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NOT TO BE PUBLISHED OPINION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NOT TO BE PUBLISHED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

2010-SC-000435-MR

DANIEL KEITH GABBARD — APPELLANT

V.

ON APPEAL FROM PENDLETON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, SPECIAL JUDGE
NO. 09-CR-00025

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Daniel Gabbard appeals as a matter of right from a Judgment of the Pendleton Circuit Court convicting him of two misdemeanor driving-under-the-influence offenses and of wanton murder, in violation of Kentucky Revised Statute (KRS) 507.020(1)(b). For the murder, in accord with the jury's recommendation, the trial court sentenced Gabbard to twenty years in prison. The Commonwealth alleged that on June 8, 2009, Gabbard, a licensed commercial truck driver, was operating his semi-tractor without a trailer southbound on US Highway 27 near Butler, Kentucky when he lost control of his vehicle, crossed the centerline of the two lane road, and collided head on with a northbound vehicle. The driver of the other vehicle, Doug Wright, the

Commonwealth's Attorney for Pendleton County,[1] was killed in the collision. The main contention of Gabbard's appeal is that the evidence did not establish the aggravated wantonness that must be shown to elevate second-degree manslaughter or reckless homicide to wanton murder. He also contends that he was denied the effective assistance of counsel and the full use of his peremptory juror strikes. Believing that the counsel issue has been raised prematurely and otherwise finding no error, we affirm.

RELEVANT FACTS

The Commonwealth's proof included medical testimony establishing blunt force traumas sustained in the collision as the cause of Wright's death, and the testimonies of several witnesses who described Gabbard's erratic driving leading up to the collision. Witnesses estimated Gabbard's speed at well in excess of the forty-five mile-per-hour limit. They had observed him weaving back and forth across the center line, and one testified that immediately before the collision she saw Gabbard's truck leave the roadway on the right side and then veer suddenly to the left into the oncoming lane. An accident reconstructionist found no evidence that Gabbard had applied his brakes, and estimated his speed at impact as fifty-five to sixty miles-per-hour. Witnesses who had stopped to lend assistance and investigators called to the scene observed unopened cans of beer inside Gabbard's truck and lying on the

[1] Wright served the 18th Judicial Circuit, which comprises Pendleton, Harrison, Robertson, and Nicholas counties.

ground outside the driver's door. Investigators ultimately found eight unopened cans of beer in and around the truck.

Gabbard did not sustain serious injuries in the collision, but he suffered a cut to his scalp and appeared disoriented at the scene. He submitted to a breath test and was later transported by ambulance to the University Hospital in Cincinnati. One of the EMTs testified that he had smelled alcohol on Gabbard's breath. Hospital personnel took three blood samples. The samples were analyzed by a forensic pathologist who testified to the presence of alcohol in them and estimated that Gabbard's blood alcohol level at the time of the collision would have been between 0.194 and 0.21 grams of alcohol per 100 milliliters of blood, a level at which, according to the pathologist, Gabbard's motor skills would very likely have been impaired.

A Pendleton County sheriff arrested Gabbard the day following the collision, and on June 17, 2009, the Grand Jury for that county indicted him for murder and for the two DUI misdemeanors. A few weeks later, having consulted with counsel, Gabbard confessed to investigators that he had been working in Northern Kentucky and Southern Ohio the day of the collision, that early that day he had purchased a package of twenty-four cans of beer and that he had begun drinking as soon as he began the trip home to Butler. He admitted that he had consumed at least twelve and could have consumed as many as sixteen beers during the drive and that during the drive he realized he was intoxicated but did not stop. He also acknowledged that he had drunk several beers during the drive home many other times. Gabbard had little

recollection of the collision and did not dispute the eyewitness descriptions of his driving.

Gabbard's defense at trial was to concede the indisputable facts of his intoxication and his role in causing the fatal collision and to concede that he deserved to be punished, but to argue that his state of mind was not the aggravated wantonness punishable as murder. He testified to his profound remorse and to his awareness, as a licensed truck driver, as a husband and father, and as a minister at a small church, of the wrongfulness of driving under the influence of alcohol, but he claimed that his having had beer during the drive home on other evenings without incident lulled him into believing that he could safely do so again. It was that false confidence, he maintained, and not indifference to the value of human life that underlay his egregious choices leading to Wright's death. The jury, as noted, rejected that defense and found Gabbard guilty of wanton murder, but the defense appears to have succeeded to the extent that the jury recommended the minimum punishment for that crime. Nevertheless, Gabbard maintains that his conduct cannot justly be characterized as murder and that the trial court erred by denying his motion for a directed verdict on that charge. We disagree.

ANALYSIS

I. The Jury's Wanton Murder Verdict Was Not Unreasonable.

In a criminal prosecution, of course, it is the Commonwealth's burden to prove each element of the alleged offense beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307 (1979); *In the Matter of Winship,* 397 U.S. 358 (1970).

