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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001249-MR

ALBERT DURHAM — APPELLANT

v.

APPEAL FROM BELL CIRCUIT COURT
HONORABLE FARMER HELTON, JUDGE
ACTION NO. 97-CR-00076

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING
** ** ** ** **

BEFORE: BUCKINGHAM, COMBS, McANULTY, Judges

COMBS, JUDGE: The appellant, Albert Durham, Jr., appeals from the judgment of the Bell Circuit Court convicting him of manslaughter in the first degree and sentencing him to twelve years' imprisonment. The appellant raises issues concerning the adequacy of the jury instructions, and he alleges that the court erred in failing to consider the feasibility of probation or other sentencing alternatives. Having carefully reviewed the record, we agree that the circuit court erroneously failed to instruct the jury properly as to the legal definition of self-protection. Therefore, we reverse and remand.

On August 6, 1997, Durham was indicted by the Bell County Grand Jury on the charges of murder and fourth-degree assault. The charges were based upon the events that took place on the night of July 20, 1997. On that night, the appellant, his uncle, Winsel Durham, and his brother, Virgil Durham (commonly known as "Woozie" or " Oozie"), had been drinking beer at the appellant's house when the three men began to argue. The argument escalated into a physical alteration among the appellant, Winsel, and Virgil. The appellant claimed that Winsel held him from behind while Virgil hit him and broke a glass over his head. The appellant's wife, Denise Durham, unsuccessfully attempted to break up the fight but was pushed aside.

Eventually, the appellant managed to break free from the two men and fled from the house. He returned shortly with a baseball bat. Upon his return, the appellant claimed he was confronted by Winsel at the door, who refused to allow him to enter the house. The appellant alleged that, in an attempt to gain access to the house, he hit Winsel in the leg with the bat. When Winsel did not move, the appellant hit him again with the bat. The bat struck Winsel in the head, and he fell to the ground. Winsel died as a result of this fatal blow. The appellant maintained that he intended to hit Winsel in the shoulder, but Winsel had moved — and the blow struck him in the head. The appellant and Denise left the house and drove away. The couple drove to Tennessee where they spent the night sleeping in their truck. The appellant returned to Kentucky the next morning and turned himself in to the police.

On April 29, 1998, Albert was tried before a jury on the charge of murder; prior to the trial, the court dismissed the assault charge upon motion of the Commonwealth. The jury found the appellant guilty of manslaughter in the first degree and sentenced him to twelve years' imprisonment. On May 6, 1998, Albert filed a motion for a new trial or judgment notwithstanding the verdict (JNOV), alleging errors regarding the jury instructions. On May 11, 1998, the court's final judgment and sentence were entered in the record in accordance with the jury's verdict and sentence. On the same date, the court held a hearing on the appellant's post-trial motion — which it denied. This appeal followed.

The appellant first argues on appeal that the court erroneously omitted the legal definition of "self-protection" from the instructions and that it should have also qualified the instructions on murder and manslaughter with the defenses of protection of property and protection of others. Before addressing the substantive merits of this appeal, we will at the threshold address the preservation problem raised by the Commonwealth of whether the appellant has properly preserved the issues regarding the jury instructions for appellant review.

The appellant argues that this issue was properly preserved by his tender of jury instructions to the court. The record indicates that at the close of the evidence, the court temporarily recessed to prepare jury instructions. Upon re-convening, the court read the instructions to the jury. The Commonwealth and the defense then presented their closing

arguments. The record itself does not show that the appellant objected at anytime to the instructions given to the jury by the court. However, at the hearing on the appellant's post-trial motion, the court acknowledged that the appellant "did propose an instruction on self-defense . . . which did not get in the file but it was filed in my office at that hearing in there on my desk. . . " Apparently, the instructions had indeed been tendered by the appellant but due to omission were never entered into the record.

RCr 9.54(2) provides:

> No party may assign as error the giving or the failure to give an instruction unless the party's position has been fairly and adequately presented to the trial judge by an offered instruction **or** by motion, or unless the party makes objection before the court instructs the jury, stating specifically the matter to which the party objects and the ground or grounds of the objection.

At the post-trial hearing, the court admitted that the appellant had adequately tendered instructions on self-protection which were mis-filed and were thus omitted from the record. We find that this acknowledgment by the trial court is sufficient to establish that the appellant did in fact preserve his objections to the jury instructions in compliance with RCr 9.54(2). The court clearly indicated that it was given fair and adequate notice of the appellant's position with regard to the jury instructions. Under the circumstances of this case, we hold that the appellant properly preserved his objections to the jury instructions by tendering his own instructions to the court.

We next consider the substantive issue of whether the instructions given to the jury by court were deficient. At trial, the court instructed the jury on four degrees of homicide: (1) Murder, (2) Manslaughter in the First Degree, (3) Manslaughter in the Second Degree, and (4) Reckless Homicide. The murder and first-degree manslaughter instructions were qualified by the self-protection defense. The court stated that the jury was to find the appellant guilty if the elements of murder or first-degree manslaughter were met and if the jury found that "he was not privileged to act in self-protection." However, the court failed to include the legal definition of self-protection at this juncture.

