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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001243-MR

ROBERT FRANKLIN — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE FREDERIC COWAN, JUDGE
ACTION NO. 09-CR-000547

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
VACATING IN PART,
AFFIRMING IN PART, AND REMANDING

** ** ** ** **

BEFORE: ACREE, MOORE, AND NICKELL, JUDGES.

MOORE, JUDGE: Robert Franklin appeals the Jefferson Circuit Court's judgment convicting him of first-degree robbery and second-degree fleeing or evading police, and sentencing him to a total of ten years of imprisonment. After a careful review of the record, we vacate the trial court's judgment and remand with instructions for the trial court to correct the clerical error in the judgment. The

judgment of the circuit court is affirmed regarding the remaining issues raised in this appeal because the booking photograph was subject to the reciprocal discovery order and rule; there was no palpable error in the trial court's ruling concerning the Commonwealth's failure to disclose the name of a potential eyewitness; and the trial court did not err in failing to grant a mistrial or a judgment notwithstanding the verdict based upon a juror's admission.

I. FACTUAL AND PROCEDURAL BACKGROUND

In this case, when the crime occurred, the victim had just returned home from paying her cellular telephone bill, and she had $730.00 in her possession. She had been home for approximately ten minutes with her three-year-old granddaughter when she heard a tap on her door. Two men barged in, shut the door, and stated that they were going to rob her. The taller of the two men searched through her clothes and purses while the shorter of the two men held a gun pointed at the victim and her granddaughter. Both men wore masks. The lighting in her apartment was dim because her window was covered by a blanket.

After the men left her house, the victim called 9-1-1 and flagged down a police car. Sergeant Marcus Laythem from the Louisville Metro Police Department was in uniform and patrolling the area in an unmarked car when he heard on his police radio a report of a robbery. He saw two black males walking out an alley near the victim's street, and he noticed that one of the males was tall and thin, while the other was shorter and heavier. These characteristics matched the descriptions of the two robbers who were reported over Sergeant Laythem's

police radio. The men separated, and one of them began running. Sergeant Laythem exited his car; identified himself as a police officer; ordered the man to stop; and when the man did not, he began chasing the man. Eventually after giving chase, Sergeant Laythem caught the man, Robert Franklin. Franklin was arrested for fleeing or evading and was ultimately also charged in the robbery.

Following a jury trial, Franklin was convicted of first-degree robbery and second-degree fleeing or evading police. The trial court sentenced him to ten years of imprisonment for the first-degree robbery conviction, and to twelve months of imprisonment for the second-degree fleeing or evading police conviction. Both sentences were ordered to be run concurrently, for a total of ten years of imprisonment.

Franklin now appeals, contending as follows: (a) the trial court erred and violated his federal and state constitutional rights to due process and a fair trial when the court excluded Franklin's booking photograph based upon a discovery violation; (b) his federal and state constitutional rights to due process and a fair trial were violated when the Commonwealth failed to disclose the name of a potential eyewitness; (c) the trial court erred when it refused to grant a mistrial or a judgment notwithstanding the verdict upon a juror's voluntary admission, minutes after the guilty verdict was returned, that she was pressured into voting "guilty"; and (d) the trial court erred to Franklin's substantial prejudice by sentencing him to twelve months of imprisonment for the second-degree fleeing or evading police

conviction, which was in conflict with the Commonwealth's offer -- and Franklin's acceptance -- of a one-day sentence.

I. ANALYSIS

A. EXCLUSION OF BOOKING PHOTOGRAPH

Franklin first alleges that the trial court erred and violated his federal and state constitutional rights to due process and a fair trial when the court excluded Franklin's booking photograph based upon a discovery violation. Specifically, Franklin contends that he was arrested soon after the crime occurred and that his physical appearance at the time he was arrested -- as apparent in his booking photograph -- was quite different from the police dispatch description which was based on the information provided to the police by the victim. The photograph reveals that Franklin was wearing a blue sweatshirt, rather than a dark brown jacket, at the time he was arrested. He was also much younger than the police dispatch description of the perpetrators being forty to forty-five years old.

