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RENDERED: NOVEMBER 26, 2008
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2006-SC-000479-MR

DOMINIC T. BUCKNER — APPELLANT

V.

ON APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE THOMAS O. CASTLEN, JUDGE
NO. 05-CR-00576

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING, IN PART, AND

REVERSING AND REMANDING, IN PART

Dominic Terrell Buckner, age seventeen at the time of the offenses, appeals from his convictions for wanton murder and kidnapping, not released alive. In accordance with the jury's recommendation on the convictions, the trial court sentenced him to twenty years in prison on each count, to run concurrently. So he appeals to this Court as a matter of right.[1]

Buckner raises nine issues on appeal. Those issues are as follows: (1) the trial court erred in not directing a verdict of acquittal for wanton murder; (2) the trial court erred in not directing a verdict of acquittal for

[1] Ky. Const. § 110(2)(b).

kidnapping, not released alive; (3) the trial court erred in not directing a verdict in favor of Buckner on the issue of renunciation; (4) Buckner's double jeopardy rights were violated by his convictions of wanton murder and kidnapping; (5) the trial court erred in failing to give a renunciation instruction on wanton murder and kidnapping; (6) the trial court erred by giving a defective instruction on wanton murder; (7) the trial court erred by giving a defective instruction on kidnapping; (8) the prosecutor committed reversible misconduct by arguing an unsupported legal theory (complicity to intentional murder) and not abandoning that theory until after defense counsel had concluded his arguments; and (9) the trial court erred in ruling that Buckner, a youthful offender who was convicted of committing a violent offense, was ineligible under the violent-offender statute, KRS 439.3401, for being considered for probation or conditional discharge under KRS 640.030(2).

Upon review, we conclude that the trial court did not err in denying Buckner's motions for directed verdicts of acquittal on the murder count or the kidnapping count; nor did the trial court err in failing to direct a verdict in Buckner's favor on the issue of renunciation. We further conclude that Buckner's double jeopardy rights were not violated by his convictions for wanton murder and kidnapping, the instructions were not erroneous, and the prosecutor did not commit prosecutorial misconduct in the closing arguments. In light of this Court's opinion in Commonwealth v. Merriman, however, we conclude

that, as a youthful offender, Buckner was eligible under KRS 640.030(2) to be considered for probation or conditional discharge. So we affirm, in part, and reverse and remand, in part, for a new sentencing hearing.

I. THE UNDERLYING FACTS.

At trial, the Commonwealth's theory of the case was that Dominic Buckner and four others went to an Owensboro residence. When they arrived at the residence, they encountered the victim, Tipton Finley, who was staying at the residence. Buckner and the others held Finley at gunpoint while searching the house for drugs to steal. When they did not find any drugs, they forced Finley to call his friends to bring drugs for them to steal. The group eventually left the house empty-handed, with Buckner having possession of the gun. Fearing, however, that Finley might call the police, Rontae Hooper, who had been in the residence with Buckner, took the gun from Buckner. Hooper then went back inside the residence and shot Finley one time in the head, killing him.

The grand jury charged Buckner with one count of murder and one count of kidnapping. The murder count charged alternate theories of intentional murder or wanton murder while acting alone or in complicity with Rontae Hooper. The kidnapping count charged that Buckner acted alone or in complicity with others to commit kidnapping with the intent to further the felony offense of robbery in the first degree and that Tipton Finley was not released alive.

Trial testimony established that earlier in the evening of the murder, Buckner accompanied his friend, Jermaine Johnson, to a fast-food restaurant in Owensboro. Johnson had arranged to meet Angel Toribio there to purchase marijuana. Johnson was the intermediary between Mario Girten from Hopkinsville, the buyer, and Toribio from Owensboro, the seller. Once Toribio arrived at the restaurant, Johnson got into Toribio's vehicle, leaving Buckner behind in Johnson's vehicle.

The Toribio vehicle left the restaurant. But before the exchange took place, Toribio noticed that another vehicle, which he did not recognize, was following him. Fearing that the vehicle belonged either to law enforcement or someone intending to rob him, Toribio stopped the vehicle and ordered Johnson to get out. No exchange took place.

Johnson returned to his vehicle where he learned that the vehicle that spooked Toribio belonged to his buyer, Mario Girten. Two other individuals from Hopkinsville, Rontae Hooper and Rodney Moore, accompanied Girten. Upon learning that the vehicle belonged to Girten, Johnson called Toribio in an attempt to set up another exchange. Toribio told Johnson to go to the residence where they eventually encountered Tipton Finley. Johnson knew of the residence because he had purchased drugs there in the past.

