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RENDERED: MARCH 24, 2011
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2009-SC-000333-MR

ERIC BRIAN HARWELL — APPELLANT

V.

ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MITCH PERRY, JUDGE
NOS. 07-CR-002060 AND 08-CR-000263

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

REVERSING AND REMANDING

Eric Brian Harwell appeals as a matter of right from a Judgment of the Jefferson Circuit Court convicting him of theft by unlawful taking over $300 and burglary. Harwell received five years on each conviction, each of which was enhanced by his first-degree persistent felony offender (PFO I) status to twenty years, set to run concurrently. Harwell alleges on appeal that: (1) his right to a speedy trial was violated; (2) the trial court committed several errors with respect to his request for hybrid counsel; (3) the trial court erroneously restricted his movement about the courtroom; (4) the trial court committed multiple errors regarding a video surveillance tape; (5) the trial court erred by overruling his *Batson* objection; and (6) court costs should not be imposed on him because he is indigent. Because we agree with Harwell on the second

issue, we reverse his conviction and remand for a new trial. We will also address other issues that may recur at retrial.[1]

RELEVANT FACTS

On the morning of April 16, 2007, Eric Harwell went to Masterson's Catering (Masterson's) to apply for a job. After completing the application he obtained from Patricia Obst, an employee of Masterson's, Harwell left the reception area. Obst testified that she then left the reception area to go talk with Masterson's chef and stop by the restroom. Upon her return, Obst discovered her purse was missing and called Kathy Staples, Masterson's controller, to request access to the surveillance videos Masterson's has throughout the property. The surveillance video, which was played for the jury, showed Harwell filling out his application, returning about ten minutes later and taking Obst's purse, which was sitting on her desk. Obst and Staples both testified they watched additional video footage at Masterson's that showed Harwell exiting the building and proceeding down a back alleyway.

Harwell was arrested on May 14, 2007 and indicted on charges of theft by unlawful taking over $300 and burglary in the third degree. Harwell's first trial, which occurred on January 29 – 31, 2008, ended in a hung jury and mistrial. Harwell was retried on February 9 – 11, 2009, found guilty of all charges, and sentenced to twenty years imprisonment. Harwell now appeals as

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[1] Harwell's arguments about errors that occurred during his first trial, from January 29 – 31, 2008 will not be addressed because the trial ended in a hung jury and mistrial. All references to a "trial" refer to the second trial, held on February 9 -11, 2009.

a matter of right. Ky. Const. § 110(2)(b). We begin with Harwell's allegation that his right to a speedy trial was violated.

ANALYSIS

I. Harwell was not denied his right to a speedy trial.

Harwell's right to a speedy trial was not violated by the twenty-one month period from his arrest to his second trial. The United States and Kentucky constitutions guarantee an accused a speedy trial. U.S. Const. Amends. VI and XIV; Ky. Const. § 11. When a defendant is denied a speedy trial the remedy is dismissal of the charges with prejudice. *Barker v. Wingo*, 407 U.S. 514, 522 (1972); *Dickerson v. Commonwealth*, 278 S.W.3d 145, 152 (Ky. 2009). We balance four factors when reviewing a speedy trial claim: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right to a speedy trial; and (4) the prejudice to the defendant. *Barker*, 407 U.S. at 530.

A. The length of delay was presumptively prejudicial.

The twenty-one month delay from Harwell's arrest to trial is presumptively prejudicial. The "length of delay" factor acts as a triggering mechanism so that when a court finds the length of delay is not presumptively prejudicial it need not make further inquiry. *Id.* There is no set length of time by which to measure presumptive prejudice. *Id.* Instead, the inquiry must take into account the passage of time as well as the nature and complexity of the case. *Id.* For example, "the delay that can be tolerated for an ordinary

street crime is considerably less than for a serious, complex conspiracy charge." *Id.*

Harwell was arrested on May 14, 2007 and convicted on February 10, 2009. This was a relatively straightforward burglary and theft case. The trial was simple, lasting two days; the facts were uncomplicated; and the proof consisted largely of testimony and the surveillance video. Further, delays of less time have been held presumptively prejudicial. *E.g.*, *Cain v. Smith*, 686 F.2d 374, 381 (6th Cir. 1982) (holding an eleven and a half month delay for a "mundane garden-variety" robbery case was presumptively prejudicial); *Bratcher v. Commonwealth*, 151 S.W.3d 332, 344 (Ky. 2004) (eighteen month delay in complex murder case was presumptively prejudicial). Thus, we find the twenty-one month delay in this case is presumptively prejudicial and proceed to balance the remaining three factors.

