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RENDERED: MAY 24, 2007
NOT TO BE PUBLISHED

FINAL

Supreme Court of Kentucky

2006-SC-000598-MR DATE 6-14-07 E.W.A. Gaunt P.C.

ROY E. WHITE — APPELLANT

V.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
NO. 06-CR-00073

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This is a matter of right appeal from a judgment in which appellant was convicted of, among other offenses, First-Degree Trafficking in a Controlled Substance and for being a Persistent Felony Offender (PFO I). Appellant's sole argument is that the convictions on Trafficking and the PFO I should be reversed because the trial court exceeded the limits of RCr 9.57 and RCr 9.74 in its interactions and communications with the jury after it announced that it was deadlocked. Appellant failed to preserve the alleged errors relating to these interactions and communications, and we adjudge that none of alleged errors rise to the level of palpable error. Hence, we affirm.

On November 30, 2005, Appellant, Roy White, was arrested as a result of a traffic stop in which a police canine alerted to the driver's side of the car, yielding a

bag of drug paraphernalia - a set of digital scales with what appeared to be cocaine residue and a box of plastic sandwich baggies. After being transported to the Fayette County Detention Center, White attempted to discard 7.4 grams of crack cocaine into a trash bin in the booking area. A large amount of cash ($1,709) and a cell phone were also found on White's person.

White was thereafter indicted for Trafficking In a Controlled Substance in the First Degree, Promoting Contraband in the First Degree, Possession of Drug Paraphernalia, Failure to or Improper Signal, and PFO I. A jury trial was held on June 20 and 21, 2006. After four and a half hours of deliberations, a RCr 9.57(1) charge and certain communications with the court, which we will recount and discuss below, White was found guilty of Trafficking In a Controlled Substance in the First Degree, Possession of Drug Paraphernalia, Failure to or Improper Signal, and PFO I. The jury recommended a sentence of ten (10) years on the Trafficking conviction, enhanced to twenty (20) years for the PFO I, twelve (12) months and days served in lieu of a $500 fine on the Possession of Drug Paraphernalia conviction, and days served in lieu of a $200 fine on the Failure to Signal conviction. The trial court sentenced White in keeping with the jury's recommendation for a total of twenty (20) years. This appeal by White followed.

The jury began its deliberations in this case at around 7:30 p.m. After about three hours, the jury sent a note out to the trial court that read, "Decision reached on 3 charges. One charge hung – what do we do?" The following is a transcript of what then occurred:

> Judge: Okay, I've got to find my Allen charge. Come up.
> [The two attorneys for the Commonwealth and defense

counsel approach the bench.] The note was, [shows the note to the attorneys] but they don't say what three; they just say three. And the standard Allen charge that I use is the five-step thing that, you know, in order to return a verdict you shall [inaudible], yada yada yada. And then sometimes they want me to ask them where they are without revealing who it is, just talk to the foreperson and say, you know I ask them what kind of, whether they're five to six, five to seven or one to eleven, and whether additional deliberations would result in any . . .

Defense counsel: That's the question I like.

Commonwealth # 1: That's fine.

Defense counsel: Yeah, I mean . . .

Commonwealth # 1: Right now?

Defense counsel: Pretty much always. Because I think it gets to the point, you know, why send them back after an Allen charge if they already know there's no way.

Commonwealth #1: Yeah absolutely.

Defense counsel: And I can tell you, they've been arguing in there.

Judge: You know, so, if they say "if you send us back there, we're going to kill each other" . . .

Commonwealth #1: That's fine.

Commonwealth #2: What happens [inaudible]?

Judge: They stay out, yeah.

Commonwealth #1: Then, I guess they have to decide whether or not to . . .

Defense counsel: Who knows what it is.

Commonwealth #1: Yeah, I don't know which one it is.

Defense counsel: Maybe they found him guilty on the signal.

Judge: On the what?

Defense counsel: On the signal.

Commonwealth #2: I think that's a "gimme."

