

RENDERED: AUGUST 26, 2016; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000356-MR

SCOTT MCGEORGE

APPELLANT

v. APPEAL FROM BELL CIRCUIT COURT
HONORABLE ROBERT COSTANZO, JUDGE
ACTION NO. 14-CR-00190

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, J. LAMBERT AND THOMPSON, JUDGES.

ACREE, JUDGE: Scott McGeorge appeals the February 20, 2015 judgment of the Bell Circuit Court finding him guilty of second-degree assault, second-degree cruelty to animals, and being a first-degree persistent felony offender. The judgment also sentenced Scott to fifteen-years' imprisonment and imposed a \$500.00 fine. We affirm.

I. Factual and Procedural Background

This case stems from violent events transpiring on the weekend of May 3 through May 5, 2014, between Scott McGeorge and his wife, Samantha. The weekend culminated with Scott's arrest. He was indicted by the Bell County Grand Jury for second-degree assault, first-degree unlawful imprisonment, second-degree cruelty to animals, and first-degree persistent felony offender (PFO). The case proceeded to trial.

The Commonwealth's evidence provided that Scott repeatedly physically attacked his wife throughout the weekend and kept her bound and locked inside their home with the curtains drawn. The pair had gotten into a physical fight the prior weekend, in which Samantha stabbed Scott in the shoulder with a knife and Scott fractured three of Samantha's ribs.

Samantha alleged that Scott attacked her for the first time on the weekend of May 3, 2014, in the bathroom. She claimed Scott pushed her into a shelf and she landed in the bathtub. She testified that he turned the cold water on her, put a BB gun to her head, and threatened to pull the trigger. Samantha also asserted that Scott pushed her down onto the couch, got on top of her and punched her with his fists. She testified that Scott choked and strangled her several times throughout the weekend so much so that she was forced to gasp for air many times. She stated that the final time, he thought he had killed her.

Samantha testified that once Scott noticed all of her bruising, he would not let her leave the house. She stated that was when Scott bound her hands

and legs with duct tape. He eventually untied her, but he would not allow her to call her children or the police. She then described how Scott repaired all of the items broken throughout the house as a result of their fights. She stated that what he could not fix, he took outside to burn. On the morning of May 5, 2014, Scott left for work.

A friend of Samantha's, Evelyn Roberts, went to the McGeorge residence that same day because she was concerned that she had not heard from Samantha for a few days. Roberts testified that she noticed the residence was dark and the curtains were closed. When Roberts saw Samantha, she called the police.

Deputy Joe Quillen arrived at the residence. Deputy Quillen testified that the residence was so dark, he had to use his flashlight. He testified that Samantha was severely beaten, trembling, avoided eye contact with him, and she could barely walk. Deputy Quillen called Emergency Medical Services to take Samantha to the hospital for an examination and treatment. Deputy Quillen testified that he observed bruising on Samantha's face, arms, back, chest, legs, and feet. He stated he saw adhesive residue on her wrists that had collected dirt. He observed a used roll of duct tape, several empty liquor bottles, and a burn pile in the yard. Deputy Quillen testified that he had been called to the scene of domestic disputes between Scott and Samantha in the past.

Samantha was taken to the hospital and examined by Dr. Schuyler Geller. Dr. Geller testified about the results of Samantha's medical examination on May 5, 2014. He stated Samantha had an acute fracture on the fourth toe on her

left foot as the result of recent trauma. Dr. Geller also noted Samantha's sub-acute fractures on her third through fifth ribs anteriorly on the left. Dr. Geller stated that those fractures occurred sometime earlier, which is consistent with the accounts of the prior weekend's events. Dr. Geller described the bruising and swelling all over Samantha's frame, including her face, chest, back, arms, and legs. Dr. Geller further testified that Samantha had suffered a minimal traumatic brain injury. He stated Samantha reported a "stunning" sensation during one of the exchanges between her and Scott that weekend. Dr. Geller described it as "seeing stars." Dr. Geller clarified that Samantha did not report loss of consciousness and had no amnesic events during the weekend in question. But, she reported a history of blackouts and described headaches three days after the weekend's altercations. Dr. Geller stated that she would need follow-up examinations to determine whether there were any long-term effects, cognitively or emotionally, but concluded that Samantha was injured in such a way that she would experience prolonged health impairment. He further stated the injury could lead to permanent changes in personality or cognitive capability. He indicated that she was more susceptible to very serious head injuries in the future because of her brain injury.

Scott presented a different story at trial. Scott stated that on May 3, 2014, he and Samantha went to the flea market in Corbin, Kentucky. On the way home, they stopped and purchased a bottle of liquor. When they arrived home, they sat outside on a picnic table and drank. Scott stated Samantha accused him of talking to another woman. Later, inside the residence, Scott claims he went to use

the bathroom. He testified that Samantha followed him, grabbed him around the neck and began choking him. Scott stated that attack prompted him to defend himself by shoving Samantha into the cabinet. Scott testified that Samantha accused him of being a child molester, and he reacted by slapping her three times in the mouth. Scott testified that Samantha's Chihuahua came into the bathroom and started barking. He admitted that he kicked the dog out from under their feet. Scott claimed he and Samantha tripped and fell into the shelf in the bathroom, knocking it down. Scott said he and Samantha went into the living room to talk. Samantha renewed her accusations that Scott was cheating on her, and she began scratching and hitting him. He testified that he wrapped a blanket around her arms, shook her, and told her to quit. He testified they spent the rest of the night talking.

