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RENDERED: MARCH 20, 2008
NOT TO BE PUBLISHED

# Supreme Court of Kentucky

FINAL

DATE Apr 10, 08 E. A. Grow P.C.

2005-SC-000335-MR
2006-SC-000262-MR

LYLE PITSONBARGER — APPELLANT

V.

ON APPEAL FROM HENDERSON CIRCUIT COURT
HONORABLE STEPHEN HAYDEN, JUDGE
NO. 04-CR-000250

COMMONWEALTH OF KENTUCKY — APPELLEE

**MEMORANDUM OPINION OF THE COURT**

**AFFIRMING**

Seventeen-year-old Lyle Pitsonbarger[1] was proceeded against as a youthful offender[2] after being charged with murder. The district court conducted a probable cause hearing and transferred the case to the circuit court.[3] Pitsonbarger was tried and convicted of murder by a jury and sentenced to thirty-five years. He appeals his conviction as a matter of right in case no. 2005-SC-000335-MR. Case no. 2006-SC-000262-MR is an appeal of the trial court's denial of a motion for new trial in said case. This Court consolidated the two cases.

On May 24, 2004, Pitsonbarger was at Timothy Alderson's house. Ana Spore and Jeremy Keyes stopped by Alderson's to borrow a jack to change the oil in Spore's

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[1] Referred to as Lyle Pitsonbarger III in 2006-SC-000262-MR and Lyle W. Pitsonbarger in the indictment.

[2] KRS 640.010.

[3] KRS 635.020(4), when over 14, charged with a felony, and with a firearm, transfer is essentially automatic.

car. Pitsonbarger helped Keyes change the oil. Subsequently, Robert Pruitt (the victim), and David Westerman arrived at Alderson's house. There was testimony that Pitsonbarger and Pruitt got in an argument, apparently concerning comments Pruitt's brother had made about Pitsonbarger's father. The argument appeared to be over when Pruitt surprised Pitsonbarger with a punch in the face (described by witnesses as "cold-cocked"), breaking Pitsonbarger's nose and knocking him to the ground. Pitsonbarger got up and deflected a second blow before going towards the rear of Alderson's house. Pruitt did not follow but asked Spore for a ride home. The witnesses differed as to whether Pruitt was outside the car next to the front passenger door, or already in the front passenger seat talking to Alderson, when Pitsonbarger returned with a gun, raised the gun, pointed it at Pruitt, and fired three shots from a few feet away. Pruitt ran to a neighbor's yard two houses down and collapsed. Pruitt subsequently died from the gunshot wounds.

Pitsonbarger was taken to the hospital for treatment for his broken nose. There, his blood alcohol level measured .12. At the hospital, a detective took a 28 minute statement (subject of a pretrial motion to suppress) wherein Pitsonbarger confessed to the shooting. Describing the events, Pitsonbarger said that he told Pruitt to tell his (Pruitt's) brother to stop saying things about Pitsonbarger's dad, and that Pruitt said he would. Pitsonbarger said that he thought everything was fine, turned his head, and Pruitt punched him, knocking him down. Pitsonbarger said that when he got up after the first punch, Pruitt grabbed his throat and kept hitting him. Pitsonbarger said that he ran into the house and got Alderson's gun intending only to scare Pruitt away because he did not want to be hit anymore. Pitsonbarger said he did not know if the gun was loaded. Pitsonbarger stated that when he came back out of the house, Pruitt had got in

the car, but then got out, yelled something about killing him, and started coming towards him again. Pitsonbarger said he got scared, raised the gun, shut his eyes and fired.

After the case was transferred to the circuit court, a trial was initially set for September 8, 2004. On August 11, 2004, Pitsonbarger moved for a competency evaluation, which was granted. The Kentucky Correctional Psychiatric Center (KCPC) performed an evaluation and submitted a report dated December 8, 2004, and filed January 4, 2005. The report concluded that Pitsonbarger was competent to stand trial. On January 18, 2005, the trial was rescheduled for March 22, 2005.

