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Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002526-MR

JAMES E. BURDUE

APPELLANT

v. APPEAL FROM MCCREARY CIRCUIT COURT
HONORABLE JERRY D. WINCHESTER, JUDGE
ACTION NO. 03-CR-00015

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART
AND REMANDING

** ** *

BEFORE: BARBER, BUCKINGHAM, AND JOHNSON, JUDGES.

JOHNSON, JUDGE: James E. Burdue has appealed from the final judgment of the McCreary Circuit Court entered on November 19, 2003, which pursuant to a jury verdict convicted him of manslaughter in the first degree¹ and sentenced him to prison for 14 years. Having concluded (1) that the indictment was not defective; (2) that the trial court did not abuse its discretion by denying Burdue a continuance on the day of trial; but (3)

¹ Kentucky Revised Statutes (KRS) 507.030.

that the jury instructions were erroneous to the substantial prejudice of Burdue as they did not contain the whole law of the case, we affirm in part, reverse in part, and remand for a new trial.

On February 24, 2003, Burdue was indicted by a McCreary County grand jury for the murder of Timothy C. Ridner (a.k.a. Emo Ridner). A jury trial was scheduled for October 21, 2003; but on October 17, 2003, Burdue filed a motion for a continuance based on the Commonwealth's failure to provide a copy of the ballistics report. Burdue's trial had originally been scheduled for May 29, 2003, but it had been continued at the request of the Commonwealth.² Apparently, the ballistics report was completed on October 17, 2003, received by the Commonwealth on October 20, 2003, and sent to Burdue's counsel by facsimile machine that same day. Following a hearing prior to the start of the trial on October 21, 2003, the trial court denied the motion for a continuance.

At the jury trial held on October 21 and 22, 2003, the evidence showed there had been a great deal of animosity between Burdue and Ridner and their families for several years. The Commonwealth presented evidence that on or about February 10, 2003, Burdue was inside his mobile home with his girlfriend, Sioux Hutchinson, and her brother, William "B.J." Hutchinson,

² The Commonwealth stated in its motion that "there are pending lab reports that are not ready which are vital in this matter."

when B.J. noticed a vehicle parked in the "turn around" adjacent to Burdue's property.³ B.J. testified that he yelled to Burdue that someone was "messaging with the vehicles."⁴ Burdue took a .25 caliber pistol from his nightstand and ran out of his mobile home.⁵ When Burdue reached the vehicles, Ridner was trying to get into the passenger side of his cousin's, Danny Ridner's, vehicle.⁶ Burdue grabbed Ridner by the hood of his sweatshirt and pulled him out of the car. Burdue testified that when he spun Ridner around, he saw what he thought was a gun in Ridner's hand, so he pulled the .25 caliber pistol from his waistband and the gun accidentally fired toward the ground. Ridner then began to flee from the scene on foot. Burdue stated that Ridner stopped about 25 feet⁷ away; and as Ridner turned toward Burdue, Burdue saw a gun in Ridner's hand. Burdue stated that he fired

³ Apparently, the driveway to Burdue's mobile home included a wide area similar to a cul-de-sac.

⁴ Specifically, Ridner was "messaging" with B.J.'s mother's Ford Explorer.

⁵ In Burdue's original taped statement, he claimed he carried a .22 caliber rifle out of the mobile home and that this was the only firearm discharged during the incident on February 10, 2003. However, Burdue admitted that his original statement was false, both under oath and in a taped statement to Detective Ronnie Meadows. During these subsequent statements, Burdue claimed he was carrying a .25 caliber pistol and B.J. was carrying a .22 rifle during the incident.

⁶ Danny Ridner (a.k.a. Dino) testified that neither he nor Emo had a gun with them and that they had no intention of harming Burdue, his family, or any of their property. He claimed he had merely parked his car at the turn around so he and Emo could smoke some marijuana before he took Emo to pick up a refrigerator.

