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Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-000511-MR

KOREY GILBERT APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE OLU A. STEVENS, JUDGE
ACTION NO. 15-CR-001972

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** *

BEFORE: COMBS, KRAMER, AND K. THOMPSON, JUDGES.

THOMPSON, K., JUDGE: Korey Gilbert appeals from a judgment of conviction and sentence of the Jefferson Circuit Court entered following a jury verdict finding him guilty of second-degree assault and two counts of wanton endangerment in the first degree. He was sentenced to a total of eighteen years of imprisonment. On appeal, Gilbert argues that the trial court erred when it did not give instructions on

self-protection and imperfect self-protection as to each count of first-degree wanton endangerment and that he was entitled to an instruction on fourth-degree assault as a lesser-included offense of second-degree assault. We conclude that the evidence supported the requested instructions and reverse and remand for a new trial.

Ronnie Amacher and Lindsey Brown knew each other through Jeffrey Bradley, who is the father of Lindsey's son and also Ronnie's boyfriend. Ronnie and Lindsey had a quarrelsome history. Gilbert, Lindsey's brother, also knew Ronnie through Bradley, but was amicable with Ronnie and her brother, Zacari Amacher.

On July 19, 2015, Ronnie went to a concert attended by Lindsey and waited for her to exit the venue. She watched Lindsey leave, and then entered a nearby garage. Lindsey was in the passenger seat of a friend's car when Ronnie opened the door, punched her, and then straddled Lindsey in her seat and repeatedly punched her.

In the early hours of July 20, 2015, Lindsey and Gilbert traveled from Indiana to the Amacher home and parked across the street. At that time, Zacari and Lorenzo Erve were on the porch and Ronnie was in the home. The charges against Gilbert arose after he fired shots from a handgun, striking Ronnie and hitting the mailbox and glass door.

Gilbert was indicted for first-degree assault and two counts of first-degree wanton endangerment. At trial, Zacari, Lorenzo, Ronnie, Lindsey, and Gilbert testified. Their testimony was not entirely consistent.

Zacari testified that he and Lorenzo are stepbrothers. He testified he could not remember much of the events on the morning of the shooting but recalled that he and Lorenzo had gone outside on the porch to smoke. Because he could not remember much from that morning, Zacari's memory was refreshed with his prior consistent statement given to Sargent Jason Grissom. In that statement, Zacari told Sargent Grissom that Gilbert did not shoot at him and Lorenzo until Ronnie stepped out on to the porch. According to Zacari's statement, other than asking Gilbert whether he had a gun, neither Zacari nor Lorenzo said anything to Gilbert.

Lorenzo testified that at the time of the shooting he was living in the Amacher home. He testified he was on the porch on July 20, 2015 for "no particular reason" and observed what he thought was a male and female standing in the street about fifty yards away. Lorenzo testified it appeared that the male had been fumbling in his hoodie with a weapon. He then stated to Ronnie, "Look [sic] like someone with a gun. Come on, y'all. Let's step in the house." Lorenzo testified that none of the porch occupants pulled out a gun. He was asked if any of the occupants made any threats toward the man in the intersection, to which he

responded: "No ma'am. I did speak loudly – 'Hey, that person is fumbling something. C'mon let's go in.' Maybe that triggered the next person or whomever the individual was."

Ronnie testified that Gilbert had been in her home multiple times before July 20, 2015, and there had never been a problem. She testified that on the morning of the shooting, Zacari and Lorenzo had gone outside on the porch because she told them Lindsey was coming over to fight. Ronnie testified that she was expecting a fist fight, but that she intended to arm herself with a hammer before going outside. She was not sure whether or not she had a hammer in her hand when she went outside on the porch.

Ronnie testified that when she reached the porch, Gilbert was standing in the street and Brown was on the sidewalk. She heard Lorenzo say to Gilbert, "Nah, we not on all that." Ronnie testified she had not heard the words Zacari and Lorenzo exchanged with Gilbert and Lindsey before she came outside but saw Gilbert pull out a gun and fire it.

