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Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001951-MR

RONNIE YADEN

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NOS. 14-CR-00512

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: J. LAMBERT, MAZE, AND TAYLOR, JUDGES.

J. LAMBERT, JUDGE: Ronnie Yaden has directly appealed from the December 1, 2014, judgment of the Kenton Circuit Court convicting him of second-degree wanton endangerment and second-degree criminal mischief, and sentencing him to nine months in jail and a \$500.00 fine. Yaden contends that the trial court improperly instructed the jury on the wanton endangerment charge and that a

witness for the Commonwealth was improperly called as a fact witness rather than an expert witness in support of the criminal mischief charge. We have closely reviewed the record and the parties' arguments in their briefs, and finding no error or abuse of discretion, we affirm the judgment.

In June 2014, the Kenton County grand jury returned a three-count Class D felony indictment against Yaden as a result of an altercation at his residence on April 9, 2014, between himself and Chris Jefferson, the boyfriend of Don Krauss, who lived in Yaden's basement apartment. Yaden was charged with two counts of first-degree wanton endangerment pursuant to Kentucky Revised Statutes (KRS) 508.060 and one count of first-degree criminal mischief pursuant to KRS 512.020.

The matter proceeded to a jury trial on November 18 and 21, 2014, and several witnesses testified about the events of April 8 and 9, 2014.

Yaden testified that he worked as a welder for a ventilating company and had lived in his house on Valeside Drive since 2005. At the time of the trial, he had known Don for fifteen years, but they were no longer friends. Don had a separate entrance to his basement apartment. Yaden knew Chris through Don, and he said that Chris was not allowed in his house because Chris and Don fought too much.

Regarding the events of April 9, 2014, Yaden testified that he had been drinking since the prior evening, but he was not incoherent. Jimmy Williams was also at his house on the evening of April 8 leading up to the altercation.

Yaden said that Don came upstairs a few times to hang out with them. After picking up Chris from work and returning home, Don went upstairs to Yaden's kitchen while Chris was in the basement. Yaden left Don and Jimmy alone in the kitchen while he went to the hot tub for ten minutes. When he returned, he saw Jimmy performing a sexual act on Don. Apparently blaming Yaden for what happened, Chris hit Yaden on the head with the side of a hammer, knocking him to the ground.

As a result, Yaden retrieved a .38 caliber gun from his bedside table and went to the front door. He said he was afraid for his life and thought he needed to defend himself and use deadly force. Yaden walked out the front door and saw Chris approaching him. Yaden raised the gun, fired into the air, and said "be gone." Chris took off running. Yaden denied pointing the gun at Chris or shooting at him, the car, or a house, and he denied chasing after Chris or firing another shot. Yaden then put the gun in the hall closet and went back downstairs. He saw that the garage door was open and went outside to close it. When he got back outside, Chris and Don began throwing landscaping rocks at him in the driveway. Yaden grabbed an axe and tried to hit Chris to get him off of him. He believed he needed to use deadly force. He did not hit Chris with the axe, but hit the windshield of the Jeep. Chris ran away, and Yaden shut the garage door. Yaden denied telling Chris that he was going to kill him and that he had shot a gun at Chris or the Jeep. He testified that he had been defending himself. When the

police arrived, Yaden reported that he was the victim and had been hit in the head with a hammer. He was upset with the way the police were treating him.

Chris Jefferson was the victim in this case. He recounted the events leading up to and during the altercation, which began after Don picked him up from work at 1:00 a.m. and took him back to Yaden's house. Don was driving Chris's grandmother's 2006 Jeep Liberty, and he parked it in Yaden's driveway in front of the shed. The altercation began after Chris discovered Don, Yaden, and Jimmy involved in a sexual encounter in Yaden's kitchen. Chris began to leave, and he and Yaden punched each other outside by the Jeep. Chris could not find his keys and got into the passenger side. Yaden began hitting the driver's side window with a rock, breaking the window. Yaden then dropped the rock outside and grabbed Chris inside of the car by his shoulder. Don tried to get Yaden off of Chris. After Yaden grabbed Chris's shoulder, Yaden threw the rock through the passenger window on the driver's side, shattering that window as well. Chris got out to look for his key on the ground when Yaden went inside. Yaden came back outside with a gun and said he wanted to kill Chris. Chris ran up the road away from the house, thinking that Yaden was going to shoot him. When he got to the second or third house, Chris stopped and turned around toward Yaden's house. He heard a gunshot. Chris stayed there for a few minutes before he went back to his Jeep where he saw Don but not Yaden. Chris went inside to look for his keys with Don's permission, but he could not find them.

