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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: JUNE 17, 2010
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2009-SC-000384-MR

ANTHONY LAMAR CALDWELL — APPELLANT

V.

ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE FREDERIC J. COWAN, JUDGE
NO. 06-CR-000856

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Anthony Caldwell appeals as a matter of right[1] from a circuit court judgment sentencing him to twenty years' imprisonment upon convictions of second-degree burglary, resisting arrest, and being a second-degree persistent felony offender (PFO 2). He claims that the trial court erred in two ways. First, he claims that the trial court invaded the province of the jury by advising the jury how to weigh credibility of witnesses or assess other evidence. Second, he claims that the trial court engaged in a fundamentally unfair sentencing process when it followed Kentucky Revised Statutes (KRS) 532.055[2] and

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1 Ky. Const. § 110(2)(b).

2 KRS 532.055(2) states, in pertinent part:

> Upon return of a verdict of guilty or guilty but mentally ill against a defendant, the court shall conduct a sentencing hearing before the

directed the jury to recommend rather than to fix the sentence. Caldwell argues that this process violates Section 11 of the Kentucky Constitution,[3] making the sentence void under Section 26 of the Kentucky Constitution.[4]

We reject both arguments and affirm the judgment.[5] We find no reversible error arising from the trial court's orientation of the jury concerning

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jury, if such case was tried before a jury. In the hearing the jury will determine the punishment to be imposed within the range provided elsewhere by law. The jury shall recommend whether the sentences shall be served concurrently or consecutively.

. . . .

(c) Upon conclusion of the proof, the court shall instruct the jury on the range of punishment and counsel for the defendant may present arguments followed by the counsel for the Commonwealth. The jury shall then retire and recommend a sentence for the defendant.

Caldwell also contends that KRS 532.055(4), which allows the judge to fix a sentence if the jury is unable to agree upon a sentence, is also unconstitutional. Because the jury agreed upon a sentence in Caldwell's case, KRS 532.055(4) had no application to his case.

[3] Ky. Const. § 11 states:

> In all criminal prosecutions the accused has the right to be heard by himself and counsel; to demand the nature and cause of the accusation against him; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor. He cannot be compelled to give evidence against himself, nor can he be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land; and in prosecutions by indictment or information, he shall have a speedy public trial by an impartial jury of the vicinage; but the General Assembly may provide by a general law for a change of venue in such prosecutions for both the defendant and the Commonwealth, the change to be made to the most convenient county in which a fair trial can be obtained.

[4] Ky. Const. § 26 states: "To guard against transgression of the high powers which we have delegated, We [d]eclare that every thing in this Bill of Rights is excepted out of the general powers of government, and shall forever remain inviolate; and all laws contrary thereto, or contrary to this Constitution, shall be void."

[5] The facts underlying Caldwell's convictions are not germane to the issues raised in this appeal so we will not discuss them at length. From our review of the parties' briefs, it appears that this case arose out of an apartment break-in and apparent

relevant considerations in weighing and assessing evidence. Caldwell failed to preserve his constitutional argument by failing to raise this objection in the trial court and by failing to present it to the Attorney General as required by KRS 418.075.[6]

A. Trial Court's Comments to Jurors about General Considerations in Weighing Evidence Not Palpable Error.

Caldwell contends that the trial court invaded the province of the jury and improperly influenced the jury's deliberations by making certain remarks regarding the jury's consideration of the evidence. We note that the trial court delivered these remarks after the jury was sworn but before the jury heard opening statements and the presentation of any evidence. We also note that Caldwell failed to object to the remarks so the issue is not preserved for

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theft. Upon Caldwell's arrest, police discovered he was in possession of two screwdrivers. Caldwell was charged with possession of burglary tools in addition to being charged with the offenses for which he was convicted. But the jury acquitted Caldwell of the possession of burglary tools charge.

[6] KRS 418.075 states, in pertinent part:

(1) In any proceeding which involves the validity of a statute, the Attorney General of the state shall, before judgment is entered, be served with a copy of the petition, and shall be entitled to be heard, and if the ordinance or franchise is alleged to be unconstitutional, the Attorney General of the state shall also be served with a copy of the petition and be entitled to be heard.

(2) In any appeal to the Kentucky Court of Appeals or Supreme Court or the federal appellate courts in any forum which involves the constitutional validity of a statute, the Attorney General shall, before the filing of the appellant's brief, be served with a copy of the pleading, paper, or other documents which initiate the appeal in the appellate forum. This notice shall specify the challenged statute and the nature of the alleged constitutional defect.

appellate review except for palpable error review.[7] After thoroughly reviewing the record and observing no specific prejudice from the remarks indentified by Caldwell, we conclude that no palpable error occurred.

