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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: APRIL 20, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 5-11-06 EllaGrowthDC

2004-SC-000310-MR

LESLIE LEON SCOTT APPELLANT

V.

APPEAL FROM CASEY CIRCUIT COURT
HONORABLE JAMES G. WEDDLE, JUDGE
03-CR-00021

COMMONWEALTH OF KENTUCKY APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Leslie Leon Scott, was indicted by a Casey County Grand Jury for three counts of wanton murder, first-degree assault and operating a motor vehicle while under the influence. The indictment arose from an automobile accident that claimed the lives of Raymond Reynolds, Mary Reynolds, and Robert Miller, and severely injured Elizabeth Thompson. The jury found Appellant guilty but mentally ill of three counts of second-degree manslaughter, a lesser included offense of wanton murder, and guilty but mentally ill of one count of first-degree assault. The trial court dismissed the other charge, operating a motor vehicle under the influence of intoxicants, before it reached the jury. After finding Appellant guilty, the jury recommended consecutive sentences of ten (10) years for each of the three (3) manslaughter convictions and twenty (20) years for the first-degree assault conviction.

Judgment was imposed in accordance with the jury verdict and sentencing recommendation for a total of fifty (50) years. Appellant appeals to this Court as a matter of right.[1]

Appellant and his wife at the time, Carolyn, had a tumultuous relationship culminating in Carolyn leaving the marital home on the date of the accident, November 8, 2002. When Appellant arrived home that evening he discovered that Carolyn had vacated the family home taking their two young sons with her. Appellant found his estranged wife at the home of Carolyn's sister, Stephanie Burgess. While at the Burgess's home, and after a confrontation with his wife, Appellant consumed his remaining prescription of between ninety (90) and one hundred fifty (150) pills of the anti-depressant, Klonopin, in a suicide attempt. Appellant's sister-in-law, Stephanie Burgess, called 911 and further tried to persuade Appellant not to leave, but she was unsuccessful. Appellant left the Burgess home in his car. Carolyn later told police that Appellant had called her from a store advising her that his driving had become erratic, and she noticed his speech was slurred and intermittently inaudible. Appellant, however, resumed driving until he collided head-on with the vehicle containing his four victims.

In this appeal, Appellant claims the trial court erred by allowing the jury to reach verdicts that were "inconsistent" as to the facts and his state of mind. Specifically, according to Appellant, implicit in the jury's verdict are two diametrically opposed findings. The jury could not have convicted Appellant of first-degree assault without a finding that he acted with extreme indifference to the value of human life. However, by also convicting Appellant of second-degree manslaughter instead of the

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[1] Ky. Const. §110(2)(b).

greater offense of wanton murder, the jury implicitly found that Appellant did not act with extreme indifference to human life; that his behavior was merely wanton.

Therefore, according to Appellant, the jury's conviction of three (3) counts of second-degree manslaughter instead of wanton murder cannot be harmonized with its verdict of first-degree assault where his actions were found to be "wanton," and "manifesting extreme indifference to the value of human life."[2]

A jury may permissibly find that a defendant acted with one culpable mental state with respect to one result of his actions, yet acted with a greater or lesser culpable mental state with respect to another result even though the two results arose simultaneously from the same conduct.[3] We held in Commonwealth v. Harrell[4] that trial courts should examine the sufficiency of the evidence for each crime submitted to the jury. This approach follows the United States Supreme Court's holdings that each count of an indictment should be weighed separately instead of looking to consistency between or among separate verdicts.[5] The facts here are indistinguishable from those in Harrell in that both involve an auto accident and differ only in that the Harrell jury considered whether the defendant could have acted both "recklessly" and "wantonly" with regard to the same behavior. Here, it is whether Appellant could have "manifested extreme indifference to the value of human life" with respect to one result but not to another.

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[2] KRS 508.010.
[3] Commonwealth v. Harrell, 3 S.W.3d 349 (Ky. 1999).
[4] 3 S.W.3d 349, 352 (Ky. 1999).
[5] Dunn v. United States, 284 U.S. 390, 393, 52 S.Ct., 189, 190, 76 L.Ed. 356, 358 (1932); United States v Powell, 469 U.S. 57, 67, 105 S.Ct. 471, 475, 83 L.Ed.2d 461, 467 (1984).