⁷ No one estimated the distance in footage. However, Burdue's counsel stood in the courtroom near the rail approximately 25 feet from the witness stand when Burdue told him he was at the correct distance.

the second shot toward Ridner and Ridner once again began to run away from him.⁸ Burdue stated that he saw Ridner throw something into the field as he ran away.⁹

Ridner's body was discovered the next morning near a road approximately one and one half miles from where the altercation occurred. Ridner had suffered two gunshot wounds, the first was a flesh wound near his right knee, the other was an entry wound through his back. Ridner's body was sent to the Kentucky State Police crime lab where an autopsy was performed. The medical examiner, Dr. Gregory James Davis, testified that Ridner's death was caused by the gunshot wound to his back, fired from an indeterminate range.¹⁰ A .25 caliber bullet was recovered from Ridner's body; however, the ballistics report was inconclusive as to whether the bullet had been fired from Burdue's pistol.

After the trial court denied Burdue's motion for a directed verdict of acquittal, Burdue requested the trial court

⁸ B.J. also claimed he fired two shots from the .22 caliber rifle he was carrying at some point during the altercation between Burdue and Ridner.

⁹ The Kentucky State Police found a toy gun in the vicinity of the location where the incident occurred. There was no testimony concerning the origin of the toy gun.

¹⁰ Dr. Davis testified that the fatal bullet entered Ridner's body through the skin; perforated the 11th intercostal space, the space between the 11th and 12th rib; the bullet then went through Ridner's diaphragm; perforated his stomach; went through the apex of his heart; then went through the fifth front intercostal space, the space between the fifth and sixth rib; and finally came to rest in the soft tissue just underneath Ridner's skin.

to instruct the jury on murder,¹¹ wanton murder,¹² manslaughter in the first degree,¹³ manslaughter in the second degree,¹⁴ reckless homicide,¹⁵ self-protection,¹⁶ protection of another,¹⁷ and imperfect self-protection.¹⁸ The trial court refused to give any instruction other than murder and manslaughter in the first degree with the element of self-protection in both instructions. The jury found Burdue guilty of manslaughter in the first degree.

On October 29, 2003, Burdue filed a motion for a new trial and a judgment notwithstanding the verdict. Burdue claimed the trial court abused its discretion by not granting his motion for a continuance based on the fact that the Commonwealth had not submitted the ballistics report "through discovery in a reasonable time before trial" thereby denying Burdue the time he needed to obtain an expert witness. Burdue also claimed the trial court erred when it denied him a jury instruction on self-protection and refused to instruct on any

¹¹ KRS 507.020.

¹² KRS 507.020(1)(b). (Obviously, since Burdue was acquitted of murder, he has abandoned his claim for a wanton murder instruction.)

¹³ KRS 507.030.

¹⁴ KRS 507.040.

¹⁵ KRS 507.050.

¹⁶ KRS 503.050.

¹⁷ KRS 503.070.

¹⁸ KRS 503.120.

lesser-included offenses for murder other than manslaughter in the first degree. The trial court summarily denied Burdue's motion on November 17, 2003, and entered the final judgment and sentence on November 19, 2003. This appeal followed.

SUFFICIENCY OF THE INDICTMENT

Burdue claims the indictment from the McCreary Circuit Court was defective because it failed to allege a mens rea, and therefore, failed to state an offense. The original indictment charged as follows:

On or about the 10th day of February, 2003, in McCreary County, Kentucky, the above named defendant, JAMES BURDUE, committed the offense of Murder by shooting Timothy Ridner with a gun and causing his death.

The indictment also correctly cited KRS 507.020 as the statute authorizing the charged offense. Burdue asserts that the indictment was insufficient to establish subject matter jurisdiction because the charge did not describe every element of the offense, i.e., "whether Ridner's death was caused intentionally, wantonly, wantonly under circumstances manifesting extreme indifference to human life, recklessly, negligently or accidentally."¹⁹ We disagree.

