RENDERED: JULY 8, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2010-CA-000619-MR

MATTHEW J. LOWE — APPELLANT

v.

APPEAL FROM BRECKINRIDGE CIRCUIT COURT
HONORABLE BRUCE T. BUTLER, JUDGE
ACTION NO. 09-CR-00090

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

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

NICKELL, JUDGE: Matthew J. Lowe was convicted following a jury trial in the Breckenridge Circuit Court on a charge of assault in the second degree[2] and was

[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.

[2] KRS 508.020, a Class C felony.

acquitted on a charge of wanton endangerment in the first degree.[3] He received a sentence of five years' imprisonment. He now appeals alleging prosecutorial misconduct and errors in the court's instructions to the jury require reversal of his conviction. We reverse and remand for a new trial.

Lowe's indictment was the result of an altercation between himself and Eddie O'Donoghue on July 3, 2009.[4] Lowe and O'Donoghue were travelling in separate vehicles in the same direction along O'Donoghue Farm Lane. Each was carrying a passenger. Lowe attempted to overtake the slower moving O'Donoghue by leaving the roadway and driving partially in a field; the field belonged to the O'Donoghue family. O'Donoghue, unhappy that Lowe was driving in his field, sped up and swerved his vehicle toward Lowe's vehicle, making minor contact. Both men stopped and exited their vehicles. A verbal altercation ensued. After a short time, the altercation became physical and Lowe punched O'Donoghue in the side of the face, knocking him to the ground. As O'Donoghue attempted to regain his footing, Lowe kicked him in the face. O'Donoghue's wife then exited their vehicle and broke up the fight. O'Donoghue retrieved his cell phone and contacted the local sheriff. Lowe left the scene before law enforcement officers arrived.

[3] KRS 508.060, a Class D felony.

[4] Conflicting testimony was given regarding the specifics of the incident. For purposes of this appeal, we have pared the facts to their bare minimum without regard to the conflicting testimony, since resolution regarding such conflicts is within the province of the finder of fact. Our treatment of the facts in this way has in no way limited or hindered our review of the issues presented.

The following day, O'Donoghue went to Breckenridge Memorial Hospital seeking treatment for his injuries. He was referred to the University of Louisville Medical Center for treatment of a fractured jaw. He was informed the fracture would heal within a few weeks' time without further intervention. He also sustained a concussion, a sprained right thumb and scrapes to his left arm. O'Donoghue suffered from a "sneezing fit" a few weeks after the incident which reinjured the fracture and ultimately required his jaw to be wired shut for approximately six weeks. During his recovery, O'Donoghue was unable to eat solid food, perform his usual farming work or wear his oxygen mask while he slept.

A jury trial was held on February 19 and 22, 2010. The jury acquitted Lowe of the wanton endangerment, but convicted him of assault in the second degree. Following further deliberations, the jury recommended the minimum sentence of five years' imprisonment. The trial court entered a final judgment and sentencing order on March 4, 2010. This appeal followed.

As an initial matter, we must comment on a patent error in Lowe's notice of appeal. The notice indicates this appeal is being taken from the trial court's final judgment and sentence entered on October 1, 2008. Because the crimes charged in this matter did not occur until some nine months later, we are confident this date is erroneous. Our review of the record reveals no orders were entered in this matter in October of any year. The failure to properly state the

order being appealed from could prove fatal to an appeal. However, in the case *sub judice*,

> [d]ismissal is not an appropriate remedy for this type of defect so long as the judgment appealed from can be ascertained within reasonable certainty from a complete review of the record on appeal and no substantial harm or prejudice has resulted to the opponent. While our court continues to have a compelling interest in maintaining an orderly appellate process, the penalty for breach of a rule should have a reasonable relationship to the harm caused. Likewise the sanction imposed should bear some reasonable relationship to the seriousness of the defect. While dismissal still may be appropriate where the breach of the rule and the harm to the opponent is sufficiently serious, under CR 73.02(2) the appellate court is charged with the burden of deciding the appropriate sanction on a case by case basis.

*Ready v. Jamison*, 705 S.W.2d 479, 481-82 (Ky. 1986). The Commonwealth has not acknowledged the error nor alleged any prejudice resulting therefrom. Thus, we believe it appropriate to review the allegations of error presented in the appeal since the order being appealed from is easily discernible from this abbreviated record.[5] However, counsel is cautioned to take appropriate measures to ensure such errors do not occur in the future because sanctions may be imposed under different or more egregious circumstances.