B. The reasons for delay do not weigh in Harwell's favor.

The second factor does not weigh in Harwell's favor because the majority of delays were caused by Harwell, and those caused by the Commonwealth were for valid reasons. On appeal, courts evaluate the reasons for delay and determine how heavily they should weigh for or against the state. *Barker*, 407 U.S. at 531. Deliberate attempts to delay trial and hamper the defense should be weighed heavily against the Commonwealth. *Id.* Neutral reasons, such as the court's docket, the attorney's schedules, or negligence are also counted against the Commonwealth, though they weigh less heavily. *Id.* The Commonwealth is neither penalized for valid reasons, such as an unavailable

witness, *id.*, nor held responsible for delays caused by the defendant, *Crayton v. Commonwealth*, 846 S.W.2d 684, 689 (Ky. 1992).

Harwell was arrested on May 24, 2007. The court held a pretrial conference on August 14, 2007, at which Harwell complained about his appointed counsel; she was removed due to a complete breakdown in communications. The pretrial conference that was scheduled for August 27, 2007 was continued for the late Justice William McAnulty's memorial service. The court held a pre-trial conference on October 2, 2007 and set the trial date for January 29, 2008. The first trial, which occurred on January 29 – 31, 2008, resulted in a hung jury and mistrial. A new trial was set for May 13, 2008 but was rescheduled because a Commonwealth witness was not available that day. Trial was then set to begin on May 22, 2008, but much of that morning was spent addressing Harwell's request for hybrid representation. The court granted the Commonwealth's motion for a continuance because (1) a key Commonwealth witness was unavailable and (2) the court was concerned about possibly sending a jury out on Friday before a three-day weekend. Trial was next set for June 23, 2008 but on that day Harwell again complained about his appointed counsel (the second attorney about whom he complained), who also was ultimately removed for a complete breakdown in communication. At a pretrial hearing on October 2, 2008, the court set the trial for February 9, 2009. Harwell's second trial was held on February 9 - 10, 2009.

On balance, we find these delays do not weigh in Harwell's favor. The two delays caused by the Commonwealth for unavailable witnesses and the

delay for the memorial service for a Kentucky Supreme Court Justice were valid. Such delays were clearly not "deliberate attempt to delay the trial in order to hamper the defense" and do not weigh against the Commonwealth. *Barker*, 407 U.S. at 531. Further, many of the delays were caused by Harwell's continued complaints about counsel and request for new representation. As such, this factor does not weigh in Harwell's favor. *See Miller v. Commonwealth*, 283 S.W.3d 690, 701 (Ky. 2009) (finding reasons for delay weighed in Commonwealth's favor where no deliberate attempt to hamper the defense, only one delay due to negligence, and majority of delays caused by defendant).

C. Harwell did assert his right to a speedy trial.

This factor weighs in favor of Harwell because he did assert his right to a speedy trial in writing in March 2008. It is the defendant's responsibility to assert his right to a speedy trial. *Barker*, 407 U.S. at 531. The length of the delay, the reason for the delay, and the prejudice caused by the delay all affect the timing and extent to which a defendant will assert his right to a speedy trial. *Id.* "The more serious the deprivation, the more likely a defendant is to complain." *Id.* As such, the defendant's assertion of his right is given "strong evidentiary weight." *Id.* This factor weighs in Harwell's favor because he did file a written notice of his right to a speedy trial and on several occasions verbally expressed his desire for a quick trial date. *Soto v. Commonwealth*, 139 S.W.3d 827, 844 (Ky. 2004) (weighing the third *Barker* factor in the defendant's favor where he made a written demand for a speedy trial).