Before the adoption of the present Rules of Criminal Procedure, our highest Court held that an indictment under KRS

¹⁹ Kentucky does not authorize a criminal offense for negligently or accidentally causing a death.

435.150 was not sufficient if it merely alleged that the charged offense was "'otherwise than according to law,'" without specifically stating the facts and underlying circumstances of the arrest.²⁰ However, the current Rules of Criminal Procedure provide for a notice pleading, and an indictment is considered sufficient if it fairly informs the defendant of the nature of the crime with which he is charged,²¹ without detailing the essential factual elements.²² "All that is necessary to 'charge an offense,' as required by RCr 8.18,²³ is to name the offense."²⁴

²⁰ Finch v. Commonwealth, 419 S.W.2d 146, 147 (Ky. 1967).

²¹ RCr 6.10 states, in relevant part, as follows:

- (1) The indictment or information shall contain a caption setting forth the name of the court and the names of the parties, and the caption shall be a part of the indictment or information.
- (2) The indictment or information shall contain, and shall be sufficient if it contains, a plain, concise and definite statement of the essential facts constituting the specific offense with which the defendant is charged.

²² Finch, 419 S.W.2d at 147.

²³ RCr 8.18 states as follows:

Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the proceedings.

²⁴ Thomas v. Commonwealth, 931 S.W.2d 446, 449 (Ky. 1996).

In Brown v. Commonwealth,²⁵ our Supreme Court determined that an indictment stating that the defendants “‘murdered Bryant Victor Dudley,’” was undeniably “loose, but not invalid.” Despite the fact that the indictment did not specify the manner or means by which the murder was allegedly committed, it was nevertheless a valid indictment. The Court in Finch stated that “if the defendant needs information concerning the details of the charge against him to enable him to prepare his defense he should be supplied them through a requested bill of particulars, rather than that a requirement be made that every indictment set forth all details of the charge.”²⁶

Thus, the indictment in this case was not defective simply because it did not state the mens rea for the charged offense. The indictment set forth the nature of the charge and was not misleading.²⁷ “The purpose for an indictment is merely to inform an accused individual of the essential facts of the charge against him so he will be able to prepare a defense.”²⁸ In this case the indictment was sufficiently detailed to be valid, and Burdue is entitled to no relief on this issue.

²⁵ 555 S.W.2d 252, 257-58 (Ky. 1977).

²⁶ Finch, 419 S.W.2d at 147.

²⁷ Salinas v. Commonwealth, 84 S.W.3d 913, 916 (Ky. 2002).

²⁸ Malone v. Commonwealth, 30 S.W.3d 180, 182 (Ky. 2000).

DENIAL OF A CONTINUANCE

Burdue also claims the trial court erred in denying his motion for a continuance. Burdue asserts that since the Commonwealth only provided the ballistics report the day before his trial, the defense had little or no time to prepare an adequate defense to this report, and the trial court's denial of a continuance violated his right to due process.

It is well-settled in Kentucky that the decision to grant a motion for a continuance is within the discretion of the trial court.²⁹ A trial court's decision whether to grant a continuance will stand unless it appears to this Court that there is a "clear abuse of judicial discretion such as to deny the accused substantial justice."³⁰ In exercising its discretion to allow or to reject a continuance, the trial court should consider the following factors:

- (1) The length of the delay;
- (2) Whether there have been any previous continuances;
- (3) The inconvenience to the litigants, witnesses, counsel, and the court;
- (4) Whether the delay is purposeful or caused by the accused;

²⁹ Hunter v. Commonwealth, 869 S.W.2d 719, 720-21 (Ky. 1994) (citing Morris v. Slappy, 461 U.S. 1, 11-12, 103 S.Ct. 1610, 1616-17, 75 L.Ed.2d 610 (1983); and Crawford v. Commonwealth, 824 S.W.2d 847, 850-51 (Ky. 1992)).

³⁰ Hunter, 869 S.W.2d at 721 (citing Brashear v. Commonwealth, 328 S.W.2d 418, 419 (Ky. 1959); and Williams v. Commonwealth, 644 S.W.2d 335, 336 (Ky. 1982)).

