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RENDERED: JUNE 19, 2014
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2013-SC-000145-MR

SETH WALLEN — APPELLANT

V.

ON APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE JOHN L. ATKINS, JUDGE
NO. 10-CR-00586

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Seth Wallen, appeals his conviction and sentence for murder. He alleges that the trial court erred when it refused to instruct the jury on lesser included offenses of murder and theories of self-protection. For the reasons set forth herein, the Court affirms his conviction and sentence.

I. Background

On the afternoon of October 9, 2010, Corey "Ike" Trice was visiting his friend Taquain Earthman at his home on 1811 Oak Street in Christian County. Trice had been at Earthman's home for only a short time when a green truck with a black hood pulled up and parked facing uphill on the street in front of the residence. A white male got out of the car. At trial, Earthman identified the man in the vehicle as Wallen.

Trice, seemingly familiar with Wallen, remarked "That's my boy. I used to work with him," and went outside. Trice returned a few minutes later and sat

inside for a time before stating he was going to his mother's house, which was nearby. After Trice left, Earthman saw the green truck go up the street and turn around before returning and parking facing downhill. Shortly thereafter, Earthman heard two gunshots. From his home, he saw Wallen get into the truck and quickly drive away. Earthman immediately went outside to investigate the disturbance and saw Trice lying in a neighbor's back yard suffering from a gunshot wound. Trice died as a result of his injuries.

A neighbor, Dorothy Smith, also witnessed the crime. Smith, who lived next door to Earthman, had been standing at her kitchen window, which overlooked Oak Street, at the time of the shooting. Smith had observed a truck, with a white man driving, pull up and park facing downhill. She saw a black man approach the truck and saw the two men begin to talk. She testified she had heard "a couple of gunshots" after she observed the two men, but had not heard any yelling or commotion before the shots.

Police recovered two shell casings and a bullet from the scene, but the best lead came from the descriptions of the truck at the scene. Earthman was able to particularly describe the truck as a green Chevy S-10 pickup truck with a black hood. This description eventually led investigators to Wallen's step-father, the owner of the truck, with whom Wallen shared a home along with his mother.

In an interview at police headquarters, Wallen initially denied driving the truck, claiming he did not have a driver's license. He admitted to knowing Trice, but claimed he did not know him very well. He told investigators he

smoked marijuana daily and stated that he usually went to the area where the shooting occurred once or twice a week to buy drugs. Prompted by Wallen's answer, investigators asked how he was able to get to the neighborhood to buy drugs. Wallen, confronted with this information, admitted he drove the truck to the neighborhood, but stated he did not drive it often.

Investigators continued to question Wallen about his activities in the neighborhood. Wallen eventually admitted to visiting the neighborhood on either the Thursday or Friday of the week before the shooting. He stated that Thursday had been the last time he had spoken to Trice and that he had purchased $25 worth of marijuana from him, even though Trice had cheated him in the past. Wallen stated that he discovered what he had been sold "wasn't good weed" when he got home.

As the interview continued, new details about the shooting emerged. Wallen told investigators he had bought a pound of marijuana from Trice for $1200. Wallen said when he got home, he discovered that Trice had cheated him—the marijuana was "light" (not a pound) and not good quality. Wallen called Trice several times, but said he would not answer. When he was finally able to make contact with Trice, Trice stated he was not going to do anything about the marijuana but agreed to meet with Wallen.

Wallen told investigators that he had taken a handgun, which he described as a "burner," when he went to meet Trice. When asked why he brought a gun, Wallen stated, "Well, actually at first it was to protect myself, but then he started talking some shit and it pissed me off." Wallen went on to

say that when he got to Oak Street, he had parked behind Trice's car and that Trice had come out to talk to him. He asked Trice if he was going to do anything about the bad weed and that Trice had answered, "Fuck you; I ain't doing shit." Wallen then admitted he pulled out the gun and shot Trice, stating, "I just pulled it out and pulled the trigger twice." Wallen indicated he and Trice were facing one another a short distance apart at the time of the shooting. After the shooting, he "freaked out" and left in the truck.

Investigators also asked Wallen if he felt he was in danger at the time he met with Trice. Wallen stated, "I wasn't in fear for my life I was just, I just knew he could be packing too, a lot of people are." Wallen was asked if "[t]he main thing is he shorted you how many ounces?" to which he responded, "Just one ounce. But it was $600 worth of weed." He was directly asked if Trice threatened him. He answered, "No, just fuck you, you ain't getting shit from me." When asked if Trice threatened to physically hurt him, Wallen shook his head side to side to indicate he had not.

Wallen's statements to police were introduced at trial. He was convicted of wanton murder and sentenced to twenty-five years' imprisonment. He appeals to this Court as a matter of right. *See* Ky. Const. § 110(2)(b).

