

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000780-MR

KYLE R. EDGELL

APPELLANT

v. APPEAL FROM BRECKINRIDGE CIRCUIT COURT
HONORABLE BRUCE T. BUTLER, JUDGE
ACTION NO. 11-CR-00113

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, LAMBERT, AND THOMPSON, JUDGES.

LAMBERT, JUDGE: Kyle Edgell was convicted of assault in the second degree and wanton endangerment in the second degree. Kyle¹ was sentenced to five (5) years' imprisonment. Based on the reasons herein, we affirm Kyle's judgment of conviction.

¹ While we normally do not refer to a defendant by his first name, we do so herein for purposes of clarity because there are two Mr. Edgells, Bart and Kyle.

On August 30, 2011, a Breckinridge County Grand Jury returned a two-count indictment charging Kyle with assault in the second degree and wanton endangerment in the first degree. The victim of the assault was Kyle's father, Bart Edgell, a retired cavalry scout in the United States Army. The indictment alleged that Bart and Kyle got into a physical altercation in which Kyle hit Bart in the face with kitchen plates, thereby assaulting him and causing him serious physical injury. During the altercation between the two men, Bart attempted to defend himself with a handgun and fired a shot that accidentally struck his wife (and Kyle's mother), Susanne Edgell, killing her. Kyle's actions leading up to the accidental shooting by Bart form the basis for the wanton endangerment charge.

Bart and Susanne were married in 1986 but had been living separately for approximately four years at the time of this incident, allegedly because of tension in the home between Bart and Kyle. Bart and Susanne had two children together, including Kyle, who was twenty-four years of age at the time of this incident. Bart and Kyle had a historically tense and acrimonious relationship. In May 2011, Bart was living at Sandy Beach in Breckenridge County, when his grandchildren and Kyle came to live with him at the request of Susanne. Bart allowed Kyle to move in with him, provided that he listened to him and helped around the house. A few weeks prior to the incident giving rise to this case, Bart and Kyle had a physical altercation caused by Kyle slamming a bedroom door at Bart's home. Bart noted that he told Kyle he did not want him to tear up his house the way he had at Susanne's house. Kyle came towards Bart, and Bart threw a

punch at Kyle and missed. Kyle then punched Bart and connected multiple times. Bart described the incident as “[Kyle] cleaned my clock.” After he hit Bart, Kyle told Bart he would show him about slamming doors and proceeded to slam the front door, breaking out the glass and causing damage to the door. Bart called the sheriff and Kyle was picked up; however, Bart did not press charges because he was told that doing so would cause his grandchildren to be removed from his home.

On Sunday, June 26, 2011, at approximately 9:30 p.m., Susanne came to Bart’s home. Bart testified that the last time he had spoken to his wife was the prior Wednesday, and during that conversation the two of them argued. Bart indicated that Susanne came to his house because she was worried about him and Kyle, based on the Wednesday conversation. Bart informed Susanne that Kyle needed to go because he could not put up with him anymore. Bart reiterated that message to Susanne on Sunday, telling her Kyle was going to have to leave.

Shortly thereafter, Kyle was helping Susanne put some of his children’s items into her car. During this time, according to Kyle’s testimony, Susanne asked him to take a walk with her, and while doing so, she told Kyle that Bart no longer wanted Kyle staying at his home. When Susanne came back inside, Bart believed Kyle and his friends had left. Susanne sat down on the couch and talked to Bart. Susanne and Bart argued, and Bart told her that he no longer wanted anything to do with Kyle and that if she did, he did not want anything to do with her either. Bart said Kyle needed to leave and that if he did not, he might kill

him. Bart noted that he meant that as a figure of speech and not that he would actually kill his son.

Unbeknownst to Bart, Kyle was outside on the front porch and overheard the conversation. Kyle burst into the house and came straight at Bart. Bart stated that he went into the kitchen towards the sink and that all he remembered was that Kyle started to hit him with kitchen plates. Bart denies hitting Kyle and could not say for certain what happened after he got up from the couch and went into the kitchen. Bart testified that he was in fear for his life—he believed Kyle was going to kill him if he did not do something.

