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RENDERED: FEBRUARY 21, 2013
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2011-SC-000767-MR

WARDELL COLEMAN — APPELLANT

V.

ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE CHARLES L. CUNNINGHAM, JR., JUDGE
NO. 07-CR-003989

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Wardell Coleman, and his wife went to a Kroger store in Louisville on the evening before Thanksgiving. Surveillance cameras showed the pair arriving in a Buick Century. While his wife made a purchase from the grocery, Coleman stood in line at the customer service desk to purchase a money order. A Kroger manager, William Rivers, was working at the service desk that evening. Coleman attempted to purchase the money order, but realized that he had insufficient cash to do so. He and his wife left the store.

About three and a half hours later, Coleman returned to the Kroger store alone and went directly to the customer service desk. Surveillance cameras showed a Buick Century entering the parking lot minutes earlier. Rivers was helping a customer at the self-service checkout lane when Colernan entered. Rivers returned to the service desk and was putting his key into the service

desk door when he looked up and saw Coleman. He recognized Coleman from earlier in the evening. Coleman pointed a gun at Rivers. He fired one shot that grazed Rivers' midsection. Coleman then ran from the store.

LMPD Officer Clarkson was working security at the Kroger that evening and secured the scene. He found a 25-caliber Fiocchi shell casing on the floor near the customer service desk. Officer Clarkson also found a bullet fragment projectile ten to fifteen feet to the left side of the customer service desk, near a display rack containing potato chips.

Coleman was eventually identified as a suspect because his wife had used a Kroger savings card when she made her purchase earlier in the evening. The card belonged to Jacinta Jordan, the daughter of Coleman's wife. When detectives showed Jordan the surveillance tapes, she identified her mother and Coleman. At trial, however, Jordan testified that she identified only her mother to the detectives.

Jordan took the detectives to her mother's home. After a warrant was obtained, officers searched the residence and found a Berretta 32-caliber semi-automatic pistol containing a magazine with two 32-caliber live rounds. They also found a box of Fiocchi ammunition with forty-one 25-caliber live rounds. However, later ballistics testing revealed that the pistol had limited functionality and could only be fired with manipulation. Testing also concluded that the pistol could not have fired the 25-caliber shell casing and projectile found at the Kroger store. A week later, Rivers identified Coleman from a photopak and also made an in-court identification.

A Jefferson Circuit Court jury found Coleman guilty of attempted murder and wanton endangerment in the first degree. Accepting the jury's recommendation, the trial court sentenced Coleman to seventeen years imprisonment on the attempted murder charge and five years on the wanton endangerment charge, to be served consecutively. Coleman now appeals as a matter of right. Ky. Const. § 110(2)(b).

Directed Verdict

Coleman first argues that he was entitled to a directed verdict of acquittal on the wanton endangerment charge. The thrust of his argument is that the Commonwealth failed to identify a particular person who was endangered by the single shot fired at Rivers. He points to the fact that there was no other person in the immediate vicinity of the customer service desk at the time.

In considering this claim, we look to the evidence as a whole and determine whether it would be clearly unreasonable for a jury to find guilt. *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991). In doing so, we draw all fair and reasonable conclusions in favor of the Commonwealth. *Id.* Upon review of the record, we conclude that the trial court did not err in submitting the wanton endangerment charge to the jury.

As instructed in this case, wanton endangerment in the first degree required the jury to find that Coleman fired the gun and thereby wantonly created a substantial danger of death or serious physical injury to "any customer" of the Kroger store. *See* KRS 508.060. Rivers testified that there

were "thousands" of people in the store that evening. Though clearly hyperbole, Rivers' testimony certainly established that there were at least several other customers in the store that Thanksgiving evening. Surveillance video showed many people walking around the store, several of whom entered the store at the same time as Coleman. Coleman proceeded directly to the customer service desk and fired the weapon within seconds of entering the store. It would not have been unreasonable for the jury to conclude that those persons were still in the immediate vicinity when Coleman fired the gun.

Shooting a gun in an occupied building is the classic example of conduct constituting wanton endangerment. *See* KRS 508.060, Kentucky Crime Commission/LRC Commentary (1974). The fact that the Commonwealth did not identify a particular person who was endangered by Coleman's action is not fatal to the conviction. *See Port v. Commonwealth*, 906 S.W.2d 327, 333 (Ky. 1995) (sufficient evidence of wanton endangerment where defendant pointed gun at particular person and fired two shots while in a crowded restaurant, thereby creating dangerous atmosphere for other diners). Rather, it was sufficient that the Commonwealth presented proof that customers were in the store at the time the shots were fired.

Nor is it fatal that Coleman fired the gun directly at Rivers, who was alone at the customer service desk. The bullet fragment was found some distance away from the desk, near a display rack. Though Officer Clarkson's testimony concerning the trajectory of the bullet fragment was stricken, the jury could still rationally conclude that the bullet did, in fact, ricochet. After

all, the bullet fragment was found ten to fifteen feet away from the customer service desk. *See Hunt v. Commonwealth*, 304 S.W.3d 15, 38 (Ky. 2009) ("It is self-evident that bullets may ricochet."). Further, the jury could rationally conclude that this ricocheting bullet might have severely injured or killed another customer in the shopping area, even though not directly next to the service desk. *See Combs v. Commonwealth*, 652 S.W.2d 859, 860 (Ky. 1983) (sufficient evidence of wanton endangerment where bullet came within fifteen feet of bystander). *Cf. Swan v. Commonwealth*, 384 S.W.3d 77, 101-102 (Ky. 2012) (insufficient evidence of wanton endangerment where evidence established that victim was in a back bedroom, behind a closed door, and hiding under a bed when three shots were fired in front living room). There was no error.

