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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-001102-MR

BARBARA TAYLOR APPELLANT

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
ACTION NO. 00-CR-00232

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION

REVERSING

** ** ** ** **

BEFORE: EMBERTON, CHIEF JUDGE; KNOPF, JUDGE; AND MILLER, SENIOR JUDGE.[1]

EMBERTON, CHIEF JUDGE. Barbara Taylor was convicted of first-degree wanton endangerment and sentenced to three years in prison after she hired an undercover police officer to kill her husband. She alleges that (1) she was entitled to a directed verdict; (2) the trial court erred when it failed to give an entrapment instruction; (3) the trial court erred when it did not instruct the jury that her voluntary abandonment of the plan was a defense to the charge; and (4) her Fourteenth Amendment

[1] Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

rights were violated when a juror brought a Bible into the jury deliberation room. We reverse.

On the evening of August 23, 2000, Barbara met Kevin Rose, an acquaintance, in a local bar. The two engaged in a conversation regarding Barbara's pending divorce from her husband, Joe Taylor. Rose testified that during the conversation Barbara inquired about having her husband killed. Concerned about the seriousness of Barbara's inquiry, Rose contacted the Kentucky State Police. Undercover Detective Robert Waldridge was assigned to investigate.

The following evening, Rose and Waldridge met at the bar. Waldridge, wearing a wire, was introduced to Barbara as a person willing to commit the murder. After a conversation among the three of them, Barbara agreed that she wanted her husband killed. She then proceeded to give Waldridge Joe's work schedule, his routines and his address. Barbara and Waldridge agreed the cost of the murder would be $500, with $100 paid immediately. Barbara paid the $100 and it was agreed that the murder would take place by the weekend. Later on the same night, there was also some discussion about Barbara securing drugs as a partial payment for the murder.

At their meeting the following day, Barbara told Waldridge she did not want the murder to take place. At that time Waldridge identified himself as a police officer and placed

her under arrest. After being read her Miranda rights, Barbara made a statement to the police and admitted she sought to have her husband killed.

Barbara maintains there was insufficient evidence to sustain her conviction and that the trial court erroneously denied her motion for a directed verdict. On a motion for directed verdict, the trial court must draw all reasonable inferences from the evidence in favor of the Commonwealth.[2] Only if it would be clearly unreasonable for a jury to find guilt can an appellate court disturb a jury's guilty verdict.[3] It is not the role of this court to decide the accused's guilt or innocence but whether the evidence, when viewed most favorably to the Commonwealth, supports the jury's finding that the Commonwealth met its burden of proving the essential elements of the crime beyond a reasonable doubt.

A person is guilty of wanton endangerment in the first degree when:

> [U]nder circumstances manifesting extreme indifference to the value of human life, he wantonly engages in conduct which creates a substantial danger of death or serious physical injury to another person.[4]

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[2] Commonwealth v. Benham, Ky., 816 S.W.2d 186 (1991).

[3] Id. at 187.

[4] KRS 508.060.

The wanton endangerment statute, effective in 1975, fills a void in our penal code. As explained by the court in Hennemeyer v. Commonwealth:[5]

> The Kentucky statutes dealing with the offenses of assault are designed to protect each individual from defined physical abuse, not only for protection for defined actual physical abuse but protection from defined attempted physical abuse. There were instances in our framework of designed criminal assaults and attempted criminal assaults prior to January 1, 1975, where a victim found himself aggrieved within a criminal statute defining elements of his complaint without criminal remedy. For instance, in those offenses absent a trauma, the conduct of the accused, no matter how dangerous, was not criminally punishable. The wanton endangerment statue, KRS 508.060, remedied this situation and, by reason thereof, a course of conduct which, prior to the adoption of this statute, was not punishable found itself within the framework of the criminal statute of wanton endangerment.

In Hancock v. Commonwealth,[6] the court recognized that wanton endangerment may be committed in many ways and stated that:

> In Hardin v. Commonwealth, Ky., 573 S.W.2d 657 (1978), the Supreme Court of Kentucky upheld the constitutionality of KRS 508.060, rejecting the argument that the statute's terms were vague and not capable of comprehension. It reasoned that "[i]t is not necessary for the statute to be so specific as to delineate the facts of any on condition under which the act of wanton

[5] Ky., 580 S.W.2d 211, 215 (1979).

[6] Ky. App., 998 S.W.2d 496, 498 (1998).

> endangerment may be performed, but a general statement is sufficient." Id. at 660. In general, examples of conduct which constitute wanton endangerment include discharging or brandishing firearms in public, using firearms or explosives in a grossly careless manner, and obstructing public highways. Hennemeyer v. Commonwealth, Ky., 580 S.W.2d 211, 214 (1979). However, wanton endangerment is not limited to specific types of conduct. It "may be committed in many ways." Hardin, supra, at 660.

In Hancock, the defendant was charged with wanton endangerment after he allegedly failed to inform his sexual partner that he had the human immunodeficiency virus. His conduct, the court held, was sufficient to support the wanton endangerment charge.

Although we agree that wanton endangerment is not limited to specific conduct, it does require that the conduct "create" a risk of serious physical harm. The issue in this case is whether Barbara's agreement with a police officer, who never attempted nor intended to execute the agreement, created a substantial danger of death or serious physical injury to Joe. We hold that it did not and reverse the conviction.

Our research has not revealed any cases factually similar to that now considered. In instances where one contracts with another to commit a crime, here murder, the common charge is solicitation. A person guilty of solicitation whether or not the criminal act solicited was carried out.[7] We

[7] See e.g., Maynard v. Commonwealth, Ky. App., 558 S.W.2d 628 (1977); KRS 506.030.

can only surmise that the Commonwealth did not pursue the solicitation charge because clearly, under the facts, Barbara would have been able to present renunciation as a defense. A renunciation defense is available only when the charge is criminal attempt, solicitation, conspiracy, or accomplice liability.[8] It is unavailable where the charge is wanton endangerment.

We do not believe that the facts of this case are sufficient to support a wanton endangerment charge. Barbara's actions did not create a risk of death or serious physical injury to the victim, Joe. Waldridge never attempted to actually murder Joe. Although we can engage in "what ifs," and imagine disastrous consequences to Joe had Waldridge been an actual hit man, it remains that there was no actual risk created.

The court in Sweatt v. Commonwealth,[9] followed similar logic when it held that the trial court erred in instructing on the charge of first-degree wanton endangerment where the defendant set fire to an unoccupied house. In Gilbert v. Commonwealth,[10] the defendant entered a Foto Fair booth and stated to the employee that "this is a hold-up." He laid a gun

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[8] See, Commentary, Cooper, Kentucky Instructions to Juries, Section 10.04; KRS 506.060.

[9] Ky. App., 586 S.W.2d 289 (1979).

[10] Ky., 637 S.W.2d 632 (1982).

on the counter with his hand on it but never pointed it at the employee. He later ordered the employee into his car, and after she refused he told her the gun was not real and allowed the employee to return to the booth. In holding it was error for the court to instruct the jury on the charge of wanton endangerment the court noted that the gun was never pointed at Watson and concluded "in the circumstances of this case it is obvious to us that the essential elements of KRS 508.060 are not present.[11]

It is equally obvious in this case that the elements of wanton endangerment have not been met. The judgment of conviction is reversed. All other issues raised by Barbara are moot.

ALL CONCUR.

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[11] Id. at 634.