

RENDERED: AUGUST 1, 2008; 2:00 P.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2007-CA-001366-MR

ALAN J. WARREN

APPELLANT

v. APPEAL FROM HARRISON CIRCUIT COURT  
HONORABLE ROBERT W. MCGINNIS, JUDGE  
ACTION NO. 07-CR-00017

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: KELLER AND THOMPSON, JUDGES; GRAVES,<sup>1</sup> SENIOR JUDGE.

THOMPSON, JUDGE: Alan J. Warren appeals from a judgment of conviction in the Harrison Circuit Court for reckless homicide. For the reasons stated herein, we affirm.

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<sup>1</sup> Senior Judge John W. Graves sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute (KRS) 21.580.

In the early morning hours of January 12, 2007, Cynthiana Police Officer Brian Hassall responded to the scene of a physical altercation where he observed Roger Smith unconscious on the pavement of a parking lot. Roger was transported to an area hospital where he was pronounced dead less than an hour after arrival. Subsequently, Roger's cause of death was declared the result of blunt force impact to his head which caused fatal bleeding and swelling of his brain.

After Cynthiana Police Office Gary Downs arrived and took several photos, he was notified of a nearby automobile accident involving two individuals matching the description of the two people who had earlier been at the crime scene. Upon reaching the scene of the car accident, Downs observed that a car had swerved off the left side of the road and struck a tree.

Downs first encountered Teresa Smith, Roger's sister, who was disoriented, confused, and apparently under the influence of alcohol. After Teresa informed law enforcement that Warren, the appellant herein, had fled on foot, Warren was located with the help of a canine dog and taken into custody.

Later, Kentucky State Police (KSP) Detective Jeremy Murrell interviewed Warren at the Cynthiana Police Department. Warren told Murrell that Roger challenged him to a fight. He stated that Roger had struck him in the back of the head four to five times before he struck back in self-defense. Finally, Warren informed Murrell that he had knots on the back of his head.

KSP Detective Christopher Jaskowiak was also present during this interview. He inspected Warren's head but did not find any injuries. He

photographed Warren's body but the lab returned the photo card indicating that the film was blank due to a camera malfunction. Apparently, the film did not advance inside the camera. Additionally, Jaskowiak did not suggest that Warren be transported to a hospital for further medical attention. On March 6, 2007, Warren was indicted for first-degree manslaughter by a Harrison County grand jury.

During the jury trial, Colby Smith, Roger's brother, testified that he went to Roger's apartment which was directly across the apartment complex from Colby's apartment. Colby testified that everyone including Warren was consuming alcohol and listening to music. Colby testified that he and Roger had a conversation in the kitchen where Roger asked whether he should smack Warren's head. Colby further testified that he observed Roger openly state that he wanted to "find somebody to fight." Warren inquired of Roger if he was challenging him to a fight. Roger and Warren then stood up and exited the apartment as if they were going to fight but soon returned acting in a friendly manner.

After Colby returned to his apartment, he heard screaming coming from the parking lot. He looked out of his window and observed Roger lying on the pavement beside Teresa's car. Not fully grasping what was occurring, Colby watched Warren kick Roger three times in the upper torso before he ran to his brother's aid.

Additionally, Teresa testified that Roger had several conversations with Colby and Michelle, Colby's future wife, in the kitchen of Roger's apartment. After their last conversation, Roger returned from the kitchen and stated he and Warren

were going to go outside. She testified that Roger was upset because Warren allegedly pulled a knife on her and threatened to cut her several weeks earlier.

After Colby and Michelle left and the three remaining individuals went outside, Teresa testified that she attempted to dissuade Roger from fighting Warren. However, she was thrown aside as Roger threw two punches at Warren who blocked them. Warren then punched Roger who collapsed. Although her brother was unresponsive, Warren mounted Roger and began striking him in the head with both fists. She then convinced Warren to get into her car, and the two sped off eventually crashing into a tree.

Additionally, Michelle testified that she told police that Warren was kicking Roger in the upper torso. However, according to the police, Michelle informed them that all she could see were figures in the dark. At the conclusion of the trial, Warren was found not guilty of first and second-degree manslaughter but was convicted of the lesser offense of reckless homicide. In accordance with the jury's recommendation, the trial court imposed a sentence of five years' imprisonment. This appeal followed.

