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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000758-MR

CARL CLINE — APPELLANT

v.

APPEAL FROM ADAIR CIRCUIT COURT
HONORABLE JAMES L. BOWLING, JR., JUDGE
ACTION NO. 09-CR-00108

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, MAZE, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Carl Cline brings this appeal from an April 11, 2011, judgment and sentence of imprisonment upon a jury verdict of the Adair Circuit Court finding him guilty of sundry offenses and sentencing him to ten-years' imprisonment. We affirm in part, reverse in part, and remand.

In the fall of 2009, appellant was unemployed and in need of a place to temporarily reside. His cousin, Stephanie Shuck, agreed to allow appellant to live with her and her nine year-old daughter, C.S., in their trailer near Columbia, Kentucky. Just before appellant moved in to the trailer, Shuck had also allowed Michael Montalvo to move in. It appears that Shuck met Montalvo on a cell-phone dating service and immediately allowed him to move in with her and her daughter. Appellant, Shuck, and Montalvo were all unemployed and frequently consuming alcohol and/or ingesting drugs at the trailer and elsewhere.

On November 23, 2009, the home of Shuck's aunt and uncle, Anna and Donald Perkins (collectively referred to as the Perkins), was burglarized. Anna, who is a sister to Shuck's mother, was out of town when the burglary occurred. When Donald came home from work on November 23, he discovered their home had been burglarized. Anna and Donald immediately suspected their niece, Shuck. Shuck had recently cleaned the Perkins' home in exchange for money to buy cigarettes and was aware that Anna was going out of town. As the Perkins both suspected Shuck, Kentucky State Police Troopers Tracy Haynes and Kenny Perkins[1] immediately proceeded to Shuck's trailer to investigate their suspicion.

Upon arriving at the trailer, Troopers Haynes and Perkins were greeted by Montalvo. Montalvo allowed the Troopers inside the trailer and told them that Shuck and appellant had gone to buy cigarettes. C.S. was at the trailer

[1] Trooper Kenny Perkins is not related to the victims, Anna Perkins and Donald Perkins.

with Montalvo. Eventually, Trooper Perkins talked with Montalvo outside the trailer, and Trooper Haynes spoke with C.S. inside.

Upon questioning by Trooper Perkins about the burglary, Montalvo told Trooper Perkins that earlier that morning Shuck and appellant borrowed his vehicle to go buy cigarettes. When Shuck and appellant returned to the trailer, they were arguing and carrying a pillowcase containing coins, jewelry, and two-dollar bills. Montalvo said that Shuck and appellant admitted that they had burglarized the Perkins' home. Montalvo then confessed he and Shuck took some of the coins to Walmart and exchanged them for bills. Montalvo also reported that he, appellant, Shuck, and C.S. then went to Bardstown. They dropped appellant off at the home of Robert Brown while Montalvo, Shuck, and C.S. then proceeded to a bank. Montalvo said he then went into the bank and exchanged the two dollar bills and coins for other currency. Upon leaving the bank, Montalvo told Trooper Perkins that he, Shuck, and C.S. picked up appellant who had apparently purchased cocaine from Brown while at his residence. Montalvo, Shuck, C.S., and appellant then proceeded to Kwik Kash Pawn and Gun where Montalvo sold a few items of the stolen jewelry for $50. The four then returned to Shuck's trailer.

During Montalvo's discussions with Trooper Perkins, Trooper Haynes was inside Shuck's trailer talking to C.S. C.S. relayed a similar story to that of Montalvo to Trooper Haynes. C.S. stated that she saw appellant and Shuck come into the trailer that morning with bags containing coins and jewelry. C.S. also confirmed that she went with Montalvo, Shuck, and appellant to Bardstown to

sell/exchange the stolen goods.

While Trooper Haynes was still at the trailer, Montalvo received a phone call from appellant. Appellant told Montalvo that he and Shuck were intoxicated, that Shuck had passed out in the car, and that he needed directions to get back to the trailer. Troopers Haynes and Perkins waited for their return. A short time later, appellant and Shuck pulled into the driveway and were taken into custody. Trooper Haynes then recorded a statement by Montalvo and C.S. Unlike the earlier interviews, Montalvo and C.S. were not separated for the recording of this statement.

