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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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: MARCH 20, 2014
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2012-SC-000624-MR

TONYA FORD — APPELLANT

V.

ON APPEAL FROM TAYLOR CIRCUIT COURT
HONORABLE DAN KELLY, JUDGE
NO. 10-CR-00162

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

In February of 2009, only days before Valentine's Day, Lebanon Police Officer David Ford was found dead in his home, the result of a gunshot to the back of his head as he sat at the family's computer. The jury found that the fatal shot was delivered by the vengeful hands of David's wife—the Appellant, Tonya Ford.

The Fords had a tumultuous marriage and were living separately at the time of his murder. Chief among their grievances was David's extramarital affair with Mary Ramos. At the time of his murder, David lived with Ms. Ramos while Appellant was searching for an apartment so that she could move out of the family home. On the day of the murder, emergency personnel were

dispatched to the scene in response to a 911 phone call placed by the Appellant stating that her husband had been shot.

A detective for the Kentucky State Police took charge of the investigation and initially interviewed Appellant. After further investigation, the detective interviewed Appellant on two additional occasions, wherein she revealed evidence implicating her as the shooter. As a result, Appellant was indicted on October 19, 2010, on one count of murder. After a lengthy trial, a Taylor Circuit Court jury found Appellant guilty of murder and recommended a sentence of twenty years. The trial court sentenced Appellant in accord with the jury's recommendation. Appellant now appeals her conviction and sentence as a matter of right pursuant to the Ky. Const. §110(2)(b). Several issues are raised and addressed as follows.

Hearsay

Appellant contends that the trial court erred by admitting hearsay evidence including a video/audio recording of a drug deal and testimony offered by the Commonwealth's witness, Officer Brandon Blair. We review the trial court's evidentiary rulings for an abuse of discretion. *Commonwealth v. King*, 950 S.W.2d 807, 809 (Ky. 1997). Under this standard, we will not disturb the trial court's ruling unless it was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (citing *Partin v. Commonwealth*, 918 S.W.2d 219, 222 (Ky. 1996)).

Recording

Appellant specifically argues that a video/audio recording admitted as evidence constitutes inadmissible "double hearsay." The recording details the conversation that occurred during a drug sale between a confidential informant ("CI") and Appellant's mother, Linda Williams. During the transaction, Williams disclosed that Appellant admitted to her that she killed David. However, at trial, Williams testified that she recalled participating in the drug transaction, but denied making the statements regarding Appellant's admission. In response, the Commonwealth requested to introduce the recording to impeach Williams' testimony. Appellant's motion objecting to its introduction was overruled and the recording was played for the jury.

Hearsay is defined as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." KRE 801(c). Hearsay is inadmissible unless otherwise provided by the Kentucky Rules of Evidence or the Rules of the Supreme Court of Kentucky. KRE 802; *see Wiley v. Commonwealth,* 348 S.W.3d 570, 580 (Ky. 2010). Hearsay within hearsay is admissible if each component of the evidence satisfies an exception to the hearsay rule. KRE 805; *Thurman v. Commonwealth,* 975 S.W.2d 888, 893 (Ky. 1998).

Regarding the first component of the alleged "double hearsay," Appellant's statements, retold by Williams during the drug buy, constitute an admission offered against a party and, therefore, are not excluded by the hearsay rule. KRE 801A(b)(1); *Thurman,* 975 S.W.2d at 893. The second

