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RENDERED: SEPTEMBER 21, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2005-SC-000329-MR

JAMEYEL TARMAR HODGE — APPELLANT

V.

APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE JOHN L. ATKINS, JUDGE
INDICTMENT NO. 03-CR-562

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART AND REVERSING IN PART

I. Introduction

Appellant, Jameyel Hodge, appeals his conviction for wanton murder, assault in the first degree, fleeing or evading in the first degree, and tampering with physical evidence. He was sentenced to life imprisonment. Because the jury was improperly instructed during the guilt phase of Appellant's trial, we reverse Appellant's wanton murder and first-degree assault convictions but affirm his fleeing or evading in the first degree and tampering with physical evidence convictions.

II. Facts

A party was held at the National Guard Armory building in Hopkinsville following the annual football game between Hopkinsville and Christian County High Schools. Attendance was high and witnesses described the party as "wall to wall" people. As the evening progressed, the crowd became increasingly rambunctious, and overhead lights were turned on twice to restore order. Shortly after midnight, a fight broke out near the

stage between two members of rival gangs from Hopkinsville, who identified themselves by wearing either blue or red clothing. Minutes later, shots were fired inside the Armory building. Corey Brodie was shot in the face; the bullet lodged under his right eye. Tameika Kendrick was shot in the abdomen and died the following morning. Accounts of the exact circumstances of the shooting vary greatly.

Appellant testified that he was near the stage when the fight broke out. When he pushed to the front, he saw several "blue" gang members beating his friend, Rudy Wallace, a "red" gang member. As he continued to push towards Wallace, Appellant was hit on the back of the head with a chair and he fell to the floor. Appellant rose and made eye contact with Corey Brodie, a "blue" gang member. Appellant knew Brodie from school, and testified that some animosity existed between the two and that they had previously fought. In fact, Appellant testified that Brodie had driven through his neighborhood that afternoon looking to "start trouble" with him. As Brodie looked at Appellant, he lifted his shirt and revealed a gun in his waistband. Appellant turned around to leave, but was handed a gun by his friend Michael Croney. According to Appellant's testimony at trial, he turned back around to face Brodie, who was pulling a gun from his waistband. Thinking that Brodie "was going to kill" him, Appellant fired one shot in the air and then one at Brodie. Appellant fled on foot and threw the gun into some bushes outside the Armory.

Corey Brodie was also near the stage when the fight erupted, and admitted that he participated in beating Wallace. He witnessed Appellant get hit over the head with a chair, and watched him fall to the ground. However, according to Brodie, he never lifted his shirt to reveal a gun and, in fact, denied ever having a gun in his possession that evening. According to Brodie, Appellant lifted a gun and pointed it at him, then pulled

his hood over his head and starting firing multiple shots both into the air and into the crowd. Brodie testified that he made a "u-turn" to run away, but was shot; the bullet hit Brodie in the face and lodged under his right eye. When interviewed by police that evening, Brodie told officers that he did not see Hodge shoot him. However, at trial, Brodie testified that he saw Hodge point the gun at him and fire it.

Tasha Haskins was also present at the Armory with her cousin, Tameika Kendrick. After watching Appellant get hit in the head with the chair, Haskins testified that he rose, pulled his hood over his head, and then raised a gun toward the ceiling. He first fired a shot at the ceiling, then began shooting into the crowd as if "he was shooting a water gun." Tameika Kendrick, who was standing nearby, fell to the ground and said she had been shot. Haskins testified that she saw Appellant run out of the building and that she followed him. She threw a boot at him and they both fell to the ground. Appellant then pointed the gun at her face momentarily, but stood up and ran away without firing it. However, in the statement she gave police that evening, Haskins did not say that she had chased Appellant outside the building, nor did she say that he had pointed a gun at her.

Several other witnesses gave accounts of the shooting. Rudy Wallace testified that several "blue" gang members, including Brodie, were physically assaulting him on the floor near the stage. During the melee, he saw someone hand Appellant a gun, although he did not actually see Hodge shoot the gun from his vantage point. Ashley Beamon testified that she saw multiple people waiving handguns moments before the fight broke out. She further stated that she saw Appellant fire only two shots, one in the air and one towards Brodie. However, she also testified that she heard multiple shots, though some sounded differently than the original two gunshots. Antonio Artis likewise

testified that he heard multiple gunshots, and that they sounded as if they were being fired from different guns and from different areas of the room.

