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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002672-MR

BENNY JOE LEACH — APPELLANT

v.

APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE PAUL E. BRADEN, JUDGE
ACTION NO. 03-CR-00052

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; McANULTY, JUDGE; MILLER, SENIOR JUDGE.[1]

COMBS, CHIEF JUDGE: Benny Leach appeals from a final judgment of the Whitley Circuit Court convicting him of assault in the second degree for stabbing Glennis Anderson, Jr., with a knife. He was sentenced to serve six years in prison. In addition, Leach was ordered to pay restitution in the amount of $10,707 to

[1] Senior Judge John D. Miller, sitting as Special Judge by Assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Jellico Community Hospital, where Anderson underwent surgery for his wounds.

On appeal, Leach argues that the trial court committed reversible error by failing to instruct the jury on fourth-degree assault. He also contends that the trial court exceeded its authority in ordering him to pay restitution to the hospital. After reviewing the evidence, we vacate the conviction and remand for a new trial.

On October 25, 2002, after several hours of drinking and socializing together at Leach's residence, Leach and Anderson began to argue. Leach admitted that he stabbed Anderson in the stomach. On April 14, 2003, he was indicted for the offense of first-degree assault. The matter proceeded to trial in September 2003. The jury heard testimony concerning the stabbing from three different witnesses: Anderson, Leach, and Kentucky State Trooper Michael Bowling, Jr.

Anderson related that early on the day of the stabbing, he was enjoying a cordial visit with Leach when a vehicle occupied by a man and a woman pulled into Leach's driveway. Anderson recognized the man in the car as someone with whom he had previously had problems; he told Leach that he did not want any trouble. Anderson testified that he assumed that Leach would ask the couple to leave. Instead, Leach began

to rant and rave: “This is my kingdom. I reign and rule here. I decide who stays here and who don’t.”

Anderson took offense at Leach’s comments. He gave the following account of his assault to the jury:

> I told him I wouldn’t listen to it, I’d just leave. There wasn’t nobody in the trailer. I’d be ashamed to hit somebody that small . . . with a stick. I wouldn’t need that. I started to exit the trailer and [Leach] reached around and stuck me right here. I had a beer in my hand walking out the door, my back to him. He reached around me and stuck me right there. I walked out the door. When I got out the door I turned around and looked and he was going to stick me again and I reached down and got a bicycle, hit him, knocked him off. The couple that pulled up, which was the girl, she jumped out of the car and ran over to his neighbor’s, which if we’d have subpoenaed him he could verify everything. He come over there and that’s when he intervened ‘cause [Leach] kept trying to get at me to stab me and everything and I kept trying to get in my car. He kept taunting me and everything so I wouldn’t leave. I was telling him, you know, if you’re wanting to kill me this bad I’ll find something to even that knife up with, and I never could find nothing so I eventually got in my car and as I was trying to leave he’d run up to my window and me in the car leaving out of the driveway. So, I eventually just left.

Anderson told the jury that he was certain that he had not threatened Leach in any way prior to being stabbed.

Trooper Bowling, who was dispatched to Leach’s residence to investigate the stabbing, questioned Leach

immediately following the event. The trooper testified that when he arrived, Leach was belligerent and was under the influence of alcohol. When questioned about the stabbing, Leach told him that he "meant to kill" Anderson. Later, Leach told the officer that Anderson had accused him of "messing around with his old lady" and that he had told Anderson to "leave him alone or he would have to hit him."

The officer interviewed Anderson a few days following the event and obtained a written statement from him. The statement, which Officer Bowling read to the jury, differs somewhat from Anderson's trial testimony:

> I went by B. J. Leach to talk and drink beer. I was there about eleven or twelve o'clock. We sat and talk for a while then he started to get smart when he got some more company and he started calling me names and cursing me. I told him that he wasn't going to talk to me that way. I would kick his ass. And he jumped at me and stabbed me in the stomach. Then he tried to stab me again and I throwed a bicycle at him to stop him and then the neighbor came and got between us and got me to leave so he couldn't stab me again.

Trooper Bowling also testified that Anderson did not mention the fact that he was stabbed from behind.

