

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001780-MR

GREGORY KANE GROCE

APPELLANT

v. APPEAL FROM CLINTON CIRCUIT COURT
HONORABLE EDDIE C. LOVELACE, JUDGE
ACTION NO. 03-CR-00022

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * *

BEFORE: TACKETT, TAYLOR, AND VANMETER, JUDGES.

TACKETT, JUDGE: Gregory Groce appeals from the judgment of the Clinton Circuit Court that he is guilty of fleeing or evading in the first degree and sentencing him to five years' imprisonment. Groce raises numerous issues on appeal, but the dispositive issue is whether the trial court's instructions to the jury deprived him of a unanimous verdict. Although he failed to preserve the issue for appellate review by objecting to the

tendered instructions, we choose to review the substantive grounds for this issue pursuant to the palpable error rule, Kentucky Rule of Criminal Procedure (RCr) 10.26. Consequently, the judgment of the Clinton Circuit Court is reversed and remanded for a new trial.

In May 2003, Groce's mother-in-law, Carol Looper, called 911 about a domestic dispute with her son-in-law. According to Looper, she and Groce argued after he struck his four year-old daughter on the arm leaving a red mark. Groce then drove away in a white Neon with blue stripes and Looper wanted police to catch him. Sheriff Kay Riddle went to Looper's home, but Groce's wife had already taken their children and left on foot. Meanwhile, Officer Stephen Martin spotted the Neon and recognized Groce, so he activated his lights and siren. Instead of pulling over, Groce drove away at a high rate of speed, passing other cars across double yellow lines while Martin pursued him until losing sight of the Neon. The next day Riddle and Officer Brad Cross went to Groce's home to serve an arrest warrant on him. When Groce answered the door and saw the sheriff on his doorstep, he slammed the door in his face. The officers kicked in the door and arrested him, charging him with fleeing or evading in the first degree. He was indicted by a grand jury and convicted of the offense after a jury trial.

Kentucky Revised Statute (KRS) 520.095 describes the offense of fleeing or evading in the first degree as follows:

(1) A person is guilty of fleeing or evading police in the first degree:

(a) When, while operating a motor vehicle with intent to elude or flee, the person knowingly or wantonly disobeys a direction to stop his or her motor vehicle, given by a person recognized to be a police officer, and at least one (1) of the following conditions exists:

1. The person is fleeing immediately after committing an act of domestic violence as defined in KRS 403.720;
2. The person is driving under the influence of alcohol or any other substance or combination of substances in violation of KRS 189A.010;
3. The person is driving while his or her driver's license is suspended for violating KRS 189A.010; or
4. By fleeing or eluding, the person is the cause, or creates substantial risk, of serious physical injury or death to any person or property; . . .

The indictment failed to include the language in subsection (a)(1) referring to fleeing after committing an act of domestic violence. Nevertheless, the Commonwealth introduced testimony from numerous witnesses, much of it hearsay, that Groce had struck his four year-old daughter and left a mark on her arm before failing to stop at Martin's direction. Groce's trial counsel failed to object to the introduction of inadmissible hearsay evidence.

At the conclusion of its case, the Commonwealth moved to amend the indictment to charge Groce under KRS 520.095(1)(a)(1). RCr 6.16 permits an indictment to be amended "any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced. . . ." Indeed, Groce's trial counsel agreed to the amending of the indictment, and the jury was instructed that it could find Groce guilty of fleeing or evading in the first degree if it believed beyond a reasonable doubt

- a) In this county on or about March 4, 2003, and before the finding of the indictment herein he operated a motor vehicle with intent to flee or elude; and
- b) He knowingly or wantonly disobeyed the direction to stop his motor vehicle which direction was given by a person which he recognized to be a police officer; and
- c) 1) the Defendant was fleeing immediately after inflicting physical injury upon a family member; or
2) that his act of fleeing or eluding caused or created a substantial risk of serious physical injury or death to any person or serious injury to property.

The jury convicted Groce and recommended a sentence of five years' imprisonment. After his trial, Groce obtained new counsel and filed a motion for a new trial arguing that the jury should not have been instructed on fleeing after inflicting a physical injury on a family member. He contended that he had no opportunity to prepare a defense against evidence that he had

injured his daughter immediately prior to evading a police officer. The trial court overruled the motion after a hearing, and this appeal followed.

Groce's brief lists four issues on appeal: the trial court's decision allowing the Commonwealth to amend the indictment at the close of its case, the trial court's refusal to grant a directed verdict of acquittal, the improper admission of bad acts evidence, and the denial of his right to a unanimous verdict. We will examine only the issue of the trial court's instructions to the jury; however, we will discuss evidence supporting other issues as necessary to explain our decision.

Groce made a motion for a directed verdict at the conclusion of the Commonwealth's case; however, he failed to renew the motion after the defense testimony and the Commonwealth's rebuttal evidence. At trial, Groce was the only witness to testify for the defense. He stated that he did not strike his daughter, but he grabbed her by the arm to prevent her from chasing a go-cart and possibly getting hurt. Groce claimed that his mother-in-law, who believed that he had struck the little girl, pulled a gun on him during their argument, so he left and walked to a friend's house. He contended that he did not drive the Neon that day because his license was suspended for driving without insurance and further asserted that he has to wear prescription sunglasses at all times. Groce

testified that he was wearing sunglasses when the officers arrested him and denied shutting the door in their faces. He said he was unaware that the police were at his house until they kicked the door in. The Commonwealth called Cross as a rebuttal witness. Cross knew Groce because they had been in school together, and he was present when Groce was arrested. He testified that Groce had not worn prescription sunglasses in school or on the day that he was arrested.

