

Commonwealth of Kentucky
Court of Appeals

NO. 2015-CA-000255-MR

JESSICA WHANN

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
ACTION NO. 13-CR-003239-002

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON, JONES, AND J. LAMBERT, JUDGES.

DIXON, JUDGE: Jessica Whann appeals from the judgment of the Jefferson Circuit Court convicting her of tampering with physical evidence, abuse of a corpse, and theft by unlawful taking under \$500. Whann contends the circuit court erred by allowing the Commonwealth to introduce videotaped deposition

testimony at trial, and she also contends the court erred by allowing the jury to review trial testimony outside her presence during deliberations. After careful review, we affirm.

On September 11, 2014, the body of Christopher Pickerell was discovered inside his vehicle in an alley off Bardstown Road in Louisville. During the course of the investigation, officers interviewed Whann, who ultimately admitted that Pickerell had overdosed on heroin at her home in the early morning hours of September 8. Whann asserted that her roommate, Thomas Bronnenburg, and an unknown third individual had moved Pickerell's body from the house to the cargo area of Pickerell's SUV. Whann admitted she then moved the vehicle to the alley where it was ultimately found. Whann and Bronnenburg were indicted on charges of tampering with physical evidence, abuse of a corpse, and theft by unlawful taking under \$500. Prior to trial, Bronnenburg agreed to testify against Whann in exchange for a twelve-month sentence if he was found guilty. Following a jury trial, Bronnenburg was convicted of facilitation to tampering with physical evidence. Whann was convicted on all counts of the indictment and received a sentence of five years' imprisonment. Whann now appeals her conviction.

I. Deposition Testimony

Larry Edrington, a friend of the Pickerell family, discovered Pickerell's vehicle in the alley and called police. The Commonwealth subpoenaed Edrington to testify; however, the trial was unexpectedly continued on the morning it was supposed to begin. As a result, the Commonwealth moved to depose Edrington because he was going to be on vacation on the rescheduled trial date. Whann objected, contending Edrington's vacation did not constitute unavailability within the meaning of RCr¹ 7.20 and KRE² 804 and that the deposition violated her right to confrontation pursuant to Section 11 of the Kentucky Constitution. The court reviewed the rules and granted the Commonwealth's motion to depose Edrington. Shortly thereafter, the judge placed Edrington under oath and the deposition commenced. Edrington testified for approximately eight minutes, and Whann declined to question him on cross-examination. The Commonwealth subsequently introduced Edrington's videotaped testimony at trial.

Whann argues the use of the videotaped deposition at trial violated her right to confront the witness pursuant to § 11 of the Kentucky Constitution, and she contends the Commonwealth failed to establish Edrington was unavailable within the meaning of RCr 7.20 and KRE 804(a).³

RCr 7.20(1) states, in relevant part:

¹ Kentucky Rules of Criminal Procedure.

² Kentucky Rules of Evidence.

³ KRE 804(a) states, in relevant part: "Unavailability as a witness' includes situations in which the declarant: . . . (4) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or (5) Is absent from the hearing and the proponent of the statement has been unable to procure the declarant's attendance by process or other reasonable means."

At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used if it appears: that the witness is dead; or that the witness is out of the Commonwealth of Kentucky, . . . or that the witness is unable to attend or testify because of sickness or infirmity; or that the party offering the deposition had been unable to procure the attendance of the witness by subpoena.

A review of the record indicates the Commonwealth moved to depose Edrington rather than attempting to secure his appearance on the rescheduled trial date; however, we are satisfied any error in admitting the deposition at trial was harmless beyond a reasonable doubt. *See Parson v. Commonwealth*, 144 S.W.3d 775, 785 (Ky. 2004). The constitutional harmless-error analysis “involves considering the improper evidence in the context of the entire trial and asking whether there is a ‘reasonable possibility that the evidence complained of might have contributed to the conviction.’” *Staples v. Commonwealth*, 454 S.W.3d 803, 826-27 (Ky. 2014) (*quoting Talbott v. Commonwealth*, 968 S.W.2d 76, 84 (Ky.1998)).

The deposition was recorded in the courtroom. Edrington testified from the witness stand, which allowed the jury the opportunity to assess his demeanor. *Parson*, 144 S.W.3d at 785. Although Whann chose not to question Edrington, she was afforded the right to cross-examine and “‘meet the witness[] face to face.’” *Id.* (*quoting* Ky. Const. § 11). Finally, Edrington’s brief testimony related to finding the vehicle in the alley and calling the police because he knew Pickerell’s family had reported him missing. The totality of the Commonwealth’s evidence included Whann’s confession to police, as well as Bronnenburg’s testimony that largely

corroborated Whann's version of events. After careful review, we conclude there was no reasonable possibility the introduction of Edrington's deposition contributed to Whann's conviction.

II. Jury Deliberation

Whann next argues the court violated RCr 9.74 and her right to be present at trial when it allowed the deliberating jury to review a portion of Bronnenburg's trial testimony outside of her presence.

RCr 9.74 states, in relevant part: "No information requested by the jury . . . after the jury has retired for deliberation shall be given except in open court in the presence of the defendant . . . and the entire jury, and in the presence of or after reasonable notice to counsel for the parties."

The record reflects that the jury sent a note to the court asking to review Bronnenburg's testimony. The court advised the parties of the request, and counsel agreed that none of the parties would be present in the courtroom while the jury reviewed the testimony. After the parties exited the courtroom, the jury returned to the courtroom and, with assistance from the bench clerk, watched a portion of Bronnenburg's testimony.

The court's procedure violated the plain language of RCr 9.74; however, Whann waived the error by failing to object to the procedure and agreeing to leave the courtroom. *McGuire v. Commonwealth*, 368 S.W.3d 100, 115 (Ky. 2012). Further, in *McAtee v. Commonwealth*, 413 S.W.3d 608, 628 (Ky. 2013), the Court addressed whether the defendant's due process rights were violated when he was

not present when the jury reviewed testimony during deliberations. The Court stated,

Assuming, without deciding, that re-watching a witness's videotaped statement during deliberations is a 'critical stage of the trial,' we conclude that failing to secure Appellant's presence constitutes harmless error at worst. That is, there is no reasonable possibility that it contributed to the conviction. Appellant was present when the video was originally played for the jury, and he was afforded a constitutionally adequate opportunity to defend against the statements made therein. We therefore hold that failure to secure Appellant's presence

when the jury re-watched Kilgore's statement, if RCr 8.28 error at all, is harmless beyond a reasonable doubt.

Id. (internal citations, quotation marks, and footnotes omitted).

Here, the jury re-watched a portion of Bronnenburg's testimony and subsequently found him guilty of facilitation to tampering with physical evidence. Whann had been present for Bronnenburg's live testimony and effectively cross-examined him regarding his involvement in the crime. In light of the totality of the evidence presented by the Commonwealth, we are convinced that Whann's absence from the courtroom during the jury's review of the testimony was harmless beyond a reasonable doubt.

For the reasons stated herein, we affirm the judgment of the Jefferson Circuit Court.

ALL CONCUR.

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