Police arrived very shortly after the fight erupted and were exiting their vehicles when the gunshots were fired. As Officer Scott Noisworthy approached the building, Haskins identified Appellant, who was running across the parking lot. Officer Noisworthy chased Appellant and watched as he threw a gun to his right onto a grassy knoll. He apprehended Appellant several blocks from the Armory.

Officer Noisworthy instructed fellow officers to search the grassy knoll but they found nothing. During a subsequent search of the building and its surroundings, a small chrome revolver with black electrical tape wound around the grip was located on the knoll identified by Officer Noisworthy. Another officer present acknowledged at trial that a large crowd of people were moving through the area between the two searches.

Bullets were also recovered inside the building from a ceiling fan and the ceiling itself. Later ballistics tests revealed that the revolver with the taped grip found on the knoll fired the .22 caliber bullet that killed Tameika Kendrick. According to expert testimony, the bullet retrieved from Brodie was also a .22 caliber. However, no ballistics tests were performed to establish whether the Brodie bullet was fired from the same gun that killed Tameika. Furthermore, Appellant was adamant during his testimony that the gun he fired did not have black electrical tape around the grip. He also testified that he threw his gun into some bushes and that, being left-handed, he threw the gun to his left. This testimony was partially corroborated by Haskins, who testified that the gun Appellant allegedly pointed at her face did not have black tape around its grip. No fingerprints were recovered from the gun with the taped grip.

Aside from the contradictory accounts of the evening and the conflicting evidence, the exact circumstances were further obscured by the fact that each witness's testimony was not without elements diminishing its credibility. Brodie admitted that he had been drinking liquor for several hours prior to the shooting. He also admitted that he lied to police that night about his involvement in the fight. Tasha Haskins admitted on the stand that she had lied to her aunt, a police officer, about whether she was involved in the initial fight. Beamon conceded that she left the Armory shortly after the incident and made no attempt to contact the police about her account of the evening, despite having personally witnessed the shooting.

Appellant was arrested following his apprehension by Officer Noisworthy. He was charged with murder, assault in the first degree, fleeing or evading police in the first degree, and tampering with physical evidence. A jury later found him guilty of all charges, and he was sentenced to life imprisonment.

Further facts will be developed as necessary.

III. Arguments

Appellant now appeals his conviction as a matter of right, Ky. Const. § 110(2)(b), asserting six claims of error: (1) improper jury instructions, (2) the admission of surprise expert testimony, (3) the improper admission of a dying declaration, (4) prosecutorial misconduct, and (5) cumulative error. Because the jury was improperly instructed, we reverse. In addition, we will address those allegations of error that are likely to recur in a retrial.

A. Jury Instructions

Appellant first argues that the trial court erroneously declined to instruct the jury on lesser included offenses. Defense counsel moved the trial court to instruct the jury

as to imperfect self-defense with respect to the assault charge and all forms of homicide. The motion was denied, and the jury was instructed only on wanton murder and assault in the first degree with a self-protection qualifier. The jury found Appellant guilty of wanton murder and, rejecting the self-protection qualifier, found him guilty of first-degree assault. Because these instructions deprived the jury of the opportunity to consider all levels of culpable mental states, we reverse and vacate the wanton murder and first-degree assault charges.

At the outset, we note that the trial court has a duty to instruct upon the whole law applicable to the case: "In a criminal case, it is the duty of the trial judge to prepare and give instructions on the whole law of the case, and this rule requires instructions applicable to every state of the case deducible or supported to any extent by the testimony." Taylor v. Commonwealth, 995 S.W.2d 355, 360 (Ky. 1999); see also RCr 9.54(1). An instruction on a lesser included offense is not required unless the evidence is such that a reasonable juror could doubt that the defendant is guilty of the crime charged, yet conclude that he is guilty of a lesser included offense. Webb v. Commonwealth, 904 S.W.2d 226, 229 (Ky. 1995).

