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# Supreme Court of Kentucky

2012-SC-000696-MR

KEITH A. MCCAIN, JR.

APPELLANT

V. ON APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE SUSAN SCHULTZ GIBSON, JUDGE  
NO. 10-CR-001323-001

COMMONWEALTH OF KENTUCKY

APPELLEE

## MEMORANDUM OPINION OF THE COURT

### AFFIRMING

Appellant, Keith A. McCain Jr., was convicted of murder and sentenced to thirty-three years' imprisonment. On appeal, McCain alleges three errors: (1) that the trial court denied him the right to present a defense by limiting evidence of the victim's and his friends' alleged habit of carrying guns and of crimes committed by witnesses after the murder occurred; (2) that he was deprived of due process of law by the improper cross-examination of a witness's juvenile adjudication record; and (3) in a combined argument, that he was entitled to a directed verdict on the charge of murder and that the trial court erred by giving the jury an initial-aggressor instruction. Having reviewed the record, this Court affirms his conviction and sentence.

## **I. Background**

On April 13, 2010, Reginald Massey saw his seventeen-year-old son, Rashad Massey, in an argument with a man and a woman on the side of the street. The woman approached his son carrying a tire iron, while the man stood nearby yelling at Rashad. Reginald, concerned for his son's well-being, stopped and asked if everything was all right. Rashad indicated he was fine and that he had his friends with him.<sup>1</sup> Nonetheless Reginald stayed with his son until the man and woman got into a red car and drove away.

Shortly after this altercation, Reginald's son was fatally shot, and Keith McCain Jr. was charged with the murder. The exact circumstances of the shooting are unclear, but testimony from several eyewitnesses was presented at trial. Rashad's friend Charles "Dink" Mills stated he met up with Rashad after school and that they, joined by two other friends, Christian and Monty, walked to a local food store. Mills said that Rashad told him he had gotten into a fight with someone, and that Rashad was going to have a fistfight with the person. Mills testified that he later learned that Rashad specifically wanted to fight the Appellant, Keith McCain, but that he did not know why he wanted to fight him.

As the group of boys approached the store, a red car pulled up across the street. Mills testified that the group turned around from the direction they were traveling and approached the car. He stated the occupants of the car—McCain,

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<sup>1</sup> It is unclear how many friends were with Rashad at the time of this initial confrontation. Reginald Massey first testified that his son was with two boys, and later stated that he was with three of his friends. Other witness accounts also vary.

two females, and another male—got out of the vehicle as the group of boys approached. The groups converged in a small grassy area across the street from the food store. The area was located near the road and was bordered on one side by a small cemetery.

Mills stated he thought there was going to be a one-on-one fistfight between McCain and Rashad. He noted that Christian had been standing very close to Rashad before the shooting occurred, and that he and Monty had stood back and were closer to the road and food store. The other occupants of the car had stood behind McCain. Mills testified that McCain and Rashad stood facing one another and that McCain had “pulled the trigger” on Rashad, shooting him. After the shooting, the group scattered. Rashad ran a short distance before collapsing.

After the shooting, Mills claimed he ran into the local food store and waited for McCain and the other occupants of the red car to leave. He did not know where his friends had gone, but said that Monty and Christian had been with Rashad when he returned to the scene. He stated that none of his friends were armed that day nor had they removed anything from the crime scene.

Other witnesses were called to testify at trial. Charletta Curry, McCain’s girlfriend at the time of the shooting, testified that she had been with him on the day of the shooting and that Rashad had previously confronted McCain. She stated she had never seen Rashad with a gun, but had seen his friends with weapons on other occasions. Curry testified that Rashad had been “running his mouth” on the day of the shooting and that there had been a

confrontation on the street near McCain's aunt's house. After this confrontation, Curry and McCain had gone to his brother's apartment complex and picked up two friends—Demetre Denson and Catherine “Cat” Williams—and had gone out to find Rashad. At the scene of the shooting, Curry stated she had gotten out of the car with a tire iron, but that McCain had told her to stay back because he did not trust Rashad. She did not know McCain had a gun until the shooting occurred.