At the close of the Commonwealth's case Gabbard moved for a directed verdict on the murder charge on the ground that the evidence was insufficient. The trial court is to grant such a motion only if, when construed in favor of the Commonwealth, the evidence could not induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty. "There 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, 187-88 (Ky. 1991). The trial court denied the motion, and Gabbard then testified as noted above. At the conclusion of his testimony, which was the only evidence proffered by the defense, Gabbard failed to renew his motion to dismiss the murder charge, and thus, as the Commonwealth correctly notes, he failed properly to preserve this issue for appeal.[2] We need not address the preservation issue, however, or the standard of review applicable to unpreserved directed verdict claims, because even under the *Benham* standard, the standard of review for preserved directed verdict claims, Gabbard is not entitled to relief. *But see Potts v. Commonwealth,* 172 S.W.3d 345 (Ky. 2005) (holding that unpreserved directed verdict claims are to be reviewed under the palpable error standard and that failures of proof do not necessarily meet that standard). Under the *Benham* standard, we may overturn the trial

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[2] Since Gabbard was not claiming a right to acquittal but only to the dismissal of the murder charge, the proper procedure would have been an objection to the jury instruction on that offense. *Johnson v. Commonwealth,* 292 S.W.3d 889 (Ky. 2009). Unfortunately, the trial court held the instruction colloquy off the record so it is unclear what occurred, but Gabbard does not claim to have preserved this issue in that manner.

court's denial of a motion for directed verdict only if, considering the evidence as a whole and drawing all reasonable inferences in favor of the Commonwealth, "it would be clearly unreasonable for a jury to find guilt." *Benham,* 816 S.W.2d at 187. Because the jury's murder verdict was not unreasonable, Gabbard is not entitled to relief.

We may begin our discussion by noting that under KRS 507.040, "[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 . . . operation of a motor vehicle." "Wantonly" is defined in KRS 501.020 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. A person who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts wantonly with respect thereto.

If the wantonness is aggravated, *i.e.,* if the person disregards a grave risk of death to another, "including, but not limited to, [risks arising from] the operation of a motor vehicle," under circumstances manifesting extreme indifference to human life, the killing ceases to be manslaughter and becomes murder instead. KRS 507.020(1)(b).

Here, Gabbard drove his massive semi-tractor at a high rate of speed in the on-coming lane of a two-lane highway. Clearly, under the circumstances of

this case that conduct has no justification, and it created such an obvious and grave risk of causing another person's death that it may reasonably be thought to manifest extreme indifference to human life. Gabbard may be deemed to have disregarded that risk both consciously and presumptively. He did so consciously both when he told himself that despite the well known dangers of drinking and driving he could drink and drive without mishap because he had been fortunate enough to have done so before and when he realized that he was intoxicated but continued to drive nevertheless. He presumptively disregarded the grave risk of death he was creating when, by driving in excess of fifty-five miles-per-hour on the wrong side of the road, he created the imminent risk of killing someone and was unaware of that risk solely by reason of his voluntary intoxication.

We do not doubt the sincerity of Gabbard's remorse or the fact that he did not intend to kill as he wove along the highway that evening, but KRS 507.020(1)(b)'s express inclusion of motor vehicle homicides as potential wanton murders makes clear the General Assembly's intent to punish seriously the taking of a life by one whose driving was especially egregious. We have recognized that intent in many cases in which, like this one, an intoxicated driver created a grave hazard that resulted in another person's death. *Hamilton v. Commonwealth,* 560 S.W.2d 539 (Ky. 1977) (speeding and running red light); *Walden v. Commonwealth,* 805 S.W.2d 102 (Ky. 1991) (speeding and driving across the center line); *Estep v. Commonwealth,* 957 S.W.2d 191 (Ky. 1997) (speeding and driving across the center line); *Love v. Commonwealth,* 55

S.W.3d 816 (Ky. 2001) (speeding and ignoring police roadblock); *Cook v. Commonwealth,* 129 S.W.3d 351 (Ky. 2004) (speeding and driving into victim's yard). As these cases make clear, and as noted above, Gabbard's operation of his heavy truck at a high speed across the center line of the highway created so grave a risk of death that a reasonable juror could find in the creation of that risk an extreme indifference to the value of human life. The trial court did not err, accordingly, when it denied Gabbard's motion to dismiss the charge of wanton murder.

