

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-002066-MR

MICHAEL LUCKY SIZEMORE

APPELLANT

v. APPEAL FROM CLAY CIRCUIT COURT
HONORABLE OSCAR G. HOUSE, JUDGE
ACTION NO. 07-CR-00104

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: CLAYTON AND NICKELL, JUDGES; ISAAC,¹ SENIOR JUDGE.

CLAYTON, JUDGE: Michael Lucky Sizemore was convicted in the Clay Circuit Court of manslaughter in the first degree for which he was sentenced to thirteen years imprisonment. Michael maintains that the trial court erred both when it denied his motion for a continuance and also when it denied his motions for a

¹ Senior Judge Sheila R. Isaac sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

directed verdict of acquittal. Finding no reversible error in either contention, we affirm the trial court.

FACTUAL AND PROCEDURAL BACKGROUND

On August 19, 2007, in the early morning hours, a fight occurred at the home of John Sizemore in Clay County. Five individuals were involved in the fight. One individual, Gerald Sizemore,² died the following day. The other four persons are John “Johnny Boy” Sizemore, Eugene Sizemore, Michael “Lucky” Sizemore [the appellant], and Nathan McDaniel, Jr. They were all charged with murder. John and Eugene are brothers. Michael is their nephew. And Nathan McDaniel, Jr., is married to John and Eugene’s sister, Carolyn Sizemore Guth McDaniel, and hence, is the uncle of Michael and the brother-in-law of John and Eugene. Other than Gerald, the victim, the individuals lived on Ephram Creek Road, outside Manchester, Kentucky. John, Eugene, and Nathan lived next door to each other. In addition, Michael lived with Nathan. The fight happened at John’s home and in the parties’ yard.

After the fight, Gerald arrived at his home in the early morning severely beaten, covered with blood, and with a deep gash wound on the right side of his head. April, his daughter, was at home and came to his assistance. She testified that he first said that Gary Becknell, her boyfriend, had beaten him. As his consciousness began to fade, he stated that another daughter’s boyfriend had injured him. April knew that this accusation could not be the truth since the

² Although Gerald has the same surname as the three of the defendants, “Sizemore,” no evidence was provided showing a close family relationship between him and the defendants.

accused person lived out-of-state. She again asked him who had done this. This time, she testified that he said something like “it’s that bunch you [referring to his wife, Bobby Cheryl, who was also present], run around with.”

April then called the police, and Manchester police officer, Marion Spurlock, came to Gerald’s residence. Gerald’s family members told Officer Spurlock that they did not know how the injuries occurred or who Gerald was with that evening. Gerald was transported to Manchester Memorial Hospital and then airlifted by helicopter to University of Kentucky Medical Center in Lexington. After surgery, physicians determined that Gerald was brain dead.

Following Gerald’s death, his body was transported to the Kentucky State Medical Examiner’s Office in Frankfort. An autopsy was performed. The assistant medical examiner determined that his death had been caused by a blunt force trauma to the head, that he suffered from a thirteen centimeter-wide laceration, which cut deeply into his brain, and that he had a subdural hematoma. In addition, Gerald had contusions, lacerations, and abrasions to the head. In fact, Gerald had more than twelve injuries to his head and neck. Besides these injuries, his fifth and sixth ribs were fractured. In all, the examiner found forty-three injuries to Gerald’s body. The injuries were consistent with him having been kicked. Later, it was ascertained that the ashtrays found by the police were consistent with an object used to inflict some of injuries.

Meanwhile, after the conclusion of the interview with Gerald’s family, Officer Spurlock contacted a television station in Hazard, Kentucky, and

had the station run a story about the fight in order to get information from the public. The next day, an anonymous caller, contacted Officer Spurlock and informed him that Gerald's car had been seen at John Sizemore's home on the night of the attack. Acting on this tip, Officer Spurlock and other officers drove to Eugene's home, which is next door to John. Eugene told the police that a fight had taken place at John's house. Upon arrival at John's home, the officers noticed glass all over the driveway. In addition, they smelled the odor of bleach from the front of the home and the stepping stones. In the yard, they found a bleach bottle. They also observed apparent blood stains on John's front porch. Eventually, John signed a written consent to search his home. Thereafter, the officers seized several items and took swabs of the blood spots.

