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Commonwealth of Kentucky

Court of Appeals

NO. 2023-CA-1468-MR

KAITLYN HAWTHORNE — APPELLANT

v.

APPEAL FROM CARLISLE CIRCUIT COURT
HONORABLE TIMOTHY A. LANGFORD, JUDGE
ACTION NO. 23-CR-00019

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: CETRULO, L. JONES, AND MCNEILL, JUDGES.

CETRULO, JUDGE: Appellant Kaitlyn Hawthorne ("Hawthorne") was convicted of first-degree unlawful transaction with a minor, and sentenced to 10 years of imprisonment following a jury trial in Carlisle Circuit Court. She appeals that judgment, sentence, and the subsequent denial of her motion for a new trial because, she argues, the court improperly permitted the jury to change its verdict. After review, we find error and vacate and remand.

FACTS & PROCEDURAL BACKGROUND

In May 2023, the Carlisle County grand jury indicted Hawthorne for the charge of first-degree unlawful transaction with a minor and first-degree sexual abuse. In September 2023, the Carlisle Circuit Court held a one-day trial. On motion by Hawthorne, the trial court ruled that the sexual abuse (a class D felony) would be a lesser included offense of the charge of unlawful transaction with a minor (a class B felony). After the completion of proof, the trial court instructed the jury that Hawthorne could be found guilty of *either* first-degree unlawful transaction with a minor, *or* first-degree sexual abuse.

In her closing arguments, Hawthorne's counsel presented a PowerPoint presentation explaining the elements of each charge and the sentencing range. The presentation clearly stated that the first-degree unlawful transaction with a minor charge carried a sentence of 10 to 20 years of imprisonment; first-degree sexual abuse carried a range of one to five years of imprisonment. Hawthorne did not inform the jury of parole eligibility requirements.

On the jury instructions, unlawful transaction with a minor was instruction number five and correlated to verdict "A." Sexual abuse was instruction number six and correlated to verdict "B." Each charge and verdict were on separate pages. After deliberations, the jury returned with a signed verdict B. The foreperson had signed her name under "We, the jury, find the Defendant, []

Hawthorne, **GUILTY** of Sexual Abuse in the First Degree under Instruction Number 6." The trial court then read the signed verdict form to the jury, polled the jury, and each affirmed their verdict.

Proceeding to the penalty phase, the Commonwealth called a probation and parole officer to testify as to the parole eligibility for a conviction under first-degree sexual abuse. As a class D felony, this conviction would only require 20% of the sentence to be served, *i.e.*, Hawthorne would be parole eligible in one year if the jury imposed five years of imprisonment; eligible 10 months into a four-year term; eligible seven months into a three-year term; eligible five months into a two-year term; and parole eligible in four months into a one-year prison sentence. Hawthorne asked the probation and parole officer about sex offender treatment program possibilities and sex offender registry requirements, and then the court excused the probation and parole officer.

After the probation and parole officer left the stand, the court asked the Commonwealth if it rested. The Commonwealth responded, "The bailiff told me the jury had questions." The court replied, "If you have a question, once you retire to the jury room you can write any question down you like, that is relevant to the case, and send it out and we'll bring you back out and answer it best we can."

After Hawthorne's father testified, the court read the sentencing instructions to the jury and told them to write their incarceration recommendation

from one to five years. Both the defense and prosecution gave brief closing arguments. During its closing, the Commonwealth emphasized the parole eligibility allowances by stating, "One year parole eligibility does not justify what she did."

Shortly after the jury went into deliberations, the jury informed the court that it had a question. A juror wrote the question on a piece of paper and gave it to the court. The note read, "What happen [*sic*] if we wrote verdict on wrong line[?] [W]e recommend 10 years for Unlawful Transaction with a minor."

Outside the presence of the jury, the court discussed the question with the parties. Hawthorne did not move for a mistrial, but the Commonwealth did, and the court denied the motion. After discussion, the court brought the jury back into the courtroom and told them that it could not answer the question. The court then repolled the jurors, and each now stated that the original verdict of guilty to sexual abuse was *not* their verdict. The court allowed the jury to return to the jury room to re-deliberate.

Shortly thereafter, the jury returned to the courtroom with the same set of jury instructions. This time, the foreperson signed both the verdict A page and the verdict B page. The trial court, after reading the instructions, stated, "Ladies and Gentlemen, you have an inconsistent verdict. I have two verdicts but both of

them have the same signature of the foreperson. Neither one are stricken out. I don't know which one you want to strike out."