On May 4, 2015, Scott testified that he went to the store to buy groceries. When he returned home, they ate dinner and watched television. Scott testified that earlier that day, a friend came over to sell Samantha pills. Scott said he bought ten pills, took two of them and gave the rest to Samantha. The next day, Scott went to work. He testified that he talked to Samantha six or eight times on the phone that day while he was at work. When he arrived home from work, a police officer was waiting to speak to him. The officer arrested Scott.

Scott was found guilty of second-degree assault, second-degree cruelty to animals, and being a persistent felony offender. He was fined \$500, and the jury recommended a sentence of fifteen-years' imprisonment. The Bell Circuit

Court entered a judgment consistent with the jury's verdict and sentencing recommendation. This appeal followed.

II. Analysis

Scott first argues to this Court that the trial court erred when it did not grant his motions for directed verdict of acquittal because (1) the Commonwealth did not prove that Samantha suffered a serious physical injury and (2) even if a serious physical injury did occur, the Commonwealth did not prove it happened between May 3 and May 5, 2014.

We review a motion for directed verdict under the standard set forth in *Commonwealth v. Benham*, 816 S.W.2d 186 (Ky. 1991):

On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserv[e] to the jury questions as to the credibility and weight to be given to such testimony.

Id. at 187. “On appellate review, the test of a directed verdict 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.*

Scott asserts that his argument about the denial of his directed verdict motions is preserved in part. However, our review of the record indicates that it is not. Motions for directed verdict “must state specific grounds for relief and should

identify which elements of the alleged offense the Commonwealth has failed to prove. Merely moving summarily for directed verdict or making a general assertion of insufficient evidence is not enough.” *Commonwealth v. Jones*, 283 S.W.3d 665, 669 (Ky. 2009) (citations omitted). Defense counsel moved for directed verdict at the close of the Commonwealth’s case stating “the Commonwealth has not proven beyond a reasonable doubt every element of the offenses that my client committed these crimes.” (VR: 2/4/2016; 9:31:40). The Commonwealth countered and the motion was denied.

Defense counsel again moved for directed verdict at the close of all of the evidence, stating almost verbatim the first motion: “Your Honor, the Commonwealth has not proven beyond a reasonable doubt on these elements, on each element of the crime, that my client committed these offenses.” (VR: 2/4/2016; 11:36:10).

Scott was charged with several different offenses comprised of various elements. Because counsel did not specify any objection in either directed verdict motion to the particular element with which he now takes issue before this Court, we will not consider the claim of error; the matter may not be raised for the first time on appeal. *Hicks v. Commonwealth*, 805 S.W.2d 144, 148 (Ky. App. 1990).

Scott alternatively asks this Court to review for palpable error. RCr¹ 10.26. “For an error to be palpable, it must be ‘easily perceptible, plain, obvious

¹ Kentucky Rules of Criminal Procedure.

and readily noticeable.”” *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006). We have so reviewed the case and conclude no error was so palpable as to have affected Scott’s substantial rights or resulted in manifest injustice. RCr 10.26.

A person is guilty of assault in the second degree when: (a) he intentionally causes serious physical injury to another person; or (b) he intentionally causes physical injury to another person by means of a deadly weapon or a dangerous instrument; or (c) he wantonly causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument. KRS² 508.020(1). “Serious physical injury” is statutorily defined as a “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.” KRS 500.080(15). “[M]edical testimony is not an absolute requisite to establish serious physical injury or even physical injury[,]” and a “victim [i]s competent to testify about [their] own injuries.” *Commonwealth v. Hocker*, 865 S.W.2d 323, 325 (Ky. 1993). The Commonwealth presented testimony of Samantha’s injuries by medical expert and by Samantha herself.

Dr. Geller provided detailed testimony about Samantha’s injuries resulting from her disputes with Scott over the weekend in question. He described the bruising and swelling covering her figure and her assorted fractures. He

² Kentucky Revised Statutes.

testified that she suffered significant physical injury. Based on Samantha's account to Dr. Geller of the weekend's events, including a "stunning" sensation after being struck and headaches thereafter, he diagnosed her with a minimal traumatic brain injury. Dr. Geller further noted for the jury what the diagnosis entails.

Samantha also testified through tears about the events that transpired on the weekend of May 3 through May 5, 2014, and her resulting injuries allowing the jury to evaluate her disposition and description of her injuries and whether they rose to the level of serious physical injury. She testified that she has not been able to work since time of these events.

In sum, there was sufficient proof of serious physical injury whereby a reasonable juror could have found Scott guilty of second-degree assault. Consequently, we conclude that palpable error did not occur when the trial court denied Scott's motions for directed verdict.