When Chris came back outside, he saw Yaden hitting the front windshield of the Jeep with an axe. Yaden then began chasing Chris around his truck in the garage. Yaden did not get close enough to hit him with the axe. Chris ran outside and up the hill to another street. He stopped when he saw a police officer. The officer asked him who had the gun, and Chris told him that Yaden did. Chris went back toward the house, and everyone was placed in handcuffs. The police performed a gunshot residue test on Yaden's hand. The police removed Chris's handcuffs and asked him if he wanted to complete a report, which he did. Only Yaden was arrested that night. Chris went on to testify that the next day, he discovered a hole in the shirt he had been wearing that night as well as an injury on his body that he believed were from a bullet graze. On cross-examination, Chris testified about prior fights between him and Don.

Don Krauss testified that he had known Yaden for fourteen years and used to live in the basement apartment of his house. He testified that he is still in a relationship with Chris and had been, on and off, for about six years. Don was 56 years old at the time of the trial and he had been out of work since he was injured on the job in December 2012. Don testified that he and Chris had permission from Yaden to go back and forth between the basement and main part of the house when Yaden was home and the connecting door was unlocked. However, Yaden apparently did not approve of his relationship with Chris.

Regarding the events of April 8 and 9, 2014, Don confirmed that he took Chris to work and picked him up at the end of his shift in the Jeep Liberty.

While waiting for Chris to complete his shift, Don watched television, played on the computer, and drank beer. Yaden came downstairs multiple times to try to get Don to drink. Don left at 12:30 a.m. to pick up Chris, and they returned to his apartment. Chris took a shower while Don went upstairs where he found Yaden and Jimmy. "One thing led to another" and Jimmy got up from the chair, got on his knees in front of him, yanked his pants down, and started to perform oral sex on Don. At that point, Chris opened the door and saw what was going on. Chris went back downstairs, got his keys, and put his clothes in the Jeep. Don stayed upstairs. Less than a minute later, Don heard Chris yell, "Let me go, Ronnie." Don jumped up, ran out of the apartment, and saw Chris and Yaden in the driveway. Yaden had Chris in a headlock. Don yelled at Yaden to let Chris go. Chris punched Yaden in the face, and Yaden let him go. Yaden swung back at Chris but missed. Don testified that Chris did not use a hammer and that no weapon was involved at that point. Yaden was bleeding from nose and eye area.

Next, Don saw Yaden walk over to the rock wall on the driveway, pick up a loose rock, and throw it through the driver's side front door window of the Jeep. He then got another rock and threw it through the passenger door window on the driver's side. Yaden went into the house and came out with a gun. Yaden went to the Jeep, put his hand through the driver's side passenger door window, and fired the gun through the back stationary window on the passenger side. By that time, Chris had come around on the sidewalk, and Yaden saw him. Don told Chris to leave, and Chris went around the corner to a neighbor's house.

Don testified that Yaden said he was going to kill Chris. Don grabbed Yaden's hand to the side as he pulled the trigger and the gun went off. Yaden then went back into house and into the garage. Yaden emerged with a fire axe, which he used to hit the Jeep's windshield. Don tried to stop Yaden from doing this. Don testified that Yaden did not fire the gun into the ground or the air.

Don went on to testify about the damage to the shirt Chris was wearing that night, which he attributed to the graze from the bullet that was shot when Don pulled Yaden's arm. He also testified about past fights he and Chris had engaged in.