1. The Assault Instructions

Appellant correctly argues that the trial court erroneously declined to instruct the jury on imperfect self-protection. The law of imperfect self-protection arises from the recognition that, in certain situations, a person might subjectively believe that the use of force is necessary to protect himself, but is either reckless or wanton in so believing:

> 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 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.

KRS 503.120(1).

This Court has explained that the purpose of the statute is to limit the application of a self-protection defense, so that "a belief which is so unreasonable that it rises to the level of wantonness or recklessness with respect to the circumstance then being encountered by the defendant...does not result in acquittal, but rather in conviction of a lesser offense for which wantonness or recklessness is the culpable mental state." Elliott v. Commonwealth, 976 S.W.2d 416, 420 (Ky. 1998). Though we were examining the effect of KRS 503.120(1) on homicide charges in Elliott, we also noted that "the same analysis would apply to intentional and unintentional assaults as defined in KRS Chapter 508." Id. at 418 n.1.

Here, there was sufficient evidence presented at trial from which a reasonable juror could conclude that Appellant's belief in the need to protect himself was wantonly or recklessly held. While Appellant testified that Brodie was pulling a gun from his waistband, Brodie denied ever having a gun in his possession. The jury is not required to accept or reject each witness's testimony in its entirety, but may choose to believe or disbelieve portions of each. Commonwealth v. Anderson, 934 S.W.2d 276, 278 (Ky. 1996) ("The trier of fact may believe any witness in whole or in part."). Accordingly, the jury might have believed that Brodie was, in fact, showing Appellant a gun in his waistband. However, the jury might have also believed that Appellant was wanton in believing that this action, alone, gave him cause to fire the gun at Brodie. In fact, the Commonwealth cross-examined Appellant as to this specific point, asking whether Appellant really thought that "just showing you a gun in his waistband means you should

shoot [Brodie] in the face?" Alternatively, the jury might have believed that Appellant's belief that Brodie was about to shoot him was recklessly formed in light of the chaotic circumstances and crowded environment. In other words, a reasonable juror might have believed that it was reckless for Appellant to conclude that Brodie actually was reaching for a weapon, which even Appellant admitted was a split-second determination.

Because either of these conclusions was reasonable based on the evidence presented at trial, it was error for the trial court to exclude the theory of imperfect self-defense from the jury instructions. Accordingly, in addition to the perfect self-protection instruction, the trial court should have also attached an imperfect self-protection instruction to the first degree assault charge. If the jury concluded, pursuant to this instruction, that Appellant's belief in the need for self-protection was wantonly held, such a finding would reduce the first-degree assault charge to second-degree assault pursuant to KRS 508.020(c): "A person is guilty of assault in the second degree when he wantonly causes serious physical injury to another person by means of a deadly weapon or dangerous instrument." If, on the other hand, the jury determined that Appellant's belief in the need for self-protection was recklessly held, a fourth-degree assault conviction would result: "A person is guilty of assault in the fourth degree when with recklessness he causes physical injury to another person by means of a deadly weapon or dangerous instrument." KRS 508.030(1)(b); see also Elliott, 976 S.W.2d at 420 n.3 (discussing the analogous effect of a self-protection qualifier to a charge of intentional murder or first-degree manslaughter).

Because the trial court declined to attach an imperfect self-protection qualifier to the first-degree assault instruction, the jury was not permitted to fully consider

Appellant's claim of self-defense. The testimony at trial was extremely conflicted and supported numerous conclusions concerning Appellant's mental state. There was sufficient evidence upon which the jury could conclude that Appellant believed he needed to protect himself, though this belief may have been wantonly or recklessly formed. For this reason, it was error to exclude the imperfect self-protection instruction.

2. Homicide Instructions

Appellant is also correct that the jury was improperly instructed with respect to the wanton murder charge. The trial court overruled Appellant's motion to instruct the jury on all forms of homicide, and determined that the evidence warranted only an instruction on wanton murder. Appellant argues that it was error to deny a self-protection qualifier to the wanton murder charge and, additionally, that it was error to refuse to instruct the jury on lesser forms of homicide. The evidence presented at trial warranted a first-degree manslaughter instruction with both self-protection and imperfect self-protection qualifiers attached, in addition to the wanton murder instruction. However, Appellant was not entitled to independent instructions as to second-degree manslaughter or reckless homicide.

a. The Wanton Murder Instructions

We first address Appellant's allegation that a self-protection and imperfect self-protection qualifier should have accompanied the wanton murder instruction. The trial court correctly rejected this request, as the plain language of the justification statute specifically prohibits an instruction on self-protection with either a wanton murder or reckless homicide charge when the victim is an innocent bystander:

> When the defendant is justified under KRS 503.050 to 503.110 in using force upon or toward the person of another, but he wantonly or recklessly injures or creates a risk of injury to innocent persons, the justification

> afforded by those sections is unavailable in a prosecution for an offense involving wantonness or recklessness toward innocent persons.

