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RENDERED: JUNE 20, 2013
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2011-SC-000699-MR

JOHN BELDEN — APPELLANT

V.

ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE IRVIN G. MAZE, JUDGE
NOS. 09-CR-001634 AND 09-CR-002654

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING, IN PART, AND REVERSING AND REMANDING, IN PART

John E. Belden received a 39-year prison sentence for his convictions for first-degree manslaughter while acting under the influence of extreme emotional disturbance (EED), second-degree assault under EED, and three counts of first-degree wanton endangerment. He now appeals to this Court as a matter of right,[1] contending (1) his convictions for both first-degree manslaughter under EED and first-degree wanton endangerment violate double-jeopardy principles, (2) his convictions for both second-degree assault under EED and first-degree wanton endangerment violate double-jeopardy principles, and (3) he was entitled to jury instructions on second-degree wanton endangerment regarding each victim.

[1] Ky. Const. § 110(2)(b).

We affirm Belden's convictions for second-degree assault under EED and first-degree wanton endangerment. We reverse Belden's conviction for first-degree manslaughter because of an instructional error and remand the case to the trial court for further proceedings.

I. FACTUAL AND PROCEDURAL BACKGROUND.

Belden and Phillip Washington worked together and shared an apartment. The events giving rise to the present case began when these two men got into an argument over the phone while Washington was away from their apartment attending a party. Washington rode home from the party with Natasha Johnson and Dominique Sutton. He rode in the backseat along with Johnson's daughter, Samyah, and Sutton's daughter, Jocelyn.[2]

Upon Washington's arrival at the shared apartment, Washington and Belden resumed their argument. Their confrontation escalated with Washington pulling a pocket knife and Belden grabbing an expandable baton while the men yelled and cursed one another. As Washington reentered the car to leave with Johnson and Sutton, he threatened to harm Belden as he slept. Belden then struck Washington with the baton. Washington got into the back seat and shut the car door, taunting Belden all the while. Belden grabbed Washington, attempting to pull him out of the car. Washington then stabbed Belden in the chest with the pocket knife.

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[2] The name of Sutton's daughter has been replaced with a pseudonym to preserve her privacy.

At this point, Johnson and Sutton were outside the car; but the two children remained in the back seat. Washington climbed into the driver's seat and tried to run Belden down with the car. Belden jumped up as the car approached, hit the windshield, and rolled off the car onto the pavement. Washington then turned the car around to face Belden, who pulled out a gun and fired a shot at the car but missed.

Washington then fled in the car with the children still in the back seat. Belden mounted his motorcycle and chased Washington. When he caught up to Washington, Belden fired another shot, this time striking Washington in the right shoulder. Washington drove on but soon lost control of the car, which veered off the side of the road, flipped, and struck a tree.

Samyah died from the injuries she sustained in the car crash. Jocelyn was treated for a broken collar bone and made a complete recovery. Washington sustained cuts on his leg and face in addition to the gunshot wound, and he was discharged from the hospital the same day.

A grand jury indicted Belden for Samyah's murder (under both intentional and wanton theories), attempted murder, first-degree criminal mischief, third-degree criminal mischief, tampering with physical evidence, violating a protective order by possessing a gun, two counts of first-degree assault, and seven counts of first-degree wanton endangerment. The trial court granted Belden's motion to sever for separate trial the charge of violating a protective order. The trial court also granted the Commonwealth's motion to

amend the first-degree assault charge concerning Jocelyn to second-degree assault and to dismiss four other counts from the indictment.

At trial, the jury convicted Belden of first-degree manslaughter under EED, second-degree assault under EED regarding Washington, and three counts of first-degree wanton endangerment (one count for each occupant of the car).[3] The jury recommended 20 years' imprisonment for first-degree manslaughter, 4 years' imprisonment for second-degree assault under EED, and 5 years' imprisonment for each count of first-degree wanton endangerment, to run consecutively for a total sentence of 39 years in prison. The trial court sentenced Belden in accordance with the jury's recommendation.

