

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-002108-MR

ANTHONY SMITH

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE EDWIN SCHROERING, JUDGE
ACTION NO. 96-CR-2759

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
VACATING AND REMANDING
** **

BEFORE: BUCKINGHAM, GARDNER, AND KNOPF, JUDGES.

KNOPF, JUDGE: This is an appeal from a judgment of conviction by the Jefferson Circuit Court finding the appellant guilty of first degree assault. This Court concludes that the trial court committed prejudicial error in allowing impeachment of the appellant's credibility by use of his prior juvenile adjudications, and in excluding evidence of prior acts of violence by the victim which were witnessed by the appellant. Therefore, we vacate the conviction and remand for a new trial.

The appellant, Anthony Smith (Anthony) was convicted of first degree assault following a jury trial in the Jefferson Circuit Court. The charge arose out of the shooting of Aubrey Williams on September 22, 1996, in Louisville. Although the

circumstances surrounding the shooting were disputed, both Anthony and Williams testified at trial. Anthony, who was age fifteen (15) at the time of the shooting, testified that he had sold cocaine for Williams for several years. Anthony testified that in September 1996, he failed to sell cocaine as instructed by Williams. On several occasions, Williams approached Anthony and demanded his share of the sale proceeds. Williams denied that the fight was about drugs. Rather, Williams stated that it was over a gambling debt which Anthony owed.

On September 22, 1996, Williams and two (2) other individuals came up to Anthony at the intersection of Amy Street and Riverpark Drive and again demanded payment. When Anthony answered that he did not have the money, Williams pushed and struck him several times. Anthony denied fighting back, while Williams stated that Anthony took a swing at him. Anthony admitted that he was armed at the time, and he further testified that Williams had a gun in his waistband. Williams testified that he was unarmed. In either case, no weapons were used in the fight, and Anthony ran from the scene. Anthony stated that Williams threatened to kill him, while Williams denied making any threats.

Upon arriving at home, Anthony told his mother, Joyce Smith, (Joyce), and his seventeen (17) year old sister, Moneka Smith, (Moneka), about the incident. Joyce instructed her children to get into her car so they could go to a relative's home. While en route, and about fifteen (15) minutes after the first confrontation, Joyce saw Williams riding his bicycle along the 3400 block of Broadway. Joyce and Moneka left the car and

confronted Williams, demanding to know why Williams had beaten Anthony. Anthony initially stayed in the car, but during the altercation, he left the car and stood behind his mother and sister. Joyce offered to pay her son's debt. Words were exchanged, and Moneka punched Williams. Anthony testified that he saw Williams reach for a gun and that he feared for his mother's safety. At that point, Anthony retrieved his own gun from his pocket, and shot Williams one (1) time in the hip.

Anthony and Joyce were both indicted for assault in the first degree. Since the felony involved the use of a firearm and Anthony was over the age of fourteen (14) years, he was transferred to circuit court for trial as an adult. KRS 635.020(4). Following a trial, the trial court instructed the jury on the charges of first degree assault, second degree assault (intentional), and assault under extreme emotional disturbance for Joyce. For Anthony, the trial court instructed the jury on the charges of first degree assault, second degree assault (intentional), second degree assault (wanton), assault under extreme emotional disturbance, and fourth degree assault. The jury acquitted Joyce on all charges, and convicted Anthony of first degree assault. The jury fixed Anthony's sentence at thirteen (13) years. However, after entry of the jury verdict, the parties announced to the court that they had entered into an agreement and stipulation in which the recommended sentence was to be eleven (11) years. The trial court imposed the recommended sentence. This appeal followed.

Anthony first argues that the trial court erred in allowing the Commonwealth to introduce evidence about his prior

juvenile adjudications. During the course of Anthony's cross-examination, the Commonwealth sought to impeach his credibility by questioning him concerning his juvenile record. Anthony's counsel objected, stating that these matters involved juvenile adjudications, not convictions. The trial court disagreed, concluding that since KRS 635.020(4) requires a juvenile charged with a felony involving a firearm be transferred to circuit court for trial as an adult offender, then the defendant should be treated as an adult for all purposes. Hence, the trial court concluded that Anthony could be impeached using his prior felony convictions in the same manner that an adult could be impeached. The Commonwealth then asked Anthony if he had pleaded guilty to a felony in juvenile court. Anthony answered "yes." Immediately thereafter, the trial court admonished the jury that the evidence of Anthony's prior convictions could only be used to determine his credibility and not as evidence of guilt.

