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THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: JANUARY 22, 2004
NOT TO BE PUBLISHED

FINAL

Supreme Court of Kentucky

2001-SC-0852-MR DATE 3-23-04 Elva Grant D.C

CHESTER SLIM SEXTON — APPELLANT

V.

APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE EDWIN M. WHITE, JUDGE
98-CR-454 and 00-CR-067

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

REVERSING AND REMANDING

Appellant, Chester Slim Sexton, was convicted of murder, first-degree robbery, and tampering with physical evidence. Upon conviction, Appellant was sentenced to serve fifty years for murder, ten years for robbery, and five years for tampering with physical evidence, with all sentences to run concurrently for a total of fifty years. Appellant appeals to this Court as a matter of right.[1]

Appellant and the victim, David Pepper, decided to go camping so they could drink alcohol to the point of inebriation. Appellant, the only surviving witness presented his version of events at trial. He testified that the two men had consumed alcohol for some period of time and that Pepper began "feeling" on him. In response, Appellant hit Pepper. Pepper then went over to his jeep and pulled out a gun, and

[1] Ky. Const. § 110(2)(b).

according to Appellant started acting "crazy" and "weird." Pepper said, "I know you're a faggot," and then said to Appellant that he was going to sodomize him "like they did when I [Pepper] was in prison."

Appellant claims the two men began wrestling and that Pepper eventually pinned Appellant face down to the ground. Pepper then placed the gun against Appellant's head and laughingly pulled down Appellant's shorts. Appellant claims that he felt the full weight of Pepper's body on him and something wet on his body. He believed that Pepper was trying to penetrate him, but was unsure if Pepper was physically able to do so.

Appellant claims that he was scared and offered to perform oral sex on Pepper if he would not penetrate him. Pepper then said to Appellant that "I knew you were gay" and let him stand up. While Pepper continued to hold the gun, he insisted on oral sex, but Appellant delayed the act. Appellant went to the jeep, started it, and ran over Pepper while he was pointing a gun at him. After stopping the jeep, Appellant ran into the woods.

A short while later, Appellant returned from the surrounding woods and found Pepper moving on the ground. As Appellant approached, Pepper looked up at him and asked "Why?" Appellant claimed that the two men began fighting on the ground and that Pepper's gun suddenly fired, mortally wounding Pepper in the chest.

Appellant left the campsite in Pepper's Jeep and drove to the home of his friend, Jerry Stacy, in Indiana. He left Stacey's home and picked up his stepbrother, Eddie Pratt, and traveled to Pratt's home while discussing ways to dispose of Pepper's body so that it could not be identified. Later that day Sexton and Pratt ended up at the home of Appellant's mother, Rita Sexton.

Appellant returned to the campsite by himself where he built a bonfire and burned Pepper's body. A Christian County Deputy Sheriff received a tip from Appellant's mother and went to the campsite where he saw the large bonfire continuing to burn. When the deputy sheriff arrived he observed Appellant dragging something toward a truck. Appellant ran from the deputy sheriff but eventually stopped. The deputy sheriff approached and asked where Pepper was and Appellant responded, "You'll have to find him." The deputy sheriff went to the bed of the truck and removed a jacket and then discovered what was later identified as the charred remains of Pepper's body.

At trial, the state medical examiner testified that the gunshot wound and the blunt crushing injury to Pepper's chest were the cause of death. He also testified that he could not determine whether the gunshot wound or the crushing came first. Appellant presents various issues on appeal and further facts will be developed as necessary.

Appellant first argues that the trial court committed error by failing to hold a competency hearing as required under KRS 504.100 and RCr 8.06. Appellant's counsel filed a motion requesting that Appellant be sent to Kentucky Correctional Psychiatric Center (KCPC) for examination, testing, and treatment. The trial court held a hearing and ordered that Appellant be sent to KCPC for evaluation for competency and criminal responsibility. On August 17, 1999, the trial court entered an Agreed Order requiring that Appellant remain at KCPC for continued treatment and examination, pursuant to a request by Dr. Steve Simon, a licensed clinical psychologist. The Agreed Order required treatment "including forced medication, with or without

Defendant's consent, and any restraint which may be necessary to effect such treatment."