On March 16, 2005, about a week before the date scheduled for trial, Pitsonbarger filed a motion for a two week continuance in order to have Dr. Eric Drogin, an expert retained by Pitsonbarger's family, evaluate Pitsonbarger and testify at trial. Dr. Drogin was scheduled to evaluate Pitsonbarger on March 20, 2005, but due to previous commitments, would not be available to testify until after April 3, 2005. The motion stated that it was anticipated that Dr. Drogin would testify that Pitsonbarger was suffering from diminished mental capacity at the time of the offense due to his youth and intoxication. The trial court heard arguments the next day, March 17. Defense counsel explained that the reason for waiting until so close to trial to retain the expert was that the family was hoping for an offer for a plea along with the family's lack of, and therefore having to borrow, funds for an independent expert. The prosecution asserted it communicated no deals from the very beginning. The Court denied the motion, primarily because Dr. Drogin had not even examined Pitsonbarger yet, and therefore there was no affidavit by the witness as to what he would testify to. RCr 9.04. Counsel stated he would file the affidavit Monday morning, March 21, 2005, as Dr. Drogin was

scheduled to examine Pitsonbarger on March 20, and would like to be heard on the motion again on March 21.

On March 21, 2005, Pitsonbarger filed an amended motion for a continuance, which included an affidavit from Dr. Drogin. The motion stated that Dr. Drogin had evaluated Pitsonbarger on March 20, 2005, and that Dr. Drogin would testify that Pitsonbarger's confession on May 24, 2004, may have been involuntarily given due to the fact that he was under the influence of alchohol (.12) and seventeen years old. Defense counsel anticipated that Dr. Drogin would testify at both the suppression hearing and the jury trial. The accompanying affidavit by Dr. Drogin, dated March 20, 2005, stated that the circumstances surrounding the confession - that Pitsonbarger was physically injured, highly intoxicated, and a minor bereft of the support and counsel of his parents when questioned by law enforcement - raise serious doubts as to his ability to provide a valid waiver of his rights. Dr. Drogin's affidavit also stated that the opportunity to compare the confession and signed waiver form with Pitsonbarger's childhood special education records would substantially augment his ability to proffer a forensic psychological opinion concerning the validity of the waiver. Following a hearing on March 21, 2005, the trial court denied the motion. However, the Commonwealth agreed to the reading of Dr. Drogin's March 20, 2005, affidavit for the jury, and said affidavit was, in fact, introduced as a defense exhibit at trial.

On the day of trial, the trial court held a hearing to decide Pitsonbarger's competency to stand trial and consider his motion to suppress his statements made to police. The court found Pitsonbarger competent to stand trial, denied the motion to suppress, and proceeded with trial. Pitsonbarger was convicted of murder and

sentenced to thirty-five years imprisonment. On appeal, Pitsonbarger alleges six errors by the trial court.

## I. DENIAL OF CONTINUANCE

First, Pitsonbarger alleges the trial court abused its discretion when it denied the motion for a continuance in order to have Dr. Drogin testify at trial. "The decision to delay trial rests solely within the court's discretion." Snodgrass v. Commonwealth, 814 S.W.2d 579, 581 (Ky. 1991), overruled on other grounds by Lawson v. Commonwealth, 53 S.W.3d 534 (Ky. 2001). Additionally,

> [f]actors the trial court is to consider in exercising its discretion are: length of delay; previous continuances; inconvenience to litigants, witnesses, counsel and the court; whether the delay is purposeful or is caused by the accused; availability of other competent counsel; complexity of the case; and whether denying the continuance will lead to identifiable prejudice.

Id.

The trial court explicitly considered the Snodgrass factors at the March 21, 2005, hearing on the amended motion for a continuance. In denying the motion, the trial court relied primarily on the following: the fact that the Commonwealth had subpoenaed 14 witnesses, the court's inability due to a full calendar to reschedule the trial until late June or early August of 2005 (with the incident having occurred ten months earlier in May, 2004), that the delay was due to the defendant's waiting until such a late date to retain the expert, and that Dr. Drogin's affidavit was still somewhat speculative as to what he would testify to (based on his statement regarding the childhood records).