Anthony argues that the trial court erred in allowing the Commonwealth to question him regarding his juvenile record. We first note the trial court's reasoning concerning the nature of a transfer pursuant to KRS 635.020(4) has been rejected by the Kentucky Supreme Court in Britt v. Commonwealth, Ky., 965 S.W.2d 147 (1998). KRS 635.020(4) is merely a mechanism for transferring juveniles charged with a felony involving a firearm to circuit court without making the required findings under KRS 640.010. Juveniles transferred to circuit court remain subject to the provisions of Chapter 640. Id. at 150.

Yet even if a juvenile transferred to circuit court were treated as an adult for all purposes, the transfer would not

affect the status, or the admissibility of prior juvenile adjudications. Thus, the ultimate question remains whether a defendant, either an adult or a juvenile tried as an adult, may be impeached as to his credibility through evidence of his prior juvenile adjudications. This question is an issue of first impression in Kentucky.

Kentucky Rule of Evidence [KRE] 609(a), which governs impeachment using prior convictions, provides as follows:

For the purpose of reflecting upon the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record if denied by the witness, but only if the crime was punishable by death or imprisonment for one (1) year or more under the law under which the witness was convicted. The identity of the crime upon which conviction was based may not be disclosed upon cross-examination unless the witness has denied the existence of the conviction. However, a witness against whom a conviction is admitted under this provision may choose to disclose the identity of the crime upon which the conviction is based.

KRE 609(a) rule is consistent with the common law rule that a witness may be asked if he has been previously convicted of a felony. If his answer is "Yes," that is the end of it and the court shall thereupon admonish the jury that the admission by the witness of his prior conviction of a felony may be considered only as it affects his credibility as a witness, if it does so. If the witness answers "No" to this question, he may then be impeached by the Commonwealth by the use of all prior convictions. After impeachment, the proper admonition shall be given by the court. Commonwealth v. Richardson, Ky., 674 S.W.2d 515, 517-18 (1984). KRE 609 differs in several respects from the

federal rule (FRE 609). In particular, KRE 609 allows a trial court to admit a conviction more than ten (10) years old if the court determines that the probative value of such conviction outweighs its prejudicial effect. McGinnis v. Commonwealth, Ky., 875 S.W.2d 518, 528 (1994). In addition, KRE 609, unlike the federal rule, does not address the admissibility of prior juvenile adjudications.

Nevertheless, cases from other jurisdictions are instructive in interpreting KRE 609. The United States Supreme Court addressed a similar issue to that presented in the present case. Davis v. Alaska, 415 U.S. 308, 39 L. Ed. 2d 347, 94 S. Ct. 1105 (1974). The defendant in that case, Davis, sought to impeach the credibility of a prosecution witness (Green) by cross examination directed at possible bias deriving from Green's probationary status as a juvenile delinquent. Alaska law prohibited admission of juvenile adjudications except during the sentencing phase. Consequently, the trial court prohibited Davis from questioning Green concerning his juvenile record.

The United States Supreme Court concluded that the Confrontation Clause requires that a defendant conduct meaningful cross-examination to determine possible bias by a witness. "[T]o make any such inquiry effective, defense counsel should have been permitted to expose to the jury those facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of witnesses." Id. at 318, 39 L. Ed. 2d at 355. In further discussing the interests of the state in protecting the privacy of juvenile adjudications, the Supreme Court explained:

The State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness. The State could have protected Green from exposure of his juvenile adjudication in these circumstances by refraining from using him to make out its case; the State cannot, consistent with the right of confrontation, require the petitioner to bear the full burden of vindicating the State's interest in the secrecy of juvenile criminal records.

Id. at 320, 39 L. Ed. 2d at 356.

