IMPORTANT NOTICE

NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: JUNE 16, 2005
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 7-7-05 ELIA Grow, DC.

2004-SC-000106-MR

DENNIS J. ISAACS — APPELLANT

V.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN P. RYAN, JUDGE
03-CR-001549

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

I. INTRODUCTION

Appellant, Dennis Isaacs, was convicted of Wanton Murder, First-Degree Robbery, and Tampering with Physical Evidence. He was also determined to be a First-Degree Persistent Felony Offender and received a total sentence of life imprisonment. Appellant contends that the evidence was insufficient to support the Wanton Murder charge, and therefore, the trial court should have granted his motion for directed verdict on that charge. Because the jury's decision to convict Appellant of Wanton Murder was not clearly unreasonable, we hold that the trial court properly denied Appellant's motion for a directed verdict. Accordingly, we affirm Appellant's convictions.

II. BACKGROUND

Appellant and his girlfriend, Ann Hill, visited JT's Brookline Inn around midnight on May 23, 2003. While at the bar, Hershell Engle, an eighty-year old patron of the bar, approached Appellant and Hill and introduced himself, and the three talked for some

time. Appellant and Hill eventually decided to leave and asked Engle if he would like to accompany them. Engle agreed, and the three left the bar together. According to Hill, she and Appellant intended to walk Engle to his home.

When the three reached Bellevue Avenue, Engle mentioned hailing a cab. Then, according to Hill, Appellant struck Engle, causing him to fall to the ground. Engle's fall was particularly violent and loud. In fact, Eric Sherzer, who lived across the street from where the body was found, testified that he heard a brief argument followed by a "loud, dull thud" in front of his house. After knocking Engle to the street, Appellant began rummaging through Engle's pockets. Finding Engle's wallet, Appellant removed the contents and threw the wallet to Hill, ordering her to get rid of it. Finally, Appellant dragged Engle across the street by the seat of his pants so that his face was scraped by the pavement and left him in front of a parked car. Appellant and Hill then left the scene.

Later that morning, at around 5:00 a.m., Robert Hatfield, a local resident just returning from work, noticed Engle's body next to the curb. Police were summoned to the scene, and an investigation was conducted. Initially, it was unclear whether Engle's death should be treated as a homicide. According to the assistant chief medical examiner, Dr. Barbara Weakley-Jones, Engle died as the result of cranial trauma from being struck below his chin. Also, Engle suffered a fractured skull, likely caused by the back of his head hitting the street. Furthermore, Dr. Weakley-Jones opined that Engle's injuries were not consistent with a normal fall, but rather suggested that he had either been pushed or hit, lending additional weight to the homicide suspicion. Ultimately, Dr. Weakley-Jones concluded that Engle died as the result of closed head injuries

consistent with an assault and a resultant fall to the ground, though the actual mechanism of death was asphyxiation.

Appellant was indicted on June 16, 2003, and was charged with Murder, First-Degree Robbery, Tampering with Physical Evidence, and with being a First-Degree Persistent Felony Offender ("PFO"). The jury convicted Appellant of Wanton Murder, First-Degree Robbery, and Tampering with Physical Evidence and determined that he was a First-Degree PFO. The jury recommended enhanced sentences of life for both the Wanton Murder and the First-Degree Robbery convictions and an enhanced sentence of 20 years for the Tampering with Physical Evidence conviction. The trial court sentenced Appellant to a total sentence of life imprisonment. Appellant appeals to this court as a matter of right.[1]

III. ANALYSIS

Appellant's sole claim of error on appeal is that the trial court improperly denied his motion for directed verdict on the Wanton Murder charge. He contends that the evidence was insufficient evidence to support a jury's conviction on this charge. We disagree and affirm Appellant's conviction.

"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 [is] the defendant . . . entitled to a directed verdict of acquittal."[2] Furthermore, we have stated that "in ruling on a directed verdict motion, the trial court must draw all reasonable inferences from the evidence in favor of the Commonwealth and assume that the Commonwealth's evidence is true, leaving questions of weight and credibility to the

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[1] KY. CONST. § 110(2)(b).

[2] Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991).

jury."[3] Thus, we will only reverse a judge's decision not to grant a motion for directed verdict when a guilty verdict would be "clearly unreasonable."

Appellant claims that the jury acted unreasonably in convicting him of Wanton Murder. According to Appellant, the evidence in this case would, at most, support a conviction for First-Degree Manslaughter, which—under one alternative—requires proof of intent to inflict serious physical injury.[4] Conviction of Wanton Murder, however, requires proof of an "extreme indifference to human life," which Appellant contends is missing in this case.[5] Although Appellant correctly notes a difference Between First-Degree Manslaughter and Wanton Murder, we disagree with his assertion that the circumstances of this case render his conviction for the latter crime unreasonable. In McGinnis v. Commonwealth,[6] we said, "wanton killing must exhibit 'purposeful or knowing' indifference, 'conduct evidencing a "depraved heart" with no regard for human life.'"[7] And Brown v. Commonwealth,[8] upon which Appellant relies, provides support for the jury's decision in this case. In Brown, we identified certain characteristics common to wanton murder cases, such as "'(i) homicidal risk that is exceptionally high; (ii) circumstances known to the actor that clearly show awareness of the magnitude of the

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[3] Slaughter v. Commonwealth, 45 S.W.3d 873, 875 (Ky.App. 2000); see also Nichols v. Commonwealth, 657 S.W.2d 932, 934 (Ky. 1983).