KRS 503.120(2); see also Phillips v. Commonwealth, 17 S.W.3d 870, 875-876 (Ky. 2000) (finding no error where trial court refused an instruction on self-protection to a charge of wanton murder based on the plain language of KRS 503.120(2)).

b. First-Degree Manslaughter Instructions

However, by simultaneously denying an instruction on first-degree manslaughter, the trial court recreated the dilemma previously characterized by this Court as the "Shannon problem," referring to the holding of Shannon v. Commonwealth, 767 S.W.2d 548 (Ky. 1988). "The so-called 'Shannon problem' derives from the fact that ... a defendant can be deprived of a valid defense merely because the indictment charged him with wanton murder, second-degree manslaughter or reckless homicide, instead of intentional murder or first-degree manslaughter." Elliott, 976 S.W.2d at 421. Here, the "Shannon problem" has been recreated: the decision to instruct the jury only as to wanton murder effectively removed Appellant's claim of self-defense—whether perfect or imperfect—from the jury's consideration.

This problem was compounded by the trial court's erroneous determination that Appellant was not entitled to a first-degree manslaughter instruction. There was evidence from which a reasonable juror could conclude that Appellant intended to cause Brodie serious physical injury, but killed Tameika Kendrick as a result of his conduct. See KRS 507.030(1) ("A person is guilty of manslaughter in the first degree when, with intent to cause serious physical injury to another person, he causes the death of such person or of a third person."). Both Appellant and Brodie testified that there was great animosity between them, and that they had fought on at least one prior occasion. Appellant also testified that he was suspended from school as a result of this prior

altercation with Brodie. Moreover, nearly every witness present that evening testified that Appellant was hit from behind with a chair as he watched his close friend being severely beaten by Brodie's friends; Brodie himself admitted that he participated in this assault. It is entirely reasonable, based on this testimony, to conclude that Appellant was sufficiently incensed by these circumstances to shoot Brodie with the intention of causing serious injury.

The Commonwealth is incorrect that Appellant's conduct—that is, firing a gun directly at a human being—demonstrates, as a matter of law, intent to kill that would defeat the necessity of a first-degree manslaughter instruction. While it is certainly possible for a juror to infer intent to kill by this conduct, Appellant's own testimony justified an instruction embodying his claim that he did not intend Brodie's death. Appellant testified at trial that he "didn't mean to hurt nobody" and specifically denied that he was "trying to kill" Brodie, but rather that he was "trying not to get [his] own life taken." Thus, based on this testimony, the jury could have rejected Appellant's claim that he was acting in self-defense, but believed that he lacked an intent to kill Brodie.

Moreover, this Court has previously recognized that the firing of a gun at another person does not necessarily establish an intent to kill as a matter of law: "[A] reasonable juror could conclude that these defendants fired at [the victim] not intending to kill him but intending only to injure him to the extent necessary to effect their escape." Luttrell v. Commonwealth, 554 S.W.2d 75, 78 (Ky. 1977) (finding error where the trial court refused to instruct the jury on second degree assault in addition to attempted murder, because "the question of whether intent to kill or intent to injure should be inferred from the evidence is one that should have been presented to the jury via an instruction on assault in the second degree"). While the circumstances of a shooting may, in many

instances, support only a conclusion that the gunman intended his victim's death, the evidence in the present matter was too conflicted to support this singular conclusion. Cf. Crane v. Commonwealth, 833 S.W. 813, 817 (Ky. 1992) (finding no error in refusal to instruct on lesser included offenses of second-degree manslaughter or reckless homicide, where uncontroverted physical evidence established that the gun was fired either intentionally or, at the least, wantonly). Therefore, the proposed instruction on first-degree manslaughter was improperly rejected.

