

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2001-CA-000759-MR

JOSHUA E. SPIVEY

APPELLANT

v. APPEAL FROM MADISON CIRCUIT COURT  
HONORABLE WILLIAM T. JENNINGS, JUDGE  
ACTION NO. 00-CR-00086

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING IN PART - REVERSING IN PART AND REMANDING

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BEFORE: COMBS, GUIDUGLI AND SCHRODER, JUDGES.

GUIDUGLI, JUDGE. Joshua Spivey ("Spivey") appeals from a final judgment of the Madison Circuit Court reflecting a jury verdict convicting Spivey of one count of assault under extreme emotional disturbance. We affirm in part, reverse in part and remand.

On September 21, 2000, a Madison County grand jury indicted Spivey on one count each of second-degree assault and

fourth-degree assault. The indictment arose from an incident occurring on July 4, 2000, in which Spivey shot Joe Green ("Green") and Ricky Adams ("Adams") with a rifle at Spivey's residence. When Adams failed to appear for trial, despite having been subpoenaed, the fourth-degree assault charge was dismissed.

The matter proceeded to trial in February, 2001, wherein Spivey admitted shooting Green but maintained that he acted in self-defense. The jury heard recorded telephone messages in which Green threatened to kill Spivey. Shortly after receiving the messages, Green came to Spivey's residence and Spivey shot him. Upon considering the evidence, the jury was instructed on second-degree assault, self-protection, protection of another, and assault under extreme emotional disturbance. The jury found Spivey guilty of assault under extreme emotional disturbance.<sup>1</sup> Spivey was later sentenced to one year in prison, and this appeal followed.

Spivey now argues that the trial court committed reversible error in failing to instruct the jury on the charge of fourth-degree assault. Fourth degree assault requires a

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<sup>1</sup> A person is guilty of assault in the second degree when a) he intentionally causes serious physical injury to another person; or (b) he intentionally causes physical injury to another person by means of a deadly weapon or a dangerous instrument; or c) he wantonly causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument. KRS 508.040 (assault under extreme emotional disturbance) mitigates a conviction of first, second, or fourth degree assault if the actor committed the crime under extreme emotional disturbance as defined by KRS 507.020(1)(a).

showing that the defendant a) intentionally or wantonly caused physical injury to another person, or b) recklessly caused physical injury to another person by means of a deadly weapon or a dangerous instrument. KRS 508.030(1). Spivey notes that the trial court has a duty to instruct the jury on the whole law applicable to the case, and argues that since fourth degree assault contains the element of recklessness, the jury should have been given the opportunity to consider whether he was reckless in his belief that an act of self-defense was warranted. He seeks to have the judgment reversed and the matter remanded for a new trial.

We have reviewed the record, the arguments and the law and believe Spivey was entitled to the requested instruction of assault, fourth degree. Hence, we reverse and remand. It is the duty of the trial court to prepare and give instructions on the whole law of the case including instructions applicable to every state of the case deducible or supported by the testimony. Taylor v. Commonwealth, Ky., 995 S.W.2d 355 (1999). An instruction on a lesser included offense is required only if, considering the totality of the evidence, the jury might have a reasonable doubt as to the defendant's guilt of the greater offense and yet believe beyond a reasonable doubt that he is guilty of the lesser offense. Id., citing Skinner v.

Commonwealth, Ky., 864 S.W.2d 290 (1993) and Luttrell v. Commonwealth, Ky., 554 S.W.2d 75 (1977).

Our Kentucky Supreme Court has recently addressed the self-protection statutes and the proper use of jury instructions relative to this defense in the cases of Elliott v.