The Commonwealth objected at trial to Franklin's request to introduce the booking photograph as evidence and argued that the photograph had not been provided to the Commonwealth as required by the court's reciprocal discovery order. Franklin's defense counsel asserted that because the photograph was in the possession of the Louisville Metro Department of Corrections, a public agency, it was not subject to the reciprocal discovery order. The trial court agreed with the Commonwealth, and denied the introduction of the photograph based upon the discovery violation.

Pursuant to RCr[1] 7.24(3)(A)(ii),

> If the defendant requests disclosure under Rule 7.24(2), upon compliance with such request by the Commonwealth, and upon motion of the Commonwealth, the court may order that the defendant permit the Commonwealth to inspect, copy, or photograph books, papers, documents or tangible objects which the defendant intends to introduce into evidence and which are in the defendant's possession, custody, or control.

The trial court in this case entered an order that contained the following provision:

> Reciprocal Discovery – RCr 7.24(3). If the Defendant does not file notice pursuant to paragraph 6(b) of this Order,[2] upon compliance by the Commonwealth, the Defendant shall permit the Commonwealth to inspect, copy or photograph[:] (a) books, papers, documents, or tangible objects which the Defendant intends to introduce into evidence and which are in the Defendant's possession, custody, or control. . . .

The court subsequently found that Franklin had violated the reciprocal discovery order by failing to provide the booking photograph to the Commonwealth. Accordingly, the court denied Franklin's request to introduce it as evidence at trial. Pursuant to RCr 7.24(9):

> If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or an order issued pursuant thereto, the court may direct such party to permit the

[1] Kentucky Rule of Criminal Procedure.

[2] Paragraph 6(b) of the order provided as follows:

> If counsel for the Defendant does not desire discovery as provided in this Order, notice must be filed within ten (10) days of entry of this Order unless good cause is shown. Upon the timely filing of such notice, all parties are released from the obligations imposed upon them by this Order.

> discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as may be just under the circumstances.

Thus, we must determine whether the trial court appropriately denied Franklin's request to introduce the booking photograph as evidence. In *Chestnut v. Commonwealth*, 250 S.W.3d 288 (Ky. 2008), an issue arose concerning the Commonwealth's failure to disclose the defendant's oral incriminating statement. The Kentucky Supreme Court concluded "that nondisclosure of a defendant's incriminating oral statement by the Commonwealth during discovery constitutes a violation of the discovery rules under RCr 7.24(1)." *Chestnut*, 250 S.W.3d at 296. The Court reasoned: "The premise underlying RCr 7.24(1) is not only to inform the defendant that *he* has made these statements, as he should be clearly aware, but rather to inform the defendant (and to make sure his counsel knows) that the Commonwealth is aware that he has made these statements." *Id*. at 297.

Although the Court in *Chestnut* analyzed a different provision of RCr 7.24 than the provision that is applicable in the present case (*i.e.*, RCr 7.24(3)(A)(ii)), the same reasoning applies here. The booking photograph was in the possession of the LMDC, and therefore it was in the Commonwealth's possession pursuant to the reasoning set forth in *Eldred v. Commonwealth*, 906 S.W.2d 694, 702 (Ky. 1994), *abrogated on other grounds by Commonwealth v. Barroso*, 122 S.W.3d 554, 564 (Ky. 2003). However, pursuant to the reasoning in *Chestnut*, the purpose of RCr 7.24(3)(a)(ii) is not only to inform the Commonwealth that it has the photograph,

as it should be aware, but rather to inform the Commonwealth that the defendant is aware of the photograph.[3] Accordingly, the trial court did not err in denying Franklin's request to introduce the booking photograph into evidence because he had violated the court's reciprocal discovery order and RCr 7.24(3)(A)(ii).

However, even if we had found that the trial court erred in denying the introduction of the photograph under the reciprocal discovery rule, the error was harmless. Kentucky Rule of Criminal Procedure 9.24 sets forth the "harmless error" doctrine and provides as follows:

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order, or in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order unless it appears to the court that the denial of such relief would be inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding that does not affect the substantial rights of the parties.

"Under the harmless error doctrine, if upon consideration of the whole case it does not appear that there is a substantial possibility that the result would have been any different, the error will be held non-prejudicial." *Gosser v. Commonwealth*, 31 S.W.3d 897, 903 (Ky. 2000).

