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**Commonwealth of Kentucky  
Court of Appeals**

NO. 2007-CA-000175-MR

STEVIE EARL WORLEY

APPELLANT

v. APPEAL FROM WHITLEY CIRCUIT COURT  
HONORABLE PAUL E. BRADEN, JUDGE  
ACTION NO. 03-CR-00121

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: ACREE, DIXON, AND TAYLOR, JUDGES.

ACREE, JUDGE: Stevie Worley appeals from a judgment of the Whitley Circuit Court finding him guilty of first-degree manslaughter and sentencing him to eighteen years' imprisonment. Although he raises several claims on appeal, the

most significant claim of error is the trial court's refusal to apply Kentucky Revised Statute (KRS) 503.085, which was enacted after Worley's offense, but before his trial. Worley argues he had legal justification to kill Dustin Cole and, thus, was immune from prosecution pursuant to the statute. We disagree and affirm the trial court.

To understand Worley's claim of justification, it is necessary to review the relationship between the parties. Cole, at the age of thirteen began a sexual relationship with Worley's niece, Christi Worley, and after three years the two had a child. The relationship between Cole and Christi was tempestuous with allegations that he was violent towards both Christi and her brother, Mike. Needless to say, Cole was not welcomed by the members of the extended Worley clan when he would show up on their property. At the time of the incident which resulted in Worley's conviction, several members of the extended family were living in a hollow in multiple trailers. Worley lived with his mother and, by some accounts, Christi's baby in one trailer. Christi testified that both she and the baby lived in her mother's trailer.

On the evening of July 31-August 1, 2003, Cole came to the hollow where the Worleys lived. According to his current girlfriend, he had received over twenty calls from members of the Worley family that day and Christi had asked him to bring her some pain pills. Christi testified differently, stating that she had told Cole he should not come up that day. Nevertheless, Cole habitually went to see Christi when she received her welfare check the first of the month. Sometime

around midnight, Cole arrived at Worley's trailer with a friend. Worley was there with his nephew, Mike, and a friend known as Red. There was a scuffle between Cole and Red with Cole accusing Red of having a relationship with Christi and Red holding Cole down on the ground until he calmed down. Cole's friend left to call 911 from a nearby home.

Afterwards, Cole and Mike got into a shouting match. According to Red, Cole taunted Worley, who was armed with a shotgun, about not having the nerve to shoot. He also stated that no one there could stop him from entering Worley's trailer to see Christi and the baby. Worley asked Cole to leave repeatedly, but Cole struggled with him and tried to wrest the shotgun away from him. Eventually, Red persuaded Cole to leave and was walking him away from Worley's trailer. At that point, Mike shouted something at Cole and Cole charged back. Worley fired the shotgun without aiming and hit Cole. Red used Worley's phone to call 911. When police arrived, they found seventeen year-old Cole dead from a shotgun wound to the chest.

Worley was indicted for the offense of murder. After the offense, but before his trial, the General Assembly enacted KRS 503.085 which provided that an individual who used force against another, as permitted by one of several specific statutes, was immune from prosecution. Worley filed a pretrial motion to dismiss the charge against him, arguing that his use of deadly force was justified in order to defend his home from invasion by Cole. The trial court stated that it had an insufficient factual basis to determine whether the statute applied to Worley's

actions. The Commonwealth argued that KRS 503.085 merely created a right to a jury instruction on justification, not to pretrial dismissal. At trial, Worley moved for a directed verdict based, in part, on the statute. The motion was overruled. The jury convicted Worley of the lesser included offense of first-degree manslaughter, and judgment was entered sentencing him to the recommended eighteen years. This appeal followed.

