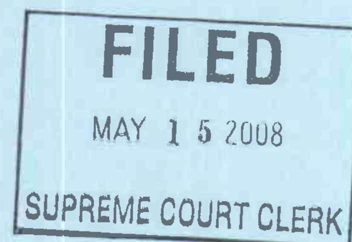


Commonwealth of Kentucky
Supreme Court

FILE NO. 2007-SC-000382-MR

KENNETH R. CAMPBELL **APPELLANT**

v.

Appeal from Breckenridge Circuit Court
Hon. Sam H. Monarch, Judge
Indictment No. 2006-CR-00131

COMMONWEALTH OF KENTUCKY **APPELLEE**

Brief for Commonwealth

Submitted by,

JACK CONWAY
Attorney General of Kentucky

HEATHER M. FRYMAN
Assistant Attorney General
Office of Criminal Appeals
Office of the Attorney General
1024 Capital Center Drive
Frankfort, Kentucky 40601
(502) 696-5342

CERTIFICATE OF SERVICE

I certify that the record on appeal has been returned to the Clerk of this Court and that a copy of the Brief for the Commonwealth has been served May, 15th, 2008, via United States Mail to: Hon. Sam H. Monarch, Judge, Breckenridge Circuit Court, Courthouse, 208 W. Main St., Hardinsburg, Kentucky 40143; via electronic mail to: Hon. Kenton R. Smith, Commonwealth's Attorney, 512 Fairway Drive, Brandenburg, Kentucky 40108; and via state delivered messenger mail to: Hon. Karen Shuff Maurer, Assistant Public Advocate, Department for Public Advocacy, 100 Fair Oaks Lane, Suite 302, Frankfort, Ky. 40601.

Heather M. Fryman
Assistant Attorney General

INTRODUCTION

The Appellant appeals his conviction from the Breckinridge Circuit Court asserting that the trial court improperly denied his motion for directed verdict on firearm enhancement, although he admitted that he was guilty of the underlying offenses. The Appellant further alleges that he was prejudiced when it became known that a juror once dated the aunt of the wife of a co-defendant.

STATEMENT CONCERNING ORAL ARGUMENT

The Commonwealth believes that the issues raised on appeal may be adequately addressed by the parties' briefs and does not request oral argument.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

INTRODUCTION i

STATEMENT CONCERNING ORAL ARGUMENT i

COUNTERSTATEMENT OF POINTS AND AUTHORITIES ii

COUNTERSTATEMENT OF THE CASE 1

ARGUMENT 6

I. THE TRIAL COURT PROPERLY DENIED THE APPELLANT'S MOTION FOR A DIRECTED VERDICT ON THE FIREARM ENHANCEMENT 7

KRS 218A.992 . . . . Passim

Commonwealth v. Benham,
816 S.W.2d 186, 187 (Ky. 1991) 7

A. The Burden Was On the Appellant to Prove His Defense 8

Commonwealth v. Harris,
344 S.W.2d 820 (Ky. 1961) 9

U.S. v. Bandy,
239 F.3d 802, 805 (6th Cir. 2001) 9

Arnold v. Commonwealth,
109 S.W.3d 161, 163 (Ky. App. 2003) 9

B. The Jury Reasonably Concluded that the Gun was in the Appellant's Possession and Used in Furtherance of the Offense 10

Commonwealth v. Montaque,
23 S.W.3d 629 (Ky. 2000) 10

Pate v. Commonwealth,
243 S.W.3d 327 (Ky. 2007) 10

II. THERE WAS NO ERROR IN SEATING MR. SKEETERS AS A JUROR 11

RCr. 9.30 11

Robertson v. Commonwealth,
597 S.W.2d 864 (Ky. 1980) 11

Howard v. Commonwealth,
608 S.W.2d 62 (Ky. App.1980) 12

RCr 9.30 12

RCr 9.30(1)(a) 12

RCr 9.30(c) 13

RCr 9.30(b) 13

Hodge v. Commonwealth,
17 S.W.3d 824 (Ky. 2000) . . . . . Passim

Williams v. Commonwealth,
734 S.W.2d 810, 812-13 (Ky.App., 1987) 15

III. THE TRIAL COURT PROPERLY DENIED THE APPELLANT'S MOTION FOR A MISTRIAL 16

Woodard v. Commonwealth,
147 S.W.3d 63, 68 (Ky.2004) . . . . . Passim

Shelton v. Commonwealth,
992 S.W.2d 849, 852 (Ky. App. 1998) 18

Williams v. Commonwealth,
233 S.W.3d 206, 211 (Ky. App. 2007) 18

Kennedy v. Commonwealth,
544 S.W.2d 219, 222 (Ky. 1976) 18

Fields v. Commonwealth,
219 S.W.3d 742 (Ky. 2007) 20

Mabe v. Commonwealth,
884 S.W.2d 668, 670 (Ky.1994) 20

Ratliff v. Commonwealth,
194 S.W.3d 258, 266 (Ky. 2006) . . . . 21.

