IMPORTANT NOTICE

NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: AUGUST 26, 2004
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2003-SC-0722-MR DATE 9-16-04 ELIA Grow, D.C.

ROBERT HATTON APPELLANT

V.

APPEAL FROM BATH CIRCUIT COURT
HONORABLE BETH LEWIS MAZE, JUDGE
02-CR-00043

COMMONWEALTH OF KENTUCKY APPELLEE

MEMORANDUM OPINION OF THE COURT

Affirming

Appellant, Robert Hatton, was convicted in the Bath Circuit Court on one count of second-degree manslaughter and four counts of first-degree wanton endangerment. He was sentenced to a total of twenty years imprisonment and appeals to this Court as a matter of right.

Appellant's convictions stem from a vehicular accident involving Appellant and another vehicle. The individual driving the other vehicle was killed, and the passengers were injured. Evidence presented at trial established two very different versions of events leading up to the crash. Appellant stated that during the early evening hours of October 6, 2002, he returned home with his nine-year-old daughter, Jessica. Appellant stated that they had intended to pick up his wife, Laura, and go out for a family dinner.

As Jessica exited Appellant's van, he noticed that the door of his jeep, which was also parked in the driveway, was open. Appellant then saw a man duck down, run around the side of the jeep, get in it and speed away. Appellant claimed that he thought Jessica had been abducted and he yelled to his wife, whom he believed was in their house, to call 911. Appellant got back into his van and sped off in pursuit of the jeep. He stated that when he caught up to the jeep at a curve in the road, the driver hit the brakes, causing Appellant to run into the back of it. After crossing over a bridge, both drivers lost control of the vehicles. Appellant testified that he realized he was not going to make the curve in the road, locked his brakes, and his van hit an embankment and pine tree. The jeep went over the embankment.

The Commonwealth, on the other hand, presented evidence that on the day of the accident, Laura had sought an EPO against Appellant due to repeated physical abuse. Laura was waiting for Appellant to return home so she could get Jessica and leave the premises before he learned of the EPO. Laura testified that when Appellant drove in the driveway, she exited the house, followed by her sister, Christine, as well as friends, Patty and Joe Wills. Laura met Jessica in the driveway and led her to the jeep. Laura stated that once everyone was in the jeep, Joe drove away at a normal rate of speed. The surviving passengers testified that they all knew Appellant, and that, contrary to Appellant's story, he clearly saw them exit the house and get into the jeep.

Laura further testified that shortly after they drove away, Appellant's van appeared behind them and repeatedly began rear-ending the jeep. Laura stated that Patty Wills was able to call 911 from her cell phone to report that Appellant was trying to kill them. The jeep was then forced off the road and over the embankment. Joe Wills died at the scene from injuries he sustained during the accident. The Commonwealth

presented further evidence that immediately after the accident, a test revealed that Appellant's blood-alcohol level was .19 percent.

On October 18, 2002, the Bath County Grand Jury indicted Appellant for one count of murder, four counts of first-degree wanton endangerment, and one count of operating a motor vehicle while under the influence. The case proceeded to trial in July 2003. The jury found Appellant guilty of second-degree manslaughter and four counts of first-degree wanton endangerment, and recommended a total of thirty years imprisonment. Pursuant to KRS 532.110(1)(c), the trial court reduced the recommended sentence to the maximum aggregate of twenty years, and fined Appellant $1,000. This appeal ensued. Additional facts are set forth as necessary.

I.

Appellant first argues that because the Commonwealth introduced insufficient evidence on the first-degree wanton endangerment charges, he was entitled to a directed verdict. While Appellant concedes that he acted wantonly, and even that his conduct with respect to the four passengers created a substantial danger of their death or serious physical injury, he contends that "no rational trier of fact could have found beyond a reasonable doubt that [his] undertaking a vehicle pursuit of an unknown person he believed just kidnapped his young daughter . . . was acting under circumstances manifesting an extreme indifference to the value of human life." While recognizing that jury verdicts need not be logically consistent, Appellant posits that the jury's inability to find extreme indifference with respect to the death of Joe Wills is significant to the sufficiency of the evidence for the wanton endangerment charges.