Worley's first argument on appeal is that the trial court erroneously refused to dismiss the indictment based on changes to the law which occurred after he committed the offense. KRS 503.085(1) reads as follows:

A person who uses force as permitted in KRS 503.050, 503.055, 503.070, and 503.080 is justified in using such force and is immune from criminal prosecution and civil action for the use of such force, unless the person against whom the force was used is a peace officer, as defined in KRS 446.010, who was acting in the performance of his or her official duties and the officer identified himself or herself in accordance with any applicable law, or the person using force knew or reasonably should have known that the person was a peace officer. As used in this subsection, the term "criminal prosecution" includes arresting, detaining in custody, and charging or prosecuting the defendant.

KRS 503.050, 503.070, and 503.080 describe circumstances under which the use of deadly force is permissible to defend one's self, a third party, or to prevent home invasion. KRS 503.055, also amended by the General Assembly while the indictment against Worley was pending, reads, in relevant part, as follows:

(3) A person who is not engaged in an unlawful activity and who is attacked in any other place where he or she has a right to be has no duty to retreat and has the right to

stand his or her ground and meet force with force, including deadly force, if he or she reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or herself or another or to prevent the commission of a felony involving the use of force.

Worley contends that, since the shooting occurred outside his home and he had reason to believe that Cole would injure him and/or invade his home, he was justified in using deadly force against him without first retreating. Thus, he claims that the trial court was required to dismiss the indictment pursuant to KRS 503.085.

Before the trial began, the trial court found that it did not have a sufficient factual basis to conclude that Worley's use of deadly force was justified. When Worley made his motion for directed verdict at the close of the prosecution's case, the trial court found that the Commonwealth had produced sufficient evidence to support a verdict of intentional murder. At the conclusion of the defendant's case, the trial court denied the motion for directed verdict because the defense offered at trial was inconsistent with the legal grounds for self-defense. We agree. At trial, there was evidence that Cole had beaten Christi multiple times, causing bruises and black eyes. Christi testified that she lived in fear of her child's father. In addition, there was evidence that Cole had attacked both Christi and Mike with a knife on separate occasions.

Worley knew all of this, in addition to having witnessed Cole in a fight with another man whom Cole injured. Nevertheless, with regard to the actual shooting, Worley testified that he did not recall cocking the shotgun. He told the

jury that, as he was backing away from Cole, the butt of the gun bumped against a parked car causing an accidental discharge. The Kentucky Supreme Court has previously determined that self-defense and accident are mutually exclusive defenses. *Grimes v. McAnulty*, 957 S.W.2d 223, 227 (Ky. 1997)(“A defendant who affirmatively asserts the defense of accident cannot also claim self-protection.”). Thus, the trial court correctly found that Worley’s defense at trial did not entitle him to claim legal justification such as would confer immunity from prosecution under KRS 503.085.

After he was convicted, Worley filed a motion for a new trial arguing, in part, that KRS 503.085 obligated the trial court to dismiss the charges against him. The trial court found that the statute could not be applied retroactively and, thus, Worley could not benefit from the immunity conferred by the amended statute. On appeal, Worley argues that KRS 503.085 was meant to apply to cases pending when it was enacted. We disagree. KRS 446.080(3) explicitly states, “No statute shall be construed to be retroactive, unless expressly so declared.” There is nothing in the language of KRS 503.085 which even suggests that the General Assembly intended it to apply retroactively. Nevertheless, Worley directs our attention to KRS 446.110 which reads as follows:

No new law shall be construed to repeal a former law as to any offense committed against a former law, nor as to any act done, or penalty, forfeiture or punishment incurred, or any right accrued or claim arising under the former law, or in any way whatever to affect any such offense or act so committed or done, or any penalty, forfeiture or punishment so incurred, or any right accrued

or claim arising before the new law takes effect, except that the proceedings thereafter had shall conform, so far as practicable, to the laws in force at the time of such proceedings. If any penalty, forfeiture or punishment is mitigated by any provision of the new law, such provision may, by the consent of the party affected, be applied to any judgment pronounced after the new law takes effect.