[3] In his reply brief, Franklin mentions Kentucky Revised Statute [KRS] 500.070(2). We note that simply requiring the defendant to provide reciprocal discovery of evidence does not run afoul of KRS 500.070(2), which provides: "No court can require notice of a defense prior to trial time." Providing evidence in reciprocal discovery is different from being required to notify the Commonwealth of a defense.

In the present case, the victim testified during trial that the two robbers wore dark clothing, which she specified as appearing in her dimly lit home to be beige, khaki, or brown in color. Sergeant Marcus Laythem from the Louisville Metro Police Department, who arrested Franklin, testified that the descriptions of the two robbers that were broadcast over the police radio were as follows: (1) a dark-skinned black male, forty to forty-five years old, who was six-foot-two-inches to six-foot-four-inches tall, and was wearing a dark brown jacket; and (2) a black male, forty to forty-five years old, who was about six feet tall, and was wearing a cream-colored jacket. Sergeant Laythem admitted that at the scene, the victim was not able to identify Franklin as one of the robbers. However, Sergeant Laythem testified that Franklin was wearing dark clothing when he caught him after the chase had ensued, and Franklin had in his pockets the exact description of what was taken from the victim in her home that day, including not only the total amount of money stolen (*i.e.*, $730.00), but the exact denominations of the individual bills that the victim said were stolen from her.

Therefore, considering that Franklin, like the perpetrator described in the radio dispatch, was a tall, thin, black male, who was seen and arrested near the victim's house very soon after the robbery was committed and who had in his pockets the exact amount of money and the exact denominations of the money that were stolen from the victim, there is not a substantial possibility that the result of the trial would have been different if the booking photograph had been introduced.[4]

[4] Although there was a discrepancy in the age descriptions of the perpetrators as sent out in the radio dispatch and Franklin's age at the time he was arrested (Franklin was apparently about

Even though Franklin contends that he was wearing blue clothing in the photograph; that no clothing that had been cast off was found in the neighborhood following the robbery; and that the police dispatch described the taller perpetrator as wearing a dark brown jacket, the victim testified that her home was dimly lit at the time of the robbery and she had a blanket over her window to keep the sunlight out; accordingly, it appeared to her that both perpetrators were wearing dark clothing. Consequently, even if the trial court had erred in denying Franklin's request to introduce the booking photograph into evidence, any such error was harmless.

B. FAILURE TO DISCLOSE NAME OF POTENTIAL EYEWITNESS

Franklin next asserts that his federal and state constitutional rights to due process and a fair trial were violated when the Commonwealth failed to disclose the name of a potential eyewitness. Franklin acknowledges that this issue is not preserved, but he asks us to review this claim for palpable error. Kentucky Rule of Criminal Procedure 10.26 provides as follows: "A palpable error which affects the substantial rights of a party may be considered . . . by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error."

> [T]he requirement of "manifest injustice" as used in RCr 10.26 . . . mean[s] that the error must have prejudiced the substantial rights of the defendant, . . . *i.e.*, a substantial

twenty years old at the time), the victim testified at trial that she believed at the time of the robbery that the two robbers were young men.

> possibility exists that the result of the trial would have been different. . . .
>
> [The Kentucky Supreme Court has] stated that upon consideration of the whole case, the reviewing court must conclude that a substantial possibility exists that the result would have been different in order to grant relief.

Castle v. Commonwealth, 44 S.W.3d 790, 793-94 (Ky. App. 2000) (internal quotation marks omitted).

Franklin contends that during trial, the victim testified that although she did not see the robbers' faces because they were wearing masks at the time they were in her house, her neighbor saw the two men without their masks as they were leaving her house. The neighbor even spoke to them. Franklin also claims the victim attested that the neighbor showed the police the direction the two men went after leaving the victim's house.

Sergeant Laythem testified that he was unable to find anyone willing to come forward with information about the crime. When Sergeant Laythem was asked at trial whether he had interviewed the neighbor, he said that he had never seen the neighbor, as the neighbor was not there at the scene when Sergeant Laythem was there. Sergeant Laythem was also asked whether he had ever obtained the neighbor's name, and he replied that he thought the name was listed in the report. After looking at the file, Sergeant Laythem revealed that the neighbor's name was William Chandler.