Appellant was subsequently indicted by an Adair County Grand Jury upon burglary in the second degree, theft by unlawful taking or disposition, receiving stolen property, possession of an open alcoholic beverage container in a motor vehicle, failure to use a seatbelt, operating a motor vehicle while under the influence of alcohol, operating on a suspended operator's license, criminal littering, and persistent felony offender in the second degree. Following a jury trial, appellant was found guilty of burglary in the second degree, theft by unlawful taking over $500, driving under the influence, possession of an open alcoholic beverage container in a motor vehicle and operating on a suspended or revoked license. He was sentenced to a total of ten-years' imprisonment, fined $350, and ordered to pay $5,500 in restitution. This appeal follows.

Appellant contends that the trial court erred by denying his motion for directed verdict. Appellant alleges that Montalvo burglarized the Perkins' home

and took the items of jewelry and currency. Appellant specifically alleges that there was insufficient evidence to convict him of the burglary and theft.

The standard of review upon a motion for directed verdict is whether "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." Kentucky Rules of Civil Procedure (CR) 50.01; *Com. v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991). And, the trial court must assume the evidence presented by the Commonwealth is true, but must reserve for the jury questions as to the credibility and weight of testimony by witnesses. *Id.*

Burglary in the second degree is codified at Kentucky Revised Statutes (KRS) 511.030, which states:

> (1) A person is guilty of burglary in the second degree when, with the intent to commit a crime, he knowingly enters or remains unlawfully in a dwelling.
>
> (2) Burglary in the second degree is a Class C felony.

Theft by unlawful taking or disposition is codified at KRS 514.030, which states, in relevant part:

> 1) Except as otherwise provided in KRS 217.181 or 218A.1418, a person is guilty of theft by unlawful taking or disposition when he unlawfully:
>
> (a) Takes or exercises control over movable property of another with intent to deprive him thereof; or
>
> (b) Obtains immovable property of another or any interest therein with intent to benefit himself or another not entitled thereto.

> (2) Theft by unlawful taking or disposition is a Class A misdemeanor unless the value of the property is five hundred dollars ($500) or more, in which case it is a Class D felony; or unless[.]

Appellant asserts that Montalvo committed the burglary and theft and that there was insufficient evidence presented at trial that he committed these crimes. A review of the record indicates otherwise. There was evidence introduced at trial that both Montalvo and C.S. initially told Troopers Perkins and Haynes that appellant and Shuck returned to the trailer that morning with a bag or pillowcase containing the stolen items. Additionally, evidence was presented that Montalvo and C.S. told the troopers about going to the bank and the pawn shop in Bardstown with appellant. Given this testimony, it would not be clearly unreasonable for the jury to find appellant guilty of the burglary and theft charges.

Appellant, however, argues that C.S. originally lied to police and implicated appellant because she was afraid of Montalvo and that she changed her story at trial. At trial, C.S. testified that Montalvo committed the burglary and theft rather than Shuck and appellant. C.S. specifically testified that on the morning of the burglary she and Shuck were home when Montalvo returned from the Perkins' home with the stolen goods. Appellant argues that C.S. initially identified him as the perpetrator of the crimes because Montalvo threatened her. However, the evidence does not support this conclusion. Rather, there was evidence presented that Montalvo had no knowledge the police were coming to the trailer, and once the police arrived there was little opportunity for Montalvo to

threaten C.S. The jury was apprised that when Troopers Perkins and Haynes initially spoke with Montalvo and C.S., the two were separated; Montalvo was outside with Trooper Perkins, and C.S. was inside with Trooper Haynes. Neither Montalvo nor C.S. knew what the other was saying; yet their stories were very similar. Rather than C.S. being influenced by Montalvo in the very short time between the burglary and the police interview, it was plausible for the jury to believe that C.S. was influenced to change her testimony in the several months that passed between the crimes and the trial.[2] As the evidence was conflicting, it was for the jury to decide. The jury obviously chose to believe Montalvo's version of events over appellant's version. Such a decision was clearly within the province of the jury as fact-finder. *See Brewer*, 206 S.W.3d 313. Upon the whole, we do not believe that it was clearly unreasonable for the jury to find appellant guilty. Therefore, we conclude that the trial court properly denied appellant's motion for directed verdict.

