RENDERED: October 22, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000894-MR

RICHARD TRAVIS MORROW — APPELLANT

v.

APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE WILLIAM T. CAIN, JUDGE
ACTION NOS. 01-CR-00029 AND 01-CR-00060

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART
AND REMANDING

** ** ** ** **

BEFORE: JOHNSON, TAYLOR, AND VANMETER, JUDGES.

JOHNSON, JUDGE: Richard Travis Morrow has appealed from a final judgment and sentence of the Pulaski Circuit Court entered on April 18, 2003, which, after the jury found Morrow guilty on one count of burglary in the first degree,[1] one count of burglary in the second degree,[2] two counts of theft by unlawful taking, over

[1] Kentucky Revised Statutes (KRS) 511.020.

[2] KRS 511.030.

$300.00,[3] and on one count of receiving stolen property,[4] sentenced Morrow to ten years' imprisonment in accordance with the jury's recommendations. Having concluded that the submitted jury instruction for Morrow's receiving stolen property charge was improper, we reverse Morrow's conviction for that offense and remand for further proceedings. Having further concluded that no other errors occurred which would warrant a reversal of Morrow's remaining convictions, we affirm that portion of the trial court's final judgment and sentence.

Shortly before midnight on January 17, 2001, Officer Shannon Smith of the Somerset Police Department received a message from dispatch informing him that a suspicious vehicle had been reported near the Tom Buis residence in Somerset, Pulaski County, Kentucky. Dispatch also informed Officer Smith that Buis was out of town at the time. Upon his arrival at the Buis residence, Officer Smith observed Morrow standing in Buis's yard near the home. According to Officer Smith, Morrow was removing work gloves from his hands and was attempting to place the gloves in his pockets. In addition, Officer Smith noticed that the gloves smelled of gasoline and that Morrow was covered with "brownish-gold" dust on his hands, shirt, and pants.

[3] KRS 514.030.

[4] KRS 514.110.

Officer Smith also determined that the "suspicious vehicle" was owned by David Lee Debord, II.

Officer Jeff Phillipi arrived on the scene shortly thereafter and joined Officer Smith in the investigation. Both officers observed smoke coming from inside Buis's home and became concerned that the house might be on fire. Consequently, Officer Smith and Officer Phillipi entered the home and began searching the house. After gaining entry to the home, the officers soon determined that the smoke was originating from the basement. Upon searching the basement, the officers discovered a large, upright safe with a hole in one of the upper corners, a portable gasoline-operated saw,[5] and a sack containing several collectible knives which had apparently been removed from the safe. In addition, the officers found Debord hiding underneath the stairwell. The following day, on January 18, 2001, Debord gave recorded statements to police officers admitting that he and Morrow had twice burglarized the Buis residence the previous day.[6]

On February 21, 2001, and March 21, 2001, in separate indictments, a Pulaski County grand jury indicted Morrow on one

[5] The smoke in the house turned out to be the exhaust from the gasoline-operated saw. It was later determined that the saw had been stolen from Don Molden Pipe Supply in Somerset approximately one month earlier.

[6] Debord stated that he and Morrow took three guns from Buis's home a few hours prior to the time when they entered the house for a second time shortly before midnight.

count of burglary in the first degree, one count of burglary in the second degree, two counts of theft by unlawful taking, over $300.00, and on one count of receiving stolen property.[7] Morrow entered pleas of not guilty to all of the charges in his indictment and the case proceeded to trial.

A jury trial was held on February 18-20, 2003, in the Pulaski Circuit Court. After hearing the evidence presented, the jury returned a verdict finding Morrow guilty on all charges. The jury recommended that Morrow be sentenced to ten years' imprisonment for his conviction for burglary in the first degree, five years' imprisonment for his conviction for burglary in the second degree, one year imprisonment for each conviction for theft by unlawful taking, over $300.00, and one year imprisonment for his conviction for receiving stolen property. The jury recommended that all of Morrow's sentences be served concurrently for a total sentence of ten years' imprisonment. After Morrow's post-judgment motions were denied and after a pre-sentence investigation had been completed, the trial court entered a final judgment and sentence on April 18, 2003, sentencing Morrow to ten years' imprisonment in accordance with the jury's recommendations. This appeal followed.

