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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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 25, 2005
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2004-SC-0111-MR

CARL HOLLAND — APPELLANT

V.

APPEAL FROM McCRACKEN CIRCUIT COURT
HONORABLE R. JEFFREY HINES, JUDGE
2002-CR-0339

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Carl Holland, was convicted by a McCracken County jury of first-degree burglary, three counts of first-degree wanton endangerment, first-degree possession of a controlled substance, and being a first-degree persistent felony offender (PFO). He was sentenced to a total of twenty years' imprisonment. He appeals to this Court as a matter of right, asserting the following trial court errors: (1) improper use of a recalled juror, and (2) improper introduction of a witness's prior written statement. We affirm.

The convictions in this matter arise from events that occurred in the early hours of September 6, 2002. Appellant appeared at the apartment complex of Shamika Riley and Rhonda Pierce. Also present in Riley's apartment were her daughter, Pierce's two sons, and Riley's friend, Shawn Jones. Circumstantial evidence suggested that

Appellant came to the apartments to confront Riley, who had allegedly sold Appellant some "bad" cocaine, and to reclaim his stereo, which he had used for payment.

Appellant first went to the door of Riley's neighbor, Patricia Rounsavall. According to Rounsavall, Appellant asked her to go next door and summon Riley, purportedly because she had some of his belongings. Rounsavall, who was sitting outside of her door talking on the phone, did not respond to Appellant but rather went inside her apartment. Rounsavall testified that she looked out the window and saw Appellant at Pierce's front door, wielding a gun. She watched as he shot the gun twice into the air. Rounsavall then observed Appellant knock on Pierce's door and demand entry. He entered the apartment, though it was unclear from the testimony whether he entered himself or Pierce let him in.

In any event, Appellant entered the Pierce and Riley apartment, and he commanded Pierce to go into Riley's bedroom and retrieve his stereo. Pierce did retreat to the bedroom, but informed Riley that Appellant was in the apartment. The two women fled through the back door to get help, leaving Sean Jones in the apartment with their children. Jones walked into the front room and found Appellant, who pointed a gun to Jones's ear and demanded to know where Riley was. Jones told Appellant that Riley had left and that he did not know her whereabouts. Jones asked Appellant why he had come to the apartment, and Appellant responded that he was looking for his stereo. Seeing a stereo on the couch, Jones offered to take it out to Appellant's car. Appellant refused, wanting Riley to bring it to him personally. Appellant eventually left the apartment without the stereo. Jones then left the apartment, taking Pierce's baby next door to Rounsavall; he also asked Rounsavall to call the police. Meanwhile, Riley and Pierce had made contact with the police as well.

Officer Shawn Maxie responded to the call, arriving first at Rounsavall's apartment. While Officer Maxie was speaking to Jones and Rounsavall, the group heard two gunshots from behind the house and saw Riley and Pierce run back into the apartment. Pierce and Riley testified that they ran back to the apartment because Appellant shot at them. Shortly thereafter, three other officers arrived at the scene. Appellant was arrested and a pat-down search revealed seven rocks of crack cocaine. Pierce and Riley identified Appellant as the person who had shot at them. One of the officers discovered a loaded gun about one block away, which appeared to have been thrown over a gate into a nearby backyard.

On November 8, 2002, the grand jury indicted Appellant and charged him with one count of first-degree burglary, three counts of first-degree wanton endangerment, possession of a controlled substance, and being a persistent felony offender in the first degree. A McCracken County jury found him guilty of all charges and he was sentenced to twenty years' imprisonment. He now appeals, raising two issues for review.

Appellant argues that the trial court erred in recalling an excused alternate juror. Following closing arguments, the court randomly drew the name of Juror #86 and dismissed him from further jury service. The fully impaneled jury then retired and began deliberations. About two hours later, a principal from a local school arrived in the courtroom and notified the court that Juror #203's child had suffered a seizure and was in the hospital.

The trial judge, faced with this unexpected circumstance, discussed the situation for several minutes with both attorneys and the school principal. He considered several options, including recessing for the day and resuming when Juror #203 was available.

Eventually, he determined that calling back Juror #86, the alternate juror, would be the best course of action. The court clerk was able to contact Juror #86, and the jury was instructed to cease deliberations until he arrived. After his arrival, the jury resumed deliberations and ultimately convicted Appellant on the aforementioned charges.

Appellant now argues that it was error for the trial judge to recall a juror that had been excused from service. Appellant argues that his substantial rights were prejudiced when the trial court failed to declare a mistrial. Our review of the record reveals that the issue was not properly preserved for appellate review.

Upon being notified of the situation, the trial court discussed several options with counsel:

> Court: As I say, we still have our— [Juror #86] was picked as the alternate juror.
>
> Defense Counsel: Yes, sir.
>
> Court: . . . I don't know procedurally. As long as he hasn't been away. I mean, he couldn't have been discussing the case with any of the jury, because they're all here. I guess we could call him back.
>
> Com: If Ms. Burne doesn't object to that, I guess that's probably the best possible option.
>
> Defense Counsel: Yes, sir. I guess so.

Later, the parties discussed the option of dismissing the jury for the afternoon, and resuming the next day. The trial court noted the possibility that Juror #203 would not be available even the following day, whereupon defense counsel objected to this option:

> Court: . . . What is not so clear is what happens if we just send them off. I mean, hopefully this child is okay, but who knows?

Defense Counsel: Judge, I would have to object to just sending them off. I mean, if we could get the alternate back here. . . .