The court then allowed the jury to return to the deliberation room. Shortly thereafter, the jury returned again. This time, the verdict A page, detailing unlawful transaction with a minor, had the foreperson's signature and "correct verdict" handwritten below the signature. The signature on the verdict B page, detailing sexual abuse, was crossed out. After accepting this verdict, the trial court polled the jurors again, and they affirmed this new verdict. At this point, the court instructed the parties that it would proceed to the penalty phase again. During a subsequent bench conference, Hawthorne moved for a mistrial, and the court denied the motion. As the conversation continued, the record becomes difficult to understand; Hawthorne objected again – at least once, possibly twice – but the entire conversation is not discernible.

Again, the probation and parole officer testified. This time, the officer informed the jury that the sentencing range for the class B felony, unlawful transaction with a minor, was 10 to 20 years with parole eligibility after the defendant served 85% of the sentence. The jury deliberated and recommended a 10-year sentence.

In October 2023, Hawthorne motioned for a new trial and argued the original verdict of sexual abuse could not be changed after the jury had been

properly polled and heard the truth-in-sentencing information. The trial court denied the motion and accepted the recommendation of the jury, sentencing Hawthorne to 10 years of imprisonment. Hawthorne appealed.

STANDARD OF REVIEW & PRESERVATION

Here, Hawthorne's motion for a mistrial, subsequent objection (presumably), and her motion for a new trial stem from the same alleged root error: the trial court permitted the jury to amend its verdict *after* "completing" the verdict and after hearing truth-in-sentencing testimony in the penalty phase of the trial. Ultimately, Hawthorne challenges the validity of the second verdict and the subsequent unauthorized sentence. The result is a conflated matter of statutory interpretation, alleged jury instruction error, and possible sentencing issues.

The Commonwealth argues the issue on appeal is not preserved, but we do not agree. As the trial court accepted the amended verdict, Hawthorne moved for a mistrial and objected at least once (although the record is unintelligible as to the nature of that specific objection(s)). Additionally, Hawthorne motioned for a new trial. Even without those overt challenges, this Court has "inherent jurisdiction to cure [certain][1] sentencing errors." *Jones v.*

[1] A claim that a sentencing decision is contrary to statute. *Ware v. Commonwealth*, 34 S.W.3d 383 (Ky. App. 2000). A claim that a sentence was imposed without fully considering what sentencing options were allowed by statute. *Hughes v. Commonwealth*, 875 S.W.2d 99, 100 (Ky. 1994). A sentence imposing fines and costs upon an indigent defendant in violation of statute. *Travis v. Commonwealth*, 327 S.W.3d 456, 459 (Ky. 2010).

Commonwealth, 382 S.W.3d 22, 27 (Ky. 2011) (citations omitted). We believe this is such an error, and we are "not bound to affirm an illegal sentence" even if it was not presented to the trial court. *See id*.

Typically, we review the denial of a motion for a new trial, a trial court's evidentiary rulings, and the denial of a motion for a mistrial, all for an abuse of discretion. *See* (consecutively) *Commonwealth v. Clark*, 528 S.W.3d 342, 345 (Ky. 2017); *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000); and *Mayse v. Commonwealth*, 422 S.W.3d 223, 226 (Ky. 2013) (citation omitted). Further, jury instructions are reviewed differently – sometimes an abuse of discretion, sometimes *de novo* – depending on the type of error alleged. *Commonwealth v. Caudill*, 540 S.W.3d 364, 366-67 (Ky. 2018);[2] *Winstead v. Commonwealth*, 327 S.W.3d 386, 409 n.55 (Ky. 2010). However, here, our analysis turns on statutory interpretation, a question of law which we review *de novo*. *See Adams v. Commonwealth*, 599 S.W.3d 752, 754 (Ky. 2019) (citation omitted). Regardless, whether employing the abuse of discretion standard or *de novo* standard of review, we find error.

[2] "When the error arises from giving an unwarranted instruction or failing to give a warranted instruction, we review the decision for abuse of discretion. However, when the error hinges on whether the text of the instruction accurately presented the applicable legal theory, we review the content of a jury instruction *de novo*." *Caudill*, 540 S.W.3d at 367 (Ky. 2018) (internal quotation marks omitted) (citing *Sargent v. Shaffer*, 467 S.W.3d 198, 203-04 (Ky. 2015), *overruled on other grounds by University Medical Center, Inc. v. Shwab*, 628 S.W.3d 112 (Ky. 2021)).

ANALYSIS

On appeal, Hawthorne argues the trial court erred by allowing the jury to change its verdict after the verdict became final. Hawthorne argues that – pursuant to Kentucky Revised Statute ("KRS") 29A.320(3) – the jury's verdict became final after the foreperson signed the jury instruction form, announced its verdict, and affirmed the judgment through polling. Further, she argues, the jury cannot change its verdict after the truth-in-sentencing phase takes place because this phase permits testimony not allowed during the guilt/innocence phase of the trial.