II. ANALYSIS.

Belden raises three issues on appeal. He argues that (1) his convictions for both first-degree manslaughter under EED and first-degree wanton endangerment violate double-jeopardy principles, (2) his convictions for both second-degree assault under EED and first-degree wanton endangerment violate double-jeopardy principles, and (3) he was entitled to jury instructions on second-degree wanton endangerment regarding each victim. In reviewing Belden's double-jeopardy claim concerning his first-degree manslaughter and

[3] The jury was instructed on murder, first- and second-degree manslaughter, reckless homicide, criminal attempt to commit murder, criminal attempt to commit murder under EED, first- and second-degree assault regarding Washington, first- and second-degree assault under EED regarding Washington, second-degree assault concerning Jocelyn, three counts of first-degree wanton endangerment, and tampering with physical evidence.

first-degree wanton endangerment convictions, we have encountered a blatant error with the first-degree manslaughter instruction that compels reversal. We discuss this error first.

A. The Jury Instruction for First-Degree Manslaughter was Erroneous.

The jury found Belden guilty of first-degree manslaughter regarding Samyah, and Belden received a sentence of 20 years' imprisonment for this conviction. But the jury instructions on first-degree manslaughter were erroneous, an issue that Belden does not raise on appeal. We ordinarily "will not engage in palpable error review pursuant to [Kentucky Rules of Criminal Procedure (RCr)] 10.26 unless such a request is made and briefed by the appellant."[4] But this case presents one of those "extreme circumstances amounting to a substantial miscarriage of justice"[5] that requires review despite Belden's failure to raise the argument.

A person is guilty of first-degree manslaughter when "[w]ith intent to cause the death of another person, he causes the death of such person or of a third person under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance . . . ."[6] So in order to find Belden guilty of first-degree manslaughter, the jury would have been required to find that Belden intended to cause the death of Samyah or someone

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[4] *Shepherd v. Commonwealth*, 251 S.W.3d 309, 316 (Ky. 2008) (citations omitted).

[5] *Id.*

[6] Kentucky Revised Statutes (KRS) 507.030(1)(b). A person is also guilty of first-degree manslaughter when "[w]ith intent to cause serious physical injury to another person, he causes the death of such person or of a third person[.]" KRS 507.030(1)(a).

else; he caused Samyah's death; and he did so while acting under the influence of EED.

Instead, the jury instruction required the following:

> [Y]ou will find [Belden] guilty of Manslaughter in the First Degree under this Instruction, if and only if, you believe from the evidence beyond a reasonable doubt all of the following:
>
> A. That in Jefferson County on or about the 31st day of May, 2009, he caused the death of [Samyah], by shooting a firearm at a car wherein she was a passenger, causing it to crash;
>
> AND
>
> B. That in so doing, he was wantonly engaging in conduct as defined in Instruction No. 13 which created a grave risk of death to another and thereby caused the death of Samyah under circumstances manifesting an extreme indifference to human life;
>
> AND
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> C. He was not privileged to act in self-protection or for the protection of others;
>
> AND
>
> D. That at the time he did so, [Belden] was acting under the influence of extreme emotional disturbance.

This jury instruction required the jury to find that Belden wantonly engaged in conduct that created a grave risk of death to another, thereby causing Samyah's death under circumstances manifesting an extreme indifference to human life. But these are the elements of wanton murder rather than first-degree manslaughter. A person is guilty of wanton murder when "under circumstances manifesting extreme indifference to human life, he

wantonly engages in conduct which creates a grave risk of death to another person and thereby causes the death of another person."[7]

But we cannot say that the jury convicted Belden of wanton murder because the instruction also required the jury to find that Belden was acting under the influence of EED. There is no such crime as wanton murder under EED. A person who commits an intentional murder while under the influence of EED is guilty of first-degree manslaughter.[8] But the Kentucky penal code does not recognize a crime of wanton murder committed under the influence of EED.[9]

