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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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: NOVEMBER 1, 2007
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2004-SC-001002-MR

DATE 1-24-08 ELAGTOUMP.C.

GREGORY IRVIN GOETZ — APPELLANT

V.

ON APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE LEONARD L. KOPOWSKI, JUDGE
NO. 03-CR-000349

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Gregory Irvin Goetz (hereinafter "Appellant") appeals as a matter of right from his conviction in the Campbell Circuit Court for one count of robbery in the first degree, for which he received a 20 year sentence, enhanced to 50 years based on his status as a persistent felony offender in the first degree. Appellant alleges that he did not have a fair opportunity to present his defense and thus did not receive a fair trial, based on the trial court's improper exclusion of relevant evidence that his drug addiction affected his ability to conform his conduct to the law.

Appellant also contends that the jury should have been instructed on the defense of insanity, the defense of voluntary intoxication, and the lesser-included offense of wanton endangerment. He argues, finally, that his pro se motion to dismiss his court-appointed attorney (treated by the court as a motion to substitute or add counsel) was denied inappropriately.

Upon our review of the arguments and the record, we conclude that the trial court did not err in excluding evidence of the effect of Appellant's voluntary drug use on his ability to conform his conduct to the law. We also conclude that it was not a manifest injustice that the jury was not instructed on the defense of voluntary intoxication or the lesser-included offense of wanton endangerment in the first degree. We conclude that the trial court properly denied Appellant's motion for appointment of new counsel. As a result, we affirm Appellant's conviction.

I. Background

The factual allegations which emerged at trial are as follows: on or around July 1, 2003, Appellant's girlfriend dropped him off at a Motel 6 because his drug-induced behavior was worsening. Appellant took with him a stockpile of drugs including cocaine, methamphetamine, heroin, OxyContin, Valium, Lortab, Tylox, and Klonopin. Although the exact timeline and quantities are unclear, Appellant testified that on the morning of July 3, 2003, he took the following drugs: 1) an OxyContin pill, 2) his last "shot" (syringe-full) of methamphetamine, cocaine, heroin, or some combination of the three, and 3) either one or two handfuls of Klonopin pills.

Before noon that day, Appellant's nephew visited him at the motel. According to the nephew, while he was there Appellant took a handful of pills, behaved in a paranoid and depressed manner, and stated that he was going to borrow money from his mother. Appellant's mother had died in 1998, five years earlier. Appellant testified at trial that he had no memory of this visit or anything after the last handful of Klonopins that he took to help him sleep off his withdrawal.

Around 1:00 p.m. the same day, Appellant entered Martin's Pharmacy wearing sunglasses, a black baseball cap, and a dark shirt. According to the store employees, he first walked to the back of the store, and then returned to the front of the store where the pharmacy counter was located. The only people in the store were a student pharmacy technician and a pharmacist. Appellant pulled a handgun, pointed it at the technician, and ordered him to get on the ground. He told the pharmacist: "I want your C2 drugs.[1] I don't want to hurt anyone, but I will, I will kill you." The pharmacist told Appellant that he would cooperate. He emptied the contents of three drawers, and assured appellant that it was what he wanted. As the pharmacist went to get a sack for the pill bottles, Appellant warned him that if he pushed a button or did anything to alert anyone, he would shoot the technician. The pharmacist put the bottles into the sack and handed them to Appellant.

Appellant ordered the man to the floor and warned them to stay on the floor for five minutes, and then told them that a friend was watching to make sure they complied. Appellant left. Before a minute had passed, the pharmacist got up and called the police. A passerby outside also observed Appellant leaving and called in to the police a possible robbery of Martin's Pharmacy.

Officer Lester Caudill was in the area and he responded to a dispatch about the robbery. He caught up with a car matching the reported description and called in the license plate number of the fleeing vehicle. Dispatch reported that the vehicle was registered to Appellant. A high speed chase ensued and other officers in the area assisted in the pursuit. Upon reaching a dead-end, Appellant abandoned his car and

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[1] The pharmacy technician explained at trial that "C2" drugs are schedule II controlled substances that are primarily narcotics.

fled into some woods nearby. Police officers searched the abandoned vehicle, finding a black hat, sunglasses, a black t-shirt, pharmacy pill bottles, and an ID card bearing Appellant's name. Other officers combed the woods in search of Appellant.

