# IMPORTANT NOTICE
## NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: SEPTEMBER 20, 2012
NOT TO BE PUBLISHED

# Supreme Court of Kentucky

2011-SC-000703-MR

MACK TACKETT — APPELLANT

V.

ON APPEAL FROM PIKE CIRCUIT COURT
HONORABLE JOHN DAVID CAUDILL, JUDGE
NO. 11-CR-00075

COMMONWEALTH OF KENTUCKY — APPELLEE

**MEMORANDUM OPINION OF THE COURT**

**AFFIRMING**

Appellant, Mack Tackett, appeals as a matter of right from a judgment entered upon a jury verdict by the Pike Circuit Court[1] convicting him of murder and sentencing him to twenty-two years and six months imprisonment. On appeal, he asserts the following arguments: 1) the trial court erred by failing to direct a verdict of acquittal on the murder charge due to insufficiency of evidence, and 2) the trial court erred by failing to instruct the jury on lesser included offenses and self defense. For the reasons set forth herein, we affirm Appellant's conviction and sentence.

## I. FACTUAL AND PROCEDURAL BACKGROUND

Appellant and his wife, Heather Tackett, lived in a mobile home on the property of his mother, Judy Tackett. On September 5, 2009, Heather sustained a gunshot wound to her neck and bruising on her face and body.

[1] The Indictment was returned by the Knott County Grand Jury, but on a motion for change of venue, the case was transferred to the Pike Circuit Court.

She was pronounced dead by the Knott County Coroner in the residence she shared with Appellant. Her body was found near a large pile of clothes that were still on hangers. A telephone was in her hand. The autopsy revealed that the cause of her death was the gunshot wound.

At about the same time that Heather was shot, Appellant suffered a gunshot wound, allegedly self-inflicted, to the head. He has no recollection of the circumstances that lead to Heather's death. Specifically, he is unable to remember whether or not he shot her. The circumstances leading up to Heather's death were established at trial through the testimony of a number of witnesses.

At trial, Judy testified that Appellant telephoned her shortly after midnight on September 5, 2009. He asked Judy to take Heather to her father's residence because they were arguing and she was packing her belongings to leave. However, around 1:55 a.m. Heather telephoned her father requesting that he pick her up from her residence because Appellant had beaten her. Moments later, Judy found Appellant on the patio of her nearby residence suffering from a gunshot wound to the head. She testified that Appellant was bleeding from a massive facial wound and was unable to talk. Judy immediately called 911 and reported that her son had shot himself. Judy later told a Kentucky State Police Detective that she asked Appellant what he had done and he responded by pointing to his residence. She then asked him if he had shot Heather and he responded by nodding. In the meantime, when

Heather's father arrived to pick her up, Judy told him that Appellant had been shot and that he should check on Heather.

Evidence indicated that the relationship between Appellant and Heather was unstable. Heather's brother testified that he had seen Appellant hit her and try to stab her with a screwdriver, and that he had once prevented Appellant from using a shotgun to commit suicide. He also testified that Appellant had stated that if he could not have Heather, no one else would.

The jury also heard testimony from a mutual friend of Appellant and Heather, Lisa Alberti, who visited their residence the evening before the shooting. She testified that Appellant was cleaning his shotgun, and that he and Heather were arguing. Heather expressed a desire for Lisa to stay at the residence, but Lisa testified that she was uncomfortable and left the residence sometime before midnight.

Upon investigation of the crime scene, the police found two spent shotgun shells that had been fired from Appellant's shotgun. The police determined that the shots had been fired in two locations.

At the conclusion of the trial, the court instructed the jury on the charge of murder and the lesser included offense of manslaughter in the first degree. Appellant was convicted of murder and sentenced to twenty-two years and six months imprisonment.

## II. APPELLANT WAS NOT ENTITLED TO A DIRECTED VERDICT OF ACQUITTAL ON THE MURDER CHARGE

Appellant contends that he was entitled to a directed verdict of acquittal on the murder charge due to insufficiency of evidence. He argues that the

Commonwealth failed to meet its burden of proof by failing to prove the elements of murder. More specifically, he asserts the Commonwealth failed to provide evidence that Appellant fired the shot that killed Heather and failed to prove he had the requisite intent to cause death or serious physical injury to her. Having failed to preserve the issue, Appellant requests review under the palpable error standard, RCr 10.26.

Under the palpable error standard articulated in *Ladriere v. Commonwealth*, "reversal is warranted 'if a manifest injustice has resulted from the error,' which requires a showing of the 'probability of a different result or error so fundamental as to threaten a defendant's entitlement to due process of law.'" 329 S.W.3d 278, 281 (Ky. 2010)(quoting *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006)). Manifest injustice is found if the error seriously affected the "fairness, integrity, or public reputation of the proceeding." *Martin*, 207 S.W.3d at 4.

Before granting a directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991).

> 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.
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> 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 . . . 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.

*Id.* at 187-88 (citations omitted).

Appellant argues that he was entitled to a directed verdict on the murder charge because, in order to convict him, the jury had to make assumptions based on circumstantial evidence. Assumptions, he argues, are not "evidence of substance," as required by *Benham*. However, a conviction can stand on circumstantial evidence as long as, based on the totality of the evidence, reasonable minds can find guilt beyond a reasonable doubt. *See Commonwealth v. Sawhill*, 660 S.W.2d 3, 4 (Ky. 1983).

