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# Commonwealth of Kentucky

# Court of Appeals

NO. 2010-CA-000313-MR

COMMONWEALTH OF KENTUCKY,
TRANSPORTATION CABINET,
DEPARTMENT OF HIGHWAYS — APPELLANT

v.

APPEAL FROM LETCHER CIRCUIT COURT
HONORABLE SAMUEL T. WRIGHT, III, JUDGE
ACTION NO. 06-CI-00448

ROCKY WATTS AND HIS WIFE,
PAMELA WATTS; RICKY WATTS; MARTHA
WATTS; RONNIE WATTS AND HIS
WIFE, FRANCIS WATTS; VICKIE
WATTS; AND VALLIE NALECZ AND
HER HUSBAND, NORBERT NALECZ — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, LAMBERT, AND VANMETER, JUDGES.

LAMBERT, JUDGE: In this mineral condemnation action, the Commonwealth of Kentucky, Transportation Cabinet, Department of Highways (the Commonwealth)

has appealed from the judgment and order of the Letcher Circuit Court entered following the return of a jury verdict setting a value of $210,000.00 for minerals underlying property needed for the reconstruction of U.S. Highway 119. After carefully reviewing the record, including the trial, as well as the parties' arguments in their briefs, we affirm.

In 2006, the Commonwealth filed two separate petitions in the Letcher Circuit Court pursuant to the Eminent Domain Act of Kentucky, Kentucky Revised Statutes (KRS) 416.540 *et seq*., and KRS 177.081, seeking to condemn both the surface property and underlying tracts of minerals, or coal, owned by several named members of the Watts family. The actions arose from the Commonwealth's need to obtain a right of way through this parcel for the reconstruction of a portion of U.S. Highway 119, a public highway, between Pine Mountain and Cumberland, Kentucky. The parties settled the petition related to the surface rights for $30,000.00, and that petition was dismissed by agreement on March 31, 2009. Therefore, the only property at issue before this Court concerns the value of sub-surface minerals.

The circuit court entered an agreed interlocutory order and judgment on March 31, 2009, finding that the Commonwealth was entitled to condemn the subject property and permitting it to take immediate possession of the land and minerals. Both the Commonwealth and the Watts family filed exceptions to the substituted Commissioners' award of $50,000.00, arguing that the amount was inadequate, and the matter was set for trial.

The circuit court held a jury trial on July 20 and July 21, 2009, where the sole issue tried was the fair market value of the mineral property. The Commonwealth called three witnesses, the first of whom was mining engineer Randolph Scott. Mr. Scott testified regarding his calculation of the quantity and quality of the coal in place on the subject property. He first testified that there was no mining plan in place, nor had a permit been granted to mine the coal. Mr. Scott testified that the subject property contained two seams of coal, the Imboden seam and the Kelly seam. The coal in the Imboden seam was of good quality, while the coal in the Kelly seam was of lesser quality but was still mineable. Based upon his review of the geological surveys and his meeting with a geologist regarding the property, Mr. Scott calculated that the subject property contained 69,406 tons of coal in place.

The Commonwealth then called two licensed and certified real property appraisers, Dixon Nunnery and Gary Endicott, to testify regarding the fair market value of the coal in place. Mr. Nunnery considered the quantity and quality of the in-place coal in each of the two seams as well as the fact that there was no mining on the subject property. He then discussed the various methods used to appraise property and calculate fair market value. For surface property, Mr. Nunnery described the three methods as the market, cost, and income approaches. For mineral or coal seams, he testified that the market approach is used, which is the approach he used for the subject property in this case. Using the market approach, Mr. Nunnery looked for similar sales of in-place coal seams, noting that

such sales were rare. He considered three comparable sales of similar quality coal in active mining areas, which he described as arm's length transactions. The first was a February 2004 sale of property containing 150,000 tons of good quality coal for $100,000.00. The second was a February 1999 sale containing 216,000 tons of clean coal for $210,000.00. The last was a February 2005 sale involving two seams containing a total of 18M tons of coal for $13,340,000.00. Based upon his neutral interpretation of the market as well as his inspection of the subject property, Mr. Nunnery calculated the fair market value of the subject property to be $55,500.00. On cross-examination, Mr. Nunnery stated he was aware of a March 2009 sale involving 68,000 tons of coal for which the purchase price was $200,000.00. Mr. Nunnery did not use this as a comparable sale because he determined that other elements were involved in that transfer. He also indicated that the price of coal on the open market did not have any application in this case.