Appellant next contends that the trial court erred by admitting into evidence the joint recorded statement that Montalvo and C.S. made to police on the premise that "neither qualified under any hearsay exception." This evidentiary statement at issue was recorded after Troopers Perkins and Haynes had spoken with Montalvo and C.S. separately and after appellant and Shuck had been taken into custody. As noted, Trooper Haynes recorded the statements of Montalvo and C.S. together. The Commonwealth argued that the recorded statement was

[2] C.S. testified that appellant, Carl Cline, had stayed with her, her mother, and grandmother on the two days before the trial.

admissible as a prior inconsistent statement made by C.S. (as her story at trial was different from what she told police initially) and as a prior consistent statement made by Montalvo (offered to rebut an implied charge of recent fabrication). Over appellant's objection that the statement was hearsay, the trial court admitted the recorded statement into evidence.

Our standard of review of the admission of this evidence by the trial court is whether an abuse of discretion occurred. *See Clephas v. Garlock, Inc.*, 168 S.W.3d 389 (Ky. App. 2004). Based on our review of the record, we cannot conclude that the trial court abused its discretion. Before the recorded statement was played for the jury, evidence had already been introduced at trial that very early in the investigation, Montalvo implicated appellant and had given police details regarding the trip to Bardstown. As concerns Montalvo, the recorded statement was at most cumulative evidence, and to the extent the trial court erred in its admission, we find any error to be harmless. Kentucky Rules of Criminal Procedure (RCr) 9.24. Absent the admission of this short recording, we cannot conclude that the outcome of the trial would have been different. *See Crane*, 726 S.W.2d 302. As to C.S.'s statement, her only comments on the recording were affirmations of "yeah" made in response to Montalvo's statements. Since appellant failed to object to the introduction of C.S.'s statements to rebut her testimony at trial, we find no prejudice or manifest injustice to justify excluding this evidence.

Appellant next contends the trial court "erred by penalizing appellant for DUI, second offense, aggravating circumstances, after the jury found him only guilty of DUI." Appellant's Brief at 12. Appellant asserts that "the jury found [appellant] guilty of simply DUI, first offense. However, the court then adjudged [appellant] guilty of a different, higher crime, a crime the jury had not been instructed on." Appellant's Brief at 13.

KRS 189A.010 sets forth the offense of DUI as follows:

> (1) A person shall not operate or be in physical control of a motor vehicle anywhere in this state:
>
> (a) Having an alcohol concentration of 0.08 or more as measured by a scientifically reliable test or tests of a sample of the person's breath or blood taken within two (2) hours of cessation of operation or physical control of a motor vehicle;
>
> (b) While under the influence of alcohol;
>
> (c) While under the influence of any other substance or combination of substances which impairs one's driving ability;
>
> (d) While the presence of a controlled substance listed in subsection (12) of this section is detected in the blood, as measured by a scientifically reliable test, or tests, taken within two (2) hours of cessation of operation or physical control of a motor vehicle;
>
> (e) While under the combined influence of alcohol and any other substance which impairs one's driving ability; or
>
> (f) Having an alcohol concentration of 0.02 or more as measured by a scientifically reliable test or tests of a

> sample of the person's breath or blood taken within two (2) hours of cessation of operation or physical control of a motor vehicle, if the person is under the age of twenty-one (21).

The penalty provisions for DUI are set forth in KRS 189A.010(5). The penalty for a second offense is specifically identified in subsection (b) of KRS 189A.010(5) as follows:

> For the second offense within a five (5) year period, be fined not less than three hundred fifty dollars ($350) nor more than five hundred dollars ($500) and shall be imprisoned in the county jail for not less than seven (7) days nor more than six (6) months and, in addition to fine and imprisonment, may be sentenced to community labor for not less than ten (10) days nor more than six (6) months. ***If any of the aggravating circumstances listed in subsection (11) of this section are present, the mandatory minimum term of imprisonment shall be fourteen (14) days***, which term shall not be suspended, probated, conditionally discharged, or subject to any other form of early release[.] (Emphasis added.)

