementation of KRS 503.085:

> The trial judge's uncertainty regarding how to implement the immunity provision is understandable because the statute offers little guidance. Indeed, the only express indication of legislative intent is in KRS 503.085(2) which provides that immunity must be granted pre-arrest by the law enforcement agency investigating the crime unless there is "probable cause that the force used was unlawful." Because the statute defines the "criminal prosecution" from which a defendant justifiably acting in self-defense is immune to be "arresting, detaining in custody and charging or prosecuting," we can infer that the immunity determination is not confined to law enforcement personnel. Instead, the statute contemplates that the prosecutor and the courts may also be called

upon to determine whether a particular defendant is entitled to KRS 503.085 immunity. Regardless of who is addressing the immunity claim, we infer from the statute that the controlling standard of proof remains "probable cause." Thus, in order for the prosecutor to bring charges or seek an indictment, there must be probable cause to conclude that the force used by the defendant was not fully justified under the controlling provision or provisions of KRS Chapter 503. Similarly, once the matter is before a judge, if the defendant claims immunity the court must dismiss the case unless there is probable cause to conclude that the force used was not legally justified.

Probable cause is a standard with which prosecutors, defense counsel and judges in the Commonwealth are very familiar although it often eludes definition. Recently, in *Commonwealth v. Jones*, 217 S.W.3d 190 (Ky. 2006), this Court noted the United States Supreme Court's definition in *Illinois v. Gates*, 462 U.S. 213, 232, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983): "[P]robable cause is a fluid concept-turning on the assessment of probabilities in particular factual contexts-not readily, or even usefully, reduced to a neat set of legal rules." Just as judges consider the totality of the circumstances in determining whether probable cause exists to issue a search warrant, they must consider all of the circumstances then known to determine whether probable cause exists to conclude that a defendant's use of force was unlawful. If such cause does not exist, immunity must be granted and, conversely, if it does exist, the matter must proceed.

Because immunity is designed to relieve a defendant from the burdens of litigation, it is obvious that a defendant should be able to invoke KRS 503.085(1) at the earliest stage of the proceeding. While the trial courts need not address the issue *sua sponte*, once the defendant raises the immunity bar by motion, the court must proceed expeditiously. Thus a defendant may invoke KRS 503.085 immunity and seek a determination at the preliminary hearing in district court or, alternatively, he may elect to await the outcome of the grand jury

> proceedings and, if indicted, present his motion to the circuit judge. A defendant may not, however, seek dismissal on immunity grounds in both courts. Once the district court finds probable cause to believe that the defendant's use of force was unlawful, the circuit court should not revisit the issue. In the case of a direct submission or where a defendant has elected to wait and invoke immunity in the circuit court, the issue should be raised promptly so that it can be addressed as a threshold motion.
>
> The sole remaining issue is how the trial courts should proceed in determining probable cause. The burden is on the Commonwealth to establish probable cause and it may do so by directing the court's attention to the evidence of record including witness statements, investigative letters prepared by law enforcement officers, photographs and other documents of record. Although Rodgers advocates an evidentiary hearing at which the defendant may counter probable cause with proof "by a preponderance of the evidence" that the force was justified, this concept finds no support in the statute. The legislature did not delineate an evidentiary hearing and the only standard of proof against which a defendant's conduct must be measured is the aforementioned probable cause. We decline to create a hearing right that the statute does not recognize.

Rodgers, 285 S.W.3d at 754-55.

In light of *Rodgers*, there is no question that Appellant was not entitled to an evidentiary hearing. However, the trial court was mistaken in its belief that it could not or should not reconsider the evidence presented to the grand jury. Indeed, once Appellant raised the issue of immunity, she was entitled to a determination by the trial court of whether the Commonwealth could meet its burden of establishing that there was probable cause to conclude that the force used by Appellant was not legally justified. *Id*.

For the reasons discussed herein, judgment of the Bullitt Circuit Court convicting Appellant of reckless homicide is hereby reversed.

NICKELL, JUDGE, CONCURS.

LAMBERT, SENIOR JUDGE, DISSENTS.

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