Defense counsel objected at that point. The trial court asked defense counsel what she wanted the trial court to do about the alleged discovery violation

but she failed to request anything. A couple of minutes later, during the same bench conference concerning the Commonwealth's failure to provide the name of the eyewitness neighbor to the defense, the trial court again asked whether defense counsel wanted to make any motions, and defense counsel again remained silent.

Defense counsel continued her cross-examination of Sergeant Laythem. He testified that he attempted to speak with the neighbor, but the neighbor declined to speak with the police. Sergeant Laythem attested that the neighbor did not give police any type of description of the men.

As previously discussed, defense counsel failed to request any relief from the trial court concerning the Commonwealth's failure to disclose the name of the neighbor who allegedly saw the two robbers leaving the victim's house. Therefore, this claim is unpreserved for appellate review. Nonetheless, Franklin asks us to review it for palpable error.

Franklin argues that pursuant to case law extending from *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963), because the eyewitness neighbor's name was never provided to him in discovery, the Commonwealth violated Franklin's due process rights. The Commonwealth was obligated to disclose evidence favorable to the defense, particularly exculpatory evidence that is known only to the prosecution. In *Brady*, the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material

either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87, 83 S.Ct. at 1196-97.

In the present case, there is no allegation, let alone any proof, that the neighbor's description of the two robbers would have been favorable to Franklin. Further, "[a] discovery violation justifies setting aside a conviction only where there exists a reasonable probability that had the evidence been disclosed the result at trial would have been different." *Weaver v. Commonwealth*, 955 S.W.2d 722, 725 (Ky. 1997) (internal quotation marks omitted); *see also Kyles v. Whitley*, 514 U.S. 419, 433, 115 S.Ct. 1555, 1565, 131 L.Ed.2d 490 (1995) (discussing "reasonable probability" element, as set forth in *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985)). In the present case, there is not a reasonable probability that the result of the trial would have been different but for the discovery violation. Sergeant Laythem testified that the description of one of the robbers that was sent out over the police radio dispatch was that one of them was a tall, thin, black man, and he attested that Franklin had those characteristics. Additionally, Sergeant Laythem attested that a pursuit occurred when he saw Franklin in the victim's neighborhood immediately after the robbery; that Sergeant Laythem told Franklin to stop because he was a police officer; that Franklin continued to run; that Sergeant Laythem chased Franklin through yards and over fences before catching him; that when he caught Franklin, Franklin had on his person the same amount of money that the victim said was stolen from her, $730.00; and that the money found on Franklin was in the exact denominations of

the bills the victim said had been stolen from her. Therefore, there is no reasonable probability that the result of the trial would have been different if the discovery violation had not occurred.

Moreover, defense counsel could have requested a continuance pursuant to RCr 7.24(9) so that she could speak with the neighbor regarding the description of the men he saw leaving the victim's house. But, defense counsel failed to request any relief. As the Court held in *Weaver*, a defendant "cannot intentionally decline to avail himself of [the] opportunity [to interview an eyewitness by requesting a continuance during trial] and then claim on appeal that he was prejudiced." *Weaver*, 955 S.W.2d at 726. Therefore, because Franklin did not request a continuance so that the neighbor could be interviewed, he cannot now claim on appeal that he was prejudiced. Consequently, there was no palpable error concerning this claim.

C. FAILURE TO GRANT A MISTRIAL OR JUDGMENT NOTWITHSTANDING THE VERDICT BASED UPON JUROR'S ADMISSION

Next, Franklin contends that the trial court erred when it refused to grant a mistrial or a judgment notwithstanding the verdict upon a juror's voluntary admission, minutes after the guilty verdict was returned, that she was pressured into voting "guilty." After the jury returned its guilty verdicts, the trial court asked the parties if either of them wanted the court to poll the jury. Neither party requested the jury to be polled.