- (5) The availability of competent counsel, if at issue;
- (6) The complexity of the case; and
- (7) Whether denying the continuance would lead to any identifiable prejudice.³¹

Under some circumstances, the facts surrounding the case may be so clear and decisive that denying the motion to continue would be an abuse of discretion by the trial court.³² However, we find no such abuse in this case.

Burdue received a copy of the two-page ballistics report on October 20, 2003, the day before trial. Burdue had previously filed a motion for a continuance on October 17, 2003, stating that he had not received a copy of the ballistics report and thus did not have adequate time to prepare his case for trial. The trial court heard the motion on October 21, 2003, the morning the trial was scheduled to begin. Counsel for Burdue stated that he was not prepared to proceed because he had not received the ballistics report in sufficient time to prepare a defense. However, counsel did not state the amount of time he would require to prepare his defense nor did he specify what prejudice he would suffer without a continuance. Based on Burdue's failure to establish a specific purpose for a

³¹ Eldred v. Commonwealth, 906 S.W.2d 694, 699 (Ky. 1994) (citing Snodgrass v. Commonwealth, 814 S.W.2d 579, 581 (Ky. 1991)).

³² Hunter, 869 S.W.2d at 721, 723.

continuance, his failure to indicate what prejudice he would suffer if the motion was denied, and his failure to specify the length of time he needed for the continuance, we conclude the trial court did not abuse its discretion in denying Burdue's motion for a continuance. Hence, we affirm on this issue.

JURY INSTRUCTIONS

The most significant issue on appeal, and the one that we agree requires a new trial, involves the trial court's error in refusing to give an instruction on manslaughter in the second degree and in not instructing the jury on imperfect self-protection. Burdue argues the trial court, in addition to instructing the jury on murder and manslaughter in the first degree, should have instructed the jury on wanton murder, manslaughter in the second degree, reckless homicide, self-protection, protection of another, and imperfect self-protection. Obviously, since Burdue was acquitted of murder, an instruction on wanton murder is not now appropriate. However, we agree with Burdue that the jury should have been instructed on manslaughter in the second degree, both as a lesser-included offense of murder and manslaughter in the first degree and as imperfect self-protection for murder and manslaughter in the first degree.

In Kentucky it is well-established that "it is the duty of the trial judge to prepare and give instructions on the

whole law of the case . . . [including] instructions applicable to every state of the case deducible or supported to any extent by the testimony.”³³ It is fundamental in a criminal case that the trial court give instructions that place the duty of determining the merits of any lawful defense the accused may have in the jury’s hands.³⁴ An instruction for a lesser-included offense is required only if, considering the totality of the evidence, a reasonable jury could acquit the defendant of the greater offense and yet believe, beyond a reasonable doubt, that he is guilty of the lesser offense.³⁵ Thus, it is the trial court’s duty to instruct the jury on every possible offense supported by the evidence.

After denying Burdue’s motion for a directed verdict of acquittal, the trial court indicated that it would instruct the jury on murder and manslaughter in the first degree. Burdue objected to these instructions and argued that since there was evidence which showed he did not intend to injure or to kill Ridner and that he feared for his life and the lives of his family, the jury should also be instructed on wanton murder,

³³ Taylor v. Commonwealth, 995 S.W.2d 355, 360 (Ky. 1999) (citing Kentucky Rules of Criminal Procedure (RCr) 9.54(1); and Kelly v. Commonwealth, 267 S.W.2d 536, 539 (Ky. 1954)).

³⁴ Sanborn v. Commonwealth, 754 S.W.2d 534, 550 (Ky. 1988) (citing Curtis v. Commonwealth, 169 Ky. 727, 184 S.W. 1105, 1107 (1916)).