component is also not excluded by the hearsay rule because Williams' recorded statements relaying Appellant's admission constitute "prior inconsistent statements." KRE 801A(a)(1). A statement is inconsistent for purposes of KRE 801A(a)(1) where the witness presently contradicts or denies the prior statement. *Brock v. Commonwealth*, 947 S.W.2d 24, 27 (Ky. 1997). Williams' trial testimony clearly contradicted her recorded statement. In addition, her recorded statement is not limited to impeachment purposes, but may also be received as substantive evidence. *Jett v. Commonwealth*, 436 S.W.2d 788, 792 (Ky. 1969). The record further reveals that the Commonwealth laid the proper foundation, in compliance with KRE 613(a), prior to playing the recording for the jury. It is noteworthy that Williams also gave a recorded statement to the police wherein she repeated Appellant's admission of guilt. That recorded statement was also played for the jury, but without objection. Therefore, even though the CI recording was properly admitted for the reasons stated above, it is also cumulative of similar non-challenged evidence. *See Torrence v. Commonwealth*, 269 S.W.3d. 842, 864 (Ky. 2008). Accordingly, the trial court did not abuse its discretion by properly admitting the CI recording.

Testimony of Officer Brandon Blair

Appellant further asserts that the trial court erred by admitting the testimony of Officer Brandon Blair because Blair's statements were hearsay and inadmissible under the spousal privilege. Although we agree that admitting Blair's hearsay testimony was error, it was harmless. In addition, the spousal privilege does not apply here.

Officer Blair was David's on-duty partner and friend. During the Commonwealth's direct examination of Blair, he testified that David had been receiving anonymous notes. Blair stated that he believed the notes were written by Appellant. On cross-examination by Appellant's counsel, Blair was questioned further regarding his opinion. On re-direct, the Commonwealth asked Blair how he came to believe that Appellant was the author of the notes. Blair explained that one of the notes revealed his plan to divorce his wife, and that he had disclosed this personal information only to David. Also, David had informed Blair that Appellant had been the only one with whom he had shared this information; therefore, she had to have been the source of the notes. Appellant's counsel objected to this answer as being hearsay. However, Appellant never objected to Blair's opinion testimony until the Commonwealth elicited this specific information on re-direct.

To provide context, a note with Appellant's fingerprint was found next to David's body at the crime scene that stated: "I told you to leave Mary alone, you were warned, you didn't listen." As previously noted, Mary was David's mistress. Therefore, this note reasonably demonstrated Appellant's motive for killing her husband and potentially put her at the scene of the crime. Though not proof positive, the presence of Appellant's fingerprint on the note created several inferences that could be argued to the jury.

Accordingly, the Commonwealth was seeking to establish much more than the mere occurrence of the conversation between David and Blair. Rather, Blair's testimony was offered to prove that his opinion as to the note's

author was true and, thus, Appellant had a propensity to write ominous notes to David. Therefore, Blair's testimony that Appellant also wrote the note found at the crime scene provided circumstantial evidence in an attempt to ultimately establish her as the murderer.

The test for harmless error is "whether the error itself had substantial influence" on the jury's verdict. *Winstead v. Commonwealth*, 283 S.W.3d 678, 688-89 (Ky. 2009) (quoting *Kotteakos v. United States*, 328 U.S. 750 (1946)). "If so, or if one is left in grave doubt, the conviction cannot stand." *Id.* at 689.

It appears that Appellant's counsel went along with the admission of Blair's opinion testimony as a strategic maneuver. For example, by failing to object during the Commonwealth's direct examination, Appellant's counsel was able to solicit from Blair during cross-examination that *David* did not believe that Appellant was leaving the ominous notes, and also that Blair had no personal knowledge that Appellant wrote the notes. Further, the record demonstrates that Blair had a separate factual basis for his opinion arising out of his knowledge and participation regarding the installation of surveillance equipment at David's home. Moreover, the record is replete with evidence suggesting Appellant's guilt and will be discussed at length in the subsequent paragraphs. Therefore, we cannot say that Blair's hearsay statement had a substantial influence on the jury. Accordingly, any error was harmless.

In addition, Appellant asserts that Blair's testimony is inadmissible under the spousal privilege because his statements referenced the existence of a private conversation between David and Appellant. This argument is

unpreserved and quickly dismissed as meritless because the spousal privilege is not available when one spouse is accused of wrongdoing against the other spouse. KRE 504(c)(2)(A).