Additionally, in Instructions No. 6 and No.7, the court instructed the jury on the defenses of protection of another and protection of property as they applied to the offenses of murder and first-degree manslaughter. The appellant contends that these defenses should have been incorporated into the instructions on murder and manslaughter and not set out in separate instructions.

The defense of self-protection is set forth in KRS 503.050 which provides:

> (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 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, or sexual intercourse compelled by force or threat.

> (3) Any evidence presented by the defendant to establish the existence of a prior act or acts of domestic violence and abuse as defined in KRS 403.720 by the person against whom the defendant is charged with employing physical force shall be admissible under this section.

The defense of self-protection is a statutory defense with specific criteria which must be shown to justify its use.

In the case before us, in order to convict the appellant of murder or first-degree manslaughter, the court required the jury to find that "[the appellant] was not privileged to act in self-protection." Aside from this statement, the instructions were silent as to the justified use of self-protection as set out in KRS 503.050.

The jury was instructed to consider the defense of self-protection with regard to murder (instruction No. 2) and first-degree manslaughter (instruction No. 3) but was not given any explanation as to the justification for self-protection. In effect, the jury was left to create its own criteria for self-protection in disregard of KRS 503.050. "In a criminal case, it is the duty of the court to prepare and give instructions on the whole law." Rice v. Commonwealth Ky., 472 S.W.2d 512 (1971), quoting Lee v. Commonwealth, Ky., 329 S.W.2d 57, 60 (1959). (Emphasis added).

The court's omission of the definition of self-protection from the jury instructions constituted reversible error. As to the defenses of protection of others and protection of property, we believe that the court's instructions on these defenses were sufficient and that it was not error for the court

to set these defenses out in separate instructions. The court provided the jury with the criteria for these defenses, and it clearly stated that the jury was to consider these defenses in connection with the instructions concerning murder and first-degree manslaughter.

The Commonwealth argues that even if the court's instructions as to the defenses of self-protection, protection of another, and protection of property were erroneous, such errors were harmless. It contends that the appellant was not entitled to instructions on the defenses of self-protection, protection of another, and protection of property as the evidence did not warrant nor support such instructions. We find this contention to be without merit.

"Our law requires the court to give instructions 'applicable to every state of case covered by the indictment and deducible from or supported to any extent by the testimony.'" Reed v. Commonwealth, Ky., 738 S.W.2d 818, 822 (1987), quoting Lee v. Commonwealth, Ky., 329 S.W.2d 57, 60 (1959). "It is also the duty of the trial court by instructions to give the accused the opportunity for the jury to determine the merits of any lawful defense which he or she has." Cheser v. Commonwealth, Ky. App., 904 S.W.2d 239, 242 (1994). The court must determine the issues to be submitted to the jury based upon the totality of the evidence. Reed at 822.

In this case, the court chose to instruct the jury on the defenses of self-protection, protection of others, and protection of property. At trial, the appellant testified that

upon realizing that his wife was still in the house with the other two drunken men, he returned with a baseball bat for protection as he was afraid that they would harm her. Upon returning to the house, he claimed that Winsel met him at the door and started pushing and hitting him as he tried to enter the house. Denise testified that she was indeed frightened that Winsel and Virgil would harm her. Additionally, photographs entered into evidence showed that extensive damage had been done to the Durham's home; furniture had been overturned, windows were broken, gashes were evident in the walls, and cabinets were torn down. There was more than ample evidence to support the court's instruction on the defenses of self-protection, protection of others, and protection or property.

Having found that the appellant is entitled to a new trial, we shall refrain from addressing the court's failure to consider probation or other alternatives at this juncture. It will have the opportunity to remedy this error — if any — at the new trial. In summary, we find that the court's instructions to the jury were inadequate as they failed to set forth criteria for self-protection.

For the foregoing reasons, we reverse the judgment of the circuit court and remand this case for a new trial.

McANULTY, JUDGE, CONCURS.

BUCKINGHAM, JUDGE, DISSENTS BY SEPARATE OPINION.

BUCKINGHAM, JUDGE, DISSENTING: I respectfully dissent from the majority opinion which reverses the appellant's

conviction because the trial court did not give a complete self-defense instruction as was mandated in Pace v. Commonwealth, Ky., 561 S.W.2d 664, 668 (1978), overruled on other grounds by Grimes v. McAnulty, Ky., 957 S.W.2d 223, 227 (1997). In my opinion, the appellant was not entitled to a self-defense instruction. He had left his residence and returned only for the protection of another (his wife) and his property, and the victim was unarmed and merely standing in the doorway at the time of the attack. The failure of the trial court to properly give an instruction to which the appellant was not entitled can only amount to harmless error, RCr 9.54, as the error does not affect the appellant's substantial rights. RCr 9.24.

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