A few minutes later, a juror asked the sheriff if she could speak to the court. She was permitted to approach the bench. When she did, she said the following to the trial court: "I don't feel like they had enough evidence and I felt like I was pressured to agree with everybody else. I don't want to take part in this. I thought I would be able to handle it but I can't." The court told her that it could not excuse her at that point because they were in the middle of trial, and she needed to be there the next day for the penalty phase. The court told her she could express her reservations to the rest of the jury during penalty phase deliberations to try to lessen Franklin's sentence, but that she needed to be there and she was ordered to be present for deliberations. The court asked the juror if she had been threatened. She responded that she had not been threatened, but that once she expressed her opinion in the jury room, the other jurors asked her multiple questions. She felt as though she was being interrogated by the other jurors. She said that some of the jurors were being "smart alecks" because she had her own opinion. She told the court that she did not want to be the next person on trial for "getting smart with somebody or cussing somebody out in the juror room."

Defense counsel moved for a mistrial, as well as judgment notwithstanding the verdict, on the ground that there was pressure on the juror to vote "guilty." However, the motions were denied. The court reasoned that the juror did not present any evidence of pressure or fraud beyond the typical scope of what occurs in jury deliberations and that a juror may not impeach his or her verdict.

We review the denial of a motion for a mistrial for an abuse of discretion. *See Martin v. Commonwealth*, 170 S.W.3d 374, 381 (Ky. 2005). "A manifest necessity for a mistrial must exist before it will be granted." *Id*. A "manifest necessity" is "an urgent or real necessity." *Commonwealth v. Scott*, 12 S.W.3d 682, 684 (Ky. 2000) (internal quotation marks omitted).

Additionally, in reviewing the denial of a motion notwithstanding the verdict, we use the same standard of review as we do for the denial of a directed verdict. *See Radioshack Corp. v. ComSmart, Inc.*, 222 S.W.3d 256, 261 (Ky. App. 2007). "[T]he test of a directed verdict 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." *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991).

> We first note that the Kentucky Supreme Court has held that
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> > a defendant's right to poll the jury will generally be deemed to have been validly waived if the defendant does not timely request the polling of the jury. In other words, a defendant may not sit on his rights only later to ask an appellate court for relief. Instead, the burden is on the defendant to assert affirmatively and timely his right to poll the jury.

Mayo v. Commonwealth, 322 S.W.3d 41, 58 (Ky. 2010). In the present case, Franklin did not ask for the jurors to be polled at the time they returned their guilty verdict. Thus, this claim, which essentially challenges the unanimity of the verdict, is waived.

Regardless, the claim also lacks merit. In *Grace v. Commonwealth*, 459 S.W.2d 143 (Ky. 1970), the appellant filed an affidavit from a juror, wherein the juror "stated that she had not agreed to the verdict." *Grace*, 459 S.W.2d at 144. Kentucky's highest court held on appeal that the verdict was not void, reasoning in part as follows: "RCr 10.04 states 'A juror cannot be examined to establish a ground for a new trial, except to establish that the verdict was made by lot.' It has long been held that a juror may uphold his verdict but may not impeach it." *Id*. (citing *Bowman v. Commonwealth*, 284 Ky. 103, 143 S.W.2d 1051 (1940); *Grider v. Commonwealth*, 398 S.W.2d 496 (Ky. 1966); and *Howard v. Commonwealth*, 240 S.W.2d 616 (Ky. 1951)).

In the present case, the juror was not threatened to vote "guilty." Rather, she stated she was merely questioned by the other jurors concerning her opinion in the case, and she faced some "smart-aleck" comments from the other jurors. Therefore, the trial court did not abuse its discretion in denying Franklin's motion for a mistrial based on the juror's allegations because a juror may not impeach her verdict.

Furthermore, based on the evidence presented at trial, including the fact that Franklin was found soon after the robbery in the victim's neighborhood with the same large amount of money on his person and the same denominations of the bills, it was not unreasonable for a juror to find him guilty. Consequently, the trial court did not err in denying Franklin's motion notwithstanding the verdict.

D. SENTENCE FOR SECOND-DEGREE FLEEING OR EVADING POLICE CONVICTION

Finally, Franklin alleges that the trial court erred to his substantial prejudice by sentencing him to twelve months of imprisonment for the second-degree fleeing or evading police conviction, which was in conflict with the Commonwealth's offer -- and Franklin's acceptance -- of a one-day sentence. Franklin acknowledges that this claim is not preserved for appellate review, but he argues that sentencing issues are jurisdictional.