Upon review, we conclude that sufficient evidence, albeit circumstantial, was presented to support Appellant's murder conviction. The shootings occurred at the residence of Appellant and Heather, no other person was known to be on the scene. Forensic evidence indicated that Appellant's shotgun had been fired twice, corresponding with the wounds inflicted upon Appellant and Heather. Also, the jury heard evidence that Appellant nodded[2] in response to Judy's question about whether he had shot Heather.[3]

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[2] Detective Chris Collins testified that Judy stated, during their interview the morning of the shooting, that she asked Appellant if he shot Heather and he nodded. However, at trial Judy testified that after she asked Appellant whether he shot Heather he tilted his head down as if he were about to lose consciousness. Upon review, we view evidence in the light most favorable to the verdict.

[3] A party may adopt the incriminating statements of another as his own admission if his "demeanor, actions, or reactions, apart from any verbal expression, may be construed as an implied acquiescence." *Griffith v. Commonwealth*, 63 S.W.2d 594, 596 (Ky. 1933), *overruled on other grounds by Colbert v. Commonwealth*, 306 S.W.2d 825 (Ky. 1957), *overruled by Morton v. Commonwealth*, 817 S.W.2d 218 (Ky. 1991).

In addition, during the hours before Heather's death, Lisa had seen Appellant and Heather arguing. Later, Heather called her father and asked him to pick her up because Appellant had beaten her. Appellant had previously told Heather's brother that if Heather left him, he would prevent anyone else from having her. The evidence that Heather was in the process of leaving Appellant would certainly contribute to the reasonable belief that he made good on his threat to keep anyone else from having her.

Upon drawing all fair and reasonable inferences in favor of the Commonwealth and reviewing the evidence as a whole, we cannot conclude that it would be unreasonable for a jury to find Appellant guilty of the murder of Heather. Therefore, Appellant was not entitled to a directed verdict; the trial court's refusal to direct a verdict of acquittal on the murder charge was not error. It is, therefore, obvious that no manifest injustice occurred and there was no palpable error.

## III. APPELLANT WAS NOT ENTITLED TO JURY INSTRUCTIONS ON MANSLAUGHTER IN THE SECOND DEGREE, RECKLESS HOMICIDE, AND SELF DEFENSE.

Appellant also asserts that the trial court erred in denying his tendered jury instructions, which included the lesser offenses of manslaughter in the second degree and reckless homicide, as well as an instruction on self defense. Appellant asserts that such jury instructions should have been given, based on the totality of the circumstances, because "the jury might have had a reasonable doubt that he acted with intent to kill or inflict serious physical injury on [Heather Tackett]."

Certainly, "a criminal defendant is entitled to jury instructions on any defense supported by the evidence." *Hilbert v. Commonwealth*, 162 S.W.3d 921, 925 (Ky. 2005). "Lesser-included offense instructions are proper if the jury could consider a doubt as to the greater offense and also find guilt beyond a reasonable doubt on the lesser offense. All instructions must be supported by the testimony and evidence presented at trial." *Parker v. Commonwealth*, 952 S.W.2d 209, 211 (Ky. 1997)(citations omitted).

While Appellant recites the basic case law establishing when lesser included offense instructions should be given, the only support for his argument is the statement in his brief that "An instruction on the lesser included offenses and self defense was required based on the totality of the circumstances." Evidence adduced at trial that might justify Appellant's requested instructions was not cited to this Court, and without further explanation showing why the requested instructions should have been given, we are simply not persuaded that the trial court erred. Upon our own review of the record, we find no instructional error.

Appellant was not entitled to an instruction on manslaughter in the second degree or reckless homicide because the evidence presented at trial would not support a finding beyond a reasonable doubt that he *wantonly* or *recklessly* caused Heather's death. KRS 507.040(1) provides that "A person is guilty of manslaughter in the second degree when he wantonly causes the death of another person . . . ." "A person acts wantonly . . . 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." KRS 501.020(3). KRS 507.050(1) provides that "A person is guilty of reckless homicide when, with recklessness he causes the death of another person." "A person acts recklessly . . . when he fails to perceive 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 failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation." KRS 501.020(4).

At trial, Appellant testified that he did not remember how Heather was shot. He fails to describe any scenario supported by the evidence that would show how his actions, if he did shoot Heather, were wanton or reckless. Further, we found no evidence to support a finding that he was aware of and acted with conscious disregard of an unjustifiable risk. Likewise, we found no evidence that would support a finding that Appellant failed to perceive a substantial and unjustifiable risk. Therefore, Appellant was not entitled to an instruction on manslaughter in the second degree.

We also conclude that Appellant was not entitled to an instruction on self defense because the evidence presented would not support a finding by the jury that Appellant believed that the use of deadly force was necessary for his own protection. "The use of physical force by a defendant upon another person is justifiable when the defendant believes that such force is necessary to

protect himself against the use or imminent use of unlawful physical force by the other person." KRS 503.050(1). A person may exert deadly physical force upon another person when there is a belief that it "is necessary to protect himself against death, serious physical injury, kidnapping, sexual intercourse compelled by force or threat, felony involving the use of force, or under circumstances permitted pursuant to KRS 503.055." KRS 503.050(2).

Once again, Appellant testified that he could not remember what occurred in the early morning hours of September 5, 2009. At trial, he advanced the theory of an alternate perpetrator, but there is no evidence in the record to indicate that Appellant believed the use of deadly physical force against Heather, or anything else was necessary to protect himself against Heather. Therefore, we find no error in the trial court's refusal to instruct upon self defense.

## IV. CONCLUSION

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

All sitting. All concur.

COUNSEL FOR APPELLANT:

Stephen W. Owens
130 Division Street
P O Box 1426
Pikeville, Kentucky 41502

Wesley Kent Varney
P O Box 106
Pikeville, Kentucky 41502

COUNSEL FOR APPELLEE:

Jack Conway
Attorney General

Gregory C. Fuchs
Assistant Attorney General
Office of Attorney General
Office of Criminal Appeals
1024 Capital Center Drive
Frankfort, Kentucky 40601-8204