D. Harwell was not prejudiced by the delay.

Harwell suffered no prejudice by the delay. The court measures prejudice by the interests that the right to a speedy trial protects: (1) to prevent oppressive pretrial incarceration; (2) to minimize the anxiety and concern of the accused; and (3) to limit the possibility that the defense will be impaired. *Barker*, 407 U.S. at 532. The final of these interests is the most important because "the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Id.*

Harwell claims he suffered prejudice by being incarcerated and unable to gather and evaluate evidence. We do not agree. As to the first factor, we do not find Harwell's pretrial incarceration oppressive. He was held in custody without bond reduction because he had a lengthy criminal history that included an escape conviction. Regarding the second factor, Harwell makes no claim that the delay caused him anxiety or concern. Finally, we do not find Harwell's defense was impaired by the delay. The facts of his case were straightforward, the evidence uncomplicated and he was at all times represented by counsel, albeit in a hybrid fashion, who was able to gather and evaluate evidence. Moreover, Harwell fails to provide any details as to how his defense was impaired and instead makes general claims about his ability to garner and investigate the evidence. We have consistently rejected generalized claims of prejudice. *Miller*, 283 S.W.3d at 702-03 (rejecting as speculative defendant's claim that he was prejudiced by the delay because he could not call all of his witnesses); *Bratcher*, 151 S.W.3d at 345 ("Conclusory claims

about the trauma of incarceration, without proof of such trauma, and the possibility of an impaired defense are not sufficient to show prejudice."). Balancing all four *Barker* factors, we conclude Harwell was not denied his right to a speedy trial.

II. The trial court committed reversible error with respect to Harwell's right to counsel.

Harwell argues the trial court committed several errors regarding his right to counsel, including failing to hold a proper *Faretta* hearing; refusing his request to make the opening statement as part of his hybrid representation; and revoking his pro se representation prior to the penalty phase of the trial. We agree the *Faretta* hearings were insufficient, but do not address those errors specifically as we reverse on two later errors committed by the trial court: arbitrarily restricting Harwell's participation in his hybrid representation and revoking Harwell's self-representation prior to the penalty phase. We turn to these two issues before reiterating the necessity for conducting a thorough *Faretta* hearing on remand should Harwell forego representation by counsel.

A. The trial court erred by arbitrarily refusing to allow Harwell to make his opening statement as part of his hybrid representation.

The trial court committed error when, without good cause, it denied Harwell's timely request to make the opening statement as part of his hybrid representation. The Sixth and Fourteenth Amendments to the United States Constitution and Section Eleven of the Kentucky Constitution guarantee defendants the right to counsel as well as the converse right to appear *pro se*. *Faretta v. California*, 422 U.S. 806, 819 (1975); *Gideon v. Wainwright*, 372 U.S.

335, 345 (1963); *Hill v. Commonwealth*, 125 S.W.3d 221, 225 (Ky. 2004) *holding modified by Depp v. Commonwealth*, 278 S.W.3d 615 (Ky. 2009). In Kentucky, due to the unique language of our Constitution,[2] defendants also have a third option: hybrid representation, an arrangement by which the defendant has both representation by counsel and a part in conducting his own defense. *Wake v. Barker*, 514 S.W.2d 692, 696 (Ky. 1974). Under this option, the defendant may "make a limited waiver of counsel, specifying the extent of services he desires, and he then is entitled to counsel whose duty will be confined to rendering the specified kind of services." *Id.*