KRS 189A.010(5)(b). And, the aggravating circumstances for DUI are identified in KRS 189A.010(11). Subsection (11)(e) is relevant to this appeal as appellant refused to submit to a blood, breath, or urine test at the time of his arrest. KRS 189A.010(11)(e) states:

> For purposes of this section, aggravating circumstances are any one (1) or more of the following:
>
> (e) Refusing to submit to any test or tests of one's blood, breath, or urine requested by an officer having reasonable grounds to believe the person was operating or in physical control of a motor vehicle in violation of subsection (1) of this section[.]

In the case *sub judice*, the guilt and penalty phases of appellant's trial were bifurcated. During the guilt phase of trial, the Commonwealth introduced evidence of appellant's current DUI charge, and the jury found him guilty. Then, during the penalty phase, the Commonwealth properly introduced evidence of appellant's previous DUI convictions, including one during the preceeding five (5) years.[3] As such, appellant was subject to the enhanced penalty provisions for DUI, second offense, pursuant to KRS 189A.010(5)(b). The Commonwealth admits that no proof of any aggravating circumstance was introduced at trial. However, a review of KRS 189A.010 reveals that the aggravating circumstance was of no consequence to appellant. KRS 189A.010(5)(b) provides that the minimum penalty for an aggravating circumstance on a DUI, second offense, is enhanced from seven (7) to fourteen (14) days; there is no change to the maximum sentence. As appellant was sentenced to the maximum penalty of six (6) months for DUI, second offense, the aggravating circumstance was of no consequence. Thus, we perceive no error by the trial court in sentencing appellant as a DUI second offense.

Appellant next contends the trial court erred by allowing two witnesses for the Commonwealth to remain in the courtroom after the separation or exclusion of witnesses' rule had been invoked. The Commonwealth argued at trial that pursuant to Kentucky Rule of Evidence (KRE) 615, Troopers Perkins and

[3] Carl Cline waived his right to have the jury fix his punishment for the misdemeanor offenses; thus, the trial court sentenced appellant on the misdemeanor DUI offense.

Haynes could remain in the courtroom during the trial as both were officers or employees of the Commonwealth. Despite appellant's objection, the trial court granted the Commonwealth's request and allowed both Troopers Perkins and Haynes to remain at counsel table during trial except that each left the courtroom when the other testified.

> KRE 615 governs exclusion of witnesses and provides:
>
> At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses and it may make the order on its own motion. This rule does not authorize exclusion of:
>
> (1) A party who is a natural person;
>
> (2) An officer or employee of a party which is not a natural person designated as its representative by its attorney; or
>
> (3) A person whose presence is shown by a party to be essential to the presentation of the party's cause.

KRE 615(1) sets forth an exception to the exclusion of witnesses rules for a person who is a party to the proceeding. KRS 615(1) obviously has no application to this case as neither Trooper Perkins nor Trooper Haynes was a party to the litigation.

KRE 615(2) clearly provides an exception for "[a]n officer or employee" designated as the party's representative to remain in the courtroom at counsel table after the rule requiring exclusion of witnesses has been invoked. And, there are numerous cases where KRE 615(2) has been applied to permit a police officer or an investigator to remain at counsel table after the exclusion of witnesses rule has

been invoked. *See Miller v. Com.*, 95 S.W.3d 838 (Ky. 2003); *Dillingham v. Com.*, 995 S.W.2d 377 (Ky. 1999); *Humble v. Com.*, 887 S.W.2d 567 (Ky. App. 1994). However, the plain language of KRE 615(2) clearly provides an exception from exclusion of witnesses for "[a]n officer or employee" not for officers or employees. Given the clear choice of the singular noun utilized in subsection (2) of KRE 615, we believe the legislature clearly intended this exception to provide for one officer or one employee to remain in the courtroom after the rule providing for separation or exclusion of witnesses had been invoked. Thus, we believe the trial court erred by allowing both officers to be designated as the "representatives" of the Commonwealth and exempt from both exclusion per KRE 615(2).

