

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001158-MR

VALERIE J. DAD

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANN O'MALLEY SHAKE, JUDGE
ACTION NO. 01-CR-002505

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: BARBER, McANULTY, AND TACKETT, JUDGES.

BARBER, JUDGE: Appellant Valerie J. Dad was a part-time clerk at her husband's small convenience store. She refused to cash a money order for a customer at the store. The customer became confrontational, striking her with a heavy object from the counter. She suffered injury as a result of the customer's actions. Dad pulled out a firearm and fired a shot at the store door after the man exited the store. She then called 911 to report the confrontation. The store videotape captured the

altercation, and several witnesses observed the difficulties between the customer with the altered money order and Dad. Charges were brought against her for firing at the business doorway, and she was convicted of wanton endangerment in the first degree. In lieu of imprisonment, she was placed on probation for a period of five years.

Dad argues that the trial court was in error when it refused to give a tendered instruction on self defense. She argues that the facts support the giving of such an instruction, and asserts that the trial court must give instructions applicable to every state of the case supported by evidence. See: Kholhein v. Commonwealth, Ky. App., 618 S.W.2d 591 (1981). She argues that the record shows that she had a subjective belief that she was in danger at the time she fired the gun. The witness testimony shows that she was injured by the customer during the confrontation. The record shows that the store had been robbed several times prior to the confrontation. The videotape of the transaction reveals, however, that the man had left or was leaving the store at the time Dad fired the gun. The Commonwealth argues that Dad had no belief that she was at risk at the time she fired the gun.

KRS 503.120(1) permits the use of physical force by a party when that party "believes that such force is necessary to protect himself against the use or imminent use of unlawful

physical force by the other person." Subsection (2) requires that the use of deadly force be found reasonable only where "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 Commonwealth argues that the record did not support the use of deadly force, as the customer was running away by the time Dad picked up and fired the gun.

The trial court may only give a self protection or self defense instruction where the jury could find that the defendant had a belief that she was at risk for imminent harm when she took the action complained of. Commonwealth v. Higgs, Ky., 59 S.W.3d 886, 889 (2001). The belief cannot be wanton or reckless, but must be supported by some evidence in the record. Id. at 890. A self protection instruction may not be given in the absence of such evidence, which would permit a jury to find in favor of the defendant. Allen v. Commonwealth, Ky., 5 S.W.3d 137, 139 (1999).

We find that the record does not support a finding that the use of deadly physical force was necessary under the circumstances. The alleged assailant was rapidly leaving or had left the premises at the time Dad fired her gun. There was no evidence supporting even a subjective belief that the use of deadly force was required at that time.

Dad asserts that the Commonwealth improperly elicited testimony from the investigating officer intimating that she refused to discuss the matter with the officer after receiving her Miranda warning. She argues that the Commonwealth is prohibited from using such information in its case in chief by Hall v. Commonwealth, Ky., 862 S.W.2d 321 (1993). The record shows that the Commonwealth questioned the testifying officer about his presence when Dad was read her rights, to which the officer answered in the affirmative. The Commonwealth then elicited testimony from the officer regarding the lengthy narrative supplied to the officers by the store customer and witnesses. The officer was not questioned regarding Dad's failure to provide a statement, although the testimony clearly showed that she had not given any statement to the police.

Dad requested a mistrial following the officer's testimony, arguing that the questioning of the officer was designed to emphasize her post arrest silence "as a prosecutorial tool," in violation of Wallen v. Commonwealth, Ky., 657 S.W.2d 232, 233 (1993). The trial court denied the motion, stating that no manifest injustice had occurred. We affirm the trial court's denial of the motion for mistrial.

Lastly Dad asserts that the trial court erred when it refused to grant her motion for directed verdict. We find that the trial court drew all fair and reasonable inferences from the

record, and properly found that there was sufficient evidence to overcome a motion for directed verdict. Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991).

TACKETT, JUDGE, CONCURS.

McANULTY, JUDGE, CONCURS IN RESULT.

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