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NOT TO BE PUBLISHED OPINION

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RENDERED: MAY 19, 2011
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2009-SC-000640-MR

BRUCE E. HARTLEY — APPELLANT

V.

ON APPEAL FROM ESTILL CIRCUIT COURT
HONORABLE THOMAS P. JONES, JUDGE
NO. 08-CR-00012-001

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant Bruce Hartley appeals from a judgment of the Estill Circuit Court convicting him of wanton murder, first-degree wanton endangerment, and tampering with physical evidence. The jury recommended, and the trial court imposed, a total sentence of 30 years' imprisonment (two 5-year sentences running concurrently with a 30-year sentence). Appellant therefore appeals to this Court as a matter of right. Ky. Const. § 110(2)(b).

Appellant argues that the trial court erred in failing to give jury instructions on imperfect self-defense, protection of property, and second-degree wanton endangerment; excluding evidence of Appellant's offer to take a polygraph examination; and not permitting defense counsel to conduct voir dire as to the penalty ranges for lesser-included offenses. Finding no reversible error, we affirm.

I. BACKGROUND

Appellant was disabled and had become dependent on prescription pain pills. This was known in the community, and Appellant had experienced numerous thefts. On January 5, 2008, 25-year-old Angel Riddell called Appellant several times, asking him if she could come to his house. Angel went to Appellant's house with 34-year-old Brenda Davenport. Brenda testified at trial that she and Angel were going to Appellant's home to get money from him. In a 911 call, Brenda would state that Angel had tried to rob Appellant.

Brenda and Angel arrived at Appellant's residence in a van at approximately 6 p.m., which was dusk. Brenda was driving, and she parked the van with the passenger side facing closest to Appellant's house. Angel exited the vehicle, while Brenda remained.

Appellant's ex-wife Victoria Hartley and his friend Phillip Abney[1] were present, sitting in the living room talking when Angel arrived. According to Victoria, Angel and Appellant walked toward the kitchen, and then back out of the house. Victoria testified that Appellant did not appear to be upset.

Brenda testified that Appellant and Angel talked for a few moments on the front porch, without there appearing to be anything wrong. Angel then walked to the van, and Appellant walked about halfway. Angel opened the passenger door, sat on the edge of the seat without closing the door, and told Brenda to drive off, because Appellant had accused her of stealing money.

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[1] Phillip Abney was indicted for tampering with physical evidence, complicity to first-degree robbery, and first-degree hindering prosecution. However, Abney died of a blood clot in July 2009 before the charges could be resolved.

Brenda glanced at Appellant, saw that he had a pistol, and told Angel to give back any money she had taken. Angel walked to Appellant and handed him cash that was rolled up in her hand.

Angel and Appellant talked for a few moments longer. When Angel returned to the van, she told Brenda that Appellant had accused her of having more of his money. Brenda saw Appellant reach for his gun, and she drove away. Appellant began firing, and the back glass of the van shattered. Brenda accelerated and continued to drive away. It was at this point that she realized Angel had been shot. Shortly thereafter, Angel lost consciousness.

Victoria testified that she heard gunshots and tires spinning. Appellant, who was picking money up off the ground, said, "They just robbed me." Appellant and Phillip Abney pursued the two women in a truck. Brenda testified that she pulled over, telling Phillip and Appellant that Angel had been shot and needed medical attention. Appellant said that he did not care, and that he wanted his money. Brenda found two $20 bills in Angel's bra strap, which she gave to Phillip. Phillip then told Brenda to go.

Brenda stopped at a house for help. The woman who lived there, Bonnie Abney, went to get her stepdaughter Teresa Neely, who lived behind her and was a nurse. Teresa's husband Roy stayed with Brenda Davenport, and Brenda called 911. This 911 call would be played for the jury. Meanwhile, Bonnie Abney drove Angel to the hospital, while Teresa Neely worked on her. They arrived at the hospital at 6:56 p.m., and Angel Riddell was pronounced

dead at 7:09 p.m. She had suffered a gunshot wound to the left upper back; the bullet had traveled through the back of the van's passenger seat.

While this was occurring, Phillip Abney and Appellant returned to Appellant's home. Victoria testified that the two men, using a flashlight, picked up shell casings from the driveway. Fearing retaliation, the men then fled to Ohio.

The next day, Appellant returned to Kentucky to turn himself in to police. Kentucky State Police Detectives Bill Collins and Brian Reeder took Appellant to the Mountain Parkway, where Appellant said he had thrown his gun. Though the weapon was never recovered, Appellant spoke freely with the detectives as they drove, after the detectives had readvised Appellant of his *Miranda* rights. Appellant did not testify at trial, but his recorded conversation with the detectives was played for the jury.