Gary Endicott considered the same elements in his calculation of the fair market value of the subject property, including the amount and quality of the in-place coal and the fact that there was no plan to mine the property in the future. In his opinion, the fair market value of the subject property was $52,000.00. In reaching this opinion, Mr. Endicott also considered comparable sales in his analysis of the fair market value. He used the February 1999 and February 2004 sales that Mr. Nunnery also considered, but as his third sale he considered a 1997 sale of 1.2M tons of coal for $612,000.00. Mr. Endicott indicated that the 1997 purchase was for both the surface property and the underlying minerals. On cross-

examination, Mr. Endicott admitted that in some cases, the open market price of coal could affect the price of coal in the ground.

The Watts family introduced the testimony of Rick Keene, who has a degree in mining and civil engineering. Mr. Keene is a licensed land surveyor and has appraised real property. Based upon his calculations, Mr. Keene testified that the subject property contained 70,940 tons of in-place coal. In assessing the fair market value of the subject property, he similarly considered several comparable sales in the area. However, Mr. Keene testified that the price of coal on the open-market at a given time had a direct impact on the price of in-place coal for purposes of fair market value calculation. Over the Commonwealth's objection, Mr. Keene testified that he created a ratio that compared the sales price to the open market price of coal. He used this ratio to extrapolate the fair market value of the subject property. When asked whether this is a generally used method, Mr. Keene answered that this was the method he used and that he was unaware of what others did. Mr. Keene considered seven comparable sales spanning a twelve-year period, including a sale to a mining company that took place less than two weeks before the date of taking in this case, which he considered to be the most comparable of the ones he reviewed. That transfer (the Thacker sale) involved the sale of approximately 68,000 tons of coal for $200,000.00, at a time when coal was selling for $68.20 per ton on the open market. Based upon his consideration of the Thacker sale (including adding $10,000.00 due to the lower extraction expense in

this case) and the price of coal on March 31, 2009, Mr. Keene calculated the fair market value of the subject property to be $210,000.00.

On cross-examination, Mr. Keene testified that he was not a certified or licensed appraiser, but learned by experience how to appraise real property. He also testified further regarding the Thacker sale. Mr. Keene stated that the mining company that purchased the Thacker property intended to mine the seam and that it had also leased the surface property in order to mine the coal. Mr. Keene ultimately testified that the Thacker sale was an arm's length transaction and that he relied primarily on that sale in reaching his conclusion as to the fair market value in the present case.

At the conclusion of his testimony, the Commonwealth moved to strike Mr. Keene's testimony, arguing that his use of the ratio factor was improper. The circuit court denied the Commonwealth's motion. The parties then extensively argued at the bench, while the jury was seated, about the details of the Thacker sale and whether the coal company paid any consideration for the separate surface lease in the sale of the coal. Counsel for the Watts family informed the court that he represented the sellers in the Thacker sale, and he stated that the lease of the surface property was confidential, but no additional consideration for the lease was included in the deed for the sale of the coal. Counsel for the Commonwealth indicated that two people had told her otherwise. The court ruled that if the Commonwealth opted to elicit such testimony during rebuttal, counsel

for the Watts family would be permitted to testify in a limited fashion. The Commonwealth opted not to elicit this testimony on rebuttal.

The Commonwealth recalled Mr. Nunnery in rebuttal. Mr. Nunnery testified that he did not consider the Thacker sale as a comparable sale because it was not an arm's length transaction. He explained that the mining company had purchased all of the property around the Thacker property, and it was all within its mining plan. Therefore, the mining company was compelled to purchase the Thacker property at any price in order to continue with its mining plan.

At the conclusion of the trial, the jury returned a verdict finding that the fair market value of the subject property was $210,000.00. The circuit court entered a judgment memorializing the jury's verdict on August 4, 2009. The Commonwealth then filed a motion for a new trial or to alter or vacate the judgment, citing the irregular proceedings concerning the rebuttal evidence, the failure to strike Mr. Keene's testimony, and the excessive amount of damages awarded. Although the circuit court made several rulings on the record, including that Mr. Endicott stated the fair market value could be affected by the open market price of coal and that the verdict was within the range of the evidence presented to the jury, the court opted to hold an evidentiary hearing on the issue of the Thacker sale.

