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RENDERED: APRIL 24, 2008
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2006-SC-000698-MR

CHESTER SEXTON — APPELLANT

V.

ON APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE EDWIN M. WHITE, JUDGE
NO. 98-CR-00454

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

REVERSING AND REMANDING

Chester Sexton appeals as a matter of right from a judgment convicting him on retrial of the murder of David Pepper. Sexton received a sentence of fifty years' imprisonment. We must reverse the judgment because we agree with Sexton that the trial court committed reversible error by refusing to include the defense of self-defense in its wanton murder, second-degree manslaughter, and reckless homicide instructions to the jury.

I. FACTS.

Sexton gave the following version of the events of his camping trip in the woods with Pepper that culminated in Pepper's murder. During an evening of heavy drinking, Pepper began "feeling on" Sexton; and Sexton struck Pepper. Pepper then grabbed a gun from his Jeep and threatened to sodomize Sexton in the same way Pepper had

himself been sodomized in prison. The two fought. Pepper held a gun to Sexton's head and pulled down Sexton's shorts. Sexton believed that Pepper was trying to penetrate him from behind. Sexton then offered to perform oral sex on Pepper to avoid penetration. Pepper then allowed Sexton to stand, continuing to demand oral sex while holding the gun. Managing to escape, Sexton fled to Pepper's Jeep and started it.

Sexton admitted that he struck Pepper with the Jeep, explaining that he did so to protect himself from threatened forcible sexual assault. He also testified that after running over Pepper and stopping the Jeep in the woods, he returned to the camp to find Pepper moving on the ground. He and Pepper struggled over a gun, and the gun discharged into Pepper's chest.

According to the medical examiner, Pepper died either from the effects of the gunshot wound to the chest or from the crushing injury to the chest. A grand jury indicted Sexton for Pepper's murder. Later, another grand jury indicted Sexton for robbery and for allegedly forcefully taking Pepper's Jeep in the incident resulting in Pepper's death and for tampering with physical evidence for allegedly burning Pepper's corpse.[1] The trial court joined the indictments for trial, and a jury convicted Sexton of all three charges. The trial court sentenced Sexton to fifty years' imprisonment for murder, ten years for robbery, and five years for tampering with physical evidence, with all sentences to run concurrently.

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[1] A copy of the second indictment (Indictment No. 00-CR-00067) does not appear in the record provided to this court in the instant appeal. However, we have gleaned the relevant charges in this second indictment from our prior decision reversing and remanding for retrial, as well as other information contained in the record provided to us in this appeal.

In Sexton's earlier matter-of-right appeal, we reversed the convictions and remanded the case to the trial court "for proceedings not inconsistent with this opinion."[2] We held that the trial court's failure to conduct a competency hearing was one reason underlying our reversal. We stated that had that been the only error, the case could have been remanded simply for a competency hearing with the convictions left standing if Sexton were retrospectively found competent to stand trial. But we also required that the case be retried for other errors, including the trial court's refusal to instruct on imperfect self-defense.

On remand, the trial court conducted a competency hearing and found Sexton competent to stand trial. On the day the new trial began, the trial court announced that it would only retry Sexton on the homicide charges because, in its interpretation of our opinion, the robbery and tampering with physical evidence convictions had not been reversed. On retrial, the trial court refused to include Sexton's requested language "that he was not privileged to act in self-defense" within the instructions for wanton murder, second-degree manslaughter, and reckless homicide; although, it did include this requested language within the instructions for intentional murder and first-degree manslaughter. The trial court overruled Sexton's objection to the prosecutor's arguing in its closing facts not in evidence regarding the date and length of Pepper's prison term.

On appeal, Sexton argues that the murder conviction must be reversed because the trial court erroneously (1) refused to include a self-defense instruction to wanton murder, second-degree manslaughter, and reckless homicide; (2) ignored the law of the

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[2] Sexton v. Commonwealth, No. 2001-SC-000852-MR, 2004 WL 102481 at * 6 (Ky. January 22, 2004).

case by failing to retry Sexton on the robbery and tampering with physical evidence charges; and (3) allowed the Commonwealth to argue facts not in evidence in its closing argument.