To be effective, a full or partial waiver of counsel must be timely and unequivocal. *Soto*, 139 S.W.3d at 857; *Moore v. Commonwealth*, 634 S.W.2d 426, 430 (Ky. 1982). A waiver is timely if made before meaningful trial proceedings have begun. *Deno v. Commonwealth*, 177 S.W.3d 753, 757-58 (Ky. 2005) (finding the request made before the jury was selected timely because, "[a]lthough an earlier request would have been preferable, the request was made before any part of the trial had begun."); *Soto*, 139 S.W.3d at 855 (citing *United States v. McKenna*, 327 F.3d 830, 844 (9th Cir. 2003)) ("[A] request is timely if made before the jury is selected or before the jury is empanelled . . . ."). A waiver is unequivocal "if the defendant specifies the extent of the services he desires." *Deno*, 177 S.W.3d at 758. Violating a defendant's right to counsel constitutes a structural error, which is not subject to harmless error analysis

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[2] Ky. Const. § 11 ("In all criminal prosecutions the accused has the right to be heard by himself *and* counsel . . . .") (emphasis added).

and requires automatic reversal. *McKaskle v. Wiggins*, 465 U.S. 168, 177 n. 8 (1984) ("Since the right of self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant, its denial is not amenable to 'harmless error' analysis. The right is either respected or denied; its deprivation cannot be harmless."); *Hill*, 125 S.W.3d at 228-29.

While Harwell's representation went through several permutations prior to trial, on February 9, 2009, the morning of trial, Harwell had hybrid representation. That morning, during discussions prior to *voir dire*, Harwell informed the court that, as part of his hybrid representation, he wanted to make his opening statement.[3] The court acknowledged Harwell's hybrid representation but reserved ruling on Harwell's request until the following morning. Selecting and empanelling the jury took the remainder of the first day. The issue of Harwell making his opening statement arose once more, prior to concluding the first day, and the court again reserved ruling until the following day. The next morning, the court denied Harwell's request to make the opening statement because it was not timely since the jury had already been seated. Immediately upon being denied the ability to make his opening statement, Harwell requested to proceed solely *pro se*. The trial court then held

[3] The trial court had prior notice that Harwell possibly wanted to give his opening statement and closing argument as Harwell had informed the trial court of as much at a pre-trial hearing in November 2008.

a *Faretta* hearing to assess Harwell's request and ultimately allowed Harwell to represent himself without the assistance of counsel.[4]

The trial court cited *Deno v. Commonwealth*, 177 S.W.3d at 753, as the authority for its decision, but the trial court misunderstood the ruling in *Deno* because that case makes clear that "a request for hybrid representation is timely if made before meaningful trial proceedings have begun," *i.e.*, "before the jury is selected or empanelled." Harwell's request to make his opening statement clearly came before the jury was selected. Harwell had indicated an interest in potentially giving the opening statement and closing argument at the last pre-trial conference in November 2008 and he stated the request unequivocally when the case was called for trial on February 9, 2009. It was inappropriate for the trial court to postpone ruling on Harwell's request until the second day and then deny the request for being untimely. Moreover, it is unclear why the trial court deemed Harwell's request to make his opening statement untimely but then found Harwell's ensuing request to be *pro se* and conduct his entire case without the assistance of counsel to be timely. The trial court's unjustified refusal to grant Harwell's timely request to modify the scope of his hybrid representation was error.

B. The trial court erred by revoking Harwell's *pro se* representation prior to the penalty phase of the trial.

The trial court further erred when, at the close of the guilt phase of the trial, it revoked Harwell's *pro se* representation. Defendants have the right to

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[4] The court required Harwell's appointed counsel remain as "whisper counsel."

appear *pro se* during the penalty phase of trial. *Soto*, 139 S.W.3d at 856 (citing *United States v. Davis*, 285 F.3d 378 (5th Cir. 2002)). However, while a court should always vigorously protect a defendant's constitutional rights, the right to self-representation is "not absolute and unfettered." *Wilson v. Mintzes*, 761 F.2d 275, 280 n. 8 (6th Cir. 1985). A defendant may not invoke the right as a ploy to disrupt the dignity, order and decorum of court or as "a license not to comply with relevant rules of procedural and substantive law." *Faretta*, 422 U.S. at 835 n. 46. *See also Illinois v. Allen*, 397 U.S. 337, 343 (1970) ("The flagrant disregard in the courtroom of elementary standards of proper conduct should not and cannot be tolerated."). A court may terminate self-representation by a defendant who "deliberately engages in serious and obstructionist conduct." *Faretta*, 422 U.S. at 834 n. 46; *see also Hummel v. Commonwealth*, 306 S.W.3d 48, 54 (Ky. 2010) (holding a court may deny self-representation when it is used to disrupt or delay proceedings or where the defendant is unable or unwilling to abide by courtroom protocol). A trial court's determination in this regard is reviewed for abuse of discretion. *Hummel*, 306 S.W.3d at 53.