According to Appellant's testimony, it was during the police chase that his blackout ended. Appellant emerged from the woods and approached Rick Turner, who was outside flying kites with his son and nephew. Appellant was shirtless and carrying a bundle wrapped in a dark t-shirt. Appellant told Turner that he'd been in a car accident and had no insurance so he did not want to call the police. Appellant asked for a ride to Cold Springs, but Turner told him he was getting ready to take his nephew to Alexandria, and offered to take him that far.

Appellant sat in the front passenger seat and put his bundle on the floor of Turner's van. Turner noticed pill bottles, which he recognized as coming from a pharmacy, and what appeared to be the outline of a gun in Appellant's rolled up t-shirt. Earlier in the day, Turner had noticed some police activity, including a helicopter search, along another part of the highway. Turner asked Appellant if he was the one the police were looking for. Appellant denied it. Appellant used Turner's cell phone, and told the person he called to pick him up at "my brother's," then asked Turner to drop him off at Goetz Auto Sales (which was owned by Appellant's brother). As soon as Appellant exited the car, Turner called 911 and told the operator that he had just dropped off a man at Goetz Auto Sales who appeared to have pill bottles and a gun.

Officers were dispatched to Goetz Auto Sales in Alexandria, where they apprehended Appellant with a paper bag of pill bottles and a gun still in his hands. At

trial, both the pharmacist and the technician identified Appellant as the person who robbed the pharmacy.

The charges against Appellant were tried from October 25-26, 2006. The trial court was faced, *in limine*, with the prosecution's motion to exclude evidence that the defendant's drug problem authorized any form of legal defense based on insanity. The Commonwealth cited this Court's opinion in Lickliter v. Commonwealth,[2] which stated that drug addiction, by itself, is not a disease constituting or leading to "mental illness" so as to afford a defense to a criminal charge.

The trial court granted the motion at a hearing before trial. Trial counsel requested clarification of the court's ruling, specifically asking whether he could present evidence regarding the effect the narcotics had on Appellant. The trial judge stated that the defense could bring a doctor in to testify as to the effect of the drugs, but that attorneys and witnesses were prohibited from offering any testimony or comment that Appellant's drug abuse problem amounted to any form of legal defense based on insanity.

II. Limitation of Psychologist's Testimony

On appeal, Appellant argues that the trial court erred in the exclusion of expert evidence as to the effect of Appellant's addiction on his ability to conform his conduct to the requirements of law. Appellant argues that this "wholesale exclusion" of expert testimony on this subject violated his right to present a defense because it would have explained to the jury why the evidence of Appellant's drug addiction set up a viable defense or mitigated his responsibility for the offense. He observes that in the Lickliter

[2] 142 S.W.3d 65, 68-69 (Ky. 2004).

case no evidence was suppressed and the defendant therein was permitted to introduce evidence from two psychologists concerning his addiction.[3]

Appellant also protests that the trial court would not permit the defense to ask a question about whether Appellant could have been psychotic on the day of the offense. The trial court held that the question was out of bounds, but that the question had been addressed by the avowal testimony.

Testifying for Appellant, a psychologist, Dr. Conner, was permitted to detail the clinical and social history he obtained from Appellant regarding his past drug abuse, and describe the effects of the drugs Appellant was taking. He testified that the drugs would cause a person to become paranoid, extremely depressed, anxious and nervous, all of which he said seemed to have been manifested by Appellant. He also said that by taking these drugs a person could suffer from hallucinations.