[7] Debord was indicted on identical charges under the same indictments. In addition, Debord was charged as being a persistent felony offender in the first degree. See KRS 532.080(3). According to the record, Debord was sentenced to ten years' imprisonment as a result of his involvement with the burglary at the Buis residence.

Morrow raises several arguments on appeal. We first turn to Morrow's claim that he was denied due process of law and the right to a fair trial when the Commonwealth's Attorney allegedly attempted to define reasonable doubt during the voir dire stage of the proceedings below. According to Morrow, the trial court erred by not granting his request for a mistrial. We disagree.

In Commonwealth v. Callahan,[8] our Supreme Court discussed the rule prohibiting either the prosecuting attorney or defense counsel from attempting to define reasonable doubt:

> The removal of the definition of reasonable doubt from the instructions in the Commonwealth is well founded in case and textbook law. In 9 Wigmore, Evidence, Section 2497 (Chadbourn rev. 1981), there is contained an excellent annotation on the subject, one quote, at page 412, reading:
>
> > We do not think that the phrase "reasonable doubt" is of such unknown or uncommon signification that an exposition by the trial judge is called for. Language that is within the comprehension of persons of ordinary intelligence can seldom be made plainer by further defining or refining. All persons who possess the qualifications for jurors know that a doubt of the guilt of the accused, honestly entertained, is a reasonable doubt.

[8] Ky., 675 S.W.2d 391, 392-93 (1984).

> Having prohibited the court from definition of the term "reasonable doubt" in the instructions, by RCr 9.56(2), we can hardly condone a client-serving definition by defense counsel or prosecutor in either voir dire, opening statement or closing argument. . . . We do not intend by this holding that counsel cannot point out to the jury which evidence, or lack thereof, creates reasonable doubt, but all counsel shall refrain from any expression of the meaning or definition of the phrase "reasonable doubt."

In the case sub judice, Morrow contends that the following statement made by the Commonwealth's Attorney during voir dire was an improper attempt to define reasonable doubt:

> [Commonwealth's Attorney]: One thing I kind of touched on a little bit and I'll get into a little bit more. Obviously you're here to decide beyond a reasonable doubt – that's your standard – if he broke into this home on January 17, 2001, and part of your duties in doing that is it's your job to – everybody that takes the stand here, it's your job to assess their credibility. That means it's your job to decide if they're telling the truth or not. The fact that we're having a trial here pretty much means you can expect we're going to have some conflicting testimony, and that's your job to wade through that. Just because we have conflicting testimony doesn't mean . . . Can you all, as jurors, do that? Do you all feel comfortable with deciding who's telling the truth and who's not? Some people feel like they shouldn't do that.
>
> One of the things that I'm going to touch on here . . . I talked a little bit about police officers are just like everybody else. They're police officers. They're human beings. They make mistakes. I think you're going to hear in this case

> that some of this evidence they found that night in the burglary, mainly [Morrow's] driver's license, social security card and some other things that were removed from the car, the police have lost. They've lost that evidence. We're not going to hide it from you. We're not going to . . . I mean, it's a fact. I will show you that there's plenty, more than enough evidence to convict him – in fact, there's overwhelming evidence to convict him, but do you all understand we're not here to decide if the police made a mistake in losing the evidence? Because I'll tell you right now they did. They shouldn't have lost it. That's a mistake. I'm not happy about it. But it's your job to decide is there enough to convict him of breaking into this house. Does anybody have a problem with that?
>
> Do you have a problem with that, sir?
>
> Prospective Juror: Isn't it beyond a reasonable doubt then?
>
> [Commonwealth's Attorney]: Well, that's not . . . I feel I can. But do you understand the question before you is not did the police make a mistake?

A Callahan violation occurs where there has been an attempt "to use other words to convey to the jury the meaning of 'beyond a reasonable doubt.'"[9] In the case at bar, the Commonwealth's Attorney merely stated that he believed he had enough evidence to convict Morrow of the crimes with which he had been charged. Simply stated, the above remarks did not constitute an impermissible attempt to define reasonable doubt.

[9] Simpson v. Commonwealth, Ky., 759 S.W.2d 224, 226 (1988).

Accordingly, Morrow's first claim of error is plainly without merit.