IV. THE APPELLANT IMPROPERLY PREMISES HIS APPELLATE ARGUMENT ON PRE-TRIAL PLEA NEGOTIATIONS 21

Weatherford v. Bursey,
429 U.S. 545, 561, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977) 21

Commonwealth v. Corey,
826 S.W.2d 319, 321 (Ky. 1992) 21

Mabry v. Johnson,
467 U.S. 504, 507 -508, 104 S.Ct. 2543, 81 L.Ed.2d 437 (1984) 22

Boykin v. Alabama,
395 U.S. 238, 241, 89 S.Ct. 1709, 23 L.Ed. 2d 274 (1969) 22

U.S. v. Usher,
703 F.2d 956 (6th Cir. 1983) 22

RCr 8.08 23

Hoskins v. Maricle,
150 S.W.3d 1 (Ky. 2004) 23

Shelton v. Commonwealth,
992 S.W.2d 849, 852 (Ky. App. 1998) 23

CONCLUSION 24

COUNTERSTATEMENT OF THE CASE

On March 2, 2007, a Breckinridge County jury found the Appellant, Kenneth R. Campbell ("the Appellant"), guilty of manufacturing methamphetamine enhanced by the possession of a firearm, possession of marijuana enhanced by the possession of a firearm, possession of drug paraphernalia enhanced by possession of a firearm, wanton endangerment in the first degree, and tampering with physical evidence. TR 224 - 228. Following the penalty phase of trial the jury recommended that the Appellant serve fifty years for the charge of manufacturing methamphetamine enhanced by possession of a firearm, five years for the charge of possession of marijuana enhanced by the possession of a firearm, five years for the charge of possession of drug paraphernalia enhanced by the possession of a firearm, five years for the charge of wanton endangerment, and five years for the charge of tampering with physical evidence. TR 210 -212. The jury further recommended that the sentences run concurrently for a total sentence of fifty years. TR 212. The Breckinridge Circuit Court ("the trial court") accepted the jury's recommendation and sentenced the Appellant to fifty years imprisonment in an order entered April 5, 2007. TR 234 - 237.

The convictions stem from a multi-day jury trial, jointly held with the trials of the Appellant's three co-defendants, David Allen ("Allen"), Thomas Hall ("Hall"), and Joseph Metten ("Metten"). TR 224. The Commonwealth presented evidence that all four men were operating a methamphetamine production operation in Breckinridge County. Officers testified that they began investigating the operation after reviewing the sale logs for certain medications sold at a local Rite Aid pharmacy, and noticed that lots of addresses were listed as Mercer Bend Road. VR 6, 3/1/07; 9:31:50 -9:35:50. Officers also discovered that Metten had an outstanding warrant. Id. at 9:35:19. When they went to Mercer Bend Road

to serve the warrant, officers found all four men in the home, smelled ether, and also observed multiple children in the home. Id. at 9:36:30. At some point during the encounter with officers, Metten attempted to flee. Id. at 9:37:57.

During pre-trial proceedings two of the defendants, including the Appellant, indicated that they would plead guilty in exchange for a reduced sentence. VR 9, 2/7/07; 2:26:10 - 2:32:50. The remaining two defendants reported that they had no interest in a plea bargain. Id. The Commonwealth stated that there was a plea offer, but that offer was contingent upon all four defendants accepting the offer. VR 9, 2/7/07; 2:25:58 -2:26:36. While the Commonwealth only stated that it had reasons for this condition, without naming what those reasons were (Id. at 2:28:08), it can be presumed that the Commonwealth would not have benefitted from a plea bargain that was only accepted by two of the four defendants. Since Allen and Hall insisted that the case would be tried, the Commonwealth would have had to try the case regardless of Metten's and the Appellant's desires to plead.

The Appellant's trial counsel did state that she opposed the Commonwealth's refusal to independently bargain with her client. That objection was limited to an allegation that she had been told that the Commonwealth would waive the condition and negotiate with the Appellant. Id. at 2:31:15. The record does not indicate her source of this information, but she alluded to references from other attorneys for the co-defendants, not to any statement actually made by the Commonwealth's attorney. Nothing on the record indicates that the Commonwealth ever made such an agreement, other than the allegations made by Appellant and Metten.

As such, *voir dire* began on February 27, 2007. During *voir dire* the trial court, both *sua sponte* and at the request of council, conducted extensive questioning which

included lengthy examinations of individual jurors in chambers. See e.g. VR 1. By late afternoon, the trial court was concerned about the number of jurors that had been excused for cause. The trial court noted that it could become necessary to consider using four venire members that had been late and, therefore, had not been added to the box. VR 1, 2/27/07; 5:06:24. At 6:30 p.m. the clerk noted that only one juror remained in the box, but also stated that there was still one person sitting in the courtroom who had not been called. Id. at 6:33:20. Upon inquiry, the clerk reported that the person was a member of the panel who had been there all day, but had not heard his name called at roll call. Id.

Since there was still one juror in the box the trial court examined that juror, but it soon became apparent that another juror would be needed. The trial court requested that the lone panel member, now identified as a "Mr. Skeeters" be brought in chambers. VR 1, 2/27/07; 6:38:35. Mr. Skeeters stated that he was present at roll call, took the oath, had been present all day, and had heard all of the *voir dire* questions. Id. at 6:39:53. After some discussion Allen's attorney objected to the inclusion of Mr. Skeeters in the venire panel Id. at 6:42:22. Later, Allen's trial counsel stated that his objection would be cured if it could be confirmed that Mr. Skeeters had simply not heard his name called at roll. Id. at 6:49:05. Likewise, the Appellant's attorney stated that she had no objection to Mr. Skeeters' inclusion in the box if it could be established that Mr. Skeeters had been present all day. Id. at 6:44:30. Mr. Skeeters, in fact, confirmed that he did not hear his name called, and that he had been there all day. Id. at 6:52:00. The trial court seated Mr. Skeeters on the panel without any further objection. Id. at 6:57:45.

