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Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-000433-MR
AND
NO. 2013-CA-000893-MR

JAMES DAVID ADKINS

APPELLANT

v. APPEAL FROM OHIO CIRCUIT COURT
HONORABLE RONNIE C. DORTCH, JUDGE
ACTION NO. 07-CR-00033

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, KRAMER, AND VANMETER, JUDGES.

KRAMER, JUDGE: James David Adkins appeals from a judgment entered by the Ohio Circuit Court convicting him of first-degree trafficking in a controlled substance and possession of drug paraphernalia. After careful review, we affirm.

BACKGROUND

On March 16, 2007, Captain Tracy Beatty of the Ohio County Sheriff's Department went to Adkins' home to serve a warrant for Adkins' arrest on an unrelated charge while Adkins was next door at his brother's house. Captain Beatty then went to Adkins' brother's house. Upon finding Adkins, Captain Beatty ordered him to come out of the house. After placing Adkins under arrest, Captain Beatty noticed an object in Adkins' pocket and asked Adkins about the object. Adkins responded that he did not know what it was. Captain Beatty searched Adkins' pocket and discovered a sock containing methamphetamine, a needle, several small plastic bags, and devices used to snort methamphetamine.

Adkins testified at trial that he found the sock of drugs in the driveway he shared with his brother after another individual, Nathan Edge, visited the property. Adkins testified he saw something fall from Edge's truck, which he assumed was trash. Adkins testified he took the sock to his brother's house intending to turn it in to law enforcement.

Following a jury trial, Adkins was convicted of first-degree trafficking in a controlled substance and possession of drug paraphernalia. He was sentenced to a total of five years of imprisonment. Adkins appealed, and this Court reversed and remanded due to an error in a jury instruction. *Adkins v. Commonwealth*, No. 2008-CA-000359-MR, 2009 WL 3486640, *1 (Ky. App. Oct. 30, 2009) (unpublished). The Commonwealth sought discretionary review, which the Kentucky Supreme Court granted. The Kentucky Supreme Court affirmed this

Court's decision. *Commonwealth v. Adkins*, 331 S.W.3d 260, 267 (Ky. 2011).

Following the new trial on remand, Adkins was again convicted of first-degree trafficking in a controlled substance and possession of drug paraphernalia. This time, he was sentenced to ten years of imprisonment. This appeal followed.

ANALYSIS

First, Adkins alleges on appeal that he was denied due process and a fair trial because the trial court did not grant him a hearing pursuant to *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), upon his request to represent himself as co-counsel. Adkins argues that he invoked his right to act as co-counsel during a pretrial hearing on July 14, 2011. This hearing concerned a motion to continue the trial. After the trial court granted a continuance and assigned a new trial date, Adkins began to speak on his own behalf. The trial judge cut Adkins off and advised him to speak through his attorney. Adkins' attorney stated that Adkins wanted to be recognized as co-counsel. The trial judge advised he was "not going to hear that today." After this hearing, Adkins never raised this issue again before the trial court.

A criminal defendant has a constitutional right to appear *pro se*. *Faretta*, 422 U.S. at 819, 95 S.Ct. at 2533. Section 11 of the Kentucky Constitution further grants a defendant the right to serve as co-counsel with his attorney, also known as hybrid representation. *Wake v. Barker*, 514 S.W.2d 692, 695 (Ky. 1974).

In order to proceed *pro se* or with hybrid representation, a defendant must forgo the right to counsel, either in whole or in part. *Swan v. Commonwealth*, 384 S.W.3d 77, 93 (Ky. 2012). Before permitting a defendant to proceed *pro se*, a trial court must determine whether the waiver of counsel is voluntary, knowing, and intelligent by conducting a *Faretta* hearing. *Id.* The failure to hold a *Faretta* hearing when a defendant invokes his right to proceed *pro se* is a structural error not subject to harmless error analysis. *Id.*

In evaluating whether a defendant invoked his right to proceed *pro se*, our Supreme Court held:

[I]nvocation of the right and whether the proper procedures were followed must be evaluated in the context of a given case. Otherwise, any hint of an invocation of the right, even if immediately withdrawn, would require a *Faretta* hearing. But the law does not require such empty process.

