

Commonwealth of Kentucky
Court of Appeals

NO. 2014-CA-001247-MR

CORINTHIAN ALLEN GAY

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 13-CR-00301-001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: MAZE, STUMBO AND TAYLOR, JUDGES.

STUMBO, JUDGE: Corinthian Allen Gay appeals from a Judgment of the Fayette Circuit Court reflecting a jury verdict of guilty on one count of Robbery in the First Degree. He argues that the trial court improperly admitted testimony that he was wearing an ankle monitor during the commission of the offense, and that the court erred in allowing the jury to view his confession on the prosecutor's laptop during

deliberations. For the reasons stated below, we find no error and AFFIRM the Judgment on appeal.

On December 20, 2012, Appellant Corinthian Gay and Demarcus Jackson robbed Michael Kloiber at his home. According to the record, Kloiber answered a knock at his front door, at which time Gay - who was allegedly wielding a handgun - forced his way into Kloiber's residence. Kloiber would later testify that he recognized Gay. Thereafter, Jackson also entered the residence. Kloiber would allege that Gay and Jackson threatened him, handcuffed him to a bar under the bathroom sink, and demanded money and marijuana. Gay and Jackson stole various items and left the residence, after which Kloiber was able to free himself and contact the Lexington police department.

Kloiber was able to identify Gay, and who the police determined was wearing an ankle monitor at the time of the robbery. The monitor's GPS revealed that Gay was present at Kloiber's residence at the time of the robbery. Gay was arrested on January 17, 2013, and subsequently confessed to being present at the time of the robbery. Gay, however, maintained that he did not have a gun, did not threaten Kloiber, and was present only to serve as a lookout for Jackson.

Gay was indicted on one count each of Robbery in the First Degree and with being a Persistent Felony Offender in the Second Degree ("PFO"). The matter proceeded to a jury trial in Fayette Circuit Court, whereupon Gay testified in his own defense. Gay stated that he participated in the robbery as a lookout, but did not have a gun and did not threaten Kloiber. During the course of the trial,

evidence was adduced Gay was wearing an ankle monitor when Kloiber was robbed, and that the monitor indicated that Gay was present at Kloiber's residence during the robbery.

When the jury later deliberated, it asked to review Gay's confession which it had already viewed during the course of the trial. Thereafter, it was determined by Judge Bunnell that the jury would view the confession on the prosecutor's laptop, with the admonition that it could use the laptop only for that limited purpose. After viewing the confession, and having considered all of the evidence, the jury returned a guilty verdict on the count of Robbery in the First Degree. It returned a not guilty verdict on the PFO charge. Gay was sentenced to fifteen years in prison, and this appeal followed.

Gay now argues that the trial court erred in allowing the admission into evidence of testimony that he was wearing an ankle monitor at the time of the offense. The court allowed the testimony because it bolstered the Commonwealth's contention that Gay was present at Kloiber's residence at the time of the robbery. Gay now contends, as he argued at trial, that the admission of this testimony was erroneous as it allowed a witness to make a suggestive reference of Gay's prior crimes, wrongs or bad acts which served to circumvent Kentucky Rules of Evidence (KRE) 404(b)'s prohibition against evidence of other crimes. Gay notes that he admitted being present at Kloiber's residence during the robbery; therefore, the testimony regarding the ankle monitor and its GPS tracker had no probative value. He directs our attention to case law which he claims supports the

conclusion that the admission served no purpose but to imply that Gay had committed prior bad acts, and he argues that it served to undermine his right to a fair trial. In response, the Commonwealth contends that evidence of Gay's ankle monitor was properly admitted because it was offered for some other purpose than to disparage Gay's character.

Gay contends that the evidence was inadmissible under KRE 404(b).

KRE 404(b) states that,

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible:

(1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; or

(2) If so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party.

The corpus of Gay's argument is that the evidence of his ankle monitor constitutes evidence of a prior crime and is therefore inadmissible. However, and as the Commonwealth properly notes, such evidence is inadmissible only if it is used to demonstrate Gay's character in conformity with that prior bad act. KRE 404(b). Conversely, KRE 404(b)(1) and (2) provide exceptions to that rule if the evidence is offered for some other purpose or is inextricably intertwined with admissible evidence.

The question for our consideration, then, is whether the evidence of Gay's ankle monitor was offered from some purpose other than proving prior bad acts, and/or was inextricably intertwined with admissible evidence. We must answer this question in the affirmative. The record demonstrates that the evidence at issue was not tendered for the direct or indirect purpose of proving that Gay had engaged in prior bad acts. Rather, the testimony was offered for the sole purpose of demonstrating that Gay was present at Kloiber's residence at the time Kloiber was allegedly robbed. The ankle monitor contained a GPS tracking device, and this device was used to bolster the Commonwealth's assertion that Gay was present at Kloiber's house when the crime was committed.

