COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2009-SC-000214-DG

GEORGE LaPRADD, Jr. — APPELLANT

v.

Court of Appeals
No. 2007-CA-1205-MR
Appeal from Jefferson Circuit Court
Action No. 06-CR-1356
Hon. Geoffrey P. Morris, Judge

COMMONWEALTH OF KENTUCKY — APPELLEE

BRIEF FOR APPELLANT, GEORGE LaPRADD, JR.

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Certificate of Service

This is to certify that a copy of the foregoing was mailed, first class postage prepaid, to Hon. Geoffrey P. Morris, Judge, Jefferson Circuit Court, Division 11, or his successor in office, Jefferson County Judicial Center, 700 West Jefferson Street, Louisville, KY 40202, and to Hon. Joshua D. Farley, Assistant Attorney General, Office of the Attorney General, Office of Criminal Appeals, 1024 Capital Center Drive, Frankfort, KY 40601, and sent to Hon. Samuel Floyd, Jr., Assistant Commonwealth's Attorney, 514 West Liberty Street, Louisville, KY 40202, on May 10, 2010. I further certify that the record on appeal was not removed from the office of the Clerk.

BRUCE P. HACKETT

INTRODUCTION

This Court granted review of the Court of Appeals decision that affirmed the final judgment of the Jefferson Circuit Court sentencing George LaPradd, Jr., the appellant, to twelve years imprisonment. Mr. LaPradd was convicted at a jury trial of possession of a handgun by a convicted felon, the jury having rejected his defense of "choice of evils" (KRS 503.030).

STATEMENT CONCERNING ORAL ARGUMENT

At this stage of the proceedings, appellant believes that oral argument may be useful to this Court. In Argument I in this brief, the appellant raises an issue about the burden of proof relating to "defenses" under KRS Chapter 503, General Principles of Justification. Dictum found in two cases decided by the Court of Appeals is contrary to KRS 500.070, to KRS 503.020 and to this Court's decisions relating to justifications under KRS Chapter 503. Appellant requests oral argument.

NOTE CONCERNING CITATIONS

The court proceedings were recorded on videotape and references to that record will be: (VR, month/day/year, hour:minute:second). Tape 1 is the trial tape. The miscellaneous tape, containing various pretrial and post-trial hearings, will be referred to as (MISC, month/day/year, hour:minute:second). The circuit court clerk's record will be designated: (TR, page). The Appendix to this brief will be designated: (App., page).

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STATEMENT OF THE CASE

A. Introduction

George LaPradd, Jr., a convicted felon, was found by the police to be in possession of a handgun on March 20, 2006. Mr. LaPradd was arrested and subsequently indicted for possession of a handgun by a convicted felon, carrying a concealed deadly weapon and persistent felony offender in the second degree. (TR 1). At trial, Mr. LaPradd testified that he took possession of the weapon so that none of the teenagers who were in the vicinity at that time could get the gun and shoot him, shoot the police officers who were investigating a stolen car report, or shoot anyone else. (VR 1, 4/4/07, 03:41:58, 03:42:50). Mr. LaPradd's defense to the charges was that his possession of the gun was necessary to avoid a dangerous situation -- the "choice of evils" defense. KRS 503.030.

Although the trial court instructed the jury on the choice of evils defense, the court refused the defense request that the instructions be written in such a way as to place the burden on the Commonwealth to prove that Mr. LaPradd was not justified in possessing the gun. (VR 1, 4/4/07, 03:55:55; 4/5/07, 09:35:54, 09:47:23, 09:51:05; TR 89-94; App. C1-6). This error is addressed in Argument I of this brief.

In addition, the trial court refused to instruct the jury on the other offense for which Mr. LaPradd had been indicted, carrying a concealed deadly weapon. (TR 1). The court granted a directed verdict on that offense over defense objection. (VR 1, 4/5/07, 09:44:02-09:46:09; TR 108, 115). As defense counsel

explained, under the evidence, a juror could conclude that Mr. LaPradd was not guilty of the possession charge because he was justified in picking up the gun, but the same juror could conclude that Mr. LaPradd was still guilty of the concealed weapon charge because he was not justified in hiding the weapon from view by putting it in his pants pocket. (VR 1, 4/5/07, 09:42:35). This issue is addressed in Argument II of this brief.