Johnson, Buckner, Girten, Hooper, and Moore got into one vehicle and drove to the residence. When they arrived at the residence, Tipton Finley was outside unloading groceries from his vehicle. Finley had a few

friends with him, but they left shortly after Buckner's group arrived. Buckner, Girten, and Hooper helped Finley take the groceries into the house while Johnson and Moore remained outside.

Buckner testified at trial that while he was in the house, Hooper pulled out a gun and showed it to him and Girten. Up to that point, Buckner did not know that Hooper had a gun. Buckner took the gun from Hooper because he liked the way it looked. While in possession of the gun, Buckner fired one shot into the floor to "intimidate" Tipton Finley.

While outside, Johnson heard the gunshot and ran to the front porch of the house. Peering inside, Johnson could see Buckner and Finley, who was alive and unharmed at this point, standing together. At trial, Johnson testified that Buckner was holding the gun to his side. Johnson observed that Hooper and Girten were searching through the house. Johnson testified that he heard Buckner asking Tipton Finley where the "weed" was and who had the "weed." He also heard Tipton Finley say, "No, you all. I can just tell Angel to come. You all just leave me alone." And, at that point, Johnson saw Tipton Finley make a phone call. It is undisputed that Finley called Angel Toribio.

In a previous taped statement to the police, however, Johnson stated that when he ran to the front porch of the house after hearing the gunshot, he saw that Buckner had been "like holding a gun to him [Tipton Finley]." When asked during that statement about Tipton

Finley's demeanor while in the house, Johnson stated that "he [Tipton Finley] was calm like he didn't have no gun to his head." And he stated that Buckner had "a pistol on the white dude [Tipton Finley]." When confronted with these statements at trial, Johnson admitted that Buckner "had a gun on" Tipton Finley but insisted that Buckner was not pointing it at him. There was a further inconsistency in Johnson's trial testimony that Hooper, Buckner, and Girten were in the house; in his statement to the police, he stated that only Hooper and Buckner were in the house, and Girten was outside with Johnson and Moore.

Johnson testified that when he ran to the front porch and saw Buckner, he told him to come outside, which Buckner did. Johnson first denied, but later admitted, that he also told Buckner to leave Tipton Finley alone. Buckner and Johnson headed toward the car. Buckner still had the gun with him. Before Buckner could get into the car, however, Hooper stopped Buckner and told him to give him the gun. Buckner refused, stating, "No." Hooper told him again to give him the gun, and Buckner refused again. After being turned down a second time, Hooper grabbed the gun from Buckner's hand. Johnson testified that they tried to stop Hooper by yelling at him; although, he contradicted his prior statement that "they" consisted of Johnson, Girten, and Moore by testifying at trial that "they" consisted of Johnson, Girten, Moore, and Buckner. The group did not physically do anything to stop Hooper from returning to the house with the gun.

Hooper returned to the house and shot Tipton Finley one time in the head, killing him, because, as Johnson testified that Hooper stated, he believed that Tipton Finley was going to call the police. The bullet removed from the victim and a bullet removed from the floor of the residence were both fired from a revolver later found in Hooper's possession. As to ownership of the gun, the Commonwealth produced evidence that it was stolen from an Owensboro residence.

Angel Toribio testified about the aborted drug deal. He also testified that he received more than one call from Tipton Finley, who was desperately seeking Toribio's help in obtaining drugs. He testified that Tipton Finley sounded "shaky" and "scared" and did not sound like himself. According to Toribio, Tipton Finley told him that he needed some "weed" for a "guy" from South Carolina who had a lot of money. He asked Toribio to hurry to the residence because the guy was going to leave. Finley said that he did not want to say too much over the phone. One other person, Kevin Sexton, testified that he spoke with Tipton Finley soon after Toribio; and he had a similar conversation with Finley. Tipton Finley said he had someone who wanted to buy four pounds of marijuana for four thousand dollars. In response to Tipton Finley's calls, Toribio, Sexton, and a few others went to the residence because they believed that something was wrong.

The group stopped along the way to pick up a friend who owned an AK-47 assault rifle. Once the friend heard the story, however, he refused

to go along, predicting that someone would get shot. By the time the group arrived at the residence after their stop, Buckner and his group had left. One of Toribio's friends, who was the only one of the group who went into the residence, found Tipton Finley dying on the kitchen floor and fled the scene.

At the close of all the evidence, the trial court instructed the jury on (intentional) murder by complicity, criminal facilitation to commit (intentional) murder, wanton murder, second degree manslaughter, reckless homicide, kidnapping (not released alive), kidnapping, and first-degree unlawful imprisonment. As to the instructions on intentional murder by complicity and criminal facilitation to commit intentional murder, the trial court incorporated renunciation instructions. But the trial court did not include renunciation instructions for any other counts. The jury found Buckner guilty of wanton murder and kidnapping, not released alive. The jury recommended twenty-year sentences, to run concurrently. After finding that Buckner was a violent offender, the trial court sentenced him to twenty years in prison on each count, to run concurrently.