Prior to beginning the penalty phase, the court revoked Harwell's right to represent himself and imposed on him hybrid representation. In a bench conference, the court stated it was not sure if Harwell had the right to continue to represent himself in the penalty phase and, at the very least, the court was going to require hybrid representation. The court did not make any findings on record that Harwell was being disruptive, it did not advise or warn Harwell that

it may revoke his right to self-representation, and it never gave any reason for doing so.

It is true that Harwell had been disruptive during pre-trial hearings and had to be chastised by the court to remain quiet, refrain from arguing and to not interrupt when the judge was speaking. However, the court must not have considered Harwell's behavior to be a serious problem because, on the heels of just such a disruptive outburst, it ruled Harwell could conduct his entire defense on his own. Moreover, review of the record reveals considerable improvement in Harwell's behavior when conducting his own defense. He was not disruptive or belligerent; he apparently followed the court's procedures, directives and protocols to the best of his ability; and he did not attempt to delay trial or flout the relevant rules of law. Harwell even maintained his good behavior when the judge read the guilty verdict. Based on the court's determination that Harwell could appear *pro se*, despite his prior disruptive conduct; Harwell's subsequent good behavior during the guilt phase; and the lack of any finding as to why the court rescinded the right, the court's revocation of Harwell's self-representation at the start of the penalty phase was arbitrary, unreasonable, and unfair. *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000). This erroneous denial of Harwell's right to represent himself requires reversal.

C. The *Faretta* hearings were insufficient.

Though it is not necessary to delve into the particulars, we do find the *Faretta* hearings held prior to trial were insufficient and provide guidance for

the trial court, should Harwell choose to forgo the assistance of counsel on remand. Attached to the right to waive counsel is the defendant's right to be informed of the "dangers and disadvantages of self-representation." *Faretta*, 422 U.S. at 835. *See also Hill*, 125 S.W.3d at 226 ("right to waive counsel is accompanied by the right to be informed by the trial court of the dangers inherent in that decision."). When a defendant manages his own defense he forfeits the benefits traditionally provided by the right to counsel. At trial, counsel helps "even the most gifted layman adhere to the rules of procedure and evidence, comprehend the subtleties of *voir dire,* examine and cross-examine witnesses effectively . . . , object to improper prosecution questions, and much more." *Iowa v. Tovar*, 541 U.S. 77, 89 (2004) (quoting *Patterson v. Illinois*, 487 U.S. 285 (1988)). Before a defendant can represent himself, he must voluntarily, intelligently, and knowingly forgo these benefits. *Hill*, 125 S.W.3d at 226. As such, when a defendant fully or partially waives his right to counsel, the trial court has an affirmative duty to conduct a *Faretta* hearing to ensure the defendant "knows what he is doing and his choice is made with eyes open." *Faretta*, 422 U.S. at 835 (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942)). Thus, it may be that a trial court grants a defendant's request to proceed *pro se* or in a hybrid fashion but still errs by failing to conduct a proper *Faretta* hearing. *Grady v. Commonwealth*, 325 S.W.3d 333, 342 (Ky. 2010).

While trial courts are not required to adhere to a formula or script when conducting a *Faretta* hearing, they are not vested with absolute discretion.