Ronnie ran into her house after the shots were fired. She was unaware that she had been struck and realized it when she noticed blood on her shirt. Ronnie testified that she had surgery on her stomach as a result of being shot and had 32 staples to close the incision. The staples remained for approximately five weeks. She has three scars on her stomach, one from the surgery and one exit and

one entrance wound from the gunshot. Ronnie could not recall the date she was discharged from the hospital but testified that it was not very long after her surgery and may have been the following day. Because Ronnie was unable to perform her job duties due to physical limitations after the shooting, she lost her job. There was no medical evidence as to the severity or nature of her injury.

Lindsey testified that after Ronnie assaulted her in the parking garage, she called Gilbert, who was at their mother's home in Jeffersonville, Indiana, to go fight Ronnie at Ronnie's house in Louisville. Gilbert attempted to talk her out of the confrontation, but she told him she was already on her way and threatened she would go without him. Gilbert agreed to go and later messaged Lindsey to bring her gun.

Once Lindsey and Gilbert got closer to the Amacher home, Lindsey called Ronnie on her cell phone and told her to come out of her house. Lindsey and Gilbert parked across the street from the Amacher home and then walked toward the home. Lindsey testified that two men aggressively confronted them, cursing and pulling at their pants while one stated to her and Gilbert, "Oh, we got beef? Y'all want smoked?" Lindsey recalled that one of the men then shouted, "Ronnie, grab the straps! Ronnie, grab the straps!" which she understood to mean guns.

Lindsey testified she did not know whether or not multiple people fired shots because she ran to her car after the first shot. After the shooting, Lindsey and Gilbert drove back to Indiana. She testified she had "no idea" what happened to the handgun and denied telling a detective that Gilbert threw it out the car window.

Lindsey conceded that she never told police about Zacari or Lorenzo speaking to her and Gilbert, the men pulling on their pants, or that she heard the phrase "Ronnie, grab the straps." Lindsey admitted that Ronnie did not threaten her during the initial confrontation that morning. She knew Ronnie would be home and her intent for going there was to engage in a physical altercation. Lindsey testified that she did not see Zacari or Lorenzo have anything in their hands.

Gilbert testified he had been in the Amacher home multiple times. He knew guns were kept in the home.

At 3:30 a.m. on the morning of the shooting, Gilbert was awakened by his mother saying his sister was crying on the phone. After speaking with Lindsey and agreeing to go to Ronnie's home, he texted her and told her to bring her handgun.

Gilbert testified that he and Lindsey stopped across the street from the Amacher home, thinking that is where Lindsey and Ronnie would fight. Gilbert

testified he saw Zacari and Lorenzo on the porch and was going to approach them, thinking they were friends. Gilbert testified that he was about twenty yards away from the home in the middle of the street when Zacari aggressively confronted him and stated: "What's up? You know what's up. You don't want this smoke." He then heard Zacari say, "Ronnie get the strap," and then, as Ronnie came out of the house, she was holding a black object in her hands, which he believed to a gun. Gilbert testified that as Ronnie walked out, Lorenzo was clutching his waistband as though he was preparing to pull a gun. Gilbert testified he believed he was going to be shot, so he fired a shot and three more as he ran away to Lindsey's car.

Gilbert admitted that on the night of the shooting, he did not see Ronnie, Zacari, or Lorenzo point a gun at him but only saw them with objects. The object he saw Ronnie with was not pointed at him when he shot his handgun.

The jury was instructed on first-degree assault, an imperfect self-protection theory of second-degree assault, and two counts of first-degree wanton endangerment. The trial court denied Gilbert's request for instructions on self-protection and imperfect self-protection as to both first-degree wanton endangerment counts and for an instruction on a lesser-included fourth-degree assault instruction.

With respect to the assault count, the jury received the following instruction on assault in the second degree:

> That in Jefferson County, on or about the 20th of July 2015, the Defendant caused a serious physical injury to Ronnie Amacher by shooting her with a gun;
>
> AND
>
> B. That the gun was a deadly weapon as defined under Instruction No. 6.
>
> AND
>
> C. The Defendant caused serious physical injury to Ronnie Amacher and that in so doing, though otherwise privileged to act in self-protection, the Defendant was mistaken in his belief that it was necessary to use physical force against Ronnie Amacher in self-protection, or in his belief in the degree of force necessary to protect himself and when the defendant caused serious physical injury to Ronnie Amacher, he was aware of and consciously disregarded a substantial and unjustifiable risk that he was mistaken in the belief, and that his disregard of that risk constituted a gross deviation from the standard of care that a reasonable person would have observed in the same situation.