Bart had a pistol clipped to his waistband and felt like he needed to draw it and shoot to get Kyle to stop assaulting him. At this time, Bart testified that Kyle was still hitting him in the face. Bart fired a shot towards the ground to attempt to get Kyle away from him, noting he could not see and did not intend to shoot or hurt anyone. After the shot, Susanne screamed that she had been hit. Bart threw his cell phone to Kyle's wife, Cherisse, and told her to call 911. Susanne was jumping up and down, stating that she was having a burning pain from the wound. Bart tried to calm Susanne and sat her down in front of the couch to see if he could locate her wound. While aiding Susanne, Bart heard Cherisse state, "Kyle, he just shot your mom." Kyle responded and yelled at Bart, "I'm going to kill you, you mother [] and started towards him." Bart responded by shooting in the direction of Kyle's voice, striking Kyle. Bart continued to tend to Susanne, and Kyle and Cherisse left the house.

Bart testified that he tried to use his home phone and Susanne's cell phone to call 911, but could not get the calls to go through. He then ran to a neighbor's house and asked him to call 911. Bart immediately returned to his house, and the police and an ambulance showed up shortly thereafter.

Bart was treated at the local hospital and transferred to Louisville due to a fracture of his eye socket. Bart testified that he still gets blurred vision and pain in his eye socket from the injuries he sustained from being struck in the head with plates by Kyle. He also testified that he has back pain and a lack of a range of motion, as this incident exacerbated an existing back injury. Bart indicated he was on disability for "blown" discs in his upper and lower back. It took approximately four months for his face to completely heal.

Bart estimated that he drank seven beers over the course of the entire day on Sunday. Bart indicated he had been home that day watching a NASCAR race and was preparing to watch television that evening when the incident occurred.

Kyle also gave a statement to the police detailing his version of events that night. He stated that he and his mother went for a walk and she explained that Bart no longer wanted Kyle to live with him. Kyle was upset by this and told her that he thought Bart should have said that to him. After the walk, Susanne went back in the house, and Kyle overheard Bart tell Susanne he wanted nothing more to do with her and that he was going to shoot Kyle. Kyle confronted Bart in the living room and said "so, you are going to shoot me, huh?" This caused Bart to

jump up from his chair and assault Kyle. Kyle claims he defended himself, grabbing at Bart and pushing him toward the kitchen. During the fighting in the kitchen, Kyle grabbed two dishes from the sink and hit Bart with them. Bart responded by biting Kyle's finger and Kyle continued to hit Bart. Bart grabbed his pistol and fired a shot at Kyle. Kyle felt the powder burn, assumed he was hit, and fled out of the house. Kyle realized he was not shot and told Cherisse he needed to go back in and check on the kids, who were asleep inside. At that time, Kyle saw his mother on the floor and heard Bart calling to her but did not see Bart helping her. Kyle was stopped at the door by his father, and as Kyle was at the gate on the front porch, he said to Bart, "you better not []ing kill my mom." Bart fired a shot and hit Kyle in the abdomen.

Kyle also referred to the incident that took place a few weeks prior, questioning the investigating officer if there was a police report stating that Bart had assaulted him on that occasion as well because Kyle was out of work and was drinking some of Bart's beer. Kyle also stated that he was aware that Bart carried a gun and had a concealed carry license.

Kyle's trial testimony was largely consistent with his statement. Kyle also called his wife (Cherisse) and her friend, Chelsea, who were both present during the altercation. Both women testified that Bart swung at Kyle first when Kyle confronted Bart in the living room.

The jury convicted Kyle of second-degree assault and second-degree wanton endangerment and recommended a sentence of five years on the assault

charge and twelve months for the wanton endangerment charge, with the sentences running concurrently for a total sentence of five years. Kyle now appeals to this Court.

As his first assignment of error on appeal, Kyle alleges that the government violated *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), when it excused a juror on the basis of her race. The *Batson* inquiry was framed by the Kentucky Supreme Court as follows:

A three-prong inquiry aids in determining whether a prosecutor's use of peremptory strikes violated the equal protection clause. Initially, discrimination may be inferred from the totality of relevant facts associated with a prosecutor's conduct during a defendant's trial. The second prong requires a prosecutor to offer a neutral explanation for challenging those jurors in the protected class. Finally, the trial court must assess the plausibility of the prosecutor's explanations in light of all relevant evidence and determine whether the proffered reasons are legitimate or simply pretextual for discrimination against the targeted class.