Furthermore, a self-protection and imperfect self-protection instruction should have accompanied the first-degree manslaughter instruction. While KRS 503.120 prohibits an imperfect self-protection defense where the culpable mental state is wanton or reckless and the victim is an innocent bystander, it has no applicability to a first-degree manslaughter charge, as first-degree manslaughter is a crime of intent. The evidence presented at trial supported both instructions with respect to Tameika Kendrick's death.

Here, the jury was entitled to believe that Appellant was acting in self-defense when he shot Brodie, based on his testimony to that effect. Though Appellant testified that he only fired one shot at Brodie and one shot at the ceiling, the jury was entitled to disbelieve this testimony, particularly in light of the testimony from Haskins and Brodie that Appellant fired additional shots. Whether Appellant fired these additional shots in an attempt to protect himself from Brodie is a question properly left to the fact-finder. Regardless, the jury could have concluded that Appellant did, in fact, fire additional shots and that one of these bullets hit Tameika Kendrick, while simultaneously believing that Appellant was firing at Brodie in self-protection.

Additionally, Appellant was entitled to an imperfect self-protection qualifier attached to the first-degree manslaughter instruction. As discussed above, with respect to the assault instructions, the established circumstances of the evening supported a conclusion that Appellant might have wantonly or recklessly believed that he needed to protect himself from Brodie. Because the jury could have concluded that Appellant was either wanton or reckless in this belief, and that he fired more than one shot in his attempt to protect himself from Brodie, he was entitled to an imperfect-self-protection instruction. The effect of this finding would reduce a first-degree manslaughter offense to second-degree manslaughter (if Appellant's belief in the need for self-protection was wantonly held) or to reckless homicide (if the belief was recklessly held). Elliott, 976 S.W.2d at 420 n.3.

c. Second-Degree Manslaughter and Reckless Homicide

Finally, Appellant argues that he was entitled to instructions on the lesser-included offenses of second-degree manslaughter and reckless homicide. Appellant correctly states that the fact that the self-protection and imperfect self-protection instructions attached to the first-degree manslaughter charge might have reduced the offense to second-degree manslaughter or reckless homicide does not affect whether he was entitled to independent, or so-called "stand-alone," second-degree manslaughter or reckless homicide instructions. Stated otherwise, while the jury might have rejected the argument that Appellant wantonly formed his belief in the need for self-protection, it might have believed that Appellant behaved wantonly with respect to the result of his conduct, i.e. Tameika's death. This Court has previously explained:

> Since the language of KRS 503.120(1) limits [the analysis of an imperfect-self-defense theory] to whether the defendant was wanton or reckless with respect to a circumstance, e.g., whether he needed to act in self-protection, it has no application to whether he was wanton or reckless with

respect to the result of his conduct, e.g., whether his act would cause the death of another person.

Elliott, 976 S.W.2d at 420.

Appellant is incorrect, however, that the evidence warranted independent instructions on second-degree manslaughter and reckless homicide. The difference between wanton murder and second-degree manslaughter is the character of the risk created: wanton murder requires a showing that the conduct created "circumstances manifesting extreme indifference to human life" and "a grave risk of death to another person." KRS 507.020(1)(b). Second-degree manslaughter requires only a showing that the defendant behaved wantonly in disregarding "a substantial and unjustifiable risk." KRS 507.040(1); KRS 501.020(3). "The difference between wanton murder and second-degree manslaughter, involuntary murder, continues to be, as the penal code originally intended, where there is evidence from which the jury could find circumstances manifesting extreme indifference to human life." Estep v. Commonwealth, 957 S.W.2d 191, 192 (Ky. 1997).

In the present matter, the jury would only be required to consider the nature of the risk created by Appellant's conduct after having rejected his claims of self-defense. The jury would then consider the nature of the risk created by Appellant's conduct—i.e., firing into a heavily crowded room with no valid justification—and whether he consciously disregarded this risk. Such conduct is the epitome of wanton murder and supports only the conclusion that Appellant acted with an extreme indifference to human life. See KRS 507.020 cmt. ("Typical of conduct contemplated for inclusion in 'wanton' murder is: firing into a crowd, an occupied building or an occupied automobile."); see also Saylor v. Commonwealth, 144 S.W.3d 812, 818-820 (Ky. 2004).

