

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001185-MR

KAREN ROSS-CARTER

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE DOUGLAS M. STEPHENS, JUDGE
INDICTMENT NO. 02-CR-00820

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, BUCKINGHAM, AND HENRY, JUDGES.

HENRY, JUDGE: Karen Ross-Carter was convicted by a Kenton Circuit Court jury of First Degree Criminal Abuse of "N.R.", a child under the age of twelve, and sentenced to six years in prison. We affirm.

In October 2002 the Covington Police Department received an anonymous call reporting a child left home alone and possibly abused. Officer Megan Tucker was dispatched to the location to conduct a "well-being" check and found N.R. alone.

When Officer Tucker asked N.R. if everything was O.K. she began to cry. When asked what was wrong N.R. showed the officer bruises on her arms and legs. She explained to the officer that a few days earlier she had gotten in trouble for leaving clothes on the basement floor when it had flooded and that her mother hit her repeatedly with something resembling a piece of a metal picture frame. At the police station, twenty-four photographs were taken of bruises or scratches on N.R.'s neck, thighs, knees, lower legs, ankles, buttocks and arms. These photographs were introduced in evidence and viewed by the jury.

N.R. is the biological niece and adopted daughter of Karen Ross-Carter. At trial, Ross-Carter admitted that she had struck the child, but characterized it as a "spanking" with a wooden stick about a quarter inch in diameter. The actual object with which N.R. was struck was not introduced in evidence. According to Ross-Carter, on the night in question she was detained at a meeting at work and when she returned home she smelled a strong odor of gas. When asked about the gas N.R. first denied having done anything but finally admitted turning on the stove. Ross-Carter spanked her because she was frightened and upset by N.R. creating a dangerous situation and then lying about it. Ross-Carter also testified that the child bruises easily because of a vitamin deficiency.

On appeal Ross-Carter argues that the trial court should have directed a verdict of acquittal for any of the following reasons: there was insufficient evidence of guilt because Ross-Carter proved that her use of force in disciplining N.R. was justifiable under KRS¹ 503.110; the Commonwealth failed to prove beyond a reasonable doubt that Ross-Carter intended the result that occurred; and the Commonwealth failed to prove beyond a reasonable doubt that she placed N.R. in a situation that may have caused her serious physical injury or cruel punishment. She also argues that reversal is required because a mistrial should have been granted when a juror conducted independent research during deliberations, and that the instructions as given permitted a finding of guilt without requiring a unanimous verdict.

JUSTIFIABLE USE OF FORCE IN DISCIPLINE

Ross-Carter was convicted of Criminal Abuse in the First Degree under the provisions of KRS 508.100, which states:

508.100 Criminal abuse in the first degree:

- (1) A person is guilty of criminal abuse in the first degree when he intentionally abuses another person or permits another person of whom he has actual custody to be abused and thereby:
- (a) Causes serious physical injury; or
 - (b) Places him in a situation that may cause him serious physical injury; or

¹ Kentucky Revised Statute.

(c) Causes torture, cruel confinement or cruel punishment;

to a person twelve (12) years of age or less, or who is physically helpless or mentally helpless.

(2) Criminal abuse in the first degree is a Class C felony.

Ross-Carter claims that she conclusively proved the defense of justification under the provisions of KRS 503.110(1), which states:

503.110 Use of force by person with responsibility for care, discipline, or safety of others

(1) The use of physical force by a defendant upon another person is justifiable when the defendant is a parent, guardian, or other person entrusted with the care and supervision of a minor or an incompetent person or when the defendant is a teacher or other person entrusted with the care and supervision of a minor, for a special purpose, and:

(a) The defendant believes that the force used is necessary to promote the welfare of a minor or mentally disabled person or, if the defendant's responsibility for the minor or mentally disabled person is for a special purpose, to further that special purpose or maintain reasonable discipline in a school, class, or other group; and

(b) The force that is used is not designed to cause or known to create a substantial risk of causing death, serious physical injury, disfigurement, extreme pain, or extreme mental distress

Ross-Carter cites Holbrook v. Commonwealth, 925 S.W.2d 191 (Ky.App. 1995) in support of her argument that a directed verdict should have been granted because she testified at trial

that she believed that the force she used was necessary to teach N.R that it was dangerous and wrong to leave the gas on and to lie to her mother about what she had done. In her view that testimony amounts to conclusive proof of justification and shifts to the Commonwealth the burden of affirmatively proving the elements found in KRS 503.110(1)(b), that is, that the force used was "designed to cause or is known to create a substantial risk of causing death, serious physical injury, disfigurement, extreme pain, or extreme mental distress."