The sole witness to testify at the evidentiary hearing on December 3, 2009, was Nathan Ratliff, who was involved in the Thacker transaction. Mr. Ratliff testified that the deeds for the coal and the lease agreement were entered

into simultaneously, and that additional, separate consideration was paid for the surface lease. He stated that the $200,000.00 purchase price for the coal was based upon a royalty calculation as would normally be done for a mineral lease. The property itself was located in the middle of a five-year mining plan, and had the coal company not obtained the property, it would have had to change the mining plan. However, Mr. Ratliff did not describe this as a "have to" sale because no one forced the company to purchase the property.

At the conclusion of Mr. Ratliff's testimony, the court determined that its previous rulings were unchanged by the new testimony. Accordingly, it denied the Commonwealth's motion. This appeal now follows.

In its brief, the Commonwealth argues that the circuit court committed error in denying its motion for a new trial by failing to strike Mr. Keene's testimony, which it claims was based upon an inappropriate standard and an improper factor; in permitting evidence of the Thacker sale because it was not a comparable sale; in upholding an excessive verdict; and in allowing irregular proceedings to continue. In response, the Watts family asserts that the Commonwealth failed to preserve its objections to Mr. Keene's methodology and qualifications because it failed to raise this issue pursuant to Kentucky Rules of Evidence (KRE) 702 and seek a *Daubert* hearing (*Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 1993)). The Watts family also argues that Mr. Keene's testimony was properly admitted; that the Thacker sale was an arm's length transaction and properly used as a

comparable sale; that the verdict was not excessive; and that the proceedings were not irregular and afforded each side a fair trial.

Kentucky Rules of Civil Procedure (CR) 59.01 provides the grounds available when a party moves for a new trial:

> A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes:
>
> > (a) Irregularity in the proceedings of the court, jury or prevailing party, or an order of the court, or abuse of discretion, by which the party was prevented from having a fair trial.
> > (b) Misconduct of the jury, of the prevailing party, or of his attorney.
> >
> > (c) Accident or surprise which ordinary prudence could not have guarded against.
> >
> > (d) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice or in disregard of the evidence or the instructions of the court.
> >
> > (e) Error in the assessment of the amount of recovery whether too large or too small.
> >
> > (f) That the verdict is not sustained by sufficient evidence, or is contrary to law.
> >
> > (g) Newly discovered evidence, material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial.
> >
> > (h) Errors of law occurring at the trial and objected to by the party under the provisions of these rules.

In *Turfway Park Racing Ass'n v. Griffin*, 834 S.W.2d 667, 669 (Ky. 1992), the Supreme Court of Kentucky set forth the standard of review for a ruling on a motion for a new trial:

> Our recent decision in *Cooper v. Fultz*, Ky., 812 S.W.2d 497 (1991), laid to rest any confusion which previously existed with respect to such appellate review. We began by declining any review until the trial court had first considered the substance of the claim and quoted with approval from *Davis v. Graviss*, Ky., 672 S.W.2d 928 (1984), which described a CR 59.01 ruling as "a discretionary function assigned to the trial judge who has heard the witnesses firsthand and observed and viewed their demeanor and who has observed the jury throughout the trial." *Id*. at 932. We followed *Prater v. Arnett*, Ky.App., 648 S.W.2d 82 (1983), in which the appellate court was held to be precluded from stepping "into the shoes" of the trial court, and precluded from disturbing its ruling unless it was found to be clearly erroneous.

With this standard in mind, we shall review the Commonwealth's arguments.

For its first argument, the Commonwealth contends that the circuit court erred in denying its motion to strike Mr. Keene's testimony. It asserts that Mr. Keene used an inappropriate methodology and considered improper factors in calculating the fair market value of the subject property. The Watts family, in turn, argues that the Commonwealth waived its ability to raise this issue because it failed to challenge his testimony pursuant to KRE 702 or request a *Daubert* hearing. In reply, the Commonwealth contends that a *Daubert* hearing was not required, noting that it did not object to Mr. Keene's ability to testify as an expert when his resume and qualifications were introduced. Rather, it was objecting to Mr. Keene's reliance upon incompetent evidence to form his opinion. We

specifically disagree with the Commonwealth's statement of the basis of its argument since it indeed was attacking Mr. Keene's qualifications and methodology. We ultimately agree with the Watts family that the Commonwealth failed to preserve this issue for our review by requesting a *Daubert* hearing.