Demetre Denson also testified at trial. He stated McCain had pulled up to the apartment complex where he was living and told him there was a “beef around the corner” and that he had gone along to back McCain up in a fight. When the group found Rashad and his friends, he stated the boys threw up hand signals that they wanted to fight and approached the car. Denson testified that he did not see or know McCain had a gun until after Rashad had been shot.

McCain testified on his own behalf at trial. He stated that Rashad had threatened him and flashed a gun at him during the confrontation earlier in the day before walking off down the street. He testified that Rashad wanted to fight and he had gotten a group of friends to go with him to find him. McCain testified he wanted to get the fight over with because he was tired of being threatened with guns. He admitted to carrying a gun for protection because of the on-going threats from Rashad and his friends. At the scene of the shooting, he claimed Rashad had pulled out a gun and that he had shot Rashad in self-defense.

Police investigation revealed additional information. No firearms were found at or around the crime scene. No significant amount of gunshot residue was found on Rashad's hands, and no gun belonging to Rashad was found at the scene. A single gunshot wound to the chest was determined to be the cause of death and a tire iron was found in the red car from the scene.

The jury found McCain guilty of murder, and he was sentenced to thirty-three years' imprisonment. He appeals to this Court as a matter of right. See Ky. Const. § 110(2)(b).

## **II. Analysis**

### **A. Right to Present a Defense Claim**

McCain's first argument to this Court is in reality a dual argument. He submits that the trial court erred by limiting testimony about several witnesses' felony convictions involving the use of guns after the murder *and* by not allowing Catherine "Cat" Williams to testify whether she knew if Rashad and his friends were known to carry guns and whether she had relayed that information to McCain. He asserts the exclusion of this evidence prevented him from presenting a defense at trial. We disagree.

At trial, McCain argued that the shooting had been in self-defense and that he had to protect himself from Rashad and his friends, whom he alleged were members of a gang. Before trial, the Commonwealth filed a motion in limine asking in relevant part that the defense be barred from presenting evidence of any details of witnesses' subsequent charges or felony convictions other than for issues of credibility or any additional proof that the crime was

gang related. McCain's counsel argued that information about witnesses' subsequent charges and crimes was relevant to his client's belief he needed to act in self-defense. The trial court ruled that evidence of the subsequent convictions would not be allowed because those convictions were not relevant to the defendant's state of mind at the time of the shooting, but held that McCain could testify to his own knowledge about the witnesses being known to carry guns and saw no reason he could not present evidence that the altercation had been gang related.

There is no question that an accused in a criminal trial has the right to present a defense. *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973) ("The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations.") And though, as McCain points out it, it is true "where constitutional rights directly affecting the ascertainment of guilt are implicated, [the rules of evidence] may not be applied mechanistically to defeat the ends of justice," *id.* at 302, it is also true "[i]n the exercise of [the right to present a defense], the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence," *id.* Stated more simply, the accused does not have an unfettered right to offer evidence, though perhaps relevant, that is otherwise inadmissible under the rules of evidence. *Montana v. Egelhoff*, 518 U.S. 37, 42 (1996).

In the present case, the trial court's ruling that witnesses' convictions for violent crimes after the murder could not be introduced at trial did not limit

McCain's right to present a defense. The trial court's ruling did not act as a complete bar to the presentation of McCain's theory of self-defense. In fact, the court noted in its ruling that McCain could certainly testify to his own knowledge that Rashad and his friends carried guns, and, he did so, as did other witnesses. Further, convictions for violent crimes after an alleged instance of self-defense cannot be evidence of a defendant's state of mind at the time of a shooting because, perhaps obviously, the defendant cannot, at that time, know of them.

Likewise, evidence of these subsequent crimes was properly excluded under the Kentucky Rules of Evidence. In the instant case, the trial court found the later convictions amounted to "specific incident[s] of conduct" used to suggest a habit or pattern of behavior at another time. This type of evidence is explicitly forbidden by Kentucky Rule of Evidence 404(b). And further, although it is permissible to state that a witness was a convicted felon, the details of that conviction are not ordinarily admissible under Kentucky Rule of Evidence 609. There is simply no indication that the trial court's decision to limit the evidence of witnesses' convictions after the murder prevented McCain from presenting a defense.