> [E]xtreme emotional disturbance statutorily plays no role in . . . wanton murder under KRS 507.020(1)(b). Extreme emotional disturbance under our code affects one's formation of the *specific* intent to murder[;] but as KRS 507.020 is drafted, it has no carry-over application to one's *wanton* behavior in creating a grave risk of death.[10]

So the jury found Belden guilty under an instruction that claimed to be for first-degree manslaughter and sentenced him as if he were convicted of first-degree manslaughter. But the instruction included the elements for wanton murder, plus an element of EED, which is not a cognizable crime under Kentucky's penal code. Although Belden does not raise this issue on

[7] KRS 507.020(1)(b).

[8] KRS 507.030(1)(b). A person who commits an intentional murder while not under the influence of EED is guilty of murder under KRS 507.020(1)(a).

[9] *See* LESLIE W. ABRAMSON, KENTUCKY PRACTICE, *SUBSTANTIVE CRIMINAL LAW* § 4:9 (2012-2013) ("An instruction on extreme emotional disturbance . . . serves as a mitigating factor to reduce an intentional murder charge to first-degree manslaughter . . . .; 40 Am.Jur.2d *Homicide* § 105 ("Extreme emotional distress is only a defense to intentional murder; it is not a defense to . . . wanton murder . . . .") (citations omitted).

[10] *Todd v. Commonwealth*, 716 S.W.2d 242, 246 (Ky. 1986).

appeal, we cannot overlook an instructional error of this magnitude. Reversal of Belden's first-degree manslaughter conviction is required.[11]

B. Belden's Convictions for Both Second-Degree Assault Under EED and First-Degree Wanton Endangerment do not Violate Double-Jeopardy Principles.

The jury found Belden guilty of both second-degree assault under EED and wanton endangerment regarding victim Washington. The wanton endangerment charge was based on Belden's act of firing a gun at the car Washington drove, and the assault charge was based on Belden's act of shooting Washington in the right shoulder. Belden contends that his convictions for these offenses violate double-jeopardy principles.[12]

The Double Jeopardy Clause of the Fifth Amendment of the U. S. Constitution provides, in pertinent part, that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb[.]" Section 13 of the Kentucky Constitution is nearly identical to, and provides protections that parallel those provided in, the Fifth Amendment.[13] And the General Assembly codified these principles in Kentucky Revised Statutes (KRS) 505.020.[14]

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[11] Because we reverse Belden's first-degree manslaughter conviction, we need not address his argument that his conviction for both first-degree manslaughter and first-degree wanton endangerment violate double-jeopardy principles, except to the extent that former jeopardy dictates the crimes for which Belden can be retried on remand. We discuss the former-jeopardy issue below.

[12] Belden did not preserve this issue for appellate review; but we "have long held that double[-]jeopardy questions may be reviewed on appeal, even if they were not presented to the trial court." *Mullikan v. Commonwealth*, 341 S.W.3d 99, 102 (Ky. 2011) (citations and internal quotations omitted).

[13] *Commonwealth v. Burge*, 947 S.W.2d 805, 809 (Ky. 1996) (citation omitted).

[14] *Grundy v. Commonwealth*, 25 S.W.3d 76, 85 (Ky. 2000).

Double-jeopardy principles protect an accused from being prosecuted or sentenced multiple times for the same offense.

Kentucky uses the *Blockburger*[15] double-jeopardy test. "[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."[16] The *Blockburger* test "focuses on the proof necessary to prove the *statutory* elements of each offense, rather than on the actual evidence presented at trial."[17] So the test can be satisfied despite substantial overlap in the evidence used to prove the offenses.[18]

Here, Belden was convicted of second-degree assault under EED and first-degree wanton endangerment. We must determine whether the applicable statutory provisions require proof of at least one fact that the other does not. A person is guilty of second-degree assault when "[h]e intentionally causes physical injury to another person by means of a deadly weapon or a dangerous instrument[.]"[19] And a defendant is allowed to show in mitigation that he acted under the influence of EED.[20]

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[15] *Blockburger v. United States*, 284 U.S. 299 (1932).

