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RENDERED: JUNE 17, 2010
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2009-SC-000633-MR

JOHNNY PHILLIPS — APPELLANT

V.

ON APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE JOHN KNOX MILLS, JUDGE
NO. 07-CR-00266

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Johnny Phillips, appeals as a matter of right[1] from a judgment of the Laurel Circuit Court convicting him of wanton murder. Pursuant to the jury's recommendation, he was sentenced to thirty years' imprisonment.

On appeal, Phillips raises the following claims: (1) that the trial court erred by instructing the jury on wanton murder; (2) that the trial court erred by denying his motion for a directed verdict on the murder charge; (3) that the trial court erred by admitting into evidence graphic postmortem photographs of the victim; and (4) that error occurred during the sentencing phase when the probation officer incorrectly stated Phillips's parole eligibility under the violent offender statute. Finding no error, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

[1] Ky. Const. § 110(2)(b).

Phillips and victim Phillip Glodo were friends. On October 18, 2007, they traveled together to Tennessee to get a boat license. Afterward, they returned to Phillips's home. At some point Phillips made a comment which Glodo construed as accusing him of stealing $50.00 from Phillips. Glodo became upset at Phillips because of the comment, and remained so until the shooting later that evening.

Phillips and Glodo had a mutual friend, Randy Capps, who testified at trial. Capps testified that when he first saw Phillips and Glodo at his residence on October 18, 2007, it appeared to him that both men had been drinking. After a short time the two left to get the boat license. Later that same day, Glodo called Capps. Capps said that Phillips was blaming him for stealing $50.00, and that he was going to "kick [Phillip's] ass." After Capps returned home, he received another phone call from Glodo in which Glodo threatened to sic his two Great Danes on Phillips. Glodo also made several calls to Phillips that day.

Later that evening, Phillips returned to the Capps residence. A few minutes before 10:00 p.m., Glodo arrived at the residence and began to argue with Phillips. Because Capps's children were home, Phillips suggested that they take their argument elsewhere.

Phillips and Glodo both got into their trucks to leave. As Phillips prepared to pull away Glodo yelled "I'll ram your ass." The two then drove off in the direction of Phillips's residence.

As Phillips drove down the narrow road he came upon a truck pulling a horse trailer coming in the opposite direction. In order to let the truck by, Phillips pulled over into a church parking lot. Glodo pulled in behind him. The two men got out of their vehicles, and, ultimately, Phillips shot Glodo in the back of the head with a twelve-gauge shotgun.

As further discussed below, following the shooting Phillips gave a statement to the police in which he claimed, inconsistently, that the shooting was both accidental and done in self-defense.

On November 16, 2007, Phillips was indicted for Glodo's murder. Following a jury trial, Phillips was convicted of wanton murder, and the jury recommended a sentence of thirty years' imprisonment. On September 28, 2009, the trial court entered final judgment consistent with the jury's verdict and sentencing recommendation. This appeal followed.

II. THE TRIAL COURT PROPERLY GAVE A WANTON MURDER INSTRUCTION

Phillips first contends that the trial court erred by instructing the jury on wanton murder. He argues that the evidence as a whole only supports the theory that the shooting was intentional – and was done so in self-defense. Because, following the shooting, Phillips claimed in his statement to police that the shooting was accidental, we disagree.

"In a criminal case, it is the duty of the trial judge to prepare and give instructions on the whole law of the case, and this rule requires instructions applicable to every state of the case deducible or supported to any extent by the

testimony." RCr 9.54(1); *Taylor v. Commonwealth*, 995 S.W.2d 355, 360 (Ky. 1999). Further, intentional murder and wanton murder are the same offense under Kentucky law and, if supported by the evidence, it is proper to instruct the jury on both alternate theories of liability. *Evans v. Commonwealth*, 45 S.W.3d 445, 447 (Ky. 2001) (citing *Ice v. Commonwealth*, 667 S.W.2d 671, 677 (Ky. 1984)); KRS 507.020.

The wanton murder provisions contained in KRS 507.020(1)(b) provide as follows:

> (1) A person is guilty of murder when:
>
> . . . .
>
> (b) Including, but not limited to, the operation of a motor vehicle under circumstances *manifesting extreme indifference to human life*, he wantonly engages in conduct which creates a *grave risk of death to another person* and thereby causes the death of another person.

(emphasis added).