II. THE TRIAL COURT DID NOT ERR IN FAILING TO DIRECT A VERDICT OF ACQUITTAL FOR WANTON MURDER.

The issue of whether Buckner was entitled to a directed verdict of acquittal for wanton murder is unpreserved. Although defense counsel challenged the trial court's failure to incorporate renunciation provisions

in the wanton murder instruction, defense counsel did not object to a wanton murder instruction.[2] While defense counsel did make a motion for directed verdict at the close of the Commonwealth's case-in-chief, and renewed that motion at the close of all the evidence, as to the murder charge, the motion pertained to whether there were two criminal endeavors rather than a continuing course of conduct. To the extent that this argument could be construed as a challenge to the sufficiency of the evidence, we conclude that under the evidence as a whole, it was not clearly unreasonable for a jury to find guilt on the charge of wanton murder. So the trial court did not err in denying Buckner's motion for a directed verdict.

On a motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth, reserving to the jury all questions of credibility and weight of the evidence.[3] "On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal."[4]

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2 Kimbrough v. Commonwealth, 550 S.W.2d 525, 529 (Ky. 1977) ("When the evidence is insufficient to sustain the burden of proof on one or more, but less than all, of the issues presented by the case, the correct procedure is to object to the giving of instructions on those particular issues.").

3 Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991); Commonwealth v. Sawhill, 660 S.W.2d 3, 4 (Ky. 1983).

4 Benham, 816 S.W.2d at 187.

Wanton murder is defined in KRS 507.020(1)(b) as "under circumstances manifesting extreme indifference to human life," a person "wantonly engages in conduct which creates a grave risk of death to another person and thereby causes the death of another person." As defined in KRS 501.020(3), a wanton mental state is as follows:

> 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.

"[P]articipation in a dangerous felony may constitute wantonly engaging in conduct creating a grave risk of death to another under circumstances manifesting an extreme indifference to human life, thus permitting a conviction not only of the dangerous felony, but also of wanton murder."[5] So a non-killing participant in a dangerous felony may be convicted of wanton murder as a principal directly under KRS 507.020(1)(b). The critical inquiry in every case is what the

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[5] Bennett v. Commonwealth, 978 S.W.2d 322, 327 (Ky. 1998); *see also* Commentary to KRS 507.020 ("If a felony participant other than the defendant commits an act of killing, and if a jury should determine from all the circumstances surrounding the felony that the defendant's participation in that felony constituted wantonness manifesting extreme indifference to human life, he is guilty of murder under KRS 507.020(1)(b).") (*cited with approval in* Kruse v. Commonwealth, 704 S.W.2d 192, 194 (Ky. 1985), *modified on denial of reh'g*, 704 S.W.2d 192 (Ky. 1986)).

"decision makers find [the participant's] state of mind to have been with regard to the resulting death."[6]

This Court has observed certain characteristics that set aggravatedly wanton conduct apart from conduct that would not warrant a wanton murder conviction: "(i) homicidal risk that is exceptionally high; (ii) circumstances known to the actor that clearly show awareness of the magnitude of the risk; and (iii) minimal or non-existent social utility in the conduct."[7]

Turning to the evidence at trial, there is no dispute that Hooper shot and killed Tipton Finley. There is also no dispute that Buckner was in the residence with Hooper, that Buckner had a gun, and that Buckner fired a shot to intimidate Tipton Finley. As Johnson admitted, although hesitantly, Buckner had a gun on Tipton Finley; and he was demanding that he tell them where to find the marijuana. Considering Johnson's prior statement to the police that Tipton Finley remained calm throughout the ordeal, "like he didn't have no gun to his head," the jury could infer that Buckner did, in fact, have a loaded gun to Tipton Finley's head. While Buckner held the gun on Tipton Finley, Hooper searched the house, presumably to find the marijuana. There can be no dispute that the actions up to this point constitute first-degree robbery, and

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6 Commentary to KRS 502.020 (*cited with approval in* Kruse, 702 S.W.2d at 195).

7 Brown v. Commonwealth, 975 S.W.2d 922, 924 (Ky. 1998) (*citing* LAWSON & FORTUNE, KENTUCKY CRIMINAL LAW § 8-2(c)(2) (1998)).

Buckner candidly admits this in his appeal.[8] There can also be no dispute that there is no social utility in the conduct of this group, whose conduct includes drug trafficking, robbery, kidnapping, and murder. After Buckner fired the shot to intimidate Tipton Finley, Hooper took the loaded gun from Buckner, who gave only slight resistance. The jury was free to construe Buckner's slight resistance as mere acquiescence or indifference. At that point, Hooper felt the need to silence Tipton Finley forever. These circumstances adequately support a rational juror's conclusions that Buckner was aware of, but consciously disregarded, a substantial and unjustifiable risk that the conduct in which he was an active participant and during which he wielded a loaded handgun would result in the victim's death.