Tovar, 541 U.S. at 89-94; *Commonwealth v. Terry*, 295 S.W.3d 819, 824 (Ky. 2009). A defendant loses all the benefits of representation when he waives his right to counsel and thus trial courts must ensure by inquiry on the record that the waiver is made with an awareness of the magnitude of the undertaking and the disadvantages of self-representation; courts must "rigorously convey" the consequences of forgoing the assistance of counsel. *Patterson*, 487 U.S. at 298. *See also Von Moltke v. Gillies*, 332 U.S. 708, 724 (1948) ("To be valid . . . waiver [of counsel] must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter."); *Terry*, 295 S.W.3d at 824. In *Terry*, this Court cited with approval the model *Faretta* questions, warnings, and findings used in federal court. 295 S.W.3d at 824. On remand, if Harwell partially or fully waives his right to counsel, the trial court must ask sufficient questions, such as those provided in *Terry*, to ensure Harwell's waiver is knowing, voluntary and intelligent.

III. Issues that may recur at trial.

A. The trial court did not err by restricting Harwell's movement around the courtroom.

The trial court properly exercised its discretion when it limited Harwell's movements around the courtroom. After the trial court granted Harwell's request to proceed *pro se*, it restrained him from walking around the courtroom

without permission and required he conduct his defense near the counsel table. Harwell protested and a deputy sheriff suggested Harwell could wear a shock device, which would enable Harwell to move around the courtroom while allowing the court to retain control. The judge hesitated to impose such measures, concerned about Harwell's presumption of innocence, but Harwell insisted on wearing the shock device, which was not visible to the jury.[5]

Preserving the dignity, order, and decorum of court proceedings is essential to the administration of justice. *Allen*, 397 U.S. at 343. When confronted with "disruptive, contumacious, stubbornly defiant defendants," trial courts have discretion to "meet the circumstances of each case," including restraining a defendant. *Id.* However, the need for courtroom decorum is balanced by the defendant's presumption of innocence. Defendants should not be handcuffed or manacled during a criminal trial except in exceptional circumstances where the trial court has good grounds for believing the defendant may attempt to do violence or escape. *Tunget v. Commonwealth*, 198 S.W.2d 785 (Ky. 1946). The main concern behind this rule - preserving the defendant's presumption of innocence - is reflected in the rule's codification: "Except for good cause shown the judge shall not permit the defendant *to be seen* by the jury in shackles or other devices for physical restraint." RCr 8.28(5) (emphasis added).[6]

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[5] The device was worn on Harwell's arm, under his sleeve. The trial court noted it could not tell on which arm Harwell wore the device.

[6] This rule was amended January 2009, effective April 1, 2009. However, this portion of the rule was not affected by the amendment.

In this case, the trial court did not abuse its discretion when it restricted Harwell's ability to move around the courtroom. Harwell had a history of being disruptive and was, on at least one occasion prior to trial, removed from the courtroom because he would not stop talking. In addition, Harwell had a lengthy criminal record, which included both an escape conviction and convictions for four counts of facilitation to robbery in the first degree, a violent crime. Nor can Harwell claim prejudice because he volunteered to wear the device. Even if the court had imposed the device on Harwell, there was no prejudice because the device could not be seen by the jury. *Grady*, 325 S.W.3d at 359. ("[W]here a restraint cannot be seen (or otherwise detected by the jury), the trial court may use the restraint at its discretion provided there is good reason for doing so.").

B. Evidentiary issues regarding the surveillance videotape.

Harwell raises several issues regarding the Masterson's surveillance tape. The video was taken from a camera mounted on the wall above and behind Obst's desk and displays Obst, her desk, and the reception area. The video consists of three segments. According to the time stamp, the first segment begins at 10:26 a.m. with Harwell already in the reception area, interacting with Obst and filling out the employment application. This segment ends at 10:31 a.m. with Harwell still in the reception area. The second segment begins at 10:40 a.m. and lasts less than one minute. This portion depicts an empty reception area and shows Harwell entering the room, walking and looking around a bit, taking the purse off the desk and leaving the room. Each

segment is intermittently interrupted by blue screens, which last a few seconds before the video resumes. Review of the time stamps indicates time and events elapse unseen while the blue screens plays. The third segment was not part of the video collected by the police and was not presented at trial. Obst and Staples testified they watched this third segment at Masterson's while viewing the surveillance video just after the incident occurred. According to their testimony, the video shows Harwell exiting the rear of the building and departing down a back alleyway.

