IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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: OCTOBER 23, 2008
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2006-SC-000640-MR

DEVRON D. WADLINGTON — APPELLANT

V.

ON APPEAL FROM TRIGG CIRCUIT COURT
HONORABLE BILL CUNNINGHAM, JUDGE
NO. 05-CR-00047-001

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Devron Wadlington appeals as a matter of right[1] from a circuit court judgment convicting him of wanton murder and sentencing him to twenty years' imprisonment. Wadlington claims that his conviction must be reversed because, at trial, the trial court erred when it (1) initially refused to order separation of witnesses on the second day of trial, (2) allowed the introduction into evidence of a 9mm gun that Wadlington alleges had no connection to the shooting death of the victim, and (3) failed to instruct the jury on self-defense. Finding no reversible error, we affirm.

---

[1] Ky. Const. § 110(2)(b).

I. FACTS.

Wadlington and a co-Defendant, George Kelly Mayes, 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 his shirt and pull a gun from his waistband 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. At least one witness thought Wadlington had a 9mm gun.

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 .45 shell casings and a 9mm casing nearby. 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 shell 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; of wanton murder; or of a lesser degree of homicide. The jury convicted both Mayes and Wadlington of wanton murder.

We affirmed Mayes's conviction in Mayes v. Commonwealth, No. 2006-SC-000656-MR, 2008 WL 466134 (Feb. 21, 2008. Rehearing denied May 22, 2008). This is Wadlington's separate appeal. Since Mayes's and Wadlington's appeals to this Court arose out of the same trial and they assert at least one common issue, we will draw freely from our opinion in Mayes.

II. ANALYSIS.

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

Wadlington contends that the trial court committed reversible error by denying his motion for separation of witnesses, a motion that he made for the first time on the second day of testimony after three witnesses had testified. 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.

Wadlington 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[.]" 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"[2] and recognizes that the denial of a motion for separation of witnesses made after witnesses have testified can be harmless error.[3]

---

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

2 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).

Later on, when Copeland took the witness stand and after Stegar had testified, Mayes's counsel approached the bench 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 the three witnesses before Stegar testified.[4] 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 remain in the courtroom.

Although Copeland was apparently present for 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, following our review, we cannot say that Copeland's testimony was clearly duplicative of Stegar's testimony. Stegar testified about how the police investigation proceeded, covering topics such as where bullets were found and

---

[4] 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.

which witnesses were interviewed. Copeland, on the other hand, testified about his own eyewitness observations at the club and surrounding area the night of the murder. Wadlington fails to pinpoint how any particular portion of Copeland's testimony was unreliable or likely changed by Copeland hearing Stegar's testimony. [5] Wadlington contends that Copeland was a "critical prosecution witness," who was "one of the few witnesses who claimed to have seen [Wadlington] with a gun that he pointed over the crowd and shot." But this statement shows that other witnesses testified to the same effect, making Copeland's testimony on this point cumulative. He also claims Copeland's testimony was internally inconsistent and inconsistent with his statement to police. But he does not claim that his counsel was unable to cross-examine Copeland on such inconsistencies, nor does he make a showing that the inconsistencies resulted from hearing Stegar's testimony as would be the case if parts of Copeland's testimony essentially mimicked parts of Stegar's testimony. So we find no reversible error arising from the trial court's handling of this matter.

B. No Palpable Error Resulted from Admission of 9mm Gun into Evidence.

Next Wadlington contends that the trial court committed reversible error in admitting into evidence a 9mm gun, which he contends was not connected in any way with the fatal shooting of Sims. This 9mm gun was found by

---

[5] *See* Hatfield v. Commonwealth, 250 S.W.3d 590, 595 (Ky. 2008) (stating that "[t]he mere threat or speculation that a witness could tailor testimony is not persuasive of its own accord to warrant prejudicial error.").

investigators in the woods wrapped in a T-shirt. Testing revealed this gun was not the source of the 9mm shell casing found near Henry's Place. According to Wadlington, the gun had no connection to the crime because it was not the source of the 9mm shell casing found; and the Commonwealth offered no direct physical evidence that he owned or possessed such a gun. But at least one witness claimed to have seen Wadlington with a 9mm gun.

Wadlington admits this issue is unpreserved but argues that admission of the gun constitutes palpable error under Kentucky Rules of Criminal Procedure (RCr) 10.26. The Commonwealth argues that defense counsel did not object to admission of the gun as a matter of trial strategy, pointing to remarks by defense counsel in closing argument drawing attention to the lack of direct evidence that the 9mm gun found was connected to the crime by noting that the 9mm shell casing found did not come from the 9mm gun found in the woods and arguing that if the jury was unsure which bullet hit Sims, it had reasonable doubt and could not convict.

Whether or not trial counsel's lack of objection to the gun's admission was intentional trial strategy, we find no palpable error in its admission. Although this gun was not definitively established as firing the bullet that killed Sims, it was, nonetheless, relevant evidence under KRE 401, which broadly defines relevant evidence as making the existence of a material fact more or less probable and, thus, presumptively admissible under KRE 402, which generally states that relevant evidence is admissible. Billy Alexander testified to having found a gun near his door after Mayes and Wadlington

stopped by his residence the night of the shooting and to having thrown that gun out into the woods where the Budweiser box was eventually found. After investigators found a .45 gun on the lot next to Alexander's house, a police canine directed the officers to the 9mm gun, which was found under an old car seat not far from the place where the .45 was found. Although experts testified that the 9mm shell casing found did not come from the 9mm gun found in the woods, a jury might still reasonably infer that the 9mm gun was used in the shooting that resulted in the untimely death of LaWarren Sims.

