Commonwealth of Kentucky
Supreme Court
No. 2013-SC-000267-DG

THEODORE ANTHONY MARAS — **APPELLANT**

V.

Appeal from the Court of Appeals
No. 2011-CA-002231-MR
Honorable Mary Shaw, Judge Jefferson Circuit Court
Indictment No. 11-CR-000280

COMMONWEALTH OF KENTUCKY — **APPELLEE**

Brief for Commonwealth

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CERTIFICATE OF SERVICE

I certify that this Brief for Appellee was mailed September 29th, 2014 to the to Hon. Mary Shaw, Judge, Jefferson Circuit Court, Jefferson County Judicial Center, 700 West Jefferson Street, Louisville, Kentucky 40202-4733; sent via electronic mail to Hon. Thomas B. Wine, Commonwealth's Attorney, 514 West Liberty, Louisville, Kentucky 40202-2887; and via first-class mail to the Hon. Bruce P. Hackett, counsel for appellant, Office of the Louisville Metro Public Defender, Advocacy Plaza, 717-719 West Jefferson Street, Louisville, Kentucky 40202. I further certify that the record has been returned to the Clerk.

Wm. Robert Long, Jr.
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INTRODUCTION

The Commonwealth responds to the appeal of Theodore Anthony Maras from the Court of Appeals opinion affirming the Jefferson Circuit Court's Judgment of Conviction and Sentence After Jury Trial convicting Mr. Maras of Stalking in the First Degree and Violation of a Protective Order. For these crimes appellant was sentenced to a total term of five (5) years imprisonment.

STATEMENT CONCERNING ORAL ARGUMENT

The Commonwealth does not believe that oral argument is necessary in this appeal because the issues are sufficiently addressed in the parties' briefs.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

INTRODUCTION i

STATEMENT CONCERNING ORAL ARGUMENT ii

COUNTERSTATEMENT OF POINTS AND AUTHORITIES iii

COUNTERSTATEMENT OF THE CASE 1

ARGUMENT 3

I-II. THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT (JNOV) 3

RCr 10.04 4

Haight v. Commonwealth,
41 S.W.3d 436 at 447 (Ky. 2002) 4

Taylor v. Commonwealth,
63 S.W.3d 151 at 166 (Ky. 2001) 4

McQueen v. Commonwealth,
721 S.W.2d 694 at 700 (Ky. 1986) 4

Hicks v. Commonwealth,
670 S.W.2d 837 (Ky. 1984) 4

FRE 606(b) 4

United States v. Gonzales,
227 F.3d 520 (6th Cir. 2000) 4

Tanner v. United States,
483 U.S. 107, 125, 107 S.Ct. 2739, 97 L.Ed.2d 90 (1987) 5