Next, Morrow contends that the trial court erred by admitting into evidence a tape-recorded telephone conversation between Morrow and two of his friends. According to Morrow, the audiotape of the telephone call, which was made by Morrow while he was in jail, was of too poor a quality to be played to the jury. We disagree and hold that the trial court did not err by admitting the audiotape into evidence.

"'It is well settled that the admission of tape recordings at trial rests within the sound discretion of the trial court.'"[10] The mere fact that some portions of an audiotape may be difficult to understand because of background noise or static does not necessarily preclude the admissibility of the whole tape.[11] An audiotape is properly admitted if there are audible portions and if "the tapes [are] not so incomprehensible as to the render them wholly untrustworthy."[12]

[10] Johnson v. Commonwealth, Ky., 90 S.W.3d 39, 45 (2003)(quoting United States v. Robinson, 707 F.2d 872, 876 (6th Cir. 1983)).

[11] Norton v. Commonwealth, Ky.App., 890 S.W.2d 632, 636 (1994)(stating that "[w]hile we agree with appellant that portions of the tapes are difficult to readily hear and understand, due to background noise and static in transmission, they are by no means wholly inaudible nor unintelligible. In our opinion, the inaudible portions are not so substantial as to render the recordings untrustworthy as a whole").

[12] Johnson, 90 S.W.3d at 46.

Our review of the audiotape in question shows that while there are portions of the tape which are somewhat difficult to understand, the tape is nonetheless of sufficient clarity to be able to hear and understand the conversation between Morrow and his friends. Consequently, we cannot say that the trial court abused its discretion by admitting this audiotape into evidence.

In two closely-related arguments, Morrow argues that both Deputy Scott Trotter of the Pulaski County Sheriff's Department and the Commonwealth's Attorney improperly "interpreted" statements that were made on the audiotape. Morrow contends that these alleged errors warrant a reversal of his convictions. We disagree.

First, with respect to Deputy Trotter's testimony, Morrow claims that Deputy Trotter "was allowed to identify the voice on the tape as the voice of [Morrow], which he should not have been entitled to do. The question of the identity of the caller should have been left to the jury." This argument is clearly without merit, since Deputy Trotter's testimony was offered simply as a means of authenticating the tape recording in order to permit its introduction into evidence.[13]

[13] See Brock v. Commonwealth, Ky., 947 S.W.2d 24, 30 (1997)(noting that after the adoption of Kentucky Rules of Evidence 901(a) in 1992, a witness's testimony identifying an individual's voice on a tape recording is sufficient authentication to permit the introduction of the tape into evidence).

Second, as for the allegedly improper comments made by the Commonwealth's Attorney, Morrow points to a statement made by the prosecutor during the Commonwealth's closing argument:

> Take [a] listen to what he says on the tape. He says, "Go over to Jessica's (sic) house," said "We're in trouble," and then said "burglary."

While we agree that the above comments were probably improper, we do not agree that this statement warrants a reversal of Morrow's convictions.

Initially, we note that Morrow failed to object to the Commonwealth's Attorney's comments at trial. As such, pursuant to RCr[14] 10.26, we consider this claim of error under our palpable error standard of review. "A palpable error is one which affects the substantial rights of a party and relief may be granted for palpable errors only upon a determination that a manifest injustice has resulted from the error."[15] For an error to be palpable, it must have been "easily perceptible, plain, obvious and readily noticeable."[16] Moreover, "[t]he reviewing court must conclude that a substantial possibility exists that the result would have been different in order to grant relief."[17]

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[14] Kentucky Rules of Criminal Procedure.

[15] Partin v. Commonwealth, Ky., 918 S.W.2d 219, 224 (1996).

[16] Burns v. Level, Ky., 957 S.W.2d 218, 222 (1998)(citing Black's Law Dictionary (6th ed. 1995)).

[17] Partin, 918 S.W.2d at 224.

As a general rule, "[i]t is for the jury to determine as best it can what is revealed in the tape recording without embellishment or interpretation" by either a witness or the counsel for either party.[18] Hence, even though the Commonwealth's Attorney attempted to quote from the audiotape during closing arguments,[19] his comments could be characterized as an improper "interpretation" since the audiotape was not perfectly clear. However, we cannot conclude that there is a substantial possibility that the outcome would have been different without these remarks, or that a "manifest injustice" has resulted because of the Commonwealth's Attorney's statements. The audiotape was available for the jurors to review during deliberations, and the Commonwealth's Attorney urged the jurors to do so.[20] Accordingly, even if the Commonwealth's Attorney's statements were improper, his comments do not rise to the level of palpable error.