Worley contends that KRS 503.085 is remedial in nature and, therefore, automatically retroactive. *Kentucky Ins. Guar. Ass'n v. Jeffers ex rel. Jeffers*, 13 S.W.3d 606, 609 (Ky. 2000).

In order to determine whether KRS 446.110 applies, we must first examine the actual language of the statute. That statute mandates the application of procedural changes to the law “so far as practicable” in cases tried after a new law is enacted. Further, changes to the law which mitigate a “penalty, forfeiture or punishment” may apply to subsequent judgments with the consent of the party affected. The amended KRS 503.085 did not enact a procedural change, creating as it did a new right to be free from prosecution for using force if such use was justified under the law. Nor, despite Worley’s argument, did it mitigate a penalty, forfeiture, or punishment. The plain language of KRS 446.110 makes clear the General Assembly’s intent that the words “penalty, forfeiture or punishment” be given their ordinary meaning. *Black’s Law Dictionary* defines the terms penalty, forfeiture, and punishment as follows:

penalty 1. Punishment imposed on a wrongdoer, esp. in the form of a punishment or fine.

forfeiture 1. The divestiture of property without compensation. 2. The loss of a right, privilege, or property because of a crime, breach of obligation, or neglect of duty.

punishment A sanction—such as a fine, penalty, confinement, or loss of property, right, or privilege—assessed against a person who has violated the law.

*Black's Law Dictionary*, 1153, 661, 1247 (7<sup>th</sup> ed. 1999). Being prosecuted for an indicted offense does not fit within the plain definitions of the words penalty, forfeiture, or punishment. The Kentucky Supreme Court has recognized that, in criminal cases, “[t]he exception of KRS 446.110 only applies if the new penalty is definitely mitigating.” *Bolen v. Commonwealth*, 31 S.W.3d 907, 909 (Ky. 2000). KRS 503.085 did not contain any language mitigating penalties since persons affected by the amended statute would never face prosecution and, thus, possible conviction and punishment. Since the statute also lacked language specifying its retroactive application, the trial court correctly determined that Worley could not avail himself of the immunity granted by the amended version of KRS 503.085 because it was not in force at the time he committed his offense.

Worley also moved for dismissal before the trial began due to the fact that the shotgun was lost while in police custody. Further, he asked the trial court to give the jury an instruction on lost evidence. Both requests were denied. He argues the trial court committed error in this regard. Prior to the start of trial, Worley sought to have the shotgun examined by an expert in order to bolster his claim that the gun discharged accidentally. However, he was informed four days



prior to trial that the gun had been among numerous items of evidence stolen from the sheriff's department some time earlier.

A defendant's right to an instruction "permitting the jury to draw a favorable inference for the defendant from the destruction of [exculpatory] evidence" was recognized by the Kentucky Supreme Court in *Sanborn v. Commonwealth*, 754 S.W.2d 534, 540 (Ky. 1998) (overruled on other grounds by *Hudson v. Commonwealth*, 202 S.W.3d 17, 22 (Ky. 2006)). However, before a defendant can assert a due process right to a missing evidence instruction, he must show that "the potentially exculpatory nature of the evidence was apparent at the time it was lost or destroyed." *Estep v. Commonwealth*, 64 S.W.3d 805, 810 (Ky. 2002). Further, "absent some degree of bad faith a defendant is not entitled to an instruction that the jury may draw an adverse inference from the failure to preserve or collect any evidence." *Peak v. Commonwealth*, 197 S.W.3d 536, 545 (Ky. 2006).

