

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001789-MR

SAMUEL E. PLOTNICK

APPELLANT

v.

APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE DANIEL L. BALLOU, JUDGE
ACTION NO. 13-CR-00067

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON, D. LAMBERT, AND MAZE, JUDGES.

MAZE, JUDGE: Samuel Plotnick appeals from his conviction and sentence on charges of second-degree manslaughter, fourth-degree assault, and resisting arrest.

Specifically, he argues that he was entitled to a directed verdict on the manslaughter charge and that the trial court erred in imposing \$130.00 in court costs. As the Commonwealth presented more than a scintilla of evidence regarding

Plotnick's wanton conduct, and as Plotnick's unpreserved allegation of error concerning court costs does not evince a palpable error, we affirm.

Background

On March 18, 2013, a Whitley County grand jury indicted Plotnick on charges including murder, third-degree assault and fourth-degree assault. At trial, various witnesses testified to the following.

On December 15, 2012, Plotnick, Jimmy Dean Peace, and Theresa Burnett gathered at Peace's home where they consumed alcohol and prescription pain medication. At one point, Burnett and Plotnick got into an argument which ended after Plotnick punched Burnett and dragged her by her hair. Burnett then went to the restroom. While there, she heard a commotion coming from outside the restroom door. When she returned from the restroom, Burnett found Plotnick kicking, stomping, and punching Peace who was face down on the ground. According to Burnett, Plotnick did this while wearing steel-toed boots. Police arrived and intervened, at which point Plotnick spit on and kicked four police officers who eventually arrested him.

Peace's sister arrived soon after the incident. She observed swelling to Peace's face, bruising to his side and back, and blood coming from his ear. Nevertheless, Peace, who also suffered from diabetes and late-stage liver disease, refused medical treatment, electing instead to stay at his sister's home. Peace was hospitalized on December 20, and he remained hospitalized at University of Kentucky Hospital until his death on January 2, 2013.

Dr. Kristen Roth, former medical examiner for the state of Kentucky, testified regarding the results of her autopsy on Peace. Despite Peace's other serious health issues, Dr. Roth testified that Peace's cause of death was "multi-system organ failure ... due to blunt impacts of head, trunk and extremities, of multiple skeletal visceral injuries ... from the trauma that he received." Dr. Roth stated that Plotnick's assault on Peace caused cells in Peace's liver to die, and because of its limited functionality at the time, Peace's liver could not recover.

Plotnick's medical expert, Dr. Thomas Young, opined that Peace died of liver failure and not as a result of the assault. Dr. Young contradicted Dr. Roth's conclusions that damage to Peace's liver and intestines caused by the trauma of the assault caused Peace's death. Rather, Dr. Young testified that poor circulation caused by Peace's end-stage liver disease caused his death.

Finally, Plotnick testified that he punched and kicked Peace – including twice in the face – but that he did not intend to kill or seriously injury Peace. Plotnick also testified that he did not know Peace was ill and that Peace exhibited no signs of illness.

At the close of the Commonwealth's case, Plotnick's attorney moved for a directed verdict, arguing that the Commonwealth had provided no evidence that Plotnick acted wantonly or with disregard for a known risk that his conduct could cause Peace's death. Plotnick renewed this motion at the close of proof. The trial court overruled both motions, and the matter proceeded to the jury.

After the trial court instructed the jury on crimes including murder, first-degree manslaughter, second-degree manslaughter, and reckless homicide, the jury convicted Plotnick of second-degree manslaughter in addition to fourth-degree assault and resisting arrest. Prior to, and in lieu of, sentencing, the parties agreed to a sentence of eight years' imprisonment for the manslaughter conviction and twelve months for each of the other charges, all to run concurrently. The trial court approved the agreed-upon sentence. In addition, the trial court ordered Plotnick to pay \$130.00 in court costs, to be paid in installments of \$25.00 per month and beginning ninety days after Plotnick's release from prison. The court ordered that Plotnick's payments be applied to restitution first and then to fees and costs. Plotnick now appeals from this judgment of conviction and sentence.

Analysis

Directed verdict is appropriate only if the Commonwealth fails to produce more than a mere scintilla of evidence. *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991). If the evidence is more than a scintilla and it would be reasonable for the jury to return a verdict of guilty based on it, then the motion should be denied. *Id.* In reviewing a trial court's decision regarding directed verdict, we, like the trial court, must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth and assume that the evidence for the Commonwealth is true, reserving for the jury questions as to credibility and weight to be given to testimony. *Id.*

A directed verdict motion is reviewed in light of the proof at trial and the statutory elements of the alleged offense. *Lawton v. Commonwealth*, 354 S.W.3d 565, 575 (Ky. 2011). Therefore, we look to KRS¹ 507.040(1), which states that “[a] person is guilty of manslaughter in the second degree when he wantonly causes the death of another person....” We also look to KRS 501.020(3) which defines “wantonly” as follows:

A person acts wantonly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. A person who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts wantonly with respect thereto.

Plotnick argues that the Commonwealth presented “zero evidence that Mr. Plotnick or any other layperson should have been aware that there was a substantial risk that Mr. Peace would die from getting kicked and punched.” We are not persuaded.

The Commonwealth provided more than a mere scintilla of evidence demonstrating Plotnick’s wanton conduct. The testimony of various witnesses established that, at the time of the incident Plotnick was wearing heavy steel-toed boots; that Plotnick used these boots, along with his fists, to kick, stomp, and punch Peace repeatedly in the head and torso; that Peace was face-down on the ground throughout the assault; and that Peace was in poor health. Despite

¹ Kentucky Revised Statutes.

Plotnick’s argument that he did not know of Peace’s poor health and his attempts to lay culpability for Peace’s death elsewhere, including upon Peace himself, the evidence and testimony the Commonwealth presented more than satisfied the low evidentiary bar needed for the question of Plotnick’s guilt to reach a jury.

We next turn to Plotnick’s unpreserved allegation of error concerning the trial court’s imposition of court costs. He contends that the trial court acted in contravention of KRS 453.190 and KRS 23A.205 when it imposed \$130.00 in court costs. Plotnick also argues that the schedule of payments the trial court set out in its order was also contrary to statute.

Plotnick requests that this Court undertake palpable error review pursuant to RCr² 10.26, which allows us to consider an unpreserved issue “which affects the substantial rights of a party[.]” We may grant relief “upon a determination that manifest injustice has resulted from the error.” *Id.* In short, the alleged error must be both palpable – “easily perceptible, plain, obvious[,] and readily noticeable” – and it must seriously affect a party’s rights. *See Wise v. Commonwealth*, 422 S.W.3d 262, 276 (Ky. 2013).

The error Plotnick alleges does not rise to the level required under RCr 10.26. A “manifest injustice” requires a showing that “the defect in the proceeding was shocking or jurisprudentially intolerable.” *Id.* (*quoting Martin v. Commonwealth*, 207 S.W.3d 1 (Ky. 2006)). The error must be so “fundamental as to threaten a defendant’s entitlement to due process of law[,]” *id.*, and it must

² Kentucky Rules of Criminal Procedure.

seriously affect “the fairness, integrity, or public reputation of the proceeding.” *Wise* (citing *Kingrey v. Commonwealth*, 396 S.W.3d 824 (Ky. 2013)). The imposition of \$130.00 in court costs simply does not rise to the level needed to justify palpable error review or relief.

Conclusion

The Commonwealth provided more than sufficient evidence to survive Plotnick’s motions for a directed verdict. Furthermore, we elect against palpable error review of Plotnick’s unpreserved allegation of error concerning court costs. Therefore, the Whitley Circuit Court’s judgment of conviction and sentence is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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