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RENDERED: MAY 23, 2013
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2012-SC-000209-MR

IVAN ORANTES-PIERCE — APPELLANT

V.

ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A.C. MCKAY CHAUVIN, JUDGE
NO. 10-CR-001229

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

I. BACKGROUND

On April 10, 2010, a Jefferson County Grand Jury indicted Appellant, Ivan Orantes-Pierce, on one count of complicity to commit murder and one count of tampering with physical evidence. Appellant's case was ultimately consolidated with those of Christian Martinez and Santino Fox. Fox entered a guilty plea, but Appellant and Martinez proceeded to a jury trial as co-defendants.

A Jefferson Circuit Court jury found Appellant guilty of murder and tampering with physical evidence. For these crimes, Appellant received a life sentence. He now appeals as a matter of right, Ky. Const. §110(2)(b), alleging that (1) a limitation placed on the number of peremptory challenges was unconstitutional as it denied him the benefit of a substantial personal right and (2) the trial judge erroneously failed to instruct the jury on a self-defense-

based theory of immunity from prosecution. For the reasons that follow, we affirm.

II. ANALYSIS

Appellant raises two issues in this appeal, both of which he concedes are unpreserved. Thus, we review for palpable error. RCr 10.26; KRE 103(e). Under the palpable error standard, an unpreserved error may be noticed on appeal only if the error is "palpable" and "affects the substantial rights of a party," and even then relief is appropriate only "upon a determination that manifest injustice has resulted from the error." RCr 10.26. "[W]hat a palpable error analysis 'boils down to' is whether the reviewing court believes there is a 'substantial possibility' that the result in the case would have been different without the error." *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006) (citations omitted).

A. Constitutionality of KRS 29A.290(2)(B)

Appellant first argues that the limit placed on his peremptory strikes denied him the benefit of a substantial personal right requiring reversal of the judgment. Specifically, Appellant alleges that the statutory authority granting the Supreme Court the power to determine the number of peremptory challenges that a party may use is an unconstitutional appropriation of power. However, given that Appellant failed to properly place the Attorney General on notice, we must decline to review this issue.

KRS 418.075(2) provides, in pertinent part, that:

> [i]n any appeal to the Kentucky . . . Supreme Court . . . which involves the constitutional validity of a statute, the Attorney General shall, before the filing of the appellant's brief be served with a copy of the pleading, paper, or other documents which initiate the appeal in the appellate forum. This notice shall specify the challenged statute and the nature of the alleged constitutional defect.

This Court has made it clear "[t]hat strict compliance with the notification provisions of KRS 418.075 is mandatory[,] meaning that even in criminal cases, we have refused to address arguments that a statute is unconstitutional unless the notice provision of KRS 418.075 had been fully satisfied." *Benet v. Commonwealth*, 253 S.W.3d 528, 532 (Ky. 2008)(citations omitted); *see also Harris v. Commonwealth*, 338 S.W.3d 222, 228-29 (Ky. 2011).

Therefore, given that Appellant failed to comply with the notice requirement of KRS 418.075, we decline to address the issue of the unconstitutionality of KRS 29A.290(2)(B).

B. Immunity

Appellant next argues that the trial court failed to instruct the jury that he was entitled to immunity from prosecution. Specifically, Appellant alleges that the trial court failed to instruct the jury that he should be immune from prosecution under KRS 503.085(1), as he was acting in self-defense at the time of the murder. Appellant therefore requests this Court grant him a new trial. Appellant concedes that this issue is unpreserved, but asks that it be reviewed for palpable error. RCr 10.26, KRE 103(e).

As part of its proof, the Commonwealth relied on a number of witnesses who claim that Appellant admitted that he killed the victim. One of the witnesses was Tera Masri, a friend of Appellant's who testified on direct examination that Appellant had admitted that a "dude" had attempted to rob him and that they "got into it." Masri further testified that Appellant told her that he had stabbed the man and then put his body in the trunk of a car.

Appellant argues that in order for a jury to make a fully informed decision, the trial judge has a duty to instruct them on all available offenses and defenses supported by the evidence. Appellant concludes that given that Masri's testimony established that he and the victim "got into it" as a result of an attempted robbery, there is no doubt that a reasonable juror could conclude that he was acting in self-defense. For this reason, Appellant believes that he is entitled to immunity from prosecution under KRS 503, and sets forth his argument as follows:

> The analysis begins with the testimony that a "dude" tried to rob Mr. Pierce. Robbery is denounced by KRS 515.020 and KRS 515.030. It is fair to describe robbery as theft or attempted theft through the use or attempted use of physical force. This language is common to both statutes. The degrees of the offense depend on the presence or absence of aggravating factors.
>
> Ms. Masri said that Mr. Pierce and the man "got into it" as a result of attempted robbery. There is no doubt that a reasonable juror could conclude that actual force was used by the man attempting to accomplish the robbery. This is significant because the use of force is the trigger for KRS Chapter 503 immunity.