B. Facts

On March 20, 2006, Officers Chris Sheehan and Steve Fisher were patrolling together in the Iroquois Homes area of Louisville. While performing their duties, they were on the lookout for a white Thunderbird that had been reported stolen. Sometime after 11:00 p.m. that evening, Officer Fisher spotted the car. (VR 1, 4/4/07, 01:45:40, 02:53:54). It was parked on Tuscarora Avenue in Iroquois Homes near a place called "the Hill." There were three or four people in the car and several people at the rear of the car. Mr. LaPradd was standing at the driver's door of the car. (VR 1, 4/4/07, 01:47:00, 02:55:44, 03:40:17).

When the police pulled up in a marked police vehicle, people scattered. When the officers got out of the police car, Officer Fisher had either his gun or his Taser in his hand. (VR 1, 4/4/07, 02:18:44, 02:23:08, 03:08:45). According to Officer Sheehan, Mr. LaPradd told the others not to run, but he began to rapidly walk away and would not heed Officer Sheehan's orders to stop. (VR 1, 4/4/07, 01:47:25, 02:24:45). Officer Sheehan noted that Mr. LaPradd placed one or both of his hands into his pockets. Once Officer Sheehan caught up with Mr.

LaPradd, he patted him down and found a loaded handgun in his pants pocket. (VR 1, 4/4/07, 01:49:34).

Mr. LaPradd stipulated that he was a convicted felon. (VR 1, 4/4/07, 03:38:33). He admitted the same in his trial testimony. (VR 1, 4/4/07, 03:45:52). Mr. LaPradd also acknowledged that he had the gun in his pocket when Officer Sheehan stopped him. (VR 1, 4/4/07, 03:52:07). He said that he had picked the gun up from the ground as Officers Sheehan and Fisher were arriving in the police car. (VR 1, 4/4/07, 03:41:58). Mr. LaPradd said that he picked up the gun to prevent the teenagers in the crowd from getting the gun and endangering himself, the officers or anyone else. (VR 1, 4/4/07, 03:42:50).

During a discussion of proposed jury instructions, Mr. LaPradd, through his attorney, made two requests that are relevant to this appeal. He wanted the jury instructed on the misdemeanor offense of carrying a concealed deadly weapon. (VR 1, 4/5/07, 09:42:35; TR 95; App. D1). He also wanted the choice of evils justification to appear as a negative element of the possession of a handgun by a convicted felon charge, to be proven beyond a reasonable doubt by the Commonwealth. (VR 1, 4/5/07, 09:47:23-09:52:00).

The jury was instructed on the possession of a handgun charge. (TR 89-94; App. B1-6). The choice of evils justification was contained in a separate instruction that did not place the burden upon the Commonwealth to prove that Mr. LaPradd was not justified in possessing the gun. (TR 91; App. C2). Mr. LaPradd was convicted of the possession offense. (VR 1, 4/5/07, 12:40:05; TR

94; App. C6). He agreed to waive jury sentencing and received a recommended sentence of ten years on possession charge, enhanced to twelve years on persistent felony offender in the second degree. (VR 1, 4/5/07, 01:17:01).

C. Court of Appeals

The Court of Appeals agreed with the trial court that Mr. LaPradd was entitled to a choice of evils instruction. (Opinion, pp. 5-6; App. A5-6). But the court concluded that the choice of evils instruction that the trial court gave, which was patterned after the one found in 1 Cooper, Kentucky Instructions to Juries (Criminal), Section 11.28 (Rev. 4th ed. 1999), "sufficiently informed the jury regarding LaPradd's 'choice of evils' defense." (App. A6). Regarding the defense request for an instruction on the lesser offense of carrying a concealed deadly weapon, the Court of Appeals found that Mr. LaPradd could have been convicted of both the felon-in-possession charge and the concealed weapon charge, and for that reason, the trial court correctly refused to give the lesser instruction. (App. A7-8).

ARGUMENT

I. THE JURY INSTRUCTIONS, WHICH ALLOWED THE JURY TO CONVICT MR. LaPRADD WITHOUT A FINDING THAT EACH ELEMENT OF THE OFFENSE HAD BEEN PROVEN BEYOND A REASONABLE DOUBT, DENIED MR. LaPRADD HIS CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW.