Lowe advances three allegations of error in urging reversal of his conviction. He first contends the prosecutor engaged in misconduct in her pattern of questioning witnesses to elicit testimony amounting to "the functional equivalent

[5] It is important to note that the substantial compliance rule set forth in *Ready* applies only to nonjurisdictional defects. *See City of Devondale v. Stallings*, 795 S.W.2d 954 (Ky. 1990).

of instructing the jury that [Lowe] was not privileged to act in self-protection." Second, Lowe argues the trial court's instructions to the jury failed to ensure a unanimous verdict. Finally, he alleges the trial court erred in failing to instruct the jury on the lesser-included offense of assault in the fourth degree.[6]

Lowe's first two allegations of error are admittedly unpreserved for our review. Instead, Lowe requests review for palpable error as set forth in Kentucky Rules of Criminal Procedure (RCr) 10.26. Thus, under that rule, we shall review those two matters solely for the presence of manifest injustice. To demonstrate manifest injustice, "the required showing is probability of a different result or error so fundamental as to threaten a defendant's entitlement to due process of law." *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006).

First, Lowe argues the prosecution engaged in misconduct by essentially instructing the jury that he was not privileged to act in self-protection. He contends the prosecution elicited testimony that O'Donohgue was legally justified in ramming "his jeep into [Lowe's] jeep because [Lowe] could have been costing O'Donoghue money by destroying hay." Lowe alleges this line of questioning introduced irrelevant and unduly prejudicial evidence, amounted to the prosecutor improperly commenting on the law, and presented evidence of uncharged crimes. We disagree.

Claims of prosecutorial misconduct are reviewed to "determine whether the alleged misconduct is so egregious, improper, or prejudicial, as to have

[6] KRS 508.030, a Class A misdemeanor.

undermined the overall fairness of the proceedings." *Hood v. Commonwealth*, 230 S.W.3d 596, 600 (Ky. App. 2007) (citing *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006)). During redirect examination of O'Donoghue, the Commonwealth was *sua sponte* instructed by the trial court to refrain from further questioning of any witnesses regarding monetary losses incurred as a result of Lowe's driving through the hay field. The Commonwealth subsequently questioned the sheriff about an individual's right to engage in self-help to prevent damage to his property. However, this testimony was elicited in an attempt to provide the jury with a justification for O'Donoghue's actions in swerving into Lowe's jeep. Therefore, the prosecutor's conduct was not improper and did not affect the overall fairness of the trial. We are unable to conclude from the record before us that exclusion of the testimony regarding damage to the standing crop or its value would have altered the outcome of Lowe's trial. Nor can we conclude Lowe was deprived of his right to due process of law. Thus, we conclude no manifest injustice occurred and Lowe is not entitled to the relief he seeks.

Second, Lowe argues the trial court's instructions to the jury failed to ensure a unanimous verdict. He alleges the instruction defining "serious physical injury" presented the jury with alternative theories of guilt which were unsupported by the evidence adduced during the trial. We disagree.

The trial court instructed the jury that "serious physical injury" is defined 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." This definition mimics the language found in KRS 500.080(15). Pursuant to RCr 9.54(2),

> [n]o party may assign as error the giving or the failure to give an instruction unless the party's position has been fairly and adequately presented to the trial judge by an offered instruction or by motion, or unless the party makes objection before the court instructs the jury, stating specifically the matter to which the party objects and the ground or grounds of the objection.

The failure to comply with RCr 9.54(2) has consistently been held to render an alleged error unpreserved and prohibit appellate review. *Commonwealth v. Duke*, 750 S.W.2d 432, 433 (Ky. 1988). *See also Commonwealth v. Collins*, 821 S.W.2d 488 (Ky. 1991); and *Evans v. Commonwealth*, 702 S.W.2d 424 (Ky. 1986). Lowe concedes he did not object to the trial court's giving of this instruction and thus failed to comply with RCr 9.54(2). He therefore requests palpable error review.

We fail to discern any manifest injustice stemming from the trial court's instruction. Lowe tendered an instruction identical to that adopted by the trial court. It has long been held that a party cannot predicate an error upon an instruction given at its own request or substantially similar to one it has tendered. *City of Greenville v. Johnston*, 244 Ky. 782, 52 S.W.2d 716, 718 (1932) (citing *Pope-Cawood Lumber & Supply Co. v. Cleet*, 236 Ky. 366, 33 S.W.2d 360 (1930); *Turner Elkhorn Coal Co. v. Smith*, 239 Ky. 428, 39 S.W.2d 649 (1931)). There was no error.