Fifteen-year-old Denzel Hamm lived on the same street as Yaden and witnessed the incident. He testified that he was in his bedroom when he heard people smashing things outside. He went downstairs, locked the doors, and went back to his room. A short time later, he heard people yelling at each other outside of his bedroom window and saw the silhouette of a person when he peeked through his blinds. He also heard one gunshot near his house. At that point, he ran downstairs to wake up his mother to tell her about fighting in yard and hearing the gunshot. His mother called the police. Denzel testified that he was scared to go outside because he thought it was unsafe.

Officer Kyle Warner is a patrol officer for the City of Covington, and he along with other officers investigated the incident. He believed there were two gunshots because he heard a shot as they arrived and another gunshot was reported in the dispatch tape. He testified Chris came running up to him, and Officer Fulton

detained Chris and stayed with him to get more information. Officer Warner saw Yaden and Don in the garage having a heated discussion, and he called them both out of the garage. They did not comply well with his order to hold up their hands and get on the ground. He said Yaden was being defiant and belligerent. Officer Fulton detained Yaden, whose face was bleeding from a cut above the right eyebrow. Both Yaden and Don were handcuffed. Officer Warner entered the house with Officer Fulton, and they found Williams in the living room. They took him out the front door. The officers took photographs of Yaden's house and recovered evidence, including a gun in a closet and ammunition in Yaden's bedroom dresser. They also inspected the driveway. Yaden reported that he had been hit with a hammer, but a hammer was not recovered. Officers did find an axe in the garage and a damaged Jeep Liberty. Officer Fulton arrested Yaden, the only person arrested that night.

Officer Jesse Wenning is also a patrol officer with the Covington Police Department. He responded to the dispute and a report of shots fired. Two officers were on the scene when he arrived, and he saw that two intoxicated men had been detained. Officer Wenning stayed outside with the two men while the other officers went inside to determine whether the shooter was in the house. He described Yaden as upset and uncooperative and said that Yaden needed help. Officer Wenning also took photographs of the entire scene that night. He did not photograph a hammer, but he did photograph a .22 caliber shell casing on the hood of the car. He said it looked like it had been there for some time. He was not in

charge of collecting evidence that night, and he later confirmed that a .38 caliber gun had been used during the incident.

During the course of the trial, the court directed a verdict of acquittal on one of the wanton endangerment counts. Once both parties had rested, the trial court instructed the jury on self-protection and wanton or reckless mistaken belief in the need to use self-defense, and permitted it to return verdicts of first- or second-degree wanton endangerment or menacing for firing the gun, and on first-, second-, or third-degree criminal mischief for damaging the Jeep Liberty.

Following deliberations, the jury returned a verdict of guilty on the lesser-included charges of second-degree wanton endangerment under Instruction No. 7 and second-degree criminal mischief under Instruction No. 10. The jury fixed Yaden's punishment on the wanton endangerment conviction at nine months in the county jail and a \$500.00 fine and on the criminal mischief conviction at a \$500.00 fine. The trial court entered a final judgment on December 1, 2014, sentencing Yaden in accordance with the jury's recommendation. The court granted him work release privileges during his time in jail and ordered him to pay a \$2,000.00 public defender fee. This appeal now follows.

On appeal, Yaden raises two arguments related to jury instructions and the admission of testimony from the insurance adjuster. The Commonwealth contends that the trial court did not commit any error or abuse its discretion.

Yaden's first argument addresses whether the trial court properly instructed the jury on mistaken belief in the need to act in self-defense. The parties

argued this issue extensively during the trial. Yaden argued below that pursuant to *Hager v. Commonwealth*, 41 S.W.3d 828 (Ky. 2001) holding modified by *Elery v. Commonwealth*, 368 S.W.3d 78 (Ky. 2012), the trial court should have instructed the jury that if it found that he had acted recklessly in his mistaken belief that he needed to use deadly force to protect himself, it should have returned a verdict of not guilty because a person cannot be recklessly wanton. “Alleged errors regarding jury instructions are considered questions of law that we examine under a *de novo* standard of review. Instructions must be based upon the evidence and they must properly and intelligibly state the law.” *Hamilton v. CSX Transp., Inc.*, 208 S.W.3d 272, 275 (Ky. App. 2006) (internal citations and quotation marks omitted).