Conversely, the Commonwealth argues that the change in verdict represents a permissible change in *form*, not an impermissible change of *substance*. Essentially, the Commonwealth argues that the verdict change was merely a "clerical error" as proven by the court's *second* polling, and that change is permissible anytime before the jury is discharged, but we do not agree. The Commonwealth contends that any information given to the jury during the penalty phase was harmless, but again, we do not agree.

KRS 29A.320 details the duty of the jury. Relevantly, proper jury procedure occurs when the foreperson signs his/her name to a unanimous verdict; the foreperson hands the verdict to the judge who reads it to the court; and, if the court polls the jury and they do not express disagreement, then the verdict is

complete. KRS 29A.320(3). After the verdict is complete – the guilt/innocence phase of the trial is over – and the court proceeds to the truth-in-sentencing stage of the penalty phase. *See* KRS 532.055.

KRS 532.055, the truth-in-sentencing statute, "is designed to provide the jury with information relevant to arriving at an appropriate sentence for a particular offense." *Furnish v. Commonwealth*, 267 S.W.3d 656, 661 (Ky. 2007). This truth-in-sentencing stage consists of evidence relevant to sentencing including, but not limited to, minimum parole eligibility, information relating to prior convicted offenses, and victim impact statements. KRS 532.055(2)(a).[3] This bifurcation – guilt/innocence *then* penalty – is intentional and has been required since 1975. *See Philpott*, 75 S.W.3d at 211-12. The Kentucky bifurcated trial process involves a jury determining "the appropriate penalty within the ranges specified by law *after* being furnished with *previously inadmissible evidence* regarding the number and nature of the defendant's prior criminal convictions and parole eligibility information." *Id*. at 212 (emphasis added). The process is bifurcated so the jury will not be improperly influenced during the guilt/innocence phase. *Norton v. Commonwealth*, 37 S.W.3d 750, 753 (Ky. 2001) (While accepting limited exceptions, the Kentucky Supreme Court held, "We remain

[3] While questions of separation of powers have subsequently been raised in connection with KRS 532.055, it has been upheld as a matter of comity. *Commonwealth v. Philpott*, 75 S.W.3d 209, 212 (Ky. 2002) (citation omitted).

adamant that sentencing issues must not be raised prior to the penalty phase of trial as a means to impermissibly influence the jury to convict based on the desired penalty rather than on the elements of each given offense.").

Here, the jury returned verdict B, signed by the foreperson, finding Hawthorne guilty of first-degree sexual abuse, as described in jury instruction number six. The court polled the jurors, and they all affirmed their judgment. This completed the verdict. *See* KRS 29A.320(3). Then, the court proceeded to the truth-in-sentencing testimony in the penalty phase of the trial. *See* KRS 532.055. During this phase, the jury heard information – parole eligibility requirements[4] – it was not permitted to hear during the guilt/innocence phase of the trial. *See Philpott*, 75 S.W.3d at 212. The jury then retired for sentencing deliberations and returned with a note to the court stating the jury wanted to change its verdict to first-degree unlawful transaction with a minor. Simply, the court erred in allowing the jury to change its vote – to impeach its own verdict – after the verdict was

[4] With some exceptions, notably *voir dire*, a jury is not normally told the sentencing range for charges during the guilt/innocence phase of the trial, as occurred here. *See Philpott*, 75 S.W.3d at 213 ("We hold now that in the trial of a 'felony case,' *i.e.*, any trial in which a jury could return a verdict of guilty of a felony offense, the jury shall not be instructed on the penalty ranges of any offense, whether the primary or a lesser included offense."). Here, the defense's closing presentation appears inconsistent with *Philpott* because Hawthorne's PowerPoint presentation (during the guilt/innocence phase) included the sentencing ranges for the charges. However, on appeal, the Commonwealth does not challenge Hawthorne's closing arguments; the Commonwealth merely argues any error was harmless because Hawthorne relayed the sentencing ranges to the jury during the guilt/innocence phase of the trial. Yet, Hawthorne does *not* argue that the jury did not know the sentencing ranges before its initial deliberation; Hawthorne argues that the jury did not know the *probation eligibility ranges* before its initial deliberation.

complete and after the jury had heard truth-in-sentencing testimony not permitted during the guilt/innocence phase. *See* KRS 29A.320(3); *see also* KRS 532.055(2)(a); *Philpott*, 75 S.W.3d 209.