Under "Instruction No. 5 SELF-PROTECTION" the jury was instructed as follows:

> If at the time an individual, including Mr. Gilbert, uses physical force upon another person he believes that person was then and there about to use physical force upon him, he is privileged to use such physical force against that person as he believed to be necessary in order to protect himself against it, including the right to use deadly force but only if he believed deadly force to be necessary to protect himself from death or serious injury at the hands of Ronnie Amacher, Zachary Amacher, or Lorenzo Erve.

The jury found Gilbert guilty of second-degree assault under a theory of imperfect self-protection and both counts of first-degree wanton endangerment.

The issues presented by Gilbert involve the trial court's jury instructions. "Each party to an action is entitled to an instruction upon his theory of the case if there is evidence to sustain it." *Farrington Motors, Inc. v. Fidelity & Cas. Co. of N.Y.*, 303 S.W.2d 319, 321 (Ky. 1957). As noted in *Sargent v. Shaffer*, 467 S.W.3d 198, 203 (Ky. 2015), "[t]he same rule applies in criminal cases." The trial court is required to "instruct the jury on all lesser-included offenses which are supported by the evidence." *Yarnell v. Commonwealth*, 833 S.W.2d 834, 837 (Ky. 1992). If the alleged error is the trial court's decision whether to give a requested instruction, the question is whether the evidence permitted "a reasonable juror to make the finding the instruction authorizes." *Springfield v. Commonwealth*, 410 S.W.3d 589, 594 (Ky. 2013) (citation omitted). In considering whether there was evidence to warrant a lesser-included instruction, an appellate court must consider the evidence in the light most favorable to the defendant. *Thomas v. Commonwealth*, 170 S.W.3d 343, 347 (Ky. 2005). The failure to give a requested instruction is reviewed using an abuse of discretion standard. *Sargent*, 467 S.W.3d at 203. The general test for abuse of discretion is whether the trial court's decision was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

Gilbert alleges that the trial court should have instructed the jury on self-protection and imperfect self-protection for each of the first-degree wanton endangerment counts. The defense of self-protection is codified in Kentucky Revised Statutes (KRS) 503.050, which states, in part:

> (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.
>
> (2) The use of deadly physical force by a defendant upon another person is justifiable under subsection (1) only when the defendant believes that such force is necessary to protect himself against death, serious physical injury, kidnapping, sexual intercourse compelled by force or threat, felony involving the use of force, or under those circumstances permitted pursuant to KRS 503.055.

Self-protection under KRS 503.050 is "a privilege—that is to say, it is a complete defense to the infliction of bodily or deadly injury." *Barker v. Commonwealth*, 477 S.W.3d 583, 587 (Ky. 2015).

It has been held that self-protection is an available defense to wanton endangerment. In *Justice v. Commonwealth*, 608 S.W.2d 74 (Ky.App. 1980), the Court held it was error not to instruct on self-protection on wanton endangerment. The defendant was charged with murder and the trial court instructed that he was privileged to use deadly force in his own self-protection. The jury acquitted. On the charge of wanton endangerment against a victim who was near the shooting,

the court refused to instruct on self-protection, and the jury convicted. The Court held that refusal was reversible error. The Court reasoned:

> Appellant admitted that he shot and killed Smith and his only defense was self-protection. The jury accepted this defense and thus we have a finding that appellant believed Smith intended either to cause him serious bodily harm or to kill him. The presence of Dotson between the appellant and Smith did not diminish the appellant's apprehension of serious injury or impending death nor did it modify his right to protect himself. If appellant had killed Dotson rather than his intended victim, an instruction on self-protection would have been required on any charges relating to Dotson's homicide. We hold that the same instruction should have been given on the charge of wanton endangerment.

Id. at 75.

In Kentucky, there is also a variation on traditional self-protection which we refer to as "imperfect self-protection."[1] KRS 503.120 provides:

> (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.

