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RENDERED: FEBRUARY 21, 2008
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2006-SC-000656-MR

GEORGE KELLY MAYES — APPELLANT

V.

ON APPEAL FROM TRIGG CIRCUIT COURT
HONORABLE BILL CUNNINGHAM, JUDGE
NO. 05-CR-00047-002

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A circuit court jury convicted George Kelly Mayes of wanton murder, and the trial court imposed a twenty-year prison sentence in accordance with the jury's recommendation. In this matter-of-right appeal,[1] Mayes raises four issues relating to the trial that he contends warrant reversal: (1) the trial court erred in denying his motion for a directed verdict, (2) the trial court erred by instructing the jury on three alternative theories of liability, (3) the trial court erred by denying his co-defendant's mid-trial motion for separation of witnesses, and (4) the trial court erred by denying his motion for a mistrial. Upon review, we find no error on these issues and affirm the judgment of conviction and sentence.

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[1] Ky. Const. § 110(2)(b).

I. FACTS.

Mayes and a codefendant, Devron Wadlington, were indicted and jointly tried for the murder of LaWarren O'Keith Sims, who was shot and killed during a melee outside Henry's Place, a raucous nightspot at Cerulean in rural Trigg County. The evidence presented at trial against the two was circumstantial. No eyewitness positively identified Sims's shooter, and the bullet that killed Sims was never found. But eyewitnesses testified to seeing Mayes raise up his shirt and pull out a gun when confronted by Anthony Wilson, who had apparently been hit with a beer can thrown by Mayes. And several eyewitnesses recalled seeing Mayes and Wadlington at the scene shooting guns into the crowd or into the air.

One witness, James Rodell Acree, testified that he drove Mayes, Wadlington, and others to Henry's Place in Mayes's car. Acree said that he stayed outside until patrons started leaving the building. At that point, Acree's cousin asked him to help him search inside the building for a set of keys. While inside, Acree heard gunfire outside. He stated that after the gunfire stopped, he went outside; and Mayes motioned for Acree to get the car. Acree drove Mayes and Wadlington to Cadiz. He stated that Mayes fired shots out of the car while leaving the scene. Acree reported hearing Mayes ask Wadlington, "did you hit him?" He related that Mayes, who was in the front passenger seat, reached over and pressed the accelerator when Acree attempted to stop for a police roadblock in Cadiz. Acree dropped Mayes and Wadlington off before driving the car to Mayes's mother's house in Cadiz. Later, he met Mayes and helped him clean out his car. They took a Budweiser box and a bullet out of the car and threw them into the weeds.

Another witness, Billy Alexander, testified that he found a handgun near the doorway of his house after Mayes stopped by. Alexander threw the gun into a field next to his house. Acree and Alexander eventually led police to the Budweiser box, the bullet, and the handgun. Acree and Alexander were cross-examined about their status as convicted felons, their incomplete initial statements to police, and their expectations of getting favorable treatment for cooperating with the prosecution. Acree admitted to being high on drugs the night of the murder, despite serving as the designated driver.

Police recovered a live .45 bullet in the Budweiser box and found a 9mm gun in the same wooded area. In the field near Alexander's house, police found a .45 gun that was missing the magazine but had a live round in the chamber. Police searched the area around Henry's Place and found bullets in a building near the bar. They also found a spent .45 shell casing on the grounds of a nearby residence. Police also searched Mayes's car and found a spent shell casing from a .45. Testing revealed that both guns were functional. An FBI weapons expert testified that the .45 shell casings recovered came from the .45 gun found by police. He stated that the 9mm casings found did not come from the 9mm gun found, however.

The medical examiner performed an autopsy and concluded that Sims died of a gunshot wound, although the examiner was unable to locate a bullet in the body. She could neither determine the range or distance from which the bullet was fired nor determine the type of bullet or gun used.

At the conclusion of the evidence, the trial court instructed the jury to decide whether Mayes and Wadlington were guilty, either individually or acting in complicity with the other, of murdering Sims while intending to kill Wilson; wanton murder; or

lesser degrees of homicide. The jury convicted both Mayes and Wadlington of wanton murder. This is Mayes's separate appeal.

