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Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002269-MR

DARRELL TYRONE LAWSON — APPELLANT

v. — APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE PAUL E. BRADEN, JUDGE
ACTION NO. 00-CR-00115

COMMONWEALTH OF KENTUCKY — APPELLEE

AND — NO. 2004-CA-000286-MR

CURTIS LAWSON — APPELLANT

v. — APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE PAUL E. BRADEN, JUDGE
ACTION NO. 00-CR-00115

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART AND REMANDING

** ** ** ** **

BEFORE: GUIDUGLI, MINTON AND TAYLOR, JUDGES.

GUIDUGLI, JUDGE: Curtis Lawson and Darrell Tyrone Lawson were tried jointly following the death of Curtis's eighteen-month-old child in a single car accident. Both Curtis and Darrell alleged

that the other was the driver of the car at the time of the fatal accident. Following a jury trial, both Curtis and Darrell were found guilty of second-degree manslaughter and sentenced to five years imprisonment. In that we believe the jury instructions were fatally flawed, we reverse both convictions.

Curtis Lawson is Darrell's uncle. On November 8, 2000, they decided to go riding in Curtis's Ford Bronco. They took Curtis's eighteen-month-old son with them. Over the course of several hours, they drove around and stopped and talked with several people. Apparently they were both drinking during this time. Around 8:00 p.m. that night, the car left the road and struck a tree. While neither of the adults was seriously injured, the baby suffered severe head trauma and died.

Testimony relating to the events of that evening varied greatly. Curtis claimed Darrell was driving at the time of the accident and left the scene immediately thereafter. Darrell alleged Curtis was driving and asked Darrell to go get the child's mother after the accident. Darrell stated that Curtis "flagged" down a car and asked the driver to give Darrell a ride. After the accident the baby and Curtis were taken to the hospital in Jellico, Tennessee, where the child was pronounced dead at 10:02 p.m. Curtis was treated for minor injuries and cooperated with the investigation by giving a statement and submitting to a blood alcohol test. The blood

alcohol analysis revealed Curtis had a blood alcohol level of .15. As part of the police investigation, the police went to Darrell's residence and found him to be sleeping. He was then taken to police headquarters for questioning and he submitted to a urine test. The result of his urine analysis revealed an alcohol level of .06 but also showed he had marijuana in his system.

Following the police investigation, the case was submitted to the Whitley County Grand Jury. On December 11, 2000, the grand jury indicted Darrell on the charge of murder alleging that he operated a motor vehicle in a wanton manner which cased the death of Aaron Ray Lawson (Curtis's eighteen-month-old son). The grand jury also returned an indictment against Curtis for criminal complicity to commit murder. The indictment alleged that Curtis had a legal duty to prevent Darrell from driving that night and his failure to act resulted in the death of his son.

Almost a year later, on November 16, 2001, the Commonwealth moved to amend the indictment and switch the charges as to both Curtis and Darrell. The motion alleged that based upon further investigation and upon DNA blood test results, Curtis was the driver at the time of the accident and Darrell was the passenger. Despite Curtis's objection, the case was eventually set for a jury trial on July 29, 2003, with

Curtis facing the wanton murder charge and Darrell being charged with criminal complicity to commit murder. Also, prior to the beginning of the trial, several additional motions were filed by defense counsel to suppress evidence, limit evidence, exclude evidence, and/or dismiss the charges. The motions were denied and the trial proceeded.

At trial, the evidence as to who was driving, Curtis or Darrell, was contradictory. There was no question that the two were together that evening and drinking and driving around with the child in the back seat of the Bronco. But who was actually driving, how the accident occurred, what the injuries each sustained indicated and what Darrell and Curtis had told other people after the accident was greatly contested. Following all the testimony, it appears that the Commonwealth and the court could not clearly decide this issue as can be evidenced by the jury instructions presented to the jury. As to Curtis and Darrell, the court instructed the jury that it could find each of them guilty of wanton murder, complicity to wanton murder, second-degree manslaughter, reckless homicide or criminal facilitation to wanton murder. The jury found both Curtis and Darrell guilty of second-degree manslaughter and recommended a sentence of five years each. The court denied a motion filed by both defendants for a new trial, and following a pre-sentence investigation, entered final judgment and sentence

on September 10, 2003. Each party thereafter filed an appeal and the two appeals have been consolidated by this Court.

