

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000727-MR

RENEE MILLER

APPELLANT

APPEAL FROM BREATHITT CIRCUIT COURT
v. HONORABLE LARRY MILLER, JUDGE
ACTION NO. 01-CR-00021

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, SCHRODER, AND VANMETER, JUDGES.

BARBER, JUDGE: Appellant, Renee Miller (Miller), appeals her convictions for third degree assault, first degree wanton endangerment, and various misdemeanors stemming from an altercation with the sheriff. We affirm Miller's conviction.

The Wolfe County Sheriff testified that at 3:30 a.m. on May 7, 2001, he received a call from his dispatcher. Miller had called the dispatcher seeking protection from "someone trying to kill" her and her children. When he arrived at the scene, the sheriff found Miller and her children in her mother's

apartment. The record shows that Miller was convinced that unknown persons were attempting to saw through the walls of the apartment and kill her and her children.

Upon arrival at Miller's home, the sheriff searched Miller's apartment and found no threat. The sheriff testified that both the paternal grandparents were concerned for the welfare of their grandchildren and were on the scene. Miller and her mother took the children out into the parking lot of the apartment complex. Miller's mother was holding a shotgun at the time. When the sheriff questioned Miller and her mother, he convinced the mother to give him the shotgun she was holding to store in his vehicle. Encouraged by the paternal grandparents, the younger child ran away from his mother, and was carried to safety. The older child remained with his mother.

As the sheriff approached Miller, her mother and the children again, Miller pointed a pistol at the sheriff and accused him of being "in on it." At the sheriff's request, Miller eventually took the clip out of the gun and dropped the clip to the ground. Then, unexpectedly, she shot at the sheriff with the pistol. Both Miller and the sheriff were knocked to the ground by the force of the shot. Although the sheriff could not find an injury on his person at the time, he later discovered that one of the magazines for bullets on his belt had

been dented and cracked by the bullet remaining in Miller's gun after she took the clip out of the weapon.

After much negotiation, Miller and her mother released the older child and entered the back seat of a vehicle driven by a Kentucky State Trooper. As the Trooper began to drive away, Miller kicked the side window, shattering it. Her mother and she escaped from the vehicle and ran through the parking lot. After a chase, they were caught and detained by the sheriff. While he was attempting to handcuff Miller and her mother, Miller struck the sheriff in the face, injuring his mouth and lip. The injuries required medical treatment. At the time of the incident, Miller had an elevated level of methamphetamines in her blood. She admitted to taking a "white powder" prior to the incident. When examined several weeks later, Miller was found to be suffering from a delusional disorder or major depression with psychosis.

At trial, Miller was found guilty of third degree assault against the sheriff for firing the gun at him, and an additional count of third degree assault for striking the sheriff. She was found guilty of first degree wanton endangerment with regard to her older son, and second degree wanton endangerment with regard to her younger son. She was also found guilty of public intoxication and criminal mischief. Miller was sentenced to serve a total of fifteen years.

Miller was initially indicted for attempted murder for firing the gun at Sheriff Dunn. At trial the jury convicted Miller of third degree assault for that offense. Miller claims that there was no evidence supporting an instruction on the lesser offense. KRS 508.025 defines third degree assault as:

Recklessly, with a deadly weapon or dangerous instrument or intentionally causes or attempts to cause physical injury to a . . . state, county, city or federal peace officer. . . .

Miller argues that her actions did not support the charge of third degree assault, and that her conviction should be reversed for this reason. Miller argues that her actions could only support a charge of attempted murder, and that convicting her of the lesser charge of third degree assault was improper and was not supported by the evidence. We disagree.

Miller's statements at the time she fired the gun at the sheriff indicated that she had no knowledge of whether a bullet remained in the gun. The record shows that Miller did remove the clip from the gun, but did not check the gun to ensure that it was no threat to others. The evidence supported both instructions provided at trial. The trial court fulfilled its duty to instruct on the whole law of the case as required. Johnson v. Commonwealth, Ky. App., 721 S.W.2d 721, 722 (1986). The court correctly provided the jury with instructions on all offenses supported by the evidence. Cheser v. Commonwealth, Ky.

App., 904 S.W.2d 239, 243 (1994); Northeast Health Management Inc. v. Colton, Ky. App., 56 S.W.3d 440, 450 (2001). There is no reversible error in the instructions given, or the jury's determination.

Miller objects to the conviction of first degree wanton endangerment with regard to her oldest son. It is uncontroverted that this child "clung to her" and followed her during her actions on the night in question, particularly during the times when she aimed and fired the gun. It is similarly uncontroverted that Miller was armed during that time. The sheriff testified that at times the loaded gun was pointed towards that child. Testimony from witnesses at trial showed that Miller "poked at" the child with the gun to get him to move to different locations. Miller does not refute that evidence. Despite this factual evidence, Miller claims that there was no evidence presented of extreme indifference to human life, as required by KRS 508.060. Kentucky law holds that pointing a gun at anyone can be sufficient to establish wanton endangerment. Key v. Commonwealth, Ky. App., 840 S.W.2d 827 (1992). The evidence in this case clearly supported the instruction and conviction on that charge.

Miller objects to testimony elicited from the paternal grandfather at trial. The paternal grandfather is a licensed pharmacist. Miller claims that his testimony was expert

testimony from a surprise witness, and should have been disallowed. Miller was charged with wanton endangerment of the paternal grandfather during the incident. Defense counsel made a motion for acquittal on that charge, as the evidence did not show that the gun had ever been aimed towards Robert Miller. That motion was denied, and Robert Miller was called to the stand. While under oath, Robert Miller testified regarding the absorption rate of methamphetamine.

Miller claims that the trial court erred in denying the motion for acquittal on that charge, and that the erroneous denial resulted in the introduction of the improper expert testimony. Introduction of expert testimony, and management of witness testimony is addressed to the sound discretion of the trial court. Farmland Mut. Ins. Co. v. Johnson, Ky., 36 S.W.3d 368, 378 (2000). It is uncontroverted that Miller admitted that she had taken a "white powder" she obtained from an unnamed individual in the Shell station parking lot prior to the incident. Miller identified this powder as "crank". Toxicology reports showed that the methamphetamine level in Miller's blood the day after the incident exceeded any therapeutic level.

Comments not contributing to the verdict must be considered harmless error. James v. Commonwealth, Ky., 679 S.W.2d 238, 239 (1984). The complaining party has a duty to show that absent the complained of error, the verdict would have

been different. Hill v. Commonwealth, Ky. App., 779 S.W.2d 230, 231 (1989). Miller has failed to show that any discussion regarding Robert Miller's toxicology knowledge prejudiced her case at trial or rose above the level of harmless error. Therefore, we find no grounds for reversal. The judgment is affirmed.

ALL CONCUR.

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