II. ANALYSIS.

A. Trial Court Properly Denied Directed Verdict Motion.

Mayes contends that the trial court should have directed a verdict of acquittal because none of the Commonwealth's witnesses testified that he killed Sims. But Kentucky law does not demand direct evidence of guilt to withstand a motion for directed verdict. When considering a motion for directed verdict, the standard is whether a reasonable jury could find guilt, accepting all of the Commonwealth's evidence as true and drawing all reasonable inferences in favor of the Commonwealth.[2] Considered in the light of this standard, the Commonwealth's evidence against Mayes was sufficient to deny the directed verdict motion. Certainly, much of the evidence against Mayes was circumstantial. But circumstantial evidence can withstand a directed verdict motion where, as here, reasonable inferences from the evidence could lead a reasonable jury to find guilt.[3]

Mayes argues that his mere presence at the scene when the victim was killed is insufficient to convict. While this is true, the evidence presented went beyond merely showing his presence at the scene of the murder. Instead, a number of witnesses testified to seeing Mayes with a gun, which he pointed at Wilson after exchanging angry words, and to seeing Mayes shooting the gun into the air or into the crowd. Some testified that they heard two distinct gunshots, one a little pop and, another, a more

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[2] Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991).

[3] Hampton v. Commonwealth, 231 S.W.3d 740, 751 (Ky. 2007).

powerful sounding shot. According to one witness, Mayes had a large gun such as a .44 or .45; and Wadlington had a 9mm gun, which she saw Wadlington fire. She assumed the louder shot that she heard but did not see came from Mayes's gun.

As Mayes admits in his brief, witness Ashley Riley testified to seeing both Mayes and Wadlington standing beside each other firing their guns into the crowd. Mayes contends that Riley's testimony on this point was less credible than other accounts. But the credibility of witnesses' testimony is a matter for the jury to weigh.[4] Accepting Riley's testimony as true and drawing all reasonable inferences in favor of the Commonwealth, the jury could have reasonably found that Mayes caused Sims's death by firing shots into the same crowd in which Riley saw Sims standing.

Testimony regarding Mayes's flight from police, cleaning out his car, and concealing items further strengthens reasonable inferences of guilt. As for Mayes's contentions in his brief that he may have even been entitled to act in self-defense because Wilson confronted him, we note that he has not cited to the record to indicate that he argued this to the trial court on his directed verdict motion. And, in any case, the jury could reasonably have found that Mayes did not need to draw a gun or shoot it to defend himself in response to Wilson's questioning whether Mayes "had a problem" with him.

As for Mayes's contention that the evidence was insufficient to establish the transferred intent theory, we disagree in light of Riley's and others' testimony concerning Mayes exchanging angry words with Wilson and then drawing a gun and

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[4] Commonwealth v. Smith, 5 S.W.3d 126, 129 (Ky. 1999). *See also* Benham, 816 S.W.2d at 187 (stating that when ruling on directed verdict motion, trial court should reserve questions of credibility of witnesses for the jury).

pointing it at Wilson. The jury could reasonably have inferred from this testimony that Mayes intended to shoot Wilson but shot Sims instead. So there was enough evidence to submit the question of transferred intent to the jury. And since the jury did not find Mayes guilty under the transferred intent theory, any error in not granting a directed verdict motion on transferred intent was harmless.[5]

As for wanton murder, of which Mayes was convicted, the trial court properly denied the motion for directed verdict. In light of Riley's testimony that Mayes and Wadlington were shooting into the crowd, there was sufficient evidence of wanton murder because shooting into a crowd of people is wanton conduct under Kentucky's penal code.[6]

We reject Mayes's argument that there was no evidence that he acted in complicity with Wadlington since there was no direct evidence of agreement or preconceived plan. Unquestionably, the Commonwealth presented no direct evidence of an express agreement or preconceived plan; but the Commonwealth did present evidence from which the jury might have reasonably inferred that Mayes and Wadlington acted in complicity.[7] For example, Riley testified that Mayes and

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5 Kentucky Rules of Criminal Procedure (RCr) 9.24.

6 The Kentucky Penal Code defines when a person is acting wantonly:

> (3) "Wantonly"—A person acts wantonly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. A person who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts wantonly with respect thereto." Kentucky Revised Statutes (KRS) 501.020(3).