Additionally, neither Trooper Perkins nor Trooper Haynes qualified under the exception provided in KRE 615(3). There was simply no showing that Perkins and Haynes was "essential to the presentation of the party's cause." This was not a complicated case involving a complex or lengthy investigation. The Commonwealth could have easily presented the case with either one of these witnesses, but both were not essential to the presentation of the case. Thus, we believe the trial court erred by allowing both Perkins and Haynes to remain in the courtroom at counsel table after separation of the witnesses was invoked under KRE 615. Having so concluded, we must now determine whether such error was prejudicial.

Appellant argues that a showing of prejudice is unnecessary and refers to the circuit court's error as a "structural error." In effect, appellant maintains that the

trial court's error in failing to separate witnesses is of such magnitude that reversible and prejudicial error follows as a matter of course and without any affirmative showing on his part.

Appellant's argument has been flatly rejected by our Supreme Court in *Hatfield v. Commonwealth*, 250 S.W.3d 590 (Ky. 2008). Therein, the Supreme Court held that a trial court's error in failing to separate witnesses per KRE 615 is subject to the harmless error analysis. *Id.*; RCr 9.24. And, the Supreme Court cited approvingly the case of *United States v. Pulley*, 922 F. 2d 1283 (6th Cir. 1991). According to our Supreme Court, the *Pulley* Court held that a district court's error was "harmless in allowing the government to have two government representatives remain in the courtroom despite the separation order." *Hatfield*, 250 S.W.3d at 595. Consequently, appellant is incorrect that any violation of a separation order under KRE 615 amounts to a "structural error" requiring reversal. Rather, it is incumbent upon appellant to demonstrate prejudice.

Ordinarily, when the rule requiring separation of witnesses under KRS 615 is violated, the chief concern is that a witness who remains in the courtroom will "tailor his testimony" in view of the testimony of prior witnesses. *Hatfield v. Com.*, 250 S.W.3d 590, 595 (Ky. 2008). In this case, appellant has not even alleged that Perkins or Haynes tailored their testimonies after hearing the testimony of the other witnesses. In fact, appellant has utterly failed to even argue that prejudice resulted from the trial court's error. In the face of such failure, we are

constrained to conclude the error committed by the trial court was merely harmless. RCr 9.24.

Appellant next contends that the trial court erred by imposing excessive restitution in the amount of $5,500 upon appellant. Specifically, appellant argues that there was insufficient proof as to the value of the items taken from the Perkins' home, that the trial court improperly ordered appellant to pay the restitution directly to the Perkins rather than to the court clerk, and that the court order did not specify with whom appellant is jointly and severally liable. We shall address these contentions *seriatim*. As these alleged errors were not preserved for appellate review, we will review same under the palpable error standard of RCr 10.26. Under such standard, an unpreserved error will only be reversed if a manifest injustice occurred. RCr 10.26.

The April 11, 2011, judgment states, in relevant part:

> The Defendant shall be jointly and severally responsible for restitution to Donnie Perkins and Anna Perkins in the amount of $5,500.00, to be paid at the rate of at least $200.00 per month beginning within thirty (30) days following the Defendant's release from custody, unless otherwise directed by this Court and/or the Kentucky Parole Board.

It is well-established that the due process clause of the United States Constitution requires that a restitution order be based upon an "adequate factual predicate" that satisfies the "minimal indicium of reliability" standard. *Fields v. Com.*, 123 S.W.3d 914, 917 (Ky. App. 2003). In short, an order of restitution must be based upon "facts with some minimal assurance of reliability." *Id.* at 917.

In this case, Donald Perkins testified regarding the value of his coins. Donald testified that approximately two hundred and fifty to three hundred coins were taken. Donald estimated the total worth of his coin collection to be $4,000. Donald testified that he based his estimate upon his experience collecting coins over the years, his review of a coin catalogue, and his visits to places that sold coins. Regarding the value of the jewelry, Anna testified that the following items were taken: a 14k gold charm on a 14k gold chain, a 14k gold "Mom" necklace, a 14k gold "Nana" necklace, a 14k gold cross charm and chain, 6 pairs of 14k gold earrings, a silver ring, and 60 other pairs of earrings. Anna testified that in her opinion the jewelry was worth $1,500. As such, we believe there exists sufficient evidence to support the trial court's order of restitution in the amount of $5,500.