Judge: You never know. They may be like, we'll give you this one if you give us that one.

Commonwealth #1: We're just like, my gosh people, it's not a Murder case.

Judge: It could be the contraband.

Commonwealth #1: Yeah.

Defense counsel: Yeah, it could be.

Commonwealth #1: It could be, yeah 'cause that just . . .

Judge: They could have found him on the other one. It could be the contraband charge. But I'll give them this charge, and then I'll say, "Mr. Foreperson, what count are you hung on?" And then, "would any further deliberations help? Can you tell me just generally, is it five to seven, six to six, or . . .

Commonwealth #1: That's fine.

Defense counsel: Yeah well, can you, do you ask the foreman that at the bench, or do you ask all the jurors, because sometimes I feel that puts pressure on if there's a lone holdout or something like that.

Commonwealth #2: Sure.

Commonwealth #1: That makes sense.

Judge: Do you want me to ask the foreperson at the bench?

Defense counsel: If you do, I would ask that you do it at the bench as opposed to in front of all . . .

Judge: First, I'll ask if he believes additional deliberations would help the stalemate. And if he says "no," then I'll ask him to approach and say, "Why do you feel that way? What's the number division?" And then, they didn't respond to my note about whether they wanted to come back tomorrow, so maybe they just. . .

Commonwealth #2: They're here for the long haul.

Judge: Maybe they just feel like there's no point.

Commonwealth #1: Yeah, there could be, very well.

Judge: Okay, so I'll bring them back. Would you tell the jury I need to bring them out?

[The jury is then brought out.]

Judge: Attorneys waive the call of the jury?

Commonwealth #1 and #2/Defense counsel: Yes, your honor.

Judge: You may be seated. Who's my foreperson?

Foreperson: Me.

Judge: Sir, I have received a note that said the jury had reached a decision on three of the charges. One charge was hung, and you asked, "What do we do?" By law, I am required to instruct you all as follows: In order to return a verdict, each juror must agree thereto. Jurors have a duty to consult with one another and to deliberate with a view toward reaching an agreement if it can be done without violence to individual judgment. Each juror must decide the case in their own mind, but only after an impartial consideration of the evidence with the other jurors. In the course of deliberations, a juror should not hesitate to reexamine their own views and change an opinion if the juror is convinced it is erroneous. And, no juror should surrender their honest conviction as to the weight of effect on the evidence solely because of the opinion of the other jurors, or for the mere purpose of returning a verdict. The three charges upon which you've reached a verdict will stand. My question to you, sir, is do you believe that further deliberations on this count on which you have not reached a verdict would be fruitful?

Foreperson: At present, no. But, there's a question I want to ask, but if I ask the question, then I may put a different light on it. That's why I don't want to ask it openly.

Judge: Okay, you may approach the bench, with counsel.

Foreperson: Okay, alright.

[Foreperson approaches the bench with the three attorneys.]

Judge: Can you tell us what charge you're hung on?

Foreperson: As far as Trafficking. We can't agree . . .

Judge: Count one.

Foreperson: We can't agree on that, and the reason being that we can't on it is because no one has proven to us or showed us where he is trafficking at, even though we understand about the scales and everything else. My question is this, and I see, I don't want to throw a different light on this by asking this question. I don't want to cause any problems by asking. You told us not to consider the sentencing, okay, and we're trying not to do that. My question to you all is this, who would be the people that would enact the sentence?

Judge: Well, let me ask you this. You said that you all were hung on the Trafficking?

Foreperson: Yes.

Judge: On count one. There's another alternative to count one.

Foreperson: Okay, but that's what we are coming into a problem about, with the B and the C. I've got nine people that want to go with the Trafficking, and there's three people that don't want to go with it. And the reason why. . .

Judge: The three that don't want to go with the Trafficking don't want to find Possession either?

Foreperson: They understand about the Possession. I'm just saying that, we accept that. We accept that, okay.

Judge: Okay. Okay.