II. Gabbard's Ineffective Assistance Of Counsel Claim Is Premature.

Gabbard next contends that he was denied the effective assistance of counsel. As noted above, the defense strategy at trial was to concede that Gabbard's impaired driving caused Wright's death, but to deny that the killing amounted to murder. In what appears to have been an attempt to impress upon the jury that Gabbard was not trying to hide anything and that he accepted responsibility for what he had done, counsel did not object to venue in Pendleton County, did not move for the separation of witnesses, and did not raise objection to any of the Commonwealth's evidence establishing how the collision occurred and Gabbard's intoxication at the time. Counsel made several comments to the jury to the effect that Gabbard was sorry for Wright's death and accepted punishment for having caused it. Apparently in an attempt to underscore Gabbard's remorse, counsel even had Gabbard appear at trial in his jail attire. Gabbard now takes issue with counsel's performance

in all of these respects and insists that the defense amounted to little more than a guilty plea to the jury.

Although the Supreme Court of the United States has upheld a defense strategy conceding guilt in an effort to mitigate punishment, *Florida v. Nixon,* 543 U.S. 175 (2004), we need not decide if that case controls here since this issue is not yet ripe for review. "As a general rule," we have explained,

> a claim of ineffective assistance of counsel will not be reviewed on direct appeal from the trial court's judgment, because there is usually no record or trial court ruling on which such a claim can be properly considered. Appellate courts review only claims of error which have been presented to trial courts. Moreover, as it is unethical for counsel to assert his or her own ineffectiveness for a variety of reasons, and due to the brief time allowed for making post trial motions, claims of ineffective assistance of counsel are best suited to collateral attack proceedings, after the direct appeal is over, and in the trial court where a proper record can be made.

Leonard v. Commonwealth, 279 S.W.3d 151, 158 n. 3 (Ky. 2009). Although Gabbard's appellate counsel did not represent him at trial, so there is nothing unethical about his raising an ineffective assistance claim at this juncture, nevertheless, the general rule against such claims on direct appeal applies here. Because the issue has not yet been presented to the trial court, there is no record—in particular no testimony by trial counsel explaining his decisions—upon which to base a meaningful review. Gabbard is not entitled to relief on this ground, therefore, but he is not precluded from asserting an ineffective assistance of counsel claim in the trial court pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42 should he so desire.

III. Gabbard Did Not Properly Preserve Alleged Jury Selection Errors.

Finally, Gabbard contends that the trial court erred when it refused to excuse for cause two venire-persons who had connections with the victim, Wright. Gabbard used peremptory strikes to remove them, and, citing *Shane v. Commonwealth,* 243 S.W.3d 336 (Ky. 2007), he now insists that he was thus denied his right to the effective use of his full complement of peremptory strikes.

Although Gabbard is correct that in *Shane* we held it to be reversible error for the trial court to, in effect, require a defendant to use one of his otherwise exhausted peremptory strikes to remove a potential juror who should have been removed for cause, we have since modified that holding. In (coincidentally) *Gabbard v. Commonwealth,* 297 S.W.3d 844 (Ky. 2009), we noted that a *Shane* violation is not prejudicial if ultimately the jury includes no one the defendant wished to remove but could not because of the violation and resulting need to use a peremptory strike on someone the court should have excused for cause. We held, accordingly, that to preserve the alleged error and to show prejudice, a defendant who wishes to complain on appeal "that he was denied a peremptory challenge by a trial judge's erroneous failure to grant a for-cause strike . . . must identify on his strike sheet any additional jurors he would have struck." *Gabbard,* 297 S.W.3d at 854.

The *Gabbard* opinion was rendered on October 29, 2009, and so was in effect when jury selection for Gabbard's trial commenced on January 12, 2010. To preserve this issue for appeal, therefore, Gabbard was required to indicate

expressly on his strike sheet and to tell the trial court which potential jurors he would have removed if the two jurors he objected to had been removed for cause. This Gabbard failed to do. His strike sheet does include two strikes which for some reason he cancelled, but there is no indication, certainly no express indication, that the cancelled strikes were ones he wished to make but could not because of the trial court's rulings. His failure to comply with the preservation requirement makes it impossible to say that Gabbard was prejudiced by the trial court's alleged errors. Even if we assume that those errors occurred, therefore, the lack of prejudice precludes relief.

CONCLUSION

In sum, the proof of wanton murder need not include evidence that the defendant was mean-spirited or that he in any way intended the death he caused. It is enough if he consciously created a grave risk of death so devoid of justification that it may reasonably be thought to reflect an extreme indifference to the value of human life. Intoxication is no defense to wanton murder, for intoxication is presumed not to affect one's consciousness of the risks one creates, and it provides no justification for risky behavior, particularly the extreme risks inherent in drunk driving. That Gabbard intended no harm, therefore, did not preclude his murder conviction, and the circumstances here—Gabbard's intoxication and the extremely high risk of death his egregious driving brought about—support the jury's finding that he disregarded a grave risk of death under circumstances manifesting an extreme indifference to human life. Gabbard failed, moreover, to preserve his claim that

the trial court erred by refusing to remove two potential jurors for cause, and his ineffective assistance of counsel claim is premature. Accordingly, we affirm the May 18, 2010 Judgment of the Pendleton Circuit Court.

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

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