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[18] Gordon v. Commonwealth, Ky., 916 S.W.2d 176, 180 (1995).

[19] Our review of the audiotape shows that the Commonwealth's Attorney misquoted Morrow during closing arguments. Instead of saying "Go over to Jessica's house," Morrow can be heard saying "over at next door, at what's his name's place, go over there to the utility closet, and there's some stuff in there, get 'em out and get the fuck rid of 'em." In addition, instead of saying "we're in trouble," Morrow can be heard saying "we're lookin' at a lot of time," and "we're lookin' at some time."

[20] See Perdue v. Commonwealth, Ky., 916 S.W.2d 148, 155 (1996)(holding that even though the prosecutor misquoted a statement made by the defendant on an audiotape, such an error was "harmless" since the audiotape and accompanying transcript were made available to the jurors for review during deliberations).

We next address Morrow's claim that the trial court erred by submitting an improper jury instruction with regard to his receiving stolen property charge. Specifically, Morrow argues that the submitted instruction failed to include a scienter requirement, i.e., the instruction did not require the jury to find that Morrow received the gasoline-operated saw knowing that the saw had been stolen. The Commonwealth has conceded that the submitted instruction was indeed improper.[21]

[21] The submitted instruction clearly omitted the required scienter element. KRS 514.110(1) reads in full as follows:

> A person is guilty of receiving stolen property when he receives, retains, or disposes of movable property of another knowing that it has been stolen, or having reason to believe that it has been stolen, unless the property is received, retained, or disposed of with intent to restore it to the owner [emphasis added].

The receiving stolen property instruction at issue stated in relevant part as follows:

> You will find the Defendant guilty of Receiving Stolen Property under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:
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> A. That in this county on or about the 17th day of January, 2001, and before the finding of the Indictment herein, he received a saw which belonged to Don Molden Pipe Supply;
>
> B. That said saw had been stolen property [when] he received it;
>
> C. That he did not receive the saw with the intention of restoring it to its rightful owner; and
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> D. That when the Defendant received the saw it had a value of $300.00 or more.

The contested issues on appeal are whether the error has been preserved for appellate court review, and if not, whether the error constitutes "palpable error" warranting a reversal of Morrow's conviction for receiving stolen property.

We first conclude that this error was not properly preserved, and that it will therefore be considered under our palpable error standard of review. "[I]n order to preserve the giving or failure to give an instruction as error for appeal, it is mandatory that an objection be made prior to the Court instructing the jury and further that the objection must be stated specifically together with grounds upon which the objection is made" [emphasis added].[22] In the instant case, no objection was made to the receiving stolen property instruction until after the instructions had been read to the jury. Therefore, since this error was not properly preserved, we apply our palpable error standard of review.

As we mentioned previously, the receiving stolen property instruction was clearly an erroneous instruction since it omitted the required scienter element.[23] The Commonwealth

[22] Commonwealth v. Collins, Ky., 821 S.W.2d 488, 492 (1991). See also RCr 9.54(2)(stating that "[n]o party may assign as error the giving or the failure to give an instruction unless the party's position has been fairly and adequately presented to the trial judge by an offered instruction or by motion, or unless the party makes objection before the court instructs the jury, stating specifically the matter to which the party objects and the ground or grounds of the objection" [emphasis added]).

[23] See Grider v. Commonwealth, Ky., 479 S.W.2d 11, 12-13 (1972)(stating that in a prosecution for receiving stolen property, the jury instruction was

argues that the faulty instruction was "harmless error" and does not warrant a reversal of Morrow's receiving stolen property conviction. In support of this argument, the Commonwealth relies in part upon the following language from Brown v. Commonwealth:[24]

> Appellant Ross claims he was entitled to a directed verdict of acquittal on receiving stolen property. . . . Ross insists that there was no proof that he knew the property was stolen. However, direct proof of knowledge is not required by our statute. KRS 514.110(2) states: "The possession by any person of any recently stolen movable property shall be prima facie evidence that such person knew such property was stolen." The owner testified that his bicycle was stolen on the same date it was found in Ross's possession. Furthermore, Ross fled and abandoned the bicycle when the police stopped to speak to him. This was sufficient to submit the charge of receiving stolen property to the jury.