In the present case, having considered the Snodgrass factors, we cannot say the trial court abused its discretion in denying a continuance for the reasons it stated. We further note that if funds were needed for an independent expert, the defense could

have requested funds from the trial court under KRS 31.110 rather than wait until the family could raise the funds for an independent evaluation.

**II. FAILURE TO GIVE INSTRUCTION ON IMPERFECT SELF DEFENSE**

Pitsonbarger's second argument is that the trial court erred by failing to give instructions on a theory of imperfect self defense. Pistonbarger concedes that this alleged error was not preserved, but requests review under RCr 10.26. Pitsonbarger was charged with an intentional homicide, murder (KRS 507.020). He was given an instruction on intentional murder; first-degree manslaughter (KRS 507.030); second-degree manslaughter (KRS 507.040); and was given a self-protection instruction under KRS 503.050, which allows the use of deadly physical force by a defendant who believes such force is necessary to protect himself against death or serious physical injury.

"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." Commonwealth v. Hager, 41 S.W.3d 828, 841-42 (Ky. 2001) (citing Elliott v. Commonwealth, 976 S.W.2d 416, 420 (Ky. 1998)). "Imperfect self-defense" does not provide for complete exoneration, but instead allows a jury to convict a defendant for a lesser offense, one for which wantonness or recklessness is the culpable mental state. Elliott, 976 S.W.2d at 420. Therefore,

> [i]f the charged offense is intentional murder or first-degree manslaughter, a wantonly held belief in the need for self-protection reduces the offense to second-degree manslaughter and a recklessly held belief reduces the offense to reckless homicide. If the charged offense is second-degree manslaughter, a recklessly held belief in the need for self-protection reduces the offense to reckless homicide.

Id. at 420 n.3.

Because the alleged error is unpreserved, we review only for palpable error under RCr 10.26. "A palpable error is one that 'affects the substantial rights of a party' and will result in 'manifest injustice' if not considered by the court." Schoenbachler v. Commonwealth, 95 S.W.3d 830, 836 (Ky. 2003) (citing RCr 10.26). "Manifest injustice" requires showing a "probability of a different result or error so fundamental as to threaten a defendant's entitlement to due process of law." Martin v. Commonwealth, 207 S.W.3d 1, 3 (Ky. 2006).

Under the facts of this case, had Pitsonbarger requested an imperfect self-defense instruction he would have been entitled to such. Hilbert v. Commonwealth, 162 S.W.3d 921 (Ky. 2005). It was, however, undisputed that Pruitt had, in fact, attacked Pitsonbarger just prior to the shooting. Further, "all KRS 503 justifications, including self-protection, are premised upon a defendant's actual subjective belief in the need for the conduct constituting the justification and not on the objective reasonableness of that belief." Hager, 41 S.W.3d at 842 (citing Elliott, 976 S.W.2d at 419) (emphasis added). The self-protection instruction Pitsonbarger received allowed for exoneration if the jury found Pitsonbarger used deadly physical force "if he believed it to be necessary" to protect himself from death or serious physical injury. Under this instruction, had the jury determined that Pitsonbarger held any subjective belief in the need to protect himself from death or serious physical injury (even if such belief were wanton or reckless), the jury would have been required to acquit Pitsonbarger, rather than convict him of a lesser included offense. In this case, it would have likely been the Commonwealth seeking the imperfect self-defense instruction in order to save their case. Therefore, we see no palpable error.

