RENDERED: MARCH 7, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2007-CA-000024-MR

GARY W. PENTECOST — APPELLANT

v.

APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE JOHN L. ATKINS, JUDGE
ACTION NO. 06-CR-00002

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON AND STUMBO, JUDGES; GRAVES,[1] SENIOR JUDGE.

[1] Senior Judge John W. Graves 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.

GRAVES, SENIOR JUDGE: Gary W. Pentecost appeals from a judgment entered upon a jury verdict convicting him of two counts of second-degree manslaughter and driving under the influence of alcohol. Pentecost contends that the victim impact statement rules contained in KRS[2] 532.055 were violated in the sentencing phase of his trial. For the reasons stated below, we affirm.

On November 4, 2005, in Fairview, Kentucky, James Johnson and his wife, Shaleen, were on a motorcycle traveling eastbound on US 68. In the meantime, Pentecost was traveling southbound on Britmart Road in his pickup truck. The Johnsons and Pentecost reached the intersection of US 68 and Britmart Road at the same time, with the Johnsons having the right-of-way. Instead of yielding to the Johnsons, Pentecost pulled into their path and they collided directly into the side of his truck. Shaleen died at the scene and James died on November 21, 2005. Pentecost's blood alcohol content at the time of the accident was .20 grams per 100 milliliters.

On January 6, 2006, Pentecost was indicted for two counts of wanton murder (KRS 507.020(1)(b)) and operating a motor vehicle under the influence of alcohol (KRS 189A.010). The case was tried before a jury in October 2006. At the conclusion of the trial the jury found Pentecost guilty of two counts of second-degree manslaughter (KRS 507.040) and DUI. As relevant here, the jury recommended a sentence of seven and one-half years on each of the two manslaughter convictions, to run consecutively, for a total of fifteen years to serve. Final judgment was entered on December 20, 2006, consistent with the jury's verdict and sentencing recommendation. This appeal followed.

[2] Kentucky Revised Statutes.

The only issue Pentecost raises upon appeal is that the trial court, in the penalty phase, erroneously permitted the two testifying statutory victims (one each for James and Shaleen) to testify regarding the repercussions of Pentecost's crime upon other family members, including reading statements from those other family members, thereby violating the victim impact statement rules contained in KRS 532.055(2)(a)(7).

Pentecost contends that the issue is preserved because he obtained a ruling in limine prior to the victim impact testimony that only one victim each for James and Shaleen would be permitted to give victim impact testimony. We agree with the Commonwealth, however, that because Pentecost did not contemporaneously object to the testimony now cited as error as it was presented, the issue is not properly preserved. *Olden v. Commonwealth*, 203 S.W.3d 672, 675 (Ky. 2006) (RCr[3] 9.22 "requires a party to render a timely and appropriate objection in order to preserve an issue for review"). Thus, we review Pentecost's claim of error pursuant to the palpable error standard contained in RCr 10.26.

A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error. RCr 10.26. The rule "is not a substitute for the requirement that a litigant must contemporaneously object to preserve an error for review. . . . 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.'" *Commonwealth v. Pace*, 82 S.W.3d 894, 895 (Ky. 2002).

[3] Kentucky Rules of Criminal Procedure.

Only one victim of the crime may give victim impact testimony during the sentencing phase of a felony trial. KRS 532.055(2)(a)(7); *Terry v. Commonwealth*, 153 S.W.3d 794, 804 (Ky. 2005) ([KRS 532.055(2)(a)(7)] says "the victim," not "the victims").

"For whatever reason, the General Assembly decided that only one 'victim' should be permitted to give victim impact evidence at the sentencing phase of a felony trial[.]" *Id.* KRS 421.500(1) defines who is "the victim." In the present case, KRS 421.500(1) provides that an adult child of the Johnsons was the statutory victim. Pentecost does not challenge that a statutory victim was permitted to testify with respect to each decedent. The two witnesses who gave victim impact statements were the Johnsons' son, Darron Johnson, and their daughter Darla Oglesby. Pursuant to KRS 532.055(2)(a)(7) their function was to testify regarding "[t]he impact of the crime upon the victim . . . including a description of the nature and extent of any physical, psychological, or financial harm suffered by the victim[.]"