KRE 702 addresses the introduction of expert testimony and provides that, "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." In *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575 (Ky. 2000), the Supreme Court adopted the reasoning of the United States Supreme Court in *Kumho Tire Company v. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 3d 238 (1999), and held that the decisions in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Mitchell v. Commonwealth*, 908 S.W.2d 100 (Ky. 1995), *overruled on other grounds by Fugate v. Commonwealth*, 993 S.W.2d 931 (Ky. 1999), apply to technical or other specialized knowledge. *Daubert* requires a trial judge, at the beginning of a trial, to determine whether a proposed expert's testimony regarding scientific, technical, or other specialized knowledge will assist the trier of fact in deciding a fact in issue. *Goodyear Tire*, 11 S.W.3d at 578.

The Supreme Court of Kentucky in *Mitchell* addressed the application of *Daubert*, specifically as it pertains to methodology, explaining:

> In applying Rule 702, "lower courts should look at whether the scientific knowledge being presented has been tested, whether it has been subject to peer review and publication, what the evidence's known rate of error is, and whether the evidence has a particular degree of acceptance in the relevant community." Abramson at § 27.83 n. 2 (Supp. 1994) (summarizing *Daubert*, 509 U.S. at ——, 113 S.Ct. at 2796–99, 125 L.Ed.2d at 482–485).
>
> In order to understand the factors better, it is important to examine *Daubert* in further detail. First, according to the United States Supreme Court, lower courts should examine whether the theory or technique can be tested. *Daubert*, 509 U.S. at ——, 113 S.Ct. at 2796–97, 125 L.Ed.2d at 482–83. A second consideration is "whether the theory or technique has been subjected to peer review and publication." *Id*. at ——, 113 S.Ct. at 2797, 125 L.Ed.2d at 483. "[S]ubmission to the scrutiny of the scientific community is a component of 'good science,' in part because it increases the likelihood that substantive flaws in methodology will be detected." *Id*. The United States Supreme Court noted that publication alone does not necessarily correlate with reliability.
>
> An additional consideration, "in the case of a particular scientific technique, the court ordinarily should consider the known or potential rate of error, ... and the existence and maintenance of standards controlling the technique's operation." *Id*.
>
> Finally, "'general acceptance' can yet have a bearing on the inquiry." *Id*. "Widespread acceptance can be an important factor in ruling particular evidence admissible, and 'a known technique that has been able to attract only minimal support within the community[ ]' ... may properly be viewed with skepticism." *Id*. at ——, 113 S.Ct. at 2797, 125 L.Ed.2d at 483 (quoting *United States v. Downing*, 753 F.2d 1224, 1238 (3d Cir.1985)).

*Mitchell*, 908 S.W.2d at 101-02.

In reviewing the Commonwealth's brief, we observe that not only does the Commonwealth object to Mr. Keene's reliance upon what it called "improper factors," but it spends considerable time attacking his qualifications as a real property appraiser and the methodology he used to calculate the fair market value. The Commonwealth did not move the court for a *Daubert* hearing to attack either Mr. Keene's qualifications or his methodology. In *Tharp v. Commonwealth*, 40 S.W.3d 356, 368 (Ky. 2000), the Supreme Court addressed a similar situation where a *Daubert* hearing was not requested, holding that "[w]e decline to speculate on the outcome of an unrequested *Daubert* hearing, or to hold that the failure to conduct such a hearing *sua sponte* constitutes palpable error." The Commonwealth should have raised these arguments before the trial court so that it could have properly considered the introduction of Mr. Keene's expert testimony pursuant to KRS 702 and *Daubert*. Because the Commonwealth failed to raise the issue of Mr. Keene's qualifications or methodology, it is precluded from raising the issue before this Court on appeal.

However, it does not appear that Mr. Keene, or even the jury, relied to any great extent upon the mathematical formula or the market price of coal to support his opinion as to the fair market value. Rather, it appears that the $210,000.00 value was based in large part upon the sale price of the Thacker property. Furthermore, the Commonwealth's own expert admitted on cross-examination that the market price of coal could have some impact on the fair market value of in-place coal.

For its second argument the Commonwealth contends that the circuit court erred in permitting Mr. Keene to rely upon the Thacker sale in his calculation of the fair market value, arguing that it was not an arm's length transaction and, therefore, could not be considered as a comparable sale. The Watts family, on the other hand, contends that the Thacker sale was in fact the product of an arm's length transaction and accurately represented the fair market value of the mineral tract in that sale, which was very similar to the sale at issue.