Commonwealth, Ky., 976 S.W.2d 416 (1998) and Commonwealth v. Hager, Ky., 41 S.W.3d 828 (2001). In Elliott, supra, at 419, 420, 422, the Court held:

**THE SELF-PROTECTION STATUTES.**

Under the common law, self-defense was available to preclude a conviction of assault or homicide only if the defendant had reasonable grounds to believe at the time of his act that the action he took was necessary to protect himself from an imminent threat of death or serious bodily injury. E.g., Brown v. Commonwealth, 308 Ky. 486, 214 S.W.2d 1018 (1948); Farley v. Commonwealth, 284 Ky. 536, 145 S.W.2d 100 (1940); Ferguson v. Commonwealth, 237 Ky. 93, 34 S.W.2d 959 (1931). The penal code takes a different approach. KRS 503.050 provides as follows:

(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, or sexual intercourse compelled by force or threat.

(Emphasis in original). Thus, the initial focus of the penal code is on the defendant's actual subjective belief in the need for self-protection and not on the objective reasonableness of that belief. However, KRS 503.120 describes two circumstances when an assault or a homicide committed under an actual belief in the need for self-protection<sup>2</sup> [Footnote in original opinion] will not result in complete exoneration. One such circumstance is when the defendant's act causes injury, risk of injury, or death to an innocent bystander. KRS 503.120(2). The other is described in KRS 503.120(1):

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 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.  
(Emphasis in original).

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<sup>2</sup> KRS 503.120(1) and (2) apply not only to claims of self-defense, but to all of the justification defenses described in KRS 503.050 through KRS 503.110.

As the emphasized language of this statute and the 1974 Commentary thereto indicate, its purpose (and only purpose) is to limit the effect of the subjective belief provisions of KRS 503.050 and the other KRS Chapter 503 justification to the extent that a belief which is so unreasonable that it rises to the level of wantonness or recklessness with respect to the circumstance then being encountered by the defendant, e.g., whether he needed to act in self-protection, does not result in acquittal, but rather in conviction of a lesser offense for which wantonness or recklessness is the culpable mental state, e.g., second-degree manslaughter or reckless homicide.<sup>3</sup> [Footnote in original opinion]. The issue is presented to the jury by an instruction along the lines of those suggested at 1 Cooper, Kentucky Instructions to Juries §§ 11.08A and B (4<sup>th</sup> ed. Anderson 1993). See Blake v. Commonwealth, Ky., 607 S.W.2d 422 (1980), as reaffirmed by Shannon v. Commonwealth, supra, at 551. Since the language of KRS 503.120(1) limits its application to whether the defendant was wanton or reckless with respect to a circumstance, e.g., whether he needed to act in self-protection, it has no application to whether he was wanton or reckless with respect to the result of his conduct, e.g., whether his act would cause the death of another person.

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<sup>3</sup> If the charged offense is intentional murder or first-degree manslaughter, a wantonly held belief in the need for self-protection reduces the offense to second-degree manslaughter and recklessly held belief reduces the offense to reckless homicide. If the charged offense is second-degree manslaughter, a recklessly held belief in the need for self-protection reduces the offense to reckless homicide. On the other hand, the "wanton or reckless belief" analysis has no application to a charge of wanton murder, because the evidence of an actual subjective belief in the need to act in self-protection necessarily precludes a finding of the element of "extreme indifference to the value of human life" required by KRS 507.020()(b). R. Lawson and W. Fortune, Kentucky Criminal Law § 4-2(e)(3), p. 152, n. 90 (LEXIS 1998). In that event, the jury would find the defendant not guilty of wanton murder because of his subjective belief in the need to act in self-protection, and thus convict him of reckless homicide.

Having concluded that the statutory analysis set forth in Shannon, Part II [Ky., 767 S.W.2d 548 (1988)] was fundamentally flawed, we now depart from its holding that KRS 503.120(1) precludes the assertion of self-protection and the other KRS Chapter 503 justifications as defenses to charges of wanton murder, second-degree manslaughter, or reckless homicide (as well as to charges of wanton or reckless assault), and reinstate the holdings in Thompson v. Commonwealth, supra, [Ky., 652 S.W.2d 78 (1983)], and Kohlheim v. Commonwealth, supra [Ky. App., 618 S.W.2d 591 (1981)]. We specifically overrule Shannon, Part II, Holbrook [v. Commonwealth, Ky., 813 S.W.2d 811 (1990)], Barbour [v. Commonwealth, Ky., 824 S.W.2d 861 (1992)], Sizemore [v. Commonwealth, Ky., 844 S.W.2d 397 (1992)] and McGinnis [v. Commonwealth, Ky., 875 S.W.2d 518 (1994)], all supra, to the extent that they hold otherwise. We also overrule that portion of McGinnis which holds that an assertion of self-defense or another KRS Chapter 503 justification precludes an instruction on wanton murder as an alternative to intentional murder.