On appeal, each party alleges the trial court erred in regards to the jury instructions submitted in the case and each party argues several alleged errors specific to his case. We shall address the jury instruction issue first and the individual claims thereafter only if necessary. The following jury instructions were given as to Curtis after the necessary introduction and definitions:

INSTRUCTION NO. 4

COMPLICITY TO WANTON MURDER

OR MURDER

You will find the Defendant Curtis Lawson guilty of Complicity to Wanton Murder under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

A. That in Whitley County on or about the 8th day of November, 2000 and before the finding of the Indictment, Darrell Tyrone Lawson killed Aaron Ray Lawson by driving a vehicle while he was intoxicated at an excessive rate of speed and/or in a reckless manner such that he lost control of the vehicle causing the death of Aaron Ray Lawson.

B. That in so doing, Darrell Tyrone Lawson was wantonly engaging in conduct which created a grave risk of death to another and thereby caused the death of Aaron Ray

Lawson under circumstances manifesting an extreme indifference to human life.

C. That the defendant, Curtis Lawson, was the father of Aaron Ray Lawson

AND

D. That at the time of Aaron Ray Lawson's death, the Defendant, Curtis Lawson, was acting wantonly or recklessly with respect to the risk that Darrell Tyrone Lawson would inflict death or injury upon Aaron Ray Lawson and failed to make an effort reasonable under the circumstances to protect Aaron Ray Lawson from such harm.

OR

A. That in Whitley County on or bout November 8, 2000, and before the finding of the indictment herein, he killed Aaron Ray Lawson by driving a vehicle while he was intoxicated at an excessive rate of speed and/or in a reckless manner such that he lost control of the vehicle causing the death of Aaron Ray Lawson.

B. That in so doing, he was wantonly engaging in conduct which created a grave risk of death to another and thereby caused the death of Aaron Ray Lawson under circumstances manifesting an extreme indifference to human life.

INSTURCTION NO. 5

SECOND-DEGREE MANSLAUGHTER

If you do not find the Defendant guilty under Instruction No 4, you will find the Defendant guilty of Second-Degree Manslaughter under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

A. That in this county on or about 8th day of November, 2000 and before the findng of the Indictment herein, he killed Aaron Ray Lawson:

AND

B. That in so doing, he was acting wantonly as that term is defined under Instruction No. 3.

INSTRUCTION NO. 6

RECKLESS HOMICIDE

If you do not find the Defendant guilty under Instruction No. 4 or 5, you will find the Defendant guilty of Reckless Homicide under this Instruction if, and only if, you believe from the evidenced beyond a reasonable doubt all of the following:

A. That in this county on or about the 8th day of November, 2000, and before the finding of the Indictment herein, he killed Aaron Ray Lawson by driving a vehicle while he was intoxicated at an excessive rate of speed and/or in a reckless manner such that he lost control of the vehicle;

AND

B. That in so doing, he was acting recklessly as that term is defined in Instruction No. 3.

INSTRUCTION NO. 7

CRIMINAL FACILITATION OF WANTON MURDER

If you do not find the Defendant guilty under Instruction No. 4, 5, or 6, you will find the Defendant guilty of Criminal Facilitation of Wanton Murder under this Instruction, if and only if, you believe from the evidence beyond a reasonable doubt all of the following:

A. That in this county, on or about November 8, 2000, and before the finding of the Indictment herein, he solicited Darrell Tyrone Lawson to drive a 1985 Ford Bronco;

B. That Darrell Tyrone Lawson wantonly intended to drive said vehicle, with the said Darrell Tyrone Lawson being in a drunken state;

C. That when the Defendant Curtis Lawson solicited Darrell Tyrone Lawson to drive said vehicle, the Defendant Curtis Lawson knew or should have known that the said Darrell Tyrone Lawson's drunken state could reasonable result in the death of the victim herein, Aaron Lawson, or some other member of the public;

AND

D. That Darrell Tyrone Lawson thereafter wantonly killed Aaron Lawson by running his vehicle off a public highway.

Darrell's jury instructions were similar with the obvious exception that Darrell's name and actions/duties were inserted where Curtis's was and vice versa. From a quick review of the

instructions, it becomes clear that the court had decided that the jury should determine who was driving the vehicle at the time of the accident and who was the passenger. It is also obvious that under the manslaughter instruction no method of committing the criminal activity was stated. The jury picked up on this. It sent a note to the court asking the following:

> Can we give both defendants second-degree manslaughter[?] Instruction #4 for Darrell Lawson does not specify that he was the driver[.] Instruction #5 for Curtis Lawson does not specify that he was the driver[.]