In the present case, the trial court provided the jury with several alternative instructions related to the wanton endangerment charge. Along with finding Yaden not guilty, the court instructed the jury that it could find him guilty of first-degree wanton endangerment under Instruction No. 6; of second-degree wanton endangerment (mistaken belief in the right of self-protection), also under Instruction No. 6; of second-degree wanton endangerment under Instruction No. 7; or of menacing under Instruction No. 8. The court included the imperfect self-protection language under Instruction No. 6, which permitted the jury to return a verdict of first-degree wanton endangerment if it found that Yaden was not privileged to act in self-protection or second-degree wanton endangerment if he had a mistaken belief in self-protection that was wantonly or recklessly held. The

jury ultimately convicted Yaden of second-degree wanton endangerment under Instruction No. 7.

In KRS 503.050(1), the General Assembly provided for the defense of self-protection: “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.” KRS 503.120(1), in turn, addresses mistaken or imperfect self-defense:

When the defendant believes that the use of force upon or toward the person of another is necessary for any of the purposes for which such belief would establish a justification under KRS 503.050 to 503.110 but the defendant is wanton or reckless in believing the use of any force, or the degree of force used, to be necessary or in acquiring or failing to acquire any knowledge or belief which is material to the justifiability of his use of force, the justification afforded by those sections is unavailable in a prosecution for an offense for which wantonness or recklessness, as the case may be, suffices to establish culpability.

In *Hager*, the Supreme Court addressed the application of KRS 503.120 in a homicide case, stating, “[w]e note at the outset that a mistaken belief in the need to act in self-protection does not affect the privilege to act in self-protection unless the mistaken belief is so unreasonably held as to rise to the level of wantonness or recklessness with respect to the circumstance then being encountered by the defendant.” *Hager*, 41 S.W.3d at 841, citing *Elliott v. Commonwealth*, 976 S.W.2d 416, 420 (Ky. 1998). The Court went on to hold:

Thus, while a wantonly held belief in the need to act in self-protection is a defense to an offense having the

mens rea element of intent, it supplies the element of wantonness necessary to convict of second-degree manslaughter; and while a recklessly held belief in the need to act in self-protection is a defense to an offense requiring either intent or wantonness, it supplies the element of recklessness necessary to convict of reckless homicide.

Id. at 842. In addition, the Court outlined “how an act committed under a mistaken belief in the need to act in self-protection affects the various degrees of homicide[.]” *Id.* at 843. When a belief was recklessly held, the Court stated:

1. *Intentional murder or first-degree manslaughter.*

.....

c. Reckless belief = reckless homicide, because it constitutes a defense to intentional conduct, the mens rea element of both intentional murder and first-degree manslaughter, and to wantonness, the mens rea element of second-degree manslaughter, but is unavailable as a defense to recklessness, the mens rea element of reckless homicide.

2. *Wanton murder.*

.....

c. Reckless belief = reckless homicide, because it negates the element of “extreme indifference to the value of human life” necessary to convict of wanton murder, and constitutes a defense to wantonness, the mens rea element of second-degree manslaughter, but is unavailable as a defense to recklessness, the mens rea element of reckless homicide.

3. *Second-degree manslaughter.*

.....

c. Reckless belief = reckless homicide, because it constitutes a defense to wantonness, the mens rea element of second-degree manslaughter, but is unavailable as a defense to recklessness, the mens rea element of reckless homicide.

4. *Reckless homicide.*

.....

b. Wanton or reckless belief = reckless homicide, because a wanton belief could not elevate an offense with a mens rea element of recklessness to a higher offense, *i.e.* second-degree manslaughter, and a reckless belief makes self-protection unavailable as a defense to recklessness, the mens rea element of reckless homicide.

Id at 843-44. As set forth in the outline, the Supreme Court instructed that the end result for a recklessly held mistaken belief in the need for self-protection for each situation is reckless homicide.

The gist of Yaden's argument on this issue is that the court should have instructed the jury to acquit if it found that his mistaken belief in the need for self-protection was recklessly held under Instruction No. 6 because Kentucky law does not recognize "reckless endangerment" as a crime. While we do believe that this argument has merit, the fact of the matter is that the jury did not convict Yaden of second-degree wanton endangerment based on a wantonly or recklessly held mistaken belief in the right to self-protection under Instruction No. 6. Rather, the jury convicted him of second-degree wanton endangerment under Instruction No. 7, which did not include this language. In doing so, the jury rejected Yaden's

claim that he was acting in self-defense and therefore never reached the question of whether his claimed belief was a mistaken one.