From our review of the record, the context and substance of the remarks are as follows. Following an explanation to the jury of the anticipated format of the trial, the trial court further directed the members of the jury not to hold objections against parties and counsel and not to speculate about what might occur during bench conferences or to conclude from rulings that the trial court favored one side over the other. The trial court stated that it did not favor one side over the other and explained that it was simply there to try to have a fair trial. The trial court explained that it would instruct the jury on the law and the jury had a duty to follow the instructions on the law. The trial court further informed the jury that its job was to decide what the facts were after scrutinizing and weighing the evidence. The trial court further explained that the evidence would consist of testimony and exhibits and that the jury should determine the facts from the evidence, draw any reasonable inferences from the evidence, and refrain from guesswork or speculation. Caldwell does not allege error from these orienting remarks.

Caldwell contends, however, that the trial court erred by telling the jury how to accomplish its task of determining the facts from the evidence by

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[7] *See* Kentucky Rules of Criminal Procedure (RCr) 10.26 ("A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.").

directing the jury that it should consider the interest or lack of interest of each witness in the outcome of the proceeding and that it should consider the clarity or lack of clarity of the witnesses' recollection of the events, the witnesses' opportunity for observation, and the overall reasonableness of the witnesses' testimony. Caldwell contends that "[t]his admonition overstepped the line between judge and jury."

From our review of the trial proceeding, we observe that the trial court also told the jury that it should consider the conduct and demeanor of witnesses and the possible bias or prejudice of any witnesses. The trial court concluded its directions by explaining that the jury should consider all other facts and circumstances that might support or discredit testimony and then determine the weight and credibility of each witness's testimony.

The trial court's remarks were not a comment on any specific evidence because none had been presented when the trial court delivered them.[8] And the trial court's comments could not be reasonably construed as favoring either side.[9] More accurately characterized, the comments of the trial court reflect its well-intentioned effort to give jurors helpful guidance in how to find facts from evidence presented in the courtroom.

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[8] The Commonwealth argues that the trial court is not necessarily prohibited from commenting on specific evidence. But we need not reach that argument here because the trial court clearly did not comment on any specific evidence.

[9] *See Chism v. Lampach*, 352 S.W.2d 191, 194 (Ky. 1961) ("In this jurisdiction comments by a trial judge which may reflect upon the credibility of a witness or tend to indicate the court's view of the quality or weight of the evidence are considered improper. Notice is taken of the high regard which jurors generally have of the judge, hence his remarks have great weight and often result in improper influence.").

We have recognized the considerable discretion afforded trial courts in controlling the conduct of court proceedings, and we find no abuse of that discretion rising to the level of palpable error here. The trial court's comments did not take sides or otherwise improperly influence the jury's deliberations.[10] So we conclude that no palpable error arose from the judge's remarks.

B. This Court Will Not Entertain Unpreserved Constitutional Argument Under the Facts of this Case.

Caldwell also contends that the sentencing hearing he received was fundamentally unfair because he alleges that KRS 532.055 — a statute requiring, in part, that juries recommend sentences but that the trial court actually impose sentence — violates Section 11 of the Kentucky Constitution because the statute relegates the jury to an advisory role. He concedes that he did not raise this constitutional issue in the trial court and that he failed to provide the Attorney General with notice of his constitutional challenge, which

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[10] *See, e.g., Transit Authority of River City (TARC) v. Montgomery*, 836 S.W.2d 413, 416 (Ky. 1992) ("Judges are sworn to administer justice and to that end should see that their decrees are carried out. A judge should and does have the right and duty, within reasonable limits, to bring out the facts in the case before him clearly, so that important functions of his office may be fairly and justly performed. While the judge should leave to the lawyers the development of the case and be cautious and circumspect in his participation and conduct, controlling the proceeding in a manner that will give it the atmosphere of impartiality, we hold that the trial judge, exercising considered restraint, is not required to remain in a sterile vacuum. He simply does not sit upon a bench as a silent and passive spectator of what is going on, but sits to administer the law and guide the proceedings before him. He is vested with a large discretion in the conduct of the trial of causes and an appellate court will not interpose to control the exercise of such discretion by a court of original jurisdiction, unless there has been an abuse or a most unwise exercise thereof.") (citations omitted); *Chism*, 352 S.W.2d at 194 ("It is difficult to define due bounds of propriety. The judge need not be a mere automaton or robot, but he should leave to the lawyers the development of the case and be cautious and circumspect in his participation and conduct and control the proceeding in a manner that will give it the atmosphere of impartiality.").

contravenes KRS 418.075 and Kentucky Rules of Civil Procedure (CR) 24.03.[11] On the notice issue, Caldwell argues that these provisions requiring notice of constitutional challenges of statutes to the Attorney General are themselves unconstitutional or otherwise invalid.[12]

We have consistently made clear that these notice provisions are mandatory.[13] We find no reason to re-examine our precedent on this matter under the facts of the present case.