Buckner argues that decisions of this Court have clarified that a person can only be liable for a wanton murder committed by another based on the type of aid or encouragement that the defendant gave the murderer, meaning, as we understand the argument, that there can be no conviction under KRS 507.020(1)(b) of a non-killing participant in a dangerous felony; there can only be a conviction under KRS 502.020 as being wantonly complicit in the killing. As discussed above, however, under the Kentucky Penal Code, "[i]f a felony participant other than the defendant commits an act of killing, and if a jury should determine from

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[8] KRS 515.020.

all the circumstances surrounding the felony that the defendant's participation in that felony constituted wantonness manifesting extreme indifference to human life, he is guilty of murder under KRS 507.020(1)(b)."[9] This Court has not abandoned the applicability of KRS 507.020(1)(b) to non-killing participants in a dangerous felony, and we have upheld wanton murder convictions when the facts and circumstances were sufficient to support the jury's finding of guilt.[10]

III. THE TRIAL COURT DID NOT ERR IN FAILING TO DIRECT A VERDICT OF ACQUITTAL FOR KIDNAPPING.

We conclude that under the evidence as a whole, it was not clearly unreasonable for a jury to find guilt on the charge of kidnapping during which the victim was not released alive. So the trial court did not err in denying Buckner's motion for a directed verdict.

As stated in the preceding section, on a motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth, reserving to the jury all

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9 Commentary to KRS 507.020.

10 *See* Kruse, 704 S.W.2d at 195 (evidence sufficient to sustain conviction for wanton murder, even though participant in armed robbery other than defendant killed store employee, where defendant participated in planning armed robbery in which firearm was used, participants cased store for two days, and participants used drugs and alcohol immediately prior to robbery); Bennett, 978 S.W.2d at 327 (although wanton murder conviction of non-killing participant challenged on double jeopardy grounds rather than sufficiency of the evidence grounds, this Court acknowledged that "participation in a dangerous felony [first-degree robbery] may constitute wantonly engaging in conduct creating a grave risk of death to another under circumstances manifesting an extreme indifference to [the value of] human life, thus permitting a conviction not only of the dangerous felony, but also of wanton murder.").

questions of credibility and weight of the evidence.[11] "On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal."[12]

As stated in KRS 509.040, as it pertains to this case:

> (1) A person is guilty of kidnapping when he unlawfully restrains another person and when his intent is:
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> . . . .
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> (b) To accomplish or to advance the commission of a felony; or
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> (c) To inflict bodily injury or to terrorize the victim or another; or
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> . . . .
>
> (2) Kidnapping is a Class B felony when the victim is released alive and in a safe place prior to trial, except as provided in this section. Kidnapping is a Class A felony when the victim is released alive but the victim has suffered serious physical injury during the kidnapping, or as a result of not being released in a safe place, or as a result of being released in any circumstances which are intended, known or should have been known to cause or lead to serious physical injury. Kidnapping is a capital offense when the victim is not released alive . . . .

Restrain is defined in KRS 509.010(2) as restricting

> another person's movements in such a manner as to cause a substantial interference with his liberty by moving him from one place to another or by confining him either in the place where the restriction commences or in a place to which he has been moved without consent. A person is moved or

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[11] Benham, 816 S.W.2d at 187 (Ky. 1991); Sawhill, 660 S.W.2d at 4 (Ky. 1983).

[12] Benham, 816 S.W.2d at 187.

> confined "without consent" when the movement or confinement is accomplished by physical force, intimidation, or deception, or by any means, including acquiescence of a victim, if he is under the age of sixteen (16) years, or is substantially incapable of appraising or controlling his own behavior.

In this case, it is undisputed that Buckner had a gun on Tipton Finley and fired the weapon to intimidate Tipton Finley. Buckner and Hooper wanted marijuana. While Buckner was in the house with Hooper, and possibly Girten, two more men, Johnson and Moore, were outside at all times. In response to Buckner and Hooper's demands and intimidation, Tipton Finley made a series of desperate phone calls in which he urged his friends to get there as soon as they could. He told them a story in the hope that they would come to the house and bring marijuana.