Thus, the culpable mental state for wanton murder is wantonness, except that to fall under the wanton murder statute the wanton conduct must also involve the statutory aggravating factors of (1) manifesting extreme indifference to human life, and (2) the creation of grave risk of death to another

person.[2] KRS 501.020(3) defines "wantonly" as follows:

> "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.

The term "wantonly" as used in KRS 507.020(b) was clarified in *Elliott v. Commonwealth*, 976 S.W.2d 416 (Ky. 1998). "The definition[ ] of 'wantonly' ... make[s] no reference to the defendant's state of mind with respect to his conduct, but refer[s] only to his state of mind with respect to the result of that conduct or to the circumstance which prompted the conduct." *Id.* at 419. So,

> [e]ven though he did not intend to kill, if he was aware of and consciously disregarded a substantial and unjustifiable risk that his conduct would result in the death of another person, he is guilty of second-degree manslaughter or, if accompanied by the statutory aggravating circumstances, wanton murder.

Id.

As noted, following the shooting, Phillips gave a statement to police in which, among other things, he claimed that the shooting was an accident. For example, in the statement Phillips said:

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[2] Causing the death of another with a wanton mental state without the aggravating factors contained in the wanton murder statute is second-degree manslaughter. KRS 507.040 provides, in relevant part, as follows: "(1) A person is guilty of manslaughter in the second degree when he wantonly causes the death of another person, including, but not limited to, situations where the death results from the person's: (a) Operation of a motor vehicle; or (b) Leaving a child under the age of eight (8) years in a motor vehicle under circumstances which manifest an extreme indifference to human life and which create a grave risk of death to the child, thereby causing the death of the child." In this proceeding, the jury was also instructed on second-degree manslaughter and reckless homicide.

> It was an accident . . . . It really was an accident. The gun went off prematurely.
>
> I used it [the shotgun] to push him away from me and it went off. . . . He was standing like this at me and had something in this hand . . . . When he come at me . . . . He rushed my truck, he rushed to the side of my truck, I pushed him away from the truck with my truck door, know what I mean . . . . He come up to my truck. I was watching him in the mirror and they weren't moving quick enough for me to go on the horses and stuff coming down that hill . . . . I pushed him off, basically used my door to get some room to get out of the truck, and as I come out of the truck I come with the gun, I pulled a shotgun out beside me. I was trying to scream at him get back in your damn truck, get the hell away from me and leave me alone and he was coming like this and his hand was at his side. In this hand right here is the one he had had the knife in, all I could see was shiny chrome and he carries a .44 that long . . . . in that hand cause he was coming at me like this, know what I mean, with this arm extended, with his forearm like extended . . . .
>
> That's when he come at me with his forearm, I didn't know if he was going to try and push me . . . . I raised that gun up cause he had that thing in his left hand when I raised the gun up. He was coming at me and I took the gun and give it that and he didn't move four inches and the gun went off.
>
> . . .
>
> I swear on my mother's grave I didn't mean to shoot that man.

As reflected by his statement, Phillips straightforwardly claimed that the shooting was an accident. An accidental act is the opposite of an intentional act. Thus, contrary to Phillips's argument, the evidence as a whole supports not only the theory that his shooting of Glodo was intentional and was done so in self-defense, but also that the shooting was not intentional, but, rather, was an "accident." The question then becomes if the jury believed the shooting was

unintentional, whether Phillips's conduct satisfies the elements of wanton murder.

The evidence presented regarding the unintentional shooting theory is that Phillips pointed a loaded shotgun at Glodo, and pushed him away with the weapon while, it may be inferred (the shotgun fired), his finger was on the trigger. Unquestionably the foregoing conduct could be found by a jury to be wanton because of the high likelihood the shotgun could fire under the circumstances described. Moreover, we believe it is self-evident that a reasonable jury could conclude that pointing a loaded shotgun at a person and prodding him with it with a finger on the trigger manifests an extreme indifference to human life and creates a grave risk of death.

Thus, sufficient evidence was presented for a reasonable jury to conclude that the elements of wanton murder were satisfied. *Harris v. Commonwealth*, 793 S.W.2d 802, 804 (Ky. 1990) (A trial judge properly instructs the jury on wanton murder where the evidence shows that the defendant was carrying a loaded, cocked pistol and he admits an intent to point it at the victim but not an intent to cause her death.) "The decision as to whether the aggravating circumstances (extreme indifference to human life and grave risk of death to another) were present is best left to the jury to decide." *Cook v. Commonwealth*, 129 S.W.3d 351, 363 (Ky. 2004). (citations omitted.)