Similarly, McCain argues that the trial court's decision to not allow Catherine "Cat" Williams to testify that she had seen Rashad and his friends with weapons and whether she had relayed this information to him was error and prevented him from presenting his defense.



While the Court agrees that this information was material to McCain's theory of self-defense and likely should have been permitted, we find that the error was harmless. RCr 9.24. "A non-constitutional evidentiary error may be deemed harmless, the United States Supreme Court has explained, if the reviewing court can say with fair assurance that the judgment was not substantially swayed by the error." *Winstead v. Commonwealth*, 283 S.W.3d 678, 688-89 (Ky. 2009) (citing *Kotteakos v. United States*, 328 U.S. 750 (1946)). "The inquiry is not simply 'whether there was enough [evidence] to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.'" *Id.* (quoting *Kotteakos*, 328 U.S. at 765 ).

Although Williams was not permitted to testify, several other witnesses—including McCain's brother, cousin, aunt, and ex-girlfriend—testified in some capacity about the group's habit of carrying guns and that they had relayed that information to McCain. Additionally, McCain testified that the victim and his friends had threatened him with a gun the day of the shooting. There is simply not a substantial possibility that the failure to admit William's testimony would have influenced the final verdict reached by the jury. As such, failure to admit Williams's testimony was harmless.

#### **B. Improper Cross-Examination about James Rutledge's Juvenile Adjudication**

McCain's next argument is that James Rutledge was improperly cross-examined by the Commonwealth about his prior juvenile adjudications, resulting in a denial of due process. McCain's counsel submits this issue is

preserved for our review by the Commonwealth's motion in limine discussing the exclusion of any details of witnesses' subsequent convictions or charges, but that claim is incorrect and borders on being fatuous. The incorrectness of this argument is highlighted by two facts: (1) the Commonwealth's motion in limine dealt only with witnesses' convictions for felonies after the murder (not prior adjudications), and (2) the very motion McCain cites as preserving this argument is the same one he argued against at trial and as being incorrect in his first argument to this Court. Really, McCain is asking that this Court treat a motion by the other side relating to different witnesses, albeit a similar subject, as preserving his claim. That is insufficient.<sup>2</sup> Consequently, we will only review this claim of error for palpable error under Criminal Rule 10.26.

An unpreserved error may only be corrected on appeal if the error is both "palpable" and "affects the substantial rights of a party" to such a degree that it can be determined "manifest injustice resulted from the error." RCr 10.26. For error to be palpable, "it must be easily perceptible, plain, obvious and readily noticeable." *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky.2006). The rule's requirement of manifest injustice requires "showing ... [a] probability of a different result or error so fundamental as to threaten a defendant's entitlement to due process of law." *Martin v. Commonwealth*, 207 S.W.3d 1, 3

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<sup>2</sup> There are some circumstances when a motion by the Commonwealth could be treated as preserving an error for the defense. For example, if the Commonwealth moved to have certain evidence declared admissible, and the defense opposed this motion, the issue would be preserved for appellate review. In such a scenario, the defense's position is squarely presented to the trial court, even if not based on an express motion to exclude the proof. But that did not happen here.

(Ky. 2006). Or, stated differently, a palpable error is where “the defect in the proceeding was shocking or jurisprudentially intolerable.” *Id.* at 4.

McCain alleges that the error in this case occurred when his witness, James Rutledge, was improperly cross-examined about his juvenile adjudications after he stated that he had left the neighborhood where the crime occurred because it had become very dangerous and he was going to college to play football. After Rutledge denied being in trouble at the time he left the neighborhood, the Commonwealth proceeded to ask him about a series of arrests ranging from charges of menacing to burglary. On re-direct, Rutledge stated that these arrests had occurred before he was eighteen years old and had been handled as juvenile adjudications. He stated he had not been convicted of any felonies.