However, in concurring in the holding that Davis had been denied his right of confrontation, Justice Stewart noted:

In joining the Court's opinion, I would emphasize that the Court neither holds nor suggests that the Constitution confers a right in every case to impeach the general credibility of a witness through cross-examination about his past delinquency adjudications or criminal convictions.

Id. at 321, 39 L. Ed. 2d at 356.

Hence, the rule set out in Davis is limited to situations where the attack on the credibility of a juvenile witness, through cross-examination about his past delinquency adjudications, is for the purpose of showing bias or prejudice and not to situations where the sole purpose of the attack is to impeach the general credibility of the witness. State v. Butler, 626 S.W.2d 6, 9 (Tenn., 1981); See also, Amin v. State, 686 P.2d 593, 596 (Wyoming, 1984). Other jurisdictions follow this general rule that a juvenile court adjudication may not be used solely to impeach the general credibility of a witness. See, "Impeachment of Witness by Juvenile Records", 68 A.L.R.3d 1112,

1120 (1975). See also, Corbett v. Bordenkircher, 615 F.2d 722, 727 (6th Cir., 1980).

Furthermore, an accused's right to confront and cross-examine witnesses is different from the state's interest in questioning a defendant about his juvenile record. An accused's right to cross-examine a witness may outweigh a state's interest in preserving a juvenile offender's anonymity. Davis v. Alaska, 415 U.S. at 320, 39 L. Ed. 2d at 356. A witness' credibility is always at issue and relevant evidence which affects credibility should not be excluded. Commonwealth v. Maddox, Ky., 955 S.W.2d 718, 721 (1997). However, the Sixth Amendment right of confrontation extends only to an accused, not to the prosecution. Therefore, the prosecution's cross-examination may be limited by the state's policy preserving a juvenile offender's anonymity.

Of those states which have directly addressed the specific question before this Court, the majority hold that a defendant's general credibility may not be impeached by use of his prior juvenile adjudications. People v. Kerns, 229 Ill.App.3d 938, 595 N.E.2d 207, 172 Ill.Dec. 144 (Ill.App.4th Dist., 1992); Lavinder v. Commonwealth, 395 S.E.2d 211 (Va.App., 1990); People v. Jackson, 177 Cal.App. 3d 708, 222 Cal.Rptr. 470 (1986); Commonwealth v. Young, 22 Mass.App.Ct. 237, 493 N.E.2d 213 (Mass.App., 1986); State v. Robinson, 449 So.2d 74 (La.App., 1984); Moore v. State, 333 So.2d 165 (Ala. App., 1976); Jackson v. State, 336 So.2d 633 (Fla. App., 1976).

Several of these states have adopted versions of FRE 609(d), which specifically prohibit admission of juvenile

adjudications to impeach the credibility of a defendant except under certain circumstances. People v. Massie, 137 Ill. App.3d 723, 92 Ill.Dec. 358, 484 N.E.2d 1213 (Ill.App.2d Dist., 1985); Amin v. State, supra; State v. Butler, supra. KRE 609 does not contain a section dealing with juvenile adjudications. However, all of jurisdictions following the majority rule do so based, at least in part, upon the public policy considerations underlying confidentiality of juvenile records.

New York has adopted a contrary rule, allowing use of prior juvenile adjudications to impeach the credibility of a defendant where "the prior crimes demonstrate dishonesty and untrustworthiness." People v. Mercado, 117 A.D.2d 627, 628, 497 N.Y.S.2d 957 (1986). See also, People v. Rivas, 175 A.D.2d 186, 572 N.Y.S.2d 336 (1991). New York preserves the materiality requirement found in the general rule. By contrast, North Carolina allows the prosecution to impeach a juvenile defendant with reference to his prior adjudications of guilt of conduct which, if committed by an adult, would have constituted conviction of a crime. State v. Tuttle, 28 N.C.App. 198, 200, 220 S.Ed.2d 630 (1975). North Carolina apparently does not impose a materiality requirement on admission of prior juvenile adjudications.

This Court believes that the better rule is that followed by the majority of jurisdictions. Like the majority of states, Kentucky has traditionally treated juvenile matters differently than adult offenses. The state is considered to be acting as *parens patriae* rather than as a prosecuting authority.

