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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: JANUARY 24, 2008
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2005-SC-000440-MR

VICKI LYNN CARRIER — APPELLANT

V.

ON APPEAL FROM WASHINGTON CIRCUIT COURT
HONORABLE DOUGHLAS M. GEORGE, JUDGE
NO. 04-CR-000035

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This matter of right appeal is from the judgment of the Washington Circuit Court convicting Appellant of first degree manslaughter and of being a second degree persistent felony offender resulting in a sentence of twenty-five (25) years. On appeal, Appellant makes four claims of error: (1) that there was no evidence that Appellant intended to cause serious physical injury to the decedent, Logue, thus preventing her conviction for first degree manslaughter; (2) that the trial court's jury instructions were erroneous and deprived Appellant of her right to present a defense, to a properly instructed jury, and to a fair trial and due process of law; (3) that the trial court abused its discretion when it held that Appellant was not a victim of domestic violence or abuse; and (4) that the trial court erred to Appellant's substantial prejudice and denied her due process of law in allowing gruesome photographs of the autopsy of Logue to be shown to the jury, despite the fact that the cause of death was not at issue. Upon our

examination of the record, the parties' briefs, and relevant case law, we affirm the final judgment and sentence of the Washington Circuit Court.

At trial, the jury heard testimony that Appellant had been previously in an abusive marriage and subsequently had become divorced. To provide financial support until Appellant got back on her feet, the decedent, Myron Logue, allowed Appellant to move in with him. On the evening of March 6, 2004, an argument ensued between Appellant and Logue at his home resulting in Appellant departing for the evening and sleeping on her brother's sofa. When she returned to Logue's home the next day, the altercation continued. The jury heard evidence regarding the details of the argument, including evidence that Appellant stabbed Logue with a cheese knife. Appellant placed a towel over Logue's bleeding wound and called 911. According to Appellant's testimony, she panicked and fled the scene, attempted to return to Logue's residence but then turned around a second time. She was ultimately detained by KSP Detective Atwood in the woods behind her brother's residence. William Ralston, a state medical examiner and forensic pathologist, testified that Logue's brachial artery had been completely severed and that Logue ultimately died of exsanguination, or in layman's terms, he bled to death. At trial, Appellant admitted that she inflicted the fatal wound but testified that she did so either by accident or in self defense.

In her first claim, Appellant states that "It is flabbergasting that Ms. Carrier was convicted of first degree manslaughter (intent to cause serious physical injury) when there was absolutely no evidence to support this verdict." A person is guilty of first degree manslaughter pursuant to KRS 507.030(1)(a) when "with intent to cause serious physical injury to another person, he causes the death of such person . . . ." Serious

physical injury is defined in KRS 500.080(15) as "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." Appellant argues that not only did the evidence presented at trial demonstrate that this was an accident, but the injury itself, a half-inch deep wound in the arm, indicates that this was not an intentional act. In response, the Commonwealth relies on Simpson v. Commonwealth,[1] which held that it was permissible for the trial court to instruct the jury on first degree manslaughter under KRS 507.030(1)(a) when a defendant told the police that the shooting was an accident, that he did not intend to kill the victim, and that he was not even shooting at the victim.[2]

The trial court instructed the jury on intentional murder, wanton murder, first degree manslaughter, second degree manslaughter, reckless homicide, and the defenses of extreme emotional disturbance and self protection. Appellant did not object to the instructions, but she did move for a directed verdict arguing that the proof was insufficient to show intent to cause serious bodily injury. Such a motion without an accompanying objection to the proposed instructions is insufficient to preserve the claim.[3] Anticipating this conclusion, Appellant also requests palpable error review pursuant to RCr 10.26. Pursuant to RCr 10.26, an appellate court may consider an issue that was not preserved if it deems the error to be "palpable," one that affected the defendant's "substantial rights" and resulted in "manifest injustice."[4]

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[1] Simpson v. Com., 759 S.W.2d 224 (Ky. 1988).

[2] Id. at 226.

[3] Anastasi v. Com., 754 S.W.2d 860, 862 (Ky. 1988).

[4] Id.

