RENDERED: May 26, 2000; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-003154-MR
NO. 1998-CA-003155-MR

JOHN CARAWAY — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JOHN POTTER, JUDGE
ACTION NO. 98-CR-001333 AND 98-CR-002273

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: DYCHE, JOHNSON AND TACKETT, JUDGES.

TACKETT, JUDGE: Appellant, John Caraway (Caraway), appeals from his convictions for assault in the second degree and for being a persistent felony offender in the second degree (PFO II).[1] For the reasons set forth herein, we affirm.

Caraway became agitated when he encountered his ex-wife, Cahoe, and her two companions, Fritz and Harper, at a bar. Upon leaving the bar, Caraway walked to the car Cahoe, Fritz, and Harper were using and slashed both passenger-side tires with a

[1]Caraway filed two appeals from the same circuit court judgment. This Court ordered the two appeals to be consolidated and both will be address in this opinion.

knife, ostensibly, Caraway said, to prevent Cahoe and her companions from chasing him. Cahoe, Fritz, and Harper later got in the car with the deflated tires and attempted to drive to Cahoe's place of employment. An encounter then occurred on the street between Caraway, Harper, and Fritz. Fritz and Caraway had a heated exchange and Caraway cut Fritz twice with his knife. Caraway then turned on Harper, which resulted in Caraway cutting Harper with the knife.

Caraway was indicted for first-degree assault against Fritz and for second-degree assault against Harper. Caraway was acquitted of assaulting Harper, but was found guilty of committing second-degree assault against Fritz and of PFO II, after which he filed this appeal.

Caraway's first argument is that the trial court erred by not instructing the jury on extreme emotional disturbance. Kentucky Revised Statute (KRS) 508.040 provides that extreme emotional disturbance is a mitigating factor for assault offenses whereby an intentional assault in the first or second degree committed under extreme emotional disturbance is reduced to a class D felony. Caraway contends that "something" Fritz said in their verbal argument "triggered" his actions.

The Kentucky Supreme Court recently held that:

> The evidence offered in support of an EED [extreme emotional disturbance] instruction must show:
>
> > a temporary state of mind so enraged, inflamed, or disturbed as to overcome one's judgment, and to cause one to act uncontrollably from the impelling force of the extreme emotional disturbance rather than from evil or malicious purposes. It is not a

> mental disease in itself, and an enraged, inflamed, or disturbed emotional state does not constitute an extreme emotional disturbance unless there is a reasonable explanation or excuse therefor, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under circumstances as defendant believed them to be.
>
> *McClellan v. Commonwealth*, Ky., 715 S.W.2d 464, 468-69 (1986), *cert. denied* 479 U.S. 1057, 107 S.Ct. 935, 93 L.Ed.2d 986 (1987). Further, there must be evidence of an event which triggers the explosion of violence on the part of the defendant, and the triggering event itself must be sudden and uninterrupted. [citation omitted].

Hudson v. Commonwealth, Ky., 979 S.W.2d 106, 108 (1998). Furthermore, "[e]vidence of mere 'hurt' or 'anger' is insufficient to prove extreme emotional disturbance." Talbott v. Commonwealth, Ky., 968 S.W.2d 76, 85 (1998).

Caraway contends that "Fritz said something during the course of this argument that so infuriated appellant that his actions were the result of an extreme emotional disturbance." However, Caraway does not specify what Fritz said which caused him to suffer from extreme emotional disturbance and it is clear that "extreme emotional disturbance must be proven by some definitive, unspeculative evidence." Id. Furthermore, mere anger does not constitute extreme emotional disturbance. Id. Caraway has also not presented a "reasonable explanation or excuse" for his slashing Cahoe's tires and then cutting Fritz, as required by Hudson, supra, at 108.

The fact that Caraway saw his former spouse in a public place with two men is not "an event which [reasonably] triggers the explosion of violence on the part of the defendant. . . ."

Id. See also Thomas v. Commonwealth, Ky. App., 587 S.W.2d 264, 266 (1979) ("the mere fact that a woman is driving down a public road . . . with a man other than her husband could hardly constitute justification or excuse for a knife attack upon the man.") In short, the evidence did not warrant an extreme emotional disturbance instruction.

Caraway's final argument is that the trial court erred by not granting him a directed verdict due to the Commonwealth's failure to introduce evidence showing that he was over eighteen at the time he committed his previous felony offense, as required by KRS 532.080(2)(b). The Commonwealth does not argue that evidence of Caraway's age at the time he committed his previous offense was introduced. Rather, the Commonwealth contends that Caraway may not raise the issue on appeal as he did not make a specific objection to the lack of such proof in his motion for directed verdict before the trial court.

It is well-settled that the Commonwealth's failure to introduce evidence in a persistent felony proceeding that a defendant was over eighteen at the time his previous felony offense was committed is a material error requiring reversal. See e.g., Tyler v. Commonwealth, Ky., 805 S.W.2d 126 (1991). However, Caraway did not raise a specific objection in his motion for a directed verdict on the PFO II charge to the Commonwealth's failure to present evidence of his age at the time he committed his previous offense. In Hicks v. Commonwealth, Ky. App., 805 S.W.2d 144 (1990), relied upon by the Commonwealth, we held that a party could not raise on appeal the issue of whether the

Commonwealth failed at trial to prove an element of an offense beyond a reasonable doubt due to a failure to make a specific objection. Id. at 148 ("since no specific objection was made by appellant to the element in either of his motions for a directed verdict or in his objections to the jury instructions, it may not be raised for the first time on appellate review.")

Nevertheless, Kentucky Rule of Criminal Procedure (RCr) 10.26 provides that "a palpable error which affects the substantial rights of a party may be considered . . . by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error." The Kentucky Supreme Court has defined a palpable error as:

> one which affects the substantial rights of a party and relief may be granted for palpable errors only upon a determination that manifest injustice has resulted from the error. This means, upon consideration of the whole case, the reviewing court must conclude that a substantial possibility exists that the result would have been different in order to grant relief.

Partin v. Commonwealth, Ky., 918 S.W.2d 219, 224 (1996).

The record reflects that the Commonwealth inexplicably failed to introduce evidence which would have informed the jury that Caraway was over eighteen at the time he committed his prior felony offenses.[2] However, the record also clearly reflects that

[2]The Commonwealth offered testimony as to Caraway's date of birth and introduced into evidence the indictment from his prior felony conviction. However, the copy of the indictment found in the record is illegible and the jury did not take the indictment (continued...)

Caraway did not call attention to the Commonwealth's mistake by making an appropriately specific motion for a directed verdict. See Hicks, supra. Although we do not condone the Commonwealth's failure to comply with the specific dictates of KRS 532.080(2)(b), we do not believe that Caraway's PFO II conviction resulted in a manifest injustice sufficient to merit reversal under the strict standards of RCr 10.26. Caraway was, in fact, over eighteen at the time he committed the previous felony offenses and the record reflects that he met all of the other elements set forth in KRS 532.080.

Caraway's conviction is affirmed.

JOHNSON, JUDGE, CONCURS.

DYCHE, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:

Daniel T. Goyette
J. David Niehaus
Louisville, Kentucky

BRIEF FOR APPELLEE:

A. B. Chandler III
Attorney General

Michael G. Wilson
Assistant Attorney General
Frankfort, Kentucky

[2](...continued)
with them during their deliberations. Thus, the Commonwealth did not present direct evidence to the jury as to Caraway's age at the time he committed the prior felony offenses.