RENDERED: JULY 13, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001978-MR

JAMARIO WHITLOCK APPELLANT

v.

APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE ANDREW SELF, JUDGE
ACTION NO. 09-CR-00199

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, KELLER AND STUMBO, JUDGES.

DIXON, JUDGE: Jamario Whitlock appeals from a judgment of the Christian Circuit Court convicting him of first-degree assault. Whitlock seeks palpable error review of unpreserved errors regarding his alleged entitlement to a directed verdict and certain jury instructions. Finding no error, we affirm.

Late in the evening of March 10, 2009, Antonio Brunson invited Antonio Coleman to stop by his house. Whitlock accompanied Coleman to Brunson's house, and they arrived around midnight. After Brunson and Whitlock were introduced, the three men sat in Brunson's Suburban and listened to music while smoking marijuana and drinking beer. After about an hour, Brunson went inside his house to retrieve additional beer. When Brunson returned to the driver's seat of his Suburban, Whitlock held him at gunpoint and asked for money. After a brief struggle, Brunson attempted to exit the vehicle, and Whitlock shot him in the back. Brunson fell to the ground; Whitlock and Coleman left the scene. Brunson drove himself to the hospital and was treated for critical internal injuries. Thereafter, police detectives interviewed Brunson and Coleman, and both men identified Whitlock as the shooter. In April 2009, Whitlock was indicted on charges of first-degree assault and first-degree robbery.

Whitlock stood trial on the indictment in March 2010. The jury returned a guilty verdict as to first-degree assault and acquitted Whitlock of first-degree robbery. Whitlock was ultimately sentenced to eleven years in prison and now appeals his conviction.

Whitlock first contends that he was entitled to a directed verdict of acquittal because his voluntary intoxication negated the requisite criminal intent for first-degree assault. The Commonwealth correctly points out that Whitlock's motion for a directed verdict was general in nature, as he did not specifically argue that the evidence of intoxication entitled him to a directed verdict. *Quisenberry v.*

Commonwealth, 336 S.W.3d 19, 35 (Ky. 2011). In his reply brief, Whitlock concedes his motion was not specific; however, he requests review of the claim as palpable error pursuant to RCr 10.26. *See Id*. On palpable error review, this Court may grant relief upon an otherwise unpreserved error that resulted in manifest injustice to the movant. RCr 10.26.

When a defendant moves for a directed verdict, the trial court must construe the evidence in a light most favorable to the Commonwealth and deny the motion "[i]f the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty." *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991). Generally, the appellate standard of review for a properly preserved error regarding the denial of a directed verdict motion is, "if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal." *Id*. After reviewing the record, we are satisfied that even under the general standard of review there was no error; accordingly, there was no palpable error.

Intoxication is a defense to a criminal act if it negates the existence of an element of the offense. KRS 501.080. Pursuant to KRS 508.010(1)(a), first-degree assault requires intentional conduct. According to Whitlock, there was evidence that he was intoxicated by alcohol and marijuana at the time of the assault, which negated the intent element of first-degree assault.

Whitlock asserts the evidence established that all three men were drinking beer and smoking marijuana prior to the assault. Whitlock emphasizes that the evidence at trial included an unsigned apology letter written to Brunson, and purportedly authored by Whitlock, which stated "I don't know what the [expletive] got into me. I guess I was weak and let the devil take control of me because I don't do that type of stuff."

The Commonwealth asserts Whitlock failed to establish the defense of intoxication because it requires more than "mere drunkenness;" instead, the proof must establish the defendant "was so drunk that he did not know what he was doing." *Rogers v. Commonwealth*, 86 S.W.3d 29, 44 (Ky. 2002).

Brunson's testimony indicated he drank beer and smoked marijuana with Whitlock and Coleman for approximately one hour before the assault occurred. Detective Woodall testified that he interviewed Whitlock about the incident. During the interview, Whitlock admitted drinking and listening to music in Brunson's vehicle, and Whitlock's description of where the men sat in the vehicle matched Brunson's account. Whitlock further alleged that he left alone before Brunson was shot and went to visit a female friend.

The record reflects that Whitlock consumed beer and marijuana before the assault; however, there was no evidence indicating Whitlock's state of mind was impaired, if at all, beyond mere drunkenness. Likewise, Whitlock's reliance on the anonymous apology letter as evidence of intoxication is unpersuasive.

After careful review, we are satisfied that the evidence was "not so overwhelming as to compel a finding by the jury as the trier of fact that [the defendant] was intoxicated to the degree that he did not know what he was doing." *Salisbury v. Commonwealth*, 556 S.W.2d 922, 924-25 (Ky. App. 1977). Viewing all of the evidence in the light most favorable to the Commonwealth, a reasonable juror could conclude Whitlock was capable of forming intent; consequently, even if this specific argument had been raised below, Whitlock would not have been entitled to a directed verdict.[1]

Whitlock next seeks review of an unpreserved claim of error regarding jury instructions. He contends the court committed palpable error by failing to instruct the jury on the defense of voluntary intoxication and the lesser included offense of second-degree assault.

Where an alleged error regarding jury instructions is not preserved, an appellate court may review the claim to determine if manifest injustice occurred. RCr 10.26. To establish 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).

Whitlock relies on the testimony that the men consumed beer and marijuana before the assault, and he points out that the author of the anonymous letter stated that the devil must have caused the perpetrator's actions.

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[1] Further, despite Whitlock's argument to the contrary, the Commonwealth was not obligated to disprove intoxication, as Whitlock did not sufficiently establish an intoxication defense. *Brown v. Commonwealth*, 555 S.W.2d 252, 257 (Ky. 1977); KRS 500.070(1).

In the case at bar, the trial court would have been obligated to instruct the jury on voluntary intoxication and the lesser included offense of second-degree manslaughter only if "the evidence would permit a juror reasonably to conclude that the defense exists or that the defendant was not guilty of the charged offense but was guilty of the lesser one." *Harris v. Commonwealth*, 313 S.W.3d 40, 50 (Ky. 2010).

Although Whitlock may have been drinking beer and smoking marijuana, there was no evidence for the jury to reasonably conclude that Whitlock "was so intoxicated that he could not have formed the requisite mens rea" for first-degree assault. *Fredline v. Commonwealth*, 241 S.W.3d 793, 797 (Ky. 2007). Likewise, there was insufficient evidence that his alleged intoxication reduced the degree of the crime to second-degree assault. *See Geary v. Commonwealth*, 503 S.W.2d 505, 510 (Ky. 1972).

We are satisfied that Whitlock was not entitled to jury instructions on voluntary intoxication and second-degree assault. Where there is no error, there can be no palpable error. *Saxton v. Commonwealth*, 315 S.W.3d 293, 303 (Ky. 2010).

For the reasons stated herein, we affirm the judgment of the Christian Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Robert Yang
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Jeffrey A. Cross
Frankfort, Kentucky