

**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**NOT TO BE PUBLISHED OPINION**

**THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.**

RENDERED: MAY 24, 2007  
NOT TO BE PUBLISHED

Supreme Court of Kentucky **FINAL**

2005-SC-000590-MR **DATE** 6-14-07 E.A. Gray, Jr., P.C.

ALLEN GREY

APPELLANT

V. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE PAMELA GOODWINE, JUDGE  
NO. 03-CR-00469

COMMONWEALTH OF KENTUCKY

APPELLEE

**MEMORANDUM OPINION OF THE COURT**

AFFIRMING

Appellant, Allen Grey, was convicted by a Fayette Circuit Court jury in May 2005 of wanton murder, three counts of assault in the fourth degree, and tampering with physical evidence. For these convictions, Grey was sentenced to a total of 35 years in prison. Grey now appeals to this Court as a matter of right. Ky. Const. §110(2)(b). He asserts three arguments in his appeal: 1) that the trial court erred when it failed to grant a mistrial when potential evidence had not been provided to Grey in discovery and was destroyed by the Commonwealth; 2) that the trial court erred in not directing a verdict on the three assault charges; and 3) that the trial court erred in instructing the jury on the wanton murder charge. For the reasons set forth herein, we affirm Grey's convictions.

On or about the evening of February 7, 2003, Grey was involved in an altercation outside of a club in Lexington, Kentucky. During the dispute, someone fired several shots – most likely into the air. Upon hearing the shots being fired, Grey fired his gun into a crowd of people, killing William Henderson, and wounding Robert Richard, Anthony Edwards, and Maurice Walker. After the shooting, Grey threw his gun into a local reservoir.

**I. A mistrial was not warranted despite potential evidence not being turned over to Grey in discovery and the evidence having been subsequently destroyed.**

At the close of evidence on the last day of the trial, the Commonwealth notified Grey, and the trial court, that a small caliber bullet had been found a few days after the shooting on top of a three-story building near the crime scene. The building was located directly behind where Grey testified he stood during the altercation. The bullet had been turned into the property room at the Lexington Police Department under another case number and was subsequently destroyed. After a bench conference, where both Officer Florence and Detective Matt Brotherton of the Lexington Police testified about the finding and destruction of the bullet, Grey prompted his counsel to make a motion for a mistrial. The trial court overruled the motion, finding that there was nothing exculpatory about the missing bullet because both Grey and the Commonwealth freely admitted another person fired a gun at the scene and that the Commonwealth did not act in bad faith. Grey's counsel argued that had it known about the bullet earlier it

would have performed a different cross-examination on several of the Commonwealth's witnesses.

In this case, we find that the trial court did not err in overruling the motion for a mistrial. In order for lost or destroyed evidence to be a violation of due process "the evidence must either be intentionally destroyed, or destroyed inadvertently outside normal practices." Tamme v. Commonwealth, 759 S.W.2d 51, 54 (Ky. 1988). In addition, the lost evidence must "possess an exculpatory value that was apparent before it was destroyed." Id. (citing California v. Trombetta, 467 U.S. 479, 489, 104 S.Ct. 2528, 2534, 81 L.Ed.2d 413 (1984)). Here, Grey presents no concrete evidence that the misplacing of the bullet, or its destruction, was intentional or destroyed inadvertently outside of normal practices. The evidence indicates that the destruction of the bullet was nothing "but an unforeseen accident which occurred in the normal course of the police department's business." Tamme, 759 S.W.2d at 54. In fact, Grey's defense counsel conceded at trial that there was no indication of bad faith on the part of the Commonwealth. Further, Grey has not presented any evidence other than mere speculation, that the bullet had any potential exculpatory value. At trial, Grey's defense counsel even agreed that the missing bullet best supported the Commonwealth's theory of the case – that the first shooter fired a bullet up into the air and not directly at Grey. Thus, the trial court committed no error in overruling the mistrial motion.

In the alternative, Grey argues that he should have at least received a missing evidence instruction on the bullet. However, as previously discussed,

Grey advances no credible theory that the bullet was destroyed in bad faith. See Estep v. Commonwealth, 64 S.W.3d 805, 810 (Ky. 2002) (stating that absent some degree of bad faith a defendant is not entitled to an instruction that the jury may draw an adverse inference from the failure to preserve or collect any evidence).

**II. Appellant was not entitled to a directed verdict on the three assault charges.**

Grey's next allegation of error is that the trial court failed to grant a directed verdict motion on the three assault charges. He argues that a directed verdict should have been granted because the bullets which hit the three victims were never recovered. Since the bullets were never recovered, and hence not linked directly to his gun, Grey argues that a third unidentified shooter could have been the person who assaulted the victims.

"On appellate review, the test for a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt." Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991). The trial court is authorized to direct a verdict in favor of the defendant "if the prosecution produces no more than a mere scintilla of evidence." Benham, 816 S.W.2d at 187.

In this case, the trial court was correct to deny the motion for a directed verdict. The prosecution presented more than sufficient evidence against Grey. Such evidence included Grey's own statement that he fired a gun in the direction of the victims, testimony from numerous witnesses indicating that Grey was the

shooter, testimony from other witnesses stating that the shots were fired from Grey's general location and that only two guns were fired that night, testimony from a man whom indicated that Grey asked him not to testify at trial because Grey was going to try to put the blame on his nephew, and the fact that Grey dumped his gun in a local reservoir after the shooting. Based on the above evidence, a reasonable juror could find that it was Grey who shot each of the victims. The trial court did not commit error in denying the motion for directed verdict.

### **III. The jury instructions were proper.**

Grey's final allegation is that the trial court erred in instructing the jury on wanton murder.<sup>1</sup> Grey admits that this issue is not preserved for appellate review. Therefore this alleged error will be reviewed under the palpable error standard. RCr 10.26. Palpable error occurs only if the alleged error created manifest injustice. Brock v. Commonwealth, 947 S.W.2d 24, 28 (Ky. 1997). Grey argues that the wanton murder instruction was error because he was firing his gun in self-defense at the shooter who was firing his gun into the air. Grey argues that since he had fear and a subjective need to defend himself, he could not have acted with extreme indifference to the value of human life, a requirement for wanton murder.

Upon review, we find adequate evidence for a jury to reasonably determine that Grey was guilty of wanton murder. Having a subjective belief that

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<sup>1</sup> In Grey's brief, he refers to this allegation of error as the trial court failing to direct a verdict on the charge of wanton murder. However, in reading his brief it is obvious that he really alleges error in the trial court's instructing the jury on the charge of wanton murder.

one is acting in self-defense does not negate otherwise wanton conduct. See KRS 503.120 (stating that a defendant cannot claim self-defense if his actions were wanton or reckless). In addition, the jury was instructed on the crimes of manslaughter in the second degree and reckless homicide and could have found Grey guilty of those acts instead of wanton murder if they believed he did not act with extreme indifference to the value of human life. There was no manifest injustice caused by the instruction on wanton murder.

For the reasons set forth herein, the judgment and sentence of the Fayette Circuit Court is affirmed.

All sitting. All concur.

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