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RENDERED: AUGUST 23, 2007
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL
DATE 9-13-07 [illegible]

2006-SC-000644-MR

DANIEL SCOTT TOWE APPELLANT

V.

ON APPEAL FROM CLINTON CIRCUIT COURT
HONORABLE EDDIE C. LOVELACE, JUDGE
NO. 05-CR-000040

COMMONWEALTH OF KENTUCKY APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Daniel Scott Towe, claims the evidence was insufficient on all counts, and that the lower court erred in finding him competent to stand trial. Finding no error, we affirm.

Appellant was convicted of assault in the first degree, wanton endangerment in the first degree, and tampering with physical evidence. He received a sentence of twenty (20) years on the first count, five (5) years on the second count, and five (5) years on the third count. The sentences were ordered to run consecutively for a total of thirty (30) years imprisonment.

I. Factual Background

On May 10, 2005, Appellant shot Morris McMillen in the side with a .44 caliber pistol. McMillen survived, but suffered horrendous pain and permanent impairment as the result of the gunshot wound.

Appellant worked for A.V. Conner, who owned a farm adjacent to that of McMillen. On the day of the shooting, Appellant had been drinking. He was going to a place on the Conner farm to recover fencing material from prior repairs. He had his girlfriend, Tonia Daniels, with him. At a turnaround on a gravel boundary road between the Conner and McMillen properties, Appellant ran into the victim. The latter was with Brandon Mason, standing next to his pickup truck drinking beer.

Appellant struck up a conversation with the two men. He began to use vulgar language and made coarse references to what he was going to do sexually with his girlfriend at a remote part of the farm. He even offered her services to McMillen and Mason. McMillen told Appellant that they didn't want any trouble and asked him to leave. He did. But about twenty minutes later, Appellant returned in his pickup truck. He pulled out his pistol, said something, and shot McMillen who was leaning against the tailgate of his truck. Appellant then pulled the hammer back on the pistol and pointed it at Mason, who turned and ran. No additional shots were fired. Appellant then left.

Mason went to the aid of McMillen who was seriously wounded. Because Mason was unable to load McMillen in the truck, he left to get help. When the Kentucky State Police officers arrived at the scene, McMillen was being loaded in an ambulance. As McMillen was not unconscious, the officers were able to learn from him how the shooting had occurred.

After an extensive search, Appellant was found hidden in the loft of a barn on the Conner property. He was arrested without incident. The .44 caliber pistol was found hidden under a mattress among weeds and leaves just to the left of the back door of the barn where Appellant had been hiding. Five live rounds and one spent cartridge were found in the pistol.

II. Analysis

A. Sufficiency of the evidence as to each offense charged

At the end of the Commonwealth's case, and at the end of the evidence, Appellant moved for a directed verdict based on insufficient evidence. The Commonwealth argues Appellant did not properly preserve this issue for our review. We disagree and will consider the merits of Appellant's appeal.

This Court has set out the standard for a directed verdict in Commonwealth v. Benham, 816 S.W.2d at 186. In Benham we stated:

> On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

Id. at 187. This Court went on to note that "[o]n 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 the defendant is entitled to a directed verdict of acquittal." Id. This is the standard that must be applied to Appellant's sufficiency of the evidence claims.

Under the Kentucky Rules of Civil Procedure (CR), "[a] motion for a directed verdict shall state the specific grounds therefor." See CR 50.01. See also Pate v. Commonwealth, 134 S.W.3d 593, 597 (Ky. 2004). Further, a motion for a directed verdict must be made both at the close of the Commonwealth's case and at the close of the evidence. See Baker v. Commonwealth, 973 S.W.2d 54, 55 (Ky. 1998). Appellant complied with this later requirement. As to the former requirement, while it could be argued it is a better practice to be more specific as to the grounds for the motion, the trial court clearly understood and had the opportunity to rule on Appellant's motions.

1. Tampering with Physical Evidence

Kentucky law states in pertinent part that:

> (1) A person is guilty of tampering with physical evidence when, believing that an official proceeding is pending or may be instituted, he:
> (a) Destroys, mutilates, conceals, removes or alters physical evidence which he believes is about to be produced or used in the official proceeding with intent to impair its verity or availability in the official proceeding[.]

See KRS 524.100(1). In applying this statute, this Court has stated that "[t]he compelling logic ... is that one who has committed a criminal act and then conceals or removes the evidence of the crime does so in contemplation that the evidence would be used in an official proceeding which might be instituted against him." Burdell v. Commonwealth, 990 S.W.2d 628, 633 (Ky. 1999).

At trial, Appellant claims that his girlfriend took the gun from him and hid it. The jury did not believe him. The evidence was overwhelming that Appellant shot McMillen with the pistol, ran from the scene, and was later found hiding in a barn. The pistol was also found hidden nearby. It was clearly not unreasonable for the jury to conclude that Appellant, while on the run, knew he would be held legally responsible for his act, and therefore concealed the weapon used in the shooting.

Even accepting Appellant's argument that it was Daniels who took the gun from him and concealed it, it could be inferred that such was done at his request or with his acquiescence. Further, Appellant's own testimony indicated he understood the police would be coming to investigate the incident. Under these circumstances, we cannot say it was clearly unreasonable for the jury to find Appellant guilty of tampering with physical evidence. Thus, the court did not err in allowing this charge to go to the jury.