Thus, since the evidence supported a wanton murder instruction, the trial court did not err by presenting the question to the jury. RCr 9.54(1).

III. PHILLIPS WAS NOT ENTITLED TO A DIRECTED VERDICT

Phillips next contends that he was entitled to a directed verdict of acquittal on the murder charge because, based upon the evidence presented at trial, "the prosecution failed to meet their burden of proof that [he] did not act in self-defense." Phillips alleges that it would be clearly unreasonable for a jury to conclude that he did not act in self-defense. As explained above, sufficient evidence was presented to support a jury verdict that Phillips engaged in wanton murder. Moreover, because Glodo was shot from behind, a jury issue was presented upon the issue of self-defense.

> On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.
>
> 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.
>
> . . . [T]here must be evidence of substance, and the trial court is expressly authorized to direct a verdict for the defendant if the prosecution produces no more than a mere scintilla of evidence.

Commonwealth v. Benham, 816 S.W.2d 186, 187-188 (Ky. 1991) (citations omitted).

It is uncontroverted that Glodo was shot in the back of the head. While not determinative, a shot from behind, for obvious reasons, raises a jury

question concerning whether Phillips, in fact, was acting in self-defense. The difficulties of an attack by a victim while faced away from the defendant are clear. *Commonwealth v. Yanoff*, 690 A.2d 260, 265 (Pa.Super. 1997) ("The fact that Appellant shot the victim in the back clearly undermines his claim of self-defense.") Thus, a jury question was presented upon the issue of whether Phillips shot Glodo in self-defense.

> 'Rarely is a defendant relying upon self-defense entitled to a directed verdict.' Only in the unusual case in which the evidence conclusively establishes justification and all of the elements of self-defense are present is it proper for the trial court to direct a verdict of not guilty. Similarly, in *Taul v. Commonwealth*, 249 S.W.2d 45 (Ky. 1952), it was held that a defendant's statement that he acted in self-defense or his description of events which show such to be the case need not be accepted at face value where the jury may reasonably infer from his incredibility or the improbability of the circumstances that one or more of the elements necessary to qualify for self-defense is missing. In *Townsend v. Commonwealth*, 474 S.W.2d 352 (Ky. 1971), we held that if the evidence relied upon to establish self-defense is contradicted or if there is other evidence from which the jury could reasonably conclude that some element of self-defense is absent, a directed verdict should not be given.
>
> While the Commonwealth always bears the burden of proving every element of the crime charged, a defendant relying upon self-defense bears the risk that the jury will not be persuaded of his version of the facts. *Collins v. Commonwealth*, 309 Ky. 572, 218 S.W.2d 393 (1949).

West v. Commonwealth, 780 S.W.2d 600, 601 (Ky. 1989).

While much of the evidence presented in this case was circumstantial, we have no reluctance in holding that sufficient evidence was presented to justify submitting the issue of whether Phillips acted in self-defense to the jury. *Wills v. Commonwealth*, 502 S.W.2d 60 (Ky. 1973); *Pruitt v. Commonwealth*,

490 S.W.2d 486 (Ky. 1972); *West*, 780 S.W.2d at 601. Thus, Phillips was not entitled to a directed verdict because there was sufficient evidence to support a jury verdict of guilt on either of the Commonwealth's theories regarding the murder charge. *Benham*, 816 S.W.2d at 187-188.

IV. THE POSTMORTEM PHOTOGRAPHS WERE PROPERLY ADMITTED

Phillips next argues that the trial court erred by permitting the Commonwealth to introduce autopsy photographs depicting the wound to the back of Glodo's head. He contends that the photographs should not have been admitted because the fact that the victim was shot in the back of the head was uncontested, and therefore the photographs were not necessary to prove any element of the prosecution's case. He also alleges that evidence concerning the wound could have been presented without the use of the photographs, and that the overly graphic nature of the photographs prejudicially inflamed the passions of the jury.

In determining admissibility of the photographs, we must first consider whether the photographs are relevant. Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." KRE 401. The autopsy photographs of Glodo's fatal injuries were relevant to demonstrate that he was, indeed, killed by gunshot wounds as stated in the indictment. *Hunt v. Commonwealth*, 304 S.W.3d 15, 40-41 (Ky. 2009). Moreover, the position of the wound in the back

of Glodo's head was relevant to refute Phillips's claim of self-defense.