Bullet Trajectory Testimony

Officer Clarkson testified that the bullet "might have travelled down the aisle and ricocheted off of something and then come back . . . and landed right there beside the customer service desk." Defense counsel objected, arguing that Officer Clarkson was not qualified as a ballistics expert and, therefore, could not hypothesize as to the trajectory of the bullet fragment ricochet. The trial court sustained the objection, but declined to admonish the jury. Coleman now claims error.

Even assuming that the trial court erred in this instance, there was no prejudice. On cross-examination, Officer Clarkson readily testified that he could not say for certain how the bullet fragment traveled. Further, as stated

above, it is within common knowledge that bullets can ricochet. The specific trajectory of the bullet fragment was not particularly important to Coleman's wanton endangerment conviction. Rather, it was the *fact* that the bullet ricocheted in an occupied grocery store. For these reasons, even if the trial court erred in refusing to admonish the jury, it did not substantially sway the verdict and was, therefore, harmless. *Winstead v. Commonwealth*, 283 S.W.3d 678, 688-89 (Ky. 2009) (harmless error standard for non-constitutional errors). *See also* RCr 9.24.

Photopak Line-up

Prior to trial, Coleman moved to suppress a photo line-up identification made by Rivers. He argued that it was unduly suggestive because the other photographs were dissimilar in age, eye color, hair style, and facial hair. The trial court denied the motion.

In determining the admissibility of eye-witness identifications, we follow the United States Supreme Court decision in *Neil v. Biggers*, 409 U.S. 188 (1972). The two-prong test enunciated in *Neil v. Biggers* requires us to first examine the pre-identification encounter to determine whether it was unduly suggestive. *Dillingham v. Commonwealth*, 995 S.W.2d 377, 383 (Ky. 1999). If the procedures were suggestive, we proceed to the next question and determine whether, under the totality of the circumstances, the identification was reliable notwithstanding the suggestive nature of the procedure. *Id.*

The trial court concluded that the line-up was not unduly suggestive and correctly ended the analysis at that point. We are unable to adequately review

this mixed conclusion of law and fact because the original photos have not been included on appeal. What has been provided are black-and-white photocopies of the line-up, which are extremely darkened. While we are able to discern the hair style of some of the men in the line-up, we cannot assess their apparent ages, eye color, complexion, or facial hair (if any). Because the photo line-up—or even a clearer, color copy—was not included in the record, we can only conclude that the trial court's findings were supported by substantial evidence. RCr 9.78. *See also Commonwealth v. Thompson*, 697 S.W.2d 143, 145 (Ky. 1985) ("[W]hen the complete record is not before the appellate court, that court must assume that the omitted record supports the decision of the trial court."). Having concluded that the line-up was not unduly suggestive, the trial court did not err in admitting testimony concerning Rivers' identification of Coleman.

Jury Selection

In his final claim of error, Coleman argues that the trial court abused its discretion by striking a juror for cause. This juror, #5, responded in the affirmative when asked if anyone had a family member charged with a crime. At the bench, she revealed that her son had been tried for murder in Jefferson Circuit Court and had been acquitted. When questioned further, she equivocated. She stated that the experience had no effect on her, yet she also stated that serving as a juror would be "uncomfortable." She said that she would not be able to separate her past experience from her consideration of

Coleman's trial. Later, the juror professed an ability to follow the trial court's instructions on the law.

RCr 9.36 requires a judge to remove a juror if there is a reasonable basis to believe the juror cannot be fair and impartial. The trial court enjoys discretion in making this determination. *Adkins v. Commonwealth*, 96 S.W.3d 779, 795 (Ky. 2003). Here, the trial court agreed with counsel that the experience of Juror #5's son did not automatically disqualify her. However, the trial court observed that her body language and demeanor indicated discomfort and hesitation, and that she equivocated on her answers. In addition, the trial court noted that she had raised her hand during general *voir dire* when asked to indicate if "this is not the case for you." Given the observations articulated by the trial court, we find no abuse of discretion in the decision to strike this juror for cause.

Conclusion

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

Minton, C.J.; Abramson, Cunningham, Noble, Scott, and Venters, JJ., sitting. Minton, C.J.; Abramson, Cunningham, and Venters, JJ., concur. Noble, J., concurs in part and dissents in part by separate opinion, in which Scott, J., joins.

NOBLE, J., CONCURRING IN PART AND DISSENTING IN PART: I concur in part and dissent in part because the Appellant was entitled to a directed verdict on the wanton endangerment charge. When Appellant shot Mr. Rivers,

he was at the door of the service desk, unlocking it to enter. His position was in front of the service desk area. Appellant fired one shot at Mr. Rivers, grazing him. The bullet fragmented, and one part was found about ten feet away beside a potato chip rack. The one shot hit its target, with the shot having been fired away from the congested part of the store toward the service desk area. At that time, based on the record, it was only *possible* for other people to be in that area, but the record does not show that any were. This cannot be wanton endangerment. If it is, then any shot fired necessarily supports a wanton endangerment charge because it is *possible* for people to be almost anywhere that the shot might go. In this case, the proof adequately supported a charge of attempted murder of Mr. Rivers. The wanton endangerment charge, in addition to being unsupported, was merely "piling on." There was no "substantial danger of death or serious physical injury," KRS 508.061(1), to anyone other than Mr. Rivers. As to him, any wanton endangerment offense merged with the attempted murder.

Scott, J., joins.

COUNSEL FOR APPELLANT:

Daniel T. Goyette
Cicely Jaracz Lambert
Office of the Louisville Metro Public Defender
Advocacy Plaza
717-719 West Jefferson Street
Louisville, KY 40202

COUNSEL FOR APPELLEE:

Jack Conway
Attorney General

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