Directed Verdict

Appellant further maintains that the trial court erred in denying her motion for a directed verdict of acquittal. We will reverse the trial court's denial of a motion for directed verdict "if under the evidence as a whole, it would be *clearly unreasonable* for a jury to find guilt." *Commonwealth v. Benham,* 816 S.W.2d 186, 187 (Ky. 1991) (citing *Commonwealth v. Sawhill,* 660 S.W.2d 3 (Ky. 1983) (emphasis added)). Our review is confined to the proof at trial and the statutory elements of the alleged offense. *Lawton v. Commonwealth,* 354 S.W.3d 565, 575 (Ky. 2011).

In the present case, Appellant was charged with murder. KRS 507.020. Under that statute, the Commonwealth was required to prove that Appellant intentionally caused the death of David Ford. The Commonwealth concedes that the evidence offered against Appellant in this case was circumstantial. However, "it is well settled that a jury may make reasonable inferences from such evidence." *Dillingham v. Commonwealth,* 995 S.W.2d 377, 380 (Ky. 1999) (citing *Blades v.* Commonwealth, 957 S.W.2d 246, 250 (Ky. 1997)); *see also Sawhill,* 660 S.W.2d at 4. The record reveals that the Commonwealth presented sufficient evidence which would allow a reasonable jury to convict Appellant. First, the jury was presented with the recording wherein Appellant's mother disclosed that Appellant admitted to her that she killed David. Second,

two witnesses testified that Appellant stated she would kill David if she ever discovered he was cheating. Third, cell phone evidence contradicted Appellant's alibi that she was not present at the residence around the time of the murder. The jury was also presented with evidence that Appellant's car was seen at the residence prior to David's murder, although the precise timeframe was unclear. Fourth, Appellant's fingerprints were found on a threatening note discovered near David's body. Finally, when informed that she would be subjected to a gunshot residue test, Appellant washed her hands and then later denied having done so.

Reviewing the evidence as a whole, it was not clearly unreasonable for the jury to convict Appellant of murder. We find that the trial court did not err in denying Appellant's motion for a directed verdict of acquittal.

Jury Instruction

For her third assignment of error, Appellant asserts that the jury instruction for murder violated her right to a unanimous verdict. Appellant did not properly preserve this issue for appeal by objecting to the jury instruction or tendering her own instruction to the trial court. RCr 9.54(2). Accordingly, we may reverse only if the alleged error is palpable. RCr 10.26. "In order to demonstrate an error rises to the level of a palpable error, the party claiming palpable error must show a 'probability of a different result or [an] error so fundamental as to threaten a defendant's entitlement to due process of law.'" *Allen v. Commonwealth,* 286 S.W.3d 221, 226 (Ky. 2009) (quoting *Martin v. Commonwealth,* 207 S.W.3d 1, 3 (Ky. 2006)).

The murder jury instruction, in relevant part, states that the jury will find Tonya Ford guilty if they believe from the evidence beyond a reasonable doubt:

> That in this county on or about February 10, 2009, and before finding of the indictment herein, she killed David Ford by shooting him with a gun; OR aided, abetted, or counseled with another in said act . . . .

"It has long been clear that in this state a defendant cannot be convicted of a criminal offense except by a unanimous verdict. *Robinson v. Commonwealth*, 325 S.W.3d 368, 370 (Ky. 2010) (citing *Cannon v. Commonwealth*, 291 Ky. 50, 163 S.W.2d 15 (1942); RCr 9.82(1)). Unanimity becomes an issue when a jury instruction includes multiple theories of a crime, "since some jurors might find guilt under one theory, while others might find guilt under another." *Davis v. Commonwealth*, 967 S.W.2d 574, 582 (Ky. 1998). However, a jury may be instructed on multiple theories of guilt in a single instruction without violating the unanimity requirement if the evidence would support conviction under each theory. *Robinson*, 325 S.W.3d at 370. This is not the case here because we agree with Appellant that there was absolutely no evidence to support the aiding, abetting, or counseling instruction.