Id. at 94-95. Accordingly if a defendant requests to represent himself, the right may be waived through subsequent conduct indicating he has abandoned his request. *Id.* at 94.

Adkins raised the issue of hybrid counsel at the conclusion of a hearing on an unrelated motion to reschedule the trial date. This unrelated motion was heard on the court's regular motion docket. The trial court did not rule on Adkins' request, but instead passed the issue by stating that it would not be heard at that time. These facts are similar enough to the facts in *Swan* to hold that the burden was on Adkins to raise the issue again; failure to do so amounts to a waiver

of the request. *See id.* at 95 (holding that a defendant seeking to invoke the right to proceed *pro se* has the burden to raise the issue again when the trial court passes the issue). Consequently by failing to raise the issue again, Adkins effectively abandoned his request to represent himself as co-counsel.

Next, Adkins alleges the trial court denied him the opportunity to present a defense by precluding evidence of Edge's prior involvement with drugs. Adkins argues evidence of Edge's prior drug-related indictment was admissible as reverse KRE¹ 404(b) evidence against an alleged alternative perpetrator. Reverse 404(b) evidence is evidence of an alleged alternative perpetrator's other crimes, wrongs, or acts offered by the defendant to prove that someone else committed the offense with which the defendant is charged. *Beatty v. Commonwealth*, 125 S.W.3d 196, 215 n.4 (Ky. 2003).

During Captain Beatty's testimony, the trial court sustained the Commonwealth objections to questions asking whether Adkins' brother had a partner in trafficking drugs and whether Captain Beatty knew Edge. Later, during Adkins' testimony, the Commonwealth objected to evidence suggesting Edge was a drug dealer because it was irrelevant, hearsay, and not within Adkins' personal knowledge. In response, Adkins' counsel argued he could produce evidence of Edge's prior drug-related conviction. Finding that Adkins could only testify about Edge's involvement with drugs if he had actual personal

¹ Kentucky Rules of Evidence.

knowledge of it, the trial court sustained the Commonwealth's objection. This objection was raised and sustained on multiple occasions during Adkins' testimony.

The standard of review of a trial court's evidentiary ruling is abuse of discretion. *Woodard v. Commonwealth*, 147 S.W.3d 63, 67 (Ky. 2004). The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

A defendant has a right to produce evidence demonstrating that an alleged alternative perpetrator committed the crime for which the defendant is accused. *Beatty*, 125 S.W.3d at 208. The standard for evidence of an alleged alternative perpetrator's prior bad acts, or reverse 404(b) evidence, is lower than the standard for regular 404(b) evidence because the danger of prejudice against a criminal defendant is not a factor. *Blair v. Commonwealth*, 144 S.W.3d 801, 810 (Ky. 2004). However, evidence is not automatically admissible simply because it tends to show that someone else committed the offense. *Beatty*, 125 S.W.3d at 208. Moreover, the right to present a defense does not abrogate the rules of evidence. *McPherson v. Commonwealth*, 360 S.W.3d 207, 214 (Ky. 2012). With these standards in mind, we hold the trial court did not err in excluding evidence of Edge's drug-related history.

First, we address the Commonwealth's objections during Captain Beatty's testimony, which occurred prior to Adkins' testimony. Adkins argues the

trial court erred in sustaining objections to questions asking whether his brother had a partner in trafficking drugs, and whether Captain Beatty knew Edge on a professional level. The Commonwealth did not state grounds for its objections, and Adkins accepted the trial court's ruling without argument. Because Adkins neither made it known what action it wanted the court to take nor voiced an objection to the action of the court, we hold this error is not preserved for appellate review under RCr² 9.22.

Adkins also argues he was denied the opportunity to present evidence of an alleged alternative perpetrator during his testimony. We disagree and hold the trial court did not abuse its discretion in prohibiting Adkins from testifying about Edge's drug-related history pursuant to KRE 602, lack of personal knowledge.