KRS 503.050(2) provides that "the use of deadly physical force by a defendant upon another person is justifiable . . . when the defendant believes that such force 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 those circumstances permitted pursuant to KRS 503.055." Appellant argues that he was justified in using deadly force against the victim given that he was attempting to rob him at the time, and therefore should be immune from prosecution.

KRS 503.085 grants immunity to defendants whose justifiable use of self-defense results in the death of the perpetrator. In *Rogers v. Commonwealth*, 285 S.W. 740 (Ky. 2009), this Court set forth the procedures to be used in order to properly raise and address a claim of immunity made under this statute. We explained that immunity is not merely a defense to be raised at trial, but is instead a protection from the burdens of prosecution in its entirety. *Id.* at 753. It is for this reason that the trial court had no duty to instruct the jury on this 'defense,' as it is not a 'defense' to be raised at trial, but an outright immunity from prosecution.

Furthermore, in determining whether a defendant is entitled to the immunity, this Court has held that "in order for the prosecutor to bring charges or seek an indictment, there must be probable cause to conclude that the force used by the defendant was not fully justified under the controlling provision or provisions of KRS Chapter 503." *Id.* at 754. The burden is on the Commonwealth to establish probable cause, and it may do so by presenting evidence including witness statements, investigatory reports, photographs or other documents in the record. *Id.* at 755. If the Commonwealth can establish

probable cause existed that the force used by the defendant was not justifiable, then immunity will not be available.

Here, there is no question that the Commonwealth established probable cause that Appellant was not using justifiable force against the victim. The only time the idea of self-defense was mentioned throughout Appellant's trial was during Masri's testimony, and even she stated that she did not believe Appellant. Given that several witnesses testified that Appellant admitted to killing the victim with no mention of acting in self-defense, probable cause that he was not using justifiable force was established. Furthermore, it is not the duty of a court to address the issue of immunity *sua sponte*, and therefore it had no duty to instruct the jury on any such matter. *Id.* at 755. Thus, no error occurred, palpable or otherwise.

Furthermore, it is unclear whether Appellant also argues that the trial judge should have instructed the jury on a theory of self-defense, as his only defense at trial was complete innocence. RCr 9.45 "imposes a duty on the trial court to instruct the jury on the whole law of the case; that is, 'this rule requires instructions applicable to every state of the case deductible from or supported to any extent by the testimony.'" *Hudson v. Commonwealth*, 385 S.W.3d 411, 416 (Ky. 2012) (*quoting Thomas v. Commonwealth*, 170 S.W.3d 343, 349 (Ky. 2005)). "However, the trial court has no duty to instruct on a theory not supported by the evidence." *Hudson*, 385 S.W.3d at 416 (*citing Payne v. Commonwealth*, 656 S.W.2d 719, 721 (Ky. 1983)).

The evidence supporting Appellant's belief in the need for the use of force need not be strong, nor free from contradiction. "However, such evidence need only raise the issue, for an instruction on self-defense is necessary once sufficient evidence has been introduced at trial which could justify a reasonable doubt concerning the defendant's guilt." *Estep v. Commonwealth,* 64 S.W.3d 805, 811 (Ky.2002); *Commonwealth v. Day,* 983 S.W.2d 505, 508 (Ky.1999); *Jewell v. Commonwealth,* 549 S.W.2d 807, 812 (Ky. 1977), *Payne v. Commonwealth,* 623 S.W.2d 867 (Ky. 1981). In the present case, the only evidence presented that would support a theory of self-defense is Masri's testimony, and it was called into doubt when she stated that she did not believe what Appellant had told her. Therefore, this Court is hard-pressed to find this testimony sufficient to call into question Appellant's guilt given the gravity of the evidence presented against him. *See Hudson,* 385 S.W.3d at 417. (holding that the ambiguous statements made by Appellant provided no more than speculative proof, and as such, the court found there to be insufficient evidence and thus they had no duty to provide an instruction regarding the defense).

Even if the trial court had instructed the jury to consider that Appellant was acting in self-defense, the outcome of the case would have been the same given the lack of evidence in support of the argument. For this reason, this Court finds that no palpable error occurred.

III. CONCLUSION

For the aforementioned reasons, we affirm Appellant's conviction and sentence.

All sitting. All concur.

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