Including Mr. Skeeters, thirty-seven jurors were seated. TR 224. After peremptory strikes, the trial court swore thirteen jurors, with one of the thirteen to be the

alternate. TR 224. The next day Allen realized that one of the jurors had some distant connection to a hostile lawsuit involving some of his relatives. VR 2, 2/28/07; 9:13:59 - 9:27:35. That juror was excused as the alternate without objection, leaving only twelve jurors for the remainder of the trial. Id. at 9:25:08.

In his opening statement at trial the Appellant's counsel admitted that the Appellant was guilty of manufacturing methamphetamine, and also admitted that he was guilty of trafficking in a controlled substance. VR 5, 2/28/07; 9:48:35 -9:55:10. The Appellant, however, suggested that he was not guilty of any charge involving a firearm because there would be no evidence that the firearm located in the residence was in a working condition. Id. at 9:54:27. Testimony from officers later showed that the shotgun was discovered behind a bed in the master bedroom, and that the gun appeared rusty or corroded. VR 5, 2/28/07; 1:14:15, 1:42:26 - 1:52:00. The Commonwealth sought to introduce an expert opinion in the form of testimony by a police officer that, in fact, the gun would fire. VR 2, 3/1/07; 11:13:47 - 12:41:53. The Appellant successfully objected, arguing that no notice of any expert testimony had been given. Id. As a result, the Appellant later moved for directed verdict on the firearm enhancement, but those motions were overruled. VR 2, 3/1/07; 9:52:44. In overruling the motion for directed verdict the trial court stated that the gun was found in the Appellant's home, under the Appellant's bed, and a shotgun is a firearm. Id. 9:51:23 - 9:52:44.

On the afternoon of March 1, 2007, Allen and Appellant closed their cases. One of the remaining co-defendants, Hall, called his wife Alicia as a witness. VR 6, 3/1/07; 2:44:10. The trial court immediately called a recess and requested that the attorneys and defendants meet in chambers. Id. In chambers the trial court expressed two concerns about

Mrs. Hall's testimony. First, the trial court was concerned that the testimony may cause Mrs. Hall to incriminate herself. VR 2, 3/1/07; 2:49:00 - 2:53:51. The trial court expressed further concern that Mrs. Hall's father was notorious within Breckinridge County, and the name had not been provided to jurors during *voir dire*. The Appellant's recitation of some portions of the trial court's discussion is largely correct, with only minor deviations from the video record. Brief of Appellant, p. 7 - 8.

Part of the judge's concern proved true when one juror, in chambers, reported that he did, in fact, know that Mrs. Hall's father had a poor reputation. VR 2, 3/1/07; 3:07:05. Juror Matthews reported that he had dated Mrs. Hall's aunt fourteen or fifteen years ago, when Mrs. Hall was approximately 6 years old. Id. at 3:07:05. This disclosure revealed that the juror knew nothing about the colorful events involving Mrs. Hall's father that had occurred only four to six years before. Further, Mr. Matthews stated that his knowledge of Mrs. Hall's father did not carry over to her. Id. at 3:09:00. He stated that his prior experience would not change his feelings about any of the defendants. Id. at 3:10:15.

Despite the trial court's apparent concern that Mrs. Hall's family had the reputation of the Ewells of Maycomb County, Allen and Hall were adamant that the trial go forward. VR 2, 3/1/07; 3:00:42. Metten's attorney was alone in stating that a mistrial would be necessary. Id. at 3:02:05. The Appellant's attorney specifically stated that the problem would be resolved by instructing the juror in question. VR 2, 3/1/07; 3:03:10. The trial court over-ruled Metten's motion for mistrial and allowed the trial to continue. Id. at 3:14:20.

Mrs. Hall testified that she was pregnant and cleaning out clutter to prepare for her third child on the day that her husband was arrested. VR 6, 3/1/07; 3:15:50. In order

to get rid of the clutter she was having a yard sale. Id. at 3:14:05. She further stated that her husband and Allen were only at the Appellant's residence on Mercer Bend Road because she had asked them to take a sewing machine to the Appellant's girlfriend, because it did not sell and Mrs. Hall did not want it in the house. Id. at 3:16:45 - 3:19:40. She further stated that she purchased the drug, Sudafed, because she had congestion and believed that it was safe to use while pregnant. Id. at 3:22:08. Mrs. Hall's testimony had absolutely nothing to do with the Appellant. In fact, the Appellant did not ask a single question of Mrs. Hall on cross. VR 6, 3/1/07; 3:30:30.

The jury obviously believed Mrs. Hall because they found Hall and Allen not guilty of all charges. VR 7, 3/2/07; 10:56:51 -10:59:30. The Appellant was found guilty of all charges listed in his indictment. Id. at 11:03:21. Metten was also found guilty of most of the charges he faced. Id. at 10:59:36. The Appellant now argues that his conviction and sentence should be reversed because the firearm was not operational, because Mr. Skeeter was seated on the jury, because of one juror's distant knowledge about Mrs. Hall's father, and because he wanted to negotiate a reduced sentence.