A. Preservation

Defense counsel submitted a written instruction on the choice of evils defense. (TR 96; App. D2). Additionally, during the discussion of proposed instructions, defense counsel requested that the choice of evils justification be included as an element of the possession of a handgun charge. Counsel argued that the Commonwealth had to prove that Mr. LaPradd was not privileged to act as he did, just like in a self-defense case. (VR 1, 4/5/07, 09:47:23). Counsel cited Section 1.03 in the Cooper[1] treatise, explaining that the defense has the burden to prove only those affirmative defenses designated as "exculpations" under the Penal Code, of which there are three. (VR 1, 4/5/07, 09:48:49, 09:50:05). The three are insanity, a mistaken belief about the age of a sexual offense victim and the justifiable reason that excuses a person charged with bail jumping for his failure to appear in court. (VR 1, 4/5/07, 09:50:05). The Commonwealth argued that it should not have the burden of proof on this issue, and the trial court ruled that the choice of evils justification would not be a negative element of the charged offense. (VR 1, 4/5/07, 09:51:05).

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[1] 1 Cooper and Cetrulo, Kentucky Instructions to Juries, Criminal, (5th ed. LexisNexis 2007).

As a result, the jury instructions given by the court in Mr. LaPradd's case required the jury to convict upon finding that only two elements had been proven beyond a reasonable doubt: 1) that Mr. LaPradd "knowingly had in his possession a handgun" and 2) "that he had been previously convicted of a felony." (TR 90; App. C2). Once the jury found guilt beyond a reasonable doubt, the instructions then allowed them to consider whether Mr. LaPradd was justified in possessing the gun. (TR 91; App. C3).

B. Penal Code -- Defenses and Exculpations

Under the Penal Code, affirmative defenses to criminal charges fall into one of two classifications. "Statutory defenses are divided into two categories: (1) those which the Commonwealth has the burden of proof to negate; and (2) those which the defendant has the burden to prove." 1 Cooper and Cetrulo, Kentucky Instructions to Juries, Criminal, Section 1.03, p. 1-10 (5th ed. LexisNexis 2007). As explained in KRS 500.070(1), where the Penal Code designates a "defense" to a charge, the Commonwealth has the burden to negate the defense (proof beyond a reasonable doubt). Under KRS 500.070(3), only where the Penal Code states that a "defendant may prove such element in exculpation of his conduct," must the defendant bear the burden of proof.

There are only three "exculpations" identified in the Penal Code for which the burden of proof is placed on the defendant. One is lack of criminal responsibility under KRS 504.020 ("A defendant may prove mental illness or retardation, as used in this section, **in exculpation of criminal conduct.**").

[emphasis added]. The second is found in KRS 510.030 and applies to prosecutions for sexual offenses that are based upon a victim's incapacity to consent:

> In any prosecution under this chapter in which the victim's lack of consent is based solely on his incapacity to consent because he was less than sixteen (16) years old, mentally retarded, mentally incapacitated or physically helpless, **the defendant may prove in exculpation** that at the time he engaged in the conduct constitution the offense he did not know of the facts or conditions responsible for such incapacity to consent. [emphasis added].

The third exculpation is found in KRS 520.070 and 520.080, the bail jumping statutes. "In any prosecution for bail jumping, **the defendant may prove in exculpation** that his failure to appear was unavoidable and due to circumstances beyond is control." [emphasis added].

C. Penal Code – Justification of "choice of evils"

The choice of evils defense is found in KRS Chapter 503, General Principles of Justification. According to KRS 503.020, "In any prosecution for an offense, justification, as defined in this chapter, is a defense." The choice of evils defense is defined in KRS 503.030. Under KRS 503.030(1), "choice of evils" justifies conduct which otherwise would be criminal "when the defendant believes it to be necessary to avoid an imminent public or private injury greater than the injury which is sought to be prevented by the statute defining the offense charged." In Senay v. Commonwealth, 650 S.W.2d 259 (Ky. 1983), this

Court specifically recognized that the choice of evils defense could exonerate someone charged with possession of a handgun by a convicted felon.