It has been a principal theory of juvenile law that an individual should not be stigmatized with a criminal record for acts committed during minority. Jefferson County Dept. for Human Services v. Carter, Ky., 795 S.W.2d 59, 61 (1990). Consequently, the confidentiality of juvenile court records must be maintained except where release is specifically authorized. KRS 610.340.

In addition, a disposition under the Juvenile Code is not to be treated as a conviction. KRS 635.040. Moreover, the Juvenile Code does not distinguish between felonies, misdemeanor or violations for purposes of dispositions. A.E. v. Commonwealth, Ky. App., 860 S.W.2d 790, 793 (1993). Therefore, there is no basis to treat Anthony's prior juvenile court adjudications as "convictions" during the guilt phase of the trial.

We agree that Anthony's juvenile record is admissible during the sentencing phase. Sanders v. Commonwealth, Ky., 844 S.W.2d 391, 394-95 (1992); Schooler v. Commonwealth, Ky.App., 628 S.W.2d 885, 886 (1981). Likewise, the records of any criminal proceedings against Anthony where he was tried as an adult are admissible. KRS 635.120. Juvenile court records may also be released to the extent authorized by KRS 610.340. Furthermore, a witness may be cross-examined concerning his juvenile adjudications, to the extent that those proceedings are relevant to show bias or lack of trustworthiness on the part of the witness. Davis v. Alaska, supra. However, we hold that the Commonwealth's may not impeach the general credibility of a juvenile defendant during the guilt phase of a trial by use of his prior juvenile convictions.

The Commonwealth contends that if its use of Anthony's prior adjudications for impeachment purposes was improper, then it should be considered harmless error because he suffered no prejudice as a result. The Commonwealth notes that Anthony had already testified that he sold drugs forty (40) to fifty (50) times over a two (2) year period. As a result, the Commonwealth argues that any error from the introduction of evidence of Anthony's prior juvenile adjudications was harmless because it was not so overwhelming as to affect Anthony's substantial rights. RCr 9.24

We disagree. Even though Anthony had previously testified about his involvement with drugs and the fact that he had carried a gun, the Commonwealth specifically sought to impeach his credibility by introducing his prior juvenile adjudications. Anthony's credibility was central to his defense of self-protection and protection of others. Consequently, we find that there exists a reasonable probability that absent the introduction of the evidence the result would have been different. Renfro v. Commonwealth, Ky., 893 S.W.2d 795, 797 (1995). Therefore, the introduction of evidence of Anthony's prior juvenile adjudications was not harmless error.

Anthony also objects to the reference to his prior juvenile arrests during the cross-examination of his mother. The Commonwealth asked Joyce if she knew that Anthony carried a gun. After she answered no, the Commonwealth asked her if she was aware Anthony had been arrested for possession of a firearm one (1) month prior to the shooting. Over the objection of Anthony's counsel, the trial court permitted the Commonwealth to ask the

question. Joyce responded by stating that she was aware of the arrest and that she went to court with Anthony. The Commonwealth next asked Joyce if she was aware that her son had possessed crack cocaine.¹ Joyce answered that she became aware that he did when he was arrested for it.

The Commonwealth asserts that its questioning of Joyce about Anthony's prior arrests was relevant to rebut her stated lack of knowledge about Anthony's involvement with guns and drugs. To a certain extent, this Court agrees. However, this Court also believes that the probative value of these questions was outweighed by their unfairly prejudicial effect to Anthony. The questions were primarily calculated to bring in evidence of Anthony's bad character, and thus should have been excluded under KRE 404(b).

Nevertheless, we decline to find that the questions constituted reversible error in the context of this case. Anthony had previously testified regarding his participation in drug transactions and that he had previously carried a gun. Unlike the previous issue involving introduction of Anthony's prior juvenile adjudications, the Commonwealth's limited questioning in this area did not present any additional evidence of which the jury was not already aware. Consequently, any error in allowing the questioning of Joyce on these matters was harmless.

¹ The Commonwealth initially asked Joyce if she was aware that her son was in juvenile court for possession of crack cocaine. The trial judge sustained both defendants' objections and instructed the jury to disregard the question. The trial court further denied the motion for a mistrial made by Anthony's counsel.

