

Commonwealth of Kentucky
Court of Appeals

NO. 2012-CA-002170-MR

MIKE DOUGLAS RIEDER

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE ERNESTO M. SCORSONE, JUDGE
ACTION NO. 11-CR-00710

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
VACATING AND REMANDING

** ** * ** * ** *

BEFORE: ACREE, CHIEF JUDGE; MAZE AND STUMBO, JUDGES.

STUMBO, JUDGE: Mike Rieder appeals from his conviction of manslaughter in the second degree. We find that the Commonwealth elicited impermissible testimony during the jury trial; therefore, we vacate Appellant's conviction and remand for a new trial.

Around 1:00 A.M. on April 17, 2011, Appellant and Jimmy Muzic were leaving the Office Lounge. Appellant and Mr. Muzic had arrived at the Office Lounge separately and did not interact inside the bar. Mr. Muzic did not have a ride home from the bar, so he requested one from Appellant. Appellant declined. Mr. Muzic got into the backseat of Appellant's vehicle and asked for a ride to the Shell Station up the street. Appellant initially said no, but after further requests from Mr. Muzic, acquiesced. Appellant drove Mr. Muzic to the gas station.

Once at the gas station, Mr. Muzic refused to get out of the vehicle. After several attempts to convince Mr. Muzic to exit the vehicle, Appellant removed a pistol he had concealed on his person.¹ Mr. Muzic continued to refuse to get out of the vehicle, so Appellant physically removed him. Once both men were outside of the vehicle, Appellant claims that Mr. Muzic attacked him. Both men began pushing each other. Appellant eventually raised his gun and pointed it at Mr. Muzic. The gun fired and the bullet struck Mr. Muzic in the head. He died instantly. Appellant claimed the gun discharged by accident. The Commonwealth claimed that he intended to shoot Mr. Muzic. Appellant was charged with murder.

A jury trial was held over three days. The jury found Appellant guilty of manslaughter in the second degree and he was sentenced to ten years imprisonment. This appeal followed. Further facts will be discussed as they become necessary.

¹ Appellant had a concealed deadly weapon license.

As stated previously, we are vacating Appellant's conviction due to impermissible testimony at trial; however, we will begin our analysis of this case with a pre-trial issue. Appellant's first argument on appeal is that the trial court erred in not dismissing his case because the Commonwealth did not establish probable cause to prosecute him. KRS 503.085 states:

(1) A person who uses force as permitted in KRS 503.050, 503.055, 503.070, and 503.080 is justified in using such force and is immune from criminal prosecution and civil action for the use of such force[.] . . . As used in this subsection, the term "criminal prosecution" includes arresting, detaining in custody, and charging or prosecuting the defendant.

(2) A law enforcement agency may use standard procedures for investigating the use of force as described in subsection (1) of this section, but the agency may not arrest the person for using force unless it determines that there is probable cause that the force that was used was unlawful.

In the case at hand, KRS 503.050 and KRS 503.055 are relevant. KRS 503.050 states in pertinent part:

(1) 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.

(2) The use of deadly physical force by a defendant upon another person is justifiable under subsection (1) only 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.

...

(4) A person does not have a duty to retreat prior to the use of deadly physical force.

KRS 503.055 states in relevant part:

(1) A person is presumed to have held a reasonable fear of imminent peril of death or great bodily harm to himself or herself or another when using defensive force that is intended or likely to cause death or great bodily harm to another if:

(a) The person against whom the defensive force was used was in the process of unlawfully and forcibly entering or had unlawfully and forcibly entered a dwelling, residence, or occupied vehicle, or if that person had removed or was attempting to remove another against that person's will from the dwelling, residence, or occupied vehicle; and

(b) The person who uses defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred.

...

(3) A person who is not engaged in an unlawful activity and who is attacked in any other place where he or she has a right to be has no duty to retreat and has the right to stand his or her ground and meet force with force, including deadly force, if he or she reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or herself or another or to prevent the commission of a felony involving the use of force.