The court could not answer the inquiry and the jury was instructed it had to rely upon the instructions as given. Ultimately, the jury found both defendants guilty of manslaughter second degree. While we do not fault the jury for reaching its conclusions, we do believe the instruction to be so erroneous as to mandate reversal for each defendant.

By failing to require the jury to make a finding of the specific act or acts engaged in by Curtis and Darrell that form each defendant's criminal culpability, the instructions erroneously permitted the jury to not reach the main issue of this case – who was actually driving the Bronco at the time of the fatal crash. A review of 1 Cooper, Kentucky Instructions to Juries, (Criminal), clearly shows that each sample instruction includes a blank space in which the instructing court is to

supply the method utilized by the defendant to carry out the criminal act. Defining the method of action undertaken by a defendant is essential to insuring that each and every element of a criminal offense is fulfilled as well as assuring that the proper degree of criminal culpability is achieved. In Elliott v. Commonwealth,[1] the Kentucky Supreme Court addressed the homicide statutes and held:

> The penal code defines two degrees of intentional homicide, *viz*: intentional murder and first-degree manslaughter; and three degrees of unintentional homicide, *viz*: wanton murder, second-degree manslaughter and reckless homicide. Each offense requires proof that the defendant committed an act which caused the death at another person. The degree of the offense depends upon the state of mind, or mens rea, of the defendant at the time of the act. Intentional murder requires "an intent to cause the death of another person," KRS 507.020(1)(a); whereas first-degree manslaughter requires either "an intent to cause the death of another person," but while acting under extreme emotional disturbance, KRS 507.030(1)(b), or "an intent to cause serious physical injury to another person," though the act nevertheless caused that person's death. KRS 507.030(1)(a). Second-degree manslaughter requires proof that the defendant "wantonly cause[d] the death of another person." KRS 507.040. Wanton murder requires proof that the defendant "cause[d] the death of another person" by "wantonly engag[ing] in conduct" creating a grave risk of death to another person under circumstances manifesting extreme indifference to human life. KRS 507.020(1)(b). Reckless homicide requires

[1] 976 S.W.2d 416, 418 (Ky. 1998).

> proof that the defendant "with recklessness ... cause[d] the death of another person." KRS 507.050.

Under the amended indictment, Curtis was charged with murder under KRS 507.020. Pursuant to KRS 507.020(1)(b), a person is guilty of murder when:

> (b) Including, but not limited to, the operation of a motor vehicle under circumstances manifesting extreme indifference to human life, he wantonly engages in conduct which creates a grave risk of death to another person and thereby causes the death of another person.

However, a similar and lesser included offense is manslaughter in the second degree, KRS 507.040(10(a), which states:

> (1) A person is guilty of manslaughter in the second degree when he wantonly causes the death of another person, including, but not limited to, situations where the death results from the person's:
>
> (a) Operation of a motor vehicle[.]

The commentary following KRS 507.040 explains the distinction between KRS 507.020 and KRS 507.040 as to a death caused due to the wanton operation of a motor vehicle. It states, in relevant part,

COMMENTARY

KENTUCKY CRIME COMMISSION/LRC

1974:

When KRS 507.040 is read in conjunction with KRS 507.020(1)(b), it is clear that all deaths resulting from wanton conduct must constitute either murder or manslaughter in the second degree. It is also clear that once the elements of wantonness are shown to exist, the choice between the two offenses depends upon whether or not the defendant's conduct manifested "extreme indifference to human life." As indicated in the Commentary to KRA 507.020, this distinguishing standard cannot be cited as an example of linguistic clarity. Yet it is used by most of the modern penal codes and justified as follows:

> Whether [wantonness] is so extreme that it demonstrates similar indifference is not a question that, in our view, can be further clarified; it must be left directly to the trier of the facts. If [wantonness] exists but is not so extreme, the homicide is manslaughter . . . Model Penal Code, § 201.2, Comment 2 (Tent. Draft No. 9, 1959).