[4] KRS 507.030(1)(a) ("A person is guilty of manslaughter in the first degree when: (a) with intent to cause serious physical injury to another person, he caused the death of such person or of a third person.").

[5] KRS 507.020(1)(b) ("A person is guilty of murder when: . . . (b) including, but not limited to, the operation of a motor vehicle under circumstances manifesting extreme indifference to human life, he wantonly engages in conduct which creates a grave risk of death to another person and thereby causes the death of another person.").

[6] 875 S.W.2d 518 (Ky. 1994).

[7] Id. at 520 (quoting KRS 507.020, Commentary).

[8] 975 S.W.2d 922 (Ky. 1998).

risk; and (iii) minimal or non-existent social utility in the conduct.'"[9] Although these factors are by no means an exhaustive list of the elements a jury will consider in any individual case, they do provide guidance when trying to determine whether the defendant manifested an "extreme indifference to human life."

In this case, Appellant, who was 5' 11" and weighed 230 pounds, punched the 80-year old victim, who was 5' 10" and weighed only 146 pounds, and knocked him to the ground with such force that, according to a witness in a nearby building, an audible "thud" was produced. Then, after immobilizing the victim, Appellant rifled through the victim's pockets, apparently oblivious to the victim's condition. Finally, upon finding the victim's wallet and taking cash from it, Appellant dragged the victim across the street, face down, leaving him in front of a parked car. As Appellant left the scene, he admonished his girlfriend, Hill, not to talk about the incident to anyone, and, if questioned, Hill was told to say that the victim was last seen walking away from Hill and Appellant. Again, there is no evidence that Appellant took any heed to the victim's condition and the possibility, if not the likelihood, that he could be seriously injured. In fact, the evidence is to the contrary. Appellant showed no concern for the value of his victim's life.[10]

Based upon these facts, which were not disputed at trial, when considered in light of the Brown factors, we conclude that it was not unreasonable for the jury to find that Appellant had acted with extreme indifference to human life, thus warranting a conviction for wanton murder. First, as to the risk of homicide, the sheer disparity in

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[9] Id. at 924 (quoting LAWSON AND FORTUNE, KENTUCKY CRIMINAL LAW § 8-c(2), at 322 (1998)).

[10] Johnson v. Commonwealth, 885 S.W.2d 951, 952 (Ky. 1994) ("This Court has held that a conviction of wanton murder is reserved exclusively for offenders who manifest virtually no concern for the value of human life.").

size and age between Appellant and the victim lead inescapably to the conclusion that there was a high risk of death resulting from Appellant's conduct. Appellant, a forty-seven year old man who outweighed the victim by eighty-four pounds, attacked the victim, an eighty-year old man, knocking him to the concrete with tremendous force. Given these facts, the risk of death was exceptionally high. Second, the evidence indicates that Appellant was aware of the risk. Appellant's admonition to Hill not to tell anyone about the incident indicates knowledge of the seriousness of the situation, i.e., the victim was seriously injured. Also, the fact that the attack occurred in the middle of a street early in the morning, a time when any aid was highly unlikely, reveals that Appellant was aware of the magnitude of the risk. Third, it is beyond dispute that Appellant's behavior in this case had no social utility.

Finally, we note that the determination as to whether a defendant's conduct manifests extreme indifference to human life, though often unclear, is best left to the jury.[11] So, unless there is no credible evidence to support a jury's finding of extreme indifference to human life, the trial court should not grant a motion for directed verdict on the issue of wanton murder. In this case, the jury's decision to find Appellant guilty of wanton murder was reasonable, and we affirm the conviction.

IV. CONCLUSION

Based on the evidence, it was not clearly unreasonable for the jury to find that Appellant acted wantonly in causing the victim's death "under circumstances manifesting extreme indifference to human life." We, therefore, find no error in the trial

[11] Brown, 975 S.W.2d at 924 (quoting KRS 507.020, Commentary) ("'Whether recklessness is so extreme that it demonstrates similar indifference is not a question that, in our view, can be further clarified; it must be left directly to the trier of facts.'").

court's decision to deny Appellant's motion for a directed verdict, and we affirm Appellant's convictions, including his conviction for Wanton Murder.

Lambert, C.J.; Cooper, Graves, Johnstone, Scott and Wintersheimer, JJ., concur.

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