(4) A person who unlawfully and by force enters or attempts to enter a person's dwelling, residence, or occupied vehicle is presumed to be doing so with the intent to commit an unlawful act involving force or violence.

[I]n 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. Similarly, once the matter is before a judge, if the defendant claims immunity the court must dismiss the case unless there is probable cause to conclude that the force used was not legally justified.

Rodgers v. Commonwealth, 285 S.W.3d 740, 754 (Ky. 2009). In the case before us, Appellant argues that he used deadly force to protect himself and because Mr. Muzic had unlawfully entered an occupied vehicle. Appellant claims that the Commonwealth had no proof to rebut his claims of self-defense and that his use of force was legally justified; therefore, his motion to dismiss the charges pursuant to KRS 503.085 should have been granted. Questions of probable cause are reviewed *de novo*. *Commonwealth v. Banks*, 68 S.W.3d 347, 349 (Ky. 2001).

We believe that the trial court was correct in finding the Commonwealth had probable cause to prosecute Appellant. The trial court found probable cause because Appellant claimed that the gun went off accidentally, not that he fired it in self-defense. In addition, both the victim and Appellant were outside of the vehicle when Mr. Muzic was killed; therefore, Appellant could not use the defense of an occupied vehicle argument. Finally, the victim was unarmed. The trial court found that these reasons met the probable cause standard that Appellant's use of force was not legally justified and we agree.

We now move to the error that requires us to vacate Appellant's conviction. During the Commonwealth's case-in-chief, it called Sergeant Richardson to testify.

Sergeant Richardson was the officer who interviewed Appellant after the shooting.²

The following exchange took place at trial:

Commonwealth: Detective, after you had concluded your interview with the defendant, did you make a decision to charge him?

Richardson: I did.

Commonwealth: And what did you charge him with?

Richardson: I charged him with murder.

Commonwealth: And why did you make that decision?

Richardson: Through the statements he had made, there was no physical force being used against him, and I didn't feel like he had the right to use his gun at that instant.

Appellant argues that Sergeant Richardson's opinion that he felt Appellant did not have the right to use his gun invaded the province of the jury as fact finder.

Appellant did not object to Sergeant Richardson's statement at trial and asks us to review this as palpable error.

A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

RCr 10.26. "[I]f upon consideration of the whole case the reviewing court does not conclude that a substantial possibility exists that the result would have been any different, the error complained of will be held to be nonprejudicial." *Jackson v. Commonwealth*, 717 S.W.2d 511, 513 (Ky. App. 1986) (citation omitted).

Appellant cites to *Ordway v. Commonwealth*, 391 S.W.3d 762 (Ky. 2013), and *Stone v. Commonwealth*, 2013 WL 1919566 (Ky. App. 2013), as support. In

² Appellant called 911 and turned himself into the police after the shooting.

Ordway, the defendant was charged with murder and presented a self-defense claim after he shot and killed two men. During the trial, certain evidence was presented that the defendant tried to leave the scene of the shooting before the police arrived. Responding to questions posed by the Commonwealth, a detective testified that people who use self-defense typically do not leave the scene of the incident, they call for help. The detective essentially testified that the defendant did not act like a person who had killed two men in self-defense. This was objected to at trial. The Kentucky Supreme Court found that “[t]he testimony was incompetent because it permitted the police detective to authoritatively suggest how innocent persons behave after they lawfully engage in an act of self-defense, and to then, with some measure of certainty, exclude Appellant from that class of persons based upon his conduct following the shooting.” *Ordway* at 775-6. The Supreme Court found this to be reversible error.

In *Stone*, the defendant was on trial for multiple charges, one being assault. Stone claimed that he did not assault the victim, merely that he restrained the victim because the victim was trying to assault him. The victim testified that Stone assaulted her. One claim of error in that case was that the Commonwealth elicited impermissible testimony from a district court prosecutor, Alison Cox. At trial, Ms. Cox stated that she felt the allegations against Stone were true. This was not objected to at trial, but Stone requested palpable error review on appeal to this Court.