Holding a gun on a person restrains a person. The facts and circumstances demonstrate that Hooper and Buckner's intent was to rob the residence of marijuana. But their efforts did not stop there. A jury could infer from their actions and Tipton Finley's actions that when they did not find any marijuana after searching the residence, they compelled Tipton Finley to find someone who did have it by holding a gun to his head and firing a shot into the floor. By all accounts, Buckner and Hooper were in the residence for at least fifteen minutes. The length of time, coupled with a loaded gun to Tipton Finley's head, constituted a substantial interference with his liberty. At trial, Buckner argued that

the so-called "kidnap" exemption of KRS 509.050 was applicable to the facts of this case. Under the exemption,

> [a] person may not be convicted of unlawful imprisonment in the first degree, unlawful imprisonment in the second degree, or kidnapping when his criminal purpose is the commission of an offense defined outside this chapter and his interference with the victim's liberty occurs immediately with and incidental to the commission of that offense, unless the interference exceeds that which is ordinarily incident to commission of the offense which is the objective of his criminal purpose. The exemption provided by this section is not applicable to a charge of kidnapping that arises from an interference with another's liberty that occurs incidental to the commission of a criminal escape.

In interpreting the applicability of the exemption, this Court has held that in order to be entitled to the exemption, a trial court must determine whether three circumstances are present in the case.[13] First, the trial court must determine "whether the appellant's criminal purpose was the commission of a criminal offense defined outside KRS Chapter 509."[14] Second, the trial court must determine whether the "interference with the victim's liberty occur[ed] immediately with and incidental to the commission of that offense . . . ."[15] Third, the "interference with the victim's liberty must not exceed that which is ordinarily incident to commission of the offense which is the objective of his criminal purpose."[16] All three circumstances must be present in

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[13] Griffin v. Commonwealth, 576 S.W.2d 514, 516 (Ky. 1978).

[14] *Id.*

[15] KRS 509.050; Griffin, 576 S.W.2d at 516.

[16] KRS 509.050; Griffin, 576 S.W.2d at 516.

order for the exemption to apply. "The purpose of the statute is to prevent misuse of the kidnapping statute to secure greater punitive sanctions for rape, robbery and other offenses which have as an essential or incidental element a restriction of another's liberty."[17]

In this case, the trial court discussed the three circumstances that must be present for the exemption to apply. In so doing, it rejected defense counsel's argument, which is reiterated on appeal, that the restraint stopped when Buckner left the house, followed by Hooper. As to that theory, the trial court did not accept that there were different chapters in this case; instead, the trial court believed that there was a continuing course of conduct. In its lengthy discussion of the applicability of the exemption, the trial court further noted the Commonwealth's theory of the case that the criminal purpose was drug trafficking or robbery, offenses defined outside the kidnapping chapter. In the end, however, the trial court relied on three Kentucky cases in concluding that the exemption was not applicable in this case because the defendant did not meet the third prong; the murder of the victim

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[17] Gilbert v. Commonwealth, 637 S.W.2d 632, 635 (Ky. 1982); Commentary to KRS 509.050 ("The necessity for this provision arises out of the fact that many of the crimes defined in this Code have as an essential element, or as an incidental element, a restriction on another's liberty. For example, offenses of robbery and forcible rape are defined in such a way as to always involve physical restraint. Other offenses may involve a restriction of someone's liberty because of the manner in which they are committed. Because of this fact, a prosecutor could misuse the kidnapping statute to secure greater punitive sanctions for rape, robbery and other offenses than are otherwise available.").

exceeded the deprivation of liberty ordinarily incident to robbery or drug trafficking.[18]

We agree with the trial court's reasoning in ruling that the exemption was not applicable on the third prong. And we add that we do not believe that the first prong was present when, while robbery or drug trafficking may have been two of the criminal purposes, Buckner and Hooper embarked on a third criminal purpose—restraining Tipton Finley to get to Angel Toribio—when they were unsuccessful at obtaining drugs from Tipton Finley. The exemption does not apply to this case.

IV. THERE WAS NO ERROR WHEN THE TRIAL COURT DID NOT DIRECT A VERDICT OF ACQUITTAL IN BUCKNER'S FAVOR ON THE ISSUE OF RENUNCIATION.

On appeal, Buckner argues that the trial court erred by failing to direct a verdict in his favor on the issue of renunciation. In the next sentence, he acknowledges that this alleged error is unpreserved because he did not make a motion for directed verdict on this issue; but he urges us to consider it under Rule 10.26 of the Kentucky Rules of Criminal

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[18] Harris v. Commonwealth, 793 S.W.2d 802, 807 (Ky. 1990) ("The murder of the victim clearly exceeds the deprivation of liberty ordinarily incident to the harassment appellant claims to have intended, or to any of the other criminal purposes found in the kidnapping instruction."); Stanford v. Commonwealth, 793 S.W.2d 112, 116-17 (Ky. 1990); (holding that exemption was not applicable when (1) apparent motive in murdering robbery victim was to prevent later identification of defendant and (2) to accomplish the crime of robbery, it was not necessary for defendant to divert his course of travel and force the victim into a ditch and take his life); Moore v. Commonwealth, 634 S.2d 426, 434 (Ky. 1982); ("The murder of the victim clearly exceeds the deprivation of liberty ordinarily incident to a robbery.").