In Commonwealth v. Day, 983 S.W.2d 505, 507-508 (Ky. 1999), an entrapment case, this Court explained how KRS Chapter 503 justifications work: "As with any other 'defense' under the penal code, once the defendant introduces enough evidence to create a doubt, the burden of proof shifts to the Commonwealth and there must be an instruction so casting it. KRS 500.070(3); Brown v. Commonwealth, Ky., 555 S.W.2d 252, 257 (1977)." In Brown, the Court also said, "This is true of every defense excepting those which the statutes provide may be proved by the defendant 'in exculpation of his conduct.' KRS 500.070." Brown v Commonwealth, 555 S.W.2d at 257. Recently, in Wyatt v. Commonwealth, 219 S.W.3d 751, 756 (Ky. 2007), this Court again reaffirmed the Brown decision, particularly the need for a jury instruction placing the burden of proof on the Commonwealth. See also, Estep v. Commonwealth, 64 S.W.3d 805, 810 (Ky. 2002)("The failure of the instructions to properly allocate the burden of proof on this issue constituted prejudicial error."). "Once evidence is introduced which justifies an instruction on self-protection or any other justification defined in KRS Chapter 503, the Commonwealth has the burden to disprove it beyond a reasonable doubt, and its absence becomes an element of the offense. KRS 500.070(1), (3), and 1974 Commentary thereto; Brown v. Commonwealth, Ky., 555 S.W.2d 252, 257 (1977)." Commonwealth v. Hager, 41 S.W.3d 828, 833, FN 1 (Ky. 2001).

D. Erroneous Court Decisions

In dictum in Beasley v. Commonwealth, 618 S.W.2d 179, 180 (Ky. App. 1981), the Court of Appeals said, "It is also to be noted that since 'choice of evils' is a defense it is incumbent upon the defendant to bear the burden of proving this defense." This erroneous statement about the defendant's burden of proof was repeated in Peak v. Commonwealth, 34 S.W.3d 80, 82 (Ky. App. 2000). But as noted above, under KRS 500.070, since "choice of evils" is a "defense" rather than an "exculpation" under the Penal Code, the defendant only has the obligation to raise the issue, and the Commonwealth then bears the burden of proof beyond a reasonable doubt.

This is what the latest edition of Justice Cooper's treatise on jury instructions says about Beasley and the "choice of evils" defense:

> There is dicta in this case at page 180 to the effect that the defendant has the burden of proof of this defense. That is incorrect. KRS 503.030; KRS 503.020; KRS 500.070(3).

Cooper and Cetrulo, Kentucky Instructions to Juries, Criminal, Section 11.28, Choice of Evils, Comment, pp. 11-34 (5th ed. LexisNexis 2008). In Beasley, the court was actually talking about the burden of going forward with evidence of the defense of choice of evils. The court was not talking about the ultimate burden of proof. In 10 Leslie W. Abramson, Kentucky Practice: Substantive Criminal Law, Section 5.20, Choice of evils, pp. 48-49 (2nd ed. 2009-2010 Pocket Part), Professor Abramson said:

> The Beasley court erroneously stated that a defendant has the burden of proof for the choice of evils defenses. It would be more accurate to say that a defendant has the burden of production.

The difference between the burden of production and the burden of persuasion or proof was explained by Professor Robert G. Lawson[2]:

> Thus, the accused's burden of going forward with evidence as to a "defense" is satisfied upon the production of evidence sufficient to raise a doubt in the mind of a reasonable person on that issue. If a trial judge concluded that the evidence is sufficient to raise such a doubt, he or she must give the jury instruction on the defense in question, and in that instruction require the state to prove absence of the factual components of that defense beyond a reasonable doubt.

Robert G. Lawson, The Kentucky Evidence Law Handbook, Section 9.05[3][b], 758 (4th ed. 2003). See also George G. Seelig, Kentucky Criminal Law, Section 4-1(b), p. 134 (2nd ed. 2007), using the same quotation from Professor Lawson to explain the burden of proof for "defenses" under the Penal Code.

As noted above, the defense of choice of evils is found in KRS 503.030. Subsection (3) of that statute says, "The relief provided a defendant by subsection (1) is a defense." Thus, choice of evils is given the same status under the Penal Code as self-protection or execution of public duty, both of which are classified as "justifications" under KRS Chapter 503. KRS 503.020 says, "In any

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[2] This Court has acknowledged that "Professor Lawson was instrumental in drafting the Kentucky Penal Code." Shannon v. Commonwealth, 767 S.W.2d 548, 549 (Ky. 1988), overruled by Elliott v. Commonwealth, 976 S.W.2d 416 (Ky. 1998).

prosecution for an offense, justification, as defined in this chapter, is a defense."

The Commentary (1974) which accompanies KRS 503.020 states:

> By designating justification as a defense, this section serves to impose upon defendants the burden of raising the issues covered in this chapter. Once this responsibility is satisfied as to a particular issue (see KRS 500.070), the prosecution must bear the ultimate burden of persuading the jury that the defendant was not justified.