However, as we noted in *Travis v. Commonwealth*, "such flawed instructions only implicate unanimity if it is reasonably likely that some members of the jury actually followed the erroneously inserted theory in reaching their verdict." 327 S.W.3d 456, 463 (Ky. 2010). In contrast, "if there

is no reasonable possibility that the jury actually relied on the erroneous theory—in particular, where there is no evidence of the theory that could mislead the jury—then there is no unanimity problem." *Id.* In the present case, the Commonwealth's entire theory at trial was that Appellant was the actual shooter. As Appellant correctly notes in her brief, the Commonwealth "never even set out to prove that [Appellant] aided or abetted another. . . ." "No other party was ever identified as a possible shooter other than [Appellant]."

Yet, in her reply brief, Appellant contends that the testimony of Officer Blair could have been the basis for an inference tending to advance the erroneous instruction, and that the instruction gave credence to Blair's testimony. We find this unpersuasive. There was no direct evidence offered at trial that Appellant aided, abetted, or counseled with another in killing David Ford. The Commonwealth's entire proof centered on the theory that Appellant acted alone. Although this case presents an error in the jury instruction, the error was simply the "inclusion of surplus language." *Travis*, 327 S.W.3d at 463. We are certain that "there is no reasonable possibility that the jury actually relied on the erroneous theory." *Id.*

Jury Issues

For her next assignment of error, Appellant presents several alleged errors involving the jury's deliberations. Each will be discussed individually.

Cell Phones

First, Appellant argues that the court erred by temporarily allowing cell phones in the jury room during part of the guilt phase deliberations.

Specifically, she contends that this gave the jurors the opportunity to discuss the case with non-jurors and independently review evidence by accessing the internet.

In *Winstead v. Commonwealth*, we recognized that jurors' use of cell phones may result in opportunities for improper outside influence. 327 S.W.3d 386, 401 (Ky. 2010). However, cell phones may be released to jurors for appropriate communication purposes such as transportation and childcare arrangements. *Id.* at 401-02. This is a flexible standard granting discretion to the trial court, and Appellant is not entitled to relief absent proof of improper influence. *Id.* No such evidence has been presented. The mere fact that jurors possessed cell phones or even made calls does not create the presumption that they discussed the case. *See Tamme v. Commonwealth*, 973 S.W.2d 13, 26 (Ky. 1998). Moreover, the Commonwealth filed an affidavit of a juror stating that none of the jurors used their cell phones during deliberations, and that court personnel told them not to use their cell phones during deliberations. We therefore find no reversible error.

Interaction with Bailiff

Next, Appellant claims that the court erred in denying her a mistrial, alleging that the bailiff in this case engaged in private conversations with the jury regarding its consensus on a verdict. We review the trial court's denial of a mistrial motion for an abuse of discretion. *Shabazz v. Commonwealth*, 153 S.W.3d 806, 810 (Ky. 2005). "[A] mistrial is an extreme remedy and should be resorted to only when there is a fundamental defect in the proceedings and

there is a 'manifest necessity for such an action.'" *Woodard v. Commonwealth,* 147 S.W.3d 63, 68 (Ky. 2004) (quoting *Bray v. Commonwealth,* 68 S.W.3d 375, 383 (Ky. 2002)).

In order to resolve this dispute, the trial court took sworn testimony from the bailiff directly refuting Appellant's assertion. The bailiff testified that he properly responded to typical jury inquiries, which were then properly submitted to the trial judge. We cannot conclude that the trial court abused its discretion in relying on this testimony.

Police Presence

For her last assignment of error, Appellant complains that the intimidating presence of law enforcement throughout the trial influenced the jury, and that she is entitled to a new trial. This argument is unpreserved and will be reviewed for palpable error. RCr 10.26.