On July 17, 2000, Appellant's counsel again moved for him to be sent to KCPC for examination and treatment due to mental illness. The trial court held a hearing and sent Appellant back to KCPC for treatment. On September 20, 2000, Dr. Simon, filed a report with the trial court. Dr. Simon reported that Appellant was in the low average range of intelligence, and that he did not cooperate with sensory system and memory screening exams. Appellant also refused to take the Weschsler Adult Intelligence Scale-Third Edition (WAIS-III) and the Whitaker Index of Schizophrenic Thinking (WIST). On the Hare Checklist-Screening Version, Appellant obtained a score of 18, a score he argued indicates psychosis. Nevertheless, Dr. Simon reported that Appellant was competent to stand trial, but no competency hearing was held by the trial court.

The statutory requirements for competency determinations are governed by KRS 504.100. Specifically, KRS 504.100(1) requires a court to appoint a psychologist or psychiatrist "to examine, treat and report on the defendant's mental condition" whenever "the court has reasonable grounds to believe that the defendant is incompetent to stand trial." KRS 504.100(3) states that after the report is filed, "the court shall hold a hearing to determine whether the defendant is competent to stand trial." This Court has interpreted the statutory language "shall hold" to mean that section 3 is mandatory and cannot be waived by the defendant.[2]

Despite extensive examinations by KCPC personnel, and findings that raised serious questions as to Appellant's competency, it appears that the trial court did

[2] Mills v. Commonwealth, Ky., 996 S.W.2d 473 (1999).

not conduct a competency hearing as required by KRS 504.100(3). Had no other reversible error occurred in these proceedings, it might be possible to remand this case for a retrospective competency hearing.[3] However, as other errors require this case to be reversed and remanded for a new trial, a competency hearing will be required on remand.

Appellant's second claim of error is that the trial court failed to properly instruct the jury on self-protection for failing to include a wanton or reckless belief qualification (imperfect self-defense). This issue was preserved for appellate review by Appellant's request for such an instruction.

Appellant claims that Pepper, while brandishing a gun, attempted to sodomize him, but was physically unable to accomplish the act. As a result of the attempted sodomy, and what Appellant feared was an acceptance of his coerced agreement to perform oral sex on Pepper, Appellant drove the jeep over Pepper in an act of self-defense. After fleeing to the woods for a short time, Appellant returned to the campsite and found Pepper lying on the ground. At this point, Pepper asked Appellant "Why," and Appellant wrestled with Pepper and the gun discharged into Pepper's chest.

At trial, Appellant received a self-defense instruction pursuant to KRS 503.050. Defense counsel wanted more and argued that the jury could have believed that Appellant was acting in self-defense during one of the encounters, and acting in imperfect self-defense during the other. Following the discussion of the requested imperfect self-defense instruction, the trial court ruled that the jury could either believe the Commonwealth's evidence that Appellant intentionally ran over and shot Pepper, or

[3] Johnson v. Commonwealth, Ky., 103 S.W.3d 687, 693 (2003).

it could believe Appellant's claim that he acted in self-defense to avoid being sodomized or shot by Pepper.

On appeal, Appellant argues that Pepper continued to demand oral sex after he let Appellant up from the ground. Appellant claims a continuing belief that he was being threatened with physical or sexual assault so as to permit the use of deadly force, but acknowledges that his belief could be regarded as wanton or reckless by the jury. Appellant testified that Pepper was pointing the gun at him when he drove the jeep over him, but admitted that it was unclear whether Pepper was actually threatening Appellant or merely trying to stop the jeep from running over him.

KRS 503.120 provides as follows:

> When the defendant believes that the use of force upon or toward the person of another is necessary for any of the purposes for which such belief would establish a justification under KRS 503.050 to 503.110 but the defendant is wanton or reckless in believing the use of any force, or the degree of force used, to be necessary or in acquiring or failing to acquire any knowledge or belief which is material to the justifiability of his use of force, the justification afforded by those sections is unavailable in a prosecution for an offense for which wantonness or recklessness, as the case may be, suffices to establish culpability.