[1] Imperfect self-protection is also sometimes referred to as "mistaken self-protection."

> (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.

In summary, "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." *Commonwealth v. Hager*, 41 S.W.3d 828, 841 (Ky. 2001). Such mistaken belief will not result in acquittal but in conviction of a lesser offense. *Id*. at 842. *Hager* teaches that under proper instructions, a jury must first find that the defendant believed it was necessary to use physical force and only after that finding consider whether that belief was wantonly or recklessly held.

Imperfect self-protection is limited by KRS 503.120(2). That limitation was discussed in *Commonwealth v. Caudill*, 540 S.W.3d 364 (Ky. 2018). In *Caudill*, the defendant was charged with murder and three counts of first-degree wanton endangerment after he shot and killed his neighbor as three neighbors stood by. *Id*. at 366. The Court held the defendant was precluded from asserting imperfect self-defense with respect to the neighbors. The Court stated:

> We recognized this statutory change in *Phillips v. Commonwealth*, holding that the "statute precludes an

> instruction on self-protection if the defendant's wanton or reckless use of deadly force caused the death of an innocent person." 17 S.W.3d 870, 875-76 (Ky. 2000). Clearly, the statute is not limited to deaths of innocent bystanders but any injury or risk of injury. As such, the Court of Appeals correctly held that KRS 503.120(2) precluded the defense of justification in Caudill's prosecution for wanton endangerment first-degree against Hudson, White, and Michael. The jury instructions clearly required a finding of wantonness as to these victims, triggering the applicability of KRS 503.120(2).

Id. at 368.

Also, a defendant cannot claim he acted in self-protection or imperfect self-protection if the defendant "with the intention of causing death or serious physical injury to the other person, provokes the use of physical force by such other person" or was the initial aggressor. KRS 503.060(2)-(3). "The purpose of the initial aggressor doctrine, like the 'provocation doctrine,' is to prevent a defendant from instigating a course of conduct then claiming he was acting in self-defense when that conduct unfolds." *Randolph v. Commonwealth*, 566 S.W.3d 576, 578 (Ky.App. 2018) (quoting *Hayes v. Commonwealth*, No. 2015-SC-000501-MR, 2017 WL 639387, at *4 (Ky. Feb. 16, 2017) (unpublished)).

The evidence supporting Gilbert's belief in the need for the use of force did not need to be strong nor free from contradiction. The evidence "need only raise the issue, for an instruction on self-defense is necessary once sufficient evidence has been introduced at trial which could justify a reasonable doubt

concerning the defendant's guilt." *Hilbert v. Commonwealth*, 162 S.W.3d 921, 925 (Ky. 2005), *superseded by statute on other grounds as stated in Commonwealth v. Hasch*, 421 S.W.3d 349 (Ky. 2013).

Lindsey testified that while Gilbert was standing in the street, Zacari or Lorenzo threatened, "Oh, we got beef? Y'all want smoked?" and "Ronnie, grab the straps," which she understood to mean guns. Gilbert testified Zacari confronted him stating, "You know what's up. You don't want this smoke." Zacari then directed Ronnie to "get the strap." He further testified that he believed Lorenzo was armed because he was clutching at his waist as if he was getting ready to pull out a gun. Gilbert explained to the jury, "I felt like I wasn't going to be able to get out without getting shot at or getting shot. I was in the open to where I couldn't duck or anything. I was in the middle of the street."

There was conflicting evidence as to who was the initial aggressor and whether Zacari and Lorenzo were innocent bystanders. Although it was undisputed that Gilbert accompanied Lindsey to the Amacher home for the purpose of Lindsey to engage in an altercation with Ronnie, Gilbert testified that he did not intend to fight anyone. Contrary to the Commonwealth's assertion that Gilbert was a trespasser on the Amacher property when he fired his handgun, the evidence does not support that factual assertion. The witnesses testified that Gilbert was in the street when he fired his gun.

We cannot say that the omitted instructions on the wanton endangerment counts were harmless. As noted, the trial court did instruct on self-protection and imperfect self-protection as to the assault charge.[2] The jury found Gilbert guilty of assault in the second degree based on those instructions. Therefore, given that the offenses charged occurred at the same time, it is more than possible that Gilbert was prejudiced by the failure to give the requested instructions.