Anthony next argues that the trial court erred in excluding his testimony about prior acts of violence which he saw Williams commit. During trial, Anthony sought to introduce evidence of four (4) particular acts of violence committed by Williams in his presence. The trial court excluded the evidence, and Anthony testified about the incidents on avowal.² The trial court maintained that if Anthony's reason for confronting Williams was because he was going to tell him that he did not have any money for the drugs, then the evidence concerning Anthony's knowledge that Williams had previously shot people for not paying for drugs would be admissible. However, the trial court concluded that since Anthony testified that his mother had offered to pay Williams what Anthony owed, then Williams' prior acts were not relevant because in that event there would be no reason to fear Williams' reaction. Before the jury, Anthony was only permitted to answer general questions relating to whether Williams had previously displayed or had possession of a firearm.

Anthony contends that the trial court erred in excluding his testimony about the four (4) prior incidents. This Court agrees that a defendant may not introduce specific instances of violent conduct to prove the character of the victim

² On avowal, Anthony testified that he witnessed an argument between Williams and an individual named "Ernie" in February 1996. Anthony stated that the argument arose from the fact that Williams owed Ernie money over a drug deal. During the course of the argument, Williams fired a gun at Ernie. During another argument between Williams and Ernie, in March 1996, Anthony testified that he saw Williams shoot Ernie in the leg.

Anthony next testified concerning an incident during the summer of 1996, when Williams, after consuming drugs, produced a handgun and began firing it in the air. Lastly, in July 1996, Anthony saw Williams hit an addict with a pistol during an argument about money.

or predisposition toward violence. KRE 404(a); Thompson v. Commonwealth, Ky., 652 S.W.2d 78 (1983). The Commonwealth maintains that the four (4) instances of violence were not material to Anthony's defense and that they were remote in time from the altercation on September 22, 1996. Consequently, the Commonwealth asserts that Anthony's proffered testimony did not have a reasonable relationship to his claim of self-defense. Baze v. Commonwealth, Ky., 953 S.W.2d 914, 921-22 (1997); citing, Carnes v. Commonwealth, Ky., 453 S.W.2d 595 (1970).

However, a defendant can introduce evidence of particular violent acts of an alleged victim, evidence of threats by the victim, and evidence of hearsay statements about such acts or threats, all of which tends to show the defendant had a justifiable fear of the victim at the time of their encounter. Wilson v. Commonwealth, Ky.App., 880 S.W.2d 877, 878 (1994); quoting, Robert G. Lawson, The Kentucky Evidence Law Handbook, § 2.15 at pg. 70 (3rd ed. 1993). After reviewing Anthony's proffered testimony on avowal, this Court finds that the evidence was improperly excluded.

The self-protection defense is set out in KRS 503.050, which states as in pertinent part:

- (1) 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.
- (2) The use of deadly physical forces 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, [or] serious physical injury...

The use of deadly physical force to protect another person is justifiable when "under the circumstances as they actually exist, the person whom he seeks to protect would have been justified under KRS 503.050." KRS 503.070(2)(b).

The trial court interpreted Anthony's self-defense theory narrowly, and specifically limited his testimony to situations which were directly analogous to what occurred on September 22, 1996. However, in doing so, the trial court failed to consider the context of Anthony's theory. According to Anthony, the confrontation between Williams and Joyce occurred as a result of the earlier altercation between Anthony and Williams.

We certainly agree with the trial judge that a victim should not be put on trial. However, where self-defense is an issue, the victim's conduct may be considered in determining the reasonableness of the defendant's fear. See, McGinnis v. Commonwealth, Ky., 875 S.W.2d 518 (1994). Furthermore, where the evidence of prior violent acts are remote in time or is of marginal relevance to the self-protection defense, then the trial court may exclude such evidence. Shannon v. Commonwealth, Ky., 767 S.W.2d 548, 553 (1988).

Yet in the present case, the four (4) incidents which Anthony testified about were directly relevant to his self-protection defense. Each of the four (4) instances involved a specific act of violence involving William's use of a firearm. Three (3) of the four (4) acts involved Williams use or threatened use of a firearm against another individual during an argument over drug money. Furthermore, those events occurred

between seven (7) months and two (2) months prior to the shooting at issue in the present case. Under the circumstances, the prior incidents were not so remote in time as to diminish their relevance.