On appellate review we should reverse for failure to grant a directed verdict only if we conclude that "under the evidence as a whole, it would be clearly unreasonable to find guilt. . . ." Commonwealth v. Benham, 816 S.W.2d 186, 187 (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." Id.

Ross-Carter concedes that she did not raise the statutory justification defense at trial. Neither did she object to the instructions. Even though the argument is not preserved we are urged to review the issue for palpable error

under RCr² 10.26. We must agree with the Commonwealth that palpable error review is not triggered in this case. Justification is a defense, and if the defendant doesn't raise a defense the Commonwealth has no burden to disprove it. KRS 503.020; 500.070(1); Schoenbachler v. Commonwealth, 95 S.W.3d 830, 835, f.n.2 (Ky. 2003). Having not raised the defense of justification at trial Ross-Carter " . . . is precluded from arguing on appeal that the trial court erred in failing to direct a verdict on that ground." Richardson v. Commonwealth, 559 S.W.2d 738, 739 (Ky.App. 1977).

SUFFICIENCY OF EVIDENCE OF INTENT

Ross-Carter next argues that the Commonwealth was required to prove that her intent when she struck N.R. was to leave bruises on her body, and that since there was no proof of such intent she was entitled to a directed verdict of acquittal. The gist of the argument is that when the legislature intended to prohibit a socially unacceptable result such as murder, the Commonwealth must prove that the actor intended the result (i.e., the death of the victim) but that when the legislature intended to prohibit socially unacceptable conduct the Commonwealth need only prove that the actor intended the conduct, citing Robert G. Lawson and William H. Fortune, Kentucky Criminal Law, § 9-6(b), p.399 (1988). In the first

² Kentucky Rules of Criminal Procedure.

place the argument is unpreserved. This theory was not presented to the trial court as a ground for directed verdict and cannot be considered here for the first time. Kennedy v. Commonwealth, 544 S.W.2d 219, 222 (Ky. 1976). In addition, "abuse" is defined in KRS 508.090 as ". . . the infliction of physical pain, injury or mental injury. . . ." It can be readily determined from reading the statute that the offense prohibited by KRS 508.100, supra, is intentionally abusing another person, and thereby causing specified results. As in Cutrer v. Commonwealth, 697 S.W.2d 156, 158 (Ky.App. 1985), "the plain language of [the statute] is sufficiently clear to apprise ordinary sensible persons of the types of acts [it] sanction[s]." The Commonwealth is not required to prove that the defendant intended to produce some specific physical manifestation on the body of the victim, such as bruising or scarring, to prove the offense of Criminal Abuse in the First Degree. Proof of the intentional abuse of another person causing one or more of the results listed in the statute, is all that is required. There was no error.

SUFFICIENCY OF EVIDENCE OF ALL THE ELEMENTS

Instruction No. V in this case read as follows:

You will find the Defendant, Karen Ross-Carter, guilty of the offense of Criminal Abuse in the First Degree, under this instruction if, and only if, you believe

from the evidence beyond a reasonable doubt
all of the following:

A. That in this county between October 10,
2002 and October 11, 2002 and before the
finding of the Indictment herein, she
intentionally abused (name of child
omitted);

AND

B. That she thereby caused (name of child
omitted) to be placed in a situation
which might have caused her serious
physical injury;

OR

C. That she thereby caused (name of child
omitted) to be subjected to cruel
punishment;

AND

D. That (name of child omitted) was at the
time twelve (12) years of age or less.

In this argument Ross-Carter contends that the
Commonwealth presented no proof that she " . . . placed [N.R.]
in a situation which might have caused her serious physical
injury" or that she "caused [N.R.] to be subjected to cruel
punishment", and therefore the trial court should have directed
a verdict of acquittal. In essence Ross-Carter is urging us to
substitute our judgment for that of the jury, as to whether her
conduct in this case constituted Criminal Abuse in the First
Degree.