Appellant placed the remaining evidence he wanted to present from Dr. Conner into the record by avowal. Dr. Conner testified on avowal that he believed there is a point where a person is so addicted that there is a physical component, in addition to a psychological one, and a question of volition, and at that point the person no longer makes choices based on sound reasoning because the urge for drugs is so strong. He thought Appellant was at that point. He testified that Appellant's drug addiction was severe based on what Appellant had reported to him. He said Appellant's judgment was quite impaired in that he was experiencing paranoia, extreme depression and anxiety before the offense was committed, which suspended his logic and rational thinking. He testified in particular that the state of Appellant's drug addiction led to a

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[3] Lickliter, 142 S.W.3d at 67.

"gray area of volition," wherein it was hard for him to say if Appellant's actions were strictly voluntary or involuntary.

Dr. Conner testified on avowal that Appellant could appreciate that his actions were wrong, but the extreme urge for drugs made his ability to conform his conduct questionable. He said that intent and compulsion went hand in hand. He stated that in terms of intent, Appellant's actions were "purposeful and goal-directed," but his logic in terms of consequences and victim empathy was suspended because of the extreme urge to obtain more drugs. In response to questions from the Commonwealth's Attorney, Dr. Conner said that Appellant's controlled demeanor at the time of the offense, which was reported by everyone who observed him that day, could be the result of an adrenaline rush which organized his thinking so that he could be more focused and purposeful despite the amount of drugs taken by Appellant.

Appellant argues that this avowal testimony would have put his addiction into context for the jury and raised doubts concerning the voluntariness of his actions. Appellant argues that he was denied the "fundamental [right] . . . of an accused to present witnesses in his own defense."[4]

While appellant's contention is generally true, a defendant's right to present relevant evidence is not unlimited, but is subject to reasonable restrictions.[5]

> State and federal rulemakers therefore have broad latitude under the Constitution to establish rules excluding evidence. Such rules do not abridge an accused's right to present a defense so long as they are not "arbitrary" or "disproportionate to the purposes they are designed to serve."

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[4] Chambers v. Mississippi, 410 U.S. 284, 302, 93 S. Ct. 1038, 1049, 35 L. Ed. 2d 297 (1973).

[5] United States v. Scheffer, 523 U.S. 303, 308, 118 S. Ct. 1261, 1264 (1998).

Id. The exclusion of evidence is only considered arbitrary or disproportionate when the interest of the defendant infringed upon is "weighty."[6] The trial court concluded that the expert testimony Appellant wanted to produce as to his mental state at the time of the crime was not relevant, given this Court's rulings that addiction alone is not a mental condition. While we are unsure that it was necessary to exclude the evidence, we do not think it was arbitrary or disproportionate as Appellant was able to produce other evidence which provided his defense. Even if the evidence was relevant, the right to introduce relevant evidence may be curtailed if there is a good reason for doing so, such as when its probative value is outweighed by the danger of prejudice or confusion of issues.[7] Evidence may also be excluded for the purpose of avoiding confusion by the jury as to Appellant's criminal responsibility. Thus, we cannot say that the trial court abused its discretion in the exclusion of the evidence at issue.

Appellant was not denied the right to present evidence in his defense by the trial court's ruling. Appellant was able to develop, by his own testimony and that of other witnesses, his defense that due to his drug use he did not have the capacity to control his behavior. He testified to the effects of the drugs on his memory and mental state. He presented the testimony of his nephew detailing that his extensive use of drugs led to paranoia and confusion. His girlfriend testified that he was erratic and very anxious in

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[6] Id. (citing Rock v. Arkansas, 483 U.S. 44, 107 S. Ct. 2704 (1987) (right of defendant to testify); Chambers v. Mississippi, 410 U.S. 284, 295, 93 S. Ct. 1038, 1046, 35 L. Ed. 2d 297 (1973) (right to confront and cross-examine witnesses and call witnesses in one's behalf); and Washington v. Texas, 388 U.S. 14, 22-23, 87 S. Ct. 1920, 1924-25, 18 L. Ed. 2d 1019 (1967) (right to have compulsory process for obtaining witnesses)).

[7] Clark v. Arizona, ___ U.S. ___, 126 S. Ct. 2709, 165 L. Ed. 2d 842 (2006).

the days preceding the offense, and would sometimes see things that were not there. Furthermore, Dr. Conner testified to the effects of the drugs on a person's behavior.

