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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002194-MR

MICHAEL LEE WILSON — APPELLANT

v.

APPEAL FROM ROBERTSON CIRCUIT COURT
HONORABLE ROBERT W. MCGINNIS, JUDGE
ACTION NO. 05-CR-00002

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON AND STUMBO, JUDGES; BUCKINGHAM,[1] SENIOR JUDGE.

STUMBO, JUDGE: Michael Wilson (Appellant) appeals his conviction of one count first-degree wanton assault and one merged count of first-degree wanton endangerment. He was sentenced to ten years in prison and he now appeals. Appellant argues that the trial court erred by not accepting his tendered jury

[1] Senior Judge David W. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

instructions for self-defense, extreme emotional disturbance (EED), voluntary intoxication, and fourth-degree assault. The Commonwealth argues that this issue was not properly preserved for appellate review or, in the alternative, that the trial court properly denied these instructions. We find that this issue was properly preserved for appellate review, but that they were properly denied by the trial court. Accordingly, we affirm the conviction.

The parties dispute the facts of the case, but it appears that Appellant came to the house of Austin Scroggins on the night of November 8, 2004. Both men were apparently drunk and got into some kind of argument or altercation. Appellant claims Mr. Scroggins put a gun to his head and threatened him. Mr. Scroggins denied this allegation and claims that they merely argued. Eventually Mr. Scroggins went back into his house and Appellant drove off. Stopping about 200 yards from the house, Appellant got out of his truck and fired two shots from a hunting rifle at Mr. Scroggins' house. Appellant claims he did this because Mr. Scroggins had pulled the gun on him and he was afraid Mr. Scroggins would follow him back home and harm him.

One bullet passed harmlessly through the house and the other struck Mr. Scroggins' leg, shattering his femur. Appellant was arrested and charged with first-degree assault and five counts of first-degree wanton endangerment (there were five people in the house when the bullet went through). These five counts were later merged into one count.

As stated above, Appellant tendered instructions regarding self-defense, extreme emotional disturbance (EED), voluntary intoxication, and fourth-degree assault, which the court rejected. He now argues that the court should have accepted his instructions.

> Our law requires the court to give instructions "applicable to every state of case covered by the indictment and deducible from or supported to any extent by the testimony." *Lee v. Commonwealth,* Ky., 329 S.W.2d 57, 60 (1959). It is irrelevant that the evidence from the parties does not indicate the need for a particular instruction. The determination of what issues to submit to the jury should be made based upon the totality of the evidence. *Rice v. Commonwealth,* Ky., 472 S.W.2d 512 (1971).

Reed v. Commonwealth, 738 S.W.2d 818, 822 (Ky. 1987).

> *Reed, supra,* does not mean, however, that in every case the defendant is entitled to an instruction on a lesser included offense, a non-lesser included misdemeanor offense or such defenses as self-protection or mitigating defenses. There must be *some evidence* or as stated in *Reed, supra,* the requested instruction must be supported ". . . to any extent by the testimony. . . ." (Emphasis in original).

Commonwealth v. Collins, 821 S.W.2d 488, 491 (Ky. 1991).

The Commonwealth contends that this issue was not preserved for appellate review. We disagree. RCr 9.54(2) reads:

> No party shall assign as error the giving or failure to give an instruction unless the party's position has been fairly and adequately presented to the trial judge by an offered instruction or by motion, or unless the party makes objection before the court instructs the jury, stating specifically the matter to which the party objects and the grounds of the objection.

The Kentucky Supreme Court has interpreted this to mean that:

> [a]ny party may tender instructions, but no party may assign as error the failure to give an instruction unless he makes specific objection to the failure to give the instruction before the court instructs the jury, stating specifically the matter to which he objects and the ground or grounds of his objections.

Evans v. Commonwealth, 702 S.W.2d 424, 424 (Ky. 1986). This holding was reiterated by the case of *Commonwealth v. Collins*, 821 S.W.2d 488, 492 (Ky. 1991). However, these cases were rendered when the wording of RCr 9.54(2) was drastically different. From 1985 to 1993, RCr 9.54(2) stated:

> Any party may tender instructions but no party may assign as error the giving or the failure to give an instruction unless he makes specific objection to the giving or the failure to give an instruction before the court instructs the jury, stating specifically the matter to which he objects and the ground or grounds of his objection.