II. Analysis

In the present case, the trial court instructed on intentional murder and wanton murder. Wallen claims he was also entitled to instructions on first-degree manslaughter and second-degree manslaughter as lesser included

offenses. He also claims that he was entitled to instructions on self-defense and imperfect self-defense.

A. Wallen was not entitled to instructions on lesser included offenses.

"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). This duty also applies to lesser included offenses. *Hudson v. Commonwealth*, 202 S.W.3d 17, 20 (Ky. 2006). But no instruction is appropriate unless supported by evidence; thus, we have held "[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 of the defendant's guilt on the greater charge, but believe beyond a reasonable doubt that the defendant is guilty of the lesser offense." *Osborne v. Commonwealth*, 43 S.W.3d 234, 244 (Ky. 2001).

Appellate courts apply the "reasonable juror" standard to claims that a trial court has erred by refusing to instruct on a lesser included offense. *Allen v. Commonwealth*, 338 S.W.3d 252, 255 (Ky. 2011). "Considering the evidence favorably to the proponent of the instruction, [an appellate court asks] ... whether a reasonable juror could acquit of the greater charge but convict of the lesser." *Id.*

As the facts of this case have been presented to the Court,[1] an instruction on first-degree manslaughter would have been justified if the evidence showed that Wallen "[w]ith intent to cause serious physical injury to another person, ... cause[d] the death of such person or of a third person." KRS 507.030(1)(a). The offense is distinguished from murder in that the defendant need not have a mental state (intentional or wanton) with respect to the result of death of the victim. Wallen contends that he was entitled to an instruction on first-degree manslaughter because of his statements that "he just pulled out the gun and shot" and that he did not "really aim," his conduct of pulling out the gun as a threatening gesture, and his supposedly not knowing he hit Trice after the shooting. He claims this proof is evidence from which a reasonable juror could conclude he only intended to seriously hurt Trice. We disagree.

Even considering this proof in the light most favorable to Wallen, it would not allow a reasonable jury to believe that he only intended to injure Trice. He has presented nothing to show that he shot at Trice intending only to injure him and not to kill him. As this Court has similarly stated in another case, the problem with Wallen's contention is that his conduct—shooting an unarmed man at near point-blank range—"so clearly posed a grave risk of killing [another person]" and "so clearly manifested [his] extreme indifference to that possibility that a reasonable juror could not find [he] engaged in that conduct

[1] The trial court ruled, and Wallen concedes, there is no evidence that he was under the influence of extreme emotional disturbance at the shooting. Thus, he does not claim entitlement to an instruction on first-degree manslaughter under extreme emotional disturbance.

without also finding that he was guilty of the sort of aggravated wantonness punishable as murder." *Allen v. Commonwealth*, 338 S.W.3d 252, 257 (Ky. 2011). So, at the very least, Wallen committed wanton murder. He was not so unlucky to cause a death in the course of intending to commit only an assault. His surprise that he succeeded in shooting Trice does not change this, given how close he was standing when he pulled the trigger. There is simply no evidence to suggest that a rational jury would acquit Wallen of murder by concluding that he did not intend the victim's death or acted in an aggravatedly wanton manner with respect to the victim's death, and instead believe he intended only to cause injury to the victim or another person but nonetheless succeeded in killing someone.

Wallen also contends he was entitled to an instruction on second-degree manslaughter. Although it is true, as Wallen contends, that second-degree manslaughter is frequently a lesser included offense of wanton murder, *id.* at 256; 1 Cooper, *Kentucky Instructions to Juries (Criminal)* § 3.28 Cmt. (5th ed. 2008), it is not a set rule that must be followed. Whether a defendant is entitled to a particular jury instruction will always be determined by the evidence presented at trial. Indeed, this Court has held on multiple occasions that second-degree manslaughter need not be included as a lesser offense of wanton murder where the facts do not support its application. *See Cecil v. Commonwealth*, 888 S.W.2d 669, 672 (Ky. 1994) (holding there was no evidence that entitled defendant to an instruction on second-degree manslaughter where it is uncontroverted defendant shot victim in the head

with a pistol from a distance of about one foot); *Crane v. Commonwealth,* 833 S.W.2d 813, 817–18 (Ky. 1992) (holding defendant was not entitled to lesser included instruction on manslaughter in the second degree where defendant admitted shooting the shot that killed a convenience store clerk while engaged in conduct that posed a grave risk of death to another person under circumstances manifesting an extreme indifference to human life).

Even the cases cited by Wallen in support of his claim, *e.g., Wolford v. Commonwealth,* 4 S.W.3d 534 (Ky. 1999), would allow a court not to give the lesser included offense instruction under these circumstances. In *Wolford,* for example, this Court stated that in the cases where the defendant was not entitled to an instruction on second-degree manslaughter as a lesser included offense "the evidence was virtually undisputed not only that the defendant killed the victim, but also with respect to the defendant's state of mind when he or she did so. The only remaining issue was the legal effect to be given to the undisputed facts." *Id.* at 538. It was further noted that "when the defendant testifies to facts showing how the killing occurred and where there is no room for any possible theory except that he is guilty of murder or he is innocent, there is no reason for the court to instruct the jury on lesser offenses." *Id.* at 538–39. Instruction on other degrees of homicide would be required, for example, "when the evidence is entirely circumstantial and only establishes the corpus delicti and other circumstances from which the defendant's connection with the crime might be inferred." *Id.* at 539. But that is not what the evidence showed here.