Because we are reversing Gilbert's wanton endangerment convictions and upon a retrial the evidence may be different, we do not comment on whether a qualifying provocation or initial aggressor instruction was warranted. If Gilbert is retried, the trial court must determine whether there is sufficient evidence to justify a qualifying instruction. *Stepp v. Commonwealth*, 608 S.W.2d 371, 374 (Ky. 1980).

Gilbert also argues that he was entitled to a lesser-included instruction on fourth-degree assault because a reasonable jury could find that Ronnie did not suffer serious physical injury from being shot by Gilbert. We agree.

KRS 508.020 provides:

> (1) A person is guilty of assault in the second degree when:

[2] It would have been proper for the trial court to require that the jury first find Gilbert acted in self-protection before considering whether his belief was wantonly or recklessly held.

> (a) He intentionally causes serious physical injury to another person; or
>
> (b) He intentionally causes physical injury to another person by means of a deadly weapon or a dangerous instrument; or
>
> (c) He wantonly causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument.
>
> (2) Assault in the second degree is a Class C felony.

KRS 508.030 provides:

> (1) A person is guilty of assault in the fourth degree when:
>
> (a) He intentionally or wantonly causes physical injury to another person; or
>
> (b) With recklessness he causes physical injury to another person by means of a deadly weapon or a dangerous instrument.
>
> (2) Assault in the fourth degree is a Class A misdemeanor.

Gilbert argues that an instruction on the lesser-included offense, fourth-degree assault, was warranted because a reasonable juror could find that Ronnie did not suffer a serious physical injury.

The issue is the magnitude of Ronnie's physical injury. Serious physical injury is defined in KRS 500.080(15) as "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." In contrast, KRS 500.080(13) defines physical injury as "substantial physical pain or any impairment of physical condition[.]" As noted in *McDaniel v. Commonwealth*, 415 S.W.3d 643, 658 (Ky. 2013), "[u]ltimately, a finding of first-degree assault is dependent on the seriousness of the resulting injury, not the potential of the act to result in 'serious physical injury. '"

There is no question that Ronnie suffered a physical injury. "Whether the nature of the evidence was such that the jury was compelled instead to find only the existence of serious physical injury is not so clear, as not all gunshot wounds are serious physical injuries." *Swan v. Commonwealth*, 384 S.W.3d 77, 100 (Ky. 2012). As noted by the Court in *Swan*, a trial court is permitted "to not instruct on lesser-included offenses only where the evidence presents an all-or-nothing proposition, allowing only a single account of the degree of the offense *or* demanding an acquittal." *Id*.

As in *Swan*, "[t]he proof here simply does not establish such an all-or-nothing proposition." *Id*. The only proof about the seriousness of Ronnie's injury was her testimony as there was no medical proof. "Even if medical proof is not necessary, the requirement of 'serious physical injury' for first-degree assault still 'sets a fairly strict level of proof. '" *Id*. at 100-01 (quoting *Prince v. Commonwealth*, 576 S.W.2d 244, 246 (Ky.App. 1978)).

While the jury could have reasonably believed from Ronnie's testimony that she suffered a substantial risk of death, substantial physical pain, or an impairment of a physical condition, the jury could also have believed that she did not. According to her testimony, Ronnie had a through-and-through wound with minimal bleeding and, while she had surgery, she was released from the hospital shortly afterward, possibly even the following day. Although she testified she had scars on her stomach, a scar is not necessarily a serious and prolonged disfigurement. *See Anderson v. Commonwealth*, 352 S.W.3d 577, 582 (Ky. 2011) (noting that KRS 500.080(15) "requires not merely disfigurement, but 'serious and prolonged' disfigurement"). We agree with Gilbert that he was entitled to an instruction on fourth-degree assault.

For the reasons stated, Gilbert's convictions and sentences for two counts of first-degree wanton endangerment and his conviction and sentence for second-degree assault are reversed and the case remanded for a new trial.

COMBS, JUDGE, CONCURS.

KRAMER, JUDGE, DISSENTS AND WILL NOT FILE SEPARATE OPINION.

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