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NOT TO BE PUBLISHED OPINION

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RENDERED: NOVEMBER 1, 2007
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2005-SC-000472-MR

KATHY ELLEN WILLIAMS — APPELLANT

V.

ON APPEAL FROM LETCHER CIRCUIT COURT
HONORABLE SAMUEL T. WRIGHT III, JUDGE
NO. 04-CR-00040

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant challenges her murder conviction for the shooting death of Forrester Caudill, arguing that the jury instructions on self-protection were in error, certain of the prosecutor's questioning of Appellant and misrepresentations regarding her testimony amounted to prosecutorial misconduct, and the jury was misled about Appellant's parole eligibility. From our review of the record and the applicable law, none of the alleged errors warrants reversal in this case. Thus, we affirm.

In November of 2003, the building where Appellant, Kathy Williams, was living burned down. Williams suspected that someone in Toby Adams' family had intentionally set the fire. Also during this period in 2003, gunfire was exchanged in the area where Williams and her son were living, although the evidence did not establish exactly who fired the shots. Late in the afternoon of November 30, 2003, Williams saw a truck pull up next to a sawmill near where she was living after the fire. Williams,

armed with a gun she had taken from Begie Breeding, the owner of the house she was living in, went out to see who it was and saw that it was Forrester Caudill, a young man who she knew to be a friend of the Adams family. A heated argument then ensued between Williams and Caudill.

Loretta Sexton, who lived near the sawmill, testified that she observed the young man get out of his truck and walk over to a car parked at the sawmill. At that point, she saw a woman she later identified as Williams walk past the car the young man had gotten into. When Caudill got out of the car, Williams turned and walked toward Caudill. According to Sexton, the two then began arguing and Williams pointed the gun at Caudill. Sexton stated that when she saw the gun raised, she and her daughter and son-in-law, Edith and Bert Fields, who also witnessed the events, ran behind Sexton's house. Shortly thereafter, Sexton and the Fields heard gunshots. Edith and Bert Fields' testimony at trial corroborated Sexton's version of the events just prior to the shooting.

Williams testified that when she saw the truck pull up to the sawmill, she went out to see who it was because she thought it was Toby Adams and she wanted to talk to him and end the feud. She stated that she took her gun with her because of all the shooting that had been going on. Williams testified that when Caudill got out of the car, she and Caudill got into a loud argument over Toby Adams. Caudill called her son J.J. a rat and her recently deceased son Stephen a son of a bitch. Williams recounted that Caudill then began jumping up and down and screaming for her to kill him. According to Williams, Caudill then lunged at her with a knife and she shot him.

Caudill died minutes later from a single gunshot wound to the chest after getting back into his truck and driving away. Caudill was discovered slumped over in his truck by neighbors after the truck crashed into an outbuilding down the hill from the sawmill.

Police found a black-handled kitchen knife under a pile of trash in the floorboard of the passenger side of the truck. No blood was found on the knife, despite evidence that Caudill had large amounts of blood on both hands at the time of his death. Williams described the knife that Caudill had as having a long jagged blade, a black handle, and a big red button on the side as for opening and closing the knife.

On January 12, 2004, Williams was indicted for Murder. A five-day jury trial commenced on April 18, 2005. The jury was instructed on Murder, First-Degree Manslaughter, Second-Degree Manslaughter, and Reckless Homicide, with allowances for the defenses of extreme emotional disturbance and self-protection. The self-protection instruction contained an initial aggressor qualification and wanton or reckless belief qualification (KRS 503.120(1)) pursuant to the dictates of Commonwealth v. Hager, 41 S.W.3d 828 (Ky. 2001). The jury found Williams guilty of Murder and recommended a sentence of life imprisonment. Williams was sentenced to life imprisonment, and this matter of right appeal followed.