This case differs from the cases relied on by Appellant, where the defendant was prevented from introducing any evidence in defense. For example, in Chambers, the defendant was prevented by evidentiary rulings from presenting evidence that another person had confessed to the crime. In Crane v. Kentucky[8] the court completely excluded evidence as to the circumstances under which the defendant's confession was obtained, preventing his attempt to challenge its credibility at trial. Appellant has not shown any "wholesale exclusion" that violated his right to present a defense. There was no constitutional violation.

Appellant was thus allowed to present a defense; although not in the way he wanted, by using particular language from the expert. The jury was fully aware of appellant's defense of chronic drug addiction, lack of memory or knowledge of what happened, and lack of control over his actions. Thus, there was no error in the trial court's ruling.

III. Denial of an Instruction on Insanity Defense

Continuing his previous argument, appellant claims that the trial court's denial of an instruction on the defense of insanity was in error. He contends that the evidence, and in particular the avowal testimony, showed that the defense was viable. Appellant points to his testimony detailing his extreme degree of drug addiction, which had begun in his teenage years. His girlfriend described paranoid delusions that Appellant had had for weeks preceding the robbery. Appellant described his mental state as a "psychosis"

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[8] 476 U.S. 683, 690-91, 106 S. Ct. 2142, 2146, 90 L.Ed.2d 636 (1986).

from the combination of cocaine and amphetamines. Appellant's nephew described Appellant's paranoid and delusional behavior while he visited Appellant in his hotel room on the morning of the robbery. The nephew's visit occurred around noon; the robbery took place around 1:00 p.m.

Appellant argues that this case is distinguishable from Lickliter because in that case the defendant merely asserted that he was acting under the influence of drugs, and there was no evidence of mental illness.[9] Appellant asserts, on the other hand, that he provided ample evidence of his mental state at the time of the robbery, and presented evidence of mental illness. He states that the evidence was sufficient, even without the avowal testimony, since evidence of mental illness can be established by lay testimony.

Appellant also argues that he provided more than a "mere showing of narcotics addiction." Appellant points to language in the Tate case, cited favorably in Lickliter, to the effect that, "a mere showing of narcotics addiction, **without more**, does not constitute 'some evidence' of mental illness or retardation so as to raise the issue of criminal responsibility, requiring introduction of the expert's controversial testimony or an instruction to the jury on that issue."[10] He maintains that he also provided evidence of mental symptoms such as paranoia and psychosis, and showed that he was experiencing them just before the time of the offense.

The evidence in this case is insufficient, however, to distinguish it from Lickliter and Tate. Lickliter cited the definition in KRS 504.060(5), which states that insanity means: "as a result of mental condition, lack of substantial capacity either to appreciate

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[9] Lickliter, 142 S.W.3d at 68.

[10] Tate, 893 S.W.2d at 372 (emphasis added).

the criminality of one's conduct or to conform one's conduct to the requirements of law." Lickliter states:

> The "mental condition" referred to in this definition, must be a mental illness or mental retardation. *See* 1 Cooper, *Kentucky Instructions to Juries* (Criminal) § 11.31 (1999). Drug addiction, by itself, is not a disease constituting or leading to "mental illness." Commonwealth v. Tate, Ky., 893 S.W.2d 368 (1995).[11]

Tate says that "it must be proved that [the defendant's] addiction amounted to or caused mental illness."[12] This requires more of a showing than merely the mental effects of drug use.

In accord with the above precedent, the trial court properly held that Appellant did not have a mental illness or retardation to justify an insanity instruction under Kentucky law. In fact, Dr. Conner testified that Appellant did not have a mental condition or defect. Appellant may have displayed some mental deficits as a result or side effect of the drugs he was taking, alone and in combination, but his expert witness did not testify that Appellant became mentally ill. As in Lickliter, the psychologist only testified to symptoms. Appellant did not establish that he developed a mental condition from the drug use in order to fit within the definition in KRS 504.060(5).