Next, after being advised of his *Miranda* rights, John agreed to make a statement to the Manchester Police Department. At about the same time, the police officers obtained an arrest warrant and another search warrant. They once more smelled bleach. In addition, they seized [the aforementioned] glass ashtrays and a barbell. Upon leaving John's residence, they spoke with Eugene again and Eugene implicated Michael.

In the course of the investigation, Michael was interviewed four different times. On August 20, 2007, at the first interview, he told the police that he did not know anything. The recorded interview was played for the jury. He stated that he was asleep at the time of the incident and that Eugene woke him and

told him that someone was beating Johnny Boy. By the time Michael walked over to John's home, he claimed the entire fight was over.

Later that day, the police interviewed him for a second time. Again the recorded interview was played for the jury. This time he said that he awoke around midnight and saw John with a cut over his eye and a bruise. Michael said that John told him that Gerald had been beating him and that John had made him leave. But he still admitted no involvement or that he had even witnessed the crime. Comparing Eugene and Michael's statements to the police, it seemed that Michael's explanation was inaccurate.

Michael was interviewed for a third time on August 21, 2007. A recording of this interview was played for the jurors, too. In this interview, Michael denied knowing anything about the attack on Gerald or that he witnessed it. Michael, however, did acknowledge that an uncle knocked on his window that night and said that a man was beating John Boy to death. Michael ran outside and saw Gerald outside with his car parked sideways. At this point, he ended the interview.

On that same day, Michael was interviewed for the fourth time. And, as with the other interviews, this one was played for the jurors. On the recording, Michael says that he was woken by his Uncle Eugene knocking on his window and saying that John Boy was being beaten to death. Michael got up and went outside to find Nathan fighting with Gerald. Michael admitted that after Nathan and Gerald fell to the ground, Michael kicked Gerald two or three times. Michael also

reported that he saw John at the door with a ball bat in his hand. Michael claimed to have held John back because John was saying he was going to kill Gerald. Further, Michael said that he saw Nathan and Eugene hitting Gerald. He also mentioned that Gerald had blood coming from a gash on his head and on one of his arms. Michael alleged that he told Eugene and Nathan to stop hitting Gerald and that he helped Gerald to his car.

On November 1, 2007, the Clay Circuit Court grand jury indicted John, Eugene, Michael, and Nathan and charged each of them with murder and complicity to murder. Three defendants – John, Nathan, and Michael – were tried separately. The fourth defendant, Eugene, pled guilty. On July 17, 2008, a Clay Circuit Court jury convicted John of murder, and he was sentenced to thirty years' imprisonment. Next, on January 12, 2009, Eugene pled to the reduced charge of manslaughter in the first degree and was sentenced to ten years' imprisonment. On July 6, 2009, a Clay Circuit Court jury convicted Nathan of manslaughter in the first degree and sentenced him to thirty years' imprisonment. Ultimately, John's conviction was affirmed by the Kentucky Supreme Court on November 25, 2009, but Nathan's conviction is pending before the Kentucky Supreme Court.

Eugene testified at Michael's trial. According to his testimony, John, Gerald, and he were drinking alcohol together on the night of the fight. At some point, Eugene said that he passed out but awoke to find Gerald beating John. After asking Gerald to stop, Eugene ran to his mother's home where Nathan and Michael resided. Because Eugene had recently had stomach surgery, he did not think he

could intervene in the fight, so he asked Nathan and Michael to help John. The three men ran over to John's home but by that time the fight had broken up.

