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NOT TO BE PUBLISHED

OPINION OF MAY 25, 2007 WITHDRAWN

# Commonwealth of Kentucky

## Court of Appeals

NO. 2006-CA-000264-MR

TERESA ANN CAVANAH

APPELLANT

v. APPEAL FROM WARREN CIRCUIT COURT  
HONORABLE JOHN R. GRISE, JUDGE  
ACTION NO. 05-CR-00200

COMMONWEALTH OF KENTUCKY

APPELLEE

### OPINION AFFIRMING

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BEFORE: STUMBO AND VANMETER, JUDGES; PAISLEY,<sup>1</sup> SENIOR JUDGE.

VANMETER, JUDGE: Teresa Ann Cavanah appeals from an judgment entered by the Warren Circuit Court after a jury convicted her of second-degree assault. For the reasons stated, we affirm.

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<sup>1</sup> Senior Judge Lewis G. Paisley, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

The Commonwealth adduced evidence to show that on the evening of February 25, 2005, the victim and his friend went to a pool hall, a strip club, and then back to the pool hall. When the victim left the pool hall the second time, he discovered that his car had a flat tire. He then saw his estranged wife and her three companions, including Cavanah, in the parking lot. Words were exchanged before Cavanah ran toward him, swung, and ran back to her car. Cavanah turned toward the victim, showed him a knife, and voiced that she had gotten him. The victim then realized that he had been stabbed in the abdomen. According to the Commonwealth, while fleeing the scene Cavanah voiced that she couldn't believe she had stabbed the victim.

The victim was transported to the hospital, where he underwent exploratory surgery to determine the extent of the stab wound and repair the injury. Fortunately, the knife did not pierce the victim's bowel or major organs. However, he was hospitalized for a week, and he needed assistance during an additional recovery period.

A detective who testified on behalf of the Commonwealth stated that he interviewed Cavanah before her arrest. The audio recording of that interview, which was played for the jury, included Cavanah's admission that she grabbed a knife from the victim's estranged wife, stabbed the victim, and then fled the scene. Further, both the victim and his friend identified Cavanah as the assailant.

Cavanah claimed at trial that she was not the assailant, but that she instead had been set up by her companions. Her witnesses included two of those companions; a bartender who viewed the group before the assault and testified regarding Cavanah's

intoxication and the hostile phone exchanges between the victim and his estranged wife; the first police officer who responded to the scene; the detective who took Cavanah's statement; and an expert pathologist who opined that the victim's wound was not as serious as portrayed by the Commonwealth.

The jury, which was instructed on both first-degree and second-degree assault, found Cavanah guilty of the latter. She was sentenced in accordance with the jury's recommendation of five years' imprisonment. This appeal followed.

First, Cavanah contends that the trial court erred by failing to direct a verdict in her favor. We disagree.

The supreme court described the appellate test for reviewing the grant or denial of a directed verdict as follows:

[I]f 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.

*Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991). *See also Commonwealth v. Sawhill*, 660 S.W.2d 3, 5 (Ky. 1983); *Trowel v. Commonwealth*, 550 S.W.2d 530, 533 (Ky. 1977).

On appeal, Cavanah's counsel cites "space limitations" and refers this court to the video tape record of the closing argument, rather than attempting to provide what counsel describes as "a complete recitation of the inconsistencies between the accounts of the witnesses present at the time of" the victim's stabbing. However, trial counsel's closing argument obviously does not constitute evidence upon which appellate review

can be grounded. As noted by the Commonwealth, this approach fails to comply with the CR<sup>2</sup> 76.12(4)(c)(v) requirement that the parties provide “ample supportive references to the record and citations of authority pertinent to each issue of law[.]” Moreover, even a review of the videotape record of trial counsel's closing argument fails to provide support for Cavanah's argument that she was entitled to a directed verdict. Regardless of whether the jury could have found Cavanah not guilty of any wrongdoing after reviewing the conflicting evidence adduced below, we cannot say that “under the evidence as a whole,” including Cavanah's confession and the victim's identification of her as his assailant, it was clearly unreasonable for the jury to find Cavanah guilty of second-degree assault. *Benham*, 816 S.W.2d at 187. The trial court did not err by failing to grant a directed verdict in her favor.

Next, Cavanah contends that the trial court erred by failing to instruct the jury regarding fourth-degree assault. We disagree.

RCr<sup>3</sup> 9.54(2) provides:

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 to which the party objects and the ground or grounds of the objection.

Although the trial court ultimately instructed the jury on both first-degree and

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<sup>2</sup> Kentucky Rules of Civil Procedure.

