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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001381-MR

JACK PHILLIPS — APPELLANT

v.

APPEAL FROM BRECKINRIDGE CIRCUIT COURT
HONORABLE SAM H. MONARCH, JUDGE
ACTION NO. 96-CR-00065

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: DYCHE, JOHNSON, AND SCHRODER, JUDGES.

SCHRODER, JUDGE. This is an appeal from an order denying appellant's RCr 11.42 motion alleging ineffective assistance of counsel in his trial for the murder of his wife. Appellant claims his trial counsel was ineffective for failing to request instructions on the lesser-included offenses of first-degree manslaughter (intending to cause serious physical injury), second-degree manslaughter, and reckless homicide. From our review of the record and applicable law, even if the evidence

had warranted instructions on the lesser-included offenses, we believe appellant was not prejudiced thereby because the evidence was overwhelming that appellant was guilty of intentional/wanton murder. Hence, we affirm.

On September 23, 1996, appellant, Jack Phillips, got home from work at around 5:00 p.m. When he walked in the door, his wife, Brenda Phillips, asked him where he had been, whereupon an argument between the two ensued. According to appellant's testimony, he asked Brenda if she had been with her boyfriend and she replied, "no, but I will be." At that point, Brenda went outside and got into her truck and began turning around in the driveway. At the same time, appellant retrieved a twelve-gauge shotgun from under the couch, loaded it with a single shell and proceeded outside. He testified that he stood in the road and when the truck came towards him, he moved to the side of the road and shot Brenda as she attempted to drive by. The forensic evidence revealed that Brenda was killed from a single shotgun blast to the left corner of her mouth from close to intermediate range.

After the shooting, Brenda's truck went off the road, traveled a little further and stopped when it ran over two logs in a ditch. At that point, appellant stated that he walked over to the truck and turned off the ignition. After that, appellant went into his house and called his brother-in-law, Wendell

Burden, and told him that he had “blowed Brenda’s fucking head off” because he was “getting tired of her messing around with Randall Bell” and “couldn’t take it no more.” Appellant then got into his car and drove to his daughter, Brenda Whitfill’s, house and told her daughter’s husband, Dennis, that he had killed Brenda and asked for another shotgun shell so he could shoot himself. When Dennis wouldn’t give a shell to him, he drove to his friend, Dee Dowell’s, house and told him that he had killed Brenda. Appellant then left there and drove to a field and spent the night in a nearby barn. The next night appellant turned himself in to police.

Appellant was indicted for the murder of his wife and tried by a jury on October 29, 1997. At the close of the evidence, the jury was instructed on intentional/wanton murder (KRS 507.020) and first-degree manslaughter based on extreme emotional disturbance (KRS 507.030(b)). Defense counsel did not tender instructions or make any objection to the instructions as given. The jury ultimately found appellant guilty of murder and he was sentenced to life imprisonment.

Appellant thereafter filed a direct appeal to the Kentucky Supreme Court. In this appeal, appellant argued that the trial court erred in failing to instruct the jury on the lesser-included offenses of first-degree manslaughter with the intent to cause serious physical injury (KRS 507.030(a)),

second-degree manslaughter (KRS 507.040), and reckless homicide (KRS 507.050). The Supreme Court affirmed the conviction, refusing to address the issue because of defense counsel's failure to preserve the issue by tendering instructions on the lesser-included offenses or by objecting to the instructions as given. Subsequently, appellant filed a motion pursuant to RCr 11.42 alleging that his trial counsel was ineffective for failing to preserve the issue of the failure to include instructions on the lesser-included offenses. A full evidentiary hearing was held on the motion. On June 4, 2002, the trial court entered an opinion and order denying the RCr 11.42 motion. This appeal followed.

The sole issue before us is whether the trial court erred in finding that the conduct of appellant's trial counsel did not constitute ineffective assistance of counsel. To prevail on a claim of ineffective assistance of counsel, the defendant must show (1) seriously deficient performance on the part of trial counsel and (2) that the deficient performance prejudiced the defense such that, but for the errors of counsel, there is a reasonable probability that the outcome would have been different. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Appellant argues that had his trial counsel requested instructions on the lesser-included offenses, there was a

reasonable probability that the jury would have convicted him of one of the lesser-included offenses and not murder. A defendant is entitled to an instruction on a lesser-included offense if, under the evidence, the jury could entertain a reasonable doubt as to his guilt of the greater offense and the evidence would support a finding of guilt as to the lesser offense. Hopper v. Evans, 456 U.S. 605, 102 S. Ct. 2049, 72 L. Ed. 2d 367 (1982). As stated earlier, the jury was instructed on intentional/wanton murder and first-degree manslaughter based on extreme emotional disturbance. The offenses which appellant claims the jury should have been instructed on require the following mental states: intent to cause serious physical injury (KRS 507.030(a)); wantonly causing death (KRS 507.040); and recklessly causing death (KRS 507.050).

