

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-000894-MR

TAMMY ELIZABETH COLMORE

APPELLANT

v. APPEAL FROM WASHINGTON CIRCUIT COURT
HONORABLE ALLAN RAY BERTRAM, JUDGE
ACTION NO. 01-CR-00024

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: CHIEF JUDGE EMBERTON; KNOPF AND SCHRODER, JUDGES.

KNOPF, JUDGE: Tammy Colmore appeals from a judgment of the Washington Circuit Court, entered April 19, 2002, convicting her of second-degree assault¹ and sentencing her to seven years' imprisonment. Colmore contends that the trial court erred by denying her motions for a directed verdict and by giving the jury confusing instructions. We are persuaded by neither contention and affirm.

¹ KRS 508.020.

The charge against Colmore stemmed from an altercation between her and her companion, James Isaacs, Jr. Apparently, during the afternoon and evening of February 16, 2001, the couple consumed whiskey in their home and bickered. The bickering gradually became heated, escalated to physical violence, and culminated when Colmore stabbed Isaacs in the chest with a small knife. The Commonwealth alleged that the stabbing, as a result of which Isaac's required emergency medical assistance and a period of hospitalization, constituted a criminal assault. Colmore maintains that she acted in self defense.

The Commonwealth's proof included the knife, pictures of a bloody towel, and the testimonies of an emergency medical technician and the investigating police officer. The technician described Isaacs's wound and his condition on the way to the hospital. The officer described the scene at the home when he arrived, not long after the stabbing. According to the officer, Isaacs was lying face down on the floor. There was blood on the floor near his chest, and a towel had apparently been placed over the wound. Colmore, naked from the waist up, was stooped next to Isaacs. The officer believed that Colmore was intoxicated. He testified that her speech was slurred and that she moved unsteadily. He had her put a shirt on then asked her what had happened.

She said, according to him, that Isaacs had begun drinking whiskey and beer and smoking marijuana early in the afternoon and that she had begun drinking whiskey that evening. Isaacs had become intoxicated and argumentative, bickering with her over his drinking, over a video game they played, and over her daughter, who lived with them. The bickering became loud and abusive. The couple yelled at each other, Isaacs threw a pot of chili left over from dinner, Colmore pushed Isaacs, Isaacs ripped Colmore's shirt off and broke a necklace she was wearing. Colmore thereupon obtained her knife from the bedroom, returned to the living room, and, when Isaacs again yelled and came at her, she stabbed him.

At the close of the Commonwealth's proof, Colmore moved for a directed verdict on the ground that, contrary to RCr 9.60, the Commonwealth was attempting to rely on Colmore's uncorroborated confession. Noting that there was ample evidence—two eye witnesses of Isaacs's wound and the knife—that Isaacs had been stabbed, the trial court denied the motion.

Colmore testified that the officer's account misrepresented what she had told him and did not accurately reflect the events of that night. She denied having been intoxicated and claimed that Isaacs, in a drunken rage, had twice torn her shirt off and held her down with his hands around her neck. So frightened of him was she after the second choking

episode that she had lapsed into a state of shock. She could remember taking the knife from her bureau, carrying it to the living room, and wanting Isaacs to leave her alone, but she claimed to have no recollection of the stabbing. Her daughter had run to a neighbor's house and called 911 while she had tried to assist Isaacs.

When Colmore renewed her motion for a directed verdict, she did so "on the same grounds" as her earlier motion, apparently that is, on the ground that her confession was not sufficiently corroborated. On appeal, however, she contends that the Commonwealth's evidence did not rebut her claim of self defense. This claim of error was not preserved. It is also without merit.

As has often been observed, "[r]arely is a defendant relying upon self-defense entitled to a directed verdict. Only in the unusual case in which the evidence conclusively establishes justification and all of the elements of self-defense are present is it proper to direct a verdict of not guilty."²

The officer in this case testified that Colmore had said nothing to him on the night of the incident about Isaacs's choking her. And though she did claim that Issacs had ripped

² Barnes v. Commonwealth, Ky., 91 S.W.3d 564, 570 (2002) (citing West v. Commonwealth, Ky., 780 S.W.2d 600 (1989)).

two shirts, the officer had found only one torn shirt at the scene. Two weeks later Colmore's parents had brought a second shirt to the police station and claimed that it was the missing one. The prosecutor maintained, however, that this second shirt appeared to have been tattered deliberately and not in a scuffle.

The credibility of Colmore's account was thus for the jury to determine. Also for the jury to determine was whether Colmore had faced an imminent threat of death or serious physical injury when, even by her own account, before the stabbing she had escaped from Isaacs to her bedroom and he had not followed her. Because a reasonable juror could conclude that the stabbing was not justified, the trial court correctly denied Colmore's directed-verdict motions.

Colmore also contends that the trial court gave an inaccurate jury instruction. Jury instruction number one read as follows:

You will find the Defendant, Tammy E. Colmore guilty of Second-Degree Assault under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:
A. That in this county on or about February 16, 2001 and before the finding of the Indictment herein, Tammy E. Colmore intentionally caused a physical injury to James M. Issacs, Jr. by stabbing him in the chest with a knife, AND

- B. That in so doing, Tammy E. Colmore was not privileged to act in self-protection, AND
- C. That in so doing Tammy E. Colmore did not believe that she was privileged to act in self-protection.

Colmore maintains that part C. of this instruction inaccurately suggests that Colmore's right to defend herself depended not on her perception of an imminent physical force but on her awareness of the self-defense "privilege."

We agree with Colmore that part C. of the instruction is unnecessary. The trial court included it apparently in an attempt to emphasize that the need for self-defense is to be assessed from the defendant's point of view. The standard self-defense instruction (instruction number four in this case) adequately makes that point.³ It also makes clear that it is the defendant's belief in the threat of force, not her belief in her privilege, that is at issue.⁴

³ "Even though the Defendant, Tammy E. Colmore, might otherwise be guilty of intentional Assault under Instruction No. 1, if at the time she stabbed James M. Isaacs, Jr. with a knife, (if she did so) she believed that James M. Isaacs, Jr. was then and there about to use physical force upon her, she was privileged to use such physical force against James M. Isaacs, Jr. as she believed to be necessary in order to protect herself against it, but including the right to use deadly physical force in so doing only if she believed it to be necessary in order to protect herself from death or serious physical injury at the hands of James M. Isaacs, Jr."

⁴ Cf. Commonwealth v. Hager, Ky., . 41 S.W.3d 828 (2001) (providing an example of a self-defense instruction).

As Colmore concedes, her objection to instruction number one was not preserved. On the contrary, she told the trial court that she had no objection to the instructions. Although we agree with Colmore that instruction number one would have been better without part C., the instructions as a whole accurately reflect the evidence and the law. We are not persuaded that part C. is apt to have confused the jury or led it to apply a wrong standard to Colmore's defense. Even if the trial court erred in including part C., therefore, the unpreserved error was not a palatable one and so does not entitle Colmore to relief.⁵

In sum, Colmore's testimony did not compel her acquittal, and the jury was adequately instructed with respect to her claim of self defense. Accordingly, we affirm the April 19, 2002, judgment of the Washington Circuit Court.

ALL CONCUR.

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⁵ RCr 9.54; RCr 10.26; Commonwealth v. Wolford, Ky., 4 S.W.3d 534 (1999); Partin v. Commonwealth, Ky., 918 S.W.2d 219 (1996).