Leach testified in his own defense. He agreed with Anderson's testimony that the tone of their visit changed when two other visitors appeared in his driveway. He testified that

Anderson told him that he had “had words” with the man. Leach responded, “Now if you’ve got trouble, take it somewheres else because I don’t want none.” According to Leach, when the couple came inside his trailer and sat down, trouble erupted:

> [Anderson] started cussing this boy here and I told him, I said, Glennis, I said, If that’s all you can do is come to my house and start cussing, I said, I’d appreciate it if you would leave, just go, man, go. Excuse my language but he said, By God, I don’t have to go nowhere. I said, well, I wished you would. Well, he jerked his hat off, throwed it in the floor, and took his shirt off and throwed it in the floor, and the last thing I remember he grabbed that mop and hit me in the side of the head with it, I know, one time, and after that I don’t remember what happened. But, now, my witness told me that he beat me –
>
> Q. Just tell me what you remember. Okay? Do you remember stabbing him?
>
> A. No, I don’t remember stabbing him.
>
> Q. But you don’t deny that you probably did.
>
> A. No, I don’t deny that I probably did. But he had me beat back. I couldn’t do nothing.
>
> Q. Did anybody try to help you or assist you?
>
> A. Well, yeah, the girl that was sitting beside of me, she told me. Now, I don’t remember this.
>
> Q. Okay. When’s the first time you remember anything after this?
>
> A. Well, when he picked the bicycle up and throwed it at me outside . . . I told him, I said, Just go on, Glennis. I said, Please, just go, man. I don’t want no problems. He went, throwed the

> bicycle and then he went out to the car and he started opening beers and throwing them at me, and then he said, You stabbed me. And I said, Yeah, I said, if you don't go on and leave me alone, I said, I'll do it again. I said, The best thing to do is leave.

The two unidentified persons whose arrival precipitated the assault did not testify; nor did Leach's neighbor. The court instructed the jury on first-degree assault and second-degree assault. It denied Leach's request for an instruction on fourth-degree assault. After the jury returned its verdict finding him guilty of second-degree assault, Leach waived jury sentencing and accepted the Commonwealth's offer of a six-year sentence. A final judgment imposing the six-year sentence was entered on November 14, 2003. As noted earlier, the judgment also required Leach to pay $10,707 to Jellico Community Hospital in satisfaction of Anderson's medical bills.

Leach argues that the trial court erred in failing to instruct the jury on fourth-degree assault as a lesser-included offense. KRS[2] 508.030(1) defines fourth-degree assault as: (1) "intentionally or wantonly" causing physical injury to another person or (2) "recklessly" causing physical injury to another person "by means of a deadly weapon or a dangerous instrument." The Commonwealth argues that the issue was not properly

[2] Kentucky Revised Statutes.

preserved for review. However, the record leaves no doubt that Leach requested the instruction, thereby sufficiently preserving the error for our review. RCr[3] 9.54(2).

Leach bases his claim for entitlement to the instruction on Elliott v. Commonwealth, 976 S.W.2d 416, 420 (Ky. 1998), which discusses in great detail the defenses available to an accused flowing from several homicide statutes. Elliott engages in a scholarly yet pragmatic analysis of the nuances and relationship of the Kentucky statutes treating wanton murder, second-degree manslaughter (reckless homicide), wanton assault, or reckless assault. Justice Cooper notes at the outset that common law provided for the affirmative assertion of self defense;

> **only if** the defendant had **reasonable grounds** to believe at the time of his act that the action he took was necessary to protect himself from an imminent threat of death or serious bodily injury.

Id. at 419 (Emphasis added.) Kentucky statutes, however, depart from the common law significantly by creating various gradations of reasonableness based on the **subjective** state of mind of the perpetrator as distinguished from a purely objective standard. KRS 503.050 provides the following exceptions to the common law:

> (1) The use of physical force by a defendant upon another person **is justifiable** when the defendant

[3] Kentucky Rules of Criminal Procedure.

> ***believes*** **that such force is necessary** to protect himself against the use or imminent use of unlawful physical force by the other person.
>
> (2) The use of physical force by a defendant upon another person **is justifiable** under section (1) only when the defendant ***believes*** **that such force is necessary** to protect himself against death, serious physical injury, kidnapping, or sexual intercourse by force or threat.

(Emphases added.)

Elliott next emphasizes that the **subjective belief** of a defendant in his need for self-defense is not absolute and is qualified and circumscribed by KRS 503.120, which provides as follows:

> (1) 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.