Williams' first argument is that the jury instructions failed to intelligibly state the law in the self-protection instruction. Specifically, Williams points to the omission of the word "not" from the second portion of the wanton or reckless belief qualification which, in effect, would reduce a Murder or First-Degree Manslaughter conviction to Second-Degree Manslaughter if it was found that Williams acted wantonly in her belief in the need for self-protection. Hager, 41 S.W.3d at 842. The instructions on the wanton or reckless belief qualification given by the trial court in the present case stated:

> Provided further, however, if you believe from the evidence beyond a reasonable doubt that the Defendant was mistaken in her belief that it was necessary to use physical force against Forrester Caudill in self-protection, or in belief in the degree of force necessary to protect herself;
> AND

> (1) That when she killed Forrester Caudill, she failed to perceive a substantial and unjustifiable risk that she was mistaken in that belief, and that her failure to perceive that risk constituted a gross deviation from the standard of care that a reasonable person would have observed in the same situation, then, if you would otherwise find the Defendant guilty of Murder under Instruction No. 3, or First Degree Manslaughter under Instruction No. 4, or Second Degree Manslaughter under Instruction No. 5, you shall not find her guilty of that offense, but shall instead find her guilty of Reckless Homicide under this Instruction No. 7B(1) and so state in your verdict;
> OR
> (2) That when she killed Forrester Caudill, she was aware of and consciously disregarded a substantial and unjustifiable risk that she was mistaken in that belief, and that her disregard of that risk constituted a gross deviation from the standard of care that a reasonable person would have observed in the same situation, then if you would otherwise find the Defendant guilty of Murder under Instruction No. 3, or First Degree Manslaughter under Instruction No. 4, you shall find her guilty of that offense, but shall instead find her guilty of Second Degree Manslaughter under this Instruction No. 7B(2) and so state in your verdict.

(emphasis added). It is clear that subsection (2) of the instruction contained a clerical error, with the omission of the word "not" in the underlined portion above. See Hager, 41 S.W.3d at 846-47. It must also be pointed out that when the trial judge read these instructions to the jury, he read them verbatim without inserting the omitted "not" in subsection (2). However, this error was never brought to the attention of the trial court, and the record does not reflect that the defense submitted its own instructions in the case. Thus, the error was unpreserved and will be reviewed for palpable error only. RCr 9.54(2); RCr 10.26. Palpable error will be found only if manifest injustice has resulted from the error. RCr 10.26. "To discover manifest injustice, a reviewing court must plumb the depths of the proceeding . . . to determine whether the defect in the proceeding was shocking or jurisprudentially intolerable." Martin v. Commonwealth, 207 S.W.3d 1, 4 (Ky. 2006).

In our view, the omission of the word "not" in subsection (2) of the wanton or reckless belief qualification did not result in manifest injustice in the present case. From our reading of the self-protection instruction as a whole, we believe that if the jury was inclined to find that Williams was wanton in her belief in the need for self-protection, they could have and would have, despite the clerical error, found Williams guilty of Second-Degree Manslaughter. The wording of subsection (1) of the wanton or reckless belief qualification was correct, and in reading subsection (2), the "but instead shall find" language would not make sense if the jury was to nevertheless find the defendant guilty of Murder or First-Degree Manslaughter.

Further, there was little evidence that Williams was mistaken (wanton or reckless) in her belief in the need for self-protection. Williams' claim of self-protection was based on her unequivocal testimony that Caudill lunged at her with a knife that she described in great detail – long, jagged blade with a black handle and a red button on the handle. The Commonwealth presented strong evidence rebutting Williams' claim that Caudill came at her with a knife. The only knife found at the scene was a black-handled knife found under a pile of trash on the floorboard of the passenger side of Caudill's truck. The knife, which was shown to the jury, looked to be an ordinary kitchen knife, was not a switchblade and had no red button on the side. Besides the fact that Williams' description of the knife did not match the knife found in Caudill's truck, the Commonwealth brought out the fact that Caudill was near death at the time he got back into his truck and would not have had the foresight to place the knife under the pile of trash. The Commonwealth also presented evidence that the knife found in Caudill's truck had no blood on it, despite the fact that there was copious blood found on Caudill's hands, probably as a result of him reflexively grabbing his chest after the gunshot.

Finally, none of the three witnesses who saw the encounter between Williams and Caudill just before the shooting saw Caudill lunge at Williams. Rather, they all testified that it was Williams who initially confronted Caudill. If the jury had believed that Caudill lunged at Williams with a knife, which they clearly did not, her claim of self-protection would presumably have served as a complete defense to the Murder charge. Hager, 41 S.W.3d at 843.