This Court has recognized imperfect self-defense as codified in KRS 503.120 in Higgs v. Commonwealth,[4] Hager v. Commonwealth,[5] and Elliott v. Commonwealth.[6] This Court noted in Hager:

> The statute first recognizes that all KRS 503 justifications, including self-protection, are premised upon a defendant's actual subjective belief in the need for the conduct constituting the justification and not on the objective reasonableness of that belief. Elliott, supra, at 419. Secondly, the statute recognizes that a defendant may be

[4] Ky., 59 S.W.3d 886 (2001).
[5] Ky., 41 S.W.3d 828 (2001).
[6] Ky., 976 S.W.2d 416 (1998).

> mistaken in his belief and that the mistaken belief, itself, may be so unreasonably held as to constitute wantonness or recklessness with respect to the circumstance then being encountered. Id. at 420. If so, the statute provides that the justification, e.g., self-protection, is unavailable as a defense to an offense having the mens rea element of wantonness, e.g., second-degree manslaughter, or recklessness, e.g., reckless homicide, "as the case may be."
>
> Thus, while a wantonly held belief in the need to act in self-protection is a defense to an offense having the mens rea element of intent, it supplies the element of wantonness necessary to convict of second-degree manslaughter; and while a recklessly held belief in the need to act in self-protection is a defense to an offense requiring either intent or wantonness, it supplies the element of recklessness necessary to convict of reckless homicide. Shannon v. Commonwealth, Ky., 767 S.W.2d 548, 548-51 (1988) ("Shannon, Part I") [(*overruled by* Elliott, supra.)] held that an intentional homicide (or assault) committed under a wanton or reckless belief in the need to act in self-protection results in a conviction of a lesser offense having wantonness or recklessness as the culpable mental state. Specifically, murder or first-degree manslaughter is reduced to second-degree manslaughter by a wantonly held belief or to reckless homicide by a recklessly held belief.[7]

This Court also held:

> Even if a defendant is mistaken in his subjective belief, he is still entitled to the defense of self-protection, subject only to the wanton or reckless belief qualification described in KRS 503.120(1).[8]

In view of Appellant's testimony, there appears to have been evidence to support a reckless or wanton belief in the need for self-protection. At trial, the trial court gave instructions on first-degree murder, first-degree manslaughter, and self-defense. The jury was deprived of an opportunity to find that Appellant was wanton or reckless in his belief in the need for self-protection and thereby reduce the degree of his culpability.

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[7] Hager, 41 S.W.3d at 842.
[8] Higgs, 59 S.W.3d at 889-90.

Accordingly, we reverse the trial court on this issue and remand this case for a new trial consistent herewith and our decisions in Higgs, Hager, and Elliott.

Appellant's third claim follows from his imperfect self-defense claim. In this regard he asserts that the trial court committed reversible error by failing to instruct the jury on second-degree manslaughter and reckless homicide. This issue was preserved by Appellant's overruled request for such instructions. Appellant argues that his demonstration of entitlement to an imperfect self-defense instruction reveals that the jury should have been given the opportunity to find him guilty of the lesser offenses of second-degree manslaughter or reckless homicide.

According to Appellant, he ran over Pepper with the jeep because he believed "something was about to happen." After running over Pepper and returning to the scene from the nearby woods, Appellant testified that Pepper started fighting with him. As a result of the encounter, Appellant testified that the gun discharged into Pepper's chest and killed him. Appellant testified that he "couldn't claim it was an accident," but that he also was not sure who pulled the trigger or what made the gun fire. Appellant testified that he had no intent to pull the trigger.

The trial court has a duty to give instructions on the "whole law of the case, including any lesser-included offenses which are supported by the evidence, [but] . . . that duty does not require an instruction on a theory with no evidentiary foundation."[9] This Court said:

> The general rule is that "the court is required to instruct on every state of the case reasonably deducible from the evidence." Ragland v. Commonwealth, Ky., 421 S.W.2d 79, 81 (1967). And, a "defendant is entitled to have his theory of

[9] Gabow v. Commonwealth, Ky., 34 S.W.3d 63, 72 (2000)(*quoting* Houston v. Commonwealth, Ky., 975 S.W.2d 925, 929 (1998)).