Foreperson: It just wasn't proven to us beyond a reasonable doubt about the Trafficking, okay. And I guess the thing that's got us hung up and really bogged down is that we're looking at amounts, okay, as far as Trafficking.

Judge: In terms of the. . .

Foreperson: Of how much, you see. And that's, I think, where the sticking point is. So, what may be able to be done with this is this: if we're going to sentence this guy, then maybe we can come to a consensus on that

Trafficking issue, you see. You see, like I say I don't want to put a different light on it . . .

Judge: You can't convict him based on sentencing. You have to base your decision on guilt or innocence based on the evidence.

Foreperson: Right. That's what's in there.

Judge: If you, If you're indicating to the court that you all do not believe that they've proven their case beyond a reasonable doubt, then you're indicating to the, and it's nine to three, based on what you're saying, and that's nine to convict and three not to convict . . .

Commonwealth #1: For Trafficking.

Judge: For Trafficking.

Foreperson: For Trafficking, and Trafficking only. That's where we're hung up at.

Judge: And my question to you is do you believe that further deliberations would convince the other three of guilt beyond a reasonable doubt?

Foreperson: I've got two "maybes" and one I know ain't. And I'm telling you what's real. This guy ain't [inaudible] . . . I have one that won't. Two will be . . . we presented enough arguments where they have doubt now, amongst ourself.

Commonwealth # 1 [addressing the foreperson]: So, if there isn't a consensus for Trafficking, do you feel that the group can come to a consensus be it on Possession or on not guilty on that charge, or is it all just . .

Foreperson: There's not going to be a "not guilty." That's not going to happen. That's not going to happen.

Defense counsel: So, it sounds like that's resolved.

Foreperson: Okay.

Judge: Can there be a consensus on Possession?

Foreperson: That's . . . I don't know. I just don't know.

Defense counsel: Just that there's . . .[Inaudible] not going to be not guilty.

Foreperson: No, because we can't say it's not guilty because it's been proven enough to us.

Defense Counsel: Everybody agrees?

Foreperson: To where he is guilty of some of it, that he is guilty; but the part that is . . . I come back to my first premise, that is Trafficking. That's what we hung about.

Defense counsel [addressing the foreperson]: May I ask, is there agreement on the lesser-included, which is the Possession?

Foreperson: I got a headache.

Defense counsel: It may just be no. The answer may just be no.

Foreperson: Say it again.

Defense counsel: Is there a consensus on Possession?

Foreperson: I believe so, 'cause like I say, the only one we have is the Trafficking. Everything else we've come to an agreement on.

Judge: So everybody agrees that he possessed it. There's just not a consensus whether he did it with intent?

Foreperson: Right, with the Trafficking.

Judge: To traffic?

Foreperson: Right.

Commonwealth #1: I was going to say Judge, it seems like there could be some consensus reached on the charge. The Commonwealth requests . . .sorry . . . that they go back and try if it seems that there can be consensus on one of the options.

Judge: One of the options.

Defense counsel: If they can't all agree on Trafficking, but they all can agree on Possession, then that matter is resolved.

Judge: And maybe he needs to explain that to them. But I didn't get an answer back from my question to you all.

Foreperson: They don't want to go out of here all night.

Judge: They what?

Foreperson: They want to come back tomorrow, one or the other. They want to try to get out of here. But maybe after this I may have to send you another note.

Judge: That's fine. We're here until you tell us that you can't stand, that you can't stand it anymore. So, based on what you've told us, then go back and, I'm going to send you all back as a group, and you deliberate until you need to send me another note.

Foreperson: Okay.

Judge: And then we'll act on that note.

Foreperson: Okay, okay, alright.

Judge: And, just for the record, you know I've never taken an Allen charge that far, but I didn't know what else to do, and I mean, I think he was pretty candid.

Defense counsel: I think he was, and we're all working to reach a resolution.

Commonwealth #1: It seems like they can reach a resolution, but maybe they just didn't understand their options.