KRS 507.050 in conjunction with KRS 501.020 defines the offense of reckless homicide, which cannot exist without the following elements: a substantial and unjustifiable risk that death will occur as a result of the conduct in question; a gross deviation from the standard of conduct that a reasonable person would observe, and a failure by the defendant to perceive the substantial and unjustifiable risk of death. The only distinction between this offense and the one defined by KRS 507.040 (manslaughter in the second degree) is in the defendant's state of mind. For the latter offense he is aware of the risk of death and consciously disregards it; for the former, he is unaware of the risk.

Based upon the preceding commentary, it becomes clear that the conduct of the action is essential to the trier of fact in determining if one is guilty of murder or manslaughter in the second degree. The court in the case before us set forth the conduct alleged of each defendant as to murder, complicity to murder, reckless homicide and facilitation to reckless homicide, but conspicuously omitted any conduct on the part of either defendant as to second-degree manslaughter. This is clear and palpable error. Consequently, both convictions must be reversed.

A more problematic issue is what happens now that Darrell's and Curtis's convictions have been reversed. As to Curtis, we believe the Commonwealth can retry him but only as to manslaughter in the second degree or any lesser offense. However, the more difficult question is can Darrell be retried. Darrell's arguments on appeal as to whether he had a legal duty to the child and as to the jury instructions indirectly touches on this issue. Darrell was charged in the amended indictment with complicity to commit murder. The Commonwealth's motion seeking the amended indictment stated:

> Due to new evidence, the Commonwealth moves the Court to amend the above Indictment as follows:
>
> COUNT I

> On or about the 8th day of November, 2000, in Whitley County, Kentucky, the above-named defendant, DARRELL TYRONE LAWSON, committed the offense of Criminal Complicity To Commit Murder when knowing that he had a legal duty to prevent Curtis Lawson from operating a motor vehicle in a wanton manner in which the infant child, Aaron Ray Lawson, was riding he brought about the circumstances which caused the death of Aaron Ray Lawson.

Obviously under this charge, the Commonwealth was pursuing Curtis as the driver of the Bronco at the time of the accident and Darrell as the passenger. At the conclusion of the trial, there is nothing in the record to indicate the Commonwealth had again amended the indictment to conclude Darrell was operating the vehicle and Curtis was merely the passenger. Despite the contradictory evidence at trial as to who was driving, the court erred by presenting jury instructions which presented a new legal theory of culpability and action on Darrell's part. We believe the court's use of the Commonwealth's proposed jury instruction affected Darrell's substantial rights and resulted in prejudice to him. Once the Commonwealth amended the indictment prior to trial to allege only complicity, it was error to again amend the method of Darrell's criminal action from merely a duty to protect the child to being the principal in causing the murder by his driving the vehicle. Darrell could not reasonably expect the Commonwealth to change its theory a

second time and his defense was not based upon such a theory of criminal behavior.

The court erred in instructing the jury on wanton murder as to Darrell. The instruction as to second-degree manslaughter was a lesser included offense under the erroneous murder instruction. There was no instruction given as to complicity to manslaughter in the second degree or to reckless homicide. Therefore, the question again is whether Darrell can be retried. We do not believe he can be retried. The general rule, sometimes called the implied acquittal theory, states that when the jury returns a verdict finding the defendant guilty of a lesser included offense, this has the effect of acquitting him on the greater charge.[2] Darrell was accused of complicity only. The complicity charge alleged he violated a legal duty to prevent Curtis from operating a motor vehicle in a wanton manner as to cause the death of Aaron. The only jury instructions which presented that theory was the complicity to commit wanton murder. The jury did not find him guilty of that crime. And while second-degree manslaughter is a lesser included offense of wanton murder, it is not a lesser included offense of complicity to commit wanton murder. While we believe the jury instructions could have included an instruction as to complicity to

[2] McGinnis v. Wine, 959 S.W.2d 437 (Ky. 1998). See also, Gunter v. Commonwealth, 576 S.W.2d 518 (Ky. 1979); Klee v. Lair, 621 S.W.2d 892 (Ky. 1981).

manslaughter in the second degree or even reckless homicide, they did not. Thus, there is no lesser included offense for Darrell to be tried on.