ARGUMENT

Even assuming, for the sake of argument, that all of the Appellant's current arguments are preserved for review by this Court, the Appellant has failed to state any meritorious argument that would entitle him to the relief that he seeks. The Appellant failed to present any defense that the firearm was not operational, and the burden is ***not*** on the Commonwealth to prove that the firearm was in working condition. There was no irregularity in seating Mr. Skeeter as a juror, and no prejudice could have resulted. Further, the Appellant has no standing to assert that a juror was biased against a co-defendant. Even

if he could present such an argument the position is disproved by the fact that Allen was acquitted of all charges. Finally, the Appellant had no constitutional right to plea negotiations.

I.

THE TRIAL COURT PROPERLY DENIED THE APPELLANT'S MOTION FOR A DIRECTED VERDICT ON THE FIREARM ENHANCEMENT

The Appellant alleges two defects in the evidence that was presented to the jury as it concerned the firearm enhancement under KRS 218A.992. First, the Appellant alleges that the Commonwealth was obligated to present evidence that the firearm was functional as an element of the offense. Second, the Appellant argues that the jury could not reasonably find that the Appellant used the firearm in furtherance of the offense. These arguments are without merit as the record demonstrates that the trial court properly denied the Appellant's motion for a directed verdict.

In reviewing the trial court's denial of a motion for directed verdict, the appellate court's role is to consider the decision of the trial judge in light of the proof presented rather than to attempt to "reevaluate the proof." Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991). In making its ruling the trial court must draw

> all fair and reasonable inferences fromthe 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. For the purposes of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

Benham, 816 S.W.2d at 187. The question on appellate review 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." Id.

Here, the jury found that the Appellant was in possession of a firearm at the time of the offense and that the gun was used in furtherance of the offense under KRS 218A.992. That statute enhanced the penalty for the other underlying charges, to which the Appellant agreed that he was guilty. VR 5, 2/28/07; 9:48:35 -9:54:27. These decisions were reasonable given the evidence presented.

A. The Burden Was On the Appellant to Prove His Defense

Although the Appellant attempts to make much of the presence of corrosion on the gun barrel, there was no evidence to suggest that the gun would not function. Even if it would not actually function, the functionality of a weapon should not be available as a defense to this type of enhancement. If the Court is inclined to believe that the defense is available, then it was the Appellant's responsibility to present evidence to support the defense. In either case, it was not the Commonwealth's burden to show whether the weapon was functional.

Functionality should not be a defense when the legislative intent of the statute would be defeated by the use of simulated weapons. The purpose of KRS 218A.992 is to discourage the use of weapons in criminal conduct, as the presence of the weapons is more likely to lead to violence. In this matter, the legislative intent of the enhancement statute would be defeated if the functionality of the weapon is a defense, as simulated weapons would have the same effect of encouraging violence. This Court has recognized this rationale in specifically refusing to make the fact that a weapon is

unloaded a defense. <u>Commonwealth v. Harris</u>, 344 S.W.2d 820 (Ky. 1961). Further, the federal courts have held that proof of the functionality of a weapon is not a factor to be considered in determining whether or not a weapon is a "firearm." <u>See</u> <u>e.g.</u> <u>U.S. v. Bandy</u>, 239 F.3d 802, 805 (6th Cir. 2001).

If such a defense were available to the Appellant, then the burden was on the Appellant to prove its application. The Appellant concedes on pages thirteen and fourteen of his brief that the functionality of a weapon is an affirmative defense in the context of the concealed weapons statute. " In Kentucky, the functionality of a firearm is not an element of the offense of carrying a concealed deadly weapon. However, its functionality is an affirmative defense." <u>Arnold v. Commonwealth</u>, 109 S.W.3d 161, 163 (Ky. App. 2003). If the functionality of a weapon is a relevant argument when considering the firearm enhancement statute, then *stare decisis* requires that the matter be treated as an affirmative defense. Further, there is simply no law or precedent that would justify the disparate treatment of the firearm enhancement penalty.

In this matter the burden was squarely upon the Appellant to raise functionality as a defense, and he had the opportunity to make the defense if he chose to do so. The Appellant failed to present any evidence to show that the gun either operated or did not operate. Instead, the Appellant sought to convince the jury that the gun was not operational by suggesting that the Commonwealth should have done ballistic testing to see if the gun fired. VR 5, 2/28/07; 9:55:10. The Commonwealth, in fact, wanted to allow one of the officers to testify that the gun would fire. The Appellant, however, claimed surprise and the evidence was excluded. VR 2, 3/1/07; 12:41:00.

Even assuming, for the purpose of argument and without waiving any other argument asserted herein, that the Commonwealth was required to prove that the gun was operational as an element of the offense, then there was sufficient circumstantial evidence presented at trial. In addition to the fact that the gun was present at trial for the jurors to observe, the Commonwealth presented testimony to the effect that the gun had been cut down or "sawed off" to make it easier to conceal and handle. VR 5, 2/28/07; 1:14:15. The jury could observe that, although the barrel was rusty, the gun still had all of its parts and was assembled. Id. It was reasonable for the jury to observe the fully intact weapon, which had been altered to make it easier to use, and conclude that the weapon would function as an instrumentality of the drug offenses.