[16] *Id.* at 304 (citation omitted).

[17] *Polk v. Commonwealth*, 679 S.W.2d 231, 233 (Ky. 1984) (citations and internal quotations omitted).

[18] LESLIE W. ABRAMSON, 8 KENTUCKY PRACTICE, *CRIMINAL PRACTICE AND PROCEDURE* § 14:16 (2012-13).

[19] KRS 508.020(1)(b). A person is also guilty of second-degree assault when . . . [h]e intentionally causes serious physical injury to another person; or . . . [h]e wantonly causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument." KRS 508.020(1)(a) and (c). The jury here was

"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."[21]

Second-degree assault requires a physical injury while first-degree wanton endangerment does not. And first-degree wanton endangerment requires both circumstances manifesting extreme indifference to the value of human life and conduct that creates a substantial danger of death or serious physical injury, which second-degree assault does not require.[22] Accordingly, these two statutes satisfy the *Blockburger* test.[23]

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not instructed under the first subsection of KRS 508.020. And subsection (c) of the second-degree assault statute is not at issue here because it does not allow the defendant to show he acted under the influence of EED. KRS 508.040(1).

We acknowledge that the instruction given to the jury for second-degree assault under EED was erroneous for multiple reasons. First, it was labeled as first- or second-degree assault under EED; but it only listed the elements for the second-degree of this offense. Second, it allowed the jury the option of finding that Belden intentionally caused physical injury to Washington by use of a deadly weapon while acting under the influence of EED or that Belden wantonly caused a physical injury by use of a deadly weapon while acting under the influence of EED. The wanton theory of second-degree assault was erroneously given because (1) a defendant is not allowed to show the mitigating factor of EED for this theory of the crime, KRS 508.040(1); and (2) it only required a physical injury instead of a serious physical injury. Belden does not raise this issue on appeal, and we decline to review it because it does not lead to a substantial miscarriage of justice. *Shepherd*, 251 S.W.3d at 316.

[20] KRS 508.040(1).

[21] KRS 508.060(1).

[22] Belden argues the convictions violate double jeopardy because the conduct that created the danger is what actually led to the physical injury. But we note that second-degree assault under EED requires only physical injury while first-degree wanton endangerment requires conduct creating a risk of *serious* physical injury.

[23] We reject Belden's argument that *Alexander v. Commonwealth*, 766 S.W.2d 631 (Ky. 1988), and *Port v. Commonwealth*, 906 S.W.2d 327 (Ky. 1995), require a different result. These cases are not on point as neither one analyzes the application

Our conclusion on this point corresponds with our holding in *Matthews v. Commonwealth*.[24] In that case, Matthews claimed that his convictions for both fourth-degree assault[25] and first-degree wanton endangerment regarding the same victim violated double-jeopardy principles. We held that there was no double-jeopardy violation. "Assault in the fourth degree requires a finding of physical injury, whereas wanton endangerment does not. Wanton endangerment requires conduct which creates a substantial danger of death or serious physical injury to another, whereas fourth-degree assault does not." The same reasoning applies to Belden's convictions for second-degree assault under EED and first-degree wanton endangerment.

C. Belden was not Entitled to Second-Degree Wanton Endangerment Instructions.

The trial court instructed the jury on three counts of first-degree wanton endangerment—one count for each victim/occupant of the car. Belden argues that the trial court erroneously declined to instruct the jury on the lesser-included offense of second-degree wanton endangerment for each victim.[26] We disagree.

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of double-jeopardy principles to convictions for both assault and wanton endangerment.

[24] 44 S.W.3d 361, 365 (Ky. 2001).

[25] "A person is guilty of assault in the fourth degree when: (a) He intentionally or wantonly causes physical injury to another person; or (b) With recklessness he causes physical injury to another person by means of a deadly weapon or a dangerous instrument." KRS 508.030(1).

[26] This argument is preserved for appeal.

