Commonwealth of Kentucky
Kentucky Supreme Court

CASE NO. 2013-SC-000824
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COMMONWEALTH OF KENTUCKY — **APPELLANT**

v.

Appeal from Pendleton Circuit Court
Hon. Jay B. Delaney, Judge
File No. 10-CR-00076

FLOYD WRIGHT — **APPELLEE**

Brief for Commonwealth

Submitted by,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief for Appellee has been mailed, postage pre-paid, this 12th day of May, 2014, to the Hon. Jay B. Delaney, Judge, Pendleton Circuit Court, Courthouse, 233 Main Street, Falmouth, KY. 44040; to: Hon. Brandon Neil Jewell, Assistant Public Advocate, Department for Public Advocacy, 100 Fair Oaks Lane, Suite 302, Frankfort, KY 40601, delivered via state deleivered messenger mail to the clerk of the Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601 and Electronically mailed to: Hon. E. Douglas Miller, Commonwealth's Attorney, 130 South Main Street, Cynthiana, Ky. 441031.

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COUNTERSTATEMENT OF THE CASE

Floyd Wright was indicted in Pendleton Circuit Court for the offense of complicity to the trafficking of cocaine with Sean Records and being a persistent felony offender in the second degree. (TR 1-2). The facts in this case are actually very simply. Record admittedly sold Sherri Klups a quantity of cocaine. Record claimed to have acted alone. Klups though testified that she heard Wright and Record talking to each other in the kitchen, baggies being handled and the freezer door being opened. (See VR 1 3/11/11 11:53:11-11:57:10). Ms. Klups, further, testified that the two–Record and Wright-- left together when she asked to see the cocaine, they returned together with the cocaine and when she inquired about its condition it was Wrigthwho answered "that we had stuck it in the freezer..." (VR 1 3/11/11 2:01:45); that he said "they had put it in the freezer" (VR 1 3/11/11 2:02:28) it was Wright again who explained why the cocaine was in the freezer–"to cool down"
(VR 1 3/11/11 1:57:30).

During the course of the trial, an audio exhibit was admitted of the informant Klup's controlled buy of the drugs. After hearing a replay once in the courtroom after the commencement of jury deliberations, the jury requested to listen to the exhibit in the jury room to determine whether there were one or two male voices heard in the course thereof. (See CD 3/11/11 4:46:45 et seq.). Wright then only made an objection thereto under RCr 9.74 to any replaying of the exhibit outside his presence even though the court and parties discussed at length that the exhibit could at that time only be replayed on the prosecutor's personal computer. (CD 1 3/11/11 4:49:50; 4:52:25).

The Court of Appeals opinion notes that the prosecutor candidly expressed reservations in this regard in that he did not know what other information was on his laptop (see appended opinion of the Court of Appeals at p. 4) but in making that observation the Court of Appeals failed to note that those reservations were made an hour before when the jury first asked for an audio player to listen to the CD on a separate and distinct prior occasion [and the assertion in the opinion that the computer likely contained a sea of inadmissible and irrelevant evidence made in the opinion is perhaps only correct to the extent that anything on the computer would be inadmissible in that the prosecutor then noted that he did not know that there was even anything pertinent to this trial on the computer]. (See CD 3/11/11 3:37:40: 3:43:35).

On that first occasion, the court brought the jury out and they listened to the exhibit in open court.(See CD 3/11/11 3:46:10). And after reconvening in the jury room, the jury sent out the second request to listen to this audio in the jury room which the court allowed over Wright's exclusive RCr 9.74 objection. At no time during the first or second instance did Wright object to the jury listening to audio on the computer. The only objection was that it was a violation of RCr 9.74.

The Court of Appeals held not that there was specifically error under RCr 9.74 in allowing the jury to listen to the exhibit privately but that giving the jury unrestricted and unmonitored access to a party's laptop outside the of the defendant's presence is highly improper and the likelihood of prejudice very high citing Mc Guire v. Commonwealth, 368 S.W.3d 100 (Ky. 2012). The Court of Appeals found "allowing the jury to take the prosecutor's laptop into the jury room with unfettered access to the laptop's files, as well

as possible internet connection, was an abuse of discretion". (See appended opinion of the Court of Appeals at p. 4) However, as the opinion noted in the sentence immediately prior thereto, the jury did not take the laptop back to the jury room and the court's instructions were not unfettered access—the laptop was set up in the jury room during a recess and the jury was then instructed to insert the disk and play the tape using Windows Media Player. (Id.).

The jury found Wright guilty as charged and recommended a sentence of 10 years on the persistent felony offender count in lieu of 5 years on the complicity count. (TR 45). An appeal was taken as a matter of right to the Court of Appeals raising six claims of error. The Court of Appeals' to be published opinion reversed the Pendleton Circuit Court for allowing the exhibit to replayed in chambers on the prosecutor's laptop. This case is now before the Court on the Commonwealth's motion on whether an objection under RCr 9.74 is limited to the propriety of the jury considering the objected to material outside the presence of the defendant and whether an unobjected to circumstance in submitting that material to the jury is grounds for reversal in the absence of demonstrable prejudice.