## III. DENIAL OF REQUEST FOR RECKLESS HOMICIDE INSTRUCTION

The third allegation of error is that the trial court erred in denying Pitsonbarger's request for a reckless homicide instruction.[4] "An instruction on a lesser-included offense is appropriate if and only if on the given evidence a reasonable juror could entertain reasonable doubt of the defendant's guilt on the greater charge, but believe beyond a reasonable doubt that the defendant is guilty of the lesser offense." Skinner v. Commonwealth, 864 S.W.2d 290, 298 (Ky. 1993). KRS 501.020(4) defines "recklessly" as follows:

> A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he fails to perceive 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 failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

The evidence in this case did not support a reckless homicide instruction. It was uncontroverted that Pitsonbarger pointed the gun at Pruitt from a few feet away and fired. We reject that in such a circumstance, one could fail to perceive a substantial and unjustifiable risk that serious injury or death will occur. Pitsonbarger's denial that he knew the gun was loaded, particularly in light of the fact the gun he fired was not his and had been in someone else's possession, does not change the analysis. Accordingly, the trial court did not err in declining to give a reckless homicide instruction.

## IV. EXCLUDED EVIDENCE REGARDING TIMOTHY ALDERSON

Pitsonbarger's fourth alleged error involves excluded evidence regarding Timothy Alderson. Pitsonbarger dropped the gun (a .22 pistol belonging to Alderson) after the shooting. Alderson was convicted of tampering with physical evidence and interfering

[4] This issue is preserved except as it relates to the issue of imperfect self defense. The defense tendered a reckless homicide instruction, which was denied by the trial court.

with the apprehension of Pistonbarger in connection with this case, apparently for putting the gun back in his house after the shooting and giving evasive answers to police as to his knowledge of the gun. On appeal, Pitsonbarger alleges that the trial court denied his confrontation right by denying him the right to cross-examine Alderson on the tampering conviction other than on avowal.[5] On appeal, Pitsonbarger alleges that this evidence was relevant to show Alderson's interest, bias, or motivation.

The trial court did allow the defense to ask Alderson if he was a convicted felon, to which he replied "I am now." Although the trial court would not allow the defense to specifically ask Alderson if he was convicted of tampering, or introduce a certified copy of the conviction, it did allow defense counsel to go into the specifics as to Alderson's actions in concealing the whereabouts of the gun used in the shooting, which was the basis for the tampering conviction. After a lengthy cross-examination on this issue, Alderson basically acknowledged these facts were what caused him to be a convicted felon. Accordingly, defense counsel was able to develop a clear picture for the jury that Alderson had been convicted of a felony in connection with this case for his actions involving the gun. We see no error in the trial court's rulings.

## V. EXCLUDED EVIDENCE OF PRUITT'S PRIOR ASSAULT CONVICTIONS

Pitsonbarger's fifth argument is that the trial court erred by excluding evidence that Pruitt had a prior history of assault convictions. This Court's opinion in Saylor v. Commonwealth, 144 S.W.3d 812, 815-16 (Ky. 2004), is instructive on this issue, wherein we stated:

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[5] Having reviewed the record, we first note that defense counsel's argument at trial as to the purpose of the avowal testimony did not pertain to the tampering conviction. The avowal testimony pertained to the trial court's precluding defense counsel from questioning Alderson as to the statements that Alderson had made to him when defense counsel interviewed him a few days after the shooting; that Pruitt was a bully and a convicted felon. While defense counsel brought out on avowal that Alderson was convicted of tampering, this related to why Alderson was in jail when defense counsel interviewed him.

