

RENDERED: AUGUST 30, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000365-MR

TEDDY JOHNSON

APPELLANT

v.

APPEAL FROM ROWAN CIRCUIT COURT
HONORABLE BETH LEWIS MAZE, JUDGE
ACTION NO. 16-CR-00186

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON, KRAMER, AND K. THOMPSON, JUDGES.

DIXON, JUDGE: Teddy Johnson appeals from a judgment of the Rowan Circuit Court sentencing him to ten years' imprisonment pursuant to a jury verdict finding him guilty of manslaughter in the second degree. Johnson's only argument is that the trial court erred by denying his motion for a directed verdict. We disagree and, thus, affirm.

In August 2016, Johnson shot and killed his daughter Carisa's boyfriend, Marvin James Adkins, Jr. ("Jimmy"). Johnson was indicted for murder, and the charge proceeded to a January 2018 jury trial. At trial, Carisa testified about her tempestuous history with Jimmy and stated that he had threatened to kill her if she ended the relationship. According to the defense testimony, on the day Jimmy was killed, he had engaged in a series of confrontations with Carisa and her parents. At one point, Jimmy shot a rifle into the air and threatened to kill Carisa and her parents, prompting Carisa's mother to call police. Jimmy fled into the woods, and the responding officers could not locate him. Once the officers left, Jimmy returned, setting off the final, fatal altercation.

Jimmy broke Carisa's mother's phone and threw her out of her wheelchair. Johnson and Jimmy engaged in a standoff, each pointing a pistol at the other. Carisa ran away, and Jimmy followed. Johnson followed Jimmy. Carisa crossed a fence and went into a field. Though Jimmy walked nearby, he did not jump the fence. Johnson repeatedly ordered Jimmy to stop, but Jimmy refused and taunted Johnson by asking if Johnson was going to arrest him. Johnson fired two shots, which he said were warning shots, but Jimmy continued onward. Johnson then fired a third time, purportedly only intending to shoot Jimmy in the leg but the shot hit Jimmy in the back, and he died. It is uncontested that Jimmy's

pistol was in his pocket at his death. Johnson testified at trial that when he fired the fatal shot, he did not know whether Jimmy still had his gun.

At trial, Carisa generally testified that she feared for her life on the day Jimmy died, but her testimony was impeached when the Commonwealth played recordings of her grand jury testimony and interview with Kentucky State Police Detective Nathan Shortridge, conducted shortly after Jimmy's death. Carisa told the grand jury that Jimmy had violent tendencies but would never hurt her. She also told Detective Shortridge that she was not scared of Jimmy. Carisa gave Detective Shortridge a version of the last minutes of Jimmy's life, which was more damning to Johnson. For example, she told Detective Shortridge that Johnson kept his pistol aimed at Jimmy's back, despite Jimmy having placed his gun in his pocket and continuing to walk away. Carisa told Detective Shortridge that before he was killed, Jimmy was presenting "no threat to [Johnson] whatsoever[.]"

Johnson's counsel perfunctorily moved for a directed verdict at the close of the Commonwealth's proof, stating only his unsupported opinion that the Commonwealth had failed to present sufficient evidence to instruct the jury on murder, first-degree manslaughter, second-degree manslaughter, or reckless homicide. Johnson renewed his motion at the end of his proof, essentially only reiterating his previous motion. The trial court quickly denied both motions and ultimately instructed the jury on murder, first-degree manslaughter, second-degree

manslaughter, and reckless homicide. The jury found Johnson guilty of second-degree manslaughter and recommended a ten-year sentence. In February 2018, the trial court sentenced Johnson in accordance with the jury’s verdict, after which he filed this appeal.

Johnson’s lone argument is that the trial court erred by denying his motion for directed verdict on the second-degree manslaughter charge. To defeat a motion for directed verdict, “the Commonwealth must only produce more than a mere scintilla of evidence.” *Lackey v. Commonwealth*, 468 S.W.3d 348, 352 (Ky. 2015) (quotation marks and citation omitted). Thus, in ruling on a motion for directed verdict, a court must draw all fair inferences from the evidence in favor of the Commonwealth and grant a directed verdict “only if the evidence is insufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty” *Id.* at 351 (quotation marks and citations omitted). Our review focuses on whether it was “clearly unreasonable for a jury to find guilt” *Id.* at 351-52 (quotation marks and citation omitted).¹

¹ Johnson cites the archaic holding in *Dority v. Commonwealth*, 269 Ky. 201, 106 S.W.2d 645, 647 (1937), that a conviction may not be maintained if the evidence is as consistent with a defendant’s innocence as guilt. Of course, that standard applies to cases based upon circumstantial evidence and has long since been superseded by the familiar “scintilla” rule. In fact, though it did not expressly mention *Dority*, our Supreme Court rejected the *Dority* standard over thirty-five years ago in *Commonwealth v. Sawhill*, 660 S.W.2d 3, 4-5 (Ky. 1983). Tellingly, despite its advanced age, *Dority* has never been cited in a published case and has been cited only once in an unpublished case—and that citation was only to note that the *Dority* standard “is no longer used by Kentucky courts” *Smith v. Commonwealth*, 2010 WL

Johnson’s argument to the contrary, notwithstanding his generic assertion at trial that there was insufficient evidence, fails the requirement in Kentucky Rules of Civil Procedure (CR) 50.01 that a motion for directed verdict “shall state the specific grounds therefor.”² *See, e.g., Early v. Commonwealth*, 470 S.W.3d 729, 733-34 (Ky. 2015). Thus, we may review only for palpable error under Kentucky Rules of Criminal Procedure (RCr) 10.26. *Id.* at 734. An error may only be deemed palpable if it “so seriously affected the fairness and integrity of the proceeding as to be shocking or jurisprudentially intolerable.” *Id.* at 734-35 (quotation marks and citation omitted).