ARGUMENT

I.

THE PENDLETON CIRCUIT COURT DID NOT ERR IN ALLOWING THE JURY TO LISTEN TO AN AUDIO EXHIBIT ON A LAPTOP IN THE JURY ROOM OVER AN RCR 9.74 OBJECTION.

Appellant's argument to the trial court was that it was a violation of RCr 9.74 for the court to allow the jury to listen to the recording of the drug buy in the jury room. The audio recording of drug buy was admitted as Commonwealth's Exhibit 2 without objection and played in full at trial for the jury. (See VR 1 3/11/11 12:08:43 et seq). And while RCr 9.74 does limit giving information after the jury has retired, RCr 9.72 though says the jury may take papers and other things received as evidence upon retiring for deliberation. It was otherwise within the judge's discretion then to allow the jury to take the exhibit to be replayed. See Johnson v. Commonwealth, 134S.W.3d 563 (Ky. 2004).

There was no claim that the exhibit is testimonial and pursuant to RCr 9.72 the jury would have been allowed to take this exhibit and other things received as evidence upon retiring. In Burkhart v. Commonwealth, 125 S.W.3d 848 (Ky. 2003), in finding no error in a court replaying an exhibit in slow motion, this Court otherwise observed that doing so in open court by the judge was not improper as the jury could have been allowed to take the properly admitted exhibit to the jury room for private viewing (as non-testimonial exhibits are generally allowed to go into deliberations).

Appellee in this case had argued that the trial otherwise erred under Mills v. Commonwealth, 44 S.W.3d 366 (Ky. 2001). Mills, though, is clearly distinguishable on

its facts. In Mills, the trial court allowed the jury to take to the jury room tapes of witness statements not previously played during the course of the trial and for which there was no foundation and which were otherwise inadmissible. This Court found particularly egregious that the tapes were never subjected to adversarial testing. Id. The recording given to the jury in this case, however, had a foundation laid, was a properly admitted exhibit and was played in toto during the course of the trial. RCr 9.74, which was the only basis of objection herein, then was not violated. And it would be otherwise ridiculous to now say a trial court following one rule of the court violates another rule.

Since the rendition of the opinion by the Court of Appeals herein, this Court in Springfield v. Commowealth, 410 S.W.2d 589 (Ky. 2013) found no error allowing the jury to view a videotape of the actual drug transaction utilizing electronic equipment outside its presence, unsupervised, in the jury room. In doing so, the Court found no conflict in the interplay between RCr 9.74 and RCr 9.72 and held that the trial court's actions were supported by sound legal principles and it was not otherwise an abuse of discretion in allowing the jury to "review this audio and video recording in the jury deliberation room." Id. at 594. Certainly, it would not then be an abuse of discretion to allow the jury to review this audio exhibit. Reversal by the Court of Appeals was not warranted for the claim as made to the trial court.

II.

THE COURT OF APPEALS IN THIS CASE ERRONEOUSLY FOUND THAT THE CLAIM OF ERROR WAS PRESERVED AND SUBJECT TO REVERSAL WITHOUT ANY SHOWING OF DEMONSTRABLE PREJUDICE.

Appellee's objection in the trial court was that it was improper for the court to allow the jury to replay the audio in the jury room under RCr 9.74. The Court of Appeals in actuality seemingly recognizes that it was not a violation of RCr 9.74 in noting that it may be proper for the jury to take a tape to review on another type of listening device and that the error herein was the laptop (or the manner in which the jury received the material.) (Opinion of the Court of Appeals on p. 4). Appellee in reply to the Commonwealth's motion for discretionary review does not dispute that he did not specifically object to the playing of the audio on the laptop but asserts "by default" his objection included to the manner in which it would be replayed. The rules do not provide for "by default" objections but require specific objections.

RCr 9.22 requires a party to make known to the trial court the action which the party desires the court to take. Appellee did not want the court to allow the jury to hear this audio in the jury room and when the court indicated it would allow the jury to hear the audio if he objected to the manner it would be play he needed to make a specific objection to preserve the claim for relief as this Court has long noted that it is otherwise improper to make one argument to the trial court and another to the appellate court. Kennedy v. Commonwealth, 544 S.W.2d 219, 222 (Ky. 1976).

The claim of error then was not otherwise preserved and the Court of Appeals was in error when it concluded it had been. See RCr 9.22. The Court of Appeals could consider the error as palpable error but the level of review is quite different much as the Court of Appeals notes further into the opinion on a different issue. (See Opinion of the Court of Appeals on pp 7-8). But as noted in footnote 4, the error is palpable error only if it is clear or plain under current law. See Commonwealth v. Jones, 283 S.W.3d 665 (Ky. 2009). However, in Springfield where the appellant made a specific objection under RCr 9.74 to the use of electronic equipment for replay of audio and video, this Court disagreed that it was even error. And after doing so noted that it did not even have any decisions directly on point as to whether the recording of a drug transaction fell in the realm of non-testimonial evidence under the rule. Obviously, then the claimed error can not be palpable error with regard to this rule if our courts had not even considered error to the first half of the question