B. The Jury Reasonably Concluded that the Gun was in the Appellant's Possession and Used in Furtherance of the Offense

The jury also reasonably concluded that the gun was used in furtherance of the underlying offenses. This Court has repeatedly held that KRS 218A.992 is applied properly if the jury may reasonably believe, based upon the evidence, that a defendant possessed a firearm, and that possession had some nexus with the charged offense. Commonwealth v. Montaque, 23 S.W.3d 629 (Ky. 2000). Possession may be actual or constructive. Id. at 632. Constructive possession is shown when the evidence demonstrates that the defendant exercised dominion or control over the item to be constructively possessed. Pate v. Commonwealth, 243 S.W.3d 327 (Ky. 2007). In this matter there was sufficient evidence to allow the jury to conclude that the gun was used in furtherance of the underlying drug offenses.

The Apppellant agreed that the residence was his residence. VR 5, 2/28/07; 9:48:50. The gun was found in the master bedroom, along with varying items used to manufacture and ingest drugs. VR 5, 2/28/07; 1:43:10 - 1:49:50. These items included what was described as a "smoking" gas generator. Id. at 1:48:30. Further, the testimony indicated that drug paraphernalia and marijuana were scattered throughout the home, indicating that the drug activities were not limited to any particular area. Contrary to the assertion of the Appellant, the testimony did not indicate that the gun was buried behind or under any bedding. The testimony was that the gun was tucked behind the headboard, within a few strides of the cooking operation in the bathroom. VR 5, 2/28/07; 1:14:15, 1:43:10. Given the physical proximity of the gun to the drug activities, and the apparent temporal proximity to recent drug activities, it was reasonable for the jury to find that the gun was used in furtherance of those activities.

II.

THERE WAS NO ERROR IN SEATING MR. SKEETERS AS A JUROR

The Appellant's argument concerning the juror named Mr. Skeeters is also baseless. The proper procedure for the selection of the jury is set out by RCr. 9.30. In this matter, the procedure was followed exactly as it is set out by the rule, and no error occurred when Mr. Skeeters' name was placed in the jury selection box. There is no error in *voir dire* if the rule of procedure is substantially complied with and there is no prejudice, or the objection is not preserved. Robertson v. Commonwealth, 597 S.W.2d 864 (Ky. 1980). If there is substantial compliance with the rules of procedure, the Appellant must demonstrate that prejudice resulted from a minor deviation. Id.

Prior to reviewing the substance of this issue it should be noted that the objection is not preserved. Allen's attorney made the original objection (VR 1, 2/27/07; 6:42:20) which was later joined by Metten's and Hall's attorneys (Id. at 6:44:20). The Appellant's attorney remained silent until she stated that she would not have ***any*** objection so long as Mr. Skeeters was subject to *voir dire* questioning. Id. at 6:44:30. Allen then stated that the objection would be cured if questioning demonstrated that Mr. Skeeters had been present all day and heard all of the *voir dire* proceeding. Id. at 6:49:05. The trial court then questioned Mr. Skeeters, thus relieving Allen's concerns. The trial court seated Mr. Skeeters without further objection. Id. at 6:57:45. The Appellant waived any objection to Mr. Skeeters' inclusion in the box. Even if the Appellant had joined the objection, which was cured without further objection, the parties' concerns were also resolved. An objection to the jury selection procedure is waived when not brought to the attention of the trial court. See e.g. Howard v. Commonwealth, 608 S.W.2d 62 (Ky. App.1980).

Even if the Court is inclined to review the matter for substance, there was no error in the trial court's procedure, as it complied with RCr 9.30. RCr 9.30(1)(a) requires:

> In a jury trial in circuit court the clerk, in open court, shall draw from the jury box sufficient names of the persons selected and summoned for jury service to compose a jury as required by law. If one or more of them is challenged, the clerk shall draw from the box as many more as are necessary to complete the jury.

This is the procedure that was utilized by the trial court. The video record from February 27, 2007, which appears on VR 1 (in chambers) & VR 3 (in open court), clearly depicts the clerk seating jurors from those that appeared for service by random draw. As jurors are challenged and struck, new jurors are drawn from the box to replace them.

The Appellant would allege substantial non-compliance with proper procedure because Mr. Skeeters was added to the jury selection box last, only after it was discovered that his name had been inadvertently left out during roll call. VR 1, 2/27/07; 4:12:15, 5:06:24, 6:33:20. This procedure, however, also complies with the procedure set out by the rule. RCr 9.30(c) states that it is proper to obtain additional names from "the drum" when "it appears that the names in the jury box are about to become exhausted[.]" Mr. Skeeters' name was randomly selected from the beginning as a member of the venire panel. Due solely to human error, his name was left out of the jury box. The rule clearly states that a venire member randomly selected from the drum may be added to the box when it is apparent that the box is about to become depleted. This is exactly what happened in this matter.

Further, even assuming that there was some minor irregularity, the rule sets out a procedure for curing irregularity that, if applied, would have had the same result. RCr 9.30(b) states that, in the event of any "irregularity" the names should be replaced in the jury box. Here, Mr. Skeeters' name was left out. The rule states that the cure is to put Mr. Skeeters' name in the box. That was done. Further, even if all of the names had been replaced, and the entire panel re-drawn, the result would have been the same because the pool of available persons had been exhausted. The only jurors that had

not been struck for cause were the thirty-seven jurors, including Mr. Skeeters, who were seated prior to the exercise of peremptory strikes. TR 224. Drawing the same thirty-seven names from the jury box would only have resulted in a game of musical chairs. It would not have changed the identity of even a single juror. As such, the Appellant has failed to demonstrate any substantial deviation from the proper procedure.