Our language in Tate demonstrates that appellant would have had to show that he had some other mental condition apart from the effects of ingestion of drugs to entitle him to an instruction on insanity as a defense. A distinction exists in the context of addiction between a temporary condition and a permanent one.[13] A permanent insanity

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[11] 142 S.W.3d at 68.

[12] Id.

[13] 21 Am. Jur. 2d Criminal Law § 54 (2007).

caused by the use of drugs or alcohol is generally held to be a defense.[14] Appellant's evidence fell short of showing a mental condition or illness. Thus, there was no error in the trial court's denial of an instruction on insanity.

IV. Jury Instructions on Voluntary Intoxication and Wanton Endangerment

Appellant also seeks review of his unpreserved claim of error arising from the court's failure to give jury instructions on the defense of voluntary intoxication and the lesser-included offense of wanton endangerment in the second degree. He alleges that his counsel would have requested these instructions if not for the court's ruling which precluded him from pursuing a defense based on drug abuse and mental illness. At trial, the court pointed out defense counsel's failure to request instructions on any lesser-included offenses. Appellant notes that his trial counsel responded for the record that his basis for failing to request additional jury instructions was the court's pretrial ruling on insanity. Here, Appellant argues that his earlier objection preserved for review his intoxication instruction claim and his claim for lesser-included offenses. In the alternative, Appellant seeks review under the palpable error standard.

We conclude that because Appellant did not offer a jury instruction on voluntary intoxication or wanton endangerment, nor move to instruct the jury, nor object to the instructions, this issue is unpreserved.[15] However, the Kentucky Rules of Criminal Procedure provide that a palpable error which affects the substantial rights of a party

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[14] Id. See People v. Whitehead, 525 N.E.2d 1084, 1087 (Ill. App. Ct. 1988) (drug addiction alone cannot justify insanity defense absent defect or disease traceable to chronic or habitual drug use and resulting in permanent kind of insanity); State v. Hartfield, 388 S.E.2d 802, 804 (S.C. 1990) (insanity caused by use of drugs or intoxication may be defense where it is permanent and destroys defendant's ability to know right from wrong).

[15] RCr 9.54; McGinnis v. Commonwealth, 875 S.W.2d 518 (Ky. 1994), overruled on other grounds by Elliott v. Commonwealth, 976 S.W.2d 416 (Ky. 1998).

may be considered on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.[16] We have explained recently that the required showing is probability of a different result or error so fundamental as to threaten a defendant's entitlement to due process of law.[17] Therefore, we review the jury instructions for manifest injustice.

Entitlement to an instruction depends on the introduction of evidence from which a reasonable inference can be drawn that the defense exists.[18] According to the Kentucky Penal Code, voluntary intoxication is a defense to a criminal charge if it negates an element of the offense.[19] When the jury finds that, because of intoxication, the defendant could not form the necessary intent for the charged crime, the result is not acquittal but a conviction for a crime with a lesser mental state.[20] Thus, voluntary intoxication is not an absolute defense, but acts to reduce the mental state from intentional to wantonness or recklessness.[21] However, to mitigate a defendant's intent, mere intoxication is not enough. There must also be sufficient evidence to raise a doubt that the defendant knew what he was doing.[22] Evidence of being under the influence of

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[16] RCr 10.26.

[17] Martin v. Commonwealth, 207 S.W.3d 1, 3 (Ky. 2006).

[18] Grimes v. McAnulty, 957 S.W.2d 223 (Ky. 1998).

[19] KRS 501.080(1).

[20] Slaven v. Commonwealth, 962 S.W.2d 845, 857 (Ky. 1997).

[21] 1 Cooper, Kentucky Instructions to Juries (Criminal) § 11.30.

[22] Lickliter, 142 S.W.3d at 68; Stanford v. Commonwealth, 793 S.W.2d 112 (Ky. 1990).

drugs is in the same category as alcohol intoxication in that it may be considered by the jury and may act to reduce the degree of the crime.[23]

Robbery in the first degree occurs when "in the course of committing theft, [a person] uses or threatens the immediate use of physical force upon another person with intent to accomplish the theft and when he . . . is armed with a deadly weapon[.]"[24] The issue raised by Appellant's asserted intoxication, therefore, is whether he formed the requisite "intent to accomplish the theft."