Procedure (RCr). There are several other alleged errors in this case that are unpreserved for appellate review, issues that we discuss in sections V, VII, and VIII of this opinion. Because these alleged errors were not preserved for appellate review, we will reverse only if they constitute palpable error under RCr 10.26, which is as follows:

> 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.

Recently, this Court discussed the concept of *manifest injustice* and 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."[19]

In light of our conclusion above that there was sufficient evidence to support the jury's conviction on wanton murder, there was no error, much less palpable error, when the trial court did not direct a verdict of acquittal on its own motion based on Buckner's so-called renunciation.

V. BUCKNER'S DOUBLE JEOPARDY RIGHTS WERE NOT VIOLATED BY HIS CONVICTIONS OF WANTON MURDER AND KIDNAPPING.

As noted in the preceding section, this issue is unpreserved. On this issue, we conclude that there was no error, much less palpable

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

error, when the Commonwealth prosecuted and punished Buckner for the offenses of wanton murder and kidnapping.

In his argument, Buckner acknowledges that this Court held in St. Clair v. Roark[20] that double jeopardy does not bar prosecuting a person for kidnapping, victim not released alive (referred to as capital kidnapping in the St. Clair case), and murder for the death of the same victim. As analyzed in St. Clair, applying the test developed in Blockburger v. United States,[21] "[t]he offense of murder contains an element, *i.e.*, either intent to kill, KRS 507.020(1)(a), or aggravated wantonness, KRS 507.020(1)(b), which is not required to enhance kidnapping from a class A felony to a capital offense."[22] Restraint is an element necessary to convict of kidnapping under KRS 509.040 but is not required to convict of murder.

Buckner attempts to distinguish this case from St. Clair by arguing that in his case, the instruction on wanton murder informed the jury that it could convict him of that offense if it believed beyond a reasonable doubt that by voluntarily participating "in the Kidnapping and/or First Degree Robbery of Tipton Finley," Buckner was "wantonly engaging in

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20 10 S.W.3d 482, 486-87 (Ky. 1999).

21 284 U.S. 299 (1932) ("The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."); Commonwealth v. Burge, 947 S.W.2d 805, 811 (Ky. 1996), *modified on denial of reh'g*, 947 S.W.2d 805 (Ky. 1997) (returning to the rule set forth in Blockburger); KRS 505.020.

22 10 S.W.3d at 487.

conduct which created a grave risk of death to another and that he thereby caused Tipton Finley's death under circumstances manifesting an extreme indifference to human life." Buckner contends that under the wording of the wanton murder instruction, kidnapping should have been considered not as a separate offense, but as a lesser-included offense of wanton murder. This Court rejected this argument in the context of convictions for wanton murder and first-degree robbery.[23] And we, likewise, reject that argument here.

As explained previously, "[p]articipation in a dangerous felony may constitute wantonly engaging in conduct creating a grave risk of death to another under circumstances manifesting an extreme indifference to human life, thus permitting a conviction not only of the dangerous felony, but also of wanton murder."[24] So the conviction of kidnapping is unnecessary to provide the mens rea required to convict of murder. Rather, the facts proving the element of restraint by deadly weapon necessary to convict of kidnapping may be the same facts which prove the element of aggravated wantonness necessary to convict of wanton murder. This does not constitute double jeopardy.

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[23] Bennett, 978 S.W.2d at 327.

[24] *Id.*

VI. THE TRIAL COURT DID NOT ERR IN FAILING TO GIVE A RENUNCIATION INSTRUCTION ON WANTON MURDER AND KIDNAPPING.

We begin with defense counsel's request for a renunciation instruction on the count of wanton murder as was included in the intentional murder instruction. During the discussion on jury instructions, the Commonwealth opposed a renunciation instruction on the count of wanton murder because, as it argued, wantonness is a state of mind. And in adjudging Buckner's state of mind in this case, the jury could consider the facts that he left the house, took the gun with him, and twice refused Hooper's orders to give him the gun as evidence that he was not acting wantonly. After wrestling with the issue for some time, the trial court, ultimately, agreed with the Commonwealth's argument and gave a wanton murder instruction that did not include the renunciation provisions of KRS 502.040.