Because Caldwell's allegation of constitutional error is admittedly unpreserved,[14] we could grant relief only if we found that any error was

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[11] CR 24.03 states, in pertinent part: "When the constitutionality of an act of the General Assembly affecting the public interest is drawn into question in any action, the movant shall serve a copy of the pleading, motion or other paper first raising the challenge upon the Attorney General." We note that CR 24.03 generally applies to criminal cases. *See* RCr 13.04 ("The Rules of Civil Procedure shall be applicable in criminal proceedings to the extent not superseded by or inconsistent with these Rules of Criminal Procedure.").

[12] Caldwell asserts in his brief that:

> As to the anticipated complaint by the Attorney General that neither KRS 418.075 nor CR 24.03 was complied with, [Caldwell] responds that the Attorney General is estopped from making the complaint until he explains how he could have appeared in the Circuit Court to defend the statute. He has no authority from KRS 15.020 to appear on his own motion because KRS 15.275(1) makes the Commonwealth's Attorney the sole attorney for the government in Circuit Court criminal prosecutions. None of the intervention statutes, KRS 15.190, 15.200, 15.732-734, would have applied in this case.
>
> The Attorney General is an Executive Branch officer whose authority is derived from Sections 91 and 93 of the Constitution. Under those Sections, his authority is established by statutes enacted by the General Assembly. No statute allows the Attorney General to make a *sua sponte* appearance on behalf of the Commonwealth of Kentucky in criminal prosecutions. The Attorney General should not be heard to complain that this issue is raised for the first time on appeal.

[13] *See, e.g., Benet v. Commonwealth*, 253 S.W.3d 528, 532 (Ky. 2008).

palpable, meaning that the alleged error affected his "substantial rights" and resulted in "manifest injustice . . . ."[15] But any error in having the jury recommend rather than fix punishment did not rise to the level of palpable error[16] because the trial court sentenced Caldwell precisely in accordance with the jury's recommendation: twenty years' imprisonment.[17] So Caldwell's theoretical argument that juries rather than judges should have the final say in

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[14] *See, e.g., Springer v. Commonwealth*, 998 S.W.2d 439, 446 (Ky. 1999) (stating that issue which appellant failed to raise to trial court but instead raised for the first time on appeal was not properly preserved).

We also note that Caldwell states in his reply brief that this Court held in *Grigsby v. Commonwealth*, 302 S.W.3d 52 (Ky. 2010), that "a sentence resulting from a judge's disregard or misapplication of a sentencing statute is jurisdictionally infirm and may be raised on appeal" despite lack of preservation. Although he has not alleged any disregard or misapplication of a sentencing statute, he argues that "[i]f the sentencing statute itself is unconstitutional, surely that claim may be presented for the first time on appeal." While perhaps this Court would arguably have authority to address the constitutionality of the sentencing statute despite lack of preservation if it chose to do so, we simply do not reach the constitutional argument here (concerning the alleged error in juries only recommending sentences) because the trial court entered the same sentence as that recommended by the jury.

[15] RCr 10.26.

[16] Quoting *Spanish Cove Sanitation, Inc. v. Louisville-Jefferson County Metropolitan Sewer District*, 72 S.W.3d 918, 921 (Ky. 2002), in his reply brief, Caldwell argues that since an unconstitutional statute is void *ab initio* and "any action taken thereunder is a nullity[,]" any action taken under KRS 532.055(2)(c) (which he alleges to be unconstitutional) "can never be harmless error"; and, thus, he implies that he is entitled to relief even in the absence of a showing of prejudice. However, from our examination of *Spanish Cove* (in which we refused to revive portions of a statute that had previously been declared unconstitutional in its entirety), there is nothing in that case that suggests that Caldwell is entitled to relief under the facts of this case.

[17] The jury recommended a sentence of ten years' imprisonment on the burglary conviction and then recommended enhancement to twenty years' imprisonment after convicting him of PFO 2. The trial court imposed a sentence of ten years' imprisonment on the burglary conviction, enhanced to twenty years' imprisonment for PFO 2. The trial court's judgment of conviction and sentence further reflected that the jury was not asked to recommend a sentence for the resisting arrest conviction because the Commonwealth and Caldwell agreed that he would receive a sentence of time served for the resisting arrest conviction.

determining sentence notwithstanding, he fails to demonstrate any constitutional violation actually affecting him in any concrete manner. We find no reason to reverse his sentence based on his unpreserved constitutional challenge to the validity of KRS 532.055.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the trial court.

All sitting. Minton, C.J.; Abramson, Cunningham, Noble, Schroder, and Scott, JJ., concur. Venters, J., concurs in result only.

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