Appellant asserts that failure to give an intoxication instruction constituted a manifest injustice because there were sufficient facts presented at trial to raise a reasonable doubt as to whether he formed the intent to rob the store. Specifically, he points to the facts that he was under the influence of drugs at the time of the robbery; that the last medication he took, Klonopin, was a tranquilizer, or "down," which he testified allowed him to do something he normally would not do; and that he does not remember robbing the pharmacy. Appellant argues his own testimony showed that he failed to form the intent to commit the robbery. He testified that he had no recollection of driving to the drug store, entering it, or who was in the building. Counsel asked Appellant if he ever made a conscious mental decision to go to the pharmacy and get drugs. Appellant said he never planned on it. He denied thinking about it or knowing that he was going to do it before it happened.

Appellant relies heavily on Mishler v. Commonwealth[25] for support for an intoxication instruction. In Mishler, the court found that there was substantial evidence

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[23] Geary v. Commonwealth, 503 S.W.2d 505, 510 (Ky.App. 1972).

[24] KRS 515.020(1)(b).

[25] 556 S.W.2d 676 (Ky. 1977).

of drug use, and while that alone was not sufficient to justify an instruction on voluntary intoxication, there was also testimony from one of the defendants that at the time of the robbery he "lost his memory and did not know what he was doing."[26] The court held that the loss of memory raised a question for the jury of the defendant's intent.[27] In fact, this Court determined in Mishler that the evidence that the defendant did not know what he was doing created a question for the jury even though the momentary loss of memory seemed "convenient," and even "preposterous."[28]

In the case at bar, Appellant testified to a comparable loss of memory. Additionally, he asserts that he did not consciously form the intent to commit the crime. Thus, he believes he was also entitled to an instruction on voluntary intoxication. He says his lack of knowledge of what he was doing negated intent.

Although there was plenty of evidence at trial of Appellant's deliberation, we cannot distinguish this case from Mishler. We conclude that if Appellant had so requested the trial court should have given an intoxication instruction, so that the jury could determine whether he was able to form the required intent despite the intoxicating effects of the drugs. If the jury had been so instructed and accepted his argument he could have been found guilty of a lesser offense. In that circumstance, if the jury believed that Appellant did not form the intent to rob the pharmacy, it could also have

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[26] Id. at 680.

[27] Id.

[28] Id.

found that he was guilty of a lesser offense. An instruction on the charge of wanton endangerment would have been appropriate.[29]

To determine whether an error is palpable, an appellate court must consider whether, upon consideration of the whole case, there is a substantial possibility that the result would have been different."[30] The RCr 10.26 requires that the palpable error must be shown to have resulted in a "manifest injustice" to warrant relief on appeal.[31] We have recently explained that the required showing is "probability of a different result or error so fundamental as to threaten a defendant's entitlement to due process of law."[32] We review the entire proceeding to determine if the claimed defect was "shocking or jurisprudentially intolerable."[33]

Here, the instructions on voluntary intoxication and wanton endangerment could have resulted in the defendant's conviction of the lesser-included offense, and a shorter imprisonment. However, we cannot conclude that it is probable, on the facts adduced at trial, that the jury would conclude that appellant did not know what he was doing and would determine that he did not form the intent to commit the crime in the case at bar.

The Commonwealth points to the evidence that those who encountered Appellant that day testified that he did not appear to be intoxicated or under the

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[29] In Slaven v. Commonwealth, 962 S.W.2d 845, 857 (Ky. 1997), this Court held that, "Absent the element of intent, the theft element of robbery evaporates leaving only the element of physical force. If . . . the only charge ... had been robbery, the intoxication defense would have required an instruction on first-degree wanton endangerment as a lesser included offense for which voluntary intoxication would be no defense." (Internal citations omitted).