In the instant case, Appellant purposefully ingested an extraordinary quantity of his prescription anti-depressant medication. As one to whom such medication was prescribed, the jury was entitled to believe that Appellant knew the risk involved particularly when he stated his intention was to commit suicide. That he stopped and called his estranged wife to tell her that his driving had become erratic, but nevertheless began driving again until he struck another vehicle, further supports the jury verdict with respect to Appellant's extreme indifference to the value of human life. Thus, there was sufficient evidence to support the verdict on the first-degree assault charge and ample evidence to sustain each manslaughter conviction. As a practical matter, the statutes at issue here are highly nuanced and their application to the evidence presented is best left to the jury. As we noted in Harrell, "rigid adherence to a prohibition against inconsistent verdicts may interfere with the proper function of a jury, particularly with regard to lenity," and "[s]uch an approach would unduly restrict the right of the jury to consider the evidence broadly and convict or acquit based upon its view of the evidence pertaining to each charge."[6] Since we hold that the convictions were proper on these grounds, we need not address parole eligibility.

Appellant next asserts that the trial court erred by permitting the cross-examination of Dr. Candace Walker, a staff psychiatrist at Kentucky Correctional Psychiatric Center (KCPC), on the sexual practices of Appellant and his wife. This issue is preserved by Appellant's motion in limine to prevent such disclosure.

The trial court prohibited the Commonwealth from referring to Appellant's sexual practices or to those of his wife in its case-in-chief. The Court sealed the written report of Dr. Walker, but advised that she could be cross-examined as to its contents if

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[6] Harrell, 3 SW.3d at 351 (emphasis added).

she testified. Despite the warning that Dr. Walker could be cross-examined in this area, the Appellant called Dr. Walker to testify on direct examination. When time came for cross-examination, Dr. Walker testified that Appellant's marriage had become a toxic situation that contributed to his pre-accident mental state. She further attributed Appellant's and his wife's lifestyle as "swingers" as harmful to Appellant and the marital relationship. The Commonwealth did not ask about any other details in this line of inquiry.

While Appellant's marital conduct in this regard was unusual and potentially prejudicial, it was a factor used by Dr. Walker, a psychiatrist, in reaching her conclusions and in writing her subsequent report. Appellant was forewarned that a direct examination of Dr. Walker would permit cross-examination as to this aspect of the basis of her opinions and conclusions. KRE 403 states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." We have held that the trial court has discretion to balance the admissibility of evidence against the danger of undue prejudice and that we will not overturn its decision except on a showing of a clear abuse of discretion.[7] The test applied to the trial court's decision is whether it was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.[8] Under that test, we conclude that the trial court did not abuse its discretion in allowing Dr. Walker to give limited testimony about the sexual practices of

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[7] Simpson v. Commonwealth, 889 S.W.2d 781, 783 (Ky. 1994).
[8] Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999); Kuprion v. Fitzgerald, 888 S.W.2d 679, 684 (Ky. 1994).

Appellant and his wife as they related to Appellant's mental state at the time of the accident.

Appellant next claims that the trial court erred by failing to provide the jury with an instruction for assault in the fourth degree as a lesser-included offense. The trial court instructed on first-degree and second-degree assault, but overruled Appellant's request for an instruction for fourth degree assault. Since Appellant tendered such an instruction to the trial court this issue is preserved for review.

The General Assembly has defined assault according to varying degrees. Appellant was convicted of first-degree assault and appeals on grounds that the jury should have been permitted to find fourth-degree assault as a lesser included offense. We will compare only those two statutes as the jury did not find him guilty of second-degree assault.

Fourth-degree assault is as follows:

> (1) A person is guilty of assault in the fourth degree when:
> (a) He intentionally or wantonly causes <u>physical injury</u> to another person; or
> (b) With recklessness he causes physical injury to another person by means of a deadly weapon or a dangerous instrument.
> (2) Assault in the fourth degree is a Class A misdemeanor.[9]

(Emphasis added.) The result of fourth-degree assault is mere physical injury. For first-degree assault the statute requires serious physical injury and that distinction is clear in the definitional statute, KRS 500.080:

> (13) "Physical injury" means substantial physical pain or any impairment of physical condition;
>
> . . . .

