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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002905-MR

JAMES WAYNE GIRDLEY — APPELLANT

v.

APPEAL FROM LARUE CIRCUIT COURT
HONORABLE LARRY D. RAIKES, JUDGE
ACTION NO. 99-CR-00015

COMMONWEALTH OF KENTUCKY — APPELLEE

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

BEFORE: McANULTY, MILLER, AND TACKETT, JUDGES.

MILLER, JUDGE: James Wayne Girdley ("Wayne") brings this appeal from a judgment of the Larue Circuit Court entered upon a jury verdict on November 18, 1999. We reverse and remand.

Wayne was convicted of first-degree assault (wanton) (Kentucky Revised Statutes (KRS) 508.010(1)(b)) with the jury recommending a ten-year sentence; first-degree wanton endangerment (KRS 508.060), with a recommendation of one year to run concurrently with the ten-year sentence. The jury recommended that Wayne be fined $500.00 each upon two counts of second-degree wanton endangerment. KRS 508.070. The court sentenced Wayne accordingly.

This matter involves a conflict between two men and a woman. In 1996, while working on the backside of Churchill Downs, Wayne met a woman named Jackie Wiggington. They began a relationship which was to culminate in the tragedy underlying this case. The relationship was not altogether void of discourse. Both Wayne and Jackie were given to excessive use of alcohol and attended Alcoholics Anonymous meetings as a means of combating their problem. In the Fall of 1998, they shared living arrangements at Jackie's apartment on Brownsboro Road in Jefferson County. Wayne worked at the Ford Motor plant and Jackie worked at a printing company in Louisville.

In 1998, Wayne perceived that Jackie was transferring her affections to Weldon Gray, a co-worker at the printing company. Jackie's relationship with Wayne began to deteriorate. Wayne became upset, depressed, and returned to his drinking habits.

On January 1, 1999, Wayne went to the Brownsboro Road apartment to obtain his personal effects. He found that the locks on the apartment had been changed and Jackie was nowhere to be found. Over the following days, his mental stability rapidly depreciated as it appeared to him that he had lost Jackie's affections.

On January 23, 1999, Wayne began drinking in earnest. Apparently he was drunk for some two days. On January 25, 1999, he drove to Weldon's trailer in a remote area of Larue County where he suspected Jackie and Weldon to be. He claims he was looking for Jackie to discuss retrieving his personal effects.

Wayne entered the trailer without invitation. Jackie was in the living room with Weldon's niece, Suzanne Foster. Weldon was in another part of the trailer apparently preparing to go to work. Weldon came into the living room with a shotgun and ordered Wayne out of the trailer. Heated words were exchanged. Wayne became very emotional stating "you stole her from me," referring to Jackie, and then added, "I've got one of those too," referring to the gun, and lastly warned, "I'm a Girdley, and we're all crazy."

Wayne left the trailer and obtained a deer rifle from his vehicle, and fired three shots into the front of the trailer. One of the shots struck Weldon in the arm causing very serious damage. The other two shots fell harmless.

An ensuing grand jury of LaRue County indicted Wayne for an assortment of offenses including first-degree assault.

On this appeal, Wayne complains of a deficiency in the trial court's instructions.

The trial lasted two days. At the close of the evidence, the court announced that it was not going to instruct on the "intentional" aspect of assault in the first degree. KRS 508.010(1)(a). The court did not perceive Wayne's conduct as being intentional. The court was impressed with Wayne's after-the-fact statement that he did not intend to shoot Weldon. The court reviewed Wayne's conduct as only wanton, and therefore instructed under the wanton aspect of first-degree assault. KRS 508.010(1)(b).

In making the foregoing decision, the court deprived Wayne of the benefit of an instruction under KRS 508.040,

"assault under extreme emotional disturbance" (EED), which would have permitted the jury to mitigate his punishment. An EED instruction is only applicable to mitigate intentional assault. Also the court's action deprived Wayne of an instruction upon intoxication under KRS 501.080. An intoxication instruction is not available under a charge of first-degree assault based upon wanton conduct. KRS 501.020(3). It is available, however, to obviate intent where the offense charged requires intent. KRS 501.080; see McGuire v. Commonwealth, Ky., 885 S.W.2d 931 (1994), and Brown v. Commonwealth, Ky., 575 S.W.2d 451 (1978).

We think our disposition of this appeal is controlled by Taylor v. Commonwealth, Ky., 995 S.W.2d 355 (1999). In that case, it was stated:

> 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 extend by the testimony. RCr 9.54(1); *Kelly v. Commonwealth*, Ky., 267 S.W.2d 536, 639 (1954). A defendant has a right to have every issue of fact raised by the evidence and material to his defense submitted to the jury on proper instructions. (Citation omitted.)

Id. at 360. The Court went on to say:

> [N]o matter how preposterous, any defense which is supported by the evidence must be submitted to the jury. "It is the privilege of the jury to believe the unbelievable if the jury so wishes." *Mishler v. Commonwealth*, Ky., 556 S.W.2d 676, 680 (1977).

Id. at 361.

KRS 501.020 provides, in part, as follows:

Definition of mental states.

The following definitions apply in the Kentucky Penal Code:

(1) "Intentionally" — A person acts intentionally with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause that result or to engage in that conduct. (Emphasis added.)

Whether the shooting of Weldon was intentional, of course, depends upon the state of mind of Wayne at the time of the shooting. The state of mind is not always apparent, and it is, of course, difficult to determine. Toward these ends, a person is presumed to intend the logical and probable consequence of his act. See Hudson v. Commonwealth, Ky., 979 S.W.2d 106 (1998).

On the whole of this case, and on the authorities cited herein, we are of the opinion Wayne was entitled to an instruction upon intentional assault in the first degree under KRS 508.010(1)(a), and concomitant instructions under KRS 508.040 and KRS 501.080.

For the foregoing reasons, the judgment of the LaRue Circuit Court is reversed and this cause is remanded for proceedings consistent with this opinion.

ALL CONCUR.

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