Adkins was properly accorded the opportunity to present evidence that the drugs belonged to Edge. Adkins testified that Edge was on the property and that he saw an object--which he believed to be the sock containing drugs--fall out of Edge's vehicle onto the driveway. Adkins could have called additional witnesses, such as his brother, to support his account of the events but chose not to. As such, we hold that the trial court's enforcement of the rules of evidence did not impede Adkins' ability to present an alleged alternative perpetrator defense.

² Kentucky Rules of Criminal Procedure.

Next, Adkins argues the trial court foreclosed his ability to present a defense through a series of erroneous rulings and interjections. The first such ruling, alleges Adkins, occurred during the following exchange:

Commonwealth: Can you explain why, when he [Captain Beatty] went to the house, no lights were on and no one answered the door?

Adkins: Actually, Ms. Ritter answered the door because she had...

Commonwealth: Objection.

Defense counsel: That's the question they asked.

Judge: I think the objection is based upon him being non-responsive to the question. [To Adkins] Now if you don't understand the question, tell Mr. Coleman. Listen to the question and answer him as the best you can.

Adkins then testified that Ms. Ritter was at his house and that he noticed the lights at his house were on when he saw Captain Beatty walking towards his brother's house.

Adkins alleges his testimony was admissible because he was responding to an open-ended question. By sustaining the objection, Adkins argues the court prevented him from giving his account of the events, allowing the Commonwealth to cut off an answer it did not like. We disagree.

Adkins was asked whether he knew of any reason why no one answered the door at his residence. Adkins was not at his residence at the time Captain Beatty went to his door, and therefore, had no personal knowledge of

whether Ms. Ritter answered the door. Adkins gave his account of what occurred in subsequent questioning. As such, there was no error.

Next, Adkins claims trial court erred by lecturing the jury about hearsay after sustaining the Commonwealth's objection to Adkins' testimony about something he heard from his brother. The trial judge advised the jury: "Hearsay, or conversations between people, are not admissible. They, the people making those statements, have to come into court to make those statements... with certain exceptions, there's 32 exceptions, none of which are applicable here." Adkins' counsel moved for a mistrial, arguing the trial court exceeded its boundaries and caused irreparable damage. The trial court overruled the objection. On appeal, Adkins argues the trial court's statement made it futile to argue any exceptions to the hearsay rule applied because it would have contradicted the trial court's pronouncement.

The decision as to whether or not to grant a mistrial rests within the discretion of the trial court and is reviewed under an abuse of discretion standard. *Woodard v. Commonwealth*, 147 S.W.3d 63, 68 (Ky. 2004); *Bray v. Commonwealth*, 68 S.W.3d 375, 383 (Ky. 2002). "[A] mistrial is an extreme remedy and should be resorted to only when there is a fundamental defect in the proceedings and there is a 'manifest necessity for such an action.'" *Woodard*, 147 S.W.3d at 68 (quoting *Bray*, 68 S.W.3d at 383). The defect must be of such a character and magnitude that it will effectively deny a litigant of a fair and

impartial trial, and its prejudicial effect cannot otherwise be cured. *Gould v. Charlton Co., Inc.*, 929 S.W.2d 734, 738 (Ky. 1996).

Adkins was not entitled to a mistrial because he cannot show any prejudicial effect by the trial court's comment to the jury. Even assuming the trial judge's comments prevented Adkins from arguing that a hearsay exception applied, he does not allege on appeal that his statement was admissible under any of the hearsay exceptions. Because Adkins presents no argument as to why the excluded comment would have been admissible, the trial judges' comment to the jury was of no consequence.

Adkins also argues the trial court erred by interrupting his closing argument. During a portion of his closing argument asking the jurors what they would have done in Adkins' situation, the trial court called the parties to the bench to advise defense counsel he was "getting close to the Golden Rule."³ Arguing that his statement did not violate the Golden Rule, Adkins now claims that he was prejudiced by the trial court's interruption because it invalidated his closing argument in the eyes of the jury. We disagree.

Contrary to Adkins' assertion, the trial judge merely cautioned defense counsel to be careful of violating the Golden Rule. The caution occurred at the bench, not in front of the jury. Adkins' claim that he was harmed because

³ The Golden Rule argument usually involves the prosecutor asking jurors to place themselves in the victim's position and decide accordingly. *Lycans v. Commonwealth*, 562 S.W.2d 303, 305 (Ky. 1978).

the jury must have inferred the trial court disapproved his closing argument is pure speculation. As such, there was no error.