The reported case of Winstead v. Commonwealth, 327 S.W.3d 386 (Ky. 2010) while addressing the use of cell phones by jurors does note limitations on the use of other electronic communication devices and is illustrative as what proof is necessary for relief when there is the potential for a juror to access outside sources. But even in the context of a specific objection, Winstead required more than the opportunity for outside influence to support relief and specifically overruled a decades old case to the contrary noting the following:

> We agree with Winstead's argument that the jurors' use of cell phones could easily result in opportunities for improper

outside influence. On a broader scope, jurors' access to any electronic communication device or media at anytime during their jury service provides an opportunity for improper outside influence on jury decisions. For that reason, the wary trial judge must clearly admonish jurors at the commencement of trial and at other times when the jurors separate during the trial to avoid using their computers, laptops, cell phones, and other electronic communication devices to communicate with anyone or perform any research on any matter connected with the trial of the case. And when the jury retires to consider its verdict, the trial judge must direct a court official to collect and store all cell phones or other electronic communication devices until deliberations are complete. During deliberations, the court may release the cell phones or other electronic communication*402 devices to allow appropriate communications by jurors (such as arranging for transportation, childcare, etc.) and may require such communication to be monitored by court officials. FN37

FN37. We note that Winstead does not assert that he requested such preventative measures.

In the case at hand, we find the trial court's handling of the matter appropriate under our more recent precedents dealing with juror misconduct in general in which we have acknowledged the discretion afforded to trial courts in dealing with such matters.[FN38] To the extent that our precedent dealing with phone calls made by unmonitored jurors, such as *Hamilton,* is inconsistent with the more flexible approach we have developed in recent years for dealing with juror misconduct, such precedent is hereby overruled. Instead, we now hold that such phone calls made by unmonitored jurors do not automatically entitle the defendant to a mistrial or other particular relief; but, rather, we recognize the trial court's discretion to determine, under the particular facts and circumstances of the case (including the nature of the misconduct and whether any prejudice from the misconduct is shown), whether a mistrial or other relief is warranted. Here, we find the trial court did not abuse its discretion in denying the motion for a mistrial because there was no clear showing of manifest necessity for mistrial in light of the lack of proof that the case was discussed and the trial court's prior admonitions.[FN39] So we

> find no reason to disturb Winstead's convictions or sentences based on the jurors' cell phone usage under the facts of this case.
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> FN38. *See, e.g., Major v. Commonwealth,* 177 S.W.3d 700, 711 (Ky.2006) (refusing to reverse because of juror improperly asking court security personnel question where no prejudice was shown since "not every incident of juror misconduct requires a new trial. The test is whether the misconduct has prejudiced the Defendant to the extent that he has not received a fair trial."); *Gould v. Charlton Co., Inc.,* 929 S.W.2d 734, 739–40 (Ky.1996) (recognizing flexible standard where trial judge has discretion to deal with juror misconduct in case where alleged judicial misconduct involved one juror giving extrajudicial information to other juror and in which trial court excused juror giving information due to having formed opinion but retained juror who had received extrajudicial information but who had not formed opinion); *Johnson v. Commonwealth,* 12 S.W.3d 258, 266 (Ky.2000) (although juror asking and court security officer answering question as to whether separate sentencing phase would be required if guilt found was improper under rules, reversal was not required in light of lack of showing of prejudice as "[l]ong ago, we joined the trend away from a strict or technical application of the rules forbidding conversations with or among jurors.").
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> FN39. *See Shemwell v. Commonwealth,* 294 S.W.3d 430, 437 (Ky.2009) ("The 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 discretion. A mistrial is an extreme remedy and should be resorted to only when there appears in the record a manifest necessity for such an action or an urgent or real necessity.") (citations and internal quotation marks omitted).

As the Court above noted, the trend has been away from strict or technical application of rules in the absence of proof that the jurors acted in violation thereof. There, though, was neither proof of juror misconduct nor evidence of any actual prejudice

in this case. The Court of Appeals opinion notes only the likelihood of prejudice and in his reply brief in that court Wright admitted that it cannot be said any juror engaged in particular misconduct. (Opinion of Court of Appeals at pp. 4-5 ; Reply Brief for Appellant at p. 4). And with regard to the laptop having internet access there was not even any proof of an available connection.

Reversal then was not otherwise warranted. Winstead. The record shows that the jury was directed to simply use the laptop to replay the properly admitted exhibit in a limited way and no information was submitted to the jury for consideration outside the defendant's presence which had not already been submitted to the jury in the defendant's presence. (See VR 1 3/11/11 3:49:00 et seq.). The use of a laptop to do so is not plain error as the Court in Winstead even allows for use of devices in a limited manner. And even if that had been error, in the absence of actual prejudice, any error would also be harmless. Winstead, see also RCr 9.24. There may have been a risk of juror misconduct but as noted in Winstead the mere risk is not error and as such could not be palpable error.

CONCLUSION

For all the foregoing reasons, the Commonwealth respectfully submits that the opinion of the Kentucky Cout of Appeals be reversed and the judgment of the Pendleton Circuit Court be affirmed.

Respectfully submitted,

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APPENDIX

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