Judge: Okay, okay, let me send them back. Okay, ladies and gentlemen of the jury, after that brief discussion with your foreperson, I'm going to send you all back to the jury room and he and you all can discuss this further. And I instructed him that I'll wait to hear, if he needs to write another note or if you need to inquire further then feel free to do that, but hopefully that information has been helpful. Okay. We'll continue in recess.

After one and a half hours of further deliberations, the jury came back with a verdict finding White guilty of First-Degree Trafficking in a Controlled Substance, rejecting the lesser-included offense of First-Degree Possession of a Controlled Substance. White contends that the trial court's interactions and communications with

the jury and its foreperson during its deliberations, as evidenced above, warrant a reversal on the First-Degree Trafficking and PFO I convictions.

RCr 9.57 sets out Kentucky's charge for deadlocked juries pursuant to Allen v. United States, 164 U.S. 492, 17 S. Ct. 154, 41 L. Ed. 528 (1896):

> (1) If a jury reports to a court that is unable to reach a verdict and the court determines further deliberations may be useful, the court shall not give any instruction regarding the desirability of reaching a verdict other than one which contains only the following elements:
>
> (a) in order to return a verdict, each juror must agree to that verdict;
>
> (b) jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;
>
> (c) each juror must decide the case, but only after an impartial consideration of the evidence with the other jurors;
>
> (d) in the course of deliberations, a juror should not hesitate to reexamine his or her own views and change his or her opinion if convinced it is erroneous; and
>
> (e) no juror should surrender his or her honest conviction as to the weight or effect of the evidence solely because of the opinion of other jurors, or for the mere purpose of returning a verdict.
>
> (2) The Court shall not poll the jury before a verdict is returned.

White concentrates most of his argument on his allegation that the trial court violated RCr 9.57(2) when it inquired of the foreperson how the jurors were divided numerically on the deadlocked charge. However, that is not what happened. Although the court did express an intent to inquire about the breakdown of the jurors, it was the foreperson who volunteered this information to the court. We also note that defense counsel expressed no objection to this information being shared with the court.

And defense counsel did not object when the court stated that it intended to ask the foreperson about the breakdown of jurors on the deadlocked charge. Defense counsel only asked that the information be revealed by the foreperson outside the hearing of the other jurors, which it was, so as to not put any pressure on the holdout jurors.

Violations of RCr 9.57 always result in error, but are subject to a harmless error analysis. Mills v. Commonwealth, 996 S.W.2d 473 (Ky.1999). But because defense counsel raised no objection and expressed no complaint at any time about how the hung jury was handled in this case as required by RCr 9.22, we will review the alleged errors pursuant to RCr 10.26 for palpable error. Under RCr 10.26, "an error is reversible only if a manifest injustice has resulted from the error." Martin v. Commonwealth, 207 S.W.3d 1, 3 (Ky. 2006) (quoting Graves v. Commonwealth, 17 S.W.3d 858, 864 (Ky. 2000)). "To discover manifest injustice, a reviewing court must plumb the depths of the proceeding . . . to determine whether the defect in the proceeding was shocking or jurisprudentially intolerable." Id. at 4.

White cites to Brasfield v. United States, 272 U.S. 448, 449, 47 S. Ct. 135, 136, 71 L. Ed. 345 (1926), wherein the practice of inquiring into the numerical breakdown of hung juries was condemned by United States Supreme Court because "in general its tendency is coercive." However, the Court thereafter clarified that its holding in Brasfield was "an exercise of this court's supervisory powers", rather than one grounded in constitutional due process or any other constitutional provision. Lowenfield v. Phelps, 484 U.S. 231, 108 S. Ct. 546, 98 L. Ed. 2d 568, 578 (1988). Because the numerical division of the jury was not elicited by the Court in the present case and was

revealed outside the hearing of the other jurors, we do not see how its revelation could be deemed coercive. If error, it does not rise to the level of palpable error.