Finally, Lowe contends the trial court erred in refusing to give his requested instruction to the jury on assault in the fourth degree as a lesser-included offense.

> [I]t is the duty of the trial judge to prepare and give instructions on the whole law of the case . . . [including] instructions applicable to every state of the case deducible or supported to any extent by the testimony; and . . . although a defendant has a right to have every issue of fact raised by the evidence and material to his defense submitted to the jury on proper instructions, the trial court should instruct as to lesser-included offenses only if, considering the totality of the evidence, the jury might have a reasonable doubt as to the defendant's guilt of the greater offense, and yet believe beyond a reasonable doubt that he is guilty of the lesser offense.

*Rogers v. Commonwealth*, 86 S.W.3d 29, 43 (Ky. 2002) (internal citations and quotation marks omitted). We review a trial court's ruling regarding instructions for an abuse of discretion. *Cecil v. Commonwealth*, 297 S.W.3d 12, 18 (Ky. 2009). In addition, we must consider the evidence in the light most favorable to Lowe because the issue is sufficiency of the evidence to warrant an instruction on a lesser-included offense. *Thomas v. Commonwealth*, 170 S.W.3d 343, 347 (Ky. 2005) (citing *Ruehl v. Houchin*, 387 S.W.2d 597, 599 (Ky. 1965)).

As is pertinent to the case at bar, a person is guilty of assault in the second degree when he "intentionally causes serious physical injury to another person." KRS 508.020(1)(a). In contrast, a person is guilty of assault in the fourth degree when he "intentionally or wantonly causes physical injury to another person." KRS 508.030(1)(a). "Physical injury" is defined in KRS 500.080(13) as "substantial physical pain or impairment of physical condition." We have previously set forth the statutory definition of "serious physical injury." Thus, the difference between assault in the second degree and assault in the fourth degree, as

relevant to this appeal, is whether O'Donoghue sustained a "serious physical injury" or a "physical injury." The trial court determined as a matter of law that O'Donoghue's injuries constituted a "serious physical injury" and declined to instruct the jury on the lesser-included offense of assault in the fourth degree. Lowe contends the extent of injury is a question of fact properly determined by the jury, citing *Rowe v. Commonwealth*, 50 S.W.3d 216 (Ky. App. 2001). After a careful review, we agree with Lowe.

In *Rowe*, the defendant struck the victim in the mouth, fracturing his chin and knocking four of his teeth back at approximately a forty-five degree angle. The teeth were reset using an arch bar and the victim's mouth was wired shut for approximately six weeks. The victim suffered severe pain and was unable to eat solid foods for several weeks. Medical testimony was presented indicating that although complications could not be ruled out and that pain could continue for some time, the victim's prognosis for recovery was good. A panel of this Court held that the proof at Rowe's trial "failed to establish as a matter of law that [the victim's] injury could only reasonably be found to constitute a "serious physical injury." *Id*. at 221. This Court further concluded that the extent of the victim's injuries was a factual question to be decided by the jury and reversed and remanded the matter for a new trial in light of the trial court's failure to instruct on the lesser-included offense.

The facts in *Rowe* are strikingly similar to the case at bar. While the testimony elicited regarding O'Donoghue's injuries was sufficient for the jury to

conclude he suffered a serious physical injury and that Lowe was guilty of assault in the second degree, it was insufficient for the trial court to so conclude as a matter of law. The cases cited by the Commonwealth and its attempt to distinguish *Rowe* are unpersuasive. The seriousness of a victim's injuries is a question of fact to be determined by the jury unless it can be concluded as a matter of law that the injuries are serious physical injuries as defined by statute. *Id*. at 220-21.

No testimony was given that O'Donoghue's injuries created a substantial risk of death or that he suffered from serious or prolonged disfigurement or prolonged loss or impairment of the function of any bodily organ. There was, however, testimony that O'Donoghue was unable to eat solid foods or to work for a period of time. This was sufficient for the jury to conclude he suffered from a prolonged impairment of health. Nevertheless, because a reasonable juror could conclude that O'Donoghue suffered only a physical injury rather than serious physical injury, the instruction for assault in the fourth degree as a lesser-included offense was warranted. Therefore, we reverse for a new trial on the assault in the second degree charge. We need not address the appellant's other arguments of error by the trial court.

For the foregoing reasons, Lowe's conviction for assault in the second degree is reversed and the case is remanded for a new trial on that charge consistent with this opinion.

ALL CONCUR.

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