1. The video was properly authenticated.

Harwell claims the video was not properly authenticated. Photographs and videotapes must be authenticated before they may be admitted into evidence. *Fields v. Commonwealth*, 12 S.W.3d 275, 279 (Ky. 2000) ("A videotape of a crime scene . . . is just as admissible as a photograph, assuming a proper foundation is laid."); KRE 901. To satisfy this preliminary requirement, the proponent only needs to make "a prima facie showing of authenticity." *Johnson v. Commonwealth*, 134 S.W.3d 563, 566 (Ky. 2004). A witness with knowledge may authenticate evidence by testifying that the evidence is what it is claimed to be. KRE 901(b)(1).

In this case, the Commonwealth demonstrated prima facie authenticity through the testimony of Obst and Staples. Obst testified the video accurately depicts the reception room as it was that morning; she identified various people and objects in the room; and she verified the date and time of the video. Staples testified the cameras operate by motion sensors; the images are stored

on a hard drive and deleted after a certain number of days, depending on the size of the files; the blue screens are the periods when the camera stops recording after a file reaches maximum capacity and begins recording in a new file; and Masterson's transferred the video to a disk, which it gave to the police. This testimony was sufficient to authenticate the first two segments of video that were admitted into evidence. *Litton v. Commonwealth*, 597 S.W.2d 616, 618-620 (Ky. 1980) (finding surveillance photographs properly authenticated when the store owner identified the photos as a fair and accurate representation of his store; explained how the cameras operated; and testified that he removed the film from the camera, sent it to the installer, and received the pictures in due course.)

2. The videos were not hearsay.

Nor were the videos inadmissible as hearsay. Hearsay is an out of court statement offered to prove the truth of the matter asserted. KRE 801(c). A statement is defined in part as "nonverbal conduct of a person, if it is intended by the person as an assertion." KRE 801(a); Robert G. Lawson, *The Kentucky Evidence Law Handbook* § 8.05(4) (4th ed. 2003) (examples of non-verbal conduct that is assertive include nodding one's head "yes," shaking one's head "no," shrugging one's shoulders "I don't know," pointing North to indicate direction, cupping one's hand behind the ear to indicate one cannot hear, pointing to identify a person). In this case, Harwell's conduct was not intended as an assertion, and thus the videos were not hearsay. *Davis v. Civil Service Com'n of the City of Philadelphia*, 820 A.2d 874, 879 n. 3 (Pa. Commw. Ct.

2003) (holding a surveillance videotape of a store showing defendant stealing was not hearsay "because nonverbal conduct of a person is only hearsay if it is intended by the person as an assertion."); *McDougal v. McCammon*, 455 S.E.2d 788, 794 (W. Va. 1995) (holding a surveillance videotape of a plaintiff was not a "statement" and thus was not hearsay)

3. The video was improperly interpreted.

Harwell also complains that several witnesses impermissibly interpreted the second segment of the videotape, wherein he takes the purse. Under KRE 602, a witness may not testify to a matter unless the witness has personal knowledge of the matter. While a witness who was present when the recorded events occurred may "narrate," *i.e.,* testify from personal recollection while the tape plays, he may not interpret what is on the tape. *Gordon v. Commonwealth*, 916 S.W.2d 176, 179-180 (Ky. 1995) ("As with any participant in a conversation, the informant witness was entitled to testify as to his recollection of what was said . . . it is apparent that the witness purported to interpret the tape recording rather than testify from his recollection. This was in error."). When a witness interprets what is on a tape, he impermissibly invades the province of the jury. *Cuzick v. Commonwealth*, 276 S.W.3d 260, 265-66 (Ky. 2009).