The jury apparently believed that Ross-Carter beat N.R. with some object so excessively that she had severe bruises all over her body several days later. It would not be at all unreasonable for the jury to infer that beating a ten-year-old child with a metal object places her in a situation that might cause her serious physical injury if, for example, the child was struck in the eye or other vulnerable spot or some other calamity occurred. We have been referred to no case holding that the proof in this case is insufficient to support a verdict of guilt, and we can find none. On the other hand the Kentucky Supreme Court noted in Canler v. Commonwealth, 870 S.W. 2d 219, 222 (Ky. 1994) that "[i]t is the jury's function to determine whether the amount of force used during a spanking constitutes cruel punishment." A criminal case should not be taken from the jury unless "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." Campbell v. Commonwealth, 564 S.W.2d 528, 530 (Ky. 1978). The case was properly submitted to the jury.

INDEPENDENT RESEARCH BY JUROR

After deliberating for a few hours the jury was allowed to recess overnight and resume deliberations the next day rather than being sequestered. Before they were released

the trial court admonished them, among other things, not to conduct independent research. Nevertheless one of the jurors looked up the definitions of culpable mental states on the internet on her home computer and printed them. When this was brought to the attention of the trial court he interviewed the juror and determined that the information had not been shared with any other juror and that in any event the definitions were "precisely" the same as those in the instructions. Ross-Carter's counsel moved for a mistrial. The trial court permitted the trial to proceed, postponing the ruling on the motion. After the verdict of guilty the court postponed sentencing also and allowed counsel to brief the legal issues involved in the mistrial motion. The court overruled the motion at sentencing.

The decision whether to grant a mistrial is within the sound discretion of the trial court and should not be disturbed absent abuse of discretion. Clay v. Commonwealth, 867 S.W.2d 200, 204 (Ky.App. 1993). A mistrial is an extreme remedy. It should only be granted in cases of manifest necessity. Neal v. Commonwealth, 95 S.W.3d 843, 851 (Ky. 2003). Several cases have held that a juror's use of outside resources to look up definitions is harmless error. See, e.g., Cole v. Commonwealth, 553 S.W.2d 468, 471 (Ky. 1977); United States v. Aguirre, 108 F.3d 1284, 1289 (10th Cir. 1997). Considering the record as a

whole it does not appear that either the outcome of the trial or substantial rights of Ross-Carter were affected, and therefore the motion was properly overruled. Cf. Byrd v. Commonwealth, 825 S.W.2d 272, 275 (Ky. 1992), (overruled on other grounds by Shadowen v. Commonwealth, 825 S.W.2d 896 (Ky. 2002)); RCr. 9.24.

DENIAL OF UNANIMOUS VERDICT

The argument here is that because the instructions, as set out above, permitted the jury to find Ross-Carter guilty if she intentionally abused N.R. and thereby either placed her in a situation which might have caused her serious physical injury, or caused her to be subjected to cruel punishment, it is impossible to ascertain under which theory the jury decided, and the verdict is not unanimous. This alleged error is admittedly unpreserved, there having been no objection at trial to the instructions, but we are again urged to review it under RCr. 10.26. In Eversole v. Commonwealth, 550 S.W.2d 513 (Ky. 1977), the court declined to review a similar allegation of error because it was not properly preserved. We will not consider an issue presented here for the first time. Kennedy v. Commonwealth, supra. For purposes of clarification we note that it is not difficult to imagine that all the jurors could reasonably have formed a mental picture of Ross-Carter beating N.R. with a metal object in such a way that she either placed her in a situation which might have caused her serious physical

injury, or caused her to be subjected to cruel punishment, or both. Had the issue been preserved we see no reason that it would not come within the holding of Wells v. Commonwealth, 561 S.W.2d 85, 88 (Ky. 1978), quoted below, which strengthens our conviction that palpable error review is not required:

We hold that a verdict can not be successfully attacked upon the ground that the jurors could have believed either of two theories of the case where both interpretations are supported by the evidence and the proof of either beyond a reasonable doubt constitutes the same offense.

The judgment of the Kenton Circuit Court is affirmed.

ALL CONCUR.

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