Williams next argues that the prosecutor's misrepresentations and improper questioning of her on cross-examination denied her a fair trial. One of the Commonwealth's witnesses, Lisa Gibson, testified about an incident which occurred some days prior to the shooting in this case wherein Williams put a gun to the head of Dustin Adams. During the questioning of Williams on cross-examination, the Commonwealth asked Williams about certain testimony she had given on direct about this alleged incident:

> Commonwealth: Yesterday, when you started testifying Mr. Reynolds asked you about Leslie [sic] Gibson and what she had testified to, and I believe your answer about putting a gun to this young boy's head, Dustin Adams, was you said you weren't denying it, you just couldn't remember it. Is that correct?
>
> Williams: I didn't do it.
>
> Commonwealth: Well that's not what you said yesterday.
>
> Williams: Well . . .
>
> Commonwealth: Have you changed since yesterday?
>
> Williams: No, no.
>
> Commonwealth: The jury heard you. I'm sure you said, "I'm not saying I didn't do it. I was on PCP. I don't remember it." Is that what your answer is?
>
> Williams: No sir.

The defense then objected on the basis that the Commonwealth was misstating William's prior testimony, that she did not say anything about PCP. The ensuing bench conference is nearly inaudible on the videotape, and there does not appear to have been any attempt to play back Williams' testimony. The court ultimately overruled the objection, but the Commonwealth continued the questioning without making another reference to PCP until closing argument.

The defense had previously asked Williams during her direct testimony if she remembered holding a gun to Dustin Adams' head. Williams responded that she did not remember the incident. Defense counsel then asked Williams why she did not remember the incident. From our viewing of the questioning, although Williams' response to this question is hard to discern word for word (her answer is muttered quickly), what is clear is that Williams uses the word "pieces" and not "PCP". During the Commonwealth's closing argument, the prosecutor makes another reference to Williams' alleged PCP testimony, stating in regards to the evidence that she held a gun to Dustin Adams' head, "She [Williams] first testified yesterday, if you remember. You can look at your notes - I know a lot of you took notes – 'I'm not saying I didn't point that pistol at his head. I'd taken so much PCP I don't remember.'" We would note that defense counsel did not object to the PCP remark in closing argument, although counsel may have felt that such an objection would be futile since the court had earlier overruled his objection to the misstatement of her testimony in their cross-examination of Williams.

We view the questioning and remark of the Commonwealth in closing argument misstating Williams' testimony that she had been on PCP as prosecutorial misconduct. While the testimony was difficult to hear and necessitated multiple listenings by this

Court, it is clear that Williams was saying the word "pieces", and not "PCP", and the prosecution should not have risked misstating the defendant's testimony of such a potentially prejudicial nature without being sure of the testimony.

A conviction will be reversed on grounds of prosecutorial misconduct in closing argument only if the misconduct is "flagrant" or if each of the following conditions is met: 1) proof of defendant's guilt is not overwhelming; 2) defense counsel objected; and 3) the trial court failed to cure the error with a sufficient admonishment to the jury. Matheny v. Commonwealth, 191 S.W.3d 599, 606 (Ky. 2006), cert. denied, __ U.S. __, 127 S.Ct. 667, 166 L.Ed.2d 522 (2006). Regardless of whether we view the error as being preserved or not because Williams did not object to the offending comment during the Commonwealth's closing argument, we view the evidence offered against Williams in this case to have been overwhelming, with Williams' admission that she shot Caudill and the Commonwealth's strong evidence refuting her claim of self-protection as discussed above. Thus, we must proceed to an assessment of whether the prosecutorial misconduct was flagrant in this case.

In Barnes v. Commonwealth, 91 S.W.3d 564, 568 (Ky. 2002), this Court adopted the approach for resolving claims of prosecutorial misconduct set out in United States v. Carroll, 26 F.3d 1380 (6th Cir. 1994). In Carroll, 26 F.3d at 1385-87 (citing United States v. Leon, 534 F.2d 667, 679 (6th Cir. 1976), overruled on other grounds by United States v. Stone, 748 F.2d 361 (6th Cir. 1984), and United States v. Bess, 593 F.2d 749 (6th Cir. 1979)), the Court enunciated the following criteria for assessing whether the prosecutorial misconduct is flagrant and rises to the level of reversible error:

> (1) whether the remarks tended to mislead the jury or to prejudice the accused;
> (2) whether they were isolated or extensive;

(3) whether they were deliberately or accidentally placed before the jury; and
(4) the strength of the evidence against the accused.

