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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: FEBRUARY 23, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2005-SC-0503-MR

ROBERT E. SHIRLEY — APPELLANT

V.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE STEVE ALAN WILSON, JUDGE
2004-CR-0247

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Robert E. Shirley, was convicted in the Warren Circuit Court of wanton murder. He was sentenced to twenty years' imprisonment and appeals to this Court as a matter of right. Finding no error, we affirm.

Appellant's conviction stems from the January 4, 2004 shooting death of Alfred Victor Michael. Appellant's wife, Jeanetta, had met Michael in June 2003, while shopping at a Wal-Mart store where he was employed. After discovering that Michael was nearly destitute, Appellant and his wife began providing him assistance. The couple helped Michael get an apartment and enroll in trade school. Michael began attending Appellant's church and coming to Appellant's house every evening for dinner.

While Appellant stated that he considered Michael an "adopted" son, there was evidence presented at trial that Appellant had, in fact, become very jealous of the relationship between Jeanetta and Michael. On the evening of January 4, 2004, Appellant arrived home after having visited family in a neighboring county. Appellant

stated that as he walked past the kitchen window on his way into the house, he observed Jeanetta and Michael embracing. Appellant thereafter retrieved a handgun from the garage. As he started through the kitchen door, Appellant exclaimed, "What is going on here?" Simultaneously, he fell, discharging the weapon and shooting Michael in the head. Appellant thereafter called 911. When police arrived, Jeanetta told them that "the door flew open and I seen my husband, he slid like, the concrete down there, as he came up, and the gun just went off." She further said, "But like I say, I don't think he intended, I think he meant to scare . . . because I did see him go down. He slipped and kind of went down." Michael died the following day.

Following a trial in April 2005, a jury found Appellant guilty of wanton murder and recommended a sentence of twenty years' imprisonment. Judgment was entered accordingly. Additional facts are set forth as necessary.

I.

Appellant first argues that the trial court erred in failing to instruct the jury on self-protection and the protection of others. Appellant contends that he introduced sufficient evidence from which a jury could have concluded that he shot Michael in self-defense or in defense of his wife. We disagree.

A defendant is entitled to have the jury instructed on the merits of any lawful defense which he has. Sanborn v. Commonwealth, 754 S.W.2d 534 (Ky. 1988). However, the entitlement to an affirmative instruction is dependent upon the introduction of some evidence justifying a reasonable inference of the existence of a defense. Brown v. Commonwealth, 555 S.W.2d 252, 257 (Ky. 1977); Jewell v. Commonwealth, 549 S.W.2d 807, 812 (Ky. 1977), overruled on other grounds by, Payne v. Commonwealth, 623 S.W.2d 867 (Ky. 1981).

During the 911 tape played for the jury, Appellant said that he only intended to point the gun at Michael, but he slipped on the concrete leading into the kitchen and the gun accidentally discharged. Later, at the police station, Appellant gave a taped statement to Detective Kevin Pickett, wherein he claimed that he had observed his wife and Michael embracing, and that Michael was thrusting his pelvic area into Jeanetta. He admitted that Jeanetta was not resisting. Nonetheless, he stated that he armed himself for protection because he knew that Michael had a propensity for violence. However, he unequivocally stated that he never intended to shoot the gun and that he did not actually pull the trigger. Although Appellant maintained that the shooting was an accident, he did not tell Detective Pickett that he slipped and fell.

Appellant testified at trial and told yet a different version of events. Appellant stated that he retrieved his gun because he believed Michael was attacking Jeanetta. Appellant testified that could not recall whether he tripped as he entered the kitchen, but that he remembered going down. He explained that as he fell down, he must have grabbed the trigger causing the gun to discharge. Appellant further told the jury that he did not intend to shoot Michael, but just show him the gun. While Appellant did testify that Michael turned and began walking toward him when Appellant opened the kitchen door, there was no evidence that Michael had any type of weapon or was the initial aggressor.

In Grimes v. McAnulty, 957 S.W.2d 223, 227 (Ky. 1997), cert. denied, 525 U.S. 824, 119 S. Ct. 70, 142 L. Ed. 2d 55 (1998), this Court held that self-defense and accidental killing are mutually exclusive.