“Absent extreme circumstances amounting to a substantial miscarriage of justice, an appellate court will not engage in palpable error review pursuant to RCr 10.26 unless such a request is made and briefed by the appellant.” *Shepherd v. Commonwealth*, 251 S.W.3d 309, 316 (Ky. 2008). Johnson has not explicitly requested palpable error review; rather, he wrongly insists that his motion was sufficient. Consequently, we would be justified in declining to review the issue under RCr 10.26. However, Johnson’s reply brief contains a fleeting recitation of the palpable error standards, which we will *very* leniently construe as

2629706, at *4 (Ky. App. July 2, 2010). In fact, Johnson’s counsel was also appellant’s counsel in *Smith*, so his continued reliance upon *Dority* is inexplicable and improper.

² CR 50.01 also applies to criminal cases. *See, e.g., Jones v. Commonwealth*, 331 S.W.3d 249, 252 (Ky. 2011).

an implied request for palpable error review. In the future, counsel shall accurately state whether any issue is preserved (and, if so, how) and must explicitly ask for palpable error review to receive it.

Johnson's contention that there was no evidence that he acted wantonly requires us to examine the statutory elements of wantonness and protection of self and others. Of course, no defendant is likely to testify explicitly that he or she acted wantonly, so we must examine the evidence to determine if wantonness was present therein.

In relevant part, Kentucky Revised Statutes (KRS) 507.040(1) provides that a person is guilty of manslaughter in the second degree "when he wantonly causes the death of another person" Under KRS 501.020(3), a person acts wantonly "when he is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists" and "[t]he risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation."

KRS 503.050(2) provides, in relevant part, that a defendant is justified in using deadly physical force "only when the defendant believes that such force is necessary to protect himself against death . . . [or] serious physical injury" Under KRS 503.070(2), deadly physical force to protect another person is justified,

in relevant part, if “[t]he defendant believes that such force is necessary to protect a third person against imminent death . . . [or] serious physical injury” and “[u]nder the circumstances as they actually exist, the person whom he seeks to protect would himself have been justified . . . in using such protection.”

Johnson’s legal right to shoot Jimmy to protect Carisa depends upon whether Carisa herself would have been justified in using deadly force, and the evidence was mixed on that issue. Carisa told the trial jury that she feared Jimmy, but she told the grand jury that Jimmy would never hurt her. She told Detective Shortridge soon after the shooting that she was not afraid of Jimmy. Jimmy had been making threats and acting aggressively; but, at the time of the shooting, he and Carisa were separated by a fence, and Jimmy’s gun was in his pocket. Moreover, Carisa told Detective Shortridge that Jimmy posed “no threat whatsoever” at the time he was killed.

The function of a jury is to weigh such conflicting evidence. In short, as the Commonwealth aptly notes, the divergent evidence permitted the jury to conclude that Johnson “wantonly disregarded the risk that he was mistaken in his belief that deadly force was necessary to protect Carisa” and that he “was aware of the substantial and unjustifiable risk that he was mistaken in his belief that deadly force was necessary, and that he consciously disregarded that risk when he pulled the trigger.” Appellee brief at 16-17.

Similarly, there was conflicting testimony about whether Johnson was entitled to use deadly force to protect himself from Jimmy. It is uncontested that Jimmy had made threats against Johnson, had pointed a pistol at Johnson and had generally been belligerent. However, it is also uncontested that Jimmy had his gun in his pocket and was walking away from Johnson when Johnson shot him. Indeed, Carisa told Detective Shortridge that Jimmy posed “no threat whatsoever” at the time he was killed. Moreover, it is beyond cavil that shooting a firearm at a person carries a risk that the person will be killed, especially when the person being shot is moving and the shooter is trying to balance upon a cane. Again, there was sufficient evidence for a jury to conclude that Johnson wantonly disregarded the risk that he was mistaken in his belief that deadly force was necessary to protect himself; that he “was aware of the substantial and unjustifiable risk that he was mistaken in his belief that deadly force was necessary[;] and that he consciously disregarded that risk when he pulled the trigger.” Appellee brief at 17.

Perhaps another jury would have reached a different result in this tragic case, but the Commonwealth presented more than a scintilla of proof that Johnson acted wantonly when he killed Jimmy—*i.e.*, committed manslaughter in the second degree—so the trial court did not err, much less palpably err, in denying Johnson’s motion for directed verdict.

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

ALL CONCUR.

BRIEFS FOR APPELLANT:

Roy Alyette Durham II
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear
Attorney General of Kentucky

M. Brandon Roberts
Assistant Attorney General
Frankfort, Kentucky