

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

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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THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE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UNPUBLISHED KENTUCKY APPELLATE DECISIONS,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BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED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.

Supreme Court of Kentucky

2010-SC-000723-MR

JOHN WAYNE SKAGGS

APPELLANT

V. ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
NO. 08-CR-00550

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, John Wayne Skaggs, was convicted of third-degree burglary, third-degree criminal mischief, and first-degree persistent felony offender. For these crimes, he was sentenced to twenty years' imprisonment. Appellant now appeals his convictions as a matter of right. Ky. Const. § 110(2)(b). Finding no reversible error, this Court affirms.

I. Background

The underlying facts of Appellant's case are not relevant to his appeal and will not be addressed. Instead, Appellant's objections focus on two events that occurred during jury deliberations, as well as a challenge to the constitutionality of the sentencing statutory scheme.

The jury began deliberations on the second day of trial. The first event arose within a few minutes. The judge advised counsel that the jury wanted to

watch a surveillance video they had seen during the trial. Because the courtroom no longer had VHS capacity, the judge asked counsel if the jury could view the tape on a portable device which she wanted to send back to the jury deliberation room. The judge asked if there was any objection to the tape being played in the courtroom and also whether there was an objection to it being played "at all." Defense counsel replied that she objected to playing the tape, but the judge decided to allow the viewing of the tape in the jury room.

The second event occurred about 35 minutes later when the judge was presented with two questions from the jury. In a conference call between the judge and the attorneys, the judge read the first question to the attorneys and they agreed on how it should be answered. The trial judge then read the second question and stated that she would not answer it because it was related to penalties. Both attorneys agreed. Appellant was not present during either proceeding.

II. Analysis

A. Appellant's Absence at Proceedings is Not Palpable Error

Appellant first argues that the trial court erred in not requiring his presence when the jury asked to review the surveillance tape and when the jury's questions were addressed. However, Appellant's counsel did not object to Appellant's absence.

The right to be present at various portions of a trial is protected both by this Court's Rules of Criminal Procedure and the state and federal constitutions. RCr 8.28(1) requires the defendant's presence "at the

arraignment, at every critical stage of the trial including the empaneling of the jury and the return of the verdict, and at the imposition of the sentence.” And

RCr 9.74 states:

No information requested by the jury or any juror after the jury has retired for deliberation shall be given except in open court in the presence of the defendant (unless the defendant is being tried in absentia) and the entire jury, and in the presence of or after reasonable notice to counsel for the parties.

Additionally, the right to be present at trial is protected by the Confrontation Clause and Due Process Clauses of the United States Constitution, and Section 11 of the Kentucky Constitution gives some protection to this right. *United States v. Gagnon*, 470 U.S. 522, 526 (1985) (“The constitutional right to presence is rooted to a large extent in the Confrontation Clause of the Sixth Amendment, but we have recognized that this right is protected by the Due Process Clause in some situations where the defendant is not actually confronting witnesses or evidence against him.”(citation omitted)); Ky. Const. § 11 (“In all criminal prosecutions the accused has the right to be heard by himself and counsel; ... [and] to meet the witnesses face to face ...”); *Powell v. Commonwealth*, 346 S.W.2d 731, 733-34 (Ky. 1961) (reading Ky. Const. § 11 as a source of the right to be present at trial).

But the right to be present is not absolute. It is subject to waiver, for one thing. *See Watkins v. Commonwealth*, 105 S.W.3d 449, 453 (Ky. 2003).

And any complaint about it on appeal must be preserved by an objection at trial, or else an appellate court is limited to review for palpable error. *See id.* at 452. Palpable error exists only when an appellant’s “substantial rights” were

affected and “manifest injustice” resulted. See RCr 10.26. “To discover manifest injustice, a reviewing court must plumb the depths of the proceeding ... to determine whether the defect was shocking or jurisprudentially intolerable.” *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006).

Though Appellant was not present for the discussion involving the videotape or for the telephonic conference, he has not demonstrated that any manifest injustice occurred. The discussions between counsel and the court concerned legal matters, on which Appellant’s trial counsel was consulted. The trial court’s contact with the jurors was limited to allowing them to review a surveillance tape they had already seen during the trial, answering a question concerning how the jury form should be read, and telling them that another question could not be answered. Appellant has failed to show how this limited contact affected the trial or the verdict, or substantially affected his rights in any manner. There was, therefore, no palpable error.

B. Any Constitutional Challenge to KRS 532.055 Was Waived

Appellant also contends that KRS 532.055 violates Section 11 of the Kentucky Constitution because it relegates juries to an advisory role. Appellant concedes that he failed to preserve this error at trial and asks this Court for review solely on the basis that an unconstitutional statute is void.

More importantly, Appellant failed to provide notice of his constitutional challenge to the Attorney General as required by statute and rule. Both KRS 418.075 and CR 24.03 require that the Attorney General be given notice

whenever the validity or constitutionality of a statute is challenged.¹ This Court has consistently made clear that these notice provisions are mandatory, “meaning that even in criminal cases, we have refused to address arguments that a statute is unconstitutional unless the notice provisions ... had been fully satisfied.” *Benet v. Commonwealth*, 253 S.W.3d 528, 532 (Ky. 2008).

Because Appellant did not even raise this issue at the trial court and failed to comply with KRS 418.075 and CR 24.03, this Court declines to address the merits of the claim.

III. Conclusion

For the above stated reasons, Appellant’s convictions are affirmed.

All sitting. All concur.

¹ KRS 418.075(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.”); RCr 24.03 (“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.”).

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