The Kentucky Supreme Court has previously held that failure to renew a motion for a directed verdict renders the issue unpreserved for appellate review. Baker v. Commonwealth, 973 S.W.2d 54 (Ky. 1998). Moreover, there was sufficient evidence to convict Groce of fleeing or evading under KRS 520.095(1)(a)(4) which states that a defendant is guilty if, "[b]y fleeing or eluding, the person is the cause, or creates substantial risk, of serious physical injury or death to any person or property. . . ." Bell v. Commonwealth, 122 S.W.2d 490, 497 (Ky. 2003) defines "substantial risk" as follows:

a risk that is "[a]mple," "[c]onsiderable in ... degree ... or extent," and "[t]rue or real; not imaginary." Accordingly, it is clear that not all risks are substantial--hence the phrase "low risk"--and not every hypothetical scenario of "what might have happened" represents a substantial risk. In any trial, the issue of whether a defendant's conduct creates a substantial risk of death or serious physical injury "depends upon proof" and reasonable

inferences that can be drawn from the evidence.

During his testimony, Martin was asked whether he felt endangered at any time while he was pursuing Groce's car. Martin said that he did not take risks because there were other motorists on the road and that he did not feel endangered. However, in response to a question about whether Groce's driving endangered anyone else on the highway that day, Martin stated his opinion that it did. The officer testified that Groce passed two cars across double yellow lines and drove at high speeds. However, Martin also said that he did not know how fast he and Groce were driving and that Groce's car did not come close to the cars he passed. Nevertheless, taken in the light most favorable to the Commonwealth, the evidence of Groce's driving was sufficient for a jury to determine that it posed an actual risk of serious injury or death. Therefore, the trial court committed no error in denying his motion for a directed verdict of acquittal based on the theory that he, by fleeing or evading, caused a serious risk of injury or death to others,

Next, we examine the evidence introduced to prove that Groce was fleeing or evading immediately after causing physical injury to a family member. First, we note that, of all the Commonwealth's witnesses, only Groce's mother-in-law offered competent evidence that Groce had struck and injured his daughter. Before police arrived at Looper's house, the children

had all left with their mother. Thus, no police officer ever saw the child or heard her describe being struck by Groce. Nor was there any evidence of a medical exam. Neither Groce's wife, nor his daughter was called as witnesses. KRS 500.080(13) defines physical injury as "substantial physical pain or any impairment of physical condition." Looper testified that Groce struck his daughter and left a red mark between her elbow and her shoulder and that the girl said Daddy hurt her. That is all the competent evidence that was presented regarding Groce causing a physical injury to a family member, and it does not establish that Groce's daughter suffered "substantial physical pain or any impairment of physical condition." Consequently, the Commonwealth did not introduce sufficient evidence for a reasonable juror to find that Groce had injured a family member immediately prior to fleeing or evading.

The Kentucky Supreme Court has previously held that jury instructions which allow a defendant to be convicted under alternate theories of guilt deprive him of a unanimous verdict if there is no evidence to support one of the theories of guilt. Boulder v. Commonwealth, 610 S.W.2d 615, 617 (Ky. 1980). The instruction in this case allowed the jury to find Groce guilty if they believed that his conduct created a substantial risk of serious physical injury or death to any person or property or if he was fleeing immediately after inflicting physical injury upon

a family member. The instruction gives us no way to ascertain which theory of guilt each juror believed. Consequently, since there was insufficient evidence to convict Groce of first-degree fleeing or evading after committing an act of domestic violence, this instruction failed to meet the unanimous verdict requirement of RCr 9.82 and Wells v. Commonwealth, 561 S.W.2d 85 (Ky. 1978). Our state Supreme Court has determined that "the denial of a unanimous verdict--where the error is properly preserved--is not subject to a harmless error analysis." Burnett v. Commonwealth, 31 S.W.3d 878, 883 (Ky. 2000). While Groce concedes that the issue was not preserved for appellate review, he argues that it is subject to review for palpable error under RCr 10.26 which states as follows:

A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or 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.

We believe that manifest injustice would result if we allowed this verdict to stand in light of the fact that Groce was deprived of his fundamental due process right to have every element of the charge against him proven beyond a reasonable doubt. Consequently, this case is reversed and remanded for a new trial.

TAYLOR, JUDGE, CONCURS.

VANMETER, JUDGE, DISSENTS AND FILES SEPARATE OPINION:

VANMETER, JUDGE, DISSENTING: I respectfully dissent.

In Commonwealth v. Pace, 82 S.W.3d 894, 895 (Ky. 2002), the court discussed the standard of review for a claim of palpable error:

An appellate court may consider an issue that was not preserved if it deems the error to be a "palpable" one which affected the defendant's "substantial rights" and resulted in "manifest injustice." RCr 10.26. In determining whether an error is palpable, "an appellate court must consider whether on the whole case there is a substantial possibility that the result would have been any different." Commonwealth v. McIntosh, 646 S.W.2d 43, 45 (Ky. 1983).

An appellate court must review the entire case to ascertain whether the result would have been different absent the error. Pace, 82 S.W.3d at 896. In my view, "a review of the case absent the error" in this instance requires a review assuming the jury had been instructed correctly. So, if the jury in this case had been instructed correctly, I do not believe there is a "substantial possibility that the result would have been any different." In fact, the evidence of appellant's guilt is much more compelling in this case than it was in Pace.

BRIEF FOR APPELLANT:

Kathleen Kallaher Schmidt
Shepherdsville, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

James Havey
Assistant Attorney General
Frankfort, Kentucky