United States v. Logan,
250 F.3d 350, 377-381 (6th Cir. 2001) 6

United States v. D'Angelo,
598 F.2d 1002 (5th Cir. 1979) 6

United States v. Tines,
75 F.3d 891, 898 (6th Cir. 1995) 6

Brofford v. Marshall,
751 F.2d 845, 853 (6th Cir. 1985) 6

United States v. Jones,
132 F.3d 232, 245-246 (5th Cir. 1998) 7

Peterson v. Wilson,
141 F.3d 573, 577-578 (5th Cir. 1998) 7

Gacy v. Welborn,
994 F.2d 305, 313 (7th Cir. 1993) 7

Silagy v. Peters,
905 F.2d 986, 1008-1009 (7th Cir. 1990) 7

Watson v. Alabama,
841 F.2d 1074, 1076, *fn.* 2 (11th Cir. 1988) 7

Johnson, v. Branch Banking and Trust Co.,
313 S.W.3d 557 (Ky. 2010) 7

http://www.merriam-webster.com/dictionary/examine 7

Brown v. Commonwealth,
174 S.W.3d 421, 428 n. 2 (Ky. 2005) 7

Commonwealth v. Bailey,
71 S.W.3d, 73, 76 (Ky. 2002) 8

Commonwealth v. Suttles,
80 S.W.3d 424, 426 (Ky. 2002) 8

Commonwealth v. Jones,
880 S.W.2d 544, 545 (Ky. 1994) 8

Commonwealth v. Benham,
816 S.W.2d 186, 187 (Ky. 1991) 8

CONCLUSION **9**

COUNTERSTATEMENT OF THE CASE

On January 25, 2011, the appellant was indict by a Jefferson Circuit grand jury for being a felon in possession of a firearm, stalking in the first degree, violation of a protective order and for being a persistent felony offender in the first degree. (TR at 1-4). These charges stemmed from incidents in which the appellant repeated followed or harassed his ex-girlfriend/victim, Christina Edwards. On September 22, 2008, a domestic violence protective order (DVO) was entered in Jefferson District Court prohibiting the appellant from having any contact with the victim and requiring him to remain at least 600 feet from the victim and members of her family. (TR at 39). Despite the entry of the DVO, appellant continued to make numerous texts or calls to the victim and even threatened to commit suicide due to the couple's separation. (TR 19 and 39). On November 1, 2010, appellant left a note on victim's door indicating that he missed her and that he was tired of her fabricating excuses not to talk to him. *Id.* Appellant also left the sawed off barrel from a double barrel shotgun in a box on the victim's doorstep. *Id.* On November 9, 2010, the victim discovered appellant waiting for her near her home. Appellant was intoxicated, armed with a gun and implied that he intended to possibly harm himself saying that he, ". . .just wanted to say goodbye." *Id.* Victim took the gun from the appellant, told appellant to go home and sober up, then left for work. *Id.* During her morning and afternoon breaks, victim discovered notes from the appellant on her car. When victim left work she noticed appellant near her place of employment. *Id.* On November 11, 2010, the appellant again violated the DVO by seeking to contact with the victim outside her daughters home. (TR at 40). Officers dispatched to this location

found appellant on scene with victim present and arrested appellant for violation of the protective order and because of an active warrant for stalking lodge against the appellant. (TR at 12).

Appellant's case proceeded to trial on September 20, 2011, for the crimes of stalking and violation of a protective order. (TR at 78). The charge of being a felon in possession of a firearm was severed.[1] Following the presentment of the above evidence and arguments of counsel, the jury retired to the jury room for its deliberations. According to appellant's post-trial motion for new trial or judgment notwithstanding the verdict (JNOV), the jurors asked the Court to clarify the meaning of the jury instructions in the midst of their deliberations. (TR 81-82). After consulting with both defense counsel and the prosecution, the trial judge sent a note back to the jury advising that no further clarification could be provided. (TR at 83). Thereafter, the jury returned its verdict finding that appellant guilty of stalking in the first degree and violation of a protective order. (TR at 78). Following the subsequent penalty phase of trial, the jury again deliberated and returned a recommendation that the appellant be sentenced to a total of five (5) years imprisonment. (TR at 79).

On September 29, 2011, the appellant filed a motion for a judgment notwithstanding the verdict and/or motion for new trial, alleging a jury error during

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[1]On December 21, 2011, the appellant was formally convicted on a plea of guilty to the crime of possession of a firearm by a convicted felon. (See "Plea of Guilty, Judgment of Conviction and Sentence Waiving PSI" attached to the end of the Transcript of Record. This document was not numbered along with the rest of the record.) For this conviction appellant was sentenced to five (5) years to be served concurrently with the sentences imposed for stalking and violation of a protective order.

deliberations that allegedly caused the appellant to be convicted of a crime that does not exist in the Commonwealth. (TR at 80-84). Specifically, the appellant alleged that some members of the jury had, after they had been discharged, informed the trial judge that they could not unanimously agree whether or not the victim feared for herself. However, they did unanimously agree that she at least feared for others, i.e. her boyfriend, and it was on this basis the conviction was rendered. *Id.*

Afer reviewing appellant's motion and the Commonwealth's response, the trial court denied the motion for JNOV on October 27, 2011. (TR at 86). On November 9, 2011, the trial court entered its Judgment of Conviction and Sentence formally convicting the appellant and sentencing him in accordance with the jury's verdict and sentencing recommendation. (TR at 100-102). On April 5, 2013, the Court of Appeals rendered an opinion unanimously affirming appellant's conviction and sentence. Subsequently, this Court granted discretionary review. Additional facts will be developed below as needed to support the Commonwealth's arguments.

ARGUMENT

I-II.

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT (JNOV).

The appellant claims that the trial court erred by not granting his motion for judgment notwithstanding the verdict after learning of an alleged jury error. Allegedly, some portion of the venire panel related to the trial court after being discharged from service that the jurors did not unanimously believe beyond a reasonable doubt that

appellant had intended to place the victim in fear that she would be subject to sexual contact, serious physical injury or death. (TR at 83). Instead, the jurors speaking with the trial court related that the jury's conviction was based on a theory that the victim feared for her boyfriend rather than herself. (TR at 83). Thus, appellant believes he was convicted under a theory that does not constitute the crime of stalking under the penal code. However, it is well-settled that this type of post-trial juror statement cannot be used to impeach a jury's verdict. Further, there was ample evidence admitted at trial to support the jury's finding of guilt on the crime of stalking in the first degree.