KRS 416.660(1) directs that in condemnation actions, landowners are to be awarded as just compensation "such a sum as will fairly represent the difference between the fair market value of the entire tract, all or a portion of which is sought to be condemned, immediately before the taking and the fair market value of the remainder thereof immediately after the taking[.]" Fair market value has been defined as "the price that a willing seller will take and a willing buyer will pay for property, neither being under any compulsion to sell or buy and both being in possession of all relevant information regarding the property." *Wilhite v. Rockwell Intern. Corp.*, 83 S.W.3d 516, 522 n.6 (Ky. 2002). *See also Commonwealth v. R.J. Corman Railroad Co./Memphis Line*, 116 S.W.3d 488 (Ky. 2003). Where the land to be condemned contains minerals, "the quality and quantity of the minerals may be properly considered as affecting the market value of the land but they cannot be valued separately." *Gulf Interstate Gas Co. v. Garvin*, 368 S.W.2d 309, 311 (Ky. 1963).

Regarding the calculation of fair market value, there are three generally recognized techniques: 1) the income approach; 2) the sales comparison approach; and 3) the cost approach. *R.J. Corman*, 116 S.W.3d at 495. In the present case, the experts utilized the comparable sales approach. "The rule which allows evidence of comparable sales as bearing on market value is predicated upon the premise that the sales were bona fide, arm's length transactions." *Com., Dept. of Highways v. Cecil*, 465 S.W.2d 250, 251-52 (Ky. 1971). A trial court may exclude evidence concerning any sale that does not fit within this category. *Id*. at 252.

An arm's length transaction is defined as: "1. A transaction between two unrelated and unaffiliated parties. 2. A transaction between two parties, however closely related they may be, conducted as if the parties were strangers, so that no conflict of interest arises." BLACK'S LAW DICTIONARY (9th ed. 2009). "An arm's length transaction is one which compares favorably with the usual course of action taken in the conduct of business with the trade generally." *Marcum v. Kentucky & I. T. R. Co.*, 363 S.W.2d 98, 100 (Ky. 1962). The former Court of Appeals described a non-arm's length transaction in *Com., Dept. of Highways v. Cardinal Hill Nursery, Inc.*, 380 S.W.2d 249, 254 (Ky. 1964), as follows:

> The respective positions of Cardinal and Derby at the time of Cardinal's sale to Derby may not be equated with the usual willing buyer and seller, dealing at arm's length. Derby already had a substantial stake in the property; Cardinal had already divested itself of so much of its fee simple title that what it had left to sell could

> hardly be deemed reflective of full market value of the entire tract.

In this case, the Commonwealth contends that the Thacker sale did not represent a comparable sale because of its confidential nature where only the parties knew all of the relevant circumstances of the transaction and because it was compelled. Much of the controversy below arose from whether the deed for the sale of the mineral rights included any additional consideration for the agreement related to the surface rights. The jury was presented with conflicting testimony regarding this question and, based on its holding, it agreed with the Watts family's evidence, as it was permitted to do. Based upon all of the testimony and discussion, we must hold that the evidence supports the finding that no additional consideration was paid. Accordingly, and for the reasons set forth below, we agree with the Watts family that this sale represented an arm's length transaction, which would generally permit it to be used as a comparable sale in this case.

Both Mr. Nunnery and Mr. Keene testified regarding the nature of the Thacker transaction. While Mr. Nunnery knew about the sale, he testified that in his opinion the sale was compelled because the purchasing coal company had already acquired all of the property surrounding the Thacker property and needed that property to continue with its mining plan. On the other hand, Mr. Keene testified that the sale was not compelled because the company could have mined around the Thacker property had the sale not been completed. In a post-trial hearing, Nathan Ratliff, who was involved in the Thacker transaction, testified in

accordance with Mr. Keene's testimony that this was not a forced sale. He then went on to testify regarding the method used to calculate the Thacker sales price, which appeared to be based on some sort of royalty rate.

Generally, this type of calculation using royalty rates is not permitted in condemnation proceedings, and it was specifically disallowed in such cases in *Gulf Interstate Gas Co. v. Garvin*, 303 S.W.2d 260 (Ky. 1957). However, we must conclude that there is no evidence that the subject property was actually valued using a royalty rate. Rather, Mr. Keene based his opinion on several factors in addition to the Thacker comparable sale, including his consideration of the subject property and the influence of the market price of mined coal.