³⁵ Taylor, 995 S.W.2d at 362 (citing Skinner v. Commonwealth, 864 S.W.2d 290 (Ky. 1993); and Luttrell v. Commonwealth, 554 S.W.2d 75 (Ky. 1977)).

manslaughter in the second degree, reckless homicide, self-protection, protection of another, and imperfect self-protection. The trial court overruled Burdue's objections to the instructions and instructed the jury on murder, manslaughter in the first degree, and self-protection without defining the term.

The jury instructions provided, in relevant part, as follows:

INSTRUCTION NO.1

MURDER

You will find the Defendant guilty of Murder 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 10, 2003, and before the finding of the Indictment herein, he killed Timothy Ridner by shooting him with a gun;³⁶

AND

B. That in so doing, he was not privileged to act in self-protection.³⁷

INSTRUCTION NO. 2

FIRST-DEGREE MANSLAUGHTER

³⁶ Noticeably, this instruction failed to include the mens rea of "intentionally," but since Burdue was acquitted of murder, this unpreserved, palpable error was harmless.

³⁷ As we noted previously, self-protection was not defined.

If you do not find the Defendant guilty of Murder under Instruction No. 1, you will find the Defendant guilty of First-Degree Manslaughter 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 10, 2003, and before the finding of the Indictment herein, he killed Timothy Ridner by shooting him with a gun;

AND

- B. That in so doing, he did not intend to kill Timothy Ridner, but intended to cause serious physical injury to Timothy Ridner;

AND

- C. That in so doing, he was not privileged to act in self-protection.

INSTRUCTION NO. 3

DEFINITIONS

Intentionally--A person acts intentionally with respect to a result or to conduct when his conscious objective is to cause that result or to engage in that conduct.

Serious Physical Injury--Means physical injury which creates a substantial risk of death, or which causes serious and prolonged disfigurement, prolonged impairment of health, or prolonged loss or impairment of the function of any bodily organ.

INSTRUCTION NO. 4

REASONABLE DOUBT

The law presumes a Defendant to be innocent of a crime and the Indictment shall not be considered as evidence or as having any weight against him. You shall find the Defendant not guilty unless you are satisfied from the evidence alone and beyond a reasonable doubt that he is guilty. If upon the whole case you have a reasonable doubt that he is guilty, you shall find him not guilty.

The above instructions have two major flaws relevant to this appeal. First, they failed to instruct the jury on every offense warranted by the evidence presented, and second they failed to properly define self-protection.

KRS 507.020 provides, in relevant part, as follows:

- (1) A person is guilty of murder when:
 - (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 a 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. . . .³⁸

KRS 507.030(1) provides that "[a] person is guilty of manslaughter in the first degree when: (a) With intent to cause serious physical injury to another person, he causes the death

³⁸ There was no evidence to support an extreme emotional disturbance instruction, and Burdue did not request it.

of such person or of a third person[.]” KRS 507.040(1) provides that “[a] person is guilty of manslaughter in the second degree when he wantonly causes the death of another person”

KRS 501.020(3) provides:

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.

KRS 507.050(1) provides that “[a] person is guilty of reckless homicide when, with recklessness he causes the death of another person.” KRS 501.020(4) provides:

A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he fails to perceive 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 failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

Thus, while a reasonable jury could have inferred from the evidence that Burdue intended to cause Ridner’s death (murder) or intended to cause him serious physical injury and caused his death (manslaughter in the first degree), there was

also evidence that Burdue did not intend to injure anyone. Burdue repeatedly testified that he "never meant to hurt that boy." Burdue claimed he fired the first shot accidentally when he pulled the hammer back. According to Burdue, this first "accidental" shot was the cause of the flesh wound near Ridner's knee. Burdue then claimed Ridner began to run away from him, but stopped and turned around, at which time Burdue claimed to have seen the profile of a gun in Ridner's hand. Burdue testified that he then pointed his gun in the direction of Ridner and fired a second shot with the intention of scaring Ridner, but not injuring him. This second shot apparently caused the fatal wound. Burdue argues that since he testified that he did not intend to injure Ridner, but merely to scare him, if the jury believed he lacked the requisite intent to cause serious physical injury or death to Ridner, it could not find him guilty of murder or manslaughter in the first degree, but only of one of the lesser-included offenses of manslaughter in the second degree or reckless homicide. We agree in part.