In addition, this Court cannot agree with the Commonwealth that Anthony was not prejudiced because he was permitted to testify generally that Williams had previously displayed a firearm. For his protection of others defense to be applicable, Anthony's fear of Williams must have been objectively reasonable based upon the circumstances as they actually existed. KRS 503.070(2)(b). The evidence proffered by Anthony tended to lend credibility to his belief in the need for self-defense. As a result, it was relevant to consider the reasonableness of his fear. By restricting details about the prior incidents, the trial court impermissibly limited Anthony's presentation of a crucial part of his defense. While the jury might have chosen to view those prior events as having limited relevance, we find that the trial court erred in excluding Anthony's testimony about them. Brock v. Commonwealth, Ky., 947 S.W.2d 24, 27 (1997).

Anthony next raises a pair of issues concerning the instructions on self-defense and defense of others. At the close of proof, Anthony's counsel filed proposed instructions setting out separate instructions for the defenses of self-protection and protection of others. The trial court adopted the Commonwealth's proposed instruction which combined the two (2) defenses as follows:

NO. 6 - SELF PROTECTION

Even though the Defendant might otherwise be guilty of intentional Assault under Instruction No. 1 and/or Instruction # 2, if at the time the Defendant shot Aubrey Williams he believed that Aubrey Williams was about to use physical force upon him, he was privileged to use such physical force against Aubrey Williams as he believed to be necessary to protect himself or others against it, but including the right to use deadly physical force in so doing only if he believed it to be necessary in order to protect himself from death or serious physical injury at the hands of Aubrey Williams, subject to these qualifications:

If you further believe from the evidence beyond a reasonable doubt that the Defendant was mistaken in his belief that it was necessary to use physical force against Aubrey Williams in self-protection, or in his belief in the degree of force necessary to protect himself, or others
AND

A. That when he shot Aubrey Williams, he failed to perceive a substantial and unjustifiable risk that he was mistaken in that belief, and that his failure to perceive that risk constituted a gross deviation from the standard of care that a reasonable person would have observed in the same situation, then:

(1) If you would otherwise find the defendant guilty of either intentional First-Degree Assault under Instruction No. 1, or intentional Second-Degree Assault under Instruction 2, you will instead find him guilty of Fourth Degree Assault under Instruction No. 5;

OR

B. That when he shot Aubrey Williams, he was aware of and consciously disregarded a substantial and unjustifiable risk that he was mistaken in that belief, and that his disregard of that risk constituted a gross deviation from the standard of [care] that a reasonable person would have observed in the same situation, then:

(1) If you would otherwise find the Defendant guilty of intentional First-Degree Assault under Instruction No. 1, you will instead find him guilty of wanton Second-Degree Assault Under Instruction No. 3;

OR

(2) If you would otherwise find the defendant guilty of intentional Second-Degree

Assault under Instruction No. 2, you will instead find him guilty of Fourth-Degree Assault under Instruction No 5.

Provided, however, that if you believe from the evidence beyond a reasonable doubt that the Defendant was the initial aggressor at 34th & Broadway in the use of physical force, the defense of self-protection is not available to him.

Anthony argues that the trial court erred in accepting the Commonwealth's proposed instruction. He contends that the trial judge should have instructed the jury separately on the defenses of self-protection and protection of others. Anthony urges that the trial court's combined instruction deprived him of his right to present his theories of the case to the jury.

This Court previously discussed the elements for establishing justification based on self-defense and for protection of others. As noted above, self-defense and protection of others differ where the defendant uses deadly force. The defendant is justified in using deadly force in self-defense when the defendant believes that such force is necessary to protect himself against death, or serious physical injury. KRS 503.050(2). By contrast, the use of deadly physical force in the protection of another is justifiable only when, *under the circumstances as they actually exist*, the person whom he seeks to protect would have been justified in using deadly physical force. KRS 503.070(2).