The instructions under which Appellant was convicted provided as follows:

INSTRUCTION NO. 5

SECOND-DEGREE MANSLAUGHTER

If you do not find Defendant guilty under Instruction No. 4, you will find the Defendant guilty of Second-Degree Manslaughter under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

A. That in this county on or about October 6, 2002 and before the finding of the Indictment herein, he operated a motor vehicle under the influence of alcohol and/or in such a manner as to cause a wreck which resulted in the death of Joseph Wills;

AND

B. That in so doing, he was acting wantonly as that term is defined under Instruction No. 3.

INSTRUCTION NO. 7

FIRST-DEGREE WANTON ENDANGERMENT

You will find the Defendant guilty of First-Degree Wanton Endangerment under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

A. That in this county on or about October 6, 2002 and before the finding of the Indictment herein, he operated a motor vehicle under the influence of alcohol and/or in such a manner as to cause the vehicle occupied by [passenger][1] to leave the roadway;

AND

B. That he thereby wantonly created a substantial danger of death or serious physical injury to [passenger];

AND

C. That under the circumstances, such conduct manifested extreme indifference to the value of human life.

The jury was also instructed that it could find Appellant guilty of murder if it believed that Appellant, while operating a vehicle under the influence of alcohol and/or in such a

[1] The jury was separately instructed on first and second-degree wanton endangerment with respect to each of the four passengers.

manner as to cause a wreck which resulted in the death of Joe Wills, was wantonly engaging "in conduct which created a *grave risk of death to another* and thereby caused the death of Joseph Wills under circumstances manifesting an extreme indifference to human life." (Emphasis added).

Under the murder instruction, the jury had to find not only that Appellant's actions resulted in the death of Joe Wills under circumstances manifesting an extreme indifference to human life, but also that they created a grave risk of death to another. Such finding was not required under the first-degree wanton endangerment instructions. Therefore, the jury's verdicts were not truly inconsistent even though it found that Appellant acted with extreme indifference with respect to the four passengers but not with respect to Joe Wills.

Notwithstanding the consistency of the verdicts, this Court in Commonwealth v. Harrell, Ky. 3 S.W.3d 349, 351 (1999) held:

> [A] rigid adherence to a prohibition against inconsistent verdicts may interfere with the proper function of a jury, particularly with regard to lenity. See Dunn v. United States, 284 U.S. 390, 393, 52 S.Ct. 189, 190, 76 L.Ed. 356, 359 (1932); United States v. Powell, 469 U.S. 57, 61, 105 S.Ct. 471, 474, 83 L.Ed.2d 461, 466 (1984). Such an approach would unduly restrict the right of the jury to consider the evidence broadly and convict or acquit based upon its view of the evidence pertaining to each charge. Moreover, that approach requires analytical precision that would inevitably lead to confusion and needless appellate reversals.
>
> The better approach would be to examine the sufficiency of the evidence to support each verdict. This approach is consistent with the United State Supreme Court's holding that each count of an indictment should be regarded as a separate indictment, and thus consistency in a verdict is not necessary. Dunn v. United States, 284 U.S. at 393, 52 S.Ct. at 190, 76 L.Ed. at 358 (1932); United States v. Powell, 469 U.S. at 67, 105 S.Ct. at 475, 83 L.Ed.2d at 467 (1984).

Despite Appellant's belief that no rational jury could have found that his pursuit of an unknown perpetrator who had just kidnapped his daughter amounted to circumstances manifesting an extreme indifference to human life, the Commonwealth presented substantial evidence to contradict his story. Viewing the evidence in a light most favorable to the Commonwealth, we conclude that it presented more than sufficient evidence to withstand a directed verdict on the first-degree wanton endangerment charges. Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991).

II.

Appellant next argues that he was prejudiced by the jury's use of a dictionary during the guilt phase deliberations. Appellant asserts that "[d]ismissing the error as harmless without taking any precautionary measures to determine the exact nature of the prejudice or to ameliorate it was clearly erroneous and an abuse of the trial court's discretion." For reasons to be discussed, we disagree.

After the jury had been deliberating for approximately four hours, the foreperson asked the bailiff for a dictionary. Before the bailiff could return with an answer from the trial court, the jury located a dictionary in the jury room and looked up the word "indifference." The trial court thereafter advised counsel of the situation. The Commonwealth responded that the use of a dictionary was not a waivable defect and the jury could not be rehabilitated if they had, in fact, opened the dictionary during deliberations. Defense counsel disagreed and requested that the trial court inquire as to whether the jury had used the dictionary.

When the jury returned to the courtroom, the foreperson informed the trial court that they had looked up the word "indifference," but that its definition had had absolutely no effect on the deliberations. The trial court thereafter explained that use of the

dictionary definition was improper, but instructed the jury to continue deliberating while the trial court and counsel conducted research to determine if a mistrial needed to be declared. The trial court reassured the jurors it was not their fault that they opened the dictionary, noting "that's what intelligent people do – try to find the answers."