Given the possible relevancy of the evidence; the lack of preservation of this issue; and the possibility that defense counsel elected not to object to its admission but, instead, to point to its introduction as showing shoddy police work, we cannot conclude that the trial court's admission of this evidence amounted to palpable error under RCr 10.26.[6]

C. No Error in Denial of Self-Defense Instruction.

Wadlington's tendered jury instructions included intentional murder and first-degree manslaughter instructions that required that the jury find "he was not privileged to act in self-protection" to convict on those charges. (Wadlington was actually convicted of wanton murder,[7] and his tendered instruction on that charge did not contain the self-protection requirement). However, Wadlington did not specifically object to the absence of a self-defense

---

6 *See* Martin v. Commonwealth, 207 S.W.3d 1, 3-4 (Ky. 2006) (discussing palpable error standard and placing particular emphasis on the term "manifest injustice.")

7 The trial court instructed the jury with separate instructions on, among other matters, intentional murder with transferred intent and wanton murder. The jury found Wadlington guilty under the wanton murder instruction.

instruction after the trial court orally stated that it was simply "denying" his tendered instructions. Our precedent establishes that because a busy trial judge might easily overlook a particular portion of tendered instructions, a party should bring the specific problem in jury instructions to the trial court's attention by objection to preserve the issue for appeal, rather than merely relying on its tendered instructions.[8]

Nevertheless, even accepting for the sake of argument that the issue is properly preserved, we find no error in the trial court's not giving a self-defense instruction, given the evidence presented in this case. Kentucky Revised Statutes (KRS) 503.050 clearly establishes that a person is privileged to use physical force, especially deadly physical force (such as shooting a gun), only under very limited circumstances:

> (1) The use of physical force by a defendant upon another person is justifiable when the defendant believes that such force is necessary to protect himself against the use or imminent use of unlawful physical force by the other person.
>
> (2) The use of deadly physical force by a defendant upon another person is justifiable under subsection (1) only when the defendant believes that such force is necessary to protect himself against death, serious physical injury, kidnapping, sexual intercourse compelled by force or threat, felony involving the use of force, or under those circumstances permitted pursuant to KRS 503.055.
>
> (3) Any evidence presented by the defendant to establish the existence of a prior act or acts of domestic violence and abuse as defined in KRS 403.720 by the person against whom the defendant is charged with employing physical force shall be admissible under this section.

---

[8] Grooms v. Commonwealth, 756 S.W.2d 131, 139-40 (Ky. 1988)

(4) A person does not have a duty to retreat prior to the use of deadly physical force.

According to Wadlington, the following facts supported a self-defense instruction:

> The crowd of 200-300 young people, already divided based on county affiliation and prior confrontations, was drinking, using drugs, pushing each other on the dance floor, and tossing beer cans at each other. Anthony Wilson, who had tried to start a fight with Kelly Mayes the week before, was angry and looking for a fight. When the partiers were heading to their vehicles after being asked to leave Henry's Place, Anthony instead repeatedly approached Kelly and Devron [Wadlington] in an angry, threatening manner. Kelly kept raising his shirt to show off his gun, giving the well-recognized "back off" message; but Anthony persisted in his loud-talking approach on Kelly and Devron, despite the efforts of friends to deter him. Rodell Acree, the designated driver for Kelly and Devron, testified somebody was trying to hurt them; and they were trying to get out of there.

The Commonwealth contends that this evidence "did not show that Wadlington had formulated a reasonable belief that he had to shoot Sims to protect himself from death. There was no evidence that Wadlington's life was in imminent danger."

We agree with the Commonwealth that this statement of facts still does not demonstrate entitlement to a self-defense instruction. The dance-floor pushing and throwing beer cans could be reasonably regarded as "unlawful physical force"; but these actions essentially ceased when everyone was ordered to leave, and Wadlington does not directly claim that he was responding to pushing and throwing beer cans by eventually firing shots. Furthermore, no one saw him shoot the gun in the air or otherwise until after leaving Henry's Place, where the pushing and beer can throwing had taken

place. Rather, Wadlington seems to be arguing that he had to protect himself in response to Wilson's "loud talking" and approaching in an angry, threatening way; but he does not allege that Wilson was brandishing a weapon, actually exhibiting physically violent behavior directed towards Wadlington and Mayes, or even threatening them with imminent physical violence. Furthermore, there is no indication that Wilson was threatening them with deadly force. Thus, no error occurred from the trial court's not instructing the jury on self-defense.

III. CONCLUSION.

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

Minton, C.J.; Abramson, Noble, Schroder, Scott, and Venters, JJ., sitting. All concur. Cunningham, J., not sitting.

COUNSEL FOR APPELLANT:

Donna Lynn Boyce
Appellate Branch Manager
Department of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, KY 40601

COUNSEL FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Perry Thomas Ryan
Assistant Attorney General
Office of Attorney General
Criminal Appellate Division
1024 Capital Center Drive
Frankfort, KY 40601-8204