The Commentary accompanying the Penal Code may be used as an aid in construing the Code. KRS 500.100; Stark v. Commonwealth, 828 S.W.2d 603, 606 (Ky. 1991), overruled on other grounds by Thomas v. Commonwealth, 931 S.W.2d 446 (Ky. 1996). In Mr. LaPradd's case, the Commonwealth had the burden, under the Penal Code, to prove beyond a reasonable doubt that Mr. LaPradd was not justified in possessing the gun. The jury instructions did not place that burden upon the Commonwealth.

E. Prosecutor's Closing Argument

Because the instructions did not give the Commonwealth the burden to prove beyond a reasonable doubt that Mr. LaPradd was not justified to act as he did, the prosecutor was able to take full advantage of that infirmity in closing arguments. The prosecutor began her closing argument by telling the jurors:

> As a juror in this case, you have two decisions to make. First, you have to look at the elements of the case and decide if the defendant, George LaPradd, Jr., was a convicted felon that was in possession of a handgun. And second, you can look at the defense and see if the defense fits the situation here and whether that negates the defendant's guilt.

(VR 1, 4/5/07, 11:00:45). The instructions did indeed allow the jury to acquit Mr. LaPradd on the basis of the choice of evils justification only if the jury found (by a preponderance of evidence)[3] that evidence of the choice of evils justification "negated" his guilt. (App. C1-3). The prosecutor returned to this same theme later in her closing argument. After telling the jury that the job of a defense attorney is to distract, confuse and trick the jury, the prosecutor said the two facts that mattered were that Mr. LaPradd possessed the gun and that he was a convicted felon. "The defense matters to the extent that that's something you should consider to see if that would negate his guilt." (VR 1, 4/5/07, 11:18:05-11:19:45). The prosecutor concluded her closing argument as follows:

> The defendant had the gun, was a convicted felon. There is no question that those elements are met. The choice of evils defense simply does not work. It's unbelievable and it's untrue. And for those reasons, the Commonwealth requests that you return a verdict of guilty to the charge of possession of a handgun by a convicted felon.

(VR 1, 4/5/07, 11:21:55-11:22:22).

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[3] The instruction did not include the word "preponderance," because that word should not appear or be defined in an instruction. See Brown v. Commonwealth, 934 S.W.2d 242, 247 (Ky. 1996) ("Furthermore, this Court has reiterated its dissatisfaction with use of the word 'preponderance' in jury instructions. Hardin v. Savageau, 906 S.W.2d 356, 358 (Ky. 1995)(concluding that "use of the term 'preponderance' is redundant and bad practice, and that any attempted definition of 'preponderance' is perilous.")(citing Ragsdale v. Ezell, 99 Ky. 236, 35 S.W. 629 (1896)).")

F. The Court of Appeals Opinion

In Mr. LaPradd's case, the Court of Appeals approved the choice of evils instruction given by the trial court because that instruction was "substantially patterned after the 'choice of evils' instruction provided in 1 Cooper, Kentucky Instructions to Juries (Criminal), Section 11.28 (Rev. 4th ed. 1999), which sufficiently informed the jury regarding LaPradd's 'choice of evils' defense." (App. A6). But the Court of Appeals failed to take into account that Chapter 11 (Defenses) of Justice Cooper's jury instruction book not only sets out a model instruction that defines the applicable justification or defense, but it also includes within the instruction that defines the elements of the criminal offense an element that requires the jury to find beyond a reasonable doubt that the defendant was not justified to act as he did. Part 2 of Chapter 11 in Justice Cooper's book is entitled "Justification," and Section 11.07 is labeled "Self-Protection (Or Other Justification); Homicide (Complete Instructions)." Justice Cooper uses homicide and the self-protection justification as examples of how the KRS Chapter 503 justifications should be set out in the jury instructions. The example instruction that defines self-protection has the heading "Self-protection (or other justification)." But each of the sample instructions that follow includes an element that requires the jury to find beyond a reasonable doubt, "That he was not privileged to act in self-protection." What was lacking in Mr. LaPradd's jury instructions was an element in the possession of a handgun instruction that essentially said that the jury was required to find beyond a reasonable doubt

"that Mr. LaPradd was not privileged to act out of a need to avoid a greater injury, as defined in Instruction No. ___ [the choice of evils instruction]." The trial court's failure to give such an instruction allowed the jury to convict Mr. LaPradd without being required to find each element of the offense beyond a reasonable doubt.