In the present case, neither Obst nor Staples was present during the second segment of the video. They could testify about matters within their personal knowledge, KRE 602, but they could not interpret the video or speculate about matters not within their personal knowledge. *Gordon*, 916

S.W.2d at 179. Thus, it was proper for Obst to identify her purse and the yellow napkins she placed over the purse, but it was improper for Obst to watch Harwell look down the hallway and comment, "I guess he was checking to see if they were looking," and watch him take the purse and leave the reception room and state, "That's him stuffing it up underneath his sweatshirt and going out the door." Staples's similar testimony was also improper. Neither woman was present to witness such events and it is "for the jury to determine as best it can what is revealed in the tape recording without embellishment or interpretation by a witness." *Id.* at 180.

4. Testimony regarding the third segment of the video violated the best evidence rule where the Commonwealth sought to prove the contents of the video.

Harwell next contends it was a violation of the best evidence rule for Obst and Staples to testify as to what they saw in the third segment of the video because neither of them observed the events therein depicted and that portion was not presented at trial. The best evidence rule requires a proponent who seeks *to prove the contents* of a writing, recording, or photograph to produce the original. KRE 1002 (emphasis added). The contents of a photograph are "sought to be proved when it has probative value that is independent of the testimony of witnesses and thus is offered as a 'silent witness.' For example, the rule would apply to . . . photographs used to prove details of objects, scenes, or events not directly observed by the naked eye of witnesses." Lawson, *supra* § 11.05(3). The Commonwealth argues it was not seeking to prove Harwell exited the rear of Masterson's and left down a back alley, but

rather was explaining why Staples and Obst searched behind the building and down the alley after the incident occurred. We need not address that argument because that was not the only context in which testimony about the third segment of video arose. Obst also testified about the contents of that segment while the Commonwealth played the first two segments of video and questioned her about the events depicted therein. In that context, the Commonwealth was not trying to explain Obst and Staples's actions, but was discussing Harwell's actions: how he saw the purse on Obst's desk while filling out the application, returned later to take it, and then left the building, fleeing down the alley. In that instance, the video was being used to prove events not directly observed by Obst or Staples and, per the best evidence rule, the video should have been produced. Lawson, *supra.*

5. The video is an "original" under the best evidence rule.

Harwell also maintains the video as a whole violates the best evidence rule because it is not the original. Under the best evidence rule, a "photograph" is defined to include "films, video tapes, and motion pictures," KRE 1001(2), and an "original" of a photograph includes "the negative or any print therefrom," KRE 1001(3). If data is stored in a computer, any "printout or output readable by sight, shown to reflect the data accurately" is an "original." KRE 1001(3). Harwell argues the video is not the original because it was played from a disk and not the hard drive. The aforementioned definitions belie this contention. The disk, which was burned directly from the hard drive,

satisfies the definition of an "original." The Commonwealth was not required to bring Masterson's computer system to court to show a surveillance video.

6. Harwell's due process rights were not violated when the police failed to obtain the video in its entirety.

Finally, Harwell's due process rights were not violated when the police failed to obtain video of the third segment and of the time that elapsed between the first and second segments. "Absent a showing of bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Kirk v. Commonwealth*, 6 S.W.3d 823, 826 (Ky. 1999). Harwell did not demonstrate any bad faith by the police. We express no opinion regarding any other issues that could arise regarding the surveillance video.

C. Court costs must be waived for indigent defendants.

Court costs may not be imposed on indigent defendants, pursuant to KRS 31.110(1)(b).[7] On remand, if Harwell remains indigent, the trial court must waive court costs. *Edmonson v. Commonwealth*, 725 S.W.2d 595 (Ky. 1987).

CONCLUSION

We reverse the Judgment of the Jefferson Circuit Court and remand for a new trial. Harwell's speedy trial rights were not violated but we are constrained to remand for a new trial due to the errors made in connection with Harwell's

[7] KRS 31.110(1)(b) provides, in pertinent part, that a "needy person" is entitled to "be provided with the necessary services and facilities of representation including investigation and other preparation. The courts in which the defendant is tried shall waive all costs."

right to self-representation. The recurring issues discussed herein and the requirements for full compliance with *Faretta* (if Harwell opts to forego representation by counsel only) should be considered by the trial court on remand.

All sitting. All concur.

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