Moreover, it was without question that Samantha suffered at least physical injuries at the hands of Scott on the weekend of May 3 through May 5, 2014. Scott admitted in his testimony that he slapped Samantha three times in the mouth, he pushed her into a cabinet, and that a cabinet fell on her during the weekend events described. He admitted he was responsible for her bruising because of all of the shoving and falling that took place. He testified that there were several physical brawls between the two over the course of the weekend. The evidence established injuries. And, the jury was given the opportunity to consider

a lesser degree of culpability. The trial court provided an instruction on the lesser-included offense of fourth-degree assault. *Parker v. Commonwealth*, 241 S.W.3d 805, 811 (Ky. 2007) (“When the evidence is subject to different interpretations by the jury, even though the trial court might believe it unlikely that the jury could find the requisite state of mind for a lesser included offense, it is nonetheless required to instruct on the lesser-included offense if such an interpretation is *possible*.”) (emphasis in original). The determination of which type of injury occurred was for the jury.

[T]he proof need only satisfy one of the alternatives to survive a directed-verdict motion:

A motion for a directed verdict of acquittal should only be made (or granted) when the defendant is entitled to a complete acquittal[,] *i.e.*, when, looking at the evidence as a whole, it would be clearly unreasonable for a jury to find the defendant guilty, under any possible theory, of any of the crimes charged in the indictment or of any lesser included offenses.

Acosta v. Commonwealth, 391 S.W.3d 809, 817 (Ky. 2013) (quoting *Campbell v. Commonwealth*, 564 S.W.2d 528, 530 (Ky. 1978)). Here, the evidence of physical injury was sufficient to deny Scott’s motions for directed verdicts. We find no palpable error.

Scott next asserts that the trial court erred when it allowed the Commonwealth to question him during cross-examination about a 2009 conviction for fourth-degree assault and to admit court documents as evidence of that

conviction. Scott argues that admission of this evidence was in violation of KRE³ 609(a) and 403. We disagree.

A trial court's evidentiary rulings are reviewed for an abuse of discretion. *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000) (citations omitted). However, this argument also was not preserved for review, but Scott has again requested that this Court review for palpable error. Unpreserved claims of evidentiary error are reviewed for palpable error pursuant to KRE 103(e). *Ernst v. Commonwealth*, 160 S.W.3d 744, 758 (Ky. 2005). "A finding of palpable error must involve prejudice more egregious than that occurring in reversible error, . . . and the error must have resulted in 'manifest injustice.'" *Id.* (citing *Brock v. Commonwealth*, 947 S.W.2d 24, 28 (Ky. 1997)).

During Scott's direct examination by his counsel, Scott testified about the couple's tumultuous past. He recounted several Emergency Protective Orders (EPO) and Domestic Violence Orders (DVO) taken out by each of them against the other and subsequently dropped. Scott described one incident in particular in which he alleged Samantha made him violate an EPO that was in place. Scott testified that Samantha used a stick to bust out a window of his truck so that she could continue to go after him. He said the police were called and he went to jail for violating the EPO and the probation he was on at the time.

On cross-examination, the Commonwealth questioned Scott further about the incident, including when it occurred, because he had asserted that

³ Kentucky Rules of Evidence.

Samantha was the aggressor. The Commonwealth asked Scott if he was convicted of fourth-degree assault in 2009 based on that confrontation. Scott admitted that he was. The Commonwealth also admitted the Bell District Court documentation about the case as an exhibit, and elicited testimony from Scott about his noncompliance with court-ordered anger management and counseling as a result of his conviction. Before questioning him on the specific incident, the Commonwealth reminded the court and Scott that he had brought the matter up in his direct testimony.

When Scott offered his perspective on the 2009 altercation and asserted that Samantha was the antagonist, he opened the door for the Commonwealth to inquire further into the matter. “[O]ne who opens the book on a subject is not in a position to complain when his adversary seeks to read other verses from the same chapter and page.” *Smith v. Commonwealth*, 904 S.W.2d 220, 222 (Ky. 1995) (citing *Harris v. Thompson*, 497 S.W.2d 422 (Ky. 1973)).

Scott sought only to reveal his self-serving side of the story, but the jury is entitled to the full story. Scott opened the door for the Commonwealth to reveal that he had been convicted of fourth-degree assault in 2009 against Samantha after he testified about the detailed events leading up to it.

Furthermore, Scott readily admitted during his testimony before the jury that he was responsible for Samantha’s bruising; he smacked her in the mouth, pushed her into a cabinet and engaged in several physical fights with her the weekend of May 3 through May 5, 2014. We consider highly unlikely the

possibility that the outcome of the case would have been different if the jury never heard evidence of Scott's 2009 fourth-degree assault misdemeanor conviction. Scott's rights were not substantially affected by the evidence; therefore, we find no palpable error.

III. Conclusion

For the reasons stated above, we affirm the judgment of the Bell Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Steven J. Buck
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Christian K. R. Miller
Assistant Attorney General
Frankfort, Kentucky