It is "virtually undisputed" that Wallen killed Trice because he was angry about having been shorted and been given bad drugs in a drug deal. This case is unlike the facts in *Wolford*, where "none of the defendants admitted firing the fatal shots, all claimed an alibi, and the evidence of guilt was purely circumstantial." 4 S.W.3d at 538.

Wallen relies on the same evidence he believes entitled him to an instruction on first-degree manslaughter to show that he is entitled to an instruction on second-degree manslaughter. But absent from his argument is any proof that the shooting was an accident or unintentional in any manner. Trice admitted to shooting at an unarmed man twice in broad daylight. Witnesses heard no argument or scuffle between the two men. There is simply no proof other than that Wallen intended Trice's death or that his conduct created anything other than a grave risk of death to another person under circumstances manifesting an extreme indifference to human life. KRS 507.020(1)(b). As such, we do not believe the trial court erred by failing to instruct on second-degree manslaughter.

B. Wallen was not entitled to a self-defense instruction.

Similarly, we think the trial court was correct not to instruct on any theory of self-defense, including imperfect self-defense. "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." KRS 503.050(1). KRS 503.050(2) states that

> 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, serious physical injury, kidnapping, sexual intercourse compelled by force or threat, felony involving the use of force, or under those circumstances permitted pursuant to KRS 503.055.

"Imminent," as it is used in KRS 503.050(1), means "impending danger." KRS 503.010(3).

There is simply no evidence that Wallen believed he was ever in danger of being a victim of imminent unlawful physical force. Indeed, Wallen's own words show the opposite. Wallen admitted in his interview with police that Trice never threatened him physically or verbally and was not aggressive with him in any way. Further, though Wallen may have initially brought the gun for self-protection, he admitted, "Well actually at first it was to protect myself but then he started talking some shit and it pissed me off. It was stupid." Believing you may need to defend yourself in the future does not justify the use of deadly force, which must be premised on a belief of imminent danger. Otherwise, the mere purchase or possession of a gun for self-protection would justify a self-defense instruction. Wallen's statements at best show that he was prepared to defend himself, not that he believed he needed to do so. The Court is satisfied that Wallen's statements support the trial court's denial of a self-defense instruction.

Further, the trial court was not in error in failing to instruct on imperfect self-defense and reckless homicide.[2] A defendant can be convicted of reckless homicide under an imperfect self-defense theory only

> where the defendant ... acts under an actual but mistaken belief that he must use physical force or deadly physical force against another person in order to protect himself from imminent death or injury about to be inflicted by that person, and in so acting he failed to perceive a substantial and unjustifiable risk that he was mistaken in his belief that force is necessary.

Commonwealth v. Hasch, 421 S.W.3d 349, 358 (Ky. 2013).

But before this theory can even apply, there must be evidence that Wallen formed a subjective, albeit mistaken, view that force was necessary.

> [T]he 'mistaken belief' component of reckless homicide under the imperfect self-defense theory is based upon the defendant's *subjective* viewpoint: a defendant must actually believe, albeit mistakenly, that the use of deadly force is necessary. But, whether the defendant's failure to perceive the risk of being mistaken was a gross deviation from the standard of care must be based upon an objective viewpoint—what a reasonable person would perceive in the situation.

Id. at 359.

In the present case, Wallen contends that he is entitled to an instruction on imperfect self-defense and reckless homicide because he thought he might need a gun for protection. But as discussed above that type of "belief" is not the type contemplated for an instruction on self-defense. Any person might believe

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[2] Further, we believe Wallen's argument that the Commonwealth claimed he was only entitled to an instruction on self-defense if he testified misconceives the import of the Commonwealth's words. It is clear to this Court that the Commonwealth was merely suggesting that the trial court cannot instruct on a theory that is not supported by any evidence and that, under this evidence, a self-defense instruction was not justified without something further, such as testimony from Wallen. There is no question that the proof can justify a self-protection instruction even when the defendant does not testify. The proof simply does not do so in this case.

they need protection, but this is different from the formation of an actual belief. For example, a homeowner may buy a gun for protection, but this does not entitle him to shoot just anyone. Similarly, Wallen believed he might need protection, but once at the scene of the shooting it was clear, by his own words, that he was not in fear for his life or believed he was in any danger. As such, there was no error in the trial court's not instructing the jury on imperfect self-defense and reckless homicide.

III. Conclusion

For the foregoing reasons, the judgment of the Christian Circuit Court is affirmed.

All sitting. All concur.

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