Appellant also contends that he was improperly ordered to pay restitution to the Perkins rather than the court clerk. The April 11, 2011, judgment stated that appellant was "responsible for restitution to Donnie Perkins." The judgment did not specifically state to whom the payment should be made. And, as set forth in his briefs, appellant is aware that pursuant to KRS 532.032 and KRS 532.033, his restitution shall be paid "through the circuit clerk," unless directed otherwise by the parole board. Thus, we believe any error in this regard to be harmless.

As to appellant's contention that the judgment did not identify the parties with whom he is jointly and severally liable, we believe this argument is also without merit. Appellant was aware that Shuck and Montalvo were implicated for the same crimes that occurred on November 23, 2009. The judgment ordering

payment of restitution to the Perkins as a result of the events of November 23, 2009, provides that appellant is responsible for payment of the entire amount of restitution, but his obligation to the Perkins is reduced to the extent of any payments received from other perpetrators. Thus, the judgment precludes the Perkins from receiving a double recovery for the property stolen, and actually works to appellant's advantage. We find no error with this language in the judgment.

Appellant's final argument is that the trial court erred by assessing a fine of $350 against him for his misdemeanor DUI conviction. This error was not preserved by appellant at trial. As sentencing is jurisdictional, errors are not waived by appellant's failure to object. *Wellman v. Com.*, 694 S.W.2d 696 (Ky. 1985).

KRS 534.040 is entitled "fines for misdemeanors and violations" and provides, in relevant part:

> Fines required by this section shall not be imposed upon any person determined by the court to be indigent pursuant to KRS Chapter 31.

KRS Chapter 31 is entitled "Application of Public Advocacy" and KRS 31.100(3) states:

> (a) A person eighteen (18) years of age or older or emancipated minor under the age of eighteen (18) who, at the time his or her need is determined, is unable to provide for the payment of an attorney and all other necessary expenses of representation[.]

In the case *sub judice*, the record indicates appellant proceeded *in forma pauperis* before the trial court, and a public defender was appointed to represent him. Thus, it appears appellant qualified as an indigent/needy person. *See Travis v. Com.*, 327 S.W.3d 456 (Ky. 2010).[4] As such, the trial court erred by ordering appellant to pay a $350 fine. Accordingly, the April 11, 2011, judgment is reversed in part as to the imposition of the fine.

For the foregoing reasons, the judgment and sentence of the Adair Circuit Court is affirmed in part and reversed in part, and this matter is remanded for proceedings consistent with this opinion.

CLAYTON, JUDGE, CONCURS.

MAZE, JUDGE, CONCURS IN PART, DISSENTS IN PART, AND FILES SEPARATE OPINION.

MAZE, JUDGE, CONCURRING IN PART AND DISSENTING IN PART. While I fully concur with the majority on most issues, I respectfully dissent from their holding that the violation of the separation-of-witnesses rule at trial amounted to harmless error in this case. The majority correctly holds that the trial court clearly erred by allowing both Troopers Perkins and Haynes to remain in the courtroom during trial, despite its prior invocation of the separation-of-witnesses rule of KRE 615. Although KRE 615(2) provides an exception for "[a]n

[4] We are aware of the Kentucky Supreme Court's recent decision in *Maynes v. Commonwealth*, 361 S.W.3d 922 (Ky. 2012). However, the only issue addressed by the Court in *Maynes* was whether an indigent criminal defendant was entitled to waiver of court costs. The issue of whether an indigent criminal defendant must pay fines was not addressed.

officer or employee" of the Commonwealth to remain at counsel table, the rule does not allow multiple witnesses remaining in the courtroom under this exception.