According to the Commonwealth, this language stands for the proposition that under KRS 514.110, the prosecution "was not required to prove that [Morrow] knew that the [ ] saw was stolen when he possessed it." We disagree. The above quoted language from Brown merely states that in a prosecution for receiving stolen property, the Commonwealth is not required to proffer direct evidence tending to show that the defendant knew the property had been stolen. In other words, circumstantial

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"fatally defective" for failing to include a requirement that the jury find that the defendant knew the property had been stolen).

[24] Ky.App., 914 S.W.2d 355, 357 (1996).

evidence tending to show that the defendant knew that the property had been stolen will be sufficient to support a conviction, and KRS 514.110(2) allows a trial court to submit a case to the jury if there is evidence of the defendant having possessed "recently stolen movable property."[25] Hence, KRS 514.110(2) does not relieve the Commonwealth of the burden of proving the knowledge requirement in a prosecution for receiving stolen property.

The Commonwealth further relies upon the following language from Neder v. United States,[26] where the Supreme Court of the United States stated:

> In this situation, where a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless.

[25] It is important to note that KRS 514.110(2) is intended to act as a guide for trial courts when determining whether the Commonwealth has proffered sufficient proof to submit the case to the jury. It does not allow for the inclusion of an instruction stating that the possession of "recently stolen movable property shall be prima facie evidence that such person knew such property was stolen." See Jones v. Commonwealth, 291 Ky. 719, 165 S.W.2d 566, 567 (1942)(noting that the language stating that "'[t]he possession by any person of any stolen property shall be prima facie evidence of his guilt under this section' . . . does not direct that the jury be instructed that the possession of stolen property shall be prima facie evidence of guilt. The provision is more in the nature of a guide to be followed by the trial judge in determining whether there is sufficient evidence to warrant the submission of a case to the jury"). The Jones case was decided under the former receiving stolen property statute, KRS 433.290.

[26] 527 U.S. 1, 17, 119 S.Ct. 1827, 1837, 144 L.Ed.2d 35 (1999).

The Commonwealth contends that in the case at bar, the evidence related to the knowledge requirement was both "uncontested and supported by overwhelming evidence," and that as such, the improper jury instruction was harmless error. We do not agree. Although the omitted element, i.e., knowledge, may not have been contested by the introduction of conflicting evidence, it was not "supported by overwhelming evidence." The Commonwealth proffered evidence tending to show that a saw had been stolen from Don Molden Pipe Supply in December 2000, and that on the night of his arrest in January 2001, Morrow was in possession of a saw matching the description of the stolen saw. While this is some evidence of knowledge on Morrow's part, we cannot conclude that this amounted to "overwhelming evidence."

Furthermore, although the Court in Brown upheld a receiving stolen property conviction based upon evidence that the defendant had possessed "recently stolen movable property," there is nothing in the Brown decision indicating that the jury instructions in that case omitted the knowledge requirement. Presumably, the jury instructions in Brown required the jury to find that the defendant knew or had reason to know that the property had been stolen. Accordingly, we do not find the language from Neder to be applicable under the facts of the instant case.

Therefore, since the instructions in the case sub judice permitted the jury to find Morrow guilty of receiving stolen property without requiring a finding that he knew or should have known that the saw had been stolen, and since the evidence tending to establish the knowledge element was not "overwhelming," we conclude that the improper jury instruction constituted palpable error. Accordingly, we reverse Morrow's conviction for receiving stolen property.

Finally, we turn to Morrow's claim that the bailiff improperly answered a juror's question during jury deliberations. According to the bailiff's affidavit filed with Morrow's post-judgment motions, the bailiff, in response to a juror's question, informed the juror that "each instruction was a separate offense and they could convict on each of them." Morrow argues that this conduct justifies a reversal of all of his convictions. We disagree and hold that while the bailiff's actions were clearly improper, Morrow has waived this claim of error by failing to object in a timely manner.