In the recording, Appellant offered a slightly different version of events than the witnesses at trial. He said that Angel had called him, wanting to "get laid." Appellant declined, because his ex-wife was at his house. Angel arrived anyway, and asked to use the restroom. Appellant said he caught Angel stealing his pills. As they left the house and neared the van, Angel told Appellant that the "sights are on you." She repeated this several times, and Appellant took this to mean that Brenda or someone else had a gun. Angel demanded money from Appellant. As the van drove off, Appellant stated that he fired at the tires. Appellant said he had used a 9 mm Glock pistol. He

explained that, while he was a good shot with most weapons, the Glock was too big for his hands.

The jury found Appellant guilty of wanton murder of Angel Riddell, first-degree wanton endangerment of Brenda Davenport, and tampering with physical evidence for removing the shell casings. The trial court imposed a 30-year sentence, consistent with the jury's recommendation, and this appeal followed.

II. JURY INSTRUCTIONS

The trial court and the attorneys spent a substantial amount of time in the judge's chambers preparing jury instructions. As to Count 1, the jury was instructed on murder (intentional and wanton), first-degree manslaughter, second-degree manslaughter, and reckless homicide. The jury was also instructed on self-protection under Count 1. As to Count 2, the jury was instructed on first-degree wanton endangerment and self-protection. As to Count 3, the jury was instructed on tampering with physical evidence.

Appellant argues that the trial court erred in failing to give instructions on imperfect self-defense (for Count 1 and Count 2), protection of property (for Count 1 and Count 2), and second-degree wanton endangerment (for Count 2). Pursuant to RCr 9.54(2),

> No party may assign as error the giving or the failure to give an instruction unless the party's position has been fairly and adequately presented to the trial judge by an offered instruction or by motion, or unless the party makes objection before the court instructs the jury, stating specifically the matter to which the party objects and the ground or grounds of the objection.

For those alleged errors that this Court finds to be unpreserved, Appellant requests review for palpable error under RCr 10.26.

> Under RCr 10.26, an unpreserved error may be reviewed on appeal if the error is "palpable" and "affects the substantial rights of a party." Even then, relief is appropriate only "upon a determination that manifest injustice has resulted from the error." *Id.* An error is "palpable," only if it is clear or plain under current law. *Brewer v. Commonwealth*, 206 S.W.3d 343 (Ky. 2006). Generally, a palpable error "affects the substantial rights of a party" only if "it is more likely than ordinary error to have affected the judgment." *Ernst v. Commonwealth*, 160 S.W.3d 744, 762 (Ky. 2005). We note that an unpreserved error that is both palpable and prejudicial, still does not justify relief unless the reviewing court further determines that it has resulted in a manifest injustice; in other words, unless the error so seriously affected the fairness, integrity, or public reputation of the proceeding as to be "shocking or jurisprudentially intolerable." *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006).

Miller v. Commonwealth, 283 S.W.3d 690, 695 (Ky. 2009).

A. Imperfect Self-Defense

Appellant argues that the trial court erred in failing to instruct the jury on imperfect self-defense. This issue is not properly preserved. As the parties prepared jury instructions in this case, there was some discussion of the model imperfect self-defense instruction found in *Commonwealth v. Hager*, 41 S.W.3d 828 (Ky. 2001). However, defense counsel never specifically requested that imperfect self-defense be included in the jury instructions.

Upon review for palpable error under RCr 10.26, we conclude that the lack of an imperfect self-defense instruction did not affect Appellant's

substantial rights, nor did it result in manifest injustice. The doctrine of imperfect self-defense, found in KRS 503.050 and KRS 503.120, limits the effect of a defendant's subjective belief in the need to use physical force when that belief is wantonly or recklessly held. *Elliott v. Commonwealth*, 976 S.W.2d 416, 420 (Ky. 1998). The result is that the defendant is not acquitted, but rather guilty of "a lesser offense for which wantonness or recklessness is the culpable mental state, i.e., second-degree manslaughter or reckless homicide." *Id.*

In *Hager*, this Court provided specimen recommended jury instructions for imperfect self-defense, providing that a jury should first be instructed on self-protection. 41 S.W.3d at 846. The self-protection instructions in the instant case complied with *Hager*, stating that Appellant was privileged to use physical force if "he believed that Angel Riddell and/or Brenda Davenport" was "then and there about to use physical force upon him," but providing that Appellant was only privileged to use deadly physical force if he believed it necessary to protect himself from serious physical injury.