Appellant was convicted of first degree manslaughter and of being a persistent felony offender and sentenced to twenty-five (25) years. As we concluded in Simpson v. Commonwealth,[5] Appellant's view of the evidence is not the only inquiry; a comprehensive view of the evidence is required. In Simpson, evidence was presented that the shooting was an accident and that Simpson had not intended to kill the victim. This included his tape-recorded statement to police, a neighbor's testimony, and Simpson's statement at the crime scene. However, we concluded that Simpson's view of the evidence was "too restrictive."[6] Evidence was also presented that Simpson disliked the victim, that they had argued inside the house, that Simpson had obtained a gun from his bedroom, and that he had ordered the victim to leave the house.[7] Upon a comprehensive view of the evidence, we concluded that the evidence was "more than sufficient to justify instructing the jury on manslaughter in the first degree."[8]

In the case sub judice, ample evidence was presented from which a jury could reasonably infer that Appellant intended to cause serious physical injury to Logue.[9] The evidence showed that Appellant and Logue were involved in a physical altercation, in which both parties struck each other. According to Appellant's own testimony, she grabbed the knife off of the kitchen counter and she stabbed Logue. Her intent was a disputed fact. Therefore, as we have said, "The jury is allowed reasonable latitude in

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[5] Simpson v. Com., 759 S.W.2d 224 (Ky. 1988).

[6] Id. at 226.

[7] Id. at 226.

[8] Id. at 226.

[9] Id. at 226, citing McClellan v. Com., 715 S.W.2d 464 (Ky. 1986).

which to infer intent from the facts and circumstances surrounding the crime."[10] Although the jury could have believed Appellant's version of the story, it was not required to do so.[11] Thus, there was no palpable error.

Appellant's second claim is that the trial court's jury instructions were erroneous because an additional element was tacked onto the instructions for intentional murder, wanton murder, manslaughter in the first degree, manslaughter in the second degree, and reckless homicide. Appellant argues that instead of the trial court's instruction which added "That in so doing, Vickie Lynn Carrier *did not believe that* she was privileged to act in self protection," the jury instruction should have been limited to the following statement: "That in so doing, [the defendant] was not privileged to act in self protection."[12] (Emphasis added). Appellant contends that the added and unprecedented "belief prong" of the self-protection instruction misled the jury and denigrates Appellant's right to be mistaken in her belief.

RCr 9.54(2) provides that "No party may assign as error the giving or the failure to give an instruction unless the party's position has been fairly and adequately presented to the trial judge by an offered instruction or by motion, or unless the party makes objection before the court instructs the jury, stating specifically the matter which the party objects and the ground or grounds of the objection."[13] "Failure to comply with RCr 9.54(2) has consistently been interpreted to prevent review of claimed error in the

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[10] Id. at 226, citing Peace v. Com., 489 S.W.2d 519 (Ky. 1972).

[11] Simpson, 759 S.W.2d at 226, citing Nichols v. Com., 657 S.W.2d 932 (Ky.1983).

[12] See Brown v. Com., 555 S.W.3d 252, 257 (Ky. 1977).

[13] RCr 9.54(2).

instructions because of the failure to preserve the alleged error for review."[14] Appellant did not make a contemporaneous objection to the court's jury instructions and concedes that this issue is unpreserved for appellate review. However, she requests palpable error review pursuant to RCr 10.26.

In Commonwealth v. Pace,[15] we said, "The palpable error rule set forth in RCr 10.26 is not a substitute for the requirement that a litigant must contemporaneously object to preserve an error for review." The general rule is that a party must make a proper objection and request a ruling on the objection at trial or the issue is waived.[16] Pursuant to RCr 10.26, an appellate court may consider an issue that was not preserved if it deems the error to be "palpable," one that affected the defendant's "substantial rights" and resulted in "manifest injustice."[17] 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."[18] In addition, we have held that "the error must seriously affect the fairness, integrity or public reputation of judicial proceedings."[19]

Although the trial court's instructions failed to precisely follow model instructions, there was no manifest injustice. The **extra** language contained in the instructions, while

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[14] Com. v. Thurman, 691 S.W.2d 213, 216 (Ky. 1985), citing Hopper v. Com., 516 S.W.2d 855 (Ky. 1974).