Based on Burdue's testimony that in firing the second shot he raised his gun, leveled his forehead, and fired in the direction of Ridner, we conclude that, unless he was found to have acted properly in self-protection, at a minimum a reasonable jury would find that that Burdue was aware of and consciously disregarded a substantial and unjustifiable risk

that his actions would likely cause Ridner's death and that Burdue's actions constituted a gross deviation from the standard of conduct that a reasonable person would observe in the situation. Thus, if the jury had been instructed on manslaughter in the second degree, unless it found he acted properly in self-protection, a reasonable jury could not have acquitted Burdue of that charge; and therefore, Burdue was not entitled to an instruction on reckless homicide. However, since there is a substantial possibility that if the jury had been instructed on manslaughter in the second degree it would have acquitted Burdue of manslaughter in the first degree, but instead found him guilty of the lesser-included offense of manslaughter in the second degree, the trial court's failure to give an instruction on manslaughter in the second degree constituted reversible error. Our holding recognizes that a reasonable jury could choose to believe Burdue fired the shot in the direction of Ridner because he feared for his own safety and he was attempting to scare Ridner away; or it could find that Burdue intended to fire the gun near Ridner without fearing for his own safety, but merely to scare Ridner. Such a finding by the jury would result in Burdue not being entitled to the defenses of self-protection or imperfect self-protection. However, a finding by the jury that Burdue shot Ridner while trying to scare him would result in Burdue being found guilty of

manslaughter in the second degree for his wanton conduct in causing Ridner's death.

Burdue also claims the trial court erred by not instructing the jury on self-protection, protection of another, and imperfect self-protection. In fact, in the instructions for both murder and manslaughter in the first degree, the jury was required to find that Burdue "was not privileged to act in self-protection." However, "self-protection" was not defined by the instructions.

KRS 503.050 provides as follows:

- (1) The use of physical force by a defendant upon another person is justifiable when the defendant believes that such force is necessary to protect himself against the use or imminent use of unlawful physical force by the other person.

In Estep v. Commonwealth,³⁹ our Supreme Court stated that "[o]nce a defendant produces evidence that he acted in self-protection, the burden of proof as to that issue shifts to the Commonwealth and is assigned by including as an element of the instruction on the offense 'that he was not privileged to act in self-protection.'"

In this case, evidence was presented to establish that Burdue and Ridner had a history of confrontations between them. Burdue stated that on one prior occasion, he discovered bullet

³⁹ 64 S.W.3d 805, 811 (Ky. 2002).

holes on the back side of his mobile home, allegedly caused by Ridner. He also claimed that Ridner had threatened to kill him on several other occasions. Burdue testified that he feared for his life when he saw Ridner stop and turn around holding what appeared to him to be a gun. Burdue testified that it was at that time he fired the second shot because he was afraid that Ridner would shoot him. Based on this testimony, a reasonable jury could have chosen to believe Burdue shot Ridner while acting in self-defense. Thus, Burdue was entitled to a self-protection instruction; and on remand that instruction should follow the specimen instruction as set forth in Commonwealth v. Hager.⁴⁰

As to Burdue's claim that he was entitled to an instruction for the protection of another, we conclude that there was no evidence that any other person was endangered by Ridner's actions.⁴¹ Thus, the trial court properly denied this instruction.

⁴⁰ 41 S.W.3d 828 (Ky. 2001). As to the trial court's failure to couch the "self-protection" instruction in definitional terms, while it may not have been a palpable error, it is an error that must be corrected at the new trial. "[T]he self-protection instruction is couched in definitional terms." Palmore, Kentucky Instructions to Juries, § 10.01 Comment (5th ed. 1990). Cf. Holland v. Commonwealth, 114 S.W.3d 792, 804-05 (Ky. 2003) (holding that "the trial court's failure to define the terms utilized in that instruction in a manner that allowed the jury to evaluate properly Appellant's involuntary intoxication defense entitles Appellant to a new trial under proper instructions").