For similar reasons, Appellant was likewise properly denied an independent

instruction as to reckless homicide. "A person is guilty of reckless homicide when, with recklessness he causes the death of another person." KRS 507.050(1). In order to be convicted of reckless homicide, the jury would have to believe that he failed to perceive the substantial and unjustifiable risk created by his conduct. KRS 501.020(4). No reasonable person would fail to perceive the risk created by firing a gun into a crowded room. See Adcock v. Commonwealth, 702 S.W.2d 440, 443 (Ky. 1986) (finding no error in denial of reckless homicide instruction where defendant severely beat an eighty-year-old woman). There was no error in the denial of an independent reckless homicide instruction.

3. Remedy

The contradictory nature of the testimony, particularly the eyewitness accounts of the incident, provided credible evidence upon which the jury could reach several differing conclusions as to Appellant's mental state. This tangled web of evidence was only further obscured by the lack of conclusive evidence that Appellant actually fired the bullet that killed Tameika Kendrick. As we explained in Commonwealth v. Wolford:

> The convoluted and contradictory testimony presented in this case is the perfect example of why fact-finding in a criminal case is delegated to a jury. We reiterate the long-standing rule that where, as here, a defendant claims an alibi, or the evidence is purely circumstantial and does not conclusively establish his state of mind at the time he killed the victim, it is appropriate to instruct on all degrees of homicide and leave it to the jury to sort out the facts and determine what inferences and conclusions to draw from the evidence.

4 S.W.3d 534, 539-40 (Ky. 1999) (emphasis added). Because the jury instructions with respect to homicide and assault did not permit the jury to consider all ranges of culpable mental states, the wanton murder and assault in the first-degree convictions are reversed. Upon retrial, the jury must be instructed on all charges that are reasonably supported by the evidence.

B. Additional Allegations of Error

Appellant argues that expert testimony concerning the caliber of the bullet that killed Tameika Kendrick was erroneously admitted in violation of CR 7.24, depriving defense counsel of a reasonable opportunity to defend against the testimony. The expert's testimony indicated that a .22 caliber bullet killed Tameika Kendrick and injured Brodie, and was therefore relevant to the wanton murder and assault charges. As the substance of the expert's testimony is now known, and it is expected that further, more conclusive tests will be performed on the bullet prior to another trial, it is unlikely that this alleged error will recur upon trial. For this reason, we need not address the issue. Terry v. Commonwealth, 153 S.W.3d 794, 797 (Ky. 2005). Furthermore, we need not address this argument with respect to Appellant's convictions for fleeing or evading police and tampering with physical evidence, as this testimony in no way supported or was relevant to these convictions.

Appellant also alleges the improper admission of a dying declaration. Specifically, Appellant argues that it was error to permit Haskins to testify that Tameika Kendrick had identified Appellant as her assailant moments after being shot. Because this issue may arise upon retrial, we will address it. Without specifically determining whether the statement was a dying declaration, we conclude that it would have been properly admitted as an excited utterance. KRE 803(2); see Soto v. Commonwealth, 139 S.W.3d 827, 860-861 (Ky. 2004).

Finally, we note that Appellant's allegations of prosecutorial misconduct are unlikely to recur upon retrial of the homicide and assault charges, and we therefore need not address them. With respect to the fleeing and tampering with evidence convictions, we again need not address the merits of this argument as any alleged error

is undoubtedly harmless. The evidence of Appellant's guilt of those crimes was overwhelming and substantially comprised of his own admissions. The alleged error was non-prejudicial beyond a reasonable doubt. Epperson v. Commonwealth, 809 S.W.2d 835, 838 (Ky. 1991).

IV. Conclusion

For the foregoing reasons, the fleeing or evading police in the first-degree and tampering with physical evidence convictions are affirmed. Appellant's wanton murder and first-degree assault convictions are reversed and remanded to the trial court for further proceedings consistent with this opinion.

Lambert, C.J.; Graves, McAnulty, Minton, Roach and Scott, JJ., concur. Wintersheimer, J., concurs in result only.

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