Kentucky law forecloses testimony from jurors, direct or hearsay via another person, about what the jurors discussed in the jury room or otherwise to impeach the jury's verdict. RCr 10.04 prohibits juror testimony to impeach a verdict except to establish that the verdict was made by lot. *Haight v. Commonwealth*, 41 S.W.3d 436 at 447 (Ky. 2002); *Taylor v. Commonwealth*, 63 S.W.3d 151 at 166 (Ky. 2001); *McQueen v. Commonwealth*, 721 S.W.2d 694 at 700 (Ky. 1986); *Hicks v. Commonwealth*, 670 S.W.2d 837 (Ky. 1984). Similarly, it is recognized by the federal courts that a juror may not be asked to testify about whether that juror correctly understood the trial court's instructions or correctly applied the trial court's instructions because such testimony is not authorized by FRE 606(b).

In *United States v. Gonzales*, 227 F.3d 520 (6th Cir. 2000), the Sixth Circuit reversed an order granting a new trial and held that the federal trial court improperly considered inadmissible testimony from a juror that was barred under FRE 606(b), and further to the extent that such testimony was not barred, the trial court abused its

discretion in concluding that such information was prejudicial in the Gonzales' trial. The Sixth Circuit explained FRE 606(b) in part as follows, 227 F.3d at 524 and 527:

> Rule 606(b) expressly bars juror testimony on three subjects: (1) "any matter or statement occurring during the course of the jury's deliberations;" (2) "the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment;" and (3) "the juror's mental processes in connection therewith." Fed. R. Evid. 606(b). The rule creates two exceptions, permitting juror testimony on two questions only: (1) "whether extraneous prejudicial information was improperly brought to the jury's attention," and (2) "whether any outside influence was improperly brought to bear upon any juror." *Id.*
>
> In *Tanner v. United States*, 483 U.S. 107, 125, 107 S.Ct. 2739, 97 L.Ed.2d 90 (1987) (holding that juror intoxication is not an "outside influence" about which jurors may testify to impeach their verdict), the Supreme Court concluded that the legislative history of Rule 606(b) demonstrates with "uncommon clarity" that Congress "specifically understood, considered, and rejected a version of Rule 606(b)" that would have deleted the proscription against testimony "as to any matter or statement occurring during the course of the jury's deliberations."
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> * * * *
>
> Assuming, for the sake of argument, that the lone juror in this instance raised a colorable claim of extraneous information, we do not believe that the foreman's alleged statement--that defense counsel always represented guilty clients--presented "an obvious potential for" or a "likelihood of" affecting the jury's verdict. We, therefore, decline to remand the case for further investigation into the one juror's claims of extraneous information.
>
> As explained by the Supreme Court in *Tanner*, 483 U.S. at 127, 107 S.Ct. 2739, "long-recognized and very substantial concerns support the protection of jury deliberations from intrusive inquiry." These concerns include the need for finality to litigation, the need to protect jurors from harassment after a verdict is rendered, and the need to

> prevent the possible exploitation of disgruntled ex-jurors. **If, as happened here, courts were to permit a lone juror to attack a verdict through an open-ended narrative concerning the thoughts, views, statements, feelings, and biases of herself and all other jurors sharing in that verdict, the integrity of the American jury system would suffer irreparably.**
>
> In this case, the district court abused its discretion in granting Gonzales a new trial based on nothing save the uncorroborated and incompetent testimony of one juror having second thoughts. Accordingly, we REVERSE and REMAND the case for sentencing. [Emphasis added.]

In *Tanner v. United States*, 483 U.S. 107 (1987), the United States Supreme Court rejected an argument that FRE 606(b) was unconstitutional because of the restrictions it imposed upon a juror's post-trial testimony when a party desired to overturn a jury verdict finding him guilty of a criminal offense. The *Tanner* opinion points out that the common law rule in the United States barred any juror from testifying to impeach a verdict. 483 U.S. at 117.