Without provocation, Eugene stated that Nathan tackled Gerald. Then, Nathan and Michael dragged Gerald off the porch. As Gerald attempted to get up, Michael struck Gerald across the waistline with a bar and Gerald fell down. Then, Nathan used a metal pipe to beat Gerald who fell down once more. Both Nathan and Michael continued hitting Gerald. Eugene said that he told Nathan and Michael to stop hitting Gerald and helped him to his car.

Michael, the Appellant, was convicted on September 10, 2009, of manslaughter in the first degree. An agreement with the prosecution set the sentence of imprisonment at thirteen years and the judgment was entered by the Clay Circuit Court on October 5, 2009. Michael now appeals from this judgment.

Michael has two main arguments regarding the appeal. First, he contends that the trial judge erred by failing to grant a continuance to allow Michael to subpoena Caroline Guth McDaniel and also by not holding a hearing to determine whether she would assert her Fifth Amendment right not to testify in the case. The Commonwealth counters that Michael never subpoenaed Carolyn to appear during the trial, Michael did not provide an affidavit, as required under Kentucky Rules of Criminal Procedure (RCr) 9.04, as to what Carolyn would say prior to making the motion for a continuance, and finally, Michael has not established that the trial judge abused his discretion.

Second, Michael contends that under the proffered jury instructions, the jury could not have possibly found him guilty and that the trial judge erred by not granting Michael's motions for a directed verdict of acquittal. Conversely, the Commonwealth argues that sufficient evidence was presented to allow the trial judge to deny the motions for a directed verdict of acquittal.

The standard of review and additional relevant evidence will be provided in the analysis.

ANALYSIS

I. The motion for continuance

The first issue concerns whether the trial court erred in denying Michael's motion for a continuance. As previously explained Michael asked for the continuance so that he could subpoena Carolyn and have a hearing to determine whether she would assert her Fifth Amendment right not to testify. The facts presented were that about a month before the trial, Carolyn moved to quash the Commonwealth's subpoena requiring her to testify in the case. She argued that she would assert her Fifth Amendment rights. The trial court granted the motion to quash her subpoena. Carolyn's attorney did not notify the defense about the motion to quash or the court's ruling. Further, no evidence has been provided that Michael objected to the entry of the motion to quash the subpoena, protested the order, or made any other effort to obtain the presence of Carolyn until the third day of the trial.

On the third day of the trial, during the direct examination of a police officer by Michael's trial counsel, defense counsel asked the officer his recollections of Carolyn's statements about what happened the night of the fight. The Commonwealth objected to the officer answering the question because it would be hearsay, and the trial court sustained the objection. At that juncture, Michael requested a short continuance in order to serve a subpoena on Carolyn. In addition, he contended that the trial judge should have held a hearing to see whether Carolyn would assert her Fifth Amendment privilege or even had the right to assert it. He adamantly claimed that Guth's statements were crucial to his defense. The trial court denied the motion for continuance ruling that no reason existed to permit a continuance because Carolyn had already asserted her Fifth Amendment privilege.

Now, Michael asserts that the trial court's denial of his motion for a continuance in order to subpoena Carolyn violates his Sixth Amendment right to compulsory process for obtaining witnesses in his defense. Several factors discount his arguments. First, if Sizemore desired the attendance of Carolyn at trial, he had the right to secure her attendance by having a subpoena issued and served upon her. This ability to subpoena Carolyn satisfies Sizemore's right to compulsory process. *Anderson v. Com.*, 63 S.W.3d 135 (Ky. 2001). And he has no right to rely upon subpoenas issued and served by the Commonwealth. *Id.*

Second, guidance is provided in RCr 9.04 which states that a continuance may be granted upon “sufficient cause shown.” Michael did not comply with RCr 9.04. It states in relevant part:

The court, upon motion and sufficient cause shown by either party, may grant a postponement of the hearing or trial. A motion by the defendant for a postponement on account of the absence of evidence may be made only upon affidavit showing the materiality of the evidence expected to be obtained, and that due diligence has been used to obtain it. If the motion is based on the absence of a witness, the affidavit must show what facts the affiant believes the witness will prove, and not merely the effect of such facts in evidence, and that the affiant believes them to be true. If the attorney for the Commonwealth consents to the reading of the affidavit on the hearing or trial as the deposition of the absent witness, the hearing or trial shall not be postponed on account of the witness’s absence. If the Commonwealth does not consent to the reading of the affidavit, the granting of a continuance is in the sound discretion of the trial judge.