2. Wanton Endangerment in the First Degree

Appellant argues the court erred in allowing the charge of wanton endangerment to be considered by the jury. He points out that, regardless of whether the revolver was ever pointed at Mason, no threats were made. Further, Appellant points out that no additional shots were fired.

Under Kentucky law

> A person is guilty of wanton endangerment in the first degree when, under circumstances manifesting extreme indifference to the value of human life, he wantonly engages in conduct which creates a substantial danger of death or serious physical injury to another person.

See KRS 508.060(1). In Commonwealth v. Clemons, this Court concluded "in certain circumstances, depending on the existence of other facts, pointing a firearm at another person may be sufficient to constitute a violation of KRS 508.060." 734 S.W.2d 459, 461 (Ky. 1987). Specifically, we concluded that the pointing a loaded firearm at police, accompanied by threats, created an explosive situation sufficient to support an instruction under KRS 508.060. Id.

The Court of Appeals revisited this issue in Key v. Commonwealth, 840 S.W.2d 827 (Ky.App. 1992). In Key the Court of Appeals concluded that "the pointing of a gun, whether loaded or unloaded (provided there is reason to believe the gun may be loaded) at any person constitutes conduct that 'creates a substantial danger of death or serious physical injury to another person' in violation of KRS 508.060." Id. at 829.

Agreeing with the reasoning expressed in Clemons, supra, and Key, supra, we find Appellant's argument to be without merit. Appellant drove up to McMillen's pickup, pulled a revolver, and shot McMillen. Mason, who was standing by McMillen's pickup, saw McMillen fall to the ground. Mason then saw Appellant point the gun at him and begin to cock the hammer back. Having every reason to believe the gun was loaded, and that he was about to become the next target, Mason fled. Under these

circumstances, we cannot say it was clearly unreasonable for the jury to find Appellant guilty of wanton endangerment. Thus, the court did not err in allowing this charge to go to the jury.

3. Assault in the First Degree

Once again Appellant argues the Commonwealth failed to present sufficient evidence to support the charge sent to the jury. In particular, he argues the Commonwealth failed to present any evidence as to intent and that the Commonwealth's case provided no evidence as to a motive for the shooting. Appellant emphasizes the fact that there was no evidence of prior trouble between him and McMillen. Without such evidence, he argues the charge should never have been sent to the jury.

A person is guilty of assault in the first degree when "[h]e intentionally causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument[.]" See KRS 508.010(1). In essence, there are three elements to this offense; (1) the assailant's mental state, (2) the means of attack, and (3) the resultant injury. See Welborn v. Commonwealth, 157 S.W.3d 608, 612 (Ky. 2005); Commonwealth v. Hammond, 633 S.W.2d 73, 74 (Ky. 1982).

There is no dispute as to the existence of sufficient evidence as to the means of attack and the seriousness of the resultant injury. Instead, Appellant's challenge goes to motive and intent. The Commonwealth's evidence demonstrated Appellant made two visits to Conner's farm on May 10th. During the first visit, Appellant's vulgar language led McMillen to tell him they didn't want any trouble and that he should leave. According to the Commonwealth, Appellant did leave but then returned to the farm. It was during the second visit that Appellant shot McMillen. At trial, Appellant made no

attempt to deny the fact that he intentionally shot McMillen. Rather, he attempted to present a case of self-defense. The jury was free to reject his self-defense claim. Given the facts presented at trial, we cannot say it was clearly unreasonable for the jury to return a verdict of guilty as to assault in the first degree. Further, we cannot say the court erred in allowing this charge to go to the jury.

B. Competency to stand trial

Appellant argues the court erred in finding he was competent to stand trial. The record indicates the court ordered Appellant to undergo a psychiatric evaluation at the Kentucky Correctional Psychiatric Center. At a hearing held on April 11, 2006, the court heard testimony from Dr. Horace Stewart, a licensed clinical psychologist. According to Appellant's brief, Dr. Stewart testified Appellant did not meet the criteria for insanity and that Appellant was being treated successfully with medication. Under these circumstances, Dr. Stewart believed Appellant was competent to stand trial.

In analyzing this claim, we must begin by noting Appellant failed to include the above material in the record for review. As noted by this Court in Commonwealth v. Thompson, 697 S.W.2d 143, 145 (Ky. 1985), "when the complete record is not before the appellate court, that court must assume that the omitted record supports the decision of the trial court." Beyond that, we note that Appellant pointed to no evidence contrary to that which he attributed to Dr. Stewart. Instead, he merely disagrees with the expert's conclusions. Even were we inclined to look beyond the missing record, there is insufficient evidence to support this argument. As hereinbefore stated, Appellant claimed self-defense. He articulated that when he arrived at the scene,

McMillen and Mason were cooking methamphetamine.[1] He testified that he was attacked by McMillen, and that he shot him in self-defense. Clearly, Appellant was capable of communicating with his attorney and assisting in his own defense.

For these reasons, we find Appellant's argument as to competency to be without merit.

III. Conclusion

Having found sufficient evidence existed as to each offense, we find the court did not err in submitting each of the charges to the jury. Further, as we must assume the record supports the court's determination as to Appellant's competency to stand trial, we deny his argument as to this issue. For these reasons we affirm Appellant's conviction by the Clinton Circuit Court.

All sitting. Lambert, C.J., Cunningham, Minton, Noble, Schroder, Scott, JJ., concur.

[1] Officers secured the site when they first responded. A search of the field, McMillen's vehicle, and Mason's home, failed to show any evidence of a methamphetamine lab.

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