This Court stated:

Upon review of the record and applicable law, we find that the admission of Cox's testimony was in error. Our law is clear that witnesses generally cannot testify to conclusions of law. *See Tamme v. Commonwealth*, 973 S.W.2d 13, 32 (Ky.1998). Moreover, our courts have specifically held that a witness's opinion that a defendant is guilty is not admissible at trial. *See Bussey v. Commonwealth*, 797 S.W.2d 483, 485–486 (Ky.1990), and *Nugent v. Commonwealth*, 639 S.W.2d 761, 764 (Ky. 1982).

Stone at 5 (footnote omitted). The Court went on to review the error for palpable error. The Court stated:

In so finding, however, we recognize that to reverse in the case of an unpreserved, palpable error, we must find that a manifest injustice has resulted from that error. Kentucky Rules of Criminal Procedure (RCr) 10.26. Such requires a showing of the probability of a different result, or an error so fundamental as to threaten a defendant's entitlement to due process of law. *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006). *Sub judice*, we believe that the admission of the testimony at issue rose to the level of error necessary for reversal only with respect to the charges of assault in the fourth degree.

With respect to these assault charges, we find conflicting evidence and contrary testimony from the parties. Certainly, it is the prerogative and privilege of the jury to weigh such as evidence, including the credibility of witnesses, and to come to a conclusion on the basis of the evidence. *White v. Commonwealth*, 312 Ky. 543, 545, 228 S.W.2d 426 (Ky. App. 1950). However, in this instance, given the lack of additional independent evidence beyond the conflicting testimony given by Stone and the victim, we cannot say with certainty that Cox's statement as to the truth of the allegations did not factor heavily into the jury's decision and might have resulted in an outcome different than that which the jury may have reached absent such testimony.

Certainly, there is no way to determine the exact weight given by the jury to the statements of an individual in a prosecutorial role who had been involved with the case and had interacted with various involved parties. However, as our United States Supreme Court stated in *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935), a prosecutor's "improper suggestions, insinuations, and especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none." Finding the testimony at issue below to be of such a nature as to carry significant weight with the jury, and being unable to determine how the jury would have found absent this testimony and in light of substantial independent evidence beyond the conflicting testimony, we believe reversal is appropriate with respect to the two assault charges. Accordingly, we reverse

Stone's conviction on the assault fourth charges and remand for a new trial on those charges alone.

Id. at 5-6.

Here, the only evidence concerning self-defense came from Appellant. The evidence contradicting it was speculative. There were other witnesses to the shooting, but they were far away and only saw the two pushing one another and then Appellant shooting Mr. Muzic. Appellant's claim at trial is that he was defending himself against Mr. Muzic when the gun fired. Whether or not Appellant used the gun and shot Mr. Muzic in self-defense was a question for the jury, not Sergeant Richardson. Using the cases of *Ordway* and *Stone* as a guide, we find that the testimony of Sergeant Richardson was improper and resulted in manifest injustice. We therefore vacate Appellant's conviction and remand for a new trial.

Appellant raises other arguments on appeal. Some of them may arise again in a new trial; therefore, we will address those arguments. Appellant claims that the trial court erred in not giving a jury instruction for defense of a vehicle. Pursuant to KRS 503.055 Appellant would have been entitled to such an instruction if he had a reasonable fear of imminent peril of death or great bodily harm when he used deadly force if the victim were unlawfully trying to enter Appellant's occupied vehicle. The trial court denied the defense's request for this instruction because the vehicle was not occupied when Mr. Muzic was shot. We agree with this reasoning and find no error.

Next, Appellant argues that evidence that he violated the rules of the concealed deadly weapon license when he took his concealed weapon into the bar should have been excluded. Prior to trial, the defense made a motion in limine to exclude any testimony or argument about the rules concerning carrying a concealed deadly weapon into the Office Lounge bar. The trial court granted the motion, but warned that the defense could always open the door to this kind of questioning at trial. At trial, Appellant stated that he had a valid conceal and carry license on the day of the shooting.