> By its very nature, self-defense relates to an intentional or knowing use of force and not an accidental shooting. "In Kentucky we have long recognized as fundamental that when

> the accused has 'admitted the shooting' and then 'attempted to justify it on the grounds of self protection . . . there is no evidence that his actions were anything other than intentional.'" McGinnis v. Commonwealth, Ky., 875 S.W.2d 518, 521 (1994) (quoting Shannon v. Commonwealth, Ky., 767 S.W.2d 548, 548-549 (1988)). Pursuant to self-defense the defendant admits, but seeks to justify, the intentional commission of the act, whereas the essence of an accident defense is the defendant's contention that he did not intentionally commit the act the state alleges constitutes a crime.

Appellant affirmatively asserted the defense of accident, and the jury was, in fact, given the instruction on "Accidental Killing," tendered by the defense. Thus, if he maintained that the shooting was an accident, he could not also claim he intentionally acted in self-defense.

Appellant's reliance on Hilbert v. Commonwealth, 162 S.W.3d 921 (Ky. 2005), is misplaced. The defendant in Hilbert claimed that he intentionally killed the victims in self-defense. However, the trial court refused to instruct the jury on self-defense, reasoning that the self-defense statute, KRS 503.050, was based on the subjective belief of the defendant and the defendant was the only one who could testify. Thus, the issue on appeal was whether or not the defendant's testimony was required in order to submit instructions on self-defense to the jury.

In holding that a defendant's testimony is not a necessary prerequisite to a self-defense instruction, this Court noted that although the defendant did not testify on his own behalf, evidence showed that he had been in an altercation with the victims and had suffered a welt on his head, that he told police that the victims kept coming at him and he did not know what to do, and that he had been severely beaten during a mugging several years earlier. We opined:

> Admittedly, the evidence supporting Appellant's belief in the need for the use of force was not strong, nor free from

> contradiction. However, such evidence need only raise the issue, for an instruction on self-defense is necessary once sufficient evidence has been introduced at trial which could justify a reasonable doubt concerning the defendant's guilt.

Id. at 925. Here, however, Appellant produced no evidence, circumstantial or otherwise, to support a finding that he acted in self-defense.

Appellant's argument that he acted in protection of his wife is equally dispelled by his claim that the shooting was an accident. We note that Appellant did not tender an instruction on the protection of another. RCr 9.54(2) clearly states that "[n]o party may assign as error the giving or the failure to give an instruction unless the party's position as been fairly and adequately presented to the trial judge by an offered instruction or by motion, or unless the party makes objection before the court instructs the jury . . . ." Nevertheless, the trial court raised the discussion "for appellate purposes" and noted that Appellant was not entitled to such an instruction because he failed to produce any evidence that Jeanetta was being attacked.

II.

Appellant next argues that the trial court erred by separately instructing the jury on wanton murder and intentional murder. Appellant claims that dividing the instructions gave the Commonwealth two bites at the apple.

During a conference on the instructions, defense counsel raised an objection to the trial court's use of separate instructions for intentional murder and wanton murder. The trial court explained that it chose to separately instruct the jury on the two offenses because each requires a different mental state. The trial court noted that, in its opinion, the separate instructions ensured that all twelve members of the jury found Appellant culpable under the same mental state.

Both murder instructions comported with the form instructions found in 1 Cooper Kentucky Instructions to Juries, §§ 3.21 and 3.23, pp. 96-101 (4th ed. Anderson 1999). Moreover, the wanton murder instruction was not worded as a lesser-included offense of the instruction on intentional murder, i.e., "If you do not find the defendant guilty [of intentional murder] under Instruction No . . . ." Cf. McGinnis v. Commonwealth, 875 S.W.2d 518 (Ky. 1994), overruled in Elliott v. Commonwealth, 976 S.W.2d 416 (Ky. 1998). Thus, while the trial court could have given one instruction containing both theories of murder, we cannot conclude that Appellant was prejudiced by the separation of offenses. See Commonwealth v. Hager, 41 S.W.3d 828, 849-50 (Ky. 2001) (Keller, J., concurring).

III.

Appellant also contends that the trial court erred by failing to sufficiently define the distinction between the wanton conduct necessary for a wanton murder conviction and the wanton conduct necessary for a second-degree manslaughter conviction. Appellant argues that the only distinction between the two offenses, the element of "circumstances manifesting an extreme indifference to human life," is "so vague and illusive as to escape the average intelligent juror." Appellant points to the fact that a juror asked for clarification between wanton murder and second-degree manslaughter as evidence that the distinction is vague.