[9] KRS 508.030.

> (15) "Serious physical injury" means physical injury which creates a substantial risk of death, or which causes serious and prolonged disfigurement, *prolonged impairment* of health, or prolonged loss or impairment of the function of any bodily organ.[10]

(Emphasis added.) In Parson v. Commonwealth[11] we compared the injury elements of second degree assault with those of fourth-degree assault.[12] Although one of the crimes charged was different, the analysis in Parson is applicable to these facts. Elizabeth Thompson, the sole surviving victim of the crash, was described in Appellant's own brief to this Court as "seriously" injured and requiring "lengthy" hospital treatment and "long-term" therapy. The record also reflects that Ms. Thompson required six months of inpatient hospitalization following the collision, continues to require a cane to walk, and has fully lost use of her left hand. This evidence indicates that her injuries and their prolonged effects on her were indeed properly characterized as "serious." For this Court to conclude that Appellant was entitled to an instruction on fourth-degree assault, it would be necessary to also conclude that a reasonable jury could believe that Thompson suffered mere physical injury as that term is defined. From the evidence, no reasonable jury could believe that Thompson's injuries were other than serious physical injuries. Accordingly, the requested instruction on fourth degree assault was properly denied.

Appellant's final claim of error arises from the trial court's inquiry of Dr. Candace Walker, a staff psychiatrist from KCPC, about whether Appellant was legally sane. After the direct examination of Dr. Walker, the trial court held a bench conference with defense and prosecution counsel to determine whether either counsel

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[10] KRS 508.010(1)(a).
[11] 144 S.W.3d 775 (Ky. 2004).
[12] Id. at 785-86.

would ask Dr. Walker's opinion on Appellant's sanity. The trial court said that if neither side sought Dr. Walker's opinion then it would. The judge then removed the jury so Appellant's counsel could confer with Dr. Walker. Appellant decided not to ask any further questions of Dr. Walker after the recess.

On cross-examination the Commonwealth asked Dr. Walker if she had such an opinion and she initially avoided answering by saying that it was up to the jury to decide, but when pressed she said she thought Appellant was sane at the time. There was no contemporaneous objection so the matter was not preserved. As requested by Appellant, however, we will review for palpable error under RCr 10.26.

RCr 10.26 authorizes relief when "manifest injustice" has resulted from error. Manifest injustice requires error so fundamental that it threatens a person's entitlement to due process of law or creates a probability of a different result but for the error.[13]

This issue is not even close. Moreover, Appellant was found guilty but mentally ill contrary to the testimony of Dr. Walker, that Appellant was sane at the time of the accident. There was no manifest injustice.

For the foregoing reasons, we affirm Appellant's convictions and sentences.

Lambert, C.J., and Graves, Johnstone, and Wintersheimer, JJ., concur. Cooper and Roach, JJ., concur in result only. Scott, J., dissents by separate opinion.

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[13] See U.S. v. Cotton, 535 U.S. 625, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002); and Johnson v. U.S., 520 U.S. 461, 177 S.Ct. 1544, 137 L.Ed.2d 718 (1997).

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DISSENTING OPINION BY JUSTICE SCOTT

Respectfully, I must dissent.

When an act by someone mentally ill, results in one car accident, killing three people and terribly injuring one – the same act either manifested an "extreme indifference to the value of human life," or it did not. It can not be both.

Pace v. Commonwealth, 636 S.W.2d 887 (Ky. 1982), got it right. Commonwealth v. Harrell, 3 S.W.3d 349 (Ky. 1999), in overruling Pace, got it wrong. I say this because, if nothing else – an inconsistent verdict – is a sure tip-off to a confused jury. And, we should not ignore this as Harrell does.

By throwing logic out the window, we are condoning verdicts as a compromise to confusion. Simple, plain instructions, written in English understandable to a lay jury, would help. But unless we recognize the inconsistency – we can do naught – but affirm. Thus, I dissent.