David Ford was a police officer. It is no surprise that his friends and colleagues were also police officers. "As such, it was not unusual for fellow officers to be present, some in official capacity and others as spectators." *Baze v. Commonwealth,* 23 S.W.3d 619, 628 (Ky. 2000) (overruled on other grounds by *Leonard v. Commonwealth,* 279 S.W.3d 151 (Ky. 2009)); *see also Hodge v. Commonwealth,* 17 S.W.3d 824, 839 (Ky. 2000) ("[T]he presence of armed policemen in the courtroom [does not] constitute[] prejudice *per se.*"). Appellant does not state the actual number of law enforcement personnel present in the courtroom during trial, nor does she offer any other evidence of

prejudice or undue influence that resulted from their presence. Therefore, we find no evidence of manifest injustice establishing palpable error.

Conclusion

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

All sitting. All concur.

NOBLE, J., CONCURRING SEPARATELY: I fully concur and agree with the majority that Officer Blair's hearsay testimony was harmless, but write separately to further discuss the hearsay nature of his testimony.

For the notes found on David's car to have any consequence in this case whatsoever, the Commonwealth's theory must have been that Appellant wrote the series of suspicious notes. The relevance of these notes is connected to a note with Appellant's fingerprint which was found next to David's body that stated, "I told you to leave Mary alone, you were warned, you didn't listen." (Mary, as noted by the majority, was David's mistress.) This note clearly provided a motive for Appellant to kill her husband, and potentially put her at the scene of the crime. Though not proof positive, the presence of her fingerprint created several permissible inferences that could be argued to the jury. Thus the questioning of Officer Blair about who he thought wrote the notes was related to establishing the identity of the murderer.

At its most basic, Officer's Blair testimony was that he had only told David about his own plans to divorce his wife, and then a suspicious note to David referencing that conversation appeared. Blair also testified that David

told him that he had only told Appellant about Blair's plans to get a divorce. This testimony was elicited to explain, in part, Blair's opinion that Appellant had to have written the note to David referring to Blair's divorce. From this, Blair extrapolated that he believed the Appellant wrote all the suspicious notes to David.

If the notes had never been written, evidence of the conversations between Blair and David would be entirely irrelevant. They were only relevant when considered in conjunction with the fact that Blair believed that Appellant authored the notes. Thus, the "truth of the matter" that the Commonwealth was attempting to assert was that Appellant wrote the notes and tried to "bootstrap" inadmissible hearsay evidence into the case under the guise that it was not being used to prove Appellant authored the notes, when in fact it was being used for just that purpose. Even though Appellant's fingerprint had been found on the note with David's body, the proof was not conclusive that the note had been written by Appellant. She could have touched the note at some time prior to the murder. The Commonwealth needed to show the incriminating note was from her, and it attempted to do that by showing she was in the habit of writing notes to David. Instead of doing this through handwriting analysis, the Commonwealth used Blair's testimony as to his opinion, and thus the out-of-court conversations between David and Blair, to establish that Appellant must have written the notes left on David's car and, in turn, that she wrote the truly incriminating note at the crime scene. Thus the conversation with David was being used, if indirectly, to prove the truth of the statements in the

conversation, as those statements were the basis of Blair's opinion that Appellant wrote the notes.

Blair did not testify as an expert witness. As a lay witness, there had to be a reasonable basis for forming his opinion that Appellant wrote the note, and the basis for the opinion had to come within common understanding. Blair based his opinion in part on the belief that David told no one but the Appellant about Blair's divorce plans. That may or may not be true. But as the basis for the reliability of Blair's lay opinion that Appellant wrote the notes, this is no different than a witness saying, "Well, that's what I *think* about it" without having a reliable basis for thinking so. This is nothing more than mere speculation based on something someone told him. It is not an opinion based on experience and general knowledge. This is definitely using an out-of-court statement to prove a fact in issue, and thus it is being offered for the truth of the matter asserted.

