

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001551-MR

DAVID COBB

APPELLANT

v. APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE JERRY D. WINCHESTER, JUDGE
INDICTMENT NO. 01-CR-00093

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: JOHNSON, MINTON, AND TACKETT, JUDGES.

MINTON, JUDGE: A Whitley Circuit Court jury convicted David Glenn Cobb (Cobb) of first-degree manslaughter for the stabbing death of Terry Carmen (Carmen) and fixed Cobb's punishment at ten years in prison. At the final sentencing, the circuit court imposed judgment in accordance with the jury's verdict. Cobb now appeals from that judgment as a matter of right. We find no error and affirm.

For about four days before his death on June 26, 2001, Carmen had been staying in an apartment in Corbin with his ex-wife, Nancy Lynn Carmen (Nancy), from whom he had been recently divorced, and her two teenage daughters. Cobb, who had been Carmen's friend of several years, was staying at the apartment, too. Nancy testified at trial that Cobb had developed a "romantic interest" in her and that he had set her up in the apartment about a week before Carmen arrived. Cobb slept in one of the bedrooms with Nancy. Nancy also said that while Carmen was staying there, the two men constantly argued; often over her.

On June 26, 2001, Cobb, Carmen, and Nancy were together at the apartment most of the day. Cobb and Carmen had been drinking alcohol and arguing for the better part of the day. By late afternoon, the men were intoxicated; and Carmen and Cobb were arguing over Nancy. While in the kitchen, Carmen swore and slapped a plate of spaghetti from Nancy's hands, precipitating a face-to-face confrontation between the men, who were cursing and shoving each other. Nancy ran outside screaming for help. Meanwhile, one of Nancy's daughters arrived in the kitchen in time to see Carmen, who was standing over Cobb, pull the blade of a steak knife from his own stomach and push it toward Cobb, cutting Cobb's hand as he deflected the blade.

Cobb did not testify at trial, but the jury heard statements about the fight that Cobb made to Nancy and to others and heard a taped confession he made to the police. Cobb told the police that Carmen got the knife first. Nancy testified that Cobb twice told her that he got to the knife first. Nancy identified the knife as a part of a set that she kept in a holder in the kitchen.

Cobb emerged from the apartment with blood on his face and clothing and told Nancy that he had stabbed Carmen. She reentered the house and saw Carmen, who was still alive, on the floor holding his stomach. She retrieved her daughter and Cobb drove the three of them to his mother's residence where Cobb called the police. Carmen died that night from massive internal bleeding caused by one of two knife wounds to the chest/abdomen.

Cobb's first argument on appeal is that the circuit court erred in failing to grant a directed verdict of acquittal on murder and the lesser-included offense of manslaughter because the Commonwealth's evidence was insufficient to prove that Cobb "intended to cause the death of another person," as required by Kentucky Revised Statute (KRS) 507.020, or that he "intended to cause serious physical injury to another person," as required by KRS 507.030(1)(a). We disagree.

"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."¹ On a motion for directed verdict, all fair and reasonable inferences from the evidence are to be drawn in favor of the Commonwealth.²

In the case at hand, the jury heard evidence that Cobb may have intended to kill Carmen. Nancy testified that the day before Cobb stabbed Carmen, she found a note Cobb left for Carmen, threatening "... leave Nancy and Myself Alone (sic) if you want to live." Nancy's mother also testified that about the time that Carmen moved into the apartment, Cobb asked her "should I kill [Carmen] or should I go home?" Moreover, "[i]ntent can be inferred from the actions of an accused and the surrounding circumstances. The jury has wide latitude in inferring intent from the evidence."³

Cobb urges that since the jury did not convict Cobb of intentional murder, and since, as instructed by the trial court, the jury was not asked to consider extreme emotional disturbance manslaughter⁴ as a lesser-included offense of intentional murder, the jury actually convicted Cobb of intent-to-injure

¹ Johnson v. Commonwealth, Ky., 90 S.W.3d 39, 42 (2002), quoting Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991).

² Benham, 816 S.W.2d at 187.

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

⁴ KRS 507.030(1)(b).

manslaughter.⁵ Cobb argues that there was no evidence from which the jury could infer that Cobb "intended to cause serious physical injury" to Carmen rather than to kill him. However, the jury heard Anna Faye Pennington, the EMT dispatcher for the Knox County Ambulance Service, recount Cobb's emergency call to her, stating: "And he told me that—for me to please send an ambulance because 'even though I did this, I don't want him to die.'" Testimony attributable to the accused that he had no intent to kill—even though his actions may indicate otherwise—is sufficient standing alone to warrant instructions on intent-to-injure manslaughter as a lesser-included offense to murder.⁶ Thus, the circuit court did not err in denying the directed verdict motion.

Cobb argues secondly that the circuit court erred by twice permitting questions from the Commonwealth on cross-examination touching upon prior bad acts. Specifically, defense counsel called Cobb's mother and his landlord, both of whom on direct examination vouched for Cobb's reputation for non-violence. On cross-examination, the Commonwealth asked each whether they were aware of a specific incident involving a shooting on Madison Street in Corbin in which Cobb was arrested. Cobb's mother explained that Cobb allegedly shot at a stray dog

⁵ KRS 507.030(1)(a).

⁶ See Simpson v. Commonwealth, Ky., 759 S.W.2d 224 (1988).

and that the charges were dropped without a court appearance. The landlord was unaware of the incident. Defense counsel made no objection to the cross-examination of Cobb's mother, so the allegation of error is not preserved.⁷ Though preserved by objection, we do not perceive that the question and response of the landlord that he was unaware of the dog-shooting incident substantially affected Cobb's rights.⁸ Moreover, Cobb opened the door to this type of questioning by offering substantive opinion evidence of his reputation for peacefulness in the community.⁹

Cobb's third allegation of error is that the circuit court erred by "admit[ing] evidence that was misleading, unfairly prejudicial and not relevant." Here, Cobb argues that the trial court should not have permitted the jury to view three photographs of items or locations about which the jury heard testimony and some dentures removed from the floor of the apartment. While we agree with Cobb that these items appear to have marginal evidentiary value, we do not agree that these items should have been excluded under KRE 401 and KRE 404. Cobb's argument on this issue is simply without merit.

The judgment of the Whitley Circuit Court is affirmed.

ALL CONCUR.

⁷ Kentucky Rules of Evidence (KRE) 103(a)(1) and Kentucky Rules of Criminal Procedure (RCr) 9.22.

⁸ *Id.*

⁹ See Commonwealth v. Higgs, Ky., 59 S.W.3d 886, 894 (2001).

BRIEF FOR APPELLANT:

Dennis Stutsman
ASSISTANT PUBLIC ADVOCATE
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
ATTORNEY GENERAL OF KENTUCKY

Perry T. Ryan
ASSISTANT ATTORNEY GENERAL
Frankfort, Kentucky