> Appellant posits that whenever a claim of self-defense is asserted, any evidence tending to show that the victim was a violent person is admissible. He is mistaken. Generally, a homicide defendant may introduce evidence of the victim's character for violence in support of a claim that he acted in self-defense or that the victim was the initial aggressor. KRE 404(a)(2); Johnson v. Commonwealth, Ky., 477 S.W.2d 159, 161 (1972); Robert G. Lawson, The Kentucky Evidence Law Handbook § 2.15[4][b], at 104 (4th ed. LexisNexis 2003). However, such evidence may only be in the form of reputation or opinion, not specific acts of misconduct. KRE 405(a); Lawson, supra, § 2.20 [4], at 116 ("By providing only for the use of reputation or opinion evidence in this situation, the rule plainly implies a prohibition on evidence of particular acts of conduct."). Specifically, in Johnson, our predecessor court held that a homicide defendant could not introduce the victim's police record for the purpose of showing his propensity for violence. Johnson, 477 S.W.2d at 161.
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> An exception exists, however, when evidence of the victim's prior acts of violence, threats, and even hearsay evidence of such acts and threats, is offered to prove that the defendant so feared the victim that he believed it was necessary to use physical force (or deadly physical force) in self-protection, "provided that the defendant knew of such acts, threats, or statements at the time of the encounter." Lawson, supra, § 2.15[4][d], at 105-06. See also Commonwealth v. Higgs, Ky., 59 S.W.3d 886, 892 (2001); Commonwealth v. Davis, Ky., 14 S.W.3d 9, 14 (2000); Wilson v. Commonwealth, Ky.App., 880 S.W.2d 877, 878 (1994). In that scenario, the evidence is not offered to prove the victim's character to show action in conformity therewith but to prove the defendant's state of mind (fear of the victim) at the time he acted in self-defense. "Obviously, such evidence could not be used to prove fear by the accused without accompanying proof that the defendant knew of such matters at the time of the alleged homicide or assault." Lawson, supra, § 2.15[4][d], at 106 (citing Baze v. Commonwealth, Ky., 965 S.W.2d 817, 824-25 (1997)).

In this case, Pistonbarger did not testify, and there was no evidence presented that he knew of the assault convictions, as would allow their admission to prove his state of mind. Id. Rather, Pistonbarger argues that he should have been able to offer specific bad acts by the victim, Pruitt, through the doctrine of curative admissibility,

because the Commonwealth opened the door by admitting improper character evidence through Pruitt's fiancée, Elizabeth Collins. Collins was called as the Commonwealth's second witness. After asking Collins a few general questions about her relationship with Pruitt, and asking her to tell about Pruitt and what Pruitt liked to do, the prosecutor asked, "What about his disposition, his attitude about others?" to which she replied, "He's always accepted by others around him. Always in good terms with people around him, most of the time." In his cross-examination of Alderson, defense counsel argued that the prosecutor opened the door through this inquiry, and as a result he should be allowed to question Alderson concerning the fact that Pruitt had six prior assault convictions.

The trial court found, and we agree, that the prosecutor opened the door with this inadmissible evidence. We also agree with the trial court that curative inadmissible evidence could therefore be admitted. The trial court specifically stated it would allow Alderson to be questioned about specific assaults if he knew about them. The problem was Alderson turned out to be a hostile witness and denied knowing much about Pruitt's reputation for violence, etc. Therefore, defense counsel was at a dead end. While defense counsel informed the trial court that he had certified copies of the convictions, he never moved to admit the certified convictions into the record, nor attempted to introduce them by avowal. Therefore, the trial court committed no error.

## VI. ADMISSION OF HEARSAY STATEMENTS OF THE VICTIM

Pitsonbarger's sixth and final allegation of error is that the trial court erred in admitting hearsay statements of Pruitt. Over objection, Ana Spore testified that after Pruitt punched Pitsonbarger in the face, Pitsonbarger asked Pruitt what he did that for, and Pruitt said, "Nobody says they're going to kill my brother. Nobody." Spore went on

to testify that Pitsonbarger responded by saying, "I didn't say I was going to, I said my dad was going to." Pitsonbarger argues that Pruitt's statement was inadmissible hearsay and prejudicial as it contradicted his statement to police (which was played for the jury) that he only threatened to "whoop [Pruitt's brother's] ass" if the brother kept saying things about Pitsonbarger's dad.

Pruitt's statement was hearsay, not falling under any exception. However, because Spore went on to testify that Pitsonbarger denied making such a statement ("I didn't say I was going to, I said my dad was going to"), this served to minimize any prejudice resulting from the admission of Pruitt's hearsay statement. Therefore, under the totality of the circumstances, the error is harmless because there is no reasonable possibility it affected the verdict.