Hager then provided the specimen jury instruction for imperfect self-defense, which applies only if the jury "believe[s] from the evidence beyond a reasonable doubt that the Defendant was mistaken in his belief that it was necessary to use physical force . . . ." *Id.* Thus, the jury must first find that a defendant believed it was necessary to use physical force before it can reach the question of whether that belief was wantonly or recklessly held.

Imperfect self-defense is a *limitation* on the usual self-defense instruction. In other words, if a jury finds that the elements of self-defense are met, it would normally acquit the defendant of that charge. However, when a jury proceeds to find that the self-defense was imperfect (i.e., that the defendant's belief in the need for self-defense was wantonly or recklessly held), it does not acquit the defendant, but rather finds him guilty of a lesser offense, i.e., second-degree manslaughter or reckless homicide. In the instant case, the jury, after being properly instructed on self-defense, rejected Appellant's self-defense argument outright when it convicted him of wanton murder and first-degree wanton endangerment. Therefore, Appellant suffered no manifest injustice and no palpable error when the jury was not instructed on imperfect self-defense.

B. Protection of Property

Appellant argues he was entitled to an instruction on protection of property, pursuant to KRS 503.080. This argument is not properly preserved. Defense counsel argued for an instruction on the use of physical force to protect property, pursuant to KRS 503.080(1). The trial court denied the request, because KRS 503.080(1) deals with non-deadly physical force. Defense counsel began to discuss KRS 503.080(2), which deals with deadly force, but never specifically requested such an instruction. We therefore review for palpable error under RCr 10.26.

We conclude that no palpable error resulted from the jury not being

instructed on protection of property. A defendant may use physical force to prevent a robbery "upon real property in his possession . . . ." KRS 503.080(1)(a). A defendant may also use physical force to prevent "[t]heft, criminal mischief, or any trespassory taking of tangible, movable property in his possession . . . ." KRS 503.080(1)(b). However, a defendant is justified in protecting property using *deadly* physical force only in defense *of a dwelling. See* KRS 503.080(2).

Appellant used deadly physical force when he fired a gun. He did so in his front yard as Angel Riddell and Brenda Davenport drove away. He did not use deadly physical force to protect a dwelling under any of the circumstances allowed under KRS 503.080(2). "An error is 'palpable,' only if it is clear or plain under current law." *Miller*, 283 S.W.3d at 695 (citing *Brewer*, 206 S.W.3d 343). No palpable error occurred, because the victims were in a vehicle, driving away from the scene when Appellant shot. This clearly shows that Appellant was not attempting to protect private property.

C. Second-Degree Wanton Endangerment

Appellant argues the trial court erred in not instructing the jury on second-degree wanton endangerment as a lesser-included offense of first-degree wanton endangerment. This argument was not properly preserved. Defense counsel suggested that there should be a lesser-included offense available that reflected a reckless mental state, which resulted in a brief discussion of the elements of second-degree wanton endangerment. However,

defense counsel never requested a second-degree wanton endangerment instruction. We therefore review for palpable error under RCr 10.26.

There are two differences between first-degree (KRS 508.060) and second-degree (KRS 508.070) wanton endangerment.

> The higher degree requires that the conduct be wanton under circumstances manifesting an extreme indifference to the value of human life while the lower degree requires only that the conduct be wanton. The higher degree requires conduct which creates a substantial danger of death or serious physical injury while the lower degree is satisfied by conduct which only creates a substantial danger of physical injury.

Combs v. Commonwealth, 652 S.W.2d 859, 860-61 (Ky. 1983). A first-degree wanton endangerment conviction requires the same mental state as a conviction for wanton murder, while second-degree wanton endangerment shares the same mental state as second-degree manslaughter. Appellant properly received an instruction on second-degree manslaughter as to Angel Riddell. And, had Appellant properly requested it, the evidence in this case would have supported an instruction on second-degree wanton endangerment as to Brenda Davenport.

However, Appellant suffered no manifest injustice in not receiving a second-degree wanton endangerment instruction. The jury, presented with the full range of possible mental states as to the offense against Angel Riddell, convicted Appellant of wanton murder. Wanton murder shares the same mental state as first-degree wanton endangerment, and the jury convicted Appellant of first-degree wanton endangerment of Brenda Davenport. Both of

these crimes were the result of a single act, i.e., firing at the van driven by Brenda Davenport. Therefore, both crimes would share the same mental state. The jury found the same mental state as to both crimes. Therefore, under the circumstances of this case, no manifest injustice resulted from the jury not being instructed on second-degree wanton endangerment. Thus, there was no palpable error.