Worley claims the stolen items of evidence were being stored in a poorly secured location due to lack of space in the sheriff's office. He contends the improper care arguably taken by the sheriff's department to safeguard evidence in its possession is the equivalent to intentional destruction or inadvertent destruction of evidence outside of normal practices. *Tamme v. Commonwealth*, 759 S.W.2d 51, 54 (Ky. 1988). He argues that police officers have a duty to keep evidence in a safe and secure location. Numerous items of evidence were stolen and, apparently, the sheriff's department was unable to ascertain until some time

later that the shotgun was among those items. Worley urges us to accept that the Commonwealth's actions in failing to preserve the gun and make it available for testing by his expert amounted to bad faith. We find this argument unpersuasive. Further, even if we accepted that the Commonwealth acted in bad faith, Worley would still not be entitled to dismissal or a missing evidence instruction because the shotgun's exculpatory potential was not readily apparent.

Worley next argues that he was denied the right to present a defense when the trial court excluded evidence which he sought to introduce. Worley retained a ballistics expert to testify in support of his assertion that the gun accidentally fired the fatal shot. However, due to the fact that the gun was stolen from the sheriff's custody, his expert was unable to examine it. The trial court allowed the expert to testify by avowal, but refused to permit the jury to hear his testimony. Worley's expert stated that he found out the brand name of the shotgun, determined when the manufacturer went out of business, and performed two test firings using a similar gun. Based on this, the expert would have testified that "more likely than not" an old gun such as the one involved in the case at hand could have accidentally discharged. The Commonwealth objected to the proposed testimony on the ground that it lacked factual underpinning, and the trial court agreed.

Kentucky Rule of Evidence (KRE) 702, as it existed at the time of Worley's trial, allowed expert testimony to assist the trier of fact in understanding scientific or technical evidence. The United States Supreme Court articulated the

following guidelines for a trial court to use in determining whether an expert's proffered evidence is admissible: "whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592, 113 S.Ct. 2786, 2796, 125 L.Ed.2d 469 (1993). The Kentucky Supreme Court adopted the *Daubert* test in *Mitchell v. Commonwealth*, 908 S.W.2d 100, 101 (Ky. 1995) (overruled on other grounds).

The factors set forth in *Daubert* and adopted in *Mitchell* that a trial court may apply in determining the admissibility of an expert's proffered testimony include, but are not limited to: (1) whether a theory or technique can be and has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) whether, with respect to a particular technique, there is a high known or potential rate of error and whether there are standards controlling the technique's operation; and (4) whether the theory or technique enjoys general acceptance within the relevant scientific, technical, or other specialized community.

*Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 578-79 (Ky. 2000).

In the case at hand, the trial court found that the testimony offered by Worley's expert lacked sufficient scientific basis and a proper factual foundation. We review the trial court's decision to exclude proffered expert testimony for abuse of discretion. *Miller v. Eldridge*, 146 S.W.3d 909, 914 (Ky. 2004). Taking into account the inability of Worley's expert to examine the gun, and the limited factual basis for his avowal testimony, we do not find that any abuse of discretion occurred here.

Worley also challenges the trial court's decision to exclude the deceased's juvenile court records. He argues that this evidence was admissible as reverse KRE 404(b) evidence of prior bad acts committed by Cole. The Commonwealth contends that this issue is not properly preserved since Worley did not argue that he was entitled this evidence under KRE 404(b) at trial. Worley sought and obtained permission to view Cole's juvenile court records to support his claim that he reasonably anticipated that Cole would attack him the night of his death. However, the trial court sustained the Commonwealth's objection to their introduction during the testimony of his niece, Christi.

We note that significant evidence of Cole's past violent behavior was introduced. Christi, the mother of his child, testified that she lived in fear of Cole, that he had cut her with a knife and given her black eyes and bruises. Further, she asserted that Worley was aware of this abuse. Worley himself told the jury that he saw Cole beat up another man. We note that the case cited by Worley in support of his reverse KRE 404(b) argument actually dealt with the admissibility of other crimes or bad acts committed by an alleged alternate perpetrator. Worley has failed to show an abuse of the trial court's discretion in refusing to admit the victim's juvenile court records.

For the foregoing reasons, the judgment of the Whitley Circuit Court is affirmed.

ALL CONCUR.

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