[15] Com. v. Pace, 82 S.W.3d 894, 895 (Ky. 2002).

[16] Id.

[17] Id.

[18] Com. v. Pace, 82 S.W.3d 894, 895 (Ky. 2002), quoting Com. v. McIntosh, 646 S.W.2d 43, 45 (Ky. 1983).

[19] Com. v. Rodefer, 189 S.W.3d 550, 553 (Ky. 2006), quoting Brock v. Com., 947 S.W.2d 24, 28 (Ky. 1997).

ill-advised, actually prevented the jury from convicting Appellant of any level of homicide if it concluded that Appellant believed she was privileged to act in self defense. Therefore, there was no palpable error.

Appellant's third claim is that the trial court abused its discretion when it held that she was not a victim of domestic violence or abuse. Post-trial, Appellant requested the trial court to recognize her as a victim of domestic violence or abuse for purposes of sentencing. If the court had ruled in Appellant's favor, she would not have been ineligible for probation, shock probation, or conditional discharge under KRS 533.060, and she would not have been subject to parole eligibility restrictions for violent offenders under KRS 439.3401. At the evidentiary hearing to obtain the benefit of this exemption, Appellant was required to show by a preponderance of the evidence that she was the victim of domestic violence.[20] Evidence was presented to the trial court that prior to the incident which led to Logue's death, he had never committed any act of domestic violence toward Appellant. The trial court exercised its discretion and concluded that Appellant was ineligible for the exemption pursuant KRS 439.3401.[21] Based on the evidence presented, the trial court's finding was not clearly erroneous.[22]

Appellant's final claim is that the trial court erred to her substantial prejudice and denied her due process of law by allowing gruesome photographs of Logue's autopsy to be displayed to the jury despite the fact that the cause of death was not at issue. We have long held that "the prosecution is permitted to prove its case by competent evidence of its own choosing, and the defendant may not stipulate away the parts of the

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[20] Com. v. Anderson, 934 S.W.2d 276 (Ky. 1996).

[21] See Com. v. Vincent, 70 S.W.3d 422, 424 (Ky. 2002).

[22] Com. v. Anderson, 934 S.W.2d at 278-79.

case that he does not want the jury to see."[23] In this case, seven photographs were introduced that each depicted injuries sustained by the victim during his altercation with Appellant. Unlike the photographs sought to be introduced in Funk v. Commonwealth,[24] the admitted photographs did not depict mutilation, decomposition, or decay that was unrelated to the crime. We conclude that Appellant may not prevent relevant evidence from being admitted by simply choosing not to challenge the manner of the victim's death, and therefore, the trial court did not err in admitting the photographs at issue.

For the foregoing reasons, we affirm the final judgment and sentence of the Washington Circuit Court.

All sitting. Lambert, C.J., and Abramson, Cunningham, Minton, and Scott, JJ., concur. Noble, J., dissents by separate opinion. Schroder, J., dissents and states that he believes the evidence supports only a conviction up to second-degree manslaughter. Further, the Appellant was a victim of domestic violence; therefore, KRS 439.3401(5) applies.

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[23] Barnett v. Com., 979 S.W.2d 98, 102 (Ky. 1998), citing Chumbler v. Com., 905 S.W.2d 488, 492 (Ky. 1995).

[24] Funk v. Com., 842 S.W.2d 476 (Ky. 1992).

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DISSENTING OPINION BY JUSTICE NOBLE

A ½ inch deep slice on the elbow with a cheese knife does not lead to "a serious and prolonged disfigurement" which is the only part of the definition of "serious physical injury" that could apply here. Holding otherwise blurs the line between "serious physical injury" and mere "physical injury." Here, the majority's backwards reasoning would result in the effective elimination of manslaughter second degree anytime an injury of any degree of seriousness results in death. Poking an unknown hemophiliac with a pencil who then dies could always be argued as manslaughter first degree. This issue was preserved adequately by the Appellant's motion for directed verdict.