Gay correctly points out that he confessed to being present when Kloiber was robbed. As such, he argues that the evidence of his GPS location was not relevant, and was otherwise unnecessary and prejudicial. Gay makes a valid argument in this regard; however, we find no basis in the law or the KRE for utilizing Gay's confession as a bar to the admission of otherwise relevant evidence. It was within the realm of possibility that Gay would recant his confession or otherwise challenge its admission. In such a case, Gay's location at the time of the robbery, as demonstrated via GPS, would be quite relevant. And even without recanting his confession, the testimony regarding Gay's GPS location bolstered his admission that he participated in the crime. Ultimately, because the evidence at issue was offered for the proper purpose of placing Gay at Kloiber's residence when the crime was committed, its introduction was not barred by KRE 404(b).

The standard of review for evidentiary issues is abuse of discretion, which is found when the trial court's decision was arbitrary, unreasonable, unfair or unsupported by sound legal principles. *Montgomery v. Commonwealth*, 320 S.W.3d 28, 34 (Ky. 2010). The Fayette Circuit Court's decision to allow the introduction of Gay's GPS location from his ankle monitor was not arbitrary, unreasonable, unfair or unsupported by sound legal principles. As such, we find no error.

Gay also argues that the court's decision to allow the jury to watch his confession on the prosecutor's laptop during deliberations constituted reversible error. He argues that the court did not admonish the jury not to look at anything else on the computer, and that "the trial court gave unfettered access to the Commonwealth's laptop." As such, he maintains that he did not receive a fair trial, and that various rights arising under the constitutions of the Commonwealth and the United States were violated.

We first note that this argument is not preserved for appellate review. When the jury sought to review Gay's confession, his counsel agreed with the court and the Commonwealth to allow the jury to view the confession on the prosecutor's laptop. Gay maintains that this constitutes palpable error under Kentucky Rules of Criminal Procedure (RCr) 10.26, and should thus be reviewed even though not objected to at trial.

RCr 9.72 allows a jury to take evidence into the jury room during deliberations. It states that,

Upon retiring for deliberation the jury may take all papers and other things received as evidence in the case. The jurors shall be permitted to take into the jury room during their deliberations any notes they may have made during the course of the trial, but upon request of either party the jury shall be admonished that the notes made by jurors shall not be given any more weight in deliberation than the memory of other jurors.

In *McAtee v. Commonwealth*, 413 S.W.3d 608 (Ky. 2013), the Kentucky Supreme Court placed limitations on the circumstances under which recorded *witness* testimony could be reviewed by juries during deliberations. However, as to a defendant's recorded confession, which is testimonial in nature, the court reserved judgment but noted that the majority of jurisdictions *allow* juries to consider recorded confessions during deliberations. It stated,

What is still unclear, perhaps, is whether a party's recorded confession—which is obviously testimonial in nature—may be taken to the jury room upon deliberation. Although this Court has not addressed that specific issue, the majority of jurisdictions allow a recorded confession—written or electronic—to go to the jury room during deliberations. We reserve judgment on the issue until it is properly before us.

Id. at 624. The court went on to cite with approval a plethora of extra-jurisdictional cases so holding, as well as 2 *McCormick on Evidence* § 220 (7th ed. 2013), stating that “[w]ritten or recorded confessions in criminal cases, however, are in many jurisdictions allowed to be taken by the jury despite their obvious testimonial character.”

Gay's confession was played to the jury during the trial, and his own counsel consented to it being shown to the jury during deliberations. Thus, by the

express terms of RCr 9.72, and pursuant to *McAtee*, the confession was properly made available to the jury during its deliberations. Additionally, and contrary to Gay's claim, the court did admonish the jury in open court and before the parties and counsel to view only the confession in the jury room.¹ Thus, even if this issue were properly before us, we would find no error. The jury's viewing of the confession during deliberations comports with RCr 9.72 and *McAtee*. *Arguendo*, even if the jury's viewing of the confession ran afoul of RCr 9.72, which we do not find to be the case, any error arising therefrom was harmless as the jury was already fully apprised of the confession having previously viewed and considered it in open court. We find no error.

For the foregoing reasons, we AFFIRM the Judgment of the Fayette Circuit Court.

ALL CONCUR.

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¹ In his responsive brief, Gay acknowledges having incorrectly claimed that the court made no admonition.