Certainly any statement that a defendant took PCP tends to portray the defendant as a drug addict and is highly prejudicial. See Schaefer v. Commonwealth, 622 S.W.2d 218, 219 (Ky. 1981) (concluding that irrelevant testimony about an individual's cocaine use was considered prejudicial error warranting reversal). As to whether the remarks were isolated or extensive, as noted above, the misstatement of Williams' testimony regarding the PCP was made once during cross-examination of Williams and once during closing argument. Although the misconduct may not have been extensive, especially in the context of this being a five-day trial with abundant evidence, neither was the misstatement an isolated comment. As for whether the misstatement was deliberate or accidental, it was deliberately made, although, given the difficulty in hearing Williams' testimony, it does not appear that the Commonwealth acted in bad faith.

Relative to the strength of the evidence against Williams, as noted above, the Commonwealth's evidence was overwhelming. Williams first denied having any involvement in the shooting, until she learned from police that there were witnesses. Williams then confessed to the shooting (which was offered into evidence), but claimed she was acting in self-defense. The testimony of the three witnesses who saw the confrontation between Caudill and Williams just prior to the shooting refuted her claim of self-defense, none of them recalling that they saw Caudill with a knife or saw him lunge at Williams. The only knife found at the scene was a kitchen knife found under a pile of trash in Caudill's truck. The knife did not fit the description of the knife given by Williams and had no blood on it. Finally, during the Commonwealth's cross-examination

of Williams, it brought out several inconsistent statements made by Williams regarding the crime, which severely impeached her credibility.

Considering the overwhelming evidence against Williams, the lengthy trial, and the fact that the references to Williams being on PCP were not extensive or pervasive, we cannot say that there is a reasonable possibility that the misstatements might have contributed to Williams' conviction. Holt v. Commonwealth, 219 S.W.3d 731, 738 (Ky. 2007). Hence, the prosecutorial misconduct did not mandate reversal.

Williams also complains that the Commonwealth misrepresented her testimony when the prosecutor, in the course of pointing out her inconsistent statements regarding how she got the gun used to shoot Caudill, stated: "So there again, you've not told the truth apparently. You didn't tell it when Mr. Reynolds [defense counsel] asked you, but you tell yet another version of it didn't you?" Defense counsel objected to the misstatement of Williams' testimony, and the trial court overruled the objection. Williams claims that this improper questioning by the Commonwealth falsely accused her of lying to her attorney on direct examination, when her testimony on direct was actually consistent with what she testified to on cross-examination – that she got the gun from Begie Breeding. It appears from the record that in the course of pointing out Williams' inconsistent statement – that she got the gun at a flea market - the Commonwealth mistakenly attributed the statement to testimony on direct examination by her counsel, when the statement was actually made to police. The question did not appear to be calculated to mislead the jury. See Berger v. United States, 295 U.S. 78, 85, 55 S.Ct. 629, 79 L.Ed. 1314 (1935). And there was evidence that Williams had, in fact, told the police that she had bought the gun at a flea market. While the question was improper, we cannot say that it constituted reversible error. See Bowler v.

Commonwealth, 558 S.W.2d 169 (Ky. 1977) (concluding that the prosecution's asking of an isolated improper question is not ordinarily grounds for reversal).

Williams' remaining argument is that the jury was misled about Williams' parole eligibility when the trial court answered a question posed by the jury when they were deliberating Williams' sentencing. The jury first sent out the following question: "Will Kathy be eligible for parole and is [sic] time already spent in jail count toward sentence?" The court answered: "The Defendant will receive credit for any time already served on this case. She will at some point be eligible for parole, though when is dependent on the sentence received." Minutes later, the jury sent out another question: "Can we impose a sentence without parole, or X amount of years and a day?" The court then answered: "Parole eligibility is controlled by statute and you cannot change it. You can impose a day above any term of years up to the maximum, but it only adds one day to the sentence and will not prevent or delay parole eligibility more than one day."

At no time did Williams' counsel express any objection to the court's responses to the jury's questions. Thus, the argument will be reviewed for palpable error only. RCr 10.26. From our review of the record, no palpable error resulted from the court's answers to the jury's sentencing questions.

For the reasons stated above, the judgment of the Letcher Circuit Court is affirmed.

Lambert, C.J.; Cunningham, Minton, Noble, Schroder and Scott, J.J., concur. Abramson, J., not sitting.

COUNSEL FOR APPELLANT:

Irvin Halbleib Jr.
P.O. Box 16175
Louisville, KY 40256

COUNSEL FOR APPELLEE:

Gregory D. Stumbo
Attorney General

Jeffrey A. Cross
Criminal Appellate Division
Office of Attorney General
1024 Capital Center Drive
Frankfort, KY 40601