Next, the admissibility of photos must be examined under KRE 403, which states: "Although relevant, evidence may be excluded if its probative value is *substantially outweighed* by the danger of *undue* prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." KRE 403 (emphasis added). Thus, we must discern whether the photographs were sufficiently gruesome so as to find the probative value "substantially outweighed" by the prejudicial effect.

As a general rule, photographs do not become inadmissible simply because they are gruesome. *Foley v. Commonwealth*, 953 S.W.2d 924, 935 (Ky. 1997). Such evidence loses its admissibility when the photographs depict a body that has been "materially altered by mutilation, autopsy, decomposition or other extraneous causes, not related to commission of the crime, so that the pictures tend to arouse passion and appall the viewer." *Clark v. Commonwealth*, 833 S.W.2d 793, 794 (Ky. 1991).

While the autopsy photographs in this case may have been gruesome, the threshold is much higher than mere gruesomeness for a photo to be inadmissible. For example, a photograph of a young child victim, where his scalp was pulled back to show there was an intent to kill, was not gruesome enough to preclude the photo evidence from the jury. *Quarels v. Commonwealth*, 142 S.W.3d 73, 85 (Ky. 2004). In another case, a videotape of

the murder scene showing burned bodies of victims, as well as numerous photographs depicting the same, were an accurate description of the crime scene and were properly admissible. *McKinney v. Commonwealth*, 60 S.W.3d 499, 509 (Ky. 2001).

Thus, the autopsy photographs were properly admitted because they were relevant to show Glodo's injuries and were not so gruesome as to create undue prejudice. *Hunt*, 304 S.W.3d at 41.

V. THE PROBATION OFFICER'S MISSTATEMENT OF PAROLE ELIGIBILITY WAS TIMELY CORRECTED BY THE TRIAL COURT

Phillips next argues that error occurred during the sentencing phase as a result of misstatements made concerning Phillips's parole eligibility. The Commonwealth concedes that the applicable rule was misstated. While the probation and parole officer, Pam Handy, did indeed, misstate the applicable parole eligibility rules for a violent offender, the trial court timely corrected the misstatement and admonished the jury concerning the correct principle of law, thereby negating the error.

Pursuant to the violent offender statute, KRS 439.3401,[3] a violent offender, under all circumstances, must serve eighty-five percent of his

[3] KRS 439.3401(3) provides "(3) A violent offender who has been convicted of a capital offense or Class A felony with a sentence of a term of years or Class B felony who is a violent offender shall not be released on probation or parole until he has served at least eighty-five percent (85%) of the sentence imposed." KRS 439.3401(4) provides "(4) A violent offender may not be awarded any credit on his sentence authorized by KRS 197.045(1), except the educational credit. A violent offender may, at the discretion of the commissioner, receive credit on his sentence authorized by KRS 197.045(3). *In no event shall a violent offender be given credit on his sentence if the credit reduces the term of imprisonment to less than eighty-five percent (85%) of the sentence.*" (emphasis added).

sentence before he is eligible for parole. During her testimony, Handy incorrectly indicated that there may be factors which may reduce parole eligibility period to below eighty-five percent. She was under the impression that various credits may produce this result, but was unable to explain how this would occur in practice. We are cited to no authority in support of Handy's theory.

After an unsuccessful attempt to have Handy correct herself, trial counsel approached the bench and asked the trial court to take judicial notice of the statute regarding the rigid eighty-five per cent requirement and instruct the jury accordingly. The trial court agreed, and addressed the jury as follows:

> Members of the jury, the Court has taken judicial notice and you will accept as evidence in your deliberations of the sentence that the statute would require the defendant to take or to serve eight-five percent of any sentence you may, at least eighty-five percent of any sentence you would impose.

"The trial court's admonition put this issue to rest. A jury is presumed to follow an admonition to disregard evidence and the admonition thus cures any error." *Johnson v. Commonwealth*, 105 S.W.3d 430, 441 (Ky. 2003). As such, we must presume that the jury followed the trial court's admonition concerning the correct parole rule under the violent offender statute, thereby negating Handy's misstatement. Moreover, Phillips received all the relief that he requested. If a party fails to move for a mistrial after objecting and receiving an admonition from the trial court, such failure indicates that party's satisfaction with the admonition. *West*, 780 S.W.2d at 602. As Phillips took

no further action after the trial court's admonition, he is presumed to be satisfied with the remedy. Thus, no error occurred.

VI. CONCLUSION

For the foregoing reasons the judgment and sentence of the Laurel Circuit Court is affirmed.

All sitting. All concur.

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