We first note that the apparently inexperienced bailiff clearly acted improperly by answering the juror's question. As a general rule under RCr 9.68,[27] RCr 9.74,[28] and KRS

[27] RCr 9.68 states in full as follows:

> When the jury is kept together in charge of officers, the officers must be sworn to keep the jurors together, and to suffer no person to speak to,

29A.320(1),[29] the officer in charge of the jury during deliberations is prohibited from communicating with the jurors.[30] However, Morrow waived this claim of error by failing to object in a timely fashion.

After answering the juror's question, the bailiff informed the trial judge as to what had occurred. The trial judge, in turn, notified both the Commonwealth's Attorney and counsel for Morrow. Our review of the record shows that

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> or communicate with, them on any subject connected with the trial, and not to do so themselves.

[28] RCr 9.74 reads in full as follows:

> No information requested by the jury or any juror after the jury has retired for deliberation shall be given except in open court in the presence of the defendant (unless the defendant is being tried in absentia) and the entire jury, and in the presence of or after reasonable notice to counsel for the parties.

[29] KRS 29A.320(1) states in full as follows:

> When the case is finally submitted to the jury, they shall retire for deliberation. When they retire, they shall be kept together in some convenient place, under the charge of an officer, until they agree upon a verdict or are discharged by the court, subject to the Supreme Court rules permitting them to separate temporarily at night and for their meals. The officer having them under his charge shall not allow any communications to be made to them, nor make any himself, except to ask them if they have agreed upon their verdict, unless by order of the court; and he shall not, before their verdict is rendered, communicate to any person the state of their deliberations, or the verdict agreed upon.

[30] See also Johnson v. Commonwealth, Ky., 12 S.W.3d 258, 266 (1999)(stating that "[a]pproximately ten minutes after the jury began their deliberations, a deputy sheriff entered the jury room for the purpose of delivering lunch menus. A juror asked the deputy if there would be a separate sentencing phase of the trial in the event Appellant was found guilty and the deputy answered, 'Yes.' We agree with Appellant that this brief colloquy violated RCr 9.68, RCr 9.70, RCr 9.74 and KRS 29A.320(1)").

Morrow's counsel specifically chose not to move for a mistrial at that time.[31] Such an election on the part of defense counsel constituted a waiver of the error.

In Gabow v. Commonwealth,[32] the Supreme Court discussed an analogous situation in which there were allegations of impropriety regarding the sequestration of the jurors. The Supreme Court stated that since counsel for the defendant was in the courtroom at the time of the alleged improprieties and was aware of what was transpiring, he waived "any impropriety with respect to the custody of the jury" by failing to object at the time.[33] The Court further stated that raising the issue for the first time in a post-judgment motion for a new trial was insufficient to preserve the error for appellate review.[34]

Similarly, in the instant case, Morrow was aware of the bailiff's conduct prior to the rendering of the jury's verdict, but deliberately chose not to object or move for a mistrial at that time. Instead, Morrow raised the issue for the first time in his post-judgment motion for a new trial.

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[31] Our review of the record shows that when the trial court, Commonwealth's Attorney, and defense counsel were discussing options regarding the bailiff's conduct, the jury announced that it had reached a verdict. According to the record, defense counsel for Morrow stated that he wanted to "let it ride," meaning that he did not wish to move for a mistrial.

[32] Ky., 34 S.W.3d 63, 73 (2000).

[33] Id.

[34] Id.

Accordingly, Morrow has waived this claim of error. Morrow will not be permitted to remain silent in the face of a known error, speculate on a favorable result, and subsequently raise the error in an untimely manner only after receiving an unfavorable verdict.[35]

Based on the foregoing, the final judgment and sentence of the Pulaski Circuit Court is affirmed in part, reversed in part, and this matter is remanded for further proceedings consistent with this Opinion.

ALL CONCUR.

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[35] See Fuller v. State, 365 So.2d 1010, 1012 (Ala.Ct.App. 1978)(holding that an error involving improper communications between a bailiff and a juror would not be considered in the absence of a timely objection at trial: "to allow defendant to complain of error at a later time would give him the opportunity to be aware of the error, but to remain silent, speculate on a favorable verdict, and in the event of an unfavorable verdict to obtain reversal on a ground which defendant deliberately chose not to raise by exception taken at the appointed time").