<sup>3</sup> Kentucky Rules of Criminal Procedure.

second-degree assault, Cavanah's tendered instructions included only first-degree assault. During the discussions regarding the proposed instructions, Cavanah's counsel never objected to the absence of an instruction on fourth-degree assault. Thus, as appellant admits on appeal, any objection to the trial court's failure to instruct on fourth-degree assault was unpreserved for appellate review.

Moreover, we are not persuaded by Cavanah's argument that as a result of the court's failure to instruct the jury on fourth-degree assault, palpable error occurred which affected her substantial rights and entitles her to relief so as to avoid manifest injustice. RCr 10.26. Our decision does not turn on the “seriousness” of the victim's physical injury, which may be a question of fact for a jury. *See Rowe v. Commonwealth*, 50 S.W.3d 216, 218-21 (Ky.App. 2001). Instead, our decision turns on the elements of fourth-degree assault, which occurs only when physical injury is inflicted on another by a person who either (a) acts intentionally or wantonly in causing the injury, or (b) acts recklessly in causing the injury “by means of a deadly weapon or a dangerous instrument.” KRS 508.030(1)(a) and (b). Cavanah is entitled to relief only if this court determines, upon consideration of the whole case, that a substantial possibility exists that the jury would have reached a different result if instructed on fourth-degree assault. *Commonwealth v. Pace*, 82 S.W.3d 894, 895 (Ky. 2002).

Here, the uncontradicted evidence was that the victim was stabbed with a knife by a perpetrator who acted intentionally or wantonly in causing the injury. Thus, Cavanah was not entitled to a fourth-degree assault instruction based on reckless

behavior. KRS 508.030(1)(b). The question then becomes whether she was entitled to a fourth-degree assault instruction based on intentional or wanton behavior not involving the use of a “dangerous instrument,” which is defined by KRS 500.080(3) as an instrument “used, attempted to be used, or threatened to be used” in a way in which it is “readily capable of causing death or serious physical injury[.]” Given the undisputed evidence that a knife was used to cause the injury which necessitated surgery and a week's hospitalization for the victim, we conclude that no substantial possibility exists that the jury, if instructed on fourth-degree assault, would have found that Cavanah physically injured the victim but in doing so did not use a dangerous instrument, and thereby committed fourth-degree rather than first or second-degree assault. It follows, therefore, that any error in the court's failure to instruct the jury on fourth-degree assault was not palpable, and that Cavanah is not entitled to relief on this claim.

Finally, Cavanah contends that the trial court erred when it denied her request for probation. We disagree.

KRS 533.010(2) provides:

Before imposition of a sentence of imprisonment, the court shall consider probation, probation with an alternative sentencing plan, or conditional discharge. Unless the defendant is a violent felon as defined in KRS 439.3401 or a statute prohibits probation, shock probation, or conditional discharge, after due consideration of the nature and circumstances of the crime and the history, character, and condition of the defendant, probation or conditional discharge shall be granted, unless the court is of the opinion that imprisonment is necessary for protection of the public because:

(a) There is substantial risk that during a period of probation or conditional discharge the defendant will commit another crime;

(b) The defendant is in need of correctional treatment that can be provided most effectively by his commitment to a correctional institution; or

(c) A disposition under this chapter will unduly depreciate the seriousness of the defendant's crime.

(Emphasis added.) Thus, barring certain circumstances not present here, a sentencing court must consider and grant probation or conditional discharge “unless the court is of the opinion that imprisonment is necessary for protection of the public” for one of the three enumerated reasons.

The videotape record of the sentencing hearing shows that the trial court specifically addressed all three of the factors set out in KRS 533.010(2) before denying probation to Cavanah. The court opined that although neither of the first two factors warranted imprisonment for the public's protection, imprisonment was necessitated by the third factor in order to prevent the depreciation of the assault's seriousness. Contrary to Cavanah's arguments on appeal, the trial court retains considerable discretion in determining, based on its opinion, whether any of the three enumerated KRS 533.010(2) factors exist and, for the protection of the public, necessitate imprisonment in lieu of an alternative disposition. *Aviles v. Commonwealth*, 17 S.W.3d 534, 536-37 (Ky.App. 2000). The court did not abuse that discretion below. Moreover, Cavanah's complaints regarding the efficacy of the statutory scheme are not properly raised in this forum.

The court's judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Trevor W. Wells  
Lexington, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo  
Attorney General of Kentucky

Jeffrey A. Cross  
Assistant Attorney General  
Frankfort, Kentucky