Although the propriety of this cross-examination is questionable, we do not believe that its occurrence can rise to the level of palpable error. Simply, the alleged error does not show the probability of a different result so fundamental as to threaten McCain’s entitlement to due process of law.

### **C. Directed Verdict and Jury Instruction**

McCain’s final claim combines an argument for a directed verdict on the murder charge with an argument that the jury was not properly instructed because the jury instructions contained language allowing the jury to consider whether McCain was the initial aggressor. In the interest of clarity, we will address each argument separately.

To briefly address McCain's first argument, a trial court presented with a motion for a directed verdict "must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth" and "[i]f 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." *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991). On appellate review, the standard is somewhat deferential: a directed-verdict decision will be reversed only "if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt." *Id.* Several witnesses at trial testified that McCain shot Rashad and that Rashad had not been armed. Given this testimony, it was not clearly unreasonable for the murder charge to go to the jury.

McCain also alleges that the trial court should not have instructed the jury on an initial-aggressor theory because the evidence definitively showed that the victim was the initial aggressor. Specifically, he alleges that the earlier confrontation at his aunt's house and the actual shooting were all part of the same event that Rashad instigated and that McCain simply defended himself after Rashad's initial threats. This conception of the evidence presented at trial is too narrow. As McCain acknowledges, "it is the duty of the trial judge to prepare and give instructions on the whole law of the case, and this rule requires instructions applicable to every state of the case deducible or supported to any extent by the testimony." *Swan v. Commonwealth*, 384 S.W.3d 77, 99 (Ky. 2012) (quoting *Taylor v. Commonwealth*, 995 S.W.2d 355, 360 (Ky.1999)); see also RCr 9.54(1). In the present case, there was evidence

that there was an initial confrontation between the victim and McCain and that time elapsed between that confrontation and the murder. The Commonwealth presented testimony that between the confrontations, McCain went to an apartment, gathered a group of friends, and armed himself before going out in a car to find the victim. The trial court is correct that the evidence presented in this case was “all over the board with regard to the intent and the facts” and as such, an initial-aggressor instruction was supported by the evidence presented in the case.

An initial-aggressor instruction is authorized by KRS 503.060. That statute states that

the use of physical force by a defendant upon another person is not justifiable when ... [t]he defendant was the initial aggressor, except that his use of physical force upon the other person under this circumstance is justifiable when:

- (a) His initial physical force was nondeadly and the force returned by the other is such that he believes himself to be in imminent danger of death or serious physical injury; or
- (b) He withdraws from the encounter and effectively communicates to the other person his intent to do so and the latter nevertheless continues or threatens the use of unlawful physical force.

KRS 503.060(3). The initial-aggressor instruction tracked this statute.

The initial-aggressor instruction allowed the jury to determine whether McCain or Rashad was the initial aggressor and whether deadly force was properly used. The evidence in no way proved definitively that Rashad was the initial aggressor, either in the first encounter or by flashing a gun at the beginning of the second encounter. While there was evidence from which the

jury could have believed Rashad was the initial aggressor, there was also evidence from which it could have concluded that McCain was instead the initial aggressor and thus could not claim self-defense. The instruction also gave the jury the opportunity to consider whether McCain could enjoy the exception to the initial-aggressor rule, which otherwise bars the use of self-defense, since it could consider whether McCain's initial confrontation was not deadly or that McCain had withdrawn from the situation.

### **III. Conclusion**

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

All sitting. All concur.

#### **COUNSEL FOR APPELLANT:**

Roy Alyette Durham II  
Assistant Public Advocate  
Department of Public Advocacy  
100 Fair Oaks Lane  
Suite 302  
Frankfort, Kentucky 40601

#### **COUNSEL FOR APPELLEE:**

Jack Conway  
Attorney General

Heather Michelle Fryman  
Assistant Attorney General  
Office of Criminal Appeals  
Office of the Attorney General  
1024 Capital Center Drive  
Frankfort, Kentucky 40601