Michael never provided an affidavit in support of his motion for a continuance to subpoena. And it is speculative to insist that Carolyn would provide any favorable testimony to Michael or not assert her Fifth Amendment right.

Next, it is well-settled that the grant or denial of a motion for continuance lies within the sound discretion of the court. *See e.g. Fredline v. Com.*, 241 S.W.3d 793 (Ky. 2007). Since the ultimate decision to grant a continuance lies within the sound discretion of the trial court, a conviction will only be overturned upon a showing of an abuse of that discretion. *Hudson v. Com.*, 202 S.W.3d 17, 22 (Ky. 2006). And whether to grant a continuance rests on the particular facts and circumstances of each trial. *Snodgrass v. Com.*, 814 S.W.2d

579, 581 (Ky. 1991) *overruled on other grounds by Lawson v. Com.*, 53 S.W.3d 534 (Ky. 2001).

Here, Michael has not demonstrated that the trial court abused its discretion in denying the motion for continuance. The trial judge denied the motion for continuance based on the facts that it was the third day of the trial and Guth had already asserted her Fifth Amendment privilege. It appeared that it would be useless to grant the motion for continuance. Finally, it bears noting that the Kentucky Supreme Court has recognized that “neither the prosecution nor the defense may call a witness knowing that the witness will assert his Fifth Amendment privilege against self-incrimination.” *Clayton v. Com.*, 786 S.W.2d 866, 868 (Ky. 1990). Thus, the trial court did not abuse its discretion in denying Michael’s motion for a continuance.

II. The motions for a directed verdict of acquittal

Michael moved for directed verdict on both counts of the indictment, murder and complicity to murder, at the close of the Commonwealth’s case and renewed the motion at the close of the evidence. But Michael’s motions for directed verdict did not challenge the jury instructions as to manslaughter in the first degree. The basis of Michael’s claim is that the evidence suggests that Nathan, not he, delivered the blows which caused Gerald’s death and there was no evidence of complicity or conspiracy to kill Gerald. Specifically, Michael highlights that the medical examiner stated that Gerald was killed by a blow to the

head, which the evidence does not show Michael inflicted. Rather the evidence shows that Michael kicked Gerald in the torso but not the head.

At that time, however, Michael did not object to any specific jury instructions. Therefore, given the lack of preservation of the issue, Michael asks for review under RCr 10.26 and Kentucky Rules of Evidence (KRE) 103(3). He maintains that the trial court's error, under the facts and circumstances of the case, is palpable error, which affects Michael's substantial rights and results in manifest injustice. Alleging that insufficient evidence was provided to convict Michael of murder or complicity to murder, Michael maintains that the conviction violates his due process. Insufficiency of the evidence is palpable error that affects a defendant's substantial rights. *Perkins v. Com.*, 694 S.W.2d 721, 722 (Ky. App. 1985). Such an error is one that an appellate court is able to correct despite its lack of preservation. *Id.*

Because, as acknowledged by Michael, no specific objection to the jury instructions was made, we must review them under RCr 10.26, that is, a review for palpable error. For an error to be palpable, it must be "easily perceptible, plain, obvious and readily noticeable." *Burns v. Level*, 957 S.W.2d 218, 222 (Ky. 1997) (citing Black's Law Dictionary (6th ed.1995)). Further, a palpable error "must involve prejudice more egregious than that occurring in reversible error[.]" *Ernst v. Com.*, 160 S.W.3d 744, 758 (Ky. 2005). A palpable error must be so serious in nature that if it were uncorrected, it would seriously affect the fairness of the proceedings. *Id.* Hence, a palpable error analysis requires

the reviewing court to determine whether it believes that a “substantial possibility” exists that the result in the case would have been different without the error.