## VII. CASE NO. 2006-SC-000262-MR

In the second appeal, no. 2006-SC-000262-MR, the Commonwealth argues that this Court did not have jurisdiction to grant a belated appeal of the trial court's denial of the motion for new trial, which was entered on May 23, 2005, and consolidated with the matter of right appeal. We disagree. The guilty verdict was returned on March 24, 2005. Prior to sentencing, Pitsonbarger filed motions and an amended motion for a new trial under RCr 10.02. On April 18, 2005, the trial court held a sentencing hearing and sentenced Pitsonbarger to 35 years. The judgment was not entered until April 26, 2005. After the verdict and before judgment, Pitsonbarger twice refiled his RCr 10.02 motion for a new trial, noticing different dates for a hearing. Pitsonbarger filed a notice of appeal on April 27, 2005. After judgment was entered and a notice of appeal was filed, Pitsonbarger filed a second amended motion for a new trial under RCr 10.06. On May 23, 2005, the trial court entered an order denying Pitsonbarger's RCr 10.02 motion for a

new trial (the post-verdict pre-judgment motion, not the post-judgment RCr 10.06 motion).[6] Our Court granted and consolidated the appeal of the pre-judgment RCr 10.02 denial of a new trial, which was proper. See Cardine v. Commonwealth, 102 S.W.3d 927 (Ky. 2003); Johnson v. Commonwealth, 17 S.W.3d 109 (Ky. 2000).

Case No. 2006-SC-000262-MR pertains to Pitsonbarger's motion for a new trial. As grounds, Pistonbarger alleged that one of the eyewitnesses, Ana Spore, committed perjury at trial. The motion was based upon an affidavit from an individual, Barry Bugg, claiming Spore told him a different version of the events on the night of the shooting than she testified to at trial. At trial, Spore testified that after Pruitt punched Pitsonbarger, Pitsonbarger took off towards the back of the house, returned with the gun, and shot Pruitt. Bugg's affidavit states that Spore told him that after punching Pitsonbarger, Pruitt had continued to beat and choke Pitsonbarger on the ground, and when Pitsonbarger got away, Pruitt yelled at Pitsonbarger to, "Get back here so I can go ahead and finish you off." Bugg's affidavit also stated that Spore told him that Pitsonbarger never went in the house, but that Alderson went into the house, came out with the gun, and gave it Pitsonbarger, and told him to "handle his business." Bugg's affidavit explained that he did not know Spore testified otherwise at trial until he read about it in the newspaper. The motion argued that had this evidence been presented at trial, Pitsonbarger would not have been convicted of murder, and possibly acquitted. The Commonwealth subsequently filed a counter-affidavit from Spore wherein she denied Bugg's contentions.

[6] Technically, the sentencing and entering of a final judgment was a denial of all pending motions for a new trial. The subsequent order of May 23, 2005, did not change things. Our order granting a belated appeal is of the denial by the trial court of the motion under RCr 10.02, not from the order of May 23, 2005. Therefore, there is no problem with jurisdiction under Johnson, 17 S.W.3d 109.

"[F]or newly discovered evidence to support a motion for new trial in a criminal case it must be of such decisive value or force that it would with reasonable certainty, change the verdict or that it would probably change the result if a new trial [were] granted." Coots v. Commonwealth, 418 S.W.2d 752, 754 (Ky. 1967); see also Caldwell v. Commonwealth, 133 S.W.3d 445, 454-55 (Ky. 2004). There were four eyewitnesses (Spore, Keyes, Alderson, and Westerman) to the events in this case. In light of the testimony from the other three eyewitnesses, and Spore's denial of Bugg's contentions, we cannot say this new evidence would with reasonable certainty change the verdict or change the result if a new trial were granted. Accordingly, the trial court did not abuse its discretion in denying the motion.

For the aforementioned reasons the judgment of the Henderson Circuit Court and its order denying Pitsonbarger's motion for a new trial are affirmed.

All sitting. All concur.

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