II. ANALYSIS.

A. Trial Court Erred by Omitting Self-Defense Instruction.

We agree with Sexton that his conviction on retrial must be reversed because of the trial court's refusal to add the language "that he was not privileged to act in self-protection" to the wanton murder instruction (Instruction 1AA), the second-degree manslaughter instruction, and the reckless homicide instruction. This issue was preserved for our review by Sexton's objection to the trial court's failure to include appropriate self-defense language in these instructions.[3] The trial court should have instructed the jury on self-defense, which we have made clear is available to homicide offenses requiring a wanton or reckless mental state if the evidence warrants it.[4] Sexton's testimony regarding Pepper's alleged attempts to sodomize him at gunpoint was sufficient evidence to warrant an instruction on self-defense. Given this evidence, the trial court erred by not instructing the jury on self-defense as to the non-intentional homicide offenses.

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3 RCr 9.54(2).

4 *See, e.g.,* Allen v. Commonwealth, 5 S.W.3d 137, 139 (Ky. 1999) (jury must be instructed on self-defense for wanton murder if there is evidentiary support for this defense); Estep v. Commonwealth, 64 S.W.3d 805, 811 (Ky. 2002) (jury must be instructed by including language "that he was not privileged to act in self-protection" as an element of reckless homicide if there is evidentiary support for this defense).

The Commonwealth argues that the trial court's instructions complied with those contained in former Justice Cooper's jury instruction manual.[5] But this manual is not binding authority. And we do not come to the same understanding of Cooper on this point as does the Commonwealth. Cooper includes the self-defense language in brackets in the intentional murder model,[6] explaining that this language should only be used if the evidence reasonably supports it. Although Cooper's model instruction on wanton murder does not explicitly set forth the self-protection defense within its model wanton murder instruction,[7] it cites Allen in its COMMENT on wanton murder instructions. Allen explicitly provides for the availability of this defense to wanton murder.[8] So a close reading of Cooper's manual indicates that the self-defense language must be included in instructions for homicide offenses with wanton or reckless states of mind so long as the evidence warrants it.

The Commonwealth argues that even if the trial court erred in not including the self-defense language in the instructions as to the elements of wanton murder and the other non-intentional homicide offenses, any deficiency was cured by Instruction 1E. But Instruction 1E sets out an imperfect self-protection defense[9]—not the self-defense

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5 WILLIAM S. COOPER & DONALD P. CETRULO, KENTUCKY INSTRUCTIONS TO JURIES *CRIMINAL* §§ 3.21, 3.23, 3.24 (5th ed. 2006).

6 *See id.* at § 3.21.

7 *See id.* at § 3.23.

8 *See id.* at § 3.23, COMMENT on p. 3-34.

9 Instruction 1E was entitled Wanton Belief Qualifications and instructed the jury as to what lesser included offense occurred if Sexton had otherwise been guilty of murder and/or manslaughter but had been "mistaken in his belief that it was necessary to use deadly physical force against David Pepper in self-protection against death or deviate sexual intercourse, or in his belief in the degree of force necessary to protect himself from it."

instruction that Sexton requested[10] and that the trial court apparently found was supported under the evidence for intentional homicide. We also note that the jury could have convicted Sexton of wanton murder under Instruction 1AA without ever being directed to consider imperfect self-defense under Instruction 1E. Instruction 1AA provided that the jury could find Sexton guilty of wanton murder if and only if the evidence showed beyond a reasonable doubt that he killed Pepper by shooting him or running him over with the jeep and:

> B. That in so doing, he was wantonly engaging in conduct which created a grave risk of death to another and thereby caused the death of David Pepper under circumstances manifesting an extreme indifference to human life.
>
> If you find Chester Sexton guilty under this Instruction, you will say so by your verdict and no more. Go to Verdict Form II and then return to the Courtroom.

Verdict Form II then simply asked the jury to find Sexton guilty or not guilty of wanton murder. The jury indicated that it found him guilty of wanton murder by the foreperson's signature.