7 *See* Mills v. Commonwealth, 44 S.W.3d 366, 371 (Ky. 2001) (stating that no particular act must be shown to establish complicity and recognizing that a "continuum of events" may establish complicity).

Wadlington stood together while shooting into the crowd. Acree asserted that Mayes and Wadlington arrived in the same car and left the scene together during the melee. Acree also recalled that while fleeing the scene, Mayes asked Wadlington, "did you hit him?"

The Commonwealth's evidence was sufficient for the jury to find guilt on a complicity theory. The evidence would have also been sufficient for the jury to find Mayes guilty of acting alone in light of Riley's testimony about seeing him fire into the crowd. We find no error in the trial court's denial of Mayes's motion for a directed verdict.

B. No Palpable Error in Jury Instructions.

Mayes contends that the trial court erroneously instructed the jury on multiple theories of guilt. But, as discussed above, the evidence was enough for the jury to consider conviction on any of the Commonwealth's theories. Mayes argues that he objected to the murder instruction. He generally objected to the court instructing the jury at all due to his perception of insufficient evidence. He also made the following specific objection:

> Defendant Mayes objects to the one murder charge as far as the instruction in that he wants to request a section C which states "and LaWarren Sims' death occurred in a manner which the defendant knew or should have known was rendered substantially more probable by his conduct." There's a case, and I thought I had it, that spoke to this type of language being part of a wanton murder instruction, and I want to say Mack v. Commonwealth, but I don't think that's the one.

Mayes now argues

> [t]he import of the Court's ruling is that there is no way of determining beyond a reasonable doubt what theory the Appellant was convicted [under] and as such he is prejudiced and denied a fair trial.

We construe this argument as an attack on the trial court's combination instruction, which asked the jury to find whether Mayes, "either individually or in complicity with Devron D. Wadlington, killed LaWarren O'Keith Sims, by shooting him with a handgun." Undoubtedly, the verdict forms used by the trial court did not direct the jury to specify whether it found Mayes guilty as acting alone or guilty as acting in complicity with Wadlington. But Mayes did not really ask the trial court to require the jury to make that differentiation in its verdict.[8] Mayes stated other grounds. So the specific issue of being unable to know whether a unanimous jury found Mayes guilty as acting alone or acting in complicity with Wadlington is not preserved for our review. Because this issue is insufficiently preserved, we could only grant relief upon a showing of palpable error.[9]

In light of the evidence and the fact that Mayes was found guilty of the same level offense and subject to the same statutory sentencing standards, regardless of whether the jury found Mayes acted alone or acted in complicity with Wadlington, we do not perceive any error in the trial court's instruction on wanton murder as rising to the level of palpable error.[10] Furthermore, because the evidence against Mayes could support a conviction on either theory, our law does not require a showing that the individual jurors

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8 Although Mayes generally objected to giving instructions at all and argued there was no evidence of complicity in his directed verdict motion, we find no indication on the record that he specifically objected to this combination instruction.

9 RCr 10.26.

10 *Id.*: "A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court 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."

agreed on which theory was applicable.[11] In sum, Mayes is not entitled to relief on this issue.

C. No Reversible Error in Trial Court's Denial of Motion for Separation of Witnesses.

Mayes contends that the trial court committed reversible error by denying Wadlington's motion for separation of witnesses, a motion that he made for the first time on the second day of testimony. The following exchange occurred on the record:

THE COURT:	You may call your next witness.
MR. OVEY [Prosecutor]:	Carl Copeland. I'll call—I don't think he's arrived yet. So we can proceed, I'll call Detective Stegar.
MR. HAGAN [Counsel for Wadlington]:	Judge, may we move for a separation of the witnesses?
THE COURT:	Well, I think it's too late.
MR. HAGAN:	Well, I think that the witness that he just called, Carl Copeland, has now come into the courtroom.
MR. OVEY:	The time for the separation was yesterday.
THE COURT:	It's too late because we've had a full day of testimony, and it would be unfair to enforce it now.