On cross-examination, the Commonwealth asked about his familiarity with the rules of carrying a concealed deadly weapon. Defense counsel objected, but the trial court overruled. The court determined that the Commonwealth was permitted to ask Appellant about his license and the rules he learned in obtaining the license. The Commonwealth then elicited testimony that Appellant was

familiar with the rules, including one about not carrying a concealed weapon into a bar.

The proper standard for review of evidentiary rulings is abuse of discretion. *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000). “The test for abuse of discretion is whether the trial judge’s decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). We cannot say the trial court erred in allowing the questioning about the license rules. The trial court stated in its ruling on the motion in limine that the defense could open the door to such questioning. It appears this is what happened here. We find no abuse of discretion.

Appellant also argues that the trial court erred in allowing the Commonwealth to introduce into evidence autopsy photos of Mr. Muzic’s brain. Appellant claims the photos were unnecessary and unduly prejudicial due to their gruesome nature.

[W]e must discern whether the photographs were sufficiently gruesome so as to find the probative value “substantially outweighed” by the prejudicial effect. As a general rule, photographs do not become inadmissible simply because they are gruesome. *Foley v. Commonwealth*, 953 S.W.2d 924, 936 (Ky. 1997). Such evidence loses its admissibility when the photographs begin to depict a body that has been “materially altered by mutilation, autopsy, decomposition or other extraneous causes, not related to commission of the crime, so that the pictures tend to arouse passion and appall the viewer.” *Clark v. Commonwealth*, 833 S.W.2d 793, 794 (Ky. 1991). We agree with [the defendant] that the autopsy photographs were gruesome; however, the threshold is much higher than mere gruesomeness for a

photo to be inadmissible. For example, a photograph of a young child victim, where his scalp was pulled back to show there was an intent to kill, was not gruesome enough to preclude the photo evidence from the jury. *Quarels v. Commonwealth*, 142 S.W.3d 73 (Ky. 2004). In another case, a videotape of the murder scene showing burned bodies of victims, as well as numerous photographs depicting the same were an accurate description of the crime scene and were properly admissible. *McKinney v. Commonwealth*, 60 S.W.3d 499 (Ky. 2001).

Hunt v. Commonwealth, 304 S.W.3d 15, 41 (Ky. 2009).

We have reviewed the photos in question. While they are quite gruesome, they were relevant to show the injuries sustained to Mr. Muzic's brain. Their probative value was not substantially outweighed by the prejudicial effect. The trial court did not abuse its discretion in allowing the introduction of the photos.

Appellant's next argument is that the restitution he was ordered to pay in the final judgment was improper because it did not meet the requirements set forth in KRS 532.032 and KRS 532.033. Because we are vacating Appellant's conviction and remanding for a new trial, this issue is moot. Any errors in the final judgment regarding restitution can be corrected should Appellant be convicted again.

Finally, Appellant argues that the trial court erred in denying his motions for directed verdict at the close of the Commonwealth's case and at the close of the defense's case. Appellant claims the Commonwealth presented no evidence to rebut his claim of self-defense.

On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. 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.

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.

Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991) (citation omitted).

“A reviewing court does not reevaluate the proof because its only function is to consider the decision of the trial judge in light of the proof presented.” *Id.*

“Circumstantial evidence is sufficient to support a criminal conviction as long as the evidence taken as a whole shows that it was not clearly unreasonable for the jury to find guilt.” *Bussell v. Commonwealth*, 882 S.W.2d 111, 114 (Ky. 1994) (citing *Trowel v. Commonwealth*, 550 S.W.2d 530 (Ky. 1977); *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991)).

In the case at hand, we believe that the trial court was correct in denying the motion for directed verdict. Evidence suggested that Appellant did not intend to shoot Mr. Muzic, but that the gun went off accidentally. Also, Mr. Muzic was not armed, so there was still a question as to whether Appellant was in fear of imminent death or serious physical injury. These facts make it reasonable for a jury to find guilt.

For the foregoing reasons, we vacate Appellant's conviction and remand for a new trial.

ALL CONCUR.

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