Next, Adkins alleges reversal is necessary because the Commonwealth made an improper appeal to community prejudice during sentencing. Adkins acknowledges that this issue is unpreserved but requests palpable error review pursuant to RCr 10.26. “Palpable error affects the substantial rights of the party and results in manifest injustice. Furthermore, an appellant claiming palpable error must show that the error was more likely than ordinary error to have affected the jury.” *Boyd v. Commonwealth*, 439 S.W.3d 126, 129–30 (Ky. 2014). In *Commonwealth v. Jones*, 283 S.W.3d 665 (Ky. 2009), the Kentucky Supreme Court discussed the palpable error rule of RCr 10.26, and stated

an unpreserved error may be noticed on appeal only if the error is “palpable” and “affects the substantial rights of a party,” and even then relief is appropriate only “upon a determination that manifest injustice has resulted from the error.” An error is “palpable,” we have explained, only if it is clear or plain under current law, *Brewer v. Commonwealth*, 206 S.W.3d 343 (Ky. 2006), and in general a palpable error “affects the substantial rights of a party” only if “it is more likely than ordinary error to have affected the judgment.” *Ernst v. Commonwealth*, 160 S.W.3d 744, 762 (Ky. 2005). *But see United States v. Olano*, 507 U.S. at 735, 113 S.Ct. 1770 (discussing the federal “plain error” standard and noting, without deciding, that there may be forfeited errors so fundamental that they “can be corrected regardless of their effect on the outcome.”). An unpreserved error that is both palpable and prejudicial still does not justify relief unless the reviewing court further determines that it has resulted in a manifest injustice, unless, in other words,

the error so seriously affected the fairness, integrity, or public reputation of the proceeding as to be “shocking or jurisprudentially intolerable.” *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006).

283 S.W.3d at 668.

Under the clear holding of *Jones*, palpable error relief is not available unless three conditions are present. The error must have (1) been clear or plain under existing law, (2) been more likely than ordinary error to have affected the judgment, and (3) so seriously affected the fairness, integrity or public reputation of the proceeding to have been jurisdictionally intolerable.

During sentencing, the Commonwealth made the following statement to the jury:

What was he convicted of? Trafficking in a controlled substance, methamphetamine... that means he is purposefully with intent putting methamphetamine out in our community. So now is your chance to tell him what you think about that. Your chance to tell him what we think of people who traffic in drugs in Ohio County. Is there anything that should mitigate it from a maximum sentence of ten years? I submit there is not.

Citing *Gaines v. Commonwealth*, 283 S.W.3d 243 (Ky. App. 2008), Adkins argues the Commonwealth appealed to improper grounds by placing upon the jury the burden of doing what is necessary to protect the community. In response, the Commonwealth claims it properly asked the jury to consider the offense and find there is nothing to mitigate the maximum sentence. The Commonwealth argues the jury was not asked to send a message to the community. Rather, it asked the

jury—as members of the community—to send a message to Adkins with a maximum sentence. We agree with the Commonwealth.

We distinguish the facts of this case from *Gaines*. During sentencing of Gaines’ drug conviction, the Commonwealth asked the jury to “let the people know that this conduct is not going to be acceptable in the community of Shelby County... let this community know that drugs of this nature, conduct of this nature is not acceptable.” *Id.* at 244. This court found this statement was improper because it incited jurors “to assume the responsibility of curing the community’s problems by rendering a severe sentence rather than focusing on Gaines’ just punishment based on the specific facts of his case.” *Id.* at 246. This type of plea differs from the instant case, where the Commonwealth did not ask the jurors to send a message to the community. Rather, the jurors were asked to send a message to Adkins based on the specific facts of the case and his crime of putting drugs into the community.

The facts in this case are similar to *Cantrell v. Commonwealth*, 288 S.W.3d 291 (Ky. 2009). During sentencing in *Cantrell*--a case involving a methamphetamine conviction--the Commonwealth told the jurors, “Now is the time for you to speak with one voice and tell people like Mr. Cantrell, who is bringing poison into our community, we don’t want you.” The Court held this statement was proper. *Id.* at 299. Similarly, in the instant case, the jurors were not being asked to send a message to the community, but rather, to the offender as a

means of deterrence. Therefore, we hold the Commonwealth's statement during sentencing was not erroneous.