Thereafter, defense counsel again suggested recalling Juror #86 and keeping the remaining jurors at court until his return:

Defense Counsel: I would be all for bringing her [Juror #203] in, letting her go, feed (sic) these people here, maybe, and see if we can get [Juror #86] back in.

The trial court then instructed the bailiff to inform Juror #203 that she had been dismissed. As Juror #203 was being escorted out of the courtroom, the trial judge again expressed his belief that recalling Juror #86 was the best solution, noting the lack of alternative options. At that point, defense counsel suggested that the trial court could "just rule a mistrial and do it again." Neither the Commonwealth's Attorney nor the trial court responded to defense counsel's suggestion. Though the discussion continued for several additional minutes, defense counsel did not mention again the possibility of a mistrial.

This issue is not preserved for appellate review. Defense counsel made no objection to the trial court's actions, as required by RCr 9.22. More compelling to our determination, however, is that defense counsel in fact advocates the trial court's decision to recall Juror #86. On at least three occasions, defense counsel specifically agrees to the trial court's proposed course of action. When the Commonwealth's Attorney asked if there was an objection to recalling Juror #86, defense counsel expressly declined. And when the trial court suggested recessing until Juror #203 could return, defense counsel objected, stating her preference that Juror #86 be recalled

instead. When an issue has not been presented to the trial court for a ruling, there is no action by the trial court for an appellate court to review. Kotas v. Commonwealth, 565 S.W.2d 445 (Ky. 1978).

Furthermore, we do not believe that defense counsel's comment to "just rule a mistrial and do it again" preserved the issue. This statement was made at a point in the exchange when the trial court was discussing all possible avenues, and defense counsel merely identified a mistrial as a possible solution. The nature and tone of her suggestion can only be characterized as casual and off-handed. Such a brief and informal suggestion, devoid of any elaboration or supporting arguments, cannot reasonably be construed as a motion. Even assuming, arguendo, that defense counsel made a valid motion for mistrial, the issue is nonetheless unpreserved for review as the trial court made no ruling. Once an objection is made, the party making the objection must insist that the court rule on the objection. Failure to receive a ruling waives the objection. Bell v. Commonwealth, 473 S.W.2d 820 (Ky. 1971).

We are mindful of the factually analogous case of Thurman v. Commonwealth, 611 S.W.2d 803 (Ky. App. 1980), wherein a juror fell ill during deliberations and was replaced, over defense objection, with a previously excused alternate juror. The Court of Appeals concluded that it was error for a trial court to reseat the excused juror after deliberations had begun. The present matter is distinct, however, in one very important respect: Appellant's defense counsel made no objection to the trial court's actions and thereby waived any objection. Kentucky courts have long recognized that defense counsel may waive appellate review of errors, even those affecting the substantial rights of a defendant, by declining to object:

> When a defendant's attorney is aware of an issue and elects to raise no objection, the attorney's failure to object may constitute a waiver of an error having constitutional implications. In the absence of exceptional circumstances, a defendant is bound by the trial strategy adopted by his counsel even if made without prior consultation with the defendant. The defendant's counsel cannot deliberately forego making an objection to a curable trial defect when he is aware of the basis for an objection.

Salisbury v. Commonwealth, 556 S.W.2d 922, 927 (Ky. App. 1977).

Here, it is plainly obvious that defense counsel made a tactical decision to recall Juror #86, determining that this remedy was in the best interests of her client. The discussion between counsel and the trial court was lengthy and informal; defense counsel had ample opportunity to make an objection or argue more vigorously for alternative remedies, such as a mistrial. She did not, and in fact expressed her support of recalling Juror #86. It is simply impermissible, then, for defense counsel to advocate one course of action at trial, then appeal the trial court's decision to follow that very recommendation. Reversal is not warranted.

Appellant also argues that the trial court erred by allowing the introduction of the written statement of witness Patricia Rounsavall. During direct examination, Rounsavall stated that after Appellant came to her apartment, he entered Riley's apartment. She then testified that while Appellant was still in Riley's apartment, Jones came over with a child and asked to use her phone to call the police. Rounsavall's written statement to the police on the night of the incident, however, indicates that Appellant had already left Riley's apartment before Jones went to Rounsavall's apartment with the child.

The Commonwealth's Attorney recognized the discrepancy. He attempted to refresh Rounsavall's recollection by reading aloud a portion of the written statement. Rounsavall listened as the Commonwealth's Attorney read the pertinent line from her

statement and said she agreed with it on that point. At the close of Rounsavall's testimony, the Commonwealth moved to admit her entire written statement on the grounds that it was a "prior inconsistent statement." Appellant objected, stating that there was no prior inconsistent statement because Rounsavall had actually adopted her prior written statement as her own testimony. The trial judge allowed the entire written statement to be admitted, citing KRE 106 and Slaven v. Commonwealth, 962 S.W.2d 845 (Ky. 1997).

We have reviewed and considered the arguments advanced by Appellant as to why reversal is required. Without addressing these assertions, we determine that any alleged error resulting from the introduction of Rounsavall's statement was harmless. RCr 9.24. Rounsavall's very brief written statement was cumulative of her in-court testimony; she testified independently to every fact included in the statement. Upon review of the entire case, we do not believe that a substantial possibility exits that the final result of this case would have been any different had this alleged error not occurred. Abernathy v. Commonwealth, 439 S.W.2d 949 (Ky. 1969).

For the foregoing reasons, the judgment of the McCracken Circuit Court is affirmed.

All concur.

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