Mayes draws our attention to Kentucky Rules of Evidence (KRE) 615, which provides that upon a motion for separation of witnesses, the trial court "*shall* order witnesses excluded so they cannot hear the testimony of other witnesses[.]" (Emphasis

[11] *See, e.g.,* Wells v. Commonwealth, 561 S.W.2d 85, 88 (Ky. 1978) ("We hold that a verdict [cannot] be successfully attacked upon the ground that the jurors could have believed either of two theories of the case where both interpretations are supported by the evidence and the proof of either beyond a reasonable doubt constitutes the same offense.") (upholding murder conviction despite jury instruction in the alternative regarding whether defendant acted intentionally or wantonly).

added.) While we do take note of the use of the mandatory term "shall," we agree with the trial court that after a full day's testimony, much of the desired effect of separation may have been lost. In fact, our case law states that "a party has a right to the separation of witnesses upon a *timely* request"[12] and recognizes that the denial of a motion for separation of witnesses made after witnesses have testified can be harmless error.[13]

Later on, after Stegar had testified, Mayes's counsel approached the bench when Copeland took the stand to make a motion for a mistrial because Copeland was allowed in the courtroom while Stegar testified. Counsel represented to the court that the defense had made sure that witnesses were not in the courtroom while other witnesses testified.[14] The trial court replied that it had no way of knowing who was in the courtroom during all prior testimony or whether there were witnesses listening to other witnesses' testimony. Counsel argued that it was appropriate to call for separation of witnesses at any point during the trial. Although denying the mistrial motion, the trial court then ordered the separation of witnesses with the exception of the investigating officers, whom defense counsel agreed could properly remain in the courtroom during other witnesses' testimony.

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12 Mills v. Commonwealth, 95 S.W.3d 838, 841 (Ky. 2003) (emphasis added).

13 Justice v. Commonwealth, 987 S.W.2d 306, 315 (Ky. 1998) (holding that denial of motion to separate witnesses was harmless error because "[t]he rule was adopted to prevent witnesses who have not yet testified from altering their testimony in light of evidence adduced at trial. . . . In the case at bar, Appellant argues that Martin and Lockhart tailored their testimony to contradict the testimony of Appellant's wife, Demaris. However, the motion to separate came *after* Demaris had testified. Thus, the motion came too late to prevent the prejudice alleged on appeal.") (citation omitted).

14 Although Mayes's counsel actually said they were careful that "our" witnesses were not in the courtroom while others testified, we note that neither defendant actually called any witnesses or presented any other proof in the guilt phase. In fact, the Commonwealth called all guilt-phase witnesses.

Although Copeland had apparently listened to Detective Stegar's testimony, we find no reversible error in the earlier denial of the motion to separate witnesses. As the trial court noted, it had no way of knowing whether witnesses had listened to other witnesses the preceding day; and, thus, any error in denying the motion as untimely was likely harmless. Furthermore, Copeland's testimony was one of many eyewitnesses' testimony and at least arguably was more favorable to Mayes than the other eyewitnesses' testimony because Copeland recalled seeing Mayes fire one shot up into the air but not into the crowd and did not see who fired two or three other shots he heard. In view of the other testimony presented indicating guilt and the fact that Copeland's testimony was at least arguably more favorable to Mayes than some other witnesses' testimony, any error was certainly harmless.[15]

D. Trial Court Properly Denied Motion for Mistrial.

Mayes contends that "manifest necessity" warranted a mistrial after the trial court denied the motion for separation of witnesses and Copeland heard Detective Stegar's testimony before testifying himself. We disagree in light of the untimeliness of the motion and the content of Copeland's testimony, as we noted previously. We find that the trial court did not abuse its discretion in denying this extreme remedy,[16] especially in light of the fact that the trial court ordered separation of witnesses as a precautionary measure following Copeland's testimony.

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[15] RCr 9.24.

[16] Commonwealth v. Scott, 12 S.W.3d 682, 684-85 (Ky. 2000) (stating that mistrials are to be granted sparingly only upon a "manifest necessity" and that trial court's ruling on mistrial motion is subject to abuse of discretion standard of review upon appeal).

III. CONCLUSION.

For the foregoing reasons, we affirm the circuit court's judgment.

All sitting, except Cunningham, J. All Concur.

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