III. EVIDENCE OF APPELLANT'S OFFER TO TAKE A POLYGRAPH EXAMINATION

As stated previously, the jury heard an audio recording of Appellant's statement to police. During the course of that statement, in support of Appellant's versions of events, he offered to take a "lie detector test." Later, the prosecutor informed the court that he felt he had been negligent in allowing this mention of a polygraph examination to be played for the jury. The Commonwealth requested that the statement be redacted from the audio recording,[2] and that the jury be admonished to disregard the mention of a lie detector test. Defense counsel objected, arguing that, while polygraph examinations are of no evidentiary value in Kentucky courts, Appellant's offer to take a lie detector test was not meaningless; therefore, the defense should be able to argue this point to the jury to show that Appellant was credible.

The trial court admonished the jury:

> Mr. Hartley had mentioned on his taped statement that you heard, he offered to take a lie detector test.

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[2] It is unclear whether the statement was redacted in the audio recording made available to the jury. The statement was not redacted from the audio recording that is part of the record on appeal.

> And Kentucky law does not permit the use of lie detector tests in courtrooms, so you're not to consider that evidence in this case. You are admonished to disregard it entirely and put it out of your mind. You are to try the case just on the evidence that you hear that's competent evidence. That's not any competent evidence. Disregard that entirely. Kentucky law does not consider that to be of any value.

Appellant argues that the trial court erred in not permitting defense counsel to argue to the jury that an offer to take a polygraph examination had value, and in admonishing the jury that a polygraph is not competent evidence and is not of any value. We conclude that no error occurred.

This Court "has held repeatedly and consistently" that polygraph evidence is inadmissible, including "mention of the taking of a polygraph, the purpose of which is to bolster the claim of credibility or lack of credibility of a particular witness or defendant." *Ice v. Commonwealth*, 667 S.W.2d 671, 675 (Ky. 1984) (citing cases so holding). *See also Morgan v. Commonwealth*, 809 S.W.2d 704, 706 (Ky. 1991). The trial court's admonition was a correct statement of Kentucky law. Therefore, there was no error.

Further, in *Davis v. Commonwealth*, this Court held that it was proper for a defendant to be prohibited from inquiring further after a witness for the Commonwealth made a passing reference to the fact that the defendant had taken a lie detector test. 795 S.W.2d 942, 949 (Ky. 1990). This is analogous to the situation in the instant case, where the Commonwealth neglected to redact Appellant's mention of a lie detector test. There was no error in prohibiting Appellant from further developing this issue.

Finally, the cases cited by Appellant are inapposite. In *Rogers v. Commonwealth*, 86 S.W.3d 29 (Ky. 2002) and *Commonwealth v. Hall*, 14 S.W.3d 30 (Ky. App. 1999), this Court and the Court of Appeals allowed discussion of polygraph examinations, but only to vindicate the defendants' rights to explain the circumstances of their confessions. *See Crane v. Kentucky*, 476 U.S. 683 (1986). Appellant sought to use his offer to bolster his credibility. No error occurred with respect to the trial court's exclusion of further evidence, nor in its admonition to the jury.

IV. VOIR DIRE AS TO PENALTY RANGE FOR LESSER-INCLUDED OFFENSES

During voir dire, the Commonwealth told potential jurors that the penalty range for murder was 20 years' to 50 years' imprisonment, or life. When defense counsel conducted voir dire, he told the potential jurors that they had not heard the penalty ranges for first- or second-degree manslaughter, nor for reckless homicide. After an objection by the Commonwealth, the trial court, pursuant to *Lawson v. Commonwealth*, 53 S.W.3d 534 (Ky. 2001), did not permit defense counsel to discuss penalty ranges for lesser-included offenses.

Appellant argues that this Court should reconsider *Lawson*, which limits voir dire on the possible range of penalties to a discussion of the penalty range for the indicted offense. *Id.* at 544. We see no compelling reason to reconsider *Lawson*, and decline the invitation to do so.

For the foregoing reasons, the judgment of the Estill Circuit Court is affirmed.

Abramson, Noble, Schroder, and Venters, JJ., concur. Minton, C.J., concurs in result only without separate opinion. Scott, J., concurs in result only by separate opinion in which Cunningham, J., joins.

SCOTT, J., CONCURRING IN RESULT ONLY: Although I concur with the majority's result, I believe it is appropriate for the parties to voir dire the jury on the possible range of penalties for lesser included offenses aptly supported by evidence in the case. Cunningham, J., joins.

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