Sentencing issues may be raised for the first time on appeal. *See Cummings v. Commonwealth*, 226 S.W.3d 62, 66 (Ky. 2007). Thus, even though this claim was not raised in the trial court, we will review it.

Franklin contends that after the jury returned its guilty verdicts concerning the felony charge of first-degree robbery and the misdemeanor charge of second-degree fleeing or evading police, the parties began discussing how to proceed with the penalty phase concerning the misdemeanor conviction. Franklin asserts that during the conversation, the Commonwealth offered "to settle the misdemeanor sentence for the minimum (one day), to which defense counsel agreed," rather than having the jury decide the penalty for that conviction. Franklin states that "[n]o colloquy was held pursuant to *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969) or RCr 8.08."[5] He contends that

[5] We note that Franklin's arguments under *Boykin* are misplaced. *Boykin* and RCr 8.08 both concern guilty plea colloquies and the fact that, before a court may accept a guilty plea, the court first must ensure that the guilty plea is voluntarily, intelligently, and knowingly entered. In the present case, the jury had already found Franklin guilty of the misdemeanor charge and the parties were merely discussing punishment; thus, Franklin did not enter, nor did he attempt to

only the robbery conviction was sent to the jury during the penalty phase, and the jury recommended a sentence of ten years of imprisonment for that conviction. At the sentencing hearing, the trial court sentenced Franklin to ten years of imprisonment for the robbery conviction and did not mention the fleeing or evading police conviction. However, the court's final judgment provided that Franklin was sentenced to ten years for the robbery conviction and twelve months, rather than one day, for the fleeing or evading police conviction.

The Commonwealth acknowledges in its appellate brief that the trial court made a clerical error when it entered a twelve-month sentence, rather than a one-day sentence, for fleeing or evading police in its judgment. Thus, the Commonwealth asks this Court, pursuant to RCr 10.10, to give leave to the trial court to correct that part of the judgment.

Upon review of the video record, it is apparent that the parties orally agreed to a sentence of one day for the misdemeanor conviction, and the trial court agreed to this arrangement. After the jury recommended ten years for the robbery conviction, the sentencing hearing was held, in which the court only mentioned the robbery conviction and sentenced Franklin to ten years for that crime. However, the final written judgment sentenced Franklin to ten years of imprisonment for robbery and twelve months of imprisonment for fleeing or evading police.

Pursuant to RCr 10.10,

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enter, a guilty plea. Consequently, there was no need for a colloquy consistent with *Boykin* and RCr 8.08.

> [c]lerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time on its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is perfected in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

In determining whether the error was clerical or judicial in nature, we must examine

> whether the error was the deliberate result of judicial reasoning and determination, regardless of whether it was made by the clerk, by counsel, or by the judge. . . . A clerical error involves an error or mistake made by a clerk or other judicial or ministerial officer in writing or keeping records. . . .

Cardwell v. Commonwealth, 12 S.W.3d 672, 674 (Ky. 2000) (internal quotation marks omitted). In *Cardwell*, the Court held that "[t]he omission in the original judgment of a provision that Cardwell's sentence was to run consecutive with his previous sentence was a mistake made in reducing the oral judgment to writing." *Id*.

The same logic applies in the present case. Our review of the proceedings reveal that the trial court orally agreed to the parties' stipulation that Franklin would receive a sentence of one day of imprisonment for his fleeing or evading police conviction and, in fact, the court only asked the jury to make a recommendation for the sentence to be imposed for the robbery conviction. And, the Commonwealth concedes this point. Thus, when the trial court entered its

written judgment that stated Franklin was sentenced to twelve months of imprisonment for the fleeing or evading police conviction, this was merely a mistake the court made in reducing the oral judgment to writing, as occurred in *Cardwell*. Therefore, we vacate and direct the circuit court to correct its judgment to provide that Franklin's sentence for fleeing or evading police is one day of imprisonment.

Accordingly, the judgment of the Jefferson Circuit Court is vacated and the court is directed to correct the clerical error in the judgment by changing the length of Franklin's sentence for the fleeing or evading police conviction from twelve months of imprisonment to one day of imprisonment. The judgment of the Jefferson Circuit Court is affirmed concerning all other issues raised in this appeal.

ALL CONCUR.

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