Complicating this issue, however, is the exact manner in which Blair's opinion was solicited. During direct examination, the Commonwealth asked Blair about the series of notes and whether he had an opinion about who wrote them. Blair indicated that he did and stated that he had told David that he believed Appellant had written the notes because of a conversation between David and himself. Appellant's counsel did not object. On cross-examination, Appellant's counsel asked if David had agreed with Blair that Appellant had written the notes. Blair stated that David had not agreed with him. Appellant's counsel then asked whether Blair had any personal knowledge that

Appellant wrote the notes or that it was only his opinion that she had. Blair agreed it was only his opinion.

On re-direct, the Commonwealth asked Blair if he had loaned David any equipment. He stated that the police department had loaned David a surveillance camera and a driveway sensor. Blair then stated that no other notes appeared after the installation of the equipment and that the only people who knew it had been installed were David, Appellant, others in the Ford household, and himself. The Commonwealth then surmised, "That sounds like the basis for your opinion that [Appellant] wrote the notes?" Blair responded that this knowledge was *part* of the basis for his opinion, but that a conversation between him and David was also the basis of the opinion. The Commonwealth then stated, "Tell the jury about that conversation." Appellant's counsel immediately objected. The trial court overruled Appellant's objection, and permitted testimony about the conversation between Blair and David about Blair's impending divorce and the fact that Blair had told only one person (the Appellant).

I believe the Commonwealth intended to use hearsay testimony not to show that the conversation occurred, but rather to show that Blair's opinion was true and thus that Appellant had a propensity to write ominous, anonymous notes to David. The Commonwealth's obvious argument was that the notes to David contained information about Blair's divorce, she was more likely to have written the notes than other people, and thus she was more likely to have written the incriminating note found at the crime scene.

However, Appellant did not timely object to Blair's opinion, which was really a form of hearsay (being based as it was on a hearsay statement). From the record, Appellant's counsel seems to have strategically gone along with the Commonwealth's solicitation of Blair's lay opinion. By allowing the introduction of Blair's opinion on direct examination, Appellant's counsel was then able to solicit from Blair that *David* did not believe that Appellant was leaving the ominous notes and also that Blair had no personal knowledge that Appellant wrote the notes.

Further, Appellant's counsel did not object to Blair's opinion until after he had already testified to one admissible basis for his opinion that Appellant wrote the notes (i.e., his personal knowledge that only himself and the Ford family knew about the installation of the surveillance equipment and the notes stopped after the equipment's installation.) Also, Blair's full hearsay testimony at trial was that David told Blair that he had only told Appellant about Blair's divorce and that David had not been convinced that Appellant wrote the notes. In fact, Blair testified that David also told him that someone, not Appellant, must have been listening outside the Ford's bathroom window, where the conversation occurred, and then wrote the note referencing Blair's divorce.

The test for harmless error is "whether the error itself had substantial influence" on the jury's verdict. *Winstead v. Commonwealth*, 283 S.W.3d 678, 688-89 (Ky. 2009) (quoting *Kotteakos v. United States*, 328 U.S. 750 (1946)). "If so, or if one is left in grave doubt, the conviction cannot stand." *Id.* at 689.

As noted, it appears that Appellant's counsel went along with the admission of Blair's lay opinion as a strategic maneuver and did not object until after one admissible basis for his opinion had been admitted into the record. Though Blair's testimony about his conversation with David was hearsay, I cannot say it had a substantial influence on the jury's verdict given that Blair had another factual basis for his opinion.

Moreover, the record was replete with evidence suggesting Appellant's guilt. The Commonwealth introduced the threatening note with Appellant's fingerprints found near the body. Cell phone records placed her in the vicinity of the crime scene at the time of the murder. And additional witness testimony showed that Appellant had stated she would kill David if she caught him cheating on her and that if she thought she could get away with it, she would do so without remorse. A single hearsay statement is not likely to sway the jury considering all the circumstances of the case.

COUNSEL FOR APPELLANT:

Danny Butler

COUNSEL FOR APPELLEE:

Jack Conway
Attorney General

Ken W. Riggs
Assistant Attorney General

John C. Miller
Angela Call
Asst. Commonwealth's Attorneys