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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-000975-MR

RICHARD FUSTON

APPELLANT

v. APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE JERRY D. WINCHESTER, JUDGE
ACTION NO. 01-CR-00102

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: EMBERTON, CHIEF JUDGE; JOHNSON AND KNOPF, JUDGES.
KNOPF, JUDGE: Richard Fuston appeals from a judgment of conviction by the Whitley Circuit Court which confirmed a jury verdict finding him guilty of first degree manslaughter. He primarily argues that the trial court erred in denying his motion for a directed verdict based upon his claim of self-defense. Finding that the evidence presented at trial warranted submission of the issue to the jury, we affirm.

In 2001, Richard Fuston and a number of other members of his family lived in the Mount Morgan Apartment complex in Williamsburg, Kentucky. Richard's sister, Tammy Fuston, and the victim, Kevin Brown, had an ongoing, but often troubled relationship. Brown occasionally stayed at Tammy's apartment, but he did not live there. On July 14, 2001, Brown assaulted Tammy Fuston. By the time the Williamsburg Police arrived at her apartment, Brown had left the scene. The police officers advised Tammy to get an Emergency Protective Order (EPO) and a warrant against Brown, which she did. She then went to the hospital in Corbin to be treated for her injuries.

While Tammy was at the hospital, Richard and his brother Scottie drove to Jellico, Tennessee to buy some beer. While there, they saw Brown's truck parked in the lot of a bar. Richard went to the Jellico Police Department to advise them that there was a warrant for Brown's arrest. They then drove back to Williamsburg. The Jellico Police Department contacted the Williamsburg Police, who confirmed the existence of the arrest warrant for Brown.

After returning from the hospital, Tammy asked Richard to accompany her back to her apartment to repair a phone which had been damaged during the altercation with Brown. Richard took his gun with him to Tammy's apartment. They were also

accompanied by their sister-in-law, Rachel Fuston, and Rachel's friend, Cherish Harris.

At approximately 1:30 a.m. on July 15, Rachel heard a thump at the door. Cherish went to look through the peep-hole, but the view was blocked. The door opened, and Brown walked in. Richard, Tammy, Rachel, and Cherish each repeatedly told Brown to leave, but Brown kept advancing into the apartment. Richard picked up the gun, cocked it, pointed it at the floor, and again told Brown to leave.

According to Richard, Brown threatened to kill him. However, the other witnesses do not recall Brown having said this. The witnesses do agree that Brown continued advancing on Richard. When Brown was within a few feet of Richard, he reached for Richard's gun with his left hand, and began reaching into his back pocket with his right hand. Richard then began firing the gun, shooting Brown a total of seven times. Brown staggered out of the apartment and collapsed on the balcony outside. He died shortly thereafter. No weapon was found on Brown's body, but a cell phone was found in his back pocket. Tests later established that Brown's blood-alcohol content was 0.144.

At the close of the Commonwealth's case and at the close of proof, Richard moved for a directed verdict based upon self-defense. The trial court denied both motions. The court

instructed the jury on the offenses of murder, first-degree manslaughter, second-degree manslaughter, and reckless homicide. The court also instructed the jury on self-defense. The jury found Richard guilty of first-degree manslaughter and fixed his sentence at seventeen years. This appeal followed.

Richard first argues that he was unfairly prejudiced by confusing jury instructions. The instructions for both murder and first-degree manslaughter (Instructions No. 1 and 2, respectively) required the jury to reject his claim of self defense. The self-defense instruction did not appear until Instruction No. 5. Richard contends that the jury implicitly had to reject his claim of self-defense before it was instructed on the nature of self-defense.

However, Richard did not object to the instructions at trial, nor did he tender alternative instructions. Thus, any error is not preserved for our review.¹ RCr 10.26 permits this court to consider an unpreserved error if the error was a "palpable error" which affects the defendant's "substantial rights" and resulted in "manifest injustice." But in this case, Richard concedes that the jury instructions were properly worded. He merely takes issue with the order of the instructions. We are not persuaded that the instructions were

¹ RCr 9.54(2); See also Clifford v. Commonwealth, Ky., 7 S.W.3d 371, 376 (1999).

apt to have confused the jury or led it to apply a wrong standard to Richard's defense. Thus, even if the instructions were given out of their proper order, the unpreserved error was not a palpable one and so does not entitle Richard to relief.

Moreover, unlike in Commonwealth v. Hager,² the instructions did not require the jury to find Richard guilty of first degree manslaughter before it could consider self-defense. Rather, the jury was properly instructed to consider, as an element of the offense, whether Richard was privileged to act in self-defense. Therefore, the instructions were not erroneous.

Richard primarily argues that the trial court erred in denying his motions for a directed verdict based upon self-defense. KRS 503.050(2) provides that the use of deadly physical force by a defendant upon another person is justifiable 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. The initial focus of the statute is on the defendant's actual subjective belief in the need for self-protection and not on the objective reasonableness of that belief.³

² Ky., 41 SW.3d 828 (2001).

³ Elliott v. Commonwealth, Ky., 976 S.W.2d 416, 419 (1998).

However, where 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, then the defendant's subjective belief in the need for self-protection will not entirely exonerate him from culpability.⁴ 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 a 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.⁵

Richard contends that the evidence conclusively established at least imperfect self-defense. He points out there was no evidence to controvert the testimony that Brown was approaching him in a threatening manner. Furthermore, the witnesses all agree that Brown was reaching into his back pocket. Even if the jury believed that his belief in the need to use deadly physical force was wanton or reckless, Richard

⁴ KRS 503.120(1).

⁵ Elliott, 976 S.W.2d at 420, n. 3, citing R. Lawson and W. Fortune, Kentucky Criminal Law § 4-2(e)(3), p. 152, n. 90.

argues that he was still entitled to a directed verdict on the charge of first-degree manslaughter.

As an initial matter, it is not clear that Richard has preserved this issue for review. Although Richard did move for a directed verdict at the appropriate times, he based the motions on his argument that the evidence conclusively established perfect self-defense. He did not assert that he was entitled to dismissal of the murder and first-degree manslaughter charges based upon imperfect self-defense. To preserve a claim that the evidence was insufficient to support an instruction on a particular theory of the case, a party must object to the giving of an instruction on that theory.⁶

Yet even if Richard's motion for a directed verdict based generally upon self-defense was sufficient to preserve the issue, we are not convinced that the trial court erred in denying the motion. From our review of the record, the evidence supporting Richard's claim of self-defense does appear quite strong. Indeed, given the fairly consistent testimony from all of the witnesses to the shooting, it is surprising that the jury entirely rejected the defense.

However, a defendant relying upon self-defense is rarely entitled to a directed verdict. The jury was not

⁶ RCr 9.54(2); Commonwealth v. Wolford, Ky., 4 S.W.3d 534, 535 (1999).

required to accept Richard's version of the facts. 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.⁷

Although the evidence supporting Richard's claim of at least imperfect self-defense was strong, it was not so overwhelming as to preclude a jury finding to the contrary.⁸ Consequently, the trial court did not err in denying his motion for a directed verdict.

Accordingly, the judgment of conviction by the Whitley Circuit Court is affirmed.

ALL CONCUR.

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⁷ West v. Commonwealth, Ky., 780 S.W.2d 600, 601 (1989); and Taul v. Commonwealth, Ky., 249 S.W.2d 45, 47 (1952).

⁸ See also Luttrell v. Commonwealth, Ky., 952 S.W.2d 216, 218 (1997).