⁴¹ Williams v. Commonwealth, 276 Ky. 754, 759, 125 S.W.2d 221 (1939).

As to Burdue's claim of imperfect self-protection, Kentucky courts have recognized the defense of imperfect self-defense as codified in KRS 503.120,⁴² in Commonwealth v. Higgs,⁴³ Hager, supra,⁴⁴ and Elliott v. Commonwealth.⁴⁵ The Court in Higgs held that "[e]ven if a defendant is mistaken in his subjective belief, he is still entitled to the defense of self-protection, subject only to the wanton or reckless belief qualification described in KRS 503.120(1)."⁴⁶ The Court in Elliott stated, "[i]f 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

⁴² KRS 503.120(1) provides as follows:

When the defendant believes that the use of force upon or toward the person of another is necessary for any of the purposes for which such belief would establish a justification under KRS 503.050 to 503.110 but 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, the justification afforded by those sections is unavailable in a prosecution for an offense for which wantonness or recklessness, as the case may be, suffices to establish culpability.

⁴³ 59 S.W.3d 866 (Ky. 2001).

⁴⁴ 41 S.W.3d at 828.

⁴⁵ 976 S.W.2d 416 (Ky. 1998).

⁴⁶ Higgs, 59 S.W.3d at 890.

a recklessly held belief reduces the offense to reckless homicide."⁴⁷

The Supreme Court in Hager stated:

[A] mistaken belief in the need to act in self-protection does not affect the privilege to act in self-protection unless the mistaken belief is so unreasonably held as to rise to the level of wantonness or recklessness with respect to the circumstance then being encountered by the defendant [citation omitted].

[KRS 503.120(1)] first recognizes that all KRS 503 justifications, including self-protection, are premised upon a defendant's actual subjective belief in the need for the conduct constituting the justification and not on the objective reasonableness of that belief. Secondly, the statute recognizes that a defendant may be mistaken in his belief and that the mistaken belief, itself, may be so unreasonably held as to constitute wantonness or recklessness with respect to the circumstance then being encountered. If so, the statute provides that the justification, e.g., self-protection, is unavailable as a defense to an offense having the mens rea element of wantonness, e.g., second-degree manslaughter, or recklessness, e.g., reckless homicide, "as the case may be" [citations omitted].

Thus, while a wantonly held belief in the need to act in self-protection is a defense to an offense having the mens rea element of intent, it supplies the element of wantonness necessary to convict of second-degree manslaughter; and while a recklessly held belief in the need to act in self-protection is a defense to an offense requiring either intent or wantonness, it supplies the element of recklessness necessary to convict of reckless homicide. . . . Specifically, murder or first-degree

⁴⁷ 976 S.W.2d at 420, n.3.

manslaughter is reduced to second-degree manslaughter by a wantonly held belief or to reckless homicide by a recklessly held belief.⁴⁸

Similar to our previous discussion, Burdue's belief in the need to use self-protection could not be found to have been merely recklessly held, but it could be found to have been wantonly held. Thus, we conclude that it was reversible error for the trial court to refuse to instruct the jury on imperfect self-protection as to a wantonly held belief for the need to use self-protection, and we reverse and remand for a new trial. When the jury is instructed at the new trial, the instruction on imperfect self-protection should be limited to a wantonly held belief for the need to use self-protection, but otherwise it should be consistent with Hagar.

For the foregoing reasons, the final judgment of the McCreary Circuit Court is affirmed in part and reversed in part, and this matter is remanded for a new trial consistent with this Opinion.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT FOR
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BRIEF FOR APPELLEE:

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⁴⁸ Hager, 41 S.W.2d at 842.

ORAL ARGUMENT FOR APPELLEE:

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