More to the point, the federal courts, including the Sixth Circuit, have ruled that even in federal court when FRE 606(b) applies, juror testimony about whether a juror or the jury collectively applied, misapplied, or correctly understood the trial court's jury instructions is barred from consideration by the court. *United States v. Logan*, 250 F.3d 350, 377-381 (6th Cir. 2001), citing *inter alia*, *United States v. D'Angelo*, 598 F.2d 1002 (5th Cir. 1979); *United States v. Tines*, 75 F.3d 891, 898 (6th Cir. 1995); *Brofford v. Marshall*, 751 F.2d 845, 853 (6th Cir. 1985), habeas corpus proceeding, holding that FRE 606(b) barred juror testimony about whether juror honored statement made on *voir dire* to put aside preconceived notions about the case during jury deliberations; *United States v.*

Jones, 132 F.3d 232, 245-246 (5th Cir. 1998), *affirmed on other grounds*, 527 U.S. 373 (1999), death penalty case, collecting cases from other circuits; *Peterson v. Wilson*, 141 F.3d 573, 577-578 (5th Cir. 1998); *Gacy v. Welborn*, 994 F.2d 305, 313 (7th Cir. 1993), death penalty case; *Silagy v. Peters*, 905 F.2d 986, 1008-1009 (7th Cir. 1990), death penalty case; *Watson v. Alabama*, 841 F.2d 1074, 1076, *fn.* 2 (11th Cir. 1988). Hence even assuming that RCr 10.04 did not comply with federal law and thus, FRE 606(b) were to be applied by the state courts to appellant's claim that a portion of the venire panel misunderstood the trial court's instructions, that rule as interpreted by the federal courts, including the Sixth Circuit, would preclude such testimony from a juror or indirectly by other parties supplying a hearsay statement about what that juror might have said.

Appellant's attempt to avoid application of RCr 10.04 to this situation by focusing on the word "examined" in the rule is not logical. Although acknowledging, " . . .the word of a statute shall be construed according to their common and approved usage," (Appellant's Brief at 24; *citing, Johnson, v. Branch Banking and Trust Co.*, 313 S.W.3d 557 (Ky. 2010), but then focuses solely on the legal definition of the word examined. Merriam-Webster's online dictionary defines "examined" as, "to inquire into closely," and/or "to interrogate closely." (http://www.merriam-webster.com/dictionary/examine) In common, everyday usage the administering an oath is not required in order to examine someone. Regardless of whether this Court believes the trial court "examined" the jurors, the trial judge's hearsay statement to defense counsel indicating what the jurors said is not competent proof on which a new trial may be granted. *See Brown v. Commonwealth*,

174 S.W.3d 421, 428 n. 2 (Ky. 2005) ("Hearsay is generally inadmissible as evidence in support of a motion for new trial"). For the jurors statements to be competent evidence, those statements would need to be taken under oath and with the opportunity for the parties to "examine" what actually took place during deliberations. Of course, this is precisely the type of examination RCR 10.04 expressly forbids.

Because the unnamed jurors statements to the judge after trial regarding how they reached their verdict are not competent statements from which the jury's verdict may be challenged under either RCr 10.04 and/or FRE 606(b), the trial court properly denied appellant's motion for judgment notwithstanding the verdict.

Further, appellant's motion for new trial/judgment notwithstanding the verdict must be reviewed under the same standard applied to a motion for directed verdict. *Commonwealth v. Bailey*, 71 S.W.3d, 73, 76 (Ky. 2002); *Commonwealth v. Suttles*, 80 S.W.3d 424, 426 (Ky. 2002); *Commonwealth v. Jones*, 880 S.W.2d 544, 545 (Ky. 1994). Under *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991), the Kentucky Supreme Court held that:

> 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. For the purpose of ruling on the motion, **the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions of credibility and weight to be given to such testimony**.

(emphasis added). Further, the Court in *Benham* held that, "[I]n appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury [or fact-finder] to find guilt." *Id.* at 187. Because, it is readily apparent from the record that the Commonwealth presented sufficient evidence at trial to support the jury's verdict finding the appellant guilty of stalking in the first degree the trial court properly overruled appellant's motion for new trial/judgment notwithstanding the verdict.

CONCLUSION

WHEREFORE, for the above-stated reasons, the Jefferson Circuit Court properly convicted and sentenced the appellant. Therefore the Commonwealth respectfully request that the Court of Appeals Opinion Affirming and the Jefferson Circuit Court's Judgment of Conviction and Sentence After Jury Trial convicting Mr. Maras of Stalking in the First Degree and Violation of a Protective Order and sentencing appellant to a total term of five (5) years imprisonment be affirmed.

Respectfully submitted,

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