A trial court must instruct a jury on all offenses that the evidence supports.[27] But "[a]n instruction on a lesser[-]included offense is appropriate if, and only if, on the given evidence a reasonable juror could entertain a reasonable doubt as to the defendant's guilt of the greater offense, but believe beyond a reasonable doubt that the defendant is guilty of the lesser offense."[28]

"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."[29]

In contrast, "[a] person is guilty of wanton endangerment in the second degree when he wantonly engages in conduct which creates a substantial danger of physical injury to another person."[30]

We have recently summarized the differences between the two degrees of wanton endangerment as follows:

> The differences between first- and second-degree wanton endangerment are the mental state and degree of danger created. As to the mental state, both crimes require wanton behavior, but first-degree also requires 'circumstances manifesting extreme indifference to the value of human life,' which has been described as 'aggravated wanton[n]ess.' As to the danger created, first-degree requires a substantial danger of death or serious physical injury, whereas second-degree requires only a substantial danger of physical injury.[31]

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[27] *Clark v. Commonwealth*, 223 S.W.3d 90, 93 (Ky. 2007) (citation omitted).

[28] *Taylor v. Commonwealth*, 995 S.W.2d 355, 362 (Ky. 1999) (citations omitted).

[29] KRS 508.060(1).

[30] KRS 508.070(1).

[31] *Swan v. Commonwealth*, 384 S.W.3d 77, 102 (Ky. 2012) (citation omitted).

Belden argues that the jury could have had a reasonable doubt that his conduct showed an extreme indifference to the value of human life. He reasons that the jury could have concluded that he was unable to form the mental culpability of aggravated wantonness because he was acting under the influence of extreme emotional disturbance.

This argument is baseless for two reasons. First, extreme indifference to the value of human life—"aggravated wantonness"—is determined by the circumstances of the crime, not the defendant's mental state. The mental state for both degrees of wanton endangerment is wantonness. A person acts wantonly when he is aware of and consciously disregards a substantial and unjustifiable risk.[32] We refer to the wantonness in first-degree wanton endangerment as "aggravated" because the defendant's conduct must also show extreme indifference for human life. This is determined by the dangerousness of the circumstances surrounding the defendant's crime.[33]

This concept is demonstrated by the commentary to KRS 508.060, which states that creation of the two degrees of wanton endangerment "is necessitated by the wide differences in dangerousness that exist with the various types of wanton conduct. For example, aimlessly firing a gun in public is not as wanton in degree as firing a gun into an occupied automobile and should not carry the same criminal sanction." These examples show that

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[32] KRS 501.020(3).

[33] *See Combs v. Commonwealth*, 652 S.W.2d 859, 861 (Ky. 1983) ("[W]e hold that a reasonable juror could not doubt that Combs acted wantonly under *circumstances which manifested* an extreme indifference to the value of human life . . . .") (emphasis added).

"aggravated" wantonness is determined by the dangerousness created by the defendant's wanton conduct. Here, Belden fired a gun at the driver of an automobile that also contained two passengers. This conduct showed extreme indifference to the value of human life regardless of whether the jury believed that Belden was acting under EED.

Second, acting under the influence of EED does not mitigate a defendant's wanton conduct. A defendant may establish in mitigation that he acted under the influence of EED for crimes of intent. As discussed above, EED is not a mitigating factor for wanton murder. And it is only relevant in assault charges "in which intentionally causing physical injury or serious physical injury is an element of the offense[.]"[34] EED plays no role in crimes with mental states other than "intentional," including first- or second-degree wanton endangerment, which both require the mental state of wantonness.[35]

Accordingly, the trial court did not err in refusing to instruct the jury on second-degree wanton endangerment for the three victims.

D. Double-Jeopardy Issues Likely to Arise on Remand.

We affirm Belden's convictions for second-degree assault under EED and wanton endangerment, but we reverse Belden's conviction for first-degree

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[34] KRS 508.040(1).