Next, Adkins alleges he was denied his right to a speedy trial pursuant to KRS⁴ 500.110, Section 11 of the Kentucky Constitution, and the Sixth Amendment of the United States Constitution. Adkins argues that despite filing what he calls motions for a speedy trial on January 18, 2012, and August 29, 2012, nearly twenty-three months passed between his remand and new trial.⁵

KRS 500.110 provides:

Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of this state, and whenever during the continuance of the term of imprisonment there is pending in any jurisdiction of this state any untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within one hundred and eighty (180) days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint; provided that for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

To trigger the 180-day calendar under the statute, a detainer must be lodged against the defendant. In *Donahoo v. Dortch*, 128 S.W.3d 491 (Ky. 2004), the Court defined a detainer as “a written notification by a criminal justice or law

⁴ Kentucky Revised Statutes.

⁵ By our calculations, it was actually twenty-one months that passed between February 10, 2011, when the Kentucky Supreme Court's decision became final, and November 15, 2012, when the new trial commenced.

enforcement agency with the institution where an inmate is serving a sentence, advising that the inmate is wanted in connection with a criminal offense, and requesting the institution to hold the inmate or to notify the agency when the inmate is about to be released.” *Id.* at 493. The Court also held that a district or circuit court may also file a detainer against an inmate. *Id.* at 494.

Adkins alleges Northpoint Training Facility--the facility where he was serving an unrelated sentence--placed a detainer on him, and claims Northpoint is a criminal justice agency with the power to place a detainer. We disagree and hold KRS 500.110 is not applicable in the instant matter because a detainer was never filed.

Contrary to Adkins’ assertion, no criminal justice agency or court asked Northpoint to hold him at the conclusion of his sentence or requested to be notified when his release was imminent. A detainer must be filed with the institution where an inmate is serving a sentence; the institution cannot file a detainer with itself. Our review of the record indicates the action taken by Northpoint--alleged by Adkins to be a detainer--was actually just a letter from Northpoint to the Commonwealth’s attorney informing him of how Adkins would be handled. As such, we hold KRS 500.110 does not apply.

Adkins also argues his right to a speedy trial under the United States and Kentucky Constitutions was violated by the delay. In *Bratcher v. Commonwealth*, 151 S.W.3d 332, 344 (Ky. 2004), the Court articulated four

factors to evaluate claims of speedy trial violation: (1) the length of the delay, (2) the reasons for the delay, (3) the defendant's assertion of his right to a speedy trial, and (4) prejudice to the defendant. *See also Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). These factors must be balanced by first considering each factor individually and then weighing them together. *Goncalves v. Commonwealth*, 404 S.W.3d 180, 193 (Ky. 2013). The Court in *Bratcher* found eighteen months to be presumptively prejudicial and further held that presumptive prejudice does not necessarily indicate a statistical probability of prejudice, but simply marks the point at which courts deem the delay unreasonable enough to trigger analysis under the factors. *Bratcher*, 151 S.W.3d at 344.

Because the twenty-one month delay in the instant matter is presumptively prejudicial, we must evaluate this matter under the factors outlined in *Bratcher*. First, we consider the reasons for the delay. When balancing the reasons for delay to determine whether a speedy trial violation occurred, a reviewing court must first identify the type of delay in order to assign the appropriate weight.⁶ *Barker*, 407 U.S. at 531, 92 S.Ct. at 2192. Our review of the

⁶ In *Barker*, the U.S. Supreme Court held:

A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.

Barker, 407 U.S. at 531, 92 S.Ct. at 2192.

record indicates the first and longest postponement was made pursuant to Adkins' request. Adkins' counsel moved for a continuance of the trial on July 12, 2011, arguing he was recently retained and needed additional time to prepare. Pursuant to this motion, the trial date was postponed until April 3, 2012. Adkins does not allege that he objected to this new date, nor does he cite to any such objection in the record.