In Hager, supra, the defendant was convicted by a jury of fourth-degree assault despite the fact that the victim died after being stabbed by Hager. The Commonwealth appealed claiming that the jury erroneously rendered a verdict of fourth-degree assault since the victim had died. Our Kentucky Supreme Court granted "certification primarily to address the issue of how KRS 503.120(1) which defines "imperfect self-defense," i.e., an act in self-protection under a mistaken belief in the need therefore, applies to the offenses of second-degree

manslaughter, KRS 507.040, and reckless homicide, KRS 507.050.”

Id. at 831. In Hager, the trial court used a series of interrogatories, or mini-verdicts, which required the jury to find the defendant guilty of fourth-degree assault if they believed that Hager committed either second-degree manslaughter or reckless homicide under a recklessly held belief in the need to act in self-protection. Justice Cooper, writing for the majority, meticulously examines KRS 503 justifications, including self-protection, and a defendant’s subjective belief in the need for the conduct constituting the justification.

After thoroughly reviewing Elliott, supra, the Hager Court held:

The statute does not provide that a wantonly or recklessly held belief in the need to act in self-protection always reduces a primary offense to a lesser included offense. It provides that an act in self-protection committed under a wantonly held belief is no defense to an offense predicated on wantonness, and that an act in self-protection committed under a recklessly held belief is no defense to an offense predicated on recklessness. It also follows that an act in self-protection committed under a wantonly held belief does not elevate an offense predicated on recklessness, e.g., reckless homicide, to a greater offense, e.g., second-degree manslaughter. Thus, the fact that the fatal conduct was committed under a wantonly held belief in the need therefore provides no defense to a charge of either second-degree manslaughter or reckless homicide; and the fact that the fatal conduct was committed under a recklessly held belief in the need therefore reduces a charge of second-degree manslaughter to reckless homicide, but

provides no defense to a charge of reckless homicide.

Hager, 41 S.W.3d at 843. While we can understand the difficulty a trial court has in instructing a jury in this type of case, we believe Elliott, supra, and Hager, supra, are controlling and require that a fourth-degree assault instruction be given in the case before us.

Spivey also contends that the trial court erred in not making the juvenile records of the complaining witnesses available to his counsel. We disagree. The trial court denied the motion but agreed to conduct an in-camera review of the juvenile records in question and release any documents that would be deemed relevant to the case. We believe the trial court properly addressed this issue and that Spivey has failed to show that the trial court abused its discretion on this issue. In Eldred v. Commonwealth, Ky., 906 S.W.2d 694, 702 (1995), our Supreme Court, citing Illinois v. Dace, 114 Ill.App.3d 9-8, 70 Ill. Dec. 684, 449 N.E.2d 1031 (1983), held:

However, the defendant is not entitled to unlimited access or use of the evidence sought. Instead, where the doctor or the patient raises the physician-patient privilege, or some other similar privacy interest is raised, an in-camera hearing shall be conducted by the trial court in the presence of the prosecutor and defense counsel to determine which information would be both relevant and material to the witness's credibility.

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Upon remand, the trial court should direct subpoenas appropriately, and conduct any in-camera review necessary.

The record indicates the trial court offered to conduct an in-camera review of Green's juvenile record and to make available to Spivey and the Commonwealth any information deemed relevant to the proceeding against Spivey. The court's action complied with the Eldred mandate.

For the foregoing reasons, we affirm in part and reverse in part and remand the judgment and sentence of the Madison Circuit Court for further proceedings.

ALL CONCUR.

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