Appellant acknowledges that he is aware of this Court's decision in Brown v. Commonwealth, 975 S.W.2d 922 (Ky. 1998), wherein we addressed this issue in terms of a constitutional challenge to the wanton murder statute, KRS 507.020(1)(b). We held therein:

Wanton murder is distinguished from second-degree (involuntary) manslaughter, KRS 507.040, which also punishes "wantonly caus[ing] the death of another person," by the additional element described in the phrase "under circumstances manifesting extreme indifference to human life." To punish wanton conduct as murder, it must be conduct as culpable as intentional murder. "[T]he culpable mental state defined in KRS 507.020 as 'wantonness,' . . . without more, will suffice for a conviction of manslaughter in the second degree but not for murder because, to qualify as 'murder,' 'a capital offense,' it must be accompanied by further 'circumstances manifesting extreme indifference to human life.'" McGinnis v. Commonwealth, Ky., 875 S.W.2d 518, 520 (1994) (citing Commentary to KRS 507.020).

Appellant is correct in his observation that extreme indifference to human life is not a phrase capable of precise definition, and the drafter of the Model Penal Code and the Kentucky Penal code admitted as much.

> There is a kind of [wanton] homicide that cannot fairly be distinguished . . . from homicides committed [intentionally]. [Wantonness] . . . presupposes an awareness of the creation of substantial homicidal risk, a risk too great to be deemed justifiable by any valid purpose that the actor's conduct serves. Since risk, however, is a matter of degree and the motives for risk creation may be infinite in variation, some formula is needed to identify the case where [wantonness] should be assimilated to [intention]. The conception that the draft employs is that of extreme indifference to the value of human life. The significance of [intention] is that, cases of provocation apart, it demonstrates precisely such indifference. 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 the facts. If recklessness exists but is not so extreme, the homicide is manslaughter. . . .

KRS 507.020, Commentary; Model Penal Code, § 201.2, Comment 2.

Similarly, this Court has on several occasions held that whether wanton conduct demonstrates extreme indifference to human life is a question to be decided by the trier of fact. Walden v. Commonwealth, Ky., 805 S.W.2d 102 (1991), overruled on other grounds, Commonwealth v. Burge, Ky., 947 S.W.2d 805 (1997); Nichols v. Commonwealth, Ky., 657 S.W.2d 932 (1983). . . .

> As stated in a recent case, "a conviction of wanton murder is reserved exclusively for offenders who manifest

> virtually no concern for the value of human life." [Johnson v. Commonwealth, Ky., 885 S.W.2d 951, 952 (1994)].
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> . . . .
>
> We are of the opinion that the phrase "extreme indifference to human life" are words of common understanding, and further that the Commentary to the Penal Code sufficiently sets forth the type of conduct that will sustain a wanton murder conviction. As such, the General Assembly was not required to include a precise definition of the phrase within KRS 507.020(1)(b). It is the duty of the trier of fact to determine, under the given circumstances, whether a defendant's conduct rises to the culpable mental state equivalent to intentional murder.

Brown, 975 S.W.2d at 923-25.

For the same rationale espoused in Brown, we conclude that the trial court did not err in failing to further clarify the distinction between wanton murder and second-degree manslaughter.

IV.

Finally, Appellant argues that the bifurcated trial process deprived him of his constitutional right to a fair trial. Appellant contends that the statutorily vague offenses coupled with a process wherein the jury only learns of the penalty range after a finding of guilt demonstrates the unconstitutionality of these proceedings.

Appellant did not assert a constitutional argument in the trial court and cites no authority to support one herein. In Commonwealth v. Reneer, 734 S.W.2d 794 (Ky. 1987), this Court specifically declined to hold KRS 532.055, which requires the determination of guilt to be bifurcated from the assessment of penalty, unconstitutional. We adhere to that precedent and decline Appellant's invitation to revisit the issue.

The judgment and sentence of the Warren Circuit Court are affirmed.

Lambert, C.J.; Graves, Johnstone, Roach, Scott, and Wintersheimer, JJ., concur. Cooper, J., dissents for the reasons set forth in his dissenting opinion in

Grimes v. McAnulty, 957 S.W.2d 227, 229-33 (Ky. 1997), and because he believes factual issues should be resolved by juries, not judges.

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