McPherson v. Commonwealth, 171 S.W.3d 1, 3 (Ky. 2005) (citations and footnotes omitted). The trial court's ultimate finding on a *Batson* challenge "is akin to a finding of fact, which must be afforded a great deal of deference by an appellate court." *Chatman v. Commonwealth*, 241 S.W.3d 799, 804 (Ky. 2007) (citation omitted). The burden of showing unlawful discrimination rests with the challenger." *Id.* A trial court's ruling on a *Batson* challenge will not be disturbed unless it is clearly erroneous. *Ordway v. Commonwealth*, 391 S.W.3d 762, 784

(Ky. 2013) (citing *Washington v. Commonwealth*, 34 S.W.3d 376, 380 (Ky. 2000)).

In the instant case, Kyle alleges that a *Batson* violation occurred because Anna Howard, a woman who was either African-American or partially African-American, was excused from the juror pool at the request of the Commonwealth. Kyle alleges that this constitutes a *Batson* violation. However, a review of the record indicates otherwise. When Kyle's alleged *Batson* violation was heard by the Court, the parties engaged in a discussion about whether or not Ms. Howard was in fact of African-American descent. Without reaching an ultimate determination on this issue, the trial court proceeded with the *Batson* inquiry. The prosecutor stated that his race-neutral reason for removing Ms. Howard was because she fell asleep during the voir dire process and seemed bored and tired. Further, in response to questions to the jurors about what they would be doing if they were not in the courtroom, Howard had said "sleeping." The trial court accepted the prosecutor's answer as a race-neutral reason for Howard's dismissal from the juror pool.

Kyle argues that the trial court's inquiry should not have ended after the trial court accepted the government's race-neutral reason for striking Ms. Howard. He argues that the court should have moved to step three of the *Batson* analysis, which was to determine the credibility of the government's allegedly race-neutral reasons for striking the only venire member of a different race than the defendant. Kyle cites to *Purkett v. Elem*, 514 U.S. 765, 769, 115 S.Ct. 1769, 131 L.Ed.2d 834

(1995), in support of his argument that steps two and three in the *Batson* analysis require a separate and distinct analysis. The Commonwealth counters that a trial court can fulfill its duty to rule at step three of the *Batson* analysis by expressing a clear intention to uphold or reject a strike after listening to the challenge and the race-neutral explanation, citing *Messiah v. Duncan*, 435 F.3d 186, 189 (2nd Cir. 2006).

We agree with the Commonwealth that the trial court properly denied Kyle's *Batson* motion. A judge is not required to engage in "a talismanic recitation of specific words in order to satisfy *Batson*." *Messiah, supra*, at 198.

"[U]nambiguous rejection of a *Batson* challenge will demonstrate with sufficient clarity that a trial court deems the movant to have failed to carry his burden to show that the prosecutor's proper race-neutral explanation is pretextual." *Id.* The Court went on to note:

The trial court is not compelled to make intricate factual findings in connection with its ruling in order to comply with *Batson*. *See Miller-El v. Cockrell*, 537 U.S. 322, 347, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003) (explaining that "a state court need not make detailed findings addressing all the evidence before it" to render a proper *Batson* ruling). As long as a trial judge affords the parties a reasonable opportunity to make their respective records, he may express his *Batson* ruling on the credibility of a proffered race-neutral explanation in the form of a clear rejection or acceptance of a *Batson* challenge.

Id. (Internal citation omitted).

In the instant case, the record reflects that the trial court adequately and reasonably conveyed its decision that the prosecutor's race-neutral justification for the peremptory strikes was credible and that Kyle failed to carry his burden on the ultimate issue of purposeful discrimination. We agree with the Commonwealth that the trial court clearly denied the *Batson* challenge and thus satisfied the *Batson* inquiry framework.

Kyle next argues that the trial court erred when it did not instruct on Extreme Emotional Disturbance (EED) because it is required to instruct the jury on the whole law of the case. In support of this argument, Kyle points out that defense counsel tendered instructions to the trial court for assault in the second-degree under EED and assault in the fourth degree under EED. At the conference on this instruction, the Commonwealth said Kyle had not demonstrated a basis for giving such an instruction. Defense counsel stated that there had been testimony before the Court that 1) the night of the incident Kyle heard Bart, his own father, say he was going to kill him; 2) Bart had attacked Kyle two weeks prior to June 26th; and 3) Kyle had seen Bart drinking on June 26th. The trial court responded that Kyle was the one who had created the troubled situation in the family and was therefore not entitled to an EED instruction.