Here, the jurors did not allege the verdict was arrived at by lot nor did any jurors mention any type of inappropriate contact or persuasion. Frankly, it is unclear if the requested verdict amendment was due to a group-wide "error" (as the Commonwealth argues) or if the jury simply changed its mind after hearing penalty testimony (as Hawthorne argues). However, *under these circumstances*, the *why* is not as important as the *when*. We are not at liberty to inquire as to the jurors' rationales after the verdict is final.

> [N]o principle of law is more firmly established than the one that the testimony of jurors is not competent to explain the grounds of their decision or impeach the validity of their finding. . . . [T]he dangerous tendency of receiving testimony of the jurors . . . would open a door so wide, and present temptations so strong for fraud, corruption, and perjury, as greatly to impair the value of, if not eventually to destroy, this inestimable form of trial by jury.

Ruggles v. Commonwealth, 335 S.W.2d 344, 346 (Ky. 1960) (internal quotation marks and citations omitted).

Further, "[o]ur law is well settled that a jury or jurors may not impeach the verdict of the jury unless the verdict was arrived at by lot or by some other method." *Dillard v. Ackerman*, 668 S.W.2d 560, 562 (Ky. App. 1984).

We agree that there are situations where a jury may change its verdict for clerical or form corrections. *See Buchanan v. Commonwealth*, 399 S.W.3d 436 (Ky. App. 2012) (this Court affirmed the trial court's decision to permit a jury to amend its verdict after polling indicated the foreperson signed the wrong page of the jury instructions). However, the Commonwealth did not cite to, nor did we locate, any precedent that permitted the jury to change its verdict *after* the verdict was complete pursuant to KRS 29A.320(3) (signed jury instruction form, verdict announced, and verdict affirmed through polling) and *after* the jury heard testimony relating to parole eligibility and/or other truth-in-sentencing evidence (not otherwise permissible during the guilt/innocence phase).

Jackson v. Commonwealth, 196 S.W.2d 865 (Ky. 1946), although decided prior to the 1975 statutory changes, is consistent with our current interpretation of when a jury verdict is complete. In *Jackson*, the defendant was charged with breaking into a warehouse and faced a penalty of one to five years of imprisonment. *Id*. at 865. After the jury returned a verdict recommending one year, the Commonwealth's Attorney objected and stated in open court that he had agreed to a five-year sentence with the defendant in exchange for not filing other charges. *Id*. The Commonwealth's Attorney then stated that if the jury did not reconsider, he would file additional charges. *Id*. The trial court allowed the jury to re-deliberate and change its verdict to a five-year sentence. *Id*. On appeal, the

highest court in Kentucky determined that except for correcting a clerical error, the trial court could not require the jury to reconsider its verdict after it had deliberated, returned, and read the verdict. *Id*. at 855-56. "In the instant case the jury under correct instructions had deliberated and returned and read a verdict correct in form and substance. It was then too late to require a reconsideration of their verdict, other for the purpose of formal correction." *Id*. at 866.

Seventy-five years later, in *Sutton v. Commonwealth*, 627 S.W.3d 836 (Ky. 2021), the Kentucky Supreme Court held true to these words in *Jackson*. Citing to *Jackson*, the *Sutton* Court stated, "[w]here correctly instructed, if a jury returns a verdict correct in form, it may not be resubmitted to the jury for substantive change." *Id*. at 856. The Court in *Sutton* further stated, "[w]here the mistake is one of form, *apparent on the face of the verdict*, the court may point out the error and require the Jury to return a verdict consistent with the instructions." *Id*. (emphasis added) (internal quotation marks and citation omitted).

In the present case, the *original* verdict did not contain an "error" apparent on its face, nor did any jurors indicate a problem with the verdict upon their initial polling. The jury did not indicate concern until after the verdict was complete and the sentencing phase began. Under these circumstances, the verdict, at that point, was no longer amendable. Thus, the trial court erred in permitting the jury to amend its original verdict. This error is not harmless due to the resulting

unauthorized sentence, *i.e.*, the dramatically different terms of imprisonment for class B felonies (10 to 20 years) and class D felonies (1 to 5 years). *See* KRS 532.060(2).

CONCLUSION

Therefore, we VACATE Hawthorne's unlawful transaction with a minor conviction and correlating sentence, and REMAND with directions to the trial court to enter a judgment consistent with the *original* jury decision and conviction of first-degree sexual abuse, and to conduct a new penalty phase in accordance with that class D felony.

ALL CONCUR.

BRIEFS FOR APPELLANT:

David Troutman
Paducah, Kentucky

BRIEF FOR APPELLEE:

Russell Coleman
Attorney General of Kentucky

Joseph A. Beckett
Assistant Attorney General
Frankfort, Kentucky