About thirty minutes later, the trial court called the jurors back to inform them that there was case law directly on point and that the trial did not need to be halted so long as the jury had not relied on the dictionary definition of indifference. The foreperson again, in the presence of the jury, affirmatively denied any such reliance. After the jury returned to its deliberations, Appellant and defense counsel both specifically waived any irregularity in the proceedings. The prosecutor, however, refused to do so, and noted his objection on the record.[2]

Appellant now argues that the presence of the dictionary in the jury room tainted the jury's decision and was reversible error. Appellant points out that the case relied on by the trial court, Cole v. Commonwealth, Ky., 553 S.W.2d 468 (1977), specifically holds that "[t]here is a time and a place for all things. Permitting a jury to take a dictionary into the jury room is neither the time nor the place." Id. at 471. In Cole, the defendant alleged that the jury had used dictionary definitions of "wanton act" and "wanton indifference" as substitutes for the trial court's definition of such terms. This Court concluded the presence of the dictionary was harmless error because it was unclear what use, if any, the jury had made of the dictionary. Id. Appellant points out, however, that Cole is distinguishable from this case in that the instructions in Cole not only defined both terms, but the trial court also orally clarified the terms to the jury upon

---

[2] The prosecutor went so far as to argue that the error "guaranteed reversal" and that Appellant's waiver did not prevent reversal on RCr 11.42 grounds of ineffective assistance of counsel. Defense counsel maintained that based on the foreperson's statements, any error was harmless, at best.

request. In the instant case, "indifference" was neither defined nor explained by the trial court.

Of course, jurors cannot obtain information from outside sources, such as a dictionary, for guidance on the law. See Grooms v. Commonwealth, Ky., 756 S.W.2d 131 (1988) ("No extraneous matter is permitted in the jury room.")(Stephens, J., concurring). As a Florida court commented, "No maker of dictionaries should ever be allowed to define legal terms to a jury unless such definitions go through the medium of the trial judge, the only one authorized by law to give definitions and explanations to the jury." Smith v. State, 95 So.2d 525, 528 (Fla. 1957). Indeed, we held as much in Cole, supra.

In this case, however, preservation is fatal to Appellant's claim. He erroneously argues that the issue is preserved by the Commonwealth's objection at trial, notwithstanding the fact that both he and his counsel were adamant about the jury continuing its deliberations. More likely than not, it was simply a matter of trial strategy that counsel believed the jury was struggling with the first-degree wanton endangerment instruction and would return a lesser verdict. Nonetheless, RCr 9.22 requires a party to render a timely and appropriate objection in order to preserve an issue for review. "Violations of constitutional rights, the same as of other rights, may be properly waived by failure to make timely and appropriate objection." See Baker v. Commonwealth, Ky., 922 S.W.2d 371 (1996). In light of the fact that Appellant affirmatively waived any irregularity, he cannot now claim reversible error. To allow such would be to condone the practice of building error into the record to warrant reversal on appeal.

Regardless of preservation, however, we are not convinced that reversal would be warranted under the circumstances presented herein. As the Sixth Circuit Court of

Appeals reasoned in United States v. Griffith, 756 F.2d 1244, 1251-52 (6th Cir. 1985), cert. denied, 474 U.S. 837 (1985), "A jury's use of a dictionary to define a relevant legal term is error, but it is not prejudicial per se." See also United States v. Gillespie, 61 F.3d 457 (6th Cir. 1995). The trial court questioned the foreperson in the presence of the jury as to whether the dictionary definition of "indifference" had any impact upon the deliberations. The foreperson responded unequivocally that it had not. While the trial court did not question each juror individually, there is absolutely no evidence in the record to indicate that anyone had a contrary opinion. Further, although Appellant emphasizes the fact that the jury was not specifically admonished to disregard the dictionary definition, there is no doubt that the jury was aware the dictionary was improper.

We presume that a properly empanelled jury follows the law and reaches a verdict based on the evidence and instructions. There is no basis to conclude in this case that the foreperson's denial of any influence from the dictionary was somehow suspect. "[O]ne who is trying as an honest man to live up to the sanctity of his oath is well qualified to say whether he has an unbiased mind in a certain matter." Gillespie, supra at 459 (quoting Smith v. Phillips, 455 U.S. 209, 217 n. 7, 102 S.Ct. 940, 946 n.7, 71 L.Ed.2d 78 (1982)).

Appellant has failed to establish that the jury's use of the dictionary resulted in prejudice or affected his right to a fair trial. The trial court concluded that the jury had not relied on the dictionary, and this conclusion is amply supported by the record. Accordingly, we do not find that any error rises to the level warranting reversal under RCr 10.26.