The Commonwealth argues that while the trial court is required to prepare and give instructions on the whole law of the case, "the trial court has no duty to instruct on theories of the case that are not supported by the evidence." *Payne v. Commonwealth*, 656 S.W.2d 719, 721 (Ky. 1983). The trial court's ultimate

decision not to give a jury instruction is reviewed for an abuse of discretion.

Williams v. Commonwealth, 178 S.W.3d 491, 498 (Ky. 2005).

In support of its argument that an EED instruction was not warranted in this case, the Commonwealth points to the statutory framework provided in Kentucky Revised Statutes (KRS) 508.040. Pursuant to that statute, assault under extreme emotional disturbance mitigates a conviction for assault under KRS 508.010 (assault in the first degree), 508.020 (assault in the second degree), and 508.030 (assault in the fourth degree). In discussing extreme emotional disturbance as it relates to assault, the Kentucky Supreme Court noted in *Commonwealth v. Elmore*, 831 S.W.2d 183, 186 (Ky. 1992), that “[t]he extreme emotional disturbance statute does not require notice by the defendant and does not depend upon expert witnesses to prove it. Its purpose is to help a defendant by reducing the sanctions for assault. It does not provide a complete defense to an assault charge.”

In *Greene v. Commonwealth*, 197 S.W.3d 76 (Ky. 2006), the Supreme Court of Kentucky summarized the definition and elements of EED as follows:

Although EED is essentially a restructuring of the old common law concept of “heat of passion,” the evidence needed to prove EED is different. There must be evidence that the defendant suffered “a temporary state of mind so enraged, inflamed, or disturbed as to overcome one's judgment, and to cause one to act uncontrollably from [an] impelling force of the extreme emotional disturbance rather than from evil or malicious purposes.” *McClellan v. Commonwealth*, 715 S.W.2d 464, 468–69 (Ky. 1986). “[T]he event which triggers the explosion of violence on the part of the criminal defendant must be sudden and uninterrupted. It is not a mental disease or illness. . . . Thus, it is wholly

insufficient for the accused defendant to claim the defense of extreme emotional disturbance based on a gradual victimization from his or her environment, unless the additional proof of a triggering event is sufficiently shown.” *Foster v. Commonwealth*, 827 S.W.2d 670, 678 (Ky. 1991) (citations omitted). And the “extreme emotional disturbance . . . [must have a] reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be.” [*Spears v. Commonwealth*, 30 S.W.3d 152,155 (Ky. 2000)].

Id. at 81-82.

In the instant case, the parties and the trial court discussed the EED instructions in chambers. Kyle asserted that he was entitled to an EED instruction because, if his self-protection defense was not believed by the jury, he committed this assault under EED, which was triggered when he heard his dad state that he was going to shoot/kill him.

The Commonwealth argues that to the contrary, the evidence in this case did not support EED, and the trial court was correct when it determined that no testimony had been presented to warrant the instruction. In support of this, the Commonwealth points out that Kyle described his relationship with his father by saying that most of the time they got along fairly well and that he was not sure why there was friction. Under Kyle’s version of events, when he overheard his father make a threat to shoot him, he went into the home and confronted his father. At that point, Bart got up and swung at him. Kyle’s assault on Bart—physically fighting with him and hitting him in the head with kitchen plates—was his effort to

defend himself from Bart's initial aggression towards him. Therefore, the Commonwealth argues, Kyle's own version of events does not leave room for an EED mitigator. Finally, the Commonwealth points out, Kyle's testimony was corroborated by two defense witnesses, who both testified that Bart swung at Kyle first after Kyle confronted Bart about his threat to kill him.

We agree with the Commonwealth that Kyle's self defense theory and his version of events, supported by two other witnesses, negates the opportunity for an EED mitigator. Kyle presented a self defense theory at trial, which was supported by two other witnesses. He cannot simultaneously argue that he was the initial aggressor, but was in a state of extreme emotional disturbance. The trial court did not abuse its discretion by failing to give the jury an instruction on EED as a mitigator for the assault charge.