Even if we were to agree with the argument that the Thacker sale was calculated using a royalty rate and this affected the calculation in the current case, we must nevertheless hold that Mr. Ratliff's testimony post-trial cannot support the Commonwealth's motion for a new trial pursuant to CR 59.01. Such testimony could and should have been introduced during the trial, when the Commonwealth had the opportunity to present testimony and evidence to counter the Watts family's evidence regarding the circumstances of the Thacker sale. The Commonwealth certainly could have called Mr. Ratliff in rebuttal, when he could have testified as he did post-trial. Mr. Ratliff's testimony cannot be considered newly discovered evidence, since the Commonwealth knew during trial about his participation in and knowledge of the Thacker sale during trial, at the very latest.

Therefore, we hold that the Commonwealth is not entitled to a new trial based upon its argument that the Thacker sale did not constitute a comparable sale.

For its third argument, which continues to attack Mr. Keene's valuation of the subject property, the Commonwealth contends that the $210,000.00 verdict was palpably excessive and was not supported by competent evidence. On the other hand, the Watts family cites to *Com., Dept. of Highways v. Stocker*, 423 S.W.2d 510, 515 (Ky. 1968), in support of its argument that the verdict was not palpably excessive:

> When the verdict is based upon substantive evidence of probative value it must be upheld even though we might prefer the opposite line of evidence or something in between. An exception would be in the case where the size of the verdict is so palpably excessive as to shock the enlightened conscience of the court, or when it is clear that it was the result of passion or prejudice. CR 52.01.

Furthermore, we recognize that: "The jury is the trier of the facts to determine what is just compensation in the constitutional sense. It is not our prerogative under the constitutions to sit as an appellate jury or substitute our judgment for that of the jury." *Stocker*, 423 S.W.2d at 515 (internal citations omitted). Despite the obvious disparity between the valuation amounts proffered by the Commonwealth and the Watts family, we must hold that the ultimate verdict the jury reached is not palpably excessive. It was exactly the amount testified to by Mr. Keene, and we have already ruled that Mr. Keene's testimony was competent. Accordingly, we reject the Commonwealth's argument and hold that the trial court did not err in denying the motion on this issue.

Finally, the Commonwealth contends that it is entitled to a new trial due to the irregularity of the proceedings, which it claims constituted manifest injustice and prevented it from having a fair trial, citing CR 61.02. The Commonwealth described as chaotic the proceedings prior to the beginning of rebuttal when the parties and the court were discussing the details of the Thacker sale, all while the jury was seated. It also contends that the use of the Thacker sale as well as Mr. Keene's methodology all created an irregular proceeding that prejudiced the Commonwealth.

CR 61.02 provides that "[a] palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or 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." In *Childers Oil Co., Inc. v. Adkins*, 256 S.W.3d 19, 26-27 (Ky. 2008), the Supreme Court discussed the application of CR 61.02:

> In *Cobb v. Hoskins*, 554 S.W.2d 886 (Ky. App. 1977), the court dealt with an objection to instructions which it described as "marginal at best." The court applied CR 61.02 and stated that "[i]n applying this rule, the palpable error must result from action taken by the court rather than an act or omission by the attorneys or the litigants." *Id*. at 888. In applying CR 61.02 the court in *Cobb* found that "the refusal of the trial court to accept the plaintiff's tendered instruction, coupled with its own erroneous Instruction No. 3, resulted in a manifest injustice." *Id*. . . . . So even without specific objection, it is clear that Childers may invoke CR 61.02 and claim palpable error if its substantial rights have been affected and a

> manifest injustice has resulted from the error. In light of *Cobb*, it appears that the task of the appellate court in review under CR 61.02 is to determine if (1) the substantial rights of a party have been affected; (2) such action has resulted in a manifest injustice; and (3) such palpable error is the result of action taken by the court.

*Childers Oil*, 256 S.W.3d at 26-27.

Our review of the portion of trial at issue does not reveal it to be exceedingly chaotic, convoluted, or irregular as the Commonwealth claims it to be. Rather, the recording shows that the parties discussed the issue at the bench in generally whispered voices. Furthermore, it was not the circuit court that caused the problem; rather, the circuit court permitted the parties to try to resolve their disagreement regarding the circumstances of the Thacker sale before the start of the Commonwealth's rebuttal. We perceive nothing erroneous in this action of the court, and we cannot hold that either this portion of the trial or the circuit court's rulings regarding Mr. Keene's testimony resulted in any manifest injustice to the Commonwealth. Accordingly, the trial court properly denied the Commonwealth's motion for a new trial on this issue.

For the foregoing reasons, the judgment and order of the Letcher Circuit Court are affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEES:

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