Without question, the Commonwealth had the burden, under the Penal Code, to prove beyond a reasonable doubt that Mr. LaPradd was not justified in possessing the gun. Mr. LaPradd respectfully submits that this Court should explain, modify, limit or overrule Beasley and Peak and thereby advise the bench and bar that where the evidence in a criminal case is sufficient to raise any of the justification defenses (KRS Chapter 503), the jury must be instructed that it is required to find beyond a reasonable doubt that the defendant was not legally justified to act as he or she did. This Court should also clarify that the defense burden discussed in both Beasley and Peak is a burden of production of evidence. Additionally, this Court should affirm that the ultimate burden of proof remains with the Commonwealth in a "choice of evils" case. Because the evidence raised the issue about whether Mr. LaPradd acted to avoid a greater evil, the Commonwealth was required to prove beyond a reasonable doubt that Mr. LaPradd was not justified, under the choice of evils doctrine, in possessing the gun.

Erroneous instructions are presumed prejudicial in Kentucky. McKinney v. Heisel, 947 S.W.2d 32, 35 (Ky. 1997). In Mr. LaPradd's case, the failure of the

trial court to give jury instructions that required proof beyond a reasonable doubt of every element necessary for conviction violated KRS 500.070 and also denied due process of law to Mr. LaPradd. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); Hillard v. Commonwealth, 158 S.W.3d 758, 768 (Ky. 2005), citing Commonwealth v. Collins, 821 S.W.2d 488, 490 (Ky. 1991).

The United States Supreme Court has held that "the Due Process Clause [of the Fourteenth Amendment] protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); See also Middleton v. McNeil, 541 U.S. 433, 437, 124 S.Ct. 1830, 158 L.Ed.2d 701 (2004), and Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). Constitutional error occurs when the jury instructions relieve the prosecution of its burden to prove essential facts to the jury beyond a reasonable doubt. Sandstrom v. Montana, 442 U.S. 510, 516-17, 524, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).

The instructions in this case and Mr. LaPradd's resulting conviction violate due process of law. The burden of proof was unconstitutionally shifted to the defense by the jury instructions. See Ramsey v. Commonwealth, 383 S.W.2d 134 (Ky. 1964); Patterson v. New York, 432 U.S. 198, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977); and Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975). As a result, Mr. LaPradd's conviction of possession of a handgun by a

convicted felon must be reversed and remanded to the circuit court for a new trial.

II. THE TRIAL COURT ERRED BY NOT INSTRUCTING THE JURY ON THE CARRYING A CONCEALED DEADLY WEAPON CHARGE.

A. Preservation

The defense submitted a written instruction on carrying a concealed deadly weapon. (TR 95; App. D1). In addition, defense counsel explained to the trial court why the jury should be instructed on the concealed weapon charge in addition to the possession by a convicted felon charge. (VR 1, 4/5/07, 09:42:35). As defense counsel explained, under the evidence a juror could conclude that Mr. LaPradd was not guilty of the possession charge because he was justified in picking up the gun, but he was still guilty of the concealed weapon charge because he was not justified in hiding the weapon from view by putting it in his pants pocket. (VR 1, 4/5/07, 09:42:35-09:44:00). The Commonwealth took the position that the concealed weapon charge was "consumed" by the possession charge under Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.E. 306 (1932). (VR 1, 4/5/07, 09:44:02). The court declined to instruct the jury on the lesser offense of carrying a concealed deadly weapon. (VR 1, 4/5/07, 09:45:00).

B. Argument

Kentucky juries must be instructed on lesser included offenses that are supported by the evidence. Martin v. Commonwealth, 571 S.W.2d 613, 615 (Ky.

1978); Wombles v. Commonwealth, 831 S.W.2d 172, 175 (Ky. 1992); Ward v. Commonwealth, 695 S.W.2d 404, 406 (Ky. 1985). An instruction on a lesser included offense is required if there is "**some evidence**" to support it. Commonwealth v. Collins, 821 S.W.2d 488, 491 (Ky. 1991) [emphasis original]. The source of the evidence is irrelevant. Whether the evidence warrants a lesser included offense instruction "is a question of law" for the trial court and the appellate court. Collins, 821 S.W.2d at 491. "[I]t is unnecessary that the evidence authorizing the instruction be affirmatively introduced by the defendant, or that the evidence be consistent with the defendant's theory of the case." 1 Cooper and Cetrulo, Kentucky Instructions to Juries (Criminal), Section 1.04B, p. 1-13 (5th ed. LexisNexis 2007) [footnote omitted], citing Pace v. Commonwealth, 561 S.W.2d 664 (Ky. 1978), overruled on other grounds by Grimes v. McAnulty, 957 S.W.2d 223 (Ky. 1997), and Wilson v. Commonwealth, 880 S.W.2d 877 (Ky. App. 1994).