White also claims it was error for the court to give the RCr 9.57(1) charge before confirming that further deliberations would be useful. In Williams v. Commonwealth, 147 S.W.3d 1 (Ky. 2004), cert. denied, 544 U.S. 986, 125 S. Ct. 1859, 161 L. Ed. 2d 745 (2005), before giving the RCr 9.57(1) charge, the court inquired of the deadlocked jury whether further deliberations would be helpful, and the jury replied that it would not. The court nevertheless gave the RCr 9.57(1) charge and sent the jury back to continue deliberations. Williams argued the court coerced a verdict by giving a RCr 9.57(1) charge to the jury after being informed that further deliberations would not be useful and by requiring the jury to continue deliberations. This Court adjudged that "[n]o error, palpable or otherwise, occurred." Id. at 9.

> We conclude that it was permissible for the trial court to read RCr 9.57, considering that the jury had only deliberated about two hours when the foreperson informed the trial court that further deliberations would not be helpful. Furthermore, any possibility of coercion was vitiated by the trial court's instruction to the jurors that they should not relinquish honest convictions for the mere purpose of obtaining a verdict. *Commonwealth v. Mitchell*, Ky., 943 S.W.2d 625 (1997).

Id.

In the case at bar, the jurors had been deliberating only three hours on the four charges when it announced it was hung. The court inquired of the jury whether further deliberations would be useful immediately after reading the RCr 9.57(1) charge. The foreperson responded that at present no further deliberations would be helpful, but then qualified his response with his request to ask the question that spawned the ensuing discussion at the bench. Given the foreperson's equivocal response to the

question and the discussion before the bench that followed, which we shall address below, we deem it was not error for the court to send the jury back for further deliberations. And, although the court should have made the determination whether further deliberations would be useful before giving the RCr 9.57(1) charge, such was not palpable error here.

White also asserts that the court's and counsels' direct communications with the foreperson at the bench constituted palpable error. Specifically, White faults the court for speaking individually to the foreperson out of the hearing of the jury, for allowing the three attorneys to speak directly to the foreperson, and for suggesting that the majority of jurors on the Trafficking charge could convince the minority in favor of the lesser-included offense of First-Degree Possession.

From our review of the verbal exchange between the court, the attorneys, and the foreperson at the bench, the court did not suggest that the majority of jurors for the Trafficking conviction might be able to convince the three holdouts. In attempting to establish whether further deliberations would be useful, the court simply asked the foreperson if he thought further deliberations might be able to convince the others of guilt beyond a reasonable doubt. When the foreperson first stated the jurors were hung on the Trafficking charge, the court reminded the foreperson of the alternative to the Trafficking charge, the First-Degree Possession instruction. After the foreperson stated that there was one juror who was not going to convict on the Trafficking charge and two "maybes", the court asked if it was possible for the jurors to agree on the lesser-included charge of Possession. Only after the foreperson indicated that the jurors were

in agreement on Possession and made it clear that "[t]here's not going to be a 'not guilty'" verdict did the court send the jurors back for further deliberations.

The court's comments here were clearly outside the limits of RCr 9.57. "When such error occurs, the focus on appeal is whether the comment itself was coercive." Mills v. Commonwealth, 996 S.W.2d 473, 493 (Ky. 1999). The test of whether a court's comments are coercive to a jury "look[s] at the language of the statement or instruction itself to determine whether it actually forced an agreement or whether it merely forced deliberations resulting in an agreement." Commonwealth v. Mitchell, 943 S.W.2d 625, 628 (Ky. 1997). From our review of the court's statements to the foreperson, there was no coercive element to the statements. Although the court reminded the foreperson of the lesser-included offense instruction and asked if there could be a consensus on the Possession charge (which the foreperson indicated they were in agreement on), the court allowed that the jury may need to send it another note in the event they were still hung. And the one and a half hours of deliberations that followed also suggest that the jury was not "'dynamited' by the trial judge's remark[s]." Id. As observed above, we certainly do not see that the court was in any way pressuring the jurors to reach an agreement on Trafficking. Accordingly, there was no palpable error.