Upon review, we conclude that the trial court did not err in failing to include renunciation provisions in the wanton murder instructions because wanton murder, as discussed in Section II above, is a theory of principal liability. The renunciation provisions, however, apply in the case of complicity liability under KRS 502.020. As to Buckner's alleged renunciation, we agree with the Commonwealth that those actions were

for the jury's consideration in determining whether or not Buckner's state of mind was wanton with regard to Tipton Finley's death.[25]

We now move to Buckner's argument on appeal that he was entitled to a renunciation instruction on the kidnapping charge. Despite the fact that Buckner argues that this argument is preserved, our review of the record reveals that it was not. The instructions that the trial court gave on kidnapping were reviewed, discussed at length, and agreed to by all parties. The parties requested that the trial court issue kidnapping instructions that required the jury to find that either (1) Tipton Finley was not released alive, or (2) the kidnapping was complete when Buckner left the house (leaving Tipton Finley alive). The trial court complied, and the jury found that Tipton Finley was not released alive. We find no error in the trial court's failure to give a renunciation instruction on the kidnapping charge.

VII. THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY ON WANTON MURDER.

This issue is not preserved. Other than the request for renunciation provisions discussed in the preceding section, defense counsel did not object to the language of the wanton murder instruction. Buckner acknowledges that the issue is not preserved and asks that we

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[25] Commentary to KRS 502.020 (*cited with approval in* Kruse, 702 S.W.2d at 195) (The critical inquiry in every case is what the "decision makers find [the participant's] state of mind to have been with regard to the resulting death.").

review the matter for palpable error. While he requests palpable error review, he makes no attempt to make the requisite showing of a "probability of a different result or error so fundamental as to threaten a defendant's entitlement to due process of law."[26]

The trial court relied on the pattern instruction from 1 COOPER & CETRULO, KENTUCKY INSTRUCTIONS TO JURIES,[27] in drafting the wanton murder instruction. The instruction was as follows:

> You will find the defendant guilty of Wanton Murder under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:
>
> A. That in Daviess County, Kentucky, on or about or during and between June 28, 2005[,] and June 29, 2005, and before the finding of the Indictment herein, he, [sic] voluntarily participated in the Kidnapping and/or First Degree Robbery of Tipton Finley;
>
> B. That during the course of that Kidnapping and/or First Degree Robbery of Tipton Finley and as a consequence thereof, Tipton Finley was shot and killed;
>
> AND
>
> C. That by so participating in that Kidnapping and/or First Degree Robbery of Tipton Finley, the defendant was wantonly engaging in conduct which created a grave risk of death to another and that he thereby caused Tipton Finley's death under circumstances manifesting an extreme indifference to human life.

In addition, the instructions defined *wantonly*; and the definition tracked the definition of *wantonly* provided in KRS 501.020(3). They defined the conduct in which Buckner was alleged to have engaged,

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[26] Martin, 207 S.W.3d at 3.

[27] Criminal § 3.30 (5th ed. 2007).

specified that the conduct in question conduct must have created a grave risk of death to another, and defined the requisite mental state for a conviction.

VIII. THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY ON KIDNAPPING.

This issue is not preserved. Defense counsel did not object to the language of the kidnapping instructions. Buckner acknowledges that the issue is not preserved and asks that we review the matter for palpable error. While he requests palpable error review, he makes no attempt to make the requisite showing of a "probability of a different result or error so fundamental as to threaten a defendant's entitlement to due process of law."[28] Considering Buckner's admissions at trial that he was at the residence with Hooper, Johnson, Girten, and Moore, that he stood next to Tipton Finley holding a loaded gun, and that he fired the gun into the floor to intimidate Tipton Finley, he could not make this showing. Nonetheless, there was no error in the kidnapping instructions because they specified the requisite elements of KRS 509.040.[29]

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[28] Martin, 207 S.W.3d at 3.

[29] *See* Meredith v. Commonwealth, 959 S.W.2d 87, 90 (Ky. 1997), *modified on denial of reh'g*, 959 S.W.2d 87 (Ky. 1998) (upholding kidnapping conviction against a claim of insufficient evidence based on kidnapping instruction containing substantially similar wording as the instruction provided in this case).

IX. THE TRIAL COURT DID NOT ERR IN DENYING BUCKNER'S MOTION FOR A NEW TRIAL BASED ON THE COMMONWEALTH'S CONCESSION DURING ITS CLOSING ARGUMENT THAT IT HAD NOT PROVEN ONE OF THE ELEMENTS OF INTENTIONAL MURDER.

As stated above, defense counsel made a motion for directed verdict on both counts of the indictment at the close of the Commonwealth's case-in-chief. As to Buckner's argument in support of acquittal on the murder count, he argued that there were two criminal endeavors rather than a continuing course of conduct. And he argued that he manifested a voluntary and complete renunciation of his criminal purpose. The trial court denied the motion for directed verdict based on those grounds on the murder count. At the close of his case-in-chief, Buckner renewed his motion for a directed verdict on both counts for the reasons stated before. The trial court denied the motions and then began discussing jury instructions with the parties. After discussing the jury instructions at length, the trial court instructed the jury on alternate theories of liability for murder: intentional murder by complicity and wanton murder. After the trial court included renunciation provisions in the intentional murder by complicity instruction, defense counsel voiced no objection to the instruction.