> the case submitted to the jury." Davis v. Commonwealth, Ky., 252 S.W.2d 9, 10 (1952).[10]

The ambiguous facts of the two encounters could support a jury finding that Appellant acted wantonly or recklessly when he drove the jeep over Pepper, or when he returned to the scene to engage the armed man. As there was some evidence to support a wanton or reckless self-defense instruction, it also would have been appropriate to give instructions on second-degree manslaughter and reckless homicide.

Appellant's fourth claim of error is that the trial court improperly excluded evidence of prior acts and statements of Pepper that caused Appellant to fear him. In view of our determination that a new trial is required on other grounds, we deem it expedient to address this issue as it will likely recur upon retrial.

On direct examination, Appellant described his version of the events that led to Pepper's death. Appellant's version of events included a description of why he feared Pepper and why he believed that Pepper intended to sodomize him. Specifically, Appellant testified that Pepper stated he was going to sodomize him similar to the manner Pepper was sodomized while in prison. The Commonwealth objected to Appellant's testimony regarding Pepper's references to past acts of sodomy in prison and the trial court sustained the objection. Appellant claims that because he was claiming self-defense, he had the right to explain why he feared Pepper, including evidence of particular acts of violence or threats made by the victim.

KRE 404(a) provides as follows:

> Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
>
> . . .

[10] Sanborn v. Commonwealth, Ky., 754 S.W.2d 534, 549 (1988).

> (2) . . . Evidence of a pertinent trait of character of the victim of the crime offered by an accused, . . . or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor.

In Higgs v. Commonwealth,[11] this Court cited several cases supporting the admissibility of evidence of prior specific threats or violence by the victim.[12] We said:

> Those cases hold that evidence of prior specific acts of threats or violence by the victim is admissible if relevant to prove the state of mind of the defendant, e.g., fear of the victim, at the time of the killing.[13]

A defendant may present evidence of particular "violent acts of an alleged victim, evidence of threats by the victim, and evidence of hearsay statements about such acts or threats," if such evidence tends to show the defendant had a justifiable fear of the victim at the time of the encounter.[14] Pepper's alleged threats to sodomize Appellant while brandishing a pistol appear to be admissible to explain any fear Appellant may have held. On retrial, if the evidence is substantially the same, this evidence should be admitted.

Finally, Appellant claims that KRS 439.3401, which sets forth parole eligibility for violent offenders, denies equal protection, due process, and imposes cruel and unusual punishment upon him. Appellant observes that as the charges of murder and first-degree robbery are subject to the violent offender statute, he is not eligible for parole for 42.5 years. By contrast, he points out that a violent offender who commits a

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[11] Supra, note 4.
[12] Id. at 892.
[13] Id. (*citing* Cesna v. Commonwealth, Ky., 465 S.W.2d 283, 284-85 (1971); Carnes v. Commonwealth, Ky., 453 S.W.2d 595, 598 (1970); Fannon v. Commonwealth, 295 Ky. 817, 175 S.W.2d 531, 533-34 (1943)).
[14] Commonwealth v. Davis, Ky., 14 S.W.3d 9, 14 (1999). See Wilson v. Commonwealth, Ky. App., 880 S.W.2d 877, 878 (1994).

class A felony and receives a life sentence is eligible for parole upon serving twenty years. As this issue may recur on retrial we will provide guidance to the trial court.

In Hughes v. Commonwealth,[15] this Court thoroughly analyzed this issue and we reaffirm the analysis that held that a defendant will become eligible for parole after serving the lesser of either eighty-five percent of his sentence or twenty years.[16]

For the forgoing reasons, we reverse and remand to the trial court for proceedings not inconsistent with this opinion.

Lambert, C.J., and Cooper, Graves, Johnstone, Keller, and Stumbo, JJ., concur. Wintersheimer, J., concurs in result only.

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[15] Ky., 87 S.W.3d 850 (2002).
[16] Id. at 855.

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