The misdemeanor offense of carrying a concealed deadly weapon is not strictly a lesser included offense of possession of a handgun by a convicted felon. But in Sanborn v. Commonwealth, 754 S.W.2d 534, 549 (Ky. 1988), the Supreme Court recognized that in some cases, a jury must be instructed on an offense that is not a lesser included offense but that is, nonetheless, a defense to the higher charge. The Court termed such a lesser offense an "alternative offense." Id. Recently, in Hudson v. Commonwealth 202 S.W.3d 17 (Ky. 2006), the Court revisited Sanborn. Noting that Sanborn was a plurality opinion, the Court

explained that a defendant is not always entitled to an instruction on any conceivable alternative lesser offense, Hudson, 202 S.W.3d at 21-22. The Court in Hudson modified Sanborn as follows:

> An instruction on a separate, uncharged, but "lesser" crime -- in other words, an alternative theory of the crime -- is required only when a guilty verdict as to the alternative crime would amount to a defense to the charged crime, *i.e.*, when being guilty of both crimes is mutually exclusive. This is a subtle distinction that the broad language in Sanborn does not necessarily make. Even in that case, however, the defendant's proposed instructions were for offenses that would have excluded the charged offenses. As such, we depart from Sanborn to the extent that it required alternate theory instructions as to uncharged crimes whenever the evidence suggests the existence of such crimes. To do otherwise would allow a criminal appellant to seek reversal of his conviction simply because the trial court failed to instruct as to all the criminal acts he may have committed, regardless of whether the other uncharged crimes have any bearing on guilty as to the charged crimes.

Hudson, 202 S.W.3d at 22.

The Court of Appeals found that this Court's use of the term "uncharged" in Hudson to modify "lesser crime" had no significance, and it was of no consequence that Mr. LaPradd had actually been indicted for the lesser offense that he wanted submitted to the jury as part of the instructions. (App. A8). There are two major factual distinctions in Mr. LaPradd's case that differentiate it from Hudson. First, the lesser offense for which Mr. LaPradd wanted a jury instruction was a charged offense -- Count Two of the indictment. Hudson applies to uncharged offenses. Secondly, as defense counsel explained, a jury could have

acquitted Mr. LaPradd of the possession of a handgun by a convicted felon offense on the basis of the choice of evils defense, yet still could have concluded that the subsequent concealment of the gun amounted to criminal behavior. Mr. LaPradd was entitled to a carrying a concealed deadly weapon instruction. He respectfully submits that this Court should reconsider and overrule Hudson. The Court should at least modify the Hudson opinion to explain that in a situation like Mr. LaPradd's case, where a jury may accept the defendant's defense to a greater charge, yet still believe that he is guilty of a lesser charge, the jury must be instructed on the lesser offense even if that lesser offense could have been charged in addition to the greater offense.

In Keeble v. United States, 412 U.S. 205, 93 S.Ct. 1993, 36 L.Ed.2d 844 (1973), the court recognized that where a finding of guilt under a lesser instruction is not an option for the jury, a danger exists that the jury will convict even if the case is not proven beyond a reasonable doubt. "Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction." 93 S.Ct. at 1998, [emphasis in original]. In Sanborn, this Court expressed the principle in terms of presenting the jury with a "middle ground" between the more severe offense and acquittal. 754 S.W.2d at 549-550.

The right to have the jury consider lesser offenses is a constitutional right. Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980). The refusal of the trial court in the case at bar to instruct the jury on carrying a

concealed deadly weapon deprived Mr. LaPradd of his rights to due process of law and to a fair trial by jury guaranteed by Sections Two, Seven and Eleven of the Kentucky Constitution and Amendments Six and Fourteen to the United States Constitution. He was also denied his right under the same constitutional provisions to fully present a defense. Crane v. Kentucky, 476 U.S. 683, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986). As a result, he is entitled to a new trial.

CONCLUSION

For the foregoing reasons, the appellant, George LaPradd, Jr., respectfully requests that his conviction for possession of a handgun by a convicted felon be reversed and remanded for a new trial.

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