Schoenbachler v. Com., 95 S.W.3d 830, 836 (Ky. 2003) (quoting *Abernathy v. Com.*, 439 S.W.2d 949, 952 (Ky.1969)). If not, the error cannot be palpable.

When confronted with a motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony. *Paulley v. Com.*, 323 S.W.3d 715, 722 (Ky. 2010).

Michael’s argument that he was entitled to a directed verdict is meritless. Initially, the argument completely ignores the elements of manslaughter in the first degree. These elements are elucidated in KRS 507.030:

- 1) A person is guilty of manslaughter in the first degree when:
 - (a) With intent to cause serious physical injury to another person, he causes the death of such person or of a third person; or
 - (b) With intent to cause the death of another person, he causes the death of such person or of a third person under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance, as defined in subsection (1)(a) of KRS 507.020.

(2) Manslaughter in the first degree is a Class B felony.

Under the instructions provided to the jury, it could find Michael guilty or not guilty of murder, murder-accomplice, murder-principal or accomplice, first-degree manslaughter, second-degree manslaughter, reckless homicide, assault second-degree or assault in the fourth degree. In the end, the jury found him guilty under the first-degree manslaughter instruction. Therefore, after hearing the testimony, the jury determined that Michael participated in the beating of Gerald with the intent of causing serious injury but not death. With regard to the complicity charge, the jury heard evidence that Michael was present at the time of Gerald's beating and that he admitted striking Gerald. Although Michael argues that he only kicked Gerald in his torso area, Michael testified that he kicked Gerald when Gerald grabbed his legs. Gerald was behind him when Michael kicked him. Michael did not believe that he kicked Gerald in the head, but the jury was free to weigh this testimony and make any reasonable inferences. Further, Michael's credibility was undermined when he admitted that he had lied several times to the police during the course of their investigation.

The trial judge denied the motions for directed verdict because his belief was that sufficient evidence existed for the jury to consider the evidence to determine whether a crime had been committed. Our review indicates that his conclusion that sufficient evidence did exist for the jury to consider was valid, and thus, no palpable error resulted from the jury's verdict. The jury had Eugene's testimony, other witnesses' testimony, evidence of markedly inconsistent

statements from Michael, which he acknowledged, and the medical examiner's report of the extreme injuries to Gerald after a severe beating – forty-three injuries in all.

We finish by noting that when evidence in a criminal trial is conflicting, the jury is free to consider the evidence and determine its credibility. *Brewer v. Com.*, 206 S.W.3d 313, 318 (Ky. 2006) (quoting *Com. v. Benham*, 816 S.W.2d 186, 187-88 (Ky. 1991)). And the trial judge did not fail to meet the standard in *Trowel v. Com.*, 550 S.W.2d 530, 533 (Ky. 1977) for the denial of a directed verdict of acquittal. In that case, the Kentucky Supreme Court ruled “[i]f under the evidence as a whole it would not be clearly unreasonable for a jury to find the defendant guilty, he is not entitled to a directed verdict of acquittal.” It is not unreasonable here for the jury to have concluded that Michael was guilty. Finally, since palpable error requires a higher level of review, and we have already determined that the trial judge did not err in its conclusion that the jury verdict was not unreasonable, clearly no palpable error occurred.

CONCLUSION

The Circuit Court correctly denied Michael's motion for a continuance and his motions for a directed verdict of acquittal under the facts, law, and arguments of counsel. Having found no error, we affirm the order of the Clay Circuit Court.

ALL CONCUR.

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