Warren first contends that the trial court erred when it failed to provide a missing evidence instruction regarding the Commonwealth's failure to preserve important evidence. Specifically, Warren contends that Detective Jaskowiak took photographs of Warren's body and hands but failed to properly preserve the photographs which denied him the right to a fair trial.

According to Warren, his self-defense trial theory was seriously hampered by the Commonwealth's failure to produce the photographs. In his brief, Warren contends that his ability "to have independent experts examine the photographs could have produced material exculpatory evidence that rebutted the prosecution's claim that there were not any injuries to the back of [his] head and that [he] was only acting in self defense after he was struck in the back of the head four to five times." Therefore, he contends that his conviction should be vacated.

A "missing evidence" instruction is designed to cure any due process violation attributable to the absence of exculpatory evidence by a less onerous remedy than dismissing or suppressing relevant evidence. *Estep v. Commonwealth*, 64 S.W.3d 805, 810 (Ky. 2002). Missing evidence instructions are only necessary when the Commonwealth's failure to preserve or collect evidence was intentional and "the potentially exculpatory nature of the evidence was apparent at the time it was lost or destroyed." *Id.* Thus, absent the Commonwealth's engagement in some degree of "bad faith," a defendant is not entitled to a missing evidence instruction. *Id.*

The trial court heard testimony indicating that Detective Jaskowiak attempted to take photographs of Warren's alleged injuries but was unsuccessful. From the evidence in the record, through no fault of Jaskowiak, the camera's film was never exposed and, thus, no photographs were developed. After hearing this testimony, the trial court found no bad faith on the part of law enforcement and denied the request for a missing evidence instruction. Based on these findings,

Warren was not entitled to a missing evidence instruction because the Commonwealth did not intentionally lose or destroy evidence.

Warren next claims that the trial court erred when it failed to grant him a directed verdict of acquittal in violation of his constitutional rights. Specifically, he contends the Commonwealth produced no evidence that he intended to inflict serious physical injury and failed to refute his claim that his actions were taken in self-defense. He further contends that Roger's family members provided the only incriminating testimony against him which should have been insufficient to support his conviction.

Further, Warren contends that the Commonwealth's witnesses' testimony conflicted with the statements that they gave to law enforcement on the morning in question and with law enforcement's testimony regarding the visibility of the crime scene from Colby's apartment window. Based on these facts, Warren contends that the trial court was obligated to grant his motion for a directed verdict of acquittal.

Our review of the denial of a motion for directed verdict is governed by the standard set forth in *Commonwealth v. Benham*, 816 S.W.2d 186 (Ky. 1991):

On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal.

*Id.* at 187.

Moreover, appellate courts provide juries with great latitude to determine the credibility and weight of the evidence. *Reynolds v. Commonwealth*, 113 S.W.3d 647, 650 (Ky.App. 2003). Even when the evidence is inconsistent and contradictory, the credibility of witnesses and the weight to be given to their testimony are within the province of the jury. *Roark v. Commonwealth*, 90 S.W.3d 24, 38 (Ky. 2002). Finally, [t]he testimony of even a single witness is sufficient to support a finding of guilt, even when other witnesses testified to the contrary if, after consideration of all of the evidence, the finder of fact assigns greater weight to that evidence.” *Commonwealth v. Suttles*, 80 S.W.3d 424, 426 (Ky. 2002).

After reviewing the evidence in its entirety, we conclude that it was not clearly unreasonable for the jury to find Warren guilty of reckless homicide. Multiple witnesses testified that Warren struck Roger multiple times while he lay motionless and defenseless on the pavement of a parking lot. The medical evidence revealed that Roger died as a direct result of blunt force impact to his head. Clearly, Warren’s reckless homicide conviction was supported by sufficient evidence because he failed to perceive that his conduct created a substantial and unjustifiable risk of death to Roger and such death did occur. *Saylor v. Commonwealth*, 144 S.W.3d 812, 819 (Ky. 2004).

Further, the fact that the victim's family members were the principal witnesses against Warren did not impugn the legitimacy of the jury's verdict. A jury's verdict may be supported by a single interested party's testimony if the testimony establishes that a violation of the law has occurred. *Gordon v. Commonwealth*, 214 S.W.3d 921, 923 (Ky.App. 2006). Additionally, the factual discrepancies between the Commonwealth's witnesses were matters reserved for the jury's determination. *Id.* at 924.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

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