As for the court allowing the attorneys to speak directly with the foreperson during this exchange, we note that Appellant's brief does not point to any specific remark made by counsel to the foreperson as being objectionable or improperly influencing the jury. While the better practice would be for attorneys to direct their

comments and questions to the court, we cannot say any palpable error resulted from these communications in this case.

White also raises the issue of RCr 9.74 relative to the exchange at the bench between the court, attorneys, and foreperson, outside the hearing of the rest of the jurors. RCr 9.74 provides:

> No information requested by the jury or any juror after the jury has retired for deliberations shall be given except in open court in the presence of the defendant . . . and the entire jury, and in the presence of or after the reasonable notice to counsel for the parties.

We agree that the communications during this bench conference were not in keeping with RCr 9.74 because they were conducted outside the hearing of the other jurors and were not restated by the court within the hearing of the other jurors. See Jump v. Commonwealth, 444 S.W.2d 723, 725 (Ky. 1969) (no violation of RCr 9.74 found where question asked by foreperson outside the hearing of the jury was restated and answered by the court within the hearing of the entire jury). However, we deem that the error was waived by defense counsel's apparent assent to the bench conference and failure to object, see Skaggs v. Commonwealth, 694 S.W.2d 672, 681 (Ky. 1985), reversed on other grounds, Skaggs v. Park, 235 F.3d 261 (6th Cir. 2000) (reversed as to the penalty phase only on habeas petition), and did not constitute palpable error. As there was nothing said during the exchange which could be construed to encourage or coerce a verdict on the Trafficking charge, there was no manifest injustice.

Finally, White complains about a note that was written to the jurors by the court that does not appear to be in the record. Our review of the trial reveals that it was

simply a note, apparently delivered to the jury prior to their announcement of the deadlock, asking whether the jurors wanted to break for the evening or continue deliberating. There was no error relative to this note. See Mills, 996 S.W.2d at 493.

The judgment of the Fayette Circuit Court is affirmed.

All sitting. Lambert, C.J., and Cunningham, Scott, and Schroder, JJ., concur. McAnulty, J., concurs by separate opinion in which Minton and Noble, JJ, join.

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Supreme Court of Kentucky

2006-SC-000598-MR

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HONORABLE PAMELA R. GOODWINE, JUDGE
NO. 06-CR-00073

COMMONWEALTH OF KENTUCKY — APPELLEE

CONCURRING OPINION BY JUSTICE McANULTY

Defense counsel rolled the dice by acquiescing in the bench conference which was clearly an evisceration of both RCr 9.74 and RCr 9.57. Although I agree that error was assented to by defense counsel, and therefore support the majority opinion, I write separately to underscore the two rules implicated.

Both rules uphold the long standing rule that juries should deliberate as a body of 12 people. No judge, no lawyer participates in that process.

In this case, I believe the trial judge's extended discussion with the jury foreperson regarding the possibilities of either (1) "turning" holdout jurors or (2) jurors agreeing to a unanimous verdict on a lesser-included offense violated both RCr 9.74 and RCr 9.57. Although I recognize that it is permissible for a judge to give verbal instructions to the jury when they do not understand the written instructions, in responding to jury questions the court should neither ask nor answer any questions that go beyond the scope of that which RCr 9.74 permits. Similarly, I acknowledge that it is

a judge's duty to determine whether further deliberations would be helpful, but the colloquy in this case went too far, placing the trial judge in the position of the "thirteenth juror."

Tactically, given the tenor of discussion with the foreperson (conviction on the lesser-included offense), it made perfect sense in this case for defense counsel to not object to the inquiry at the bench. Accordingly, this case is not the appropriate case to find palpable error. However, trial judges should not view this type of colloquy as either appropriate or permissible under either RCr 9.74 or RCr 9.57.

Minton and Noble, J.J., join.