Kyle next argues that his right to present a complete defense was hindered by the trial court's refusal to let two of his witnesses testify. Both witnesses were nurses with his mother, Susanne, and he claims they spoke to her on Sunday, June 26, 2011, prior to her death. Kyle alleges that because of the trial court's failure to allow the women to testify, the trial court prevented him from presenting a complete defense and also limited his EED testimony and prevented him from impeaching Bart.

The United States Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense. *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006). However, a defendant's right

to present evidence is not unlimited, and “state and federal rule makers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials[.]” *U.S. v. Scheffer*, 523 U.S. 303, 309, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998). This latitude is impermissibly exceeded when an accused’s right to present a defense “is abridged by evidence rules that infring[e] upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve.” *Holmes*, 547 U.S. at 324 (internal quotations omitted).

As stated above, Kyle’s theory at trial was self-defense or self-protection. To that end, Kyle testified that after he heard his father say he might shoot him, he entered his father’s home and verbally confronted Bart. Bart assaulted him, and Kyle defended himself. This testimony was corroborated by Kyle’s wife, Cherisse, and her friend Chelsea, who both testified that Bart was the initial aggressor and swung at Kyle first. Further, Bart testified that he told Susanne a few days prior that he wanted Kyle out of his house. Susanne told this same information to Kyle that Sunday evening. And Bart admitted, and Kyle overheard, that Bart told Susanne that he wanted nothing more to do with Susanne and wanted Kyle gone or he would kill him. This statement was also corroborated by Cherisse and Chelsea. Kyle and Bart both testified about a physical altercation two weeks prior in which Bart admitted to swinging at Kyle first. Bart also testified that Susanne came to the house that Sunday because she was worried about the situation between him and Kyle.

The Commonwealth argues that hearsay evidence from Kyle's mother (that she told two co-workers that Sunday while at work that she was worried about the situation between Kyle and Bart) adds nothing to the aforementioned evidence. The Commonwealth points out that this is particularly so given that one of them stated she did not know when Bart and Susanne supposedly talked about the situation with Kyle, and the other only knew Susanne excused herself to answer a call and that when she came back she stated that Bart had made threats about Kyle. Kyle argues within this claim that he should have had the opportunity to impeach Bart's statement that prior to the incident, he had last spoken to Susanne on Wednesday, June 22, 2011, with information from witnesses that had knowledge that Susanne spoke to Bart on the day of the incident.

The Commonwealth argues that the witnesses' proposed testimony does not necessarily impeach Bart, and that even if it does, it makes no difference because it is a collateral matter—whether Bart talked to Susanne on Wednesday or Sunday—as Bart does not dispute that they talked and he told her Kyle had to go. We agree. The best evidence of Bart as the initial aggressor comes from what was seen and heard at the house that evening, and Kyle presented his own testimony and the testimony of both Cherisse and Chelsea in this regard. The statements of additional witnesses Kyle attempted to introduce did not add anything to Kyle's claim of self defense. Instead, the hearsay testimony of the two nurses who worked with Susanne was cumulative, indirect evidence of Kyle's claimed EED, which the trial court excluded evidence of previously. We agree with the

Commonwealth that the trial court did not err in refusing to allow the two nurses to testify. The nurses would not have aided in the jury's understanding or made it more likely that Bart was the initial aggressor. Kyle's arguments that the hearsay testimony amounts to an excited utterance or present sense impression does not persuade this Court that the testimony of the nurses should have been admitted. The observations made by the nurses of conversations Susanne had earlier in the day do not amount to an excited utterance or a present sense impression, as they were too far removed from the incident that is the central focus of this case.

Kyle next argues that the Commonwealth elicited improper information when it cross-examined Cherisse and Kyle and that such information was not relevant. Kyle admits that no objection was made to the introduction of his testimony on cross-examination, but asks this Court to review it for palpable error under RCr 10.26.