[35] To the extent that Belden claims the jury could have concluded that he did not consciously disregard a substantial and unjustifiable risk that he was creating a danger of death or serious physical injury to the victims, this speaks more to his ability while under EED to comprehend the danger and consciously disregard it. If this argument were correct (which it is not), this would defeat the element of wantonness altogether. But wantonness is an element of second-degree wanton endangerment, as well. So we cannot see how this reasoning supports Belden's argument that he was entitled to an instruction on the lesser-included offense.

manslaughter and remand for further proceedings. This raises the issue of what charges can and cannot be retried under double-jeopardy principles.

Generally, retrial after an appellate court reverses a conviction is not barred by double-jeopardy principles.[36] There are two exceptions to this general rule:

> (1) [T]he double jeopardy clause precludes retrial 'once the reviewing court has found the evidence legally insufficient' to support the conviction[]; and (2) [T]he 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.[37]

This second exception, which has been referred to as acquittal by implication, does not preclude retrial on lesser-included offenses upon reversal of a conviction for a greater offense.[38] Accordingly, double-jeopardy principles do not prevent Belden's retrial for first-degree manslaughter and all of the potential lesser-included offenses for that charge, which are second-degree manslaughter and reckless homicide.

This conclusion is unaffected by the jury's error in the present case of completing the not-guilty portions of the verdict forms of the lesser-included offenses after finding Belden guilty of first-degree manslaughter. The trial court's instructions to the jury clearly directed the jury to determine Belden's guilt of the lesser-included offenses only if the jury found Belden not guilty of

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[36] *Couch v. Maricle*, 998 S.W.2d 469, 471 (Ky. 1999) (citation omitted).

[37] *Id.* (citations and internal quotations omitted).

[38] *McGinnis v. Wine*, 959 S.W.2d 437, 439 (Ky. 1998) ("[T]he concept of acquittal by implication climbs up the ladder, not down.")

the greater offenses. We have held that the jury's mistake in proceeding to find a defendant not guilty of the lesser-included offenses does not bar retrial of the lesser-included offenses.[39] By finding a defendant guilty of a greater offense, a jury necessarily concludes that all of the elements of the lesser-included offenses were present. "By proceeding beyond its instructions and authority, the additional verdicts amount[] to no more than mere surplusage."[40]

Retrial of wanton murder is a different question. At trial, the jury was given a series of instructions for the charge of murder and its lesser-included offenses, beginning with wanton murder. The instruction was erroneous because it required the jury to find that Belden was not acting under EED, a mitigating factor available for the defendant to present for certain crimes, of which wanton murder is not one. But apart from the addition of EED, the instruction included all the requisite elements of wanton murder. And, in finding Belden not guilty under this instruction, the jury necessarily concluded that all elements of wanton murder were not present. As such, Belden cannot be later retried for wanton murder.

Additionally, retrial for first-degree manslaughter[41] is not similarly barred because of Belden's first-degree wanton endangerment conviction

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[39] *Id.* at 438-40.

[40] *Id.* at 439.

[41] "A person is guilty of manslaughter in the first degree when: (a) With intent to cause serious physical injury to another person, he causes the death of such person or of a third person; or (b) With intent to cause the death of another person, he causes the death of such person or of a third person under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance[.]" KRS 507.030(1).

regarding Samyah. The two statutes satisfy the *Blockburger* test because each requires proof of at least one element that the other does not require. First-degree wanton endangerment requires conduct that creates a substantial danger of death or serious physical injury under circumstances manifesting extreme indifference to the value of human life while first-degree manslaughter does not. And first-degree manslaughter requires the death of a person, while first-degree wanton endangerment does not.

III. CONCLUSION.

We affirm Belden's convictions for second-degree assault under EED and first-degree wanton endangerment. We reverse Belden's conviction for first-degree manslaughter of Samyah. On remand, double-jeopardy principles do not prevent Belden's retrial for first-degree manslaughter and the lesser-included offenses of second-degree manslaughter and reckless homicide regarding Samyah.

All sitting. All concur.

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