

RENDERED: June 25, 2004; 10:00 a.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2003-CA-000625-MR

MARK W. JOHNSTON

APPELLANT

v. APPEAL FROM MORGAN CIRCUIT COURT  
HONORABLE SAMUEL C. LONG, JUDGE  
ACTION NO. 00-CR-00011

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: JOHNSON, TAYLOR AND VANMETER, JUDGES.

VANMETER, JUDGE: This appeal is from a judgment entered by Morgan Circuit Court after a jury found appellant, Mark Johnston, guilty of manslaughter in the second degree. The trial court sentenced appellant in conformity with the jury's ten year recommendation. We affirm.

On December 5, 1999, appellant and the victim, Jimmy Davis, spent the greater part of the day together with some other friends, drinking alcohol and riding four-wheelers in Morgan County. At about 5:00 p.m. the group broke up, and Davis

and appellant went to appellant's house. Mark Payne, who arrived at the house at about 7:00 p.m., testified that nothing remarkable was happening until Davis got up to leave and began shaking hands with the others. As Davis shook hands with another guest named Dave, he pulled Dave up out of his seat and appellant intervened, telling Davis not to start anything. This led to a confrontation between Davis and appellant, during which mutual threats and obscenities were leveled. At some point, the two got into a scuffle in which appellant fell. Payne was not certain whether Davis struck appellant or whether appellant slipped or tripped. In any event, appellant obtained a shotgun, which he pointed in Davis' face, demanding that Davis leave. The altercation and mutual cursing then continued outside on the porch, with Davis going to the driveway and starting his four-wheeler.

At this point, appellant fired the shotgun. Payne heard Davis say, "you missed me," to which appellant replied, "I wasn't shooting at you." When Davis approached the porch, appellant advised him to stay away or he would take his head off, wielding the shotgun barrel like a baseball bat. Davis backed away and went towards his four-wheeler. After more arguing and cursing, appellant went back into the house and got another shotgun, and he left the house from an exit other than the one at the porch. Although persons inside the house did not

see the events which immediately preceded the shooting, they heard a second gunshot, which resulted in Davis' death.

Appellant did not testify at trial. The jury, however, heard his version of the events from a taped statement which he gave to police following the incident. As noted above, appellant was convicted of manslaughter in the second degree and was sentenced to ten years' imprisonment. This appeal followed.

Appellant's argument on appeal is that the trial court erred in failing to grant a directed verdict of acquittal based on self-defense. We disagree.

The Kentucky Supreme Court recently reiterated: "On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal." *Johnson v. Commonwealth*, Ky., 90 S.W.3d 39, 42 (2002) (quoting *Commonwealth v. Benham*, Ky., 816 S.W.2d 186, 187 (1991)). On a motion for directed verdict, all fair and reasonable inferences from the evidence are to be drawn in favor of the Commonwealth. *Benham*, 816 S.W.2d at 187.

In *West v. Commonwealth*, 780 S.W.2d 600, 601 (1989), the court discussed at length the interplay between self-defense and a motion for directed verdict:

Rarely 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. In *Taul v. Commonwealth, Ky.*, 249 S.W.2d 45 (1952), this Court held that a defendant's statement that he acted in self-defense or his description of events which show such to be the case need not be accepted at face value where the jury may infer from his incredibility or the improbability of the circumstances that one or more of the elements necessary to qualify for self-defense is missing. In *Townsend v. Commonwealth, Ky.*, 474 S.W.2d 352 (1971), we held that if the evidence relied upon to establish self-defense is contradicted or if there is other evidence from which the jury could reasonably conclude that some element of self-defense is absent, a directed verdict should not be given. While the Commonwealth always bears the burden of proving every element of the crime charged, a defendant relying upon self-defense bears the risk that the jury will not be persuaded of his version of the facts. *Collins v. Commonwealth*, 309 Ky. 572, 218 S.W.2d 393 (1949).

In the instant case, appellant's strategy was to depict Davis as a mean, violent drunk whose temper caused the incident that led to his death, and to show that appellant naturally was responding, as anyone would, to protect his family and himself. See *Holcomb v. Commonwealth, Ky.*, 280 S.W.2d 499 (1955). Appellant sought to persuade the jury that when he went outside with the second gun, he was responding to Davis' threats and his perception that Davis was obtaining a gun from the four-

wheeler; and that fatal shot was fired only in response to Davis' lunging at and cutting appellant with a knife.

However, the record contains evidence that both appellant and Davis had been drinking before the incident, and that when Davis prepared to leave appellant's house, appellant started the incident which led to the exchange of words. The record also contains evidence that appellant brought the firearms into the altercation and initially pointed a gun in Davis' face, that Davis left appellant's house and did not return back to the porch, that Davis had started his four-wheeler to leave, that appellant shot a firearm while Davis was away from the house, that Davis did not have a firearm, and that appellant came from nowhere and shot Davis. In addition, no witness ever saw Davis with a gun, knife or other weapon, and Davis' clothing did not contain gunshot residue.<sup>1</sup> Moreover, as noted by the Commonwealth, the variances between the witnesses' statements at the scene and their testimony at trial give rise to the possibility of fabrication.

In convicting appellant of manslaughter in the second degree, the jury was required to believe, beyond a reasonable

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<sup>1</sup> The absence of gunshot residue could have been accounted for by the rain which was falling that evening, but its absence could also contradict appellant's story that Davis was in close proximity when the fatal shot was fired.

doubt, that appellant wantonly<sup>2</sup> caused Davis' death, and that he was not privileged to act in self-defense. As has been frequently noted, "[c]redibility and weight of the evidence are matters within the exclusive province of the jury." *Commonwealth v. Smith, Ky.*, 5 S.W.3d 126, 129 (1999). Based on all the testimony presented at the trial, it was not clearly unreasonable for the jury to find appellant guilty.

The judgment of the Morgan Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Barbara Anderson  
Lexington, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III  
Attorney General of Kentucky

Gregory C. Fuchs  
Assistant Attorney General  
Frankfort, Kentucky

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<sup>2</sup> Under KRS 501.020(2), "[a] person acts wantonly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. A person who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts wantonly with respect thereto."