Here, Appellant tendered his instructions, but did not specify his objections to the trial court. This is not fatal to his appeal under the current incarnation of RCr 9.54(2). The case of *Pollini v. Commonwealth*, 172 S.W.3d 418, 428 (Ky. 2005), finds that "[f]or adequate preservation of exceptions to jury instructions, the Kentucky Rules of Criminal Procedure require evidence on the record of either (1) a specific objection or (2) the tendering of an instruction in such a manner which presents the party's position 'fairly and adequately' to the trial judge." There is no evidence in the record to show Appellant specifically

objected to the jury instructions given, but we find that he fairly and adequately presented his position to the court.

His entire defense revolved around self-defense, voluntary intoxication, EED, and fourth-degree assault. Self-defense because he believed Mr. Scroggins might follow him home; voluntary intoxication because he testified he was severely intoxicated; EED because he was frightened when Mr. Scroggins allegedly held a gun to his head; and fourth-degree assault because he argued his actions were more reckless than wanton. These instructions were narrowly tailored and specifically geared toward the arguments he presented during his defense. We find that his submission of these instructions with the evidence presented in support of these arguments was enough to fairly and adequately present his position to the court.

Although we find that he preserved this issue for our review, after a careful review of the evidence presented at trial, we cannot say the failure to give the requested instructions was in error. A trial judge has no duty to give an instruction "on a theory with no evidentiary foundation." *Houston v. Commonwealth*, 975 S.W.2d 925, 929 (Ky. 1998).

A defendant is entitled to use justifiable physical force to protect himself against "the use or imminent use" of unlawful force. KRS 503.050. Here, when Appellant used force against Mr. Scroggins, Appellant was either 200 feet or 200 yards away and Mr. Scroggins was inside his house. There was no force currently being used or imminently about to be used on Appellant. It was

reasonable for the trial judge to determine there was no evidence to support this instruction.

As for the instruction of voluntary intoxication, "[v]oluntary intoxication does not negate culpability for a crime requiring a culpable mental state of wantonness or recklessness. . . ." *McGuire v. Commonwealth*, 885 S.W.2d 931, 934 (Ky. 1994). Here, Appellant was charged with wanton assault and wanton endangerment. The instruction requested did not fit the mental state of the crimes with which Appellant was charged.

EED is also a defense against crimes which are specifically intended. It has no application to crimes that use wanton as the applicable mental state. *See Todd v. Commonwealth*, 716 S.W.2d 242 (Ky. 1986) (where EED could not be used as a defense for wanton murder because it affects one's specific intent).

Finally, not giving an instruction for fourth-degree assault was not in error.

> An instruction on Fourth-Degree Assault should be given as a lesser included offense, if (1) a dangerous instrument was not used; and (2) there is reasonable doubt as to whether the degree of the defendant's wantonness reached the level described in this instruction, or only that contained in the definition of "wantonly" in KRS 501.020(3); or (3) there is a reasonable doubt whether the victim sustained a serious physical injury or a physical injury.

1 Cooper, Kentucky Instructions to Juries (Criminal) § 3.34. Here, a dangerous instrument was used, Appellant's hunting rifle, and there is no reasonable doubt that the victim sustained serious physical injury.

KRS 500.080(15) defines serious physical injury as "physical injury which creates a substantial risk of death, or which causes serious and prolonged disfigurement, prolonged impairment of health, or prolonged loss or impairment of the function of any bodily organ." Mr. Scroggins' femur was shattered which required two surgeries and the implantation of a titanium rod into his leg. According to *Parson v. Commonwealth*, 144 S.W.3d 775, 787 (Ky. 2004), prolonged pain is an impairment of health under KRS 500.080(15). Mr. Scroggins was not allowed to walk for over two months and for the first month he stated he was in "agonizing pain." He also testified at trial, almost a year and a half after he was shot, that he still had pain in his leg, that he limped, and that he could not stand for more than four hours at a time.

We therefore hold that while Appellant's arguments were preserved for appellate review, there was no evidence to warrant the inclusion of these four instructions. Accordingly we affirm.

ALL CONCUR.

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