Assuming, for the purposes of argument, that the Appellant has alleged some minor deviation in the procedure, he is still not entitled to the relief that he requests because he has failed to demonstrate that any prejudice resulted from the trial court's decision to seat Mr. Skeeters. The Appellant, in fact, seems to agree that he cannot show that any prejudice resulted and, thus, asks the Court to find that the deviation constituted a substantial deviation that should result in reversal *per se*. Brief of Appellant, p. 16.

This result would be contrary to precedent, which has held that such matters of isolated human error are not substantial deviations and they should not result in reversal. For example, in Hodge v. Commonwealth, 17 S.W.3d 824 (Ky. 2000), the court clerk was asked to draw, at random, three jurors to be excused as alternates at the conclusion of the guilt phase. The clerk did so and announced that jurors 70, 33, and 42 were alternates. Three jurors got up and left. Hodge, 17 S.W.3d at 840. Later, when the jury was polled, it was discovered that juror three left and juror 33 actually deliberated and decided the case. Id. In holding that there was no reversible error this Court stated:

> The problem was not the procedure, but the fact that two jurors apparently misunderstood the clerk with the result that the wrong juror was excused. We agree that preservation of randomness is a central principle in the jury selection process. However, "[r]andomness means that, at no time in the jury selection process will anyone involved in the action

> be able to know in advance, or manipulate, the list of names who will eventually compose the ... jury." Williams v. Commonwealth, Ky.App., 734 S.W.2d 810, 812-13 (1987). Appellant does not suggest that this irregularity occurred because of any premeditation or manipulation of the jury selection process.

Hodge v. Commonwealth, 17 S.W.3d 824, 841 (Ky. 2000). The Court further stated that "[t]his inadvertent error in the proceedings, though bizarre, was harmless." Id.

Just as in Hodge, the procedure utilized by the trial court was proper, but a misunderstanding due to human error resulted in one juror's name being left out of the box. The accident was not the result of any premeditation or manipulation, nor could the error have resulted in any knowledge of the make-up of the pool, since the omission was not discovered until the end of the day when no other juror was left. Further, Mr. Skeeters had been present for all of *voir dire*. In fact, this case lacks the very evil that was cited by the Robertson decision. In Robertson the problem was that the parties knew who the replacement would be and could purposely manipulate their strikes in order to obtain a certain result, or a particular person. Robertson, 597 S.W.2d at 864. This matter is not a case where the trial court unilaterally ignored or altered the prescribed procedure. Instead, it is a case in which the trial court had to adapt to a human's failure to hear his name called in a manner that complied with the rule as closely as can be reasonably expected. Since the Appellant cannot claim that any error or prejudice resulted, the trial court should be affirmed.

III.

THE TRIAL COURT PROPERLY DENIED THE APPELLANT'S MOTION FOR A MISTRIAL

The Appellant failed to preserve any objection to his third argument in addition to lacking proper standing to raise this argument. The Appellant alleges prejudice by a juror against one of his co-defendants, namely Hall. This argument was shown to be baseless because the jury demonstrated that it held no prejudice against Hall or his family, by acquitting him of all charges. VR 7, 3/2/07; 10:58:21. "[T]he decision to grant a mistrial is within the sound discretion of the trial court, and such a ruling will not be disturbed absent an abuse of that discretion." Woodard v. Commonwealth, 147 S.W.3d 63, 68 (Ky.2004). At most, even assuming that the Appellant had preserved the alleged error and could raise a challenge based upon Hall's wife's distant connection to a woman that a juror dated when Mrs. Hall was a small child, then the trial court did not abuse its discretion in refusing to declare a mistrial.

During trial, Hall sought to call his wife as a witness. VR 6, 3/1/07; 2:44:10. The trial court immediately stated that the parties and attorneys should confer in chambers. Id. Once in chambers, the trial court expressed the opinion that the witness's identity should have been revealed during *voir dire*, as Mrs. Hall's father was rather notorious within the confines of Breckinridge County. VR 2, 3/1/07; 2:49:00. The exact wording, with a few minor inaccuracies, is largely set out in the Appellant's brief at pages 14 and 15. It is important to note, however, that this description of Mrs. Hall's father was purely the opinion of the trial judge, and was not expressed by any juror or in front of any juror.

After hearing the trial judge's explanation and admonishment that the name should have been revealed during *voir dire*, as well as the trial court's concern that Mrs. Hall should be warned about self incrimination, Hall and Allen insisted that there was nothing to be done. VR 2, 3/1/07; 3:00:42. Both of these defendants, about whom Mrs. Hall's testimony actually concerned, stated that they had no objection and would insist on going forward. VR 2, 3/1/07; 3:00:42. Only then, Metten's trial counsel seized on the trial court's dramatic description and stated that he would like a mistrial. VR 2, 3/1/07; 3:02:05. Other counsel, with equal vehemence, stated that there was no problem, but if there was it could be cured by instructing the jury. VR 2, 3/1/07; 3:03:30. The Appellant's counsel remained silent.