Furthermore, in Instruction One on Self-Protection,[11] the trial court crossed out the reference to Wanton Murder (Instruction 1AA), which erroneously instructed the jury that this defense was not available to wanton murder.

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[10] According to BLACK'S LAW DICTIONARY (8th ed. 2004), *imperfect self-defense* is defined as "[t]he use of force by one who makes an honest but unreasonable mistake that force is necessary to repel an attack" and can result in a lesser charge in many jurisdictions (including Kentucky). *Perfect self-defense* is defined as "[t]he use of force by one who accurately appraises the necessity and the amount of force to repel an attack." *Id.*

[11] Instruction One appeared as follows: "Even though Chester Sexton might otherwise be guilty of an offense described in Instructions 1A, ~~1AA~~ or 1B, if at the time Chester Sexton killed David Pepper, he believed that Pepper then and there was about to use deadly physical force or was threatening the use [of] physical force in order to engage in deviate sexual intercourse, Chester Sexton was privileged to use deadly physical force against David Pepper as he believed necessary in order to protect himself against it. You are

We recognize that possibly some of the error could have been negated by the trial court's reading of its instructions to the jury. But the trial court told the jury that any references to self-defense as available to wanton or reckless offenses were "typos." So the communication to the jury was that self-defense was not a defense to wanton or reckless homicide offenses. This was error.

Mindful of the dismal prospect of a possible third trial of this case, we must reverse, nevertheless, because of this error.[12] The trial court is directed on remand to include the language "that he was not privileged to act in self-protection" in the jury instructions for homicide charges requiring a wanton or reckless mental state if there is evidence supporting such a defense.

B. Law of the Case Issue Not Necessary to Resolve.

Because we reverse the murder conviction on the basis of erroneous jury instructions, we need not address whether any error in the trial court's refusing to retry Sexton on robbery and tampering with physical evidence charges contained in Indictment No. 00-CR-00067 affected the validity of the murder conviction, which is the only conviction now on appeal to this Court. While the trial court stated on the record that it believed the robbery and tampering with physical evidence convictions not to be disturbed by the earlier opinion of this Court on the first appeal, we note that our earlier opinion expressly reversed and remanded all of Sexton's convictions without affirming any part of the trial court's judgment. And we note that following the new competency

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further instructed that Chester Sexton had no duty to retreat from David Pepper before using deadly force to protect himself."

[12] Allen, 5 S.W.3d at 139 (holding that "failure to give an instruction on self-protection as a defense to the wanton murder charge was reversible error" where evidence warranted the instruction, especially as trial court had given instruction on self-protection as defense to intentional murder charge).

hearing, the trial court did not enter a new judgment purporting to reinstate the robbery and tampering with physical evidence convictions in 00-CR-00067. But the robbery and tampering with physical evidence charges are simply not now before us.

C. Closing Argument Should Not Refer to Facts Not in Evidence.

Sexton contends that the prosecution engaged in egregious misconduct by arguing facts not in evidence regarding the victim's prison record in closing argument. The specific language he objects to is that "in 1980 [David Pepper] went to prison for three years" and that Pepper "made a mistake, way back, and now they're trying to portray him as this monster when he turned his life around." This argument responded to Sexton's testimony that Pepper threatened to sodomize him as Pepper had been sodomized in prison and a reference during the defense's opening statement to Pepper's having spent time in prison.

Despite arguing facts not in evidence, these statements by the prosecutor in closing were not the type of egregious misconduct that we consider to render the entire trial fundamentally unfair[13] since it was responding to defense references to the victim's prison stint. So we would not have reversed on this ground standing alone. But on remand, we remind the trial court and the Commonwealth that arguing facts not in evidence in closing argument is improper.

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[13] *See* Stopher v. Commonwealth, 57 S.W.3d 787, 805 (Ky. 2001) (recognizing that prosecution is entitled to some latitude on closing argument and stating that convictions may be reversed only if misconduct renders trial "fundamentally unfair.").

III. CONCLUSION.

For the foregoing reasons, we reverse the judgment of the Christian Circuit Court and remand for further proceedings in accordance with this opinion.

All sitting. All concur.

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