In that we have reversed Darrell's conviction and remanded for dismissal, the remaining issues raised by Darrell on appear are moot. Those issues included his motion to sever the trials and arguments that he had no legal duty to the child victim (his cousin) of the accident. While the issue of a legal duty to a child victim is extremely intriguing, it must wait for another day since it is not our position to give advisory opinions.

Curtis also raised several other issues in his appeal. They include his arguments that the trial court erred by amending the indictment on the day of trial, by permitting the introduction of his blood alcohol analysis, by failing to grant a mistrial when Darrell mentioned his offer to take a lie detector test, and as a result of cumulative errors. We have reviewed each of these claims and find no error. The motion to amend Curtis's indictment from complicity to murder was first filed on November 16, 2001. While the court may not have ruled on Curtis's opposition to that motion until the day of the trial, Curtis had notice and prepared for trial on the amended charge. Despite Curtis's arguments to the contrary, his rights

were not substantially prejudiced by the court's ruling on this matter.[3]

Curtis also contends that his blood alcohol analysis should have been suppressed because the test did not comply with the requirements of KRS 189A.010 and KRS 189A.103. While it has been held to be error to instruct a jury on the statutory presumption that applies only to D.U.I. cases (KRS 189A.010), in cases other than D.U.I's, there is no such prohibition on admitting evidence tending to prove alcohol consumption.[4] The fact that Curtis had consumed alcohol beverages prior to the accident and the amount of alcohol in his blood stream is relevant evidence in proving and distinguishing the elements of the crimes of wanton murder and manslaughter in the second degree. As stated In Walden,[5]

> The 1984 Amendment declares legislative intent to include vehicular homicide as *potentially* serious enough to justify a murder conviction, but it does *not* change the essential nature of the elements of the offense. Wanton murder continues to be distinguished from second-degree manslaughter, KRA 507.040, which also punishes "wantonly caus[ing] the death of another person," by the additional element described in the phrase, "under circumstances manifesting extreme

[3] See generally, RCr 6.16; Anderson v. Commonwealth, 63 S.W.3d 135 (Ky. 2002); Robards v. Commonwealth, 419 S.W.2d 570 (Ky. 1967).

[4] See Walden v. Commonwealth, 805 S.W.2d 102 (Ky. 1991), reversed on other grounds.

[5] Id. at 104-05.

> indifference to human life." The 1984 "Slammer Bill" also amended second-degree manslaughter (KRS 507.040) by adding the phrase, "including, but not limited to, the operation of a motor vehicle." The difference between wanton murder and involuntary manslaughter (Manslaughter II) continues to be, as the Penal Code originally intended, whether there is evidence from which the jury could find "circumstances manifesting extreme indifference to human life." Depending on the situation, drunk driving may be such a circumstance.
>
> In *Nichols v. Commonwealth*, Ky., 657 S.W.2d 932 (1983), involving "firing of a pistol into an occupied car," we held that whether the evidence proved wanton murder or second-degree manslaughter was a question of fact, quoting the Model Penal Code, § 201.2 [sic], Comment 2 (Ten.Draft No. 9, 1959), to the effect that whether wantonness is so extreme that it demonstrates such indifference to human life as to qualify as the culpable equivalent of intentional murder "is not a question that, in our view, can be further clarified; it must be left directly to the trier of the facts." 657 S.W.2d at 935. Applying this rule to present circumstances, we hold that here the extreme nature of the appellant's intoxication was sufficient evidence which a jury could infer wantonness so extreme as to manifest extreme indifference to human life. Therefore, we affirm the conviction for wanton murder.