By combining the self-protection and protection of others instructions, the trial court blurred the distinction between the two (2) defenses. However, any error in so doing worked to Anthony's benefit. The trial court's instruction only

required him to prove the need for self-protection and protection of his family under the circumstances as he reasonably believed them to be. Consequently, this Court finds no reversible error in this regard.

Anthony next contends that the trial court failed to determine whether the two (2) situations between himself and Williams constituted a single continuing encounter, or were separate and distinct transactions. He argues that the initial aggressor qualification in the self-protection/protection of others instruction improperly separated the two (2) confrontations. Anthony further asserts that the first incident at the intersection of Amy Street and Riverpark Drive, and the second incident at 34th and Broadway, were part of a single continuing encounter. Since Williams was the initial aggressor at the first incident, Anthony argues that the shooting was merely a continuation of the fight started by Williams. Therefore, he concludes that the trial court erred in providing the initial aggressor instruction.

The leading case on when to give an initial aggressor instruction is Stepp v. Commonwealth, Ky., 608 S.W.2d 371 (1980). In Stepp, the defendant and the victim were engaged in a heated argument while at work. After telling the defendant that he would be back, the victim returned to his truck and departed. About fifteen (15) minutes later, the victim returned with a shotgun sticking out of the window of his truck. As the trucks slowly approached each other, the defendant deflected the shotgun with one hand and shot the victim in the back of his head, causing the victim's death. Id. at 372-73.

The defendant objected to the giving of an initial aggressor instruction, arguing that the two (2) situations were separate encounters and that the victim, not he, was the aggressor in the second encounter. The Kentucky Supreme Court noted that KRS 503.060(3) limits the self defense and protection of others justifications in circumstances where the defendant was the initial aggressor. Where the defendant was the initial aggressor, use of physical force upon the other person under that circumstance is justified when, (a) his initial physical force was non-deadly and the force returned by the other is such that he believes himself to be in imminent danger of death or serious physical injury; or (b) he withdraws from the encounter and effectively communicates to the other person his intent to do so and the latter nevertheless continues or threatens the use of unlawful physical force. Id. at 374.

The Supreme Court further explained that the answer to this issue requires the determination as to whether the second encounter was separate and distinct from the first encounter or whether it was a continuance of the former.

There is no exact formula to apply in determining whether the second encounter was a continuance of the first or whether the second encounter was distinct from the first. The criterion is whether movant, in good faith, believed it was necessary to exercise extreme force in saving his own life. It is not every assertion of such belief that is adequate to support a plea of self-defense. It is the whole circumstances which surround the incident that must be considered by the trial judge in deciding whether an instruction on self-defense is proper or whether an instruction on self-defense with limitations is proper. We have held that before such qualifying instructions are proper there must of course be evidence to

justify it. In other words, the trial judge must find as a matter of law that there is sufficient evidence to justify such limitations before instructing the jury.

Id. at 374.

Based upon the facts presented in that case, the Supreme Court concluded that there was sufficient evidence to require the trial judge to find as a matter of law that there were two (2) separate encounters. Consequently, the Supreme Court found that the inclusion of the initial aggressor qualification was prejudicially erroneous.

In contrast, Anthony, rather than the prosecution, is arguing that the second encounter was a continuation of the first. The trial judge in this case found that the two (2) incidents between Anthony and Williams were separate and distinct transactions. The trial judge concluded that the first confrontation had ended when Anthony fled the scene. The second incident was the result of Joyce confronting Williams about the first incident. Based upon the evidence, this finding was not clearly erroneous as a matter of law.

Although the two (2) encounters were close in time and related in subject matter, they were separate and distinct transactions. In the first confrontation, Williams was clearly the initial aggressor. However, in the second confrontation, an issue of fact exists concerning which person was the initial aggressor. Joyce and Moneka began the argument with Williams. Furthermore, Moneka punched Williams. However, Anthony testified that he saw Williams reaching for a gun. Williams denied even possessing a gun. Under the circumstances, there was sufficient

evidence to present to the jury the question of who was the initial aggressor during the second encounter.

Accordingly, the judgment of conviction by the Jefferson Circuit Court is vacated, and this matter is remanded for a new trial in accord with the foregoing opinion.

ALL CONCUR.

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