Accordingly, even if we were to find that the trial court erred in instructing the jury, we must hold that this is harmless error based on the circumstances of this case and the jury's finding that Yaden was not acting in self-protection. *See* Kentucky Rules of Criminal Procedure (RCr) 9.24.

For his second argument, Yaden seeks review of the trial court's decision to permit the Commonwealth to call insurance adjuster Brent Dammeyer to testify about his estimation of the amount of damage to the Jeep to support the criminal mischief charge. Yaden contends that the Commonwealth improperly called him as a fact witness rather than as an expert witness and that the trial court abused its discretion in permitting him to testify because the Commonwealth had not provided proper notice pursuant to RCr 7.24(1)(c). We shall review the trial court's ruling for abuse of discretion. *Wiley v. Commonwealth*, 348 S.W.3d 570, 580 (Ky. 2010).

RCr 7.24 provides for discovery and the inspection of records in criminal cases. Specifically relating to this case, RCr 7.24(1)(c) mandates:

[U]pon written request by the defense, the attorney for the Commonwealth shall furnish to the defendant a written summary of any expert testimony that the Commonwealth intends to introduce at trial. This summary must identify the witness and describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications.

Yaden made such a request in this case. RCr 7.24(9) provides for penalties for a party's failure to comply with the rule:

If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or an order issued pursuant thereto, the court may direct such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as may be just under the circumstances.

Yaden's counsel raised the Commonwealth's failure to provide the necessary notification when it called Mr. Dammeyer to the stand. Yaden asserted that his testimony would be based on specialized knowledge and thus would be considered expert testimony, subject to application of the rule. The trial court permitted him to testify, noting that this was not "brain surgery."

Kentucky Rules of Evidence (KRE) 702 provides for expert testimony:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if:

- (1) The testimony is based upon sufficient facts or data;
- (2) The testimony is the product of reliable principles and methods; and
- (3) The witness has applied the principles and methods reliably to the facts of the case.

KRE 701 provides for opinion testimony by a lay witness with certain limitations:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are:

- (a) Rationally based on the perception of the witness;
- (b) Helpful to a clear understanding of the witness' testimony or the determination of a fact in issue; and
- (c) Not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Over Yaden's objection, Mr. Dammeyer testified that he is an auto damage appraiser for State Auto Insurance Companies and that he prepared an estimate to repair the damage to policy-holder Joann Jefferson's Jeep Liberty. Based on his calculations, the total cost of the repairs was \$1771.77, without allowing for the deductible and parts allowance. The estimate did not include the cost of replacing the broken windows. Mr. Dammeyer said that he used numbers provided by the manufacturer in order to reach his estimate. He specifically stated that he required specialized knowledge to do his job, including using the computer program provided by the manufacturer to determine parts and labor costs. He admitted that his estimate was based on his specialized knowledge, training, and experience.

Based upon his testimony, it appears to this Court that Mr. Dammeyer was providing expert testimony related to his estimate of the damage to the Jeep. Therefore, the Commonwealth should have provided the necessary notice pursuant to RCr 7.24(1)(c). However, RCr 7.24(9) provides the trial court with the discretion to prohibit the introduction of such testimony. Here, we cannot hold that the trial court abused its discretion in permitting Mr. Dammeyer to testify as to his

estimate. As the trial court stated during trial, this was not “brain surgery,” and Yaden was able to effectively cross-examine him. We note that the jury opted to convict Yaden of second-degree criminal mischief, which requires a finding of damage in excess of \$500.00, rather than of first-degree criminal mischief, which requires a finding of damage in excess of \$1,000.00. Accordingly, we do not find any abuse of the trial court’s discretion in permitting Mr. Dammeyer to testify.

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

MAZE, JUDGE, CONCURS.

TAYLOR, JUDGE, CONCURS IN RESULT ONLY.

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