The trial court found that trial counsel was not ineffective because his decision to not seek an instruction on the lesser-included offenses was a matter of sound trial strategy. See Moore v. Commonwealth, Ky., 983 S.W.2d 479 (1998), cert. denied, 528 U.S. 842, 120 S. Ct. 110, 145 L. Ed. 2d 93 (1999). It was the trial court's belief that trial counsel went for an "all-or-nothing" approach, giving the jury only the options of murder and first-degree manslaughter based on extreme emotional disturbance, and not the lesser offenses. However, that conclusion was disputed by evidence presented at

the RCr 11.42 hearing. A letter from appellant's trial counsel was admitted which stated, "It was my belief then, and it remains my belief now, the totality of the evidence presented at trial did not warrant instructions on either first or second degree manslaughter." Hence, we must reject the trial court's conclusion of sound trial strategy.

The trial court also found that even if trial counsel's performance was deficient, appellant was not prejudiced thereby because the outcome would have been no different had the jury received instructions on the lesser-included offenses. We agree.

> The trial court is permitted to examine the question of prejudice *before* it determines whether there have been errors in counsel's performance. In making its decision on *actual* prejudice, the trial court obviously may and should consider the totality of the evidence presented to the trier of fact.

Brewster v. Commonwealth, Ky. App., 723 S.W.2d 863, 864-865 (1986).

The evidence at trial consisted of the testimony of appellant, the state medical examiner, a state police detective who investigated the crime, a deputy sheriff who responded to the scene, the friends and family members to whom appellant confessed the crime, and certain exhibits. The state medical examiner testified that the victim was killed by a single shotgun blast to the left corner of her mouth from a close to

intermediate distance. Detective Steve Manning of the Kentucky State Police, who was a firearms expert, testified that he believed that the shot had been fired from close range from the fact that the plastic cup from the end of the shotgun shell was found on the floorboard of the car and the imprint made on the victim's shoulder from the plastic cup. Wendell Burden testified that appellant told him that he blew Brenda's head off because he was tired of her messing around with another man and could not take it anymore. As for exhibits, a note that was found in appellant's car after the shooting was admitted into evidence which stated, "I just hope Brendie, Bill, Shady Jr. see what love can do. Am sorry I can't take it no more."

Appellant testified that when he arrived home from work on the day in question, he had had approximately sixteen to eighteen beers over the course of the day. Brenda asked appellant where he had been and thereafter the two got into an argument. At some point during the argument, appellant asked Brenda "Where you been, with your boyfriend?" Brenda responded, "no, but I will be." Brenda got up and went outside and got into her car and began circling the turnaround in the driveway. At the same time, appellant retrieved his twelve-gauge shotgun from under the couch, loaded it with a single shell, and proceeded outside in the road. Appellant testified that he walked to the middle of the road, and she came towards him at

around thirty miles per hour. Appellant then stated, "I run backwards out of the road and that's when the gun – when I shot." On cross-examination, appellant stated that he was not trying to kill Brenda when he shot the gun, he just wanted "to get her to stop." He claimed that he did not point the gun at Brenda, that he "didn't point at nothing."

KRS 507.020(1) defines murder as:

> (a) With intent to cause the death of another person, he causes the death of such person or of a third person; except that in any prosecution a person shall not be guilty under this subsection if he acted under the influence of extreme emotional disturbance for which there was reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. However, nothing contained in this section shall constitute a defense to a prosecution for or preclude a conviction of manslaughter in the first degree or any other crime; or
> (b) Including, but not limited to, the operation of a motor vehicle under circumstances manifesting extreme indifference to human life, he wantonly engages in conduct which creates a grave risk of death to another person and thereby causes the death of another person.

In our view, the evidence was overwhelming that appellant was guilty of murder, that he either intended to kill Brenda or that he wantonly engaged in conduct creating a grave risk of death to Brenda under circumstances manifesting an extreme indifference to her life. See Nichols v. Commonwealth,

Ky., 657 S.W.2d 932 (1983). Given appellant's proximity to the victim when she was shot, the fact that she was shot in the mouth, the existence of a motive (her infidelity), and appellant's conduct and statements after the shooting, we believe the jury would not have convicted appellant of anything less than intentional/wanton murder had they been instructed on the lesser-included offenses. Accordingly, we affirm the denial of the RCr 11.42 motion.

For the reasons stated above, the judgment of the Breckinridge Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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