Following this continuance, for reasons which are unclear from the record, the trial court continued the April 3, 2012 trial date and scheduled a pretrial conference on April 12, 2012. During the pretrial conference, the trial court rescheduled the trial for August 28, 2012. Adkins did not object.

The trial did not begin on August 28, 2012, for reasons that are unclear from the record. Following an October 25, 2012 hearing, the trial court entered an order rescheduling the trial for November 9, 2012. On November 8, 2012, Adkins' counsel moved for a continuance. The trial was rescheduled and ultimately held on November 15, 2012.

The longest delay--from July 11, 2011, until April 3, 2012--was due to Adkins' actions. While the reasons for additional delays after April 3, 2012, are unclear, Adkins either did not object to these continuances, or he does not allege that he objected and point to evidence in the record of his objection. As a whole, we hold the evidence demonstrates the delays were appropriate, and as such, this factor weighs against Adkins' claim.

We next consider whether Adkins asserted his right to a speedy trial. On January 18, 2012, Adkins filed a notice requesting a trial be conducted within 180 days.⁷ While the relief requested was made pursuant to KRS 500.110, we hold that by filing this motion, Adkins took proper steps to assert his right to a speedy trial. As such, this factor weighs in favor of Adkins' claim.

Finally, we evaluate whether Adkins suffered prejudice by the delay. Adkins alleges the excessive delay impeded his contact with three witnesses who testified on his behalf at his first trial. As a result, Adkins claims none of these witnesses were able to testify on his behalf at his second trial. Generally, this would have been sufficient to prove prejudice. However, Adkins cites no evidence in the record to support this claim. Evidence that could have supported this claim includes an affidavit from his attorney stating that he tried to contact the witnesses but was unable to; subpoenas that were unable to be served on the witnesses; or even Adkins claiming in the circuit court in a motion to dismiss for violation of his right to a speedy trial that he had been prejudiced by the inability to get in touch with the prior witnesses so that they could testify on his behalf at his second trial. Without any supporting evidence, his assertion that these witnesses were unavailable for his second trial due to the delay is purely speculative. For this

⁷ On August 29, 2012, Adkins also filed an additional motion styled "Assertion of Constitutional Rights to a Speedy Trial and Disposition of All Pending Charges." This motion requested his indictment be dismissed for failure to provide a speedy trial. It is well established that a motion to dismiss for lack of a speedy trial is not a formal demand for a speedy trial. *Tamme v. Commonwealth*, 973 S.W.2d 13, 22 (Ky. 1998).

reason, we find Adkins was not prejudiced by the delay in scheduling his second trial.

Taking all of the *Bratcher* factors together, we find Adkins' Constitutional right to a speedy trial was not violated. We are particularly persuaded by the fact that the reasons for the delays were appropriate, particularly the longest delay which was made at Adkins' request and because Adkins could not demonstrate actual prejudice.

Lastly, Adkins argues the trial court erred by failing to credit him with 162 days served under home incarceration prior to his sentencing. Adkins sought to obtain credit for home incarceration in a motion filed on February 18, 2013. After being ordered by the court to calculate Adkins' jail credit, the Department of Corrections advised that Adkins was entitled to seventeen days credit and that he was not entitled to the time he was requesting from home incarceration because he was not on an electronic monitoring device pursuant to KRS 532.200. The court entered an order crediting Adkins with seventeen additional days served.

KRS 532.200 defines home incarceration as:

“Home incarceration” means the use of a monitoring device approved by the commissioner of the Department of Corrections to facilitate a prisoner's ability to maintain gainful employment or to participate in programs approved as a condition of his or her incarceration, or both, using the person's home for purposes of confinement[.]

Adkins alleges a telephone is included within the definition of an approved monitoring device under KRS 532.220(6). Contrary to Adkins' assertion, KRS

532.220(6) merely provides one of the conditions for home incarceration is that the incarcerated maintain a telephone. This provision does not include a telephone within the definition of an approved monitoring device. As such, the trial court did not err in failing to credit Adkins with home incarceration time.

Based on the foregoing, we affirm the judgment of the Ohio Circuit Court.

ALL CONCUR.

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