Perhaps demonstrating the adage that even a blind hog can occasionally find an acorn, one juror did, in fact, ask to speak to the trial court and the parties in chambers after making the connection between Mrs. Hall and her father. That juror stated that he felt that he should reveal that he recognized Mrs. Hall because he had dated her aunt perhaps fourteen or fifteen years before the trial date. VR 2, 3/1/07; 3:07:05. The unnamed aunt had avoided Mrs. Hall's father because of his bad behavior. Id. The juror stated that Mrs. Hall was then known as Miss Lucas and was probably around six years old at the time. Id. The juror further stated that he had no feeling about Mrs. Hall, and that his knowledge about her father's reputation would not "carry over" to her. VR 2, 3/1/07; 3:09:00. In fact, the juror seemed quite adamant that the reputation of the father should not have anything to do with the daughter. He agreed that he would have no opinion about any defendant if he learned that Mrs. Hall was the wife of one of the

defendants. Id. at 3:10:15. As such, the Appellant now tries to assert the objection that Hall waived, despite never making any objection.

The Appellant's trial counsel never made any objection during the lengthy discourse relating to Ms. Hall's testimony. In fact, the only statement that trial counsel ever made was a statement that any error would be cured by an instruction to the juror in question. VR 2, 3/1/07; 3:03:10. The Appellant's numerous citations in his statement of preservation on this issue are seriously misleading in that they cite to Metten's objection - not his own. Brief of the Appellant, p. 17.

Since the Appellant failed to allege any error while before the trial court, the Appellant cannot change his position and adopt Metten's objections in presenting arguments to this Court. "An appellate court will not consider a theory unless it has been raised before the trial court ***and*** that court has been given the opportunity to consider the merits of the theory." Shelton v. Commonwealth, 992 S.W.2d 849, 852 (Ky. App. 1998)(emphasis added). An appellant is "not...permitted to feed one can of worms to the trial judge and another to the appellate court." Williams v. Commonwealth, 233 S.W.3d 206, 211 (Ky. App. 2007) quoting Kennedy v. Commonwealth, 544 S.W.2d 219, 222 (Ky. 1976).

Further, Mrs. Hall's testimony concerned only Hall and Allen. She stated that the two men went to the Appellant's residence on Mercer Bend Road because she had asked them to take a sewing machine to the Appellant's girlfriend. The sewing machine had not sold at her yard sale and she was trying to clean clutter out of her house. VR 6, 3/1/07; 3:16:45 - 3:19:40. She further stated that she had taken the drug, Sudafed, because she had congestion and it was safe to use while pregnant. Id. at 3:22:08. She did

not claim to have any knowledge of the Appellant or Mr. Metten, and did not discuss anything other than how her husband and his friend happened to be at the scene when the officers arrived to investigate. The testimony contained absolutely no information concerning the Appellant's case. In fact, the Appellant's trial counsel did not even ask any questions on cross examination. Id. at 3:30:30. Metten's own testimony then confirmed Mrs. Hall's version of events, because Metten stated that although he had met Hall, he did not know Allen. VR 6, 3/1/07; 4:16:08. The jury also went on to acquit both Hall and Allen of all charges. VR 7, 3/2/07; 10:56:51 -10:59:30.

The Appellant's argument on this matter is flawed because he ignores the fact that Mrs. Hall was not his witness and she did not provide any testimony or information concerning him. Even assuming, for the purposes of argument and without waiving any other argument set out herein, that the juror had actually been partial based upon his knowledge of Mrs. Hall's father, that bias would have been against Hall, not the Appellant. The Appellant's argument is further flawed because it is clear that the juror did not actually harbor any bias against Hall or Allen, as they were both acquitted.

"A mistrial is an extreme remedy and should be resorted to only when there is a fundamental defect in the proceedings and there is a 'manifest necessity for such an action. 'The occurrence complained of must be of such character and magnitude that a litigant will be denied a fair and impartial trial and the prejudicial effect can be removed in no other way.'" Woodard v. Commonwealth, 147 S.W.3d 63, 67 (Ky. 2004) (internal citation omitted). In this matter, although Hall may have had legitimate concerns regarding the juror, he elected to continue without objection. The Appellant is now attempting to assert Hall's argument even though the testimony had nothing to do

with the Appellant, and the juror's knowledge of Mrs. Hall could not have conceivably prejudiced the Appellant.

This Court has held that a similar argument was without merit because the alleged bias or prejudice did not actually affect the defendant raising the issue on appeal. In Fields v. Commonwealth, 219 S.W.3d 742 (Ky. 2007), this Court stated that Fields could not successfully argue that a juror was dishonest during *voir dire* when that juror stated that he did not know a co-defendant. The Court stated that, in addition to lack of preservation, the bias went to the co-defendant, not to Fields. The same is true in this matter.

Further, the authority cited by the Appellant does not go to this issue. Rather, the Appellant has cited general case law concerning when an individual juror is properly struck for cause. Even assuming that the case law were appropriately relied upon by the Appellant, the Appellant's allegation is that the potential for bias goes to Hall rather than any actual potential for bias against the Appellant. The fact is that the Appellant had absolutely no relationship whatsoever with the juror in question, let alone the type of close connection that would properly result in the juror being excused for cause. The Appellant's argument, when simply stated, is that the juror in question once dated a co-defendant's wife's aunt, fifteen to sixteen years before the trial.