We review alleged errors regarding the admissibility of evidence for an abuse of discretion. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

In particular, Kyle alleges that the information about when Cherisse had her first child (at age sixteen) was irrelevant and meant to "smear Cherisse as a bad mother." However, Cherisse ultimately testified that the children were with Bart so that they could get medical coverage and that when she took her children to Bart "she had nowhere to go and nowhere for the children to go." The Commonwealth argues that contrary to Kyle's claims, this information was relevant because Cherisse testified that Bart was a drunk and that when drinking, he was violent,

made irrational decisions, and was a bad person. The Commonwealth argues that it wanted to counter Cherisse's claims that she thought Bart was a bad person with the information that she entrusted her children in his care and that they had been in his care for seven months. The Commonwealth argues that the information was relevant because it went to the credibility of Cherisse as a witness and explained and gave context as to why the children were living with Bart when the incident occurred.

We agree with the Commonwealth that the information elicited from Cherisse on cross-examination was relevant and probative as to why the children were living with Bart and was relevant for the jury to judge and determine Cherisse's credibility as a witness so that it could evaluate her testimony about whether Kyle or Bart was the initial aggressor.

During Kyle's cross-examination, the prosecutor asked Kyle about his employment history. Kyle claims this information was so unduly prejudicial that it rendered his trial fundamentally unfair and that the evidence was "not relevant to any material issue and was calculated to do nothing but rouse the jury's emotions against [him]. *See Brown v. Commonwealth*, 313 S.W.3d 577 (Ky. 2010).

The Commonwealth contends that during cross-examination, defense counsel did object to the prosecutor's asking about Kyle's employment history, and therefore the argument is preserved for review by this Court. Regardless of whether the objection is preserved, we agree with the Commonwealth that the testimony elicited during Kyle's cross-examination was not unduly prejudicial and

was probative as to why Kyle was living with his father—someone with whom he clearly had issues. Kyle’s employment history and living situation provided context and set the backdrop for Kyle’s offensive conduct. From that basis, no error occurred, particularly given that Kyle’s lack of employment was also referred to during Bart’s testimony, as well as during the testimony of the lead detective that the two had a physical altercation approximately two weeks before due in part to Kyle’s drinking some of Bart’s beer while unemployed.

Finally, Kyle argues that the trial court should have granted his motion for a directed verdict on the wanton endangerment charge. Kyle notes that the Commonwealth’s theory was that even though Bart was drinking beer and had told Kyle he was going to kill him, Kyle could be guilty of wanton endangerment because he had engaged in combat with Bart, who subsequently shot blindly and struck Susanne. Kyle argues that he could not have reasonably foreseen that Bart would pull out a gun and shoot while there were children in the house. Counsel also argued that under the Commonwealth’s theory, every time someone was in a fight and the other person pulled a gun out, the first person would be criminally liable for the second person’s actions.

The directed verdict standard announced in *Jackson v. Virginia*, 443 U.S. 307, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1979), was adopted by Kentucky in *Commonwealth v. Sawhill*, 660 S.W.2d 3 (Ky. 1983), and reiterated in *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (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.

See also Yarnell v. Commonwealth, 833 S.W.2d 834 (Ky. 1992). “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.” *Benham*, at 187.

A criminal defendant is guilty of wanton endangerment in the second degree when he 1) wantonly; 2) engages in conduct; 3) which creates a substantial danger of physical injury to another person. KRS 508.060(2). Kyle argues that Bart is the one who wantonly fired his firearm while in the home with the children and Susanne, and that accordingly Bart, and not himself, is the one guilty of wanton conduct.

The Commonwealth counters that it was not clearly unreasonable for the jury to find Kyle guilty of wanton endangerment in the second degree based upon the facts as presented to them. In support of this, the Commonwealth points out that Kyle and Bart had a history of a tense, heated relationship and that Kyle was aware that Bart had a gun as well as a concealed carry license. Under these facts,

the Commonwealth argues, it was not clearly unreasonable for the jury to find Kyle guilty of wanton endangerment.

While we do not necessarily agree with the jury's verdict that Kyle was guilty of wanton conduct, we cannot say that it was clearly unreasonable for it to find him guilty of the offense, and therefore that the trial court erred in not granting the directed verdict motion. The evidence as presented was sufficient to survive a motion for directed verdict. Accordingly, we find no error by the trial court in this regard.

Discerning no reversible error, we affirm the judgment of the Breckinridge Circuit Court sentencing Kyle Edgell to a term of five years' imprisonment for assault in the second degree and wanton endangerment in the second degree.

ALL CONCUR.

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