I recognize that the trial court required each officer to leave the courtroom while the other was testifying. Our Supreme Court has approved this procedure where the Commonwealth shows that the presence of both officers is essential to the presentation of the Commonwealth's case. *See Meece v. Commonwealth*, 348 S.W.3d 627, 699 (Ky. 2011). But in this case, the majority finds no showing that both Troopers' presence was essential to the Commonwealth's case, as required under the exception in KRE 615(3).

While the majority acknowledges the clear error, it deems the error to be harmless under RCr 9.24. I cannot agree with this conclusion. In the absence of a valid exception to KRE 615, and considering that the error was clearly preserved, I am concerned that the majority's approach improperly places the burden of showing prejudice on Cline.

RCr 9.24 mandates that "no error or defect in any ruling . . . or in anything done or omitted by the court . . . is ground for granting a new trial or for setting aside a verdict . . . unless it appears to the court that the denial of such relief would be inconsistent with substantial justice." Further, RCr 9.24 provides we "must disregard any error or defect in the proceeding that does not affect the substantial rights of the parties."

> A preserved, non-constitutional error is harmless "if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the

> whole, that the judgment was not substantially swayed by the error . . . ." But "[t]he inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." *Kotteakos v. United States*, 328 U.S. 750, 765, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946).

Day v. Commonwealth, 361 S.W.3d 299, 302-303 (Ky. 2012).

Cline preserved this issue for review by repeated strenuous objections before the trial court. Nevertheless, the majority requires him to make the showing of prejudice under RCr 9.24. The majority further cites *Hatfield v. Commonwealth*, 250 S.W.3d 590 (Ky. 2008) and *United States v. Pulley*, 922 F.2d 1283 (6th Cir. 1991) as authority for the proposition that the defendant must prove actual prejudice, showing that the witnesses had the opportunity to tailor their testimony to conform to that of other witnesses. While I agree that this is an important consideration to show prejudice, I cannot agree that it is an exclusive requirement for showing prejudice.

I am reminded of Justice Palmore's apt observation, "common sense must not be a stranger in the house of the law." *Cantrell v. Kentucky Unemployment Insurance Commission*, 450 S.W.2d 235, 237 (Ky. 1970). The presence of a police officer sitting with counsel for the Commonwealth has an obvious, though unspoken effect on the jury. To balance the needs of the Commonwealth against the defendant's right to a fair trial, KRE 615(2) allows one testifying officer to remain at counsel's table during trial. Under KRE 615(3), the

Commonwealth bears the burden of proving that the presence of additional officers is essential to the presentation of its case.

By requiring Cline to show actual prejudice from a violation of this rule, the approach taken by the majority (and by other panels of this Court), turns this burden on its head. Cline's counsel did everything he was required to do at trial by objecting to the presence of both officers. The Commonwealth failed to show an exception under KRE 615. Yet we find this error to be harmless despite the real, albeit intangible potential for prejudice. I am convinced that the unwarranted presence of both Troopers, while allowed in good faith, was sufficient to substantially influence the outcome of this case. Moreover, if prejudice is not presumed by the unwarranted presence of two officers at counsel table, could we say that more than two would be acceptable?

Finally, I am concerned that the application of the harmless error rule in this case encourages arbitrary results. The trial court has wide discretion to exclude witnesses as a remedy for violation of the separation-of-witnesses rule. *Smith v. Miller*, 127 S.W.3d 644, 647 (Ky. 2004). This discretion is not unlimited, and a mechanical application of the remedy without a showing of prejudice would likely result in a reversal on appeal. *Id.* Nevertheless, our standard of review for abuse of discretion is deferential. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). Yet where the situation is reversed, the harmless error rule places a higher burden on the defendant.

I am acutely aware of the difficult task facing trial judges in matters of discretion. I am confident that judges endeavor to reach the correct and fair result. However, our rule requiring a defendant to show actual prejudice in these cases seems to have led to a continuing practice of error in this matter. Where the trial court has abused its discretion by improperly allowing multiple witnesses to remain at counsel table without a valid exception under KRE 615 and the objection is properly preserved, I believe that the burden of showing the absence of prejudice should fall on the Commonwealth. Consequently, I would reverse the judgment of conviction on this issue and would remand for a new trial.

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