"The test is whether, after having heard all of the evidence, the prospective juror can conform his views to the requirements of the law and render a fair and impartial verdict." Mabe v. Commonwealth, 884 S.W.2d 668, 670 (Ky.1994). This Court has held that a social acquaintance is not so closely connected that his or her verdict may be subconsciously affected by the acquaintance so that the juror must be

excused for cause. Ratliff v. Commonwealth, 194 S.W.3d 258, 266 (Ky. 2006). As such, the juror's social acquaintance with the aunt of the wife of a co-defendant, when the wife was a very small child, is not the type of relationship that should result in a mistrial when discovered after *voir dire.*

IV.

THE APPELLANT IMPROPERLY PREMISES HIS APPELLATE ARGUMENT ON PRE-TRIAL PLEA NEGOTIATIONS

The Appellant's final argument is also improper. As the Appellant concedes, the United States Supreme Court has clearly held that there are no constitutional rights implicated during negotiations for a plea bargain. Weatherford v. Bursey, 429 U.S. 545, 561, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977). In fact, although a prosecutor will generally engage in some type of negotiation, he is under no obligation to make any offer whatsoever. The prosecutor may simply elect to present the case to a jury if he prefers to do so. Id. As such, there are no competing legal principles at issue in the Appellant's case.

This Court has recognized that the Commonwealth may simply refuse to engage in a plea bargain, and no constitutional rights are implicated by such a refusal. Commonwealth v. Corey, 826 S.W.2d 319, 321 (Ky. 1992). This principle extends to a situation where the proposed bargain is "impracticable." Id. The Court explained in Corey that the defendant may plead guilty, or may plead not guilty and have a jury trial, but he is not entitled to a bargain with the Commonwealth in exchange for a guilty plea. Id.

The Appellant seems to suggest that he had a constitutional right to plead guilty and accept a lesser sentence. This is simply not true. When similar arguments have been presented, the United States Supreme Court has stated that any pre-trial negotiation holds no constitutional significance unless the plea is accepted and embodied in a judgment and sentence. See e.g. Mabry v. Johnson, 467 U.S. 504, 507 -508, 104 S.Ct. 2543, 81 L.Ed.2d 437 (1984). If, and only if, the defendant is allowed to plead, then the trial court must ensure that the defendant has *waived* his privilege against self incrimination under the 5th Amendment, the right to a trial by jury, and the right to confront his accusers. See Boykin v. Alabama, 395 U.S. 238, 241, 89 S.Ct. 1709, 23 L.Ed. 2d 274 (1969). To waive these rights the trial court must find that the defendant acted knowingly, voluntarily, and intelligently. Id.

As the Appellant concedes, other jurisdictions have held that a "group" plea is sometimes coercive and should be disclosed to the trial court. This is due to the trial court's duty to ensure that the defendant is properly *waiving* his constitutional rights in a knowing and voluntary manner. U.S. v. Usher, 703 F.2d 956 (6th Cir. 1983). Again, the waiver of a constitutional right to trial does not create an affirmative duty to offer the defendant a good deal. In this matter, the Appellant continually confuses the trial court's duty to ensure that a defendant's rights are properly waived, and makes an assumption that a waiver creates an affirmative duty on the part of the Commonwealth. In short, the Appellant is suggesting that his constitutional rights were violated because the Commonwealth refused to offer him a reduced sentence in exchange for his agreement to plead guilty.

The nature of the plea negotiation in this jurisdiction is evidenced by the trial court's right to reject a guilty plea altogether, under proper circumstances. RCr 8.08. The trial court also has the discretion to reject the plea bargain, even after the Commonwealth's consent to enter into the bargained for exchange. Hoskins v. Maricle, 150 S.W.3d 1 (Ky. 2004). The Appellant's argument in this matter is, therefore, not an issue of first impression in Kentucky. It is simply a misstatement of long standing Kentucky precedent based upon federal constitutional principles that the Appellant never waived.

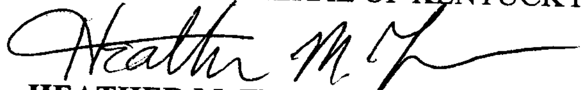
Further, even if there were some merit in the Appellant's argument, the Appellant never made the argument before the trial court and, therefore, failed to preserve the argument for appellate review. The Appellant's trial counsel did voice an objection to the Commonwealth's refusal to independently bargain with her client. That objection was, however, strictly limited to an allegation that she had been told that the Commonwealth would waive the condition and negotiate with the Appellant. VR 9, 2/7/07; 2:25:58 -2:31:15. Nothing on the record indicates that the Commonwealth ever made such an agreement, other than the allegations made by Appellant and Metten. Since the Appellant failed to allege any constitutional violation while before the trial court, the Appellant cannot change the basis of his objection before this Court. "An appellate court will not consider a theory unless it has been raised before the trial court ***and*** that court has been given the opportunity to consider the merits of the theory." Shelton v. Commonwealth, 992 S.W.2d 849, 852 (Ky. App. 1998)(emphasis added).

CONCLUSION

For the foregoing reasons, the Commonwealth respectfully requests that this Court affirm the rulings of the Breckinridge Circuit Court.

Respectfully Submitted,

JACK CONWAY
ATTORNEY GENERAL OF KENTUCKY



HEATHER M. FRYMAN
ASSISTANT ATTORNEY GENERAL
OFFICE OF CRIMINAL APPEALS
OFFICE OF THE ATTORNEY GENERAL
1024 CAPITAL CENTER DRIVE
FRANKFORT, KENTUCKY 40601-8204
(502) 696-5342

COUNSEL FOR APPELLEE