Curtis next argues that a mistrial should have been granted when Darrell mentioned that he had offered to take a lie detector test. Since we have reversed on other grounds, we state that upon retrial, Darrel should be admonished prior to his testimony not to mention his willingness to submit to a

polygraph test. However, it should also be noted that in Phillips v. Commonwealth,[6] the Kentucky Supreme Court held that there "must arise a clear inference that there was a result and that the result was favorable, or some other manner in which the inference could be deemed prejudicial" before a mistrial would be deemed necessary under similar circumstances. And in Tramme v. Commonwealth,[7] it was held that mere utterance of the word "polygraph" is not grounds for reversal. While this situation should not re-occur at another trial, it is clear that the mere inadvertent utterance of the word "polygraph" or "lie detector" is not grounds for reversal.

Finally, we address the issues of whether Darrell and Curtis were entitled to separate trials. Darrell argues that pursuant to RCr 9.16 each defendant should have received separate trials. RCr 9.16 provides, in relevant part:

> If it appears that a defendant or the Commonwealth is or will be prejudiced by a joinder of offenses or of defendants in an indictment, information, complaint or uniform citation or by joinder for trial, the court shall order separate trials of counts, grant separate trials of defendants or provide whatever other relief justice requires.

Under RCr 9.16, the court is required to grant separate trials if a defendant "is or will be prejudiced by

[6] 17 S.W.3d 870, 877 (Ky. 2000) citing McQueen v. Commonwealth, 669 S.W.2d 519 (Ky. 1984).

[7] 973 S.W.2d 13, 33 (Ky. 1998).

joinder for trial."[8] Whether to grant separate trials is primarily within the discretion of the trial judge.[9] A reviewing court will not reverse a conviction for failure to grant separate trials unless it is clearly convinced that prejudice occurred and that the likelihood of prejudice was so clearly demonstrated to the trial judge as to make his failure to grant severance an abuse of discretion.[10]

Neither antagonistic defenses nor the fact that the evidence for or against one defendant incriminates the other amounts, by itself, to unfair prejudice.[11] In Phillips, supra, at 876, citing Ware, supra, the Court held:

> Phillip's claim of entitlement to a separate trial is premised upon the fact that Johnson accused him of being the first to shoot and his perception that he was thus being prosecuted by both the Commonwealth's attorney and Johnson's attorney. Suffice it to say that:
>
> > [N]either antagonistic defenses nor the fact that the evidence for or against one defendant incriminates the other amounts, by itself, to unfair prejudice. . . . That different defendants alleged to have been involved in the same transaction have conflicting versions of what took place, or the extent to which they

[8] Hoskins v. Commonwealth, 374 S.W.2d 839 (Ky. 1964).

[9] Slone v. Commonwealth, 677 S.W.2d 894 (Ky. 1984).

[10] Wilson v. Commonwealth, 836 S.W.2d 872 (Ky. 1992).

[11] Ware v. Commonwealth, 537 S.W.2d 174 (Ky. 1976).

> participated in it, vel non, is a reason for rather than against a joint trial. If one is lying, it is easier for the truth to be determined if all are required to be tried together.

The trial judge did not abuse its discretion by deciding to try Curtis and Darrell together. The analysis in Ware applies because, while both defendants admit to being in the vehicle at the time of the accident, both defendants also deny driving the vehicle at the time of the crash. At trial, Curtis and Darrell maintained their conflicting versions of what took place on the night of the accident. In order for the truth to be determined, it was appropriate for both defendants to be tried together.

For the foregoing reasons, the final judgments entered by the Whitley Circuit Court against Curtis Lawson and Darrell Tyrone Lawson are affirmed in part, and reversed in part and remanded for further proceedings consistent with this opinion.

TAYLOR, JUDGE, CONCURS IN RESULT ONLY.

MINTON, JUDGE, CONCURS IN RESULT ONLY AND FILES SEPARATE OPINION.

MINTON, JUDGE, CONCURRING IN RESULT ONLY: I agree with the result reached by the majority in these appeals. But I write separately because I would reach the results in a different way, especially as to Darrell.

As to Curtis, it appears to me that even though the last-minute addition of a complicity charge against him was improper, that error ultimately proved to be harmless as he was acquitted of all complicity-related charges.[12] Rather, the reversible error as to Curtis lies in the instruction for second-degree manslaughter. That instruction improperly omits the required factual finding as to the method by which Curtis allegedly caused the death of the victim.[13] So I concur with the majority's conclusion that Curtis's conviction must be reversed for an instructional error and that he is, on remand, subject to retrial for second-degree manslaughter and any appropriate lesser-included offenses.