III.

Appellant next alleges that the trial court erred by allowing improper victim impact testimony from Joe Wills' two adopted children. He argues that KRS 532.055[3] and KRS 421.500[4] preclude minors from offering victim impact testimony. However, while Appellant claims this issue is preserved, a review of the record indicates otherwise.

During the sentencing phase, the Commonwealth called Paige and James Wills, the minor adopted children of Joe Wills. Appellant objected to the testimony on the grounds that it was unclear whether the children were, in fact, legally adopted. Defense counsel specifically agreed to the testimony upon verification of adoption. Thus, the question of whether the children were "victims" within the context of the statutes was not presented to the trial court and will not be reviewed by this Court. Appellant cannot "feed one can of worms to the trial judge, and another to the appellate court." Kennedy v. Commonwealth, Ky., 544 S.W.2d 219, 222 (1976). See also Gabow v. Commonwealth, Ky., 34 S.W.3d 63 (2000); Rupee v. Commonwealth, Ky., 821 S.W.2d 484 (1991). Suffice it to say that a review of the children's very limited testimony supports the conclusion that error, if any, was harmless.

IV.

Finally, Appellant takes issue with the fact that the trial court imposed a $1,000 fine during sentencing despite the fact that it waived court costs on the grounds he was

---

[3] KRS 532.055(2)(a)(7) permits evidence of "[t]he impact of the crime upon the victim, as defined in KRS 421.500, including a description of the nature and extent of any physical, psychological, or financial harm suffered by the victim" to be offered during sentencing.

[4] KRS 421.500 defines a victim as: "an individual who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of a . . . criminal homicide . . . . If the victim is a minor or legally incapacitated, 'victim' means a parent, guardian, custodian or court-appointed special advocate."

a "poor person." The trial court imposed the fine pursuant to KRS 534.030, which provides, in relevant part:

> (1) Except as otherwise provided for an offense defined outside this code, a person who has been convicted of any felony shall, in addition to any other punishment imposed upon him, be sentenced to pay a fine in an amount not less than one thousand dollars ($1,000) and not greater than ten thousand dollars ($10,000) or double his gain from commission of the offense, whichever is greater.
>
> (4) Fines required by this section shall not be imposed upon any person determined by the Court to be indigent pursuant to KRS Chapter 31.

Subsection (2) requires that "the court shall consider" certain factors to determine the amount of any fine imposed.

The final judgment and sentence reflects that court costs were waived due to Appellant having been found to be a "poor person" which is defined under KRS 453.190(2), as "a person who is unable to pay the costs and fees of the proceeding in which he is involved without depriving himself or his dependent of the necessities of life, including food, shelter, or clothing." However, KRS 31.100(3) defines an "indigent person" as "(a) a person eighteen (18) years of age or older . . . who, at the time his need is determined, is unable to provide for the payment of an attorney and all other necessary expenses of representation." Thus, being a poor person does not necessarily impact the imposition of a fine under KRS 534.030 if the defendant does not also meet the definition of an indigent person under Chapter 31.

Appellant's reliance on Simpson v. Commonwealth, Ky., 889 S.W.2d 781 (1994), is misplaced. Therein, this Court specifically noted:

> Pursuant to the statute, the judge must independently determine the appropriateness of any fine, and if so, the appropriate amount and method of payment thereof. In so doing, the judge must also consider whether the appellant is indigent. In this connection, we observe that at sentencing in this case, the appellant was represented by an assistant

> public advocate. Thus, we may assume that the trial judge had already determined that the appellant was indigent.

Id. at 784. Unlike the defendant in Simpson, Appellant was represented by private counsel throughout his trial and sentencing. Further, no affidavit of indigency appears in the record until Appellant filed his notice of appeal and motion to proceed in forma pauperis.

Although the trial court referred to Appellant as "indigent" during the sentencing hearing, we are of the opinion that such was poor wording rather than a legal finding. Therefore, even though the trial court exercised its discretion in waiving the $100 court costs, it was not authorized to waive the $1,000 mandatory fine established by KRS 534.030. No error occurred.

The judgment and sentence of the Bath Circuit Court are affirmed.

All concur.

COUNSEL FOR APPELLANT

Donna L. Boyce
Department of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, KY 40601

COUNSEL FOR APPELLEE

Gregory D. Stumbo
Attorney General

William Robert Long
Assistant Attorney General
Criminal Appellate Division
1024 Capital Center Drive
Frankfort, KY 40601