During his victim impact testimony, in addition to testifying regarding how Pentecost's crime had affected him personally, Darron also read a total of six very brief statements composed by his three children expressing their love for their grandparents and their sadness at their loss. He also presented three pictures drawn by the children depicting their grief. Darron also read verbatim to the jury a statement prepared by his brother, Dean Johnson, describing how his parents' deaths had affected him.

During her victim impact testimony, Darla, in addition to testifying about the impact of the crime on her personally, also read to the jury, verbatim, a statement prepared by her sister, Selena House describing how her parents' deaths had affected her.

Selena's statement included statements made by her children concerning their grandparents' deaths

As previously noted, only one statutory victim of a felony crime is permitted to give victim impact evidence. Here, because there were two felony crimes, without objection of Pentecost, two statutory victims took the stand to testify. We believe the application of the rule in this respect was proper.

When a statutory victim relates the impact of the crime upon him or her, it is generally inevitable, in the normal course of events, that other family members, and the impact of the crime upon them, will be referred to in the testimony. We believe that is permissible. However, we further believe that permitting a statutory victim to take the stand and read extensive statements from other family members suffering from the crime would circumvent the intent of KRS 532.055(2)(a)(7) to limit victim impact testimony to a single statutory victim. As such, we believe it was error for Darron and Darla to have read the full statements prepared by Dean and Selena.

Nevertheless, we do not believe the error rises to the level of palpable error in that we do not believe that there is a substantial possibility that the result would have been any different absent the improper testimony. The manslaughter convictions were Class C felonies. KRS 507.040(2). A Class C felony carries a sentence of five to ten years. KRS 532.060(2)(c). Hence the jury sentenced Pentecost at the mid-range point (seven and one-half years) for each conviction, to run consecutively, for a total of 15 years to serve.

Thus, Pentecost received a 15-year total sentence for driving his truck, while intoxicated at a 2.0 blood alcohol level (two and one-half times the legal limit), into

the path of the Johnsons' motorcycle, killing them. The jury had already shown leniency by rejecting the Commonwealth's plea to convict him of wanton capital murder, which carried a maximum sentence under the circumstances of this case of life without the possibility of parole.[4] KRS 532.030(1). Even with no victim impact statement at all, we are doubtful that the jury would have been more lenient than it was in its sentencing recommendation.[5] Indeed, upon a resentencing, Pentecost would run a not insignificant risk of receiving a greater sentence than he is now under. In summary, we do not believe the palpable error standard has been met in this case.

For the foregoing reasons the judgment of the Christian Circuit Court is affirmed.

CLAYTON, JUDGE, CONCURS.

STUMBO, JUDGE, CONCURRING IN RESULT ONLY: I concur with the result reached by the majority but wish to state my disagreement with the conclusion that the motion in limine was insufficient to preserve Appellant's objection to the testimony of the victims. KRE 103(d) specifically provides that a motion in limine resolved by order of record is sufficient to preserve error for appellate review. While some case law requires contemporaneous objection as well, those cases involve situations in which the pretrial motion was broad in nature or differed in some way from the objection raised on appeal and thus did not specifically address the issue raised in limine. Here the evidence and objection raised were precisely as raised pretrial. I would not

[4] The Commonwealth did not seek the death penalty.

[5] The jury was made aware by the testifying probation and parole witness that Pentecost would be eligible for parole after serving only 20% of his sentence.

reverse on this issue because, as the majority persuasively states, the error was not sufficiently egregious to require a new sentencing phase.

BRIEF FOR APPELLANT:

J. Brandon Pigg
Assistant Public Advocate
Department of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Clint E. Watson
Assistant Attorney General
Frankfort, Kentucky