And I agree with the majority's ultimate conclusion regarding Darrell's conviction, but for an entirely different reason. As a prefatory note, I also agree with the majority that the last-minute addition of principal actor charges, such as wanton murder, against Darrell was improper and merits reversal. But unlike the majority, I believe that Darrell may

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[12] *See, e.g.,* Skinner v. Commonwealth, 864 S.W.2d 290 (Ky. 1993) (holding that a defendant is not prejudiced by the giving of an erroneous instruction not used by the jury in finding a conviction).

[13] Justice Cooper's instruction manual clearly provides that the method used to cause death is an element of a second-degree manslaughter instruction. *See* 1 COOPER, *KENTUCKY INSTRUCTIONS TO JURIES* (CRIMINAL) § 3.28. Curiously, the trial court did provide the method by which the victim was killed in the wanton murder instruction, which immediately preceded the second-degree manslaughter instruction.

not be retried on complicity charges because he had no legal duty toward the victim, who was his first cousin.

Complicity under these facts is governed by KRS 502.020. Subsection one of that statute provides, in relevant part, as follows: "A person is guilty of an offense committed by another person when, with the intention of promoting or facilitating the commission of the offense, he: . . . (c) [h]aving a legal duty to prevent the commission of the offense, fails to make a proper effort to do so." Under the Commonwealth's theory of the case, Darrell was liable for complicity to Curtis's wanton murder because Darrell failed in his legal duty to prevent Curtis from driving while intoxicated. The Commonwealth's appellate brief does not, unfortunately, address this argument. So I will discuss the arguments made by the Commonwealth's Attorney to the trial court.

First, the Commonwealth argued that KRS 620.010 supported complicity charges against Darrell. But KRS 620.010 stands for the position that children have the right to be free from physical or sexual injury.[14] This is an admirable position with which no one could rationally disagree. But the plain

[14] KRS 620.010 is a statement of legislative purpose underlying the statutes dealing with neglect and abuse of children. The portion of the statute relied upon by the Commonwealth below is as follows: "Children have certain fundamental rights which must be protected and preserved, including but not limited to, the rights to adequate food, clothing and shelter; the right to be free from physical, sexual or emotional injury or exploitation . . . ."

language of KRS 620.010 imposes no duty of care toward the victim on Darrell or, for that matter, anyone else.

In addition, the Commonwealth's reliance below upon KRS 620.030 is misplaced. Subsection one of that statute states that "[a]ny person who knows or has reasonable cause to believe that a child is dependent, neglected or abused shall immediately cause an oral or written report to be made to a local law enforcement agency or the Kentucky State Police[.]" Under that statute, it has been held that a parent has a legal duty to prevent intentional physical injury to his or her child.[15] The case at hand, however, does not involve intentional injury to the victim. Furthermore, the Commonwealth has not cited, nor have we independently located, any authority extending the legal duty toward a child to anyone beyond those situations identified in West v. Commonwealth.[16] As noted by Darrell, the extension of the legal duty doctrine proposed by the Commonwealth's Attorney is limitless. The law simply has not imposed criminal liability for omissions to act so broadly.

In order to avoid such a problematic result, I believe that Darrell, as a matter of law, was improperly charged with

[15] Lane v. Commonwealth, 956 S.W.2d 874, 875 (Ky. 1997) ("In view of the expressed statement of legislative intent of Chapter 620, we hold that KRS 620.010 creates an affirmative duty for the parent of a child to prevent such physical injury which would result in an assault on that child.") (Plurality opinion of three justices).

[16] 935 S.W.2d 315, 317 (Ky.App. 1996).

complicity in the tragic death of Curtis's child in the first place.[17] So the trial court erred by not directing a verdict of acquittal on the complicity charges against Darrell at the close of the Commonwealth's case, meaning that Darrell is not subject to retrial on those charges.

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[17] The absence of a legal duty does not mean that Darrell owed no moral duty toward the victim. Rather, it means only that Darrell cannot be held criminally liable for failing to prevent the child's death.