> (2) When the defendant is justified under KRS 503.050 to 503.110 in using force upon or toward the person of another, **but he wantonly or recklessly injures or creates a risk of injury to innocent persons, the justification afforded by those sections is unavailable** in a prosecution for an offense involving wantonness or recklessness toward innocent persons.

(Emphases added.) Thus, the state of mind of a person believing himself justified to protect himself cannot shield him from prosecution if he was unreasonable (wanton or reckless) in his belief or if innocent third parties are injured. Needless to say, the analysis is fraught with subtleties that elude precision of definition.

Elliott concludes that an "imperfect" state of mind as to reasonableness exists as a middle ground. When a defendant is wanton or reckless in his belief that force is necessary for self-defense, he cannot rely on such an imperfect defense for purposes of an acquittal. However, he is entitled to an instruction on a lesser-included offense (in this case, fourth-degree assault).

> The statute [KRS 503.120(1)] permits a defense premised upon **an actual, but wantonly or recklessly held, belief** to reduce a primary offense to a **lesser offense**; but does not permit the same or another KRS Chapter 503 defense to be applied to the reduced offense in order to effect an acquittal.

Id. at 422. (Emphasis added.)

Relying on Taylor v. Commonwealth, 995 S.W.2d 355 (Ky. 1999), the Commonwealth argues that there was no evidence to warrant the giving of an instruction on fourth-degree assault. However, Taylor is highly distinguishable from this case as it did not involve a claim of self-defense or the propriety of instructing on a lesser-included offense based on the concept of imperfect self-defense as discussed in Elliott. Taylor struck his victim in the head with the stock of his rifle during a robbery. The court rejected his claim of entitlement to an instruction on fourth-degree assault because there was no evidence to support a finding that the assault was the result of a wanton or reckless mental state. Id. at 362.

After a review of the record, we conclude that Leach was entitled to the requested instruction on fourth-degree assault. A trial court is generally required "to instruct on every state of the case reasonably deducible from the evidence." Ragland v. Commonwealth, 421 S.W.2d 79, 81 (Ky. 1967). There was evidence from which the jury could have inferred that Leach's belief in his need to defend himself was wantonly or recklessly held. If the jury believed that the events transpired as recounted in Anderson's written statement (that he threatened to "whip [Leach's] ass" and was immediately jumped on

and stabbed by Leach), the jury could have rejected Leach's claim of self-defense while still finding that he was wanton or reckless in believing that he needed to stab Anderson. Commonwealth v. Hager, 41 S.W.3d 828, 836 (Ky. 2001). However, under the instructions given by the court, the jury did not have the opportunity to assess Leach's culpability under the Elliott criteria. Accordingly, Leach is entitled to a new trial.

Leach also contends that the trial court erred in ordering him to pay restitution to Jellico Community Hospital. He argues that the applicable statute, KRS 532.032(1), limits the authority of a trial court to order restitution to a **victim** only -- thus precluding to providers of medical services to crime victims. Although Leach admits this issue has not been preserved for review, we will address the issue since a new trial will be granted.

KRS 532.032(1) provides as follows:

> Restitution to a named victim, if there is a named victim, shall be ordered in a manner consistent, insofar as possible, with the provisions of this section and KRS 439.563, 532.033, 533.020, and 533.030 in addition to any other part of the penalty for any offense under this chapter. The provisions of this section shall not be subject to suspension or nonimposition.

In Clayborn v. Commonwealth, 701 S.W.2d 413 (Ky.App. 1985), this Court held that the trial court abused its discretion in

ordering the defendant to pay restitution for the medical expenses of his victim that exceeded the amount **actually paid by the victim** from his own funds. In Clayborn, most (if not all) of the victim's medical expenses were paid by the victim's insurer. While recognizing that the insurer had losses of $22,000 as a result of the assault on its insured, the court held that the insurance company was "not a reimbursable entity under the statute." Id., at 415-16.

In the case before us, no evidence was presented as to Anderson's actual out-of-pocket expenses, nor was there any evidence that the medical bills were paid by a governmental entity or by an insurer. On remand, the trial court is directed to confine its award of restitution to Anderson's actual expenses and to limit the amount of restitution ordered as to those itemized expenses actual paid by him.

The judgment of the Whitley Circuit Court is vacated, and this matter is remanded for a new trial.

ALL CONCUR.

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