[30] Martin v. Commonwealth, 270 S.W.3d 1, 3 (Ky. 2006).

[31] Id.

[32] Id.

[33] Id. at 4.

influence of drugs. We note further that there was evidence of Appellant's deliberation in committing this offense. Appellant concealed his identity with hat and sunglasses. He took a gun with him, which he testified he had obtained just the week before, probably in a drug deal. He was able to drive his vehicle, and not only flee from the police at high speeds but to elude them. In addition, once he emerged from the chase, he concealed the pill bottles and gun, lied about having had a wreck in order to obtain a ride, and formulated a plan for where to go after he got a ride.

While it was possible that the result would have been different if instructions on voluntary intoxication and wanton endangerment had been provided, we cannot say on these facts that there was a probability of a different result. Furthermore, we do not conclude that failure to instruct on the lesser included offense or defense of intoxication in the case at bar was shocking or jurisprudentially intolerable under the circumstances of this case. Thus, we perceive no manifest injustice, and accordingly affirm appellant's conviction for robbery in the first degree.

V. Denial of Defendant's Pro Se Motion for Appointment of New Counsel

On June 9, 2007, Appellant wrote a letter to the clerk of the Campbell Circuit Court requesting that his public defender be removed. Appellant alleged that his counsel refused to accept phone calls or answer letters from him, failed to provide Appellant with copies of his psychiatric records, and failed to respond to any of Appellant's requests. Appellant stated in his letter: "[t]heirs (sic) no way in any form do (sic) I want this man around me . . . I will not have this man go to a jury trial or talk to anyone on my behalf." This letter was entered into the record. The Court treated it as a *pro se* motion to substitute or add counsel. The trial court conducted a hearing on the

motion on June 28, 2004. In an order entered June 30, 2004, the court overruled the motion.

In reviewing the trial court's denial of the motion, we note that "[a] defendant . . . is not entitled to the dismissal of his counsel and the appointment of substitute counsel, except for adequate reasons or a clear abuse by counsel."[34] "When a defendant requests substitution of counsel during trial, 'the defendant must show good cause, such as a conflict of interest, a complete breakdown of communication or an irreconcilable conflict which leads to an apparently unjust verdict.'"[35] Whether good cause is shown is within the discretion of the trial court.[36] Therefore, we review for abuse of discretion.

The allegations made by the Appellant about the conduct of his attorney would have been serious enough – suggesting a complete breakdown of communication – to require new counsel if substantiated. While it is clear that a hearing was held, with the Appellant and his counsel present, it was not videotaped, however, and so this Court cannot review what transpired at the hearing. What we do know from the record is that after the hearing no further complaints were made by Appellant regarding his attorney's performance.

The fact that the Appellant made no further criticism of his attorney's performance suggests that any problems that Appellant had with his counsel were

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[34] Henderson v. Commonwealth, 636 S.W.2d 648, 651 (Ky. 1982), relying on Baker v. Commonwealth, 574 S.W.2d 325 (Ky.App. 1978) and Fultz v. Commonwealth, 398 S.W.2d 881 (Ky. 1966).

[35] Deno v. Commonwealth, 177 S.W.3d 753, 759 (Ky. 2005) quoting Shegog v. Commonwealth, 142 S.W.3d 101, 105 (Ky. 2004) (citing United States v. Calabro, 467 F.2d 973, 986 (2nd Cir. 1972))).

[36] Id.

resolved at the hearing. After the hearing and at trial, Appellant allowed counsel to represent him, question his witnesses, and make objections and arguments on his behalf. Appellant's allegations that counsel inadequately prepared him and defense witnesses for trial do not amount to a complete breakdown of communication or an irreconcilable conflict. We find nothing in the record, therefore, to indicate that there was cause necessitating substitution of counsel and so we find no abuse of discretion.

V. Conclusion

Accordingly, we affirm the Appellant's conviction in the Campbell Circuit Court.

Lambert, C.J., and Abramson, Cunningham, Minton, Noble, and Schroder, JJ., concur. Scott, J., concurs in result only.

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