During the Commonwealth's closing argument, the prosecutor took the jury through each element of the instructions, beginning with the murder by complicity instruction. It demonstrated how it had proven each element except the element that it was Dominic Buckner's intention

that Rontae Hooper would kill Tipton Finley. The Commonwealth argued that while the intentional murder instruction did not apply, the wanton murder instruction did. Defense counsel did not object. Instead, Buckner filed a motion for a new trial a few days after the jury found Buckner guilty of wanton murder.

In his motion for a new trial, Buckner argued that it was an unfair and unreasonable tactic for the Commonwealth to oppose his motion for a directed verdict on the legal theory of complicity to murder but then concede to the jury in closing argument that there was not evidence to support a conviction on that count. The trial court denied Buckner's motion for a new trial.

We conclude that the trial court did not err in denying Buckner's motion for a new trial. We reverse for alleged "prosecutorial misconduct in a closing argument only if the misconduct is 'flagrant' or if each of the following three conditions is satisfied: (1) [p]roof of defendant's guilt is not overwhelming; (2) [d]efense counsel objected; and (3) [t]he trial court failed to cure the error with a sufficient admonishment to the jury."[30] In another case in which prosecutorial misconduct in closing argument was alleged, this Court held that a reviewing court must determine that the alleged misconduct was of such an egregious nature as to deny him his

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[30] Barnes v. Commonwealth, 91 S.W.3d 564, 568 (Ky. 2002) (*following the Sixth Circuit Court of Appeals in* United States v. Carroll, 26 F.3d 1380, 1390 (6th Cir. 1994), and United States v. Bess, 593 F.2d 749, 757 (6th Cir. 1979)).

constitutional right of due process of law, keeping in mind that the trial court is to allow great leeway to both counsel in closing argument.[31] Our analysis "must focus on the overall fairness of the trial, and not the culpability of the prosecutor."[32]

Here, guided by the above principles, we cannot agree that the prosecutor's statements in this case were neither flagrant or of such an egregious nature as to deny Buckner his constitutional right to due process of law. A closing argument is "just that–*an argument.*"[33] Had defense counsel objected, the prosecutor could have explained that he decided to focus on seeking a conviction under the wanton murder theory and maintained that there was sufficient evidence of intentional murder in spite of his concession. But defense counsel did not object perhaps because the prosecutor's concession could have inured to his client's benefit in an acquittal of the murder charge. Having made that strategic gamble and lost, he will not now be heard to complain. Upon our review of the trial, we conclude that even if the Commonwealth's comments were improper, they were not so egregious as to have deprived Buckner of his right to a fair trial, especially in the absence of contemporaneous objection and the lack of concrete prejudice to Buckner.

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[31] Slaughter v. Commonwealth, 744 S.W.2d 407, 411-12 (Ky. 1987), *cert. denied*, 490 U.S. 1113 (1989).

[32] *Id.* at 411-12.

[33] *Id.* at 412.

X. THE TRIAL COURT ERRED IN RULING THAT BUCKNER, A YOUTHFUL OFFENDER WHO WAS CONVICTED OF COMMITTING A VIOLENT OFFENSE, WAS INELIGIBLE UNDER THE VIOLENT-OFFENDER STATUTE, KRS 439.3401, FOR BEING CONSIDERED FOR PROBATION OR CONDITIONAL DISCHARGE UNDER KRS 640.030(2).

Finally, Buckner contends that the trial court erred by sentencing him under the violent offender statute, KRS 439.3401. We agree.

We recently held that the violent offender statute did not control over the specific language of KRS 640.030.[34] More specifically, we forcefully held that "[b]y statutory interpretation, logic, and belief in the good sense of the legislature, the Violent Offender Statute cannot be read to apply to youthful offenders."[35] Buckner filed a motion to be sentenced as a youthful offender, which the trial court denied. Instead, acting before our decision in Merriman, the trial court found that Buckner was a youthful offender; but the violent offender statute barred Buckner from being sentenced as a youthful offender. So the trial court applied KRS 439.3401 in its final judgment. Since that action is in direct conflict with Merriman, Buckner's sentence must be vacated and this matter remanded for resentencing in accordance with KRS 640.030 and Merriman.

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[34] Commonwealth v. Merriman, ___ S.W.3d ___, 2008 WL 4286508 (Ky. Sept. 2008).

[35] *Id.* at * 4.

XI. CONCLUSION.

For the reasons stated above, we affirm the trial court's judgment. We reverse for a new sentencing hearing, however, during which the trial court shall sentence Buckner under the youthful offender provisions of KRS 640.030.

All sitting. All concur.

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