RENDERED: AUGUST 15, 2014; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001672-MR

TRACY NAPIER — APPELLANT

v.

APPEAL FROM PERRY CIRCUIT COURT
HONORABLE WILLIAM ENGLE, III, JUDGE
ACTION NO. 10-CR-00197

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: JONES, STUMBO AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Tracy Napier was convicted by a Perry Circuit Court jury of first-degree assault and sentenced to ten-years' imprisonment. He filed this direct appeal alleging the following errors: (1) the jury was permitted to replay a witness's testimony using the prosecutor's unclean[1] laptop in the jury deliberation room; (2) the trial court admitted the deposition testimony of a forensic scientist without a hearing to determine its reliability and the Commonwealth did not

[1] The distinction between a "clean" and "unclean" laptop is significant in this case. We use the term "unclean" in the present context to mean the Commonwealth's laptop's hard drive had not been swiped of all data, including any data relating to Napier's case.

provide the expert's notes prior to the deposition; (3) the investigating detective testified as to Napier's guilt or innocence; (4) Napier was entitled to an instruction on fourth-degree assault as a lesser included offense; and (5) the trial court could not impose court costs and fees without conducting a hearing to determine whether he is a "poor person." We conclude the trial court committed clear and obvious errors when it permitted the jury to replay testimonial evidence on the Commonwealth's unclean laptop in the jury deliberation room without Napier's presence. We reverse.

Napier was indicted by a Perry County grand jury and charged with one count of attempted murder after he allegedly shot Carl Holbrook. Napier's first jury trial resulted in a hung jury.

Napier's second trial commenced on July 23, 2012, and he was found not guilty of attempted murder but guilty of first-degree assault. Prefatory to our discussion, we note the trial spanned eight days and Napier and the Commonwealth have chosen not to recite the evidence at length. To avoid searching the record for unnecessary detail, we limit the facts to those presented in Napier's and the Commonwealth's briefs. Napier and the Commonwealth focus on two interviews conducted by Detective Randy Combs played to the jury.[2] From those interviews, two different versions of the facts leading to the shooting emerged.

[2] Napier and the Commonwealth do not cite to Holbrook's testimony or much of the testimony produced at trial that may or may not lend additional insight to the basis for the jury's verdict. However, a party is not required to recite the entirety of the evidence and, in fact, is not encouraged to do so by our civil rules, which require only those facts "necessary to an understanding of the issues presented by the appeal" be recited. Kentucky Rules of Civil Procedure 76.120(c)(iv).

Paul Wooten, a witness at the shooting scene, was interviewed by Detective Combs. Wooten described his version of the events that occurred on the night of the shooting as follows:

Wooten was staying at a trailer park with Holbrook and Wooten's grandmother. During the night and while his grandmother slept, Wooten heard a loud noise later discovered to be Napier riding his motorcycle in the trailer park. Holbrook placed a landscaping timber across the road to impede Napier's travel. At some point, Holbrook and Wooten confronted Napier and ordered him to leave the trailer park. After hostile words were exchanged, Napier told Holbrook and Wooten to meet him at a cemetery close to Napier's home where they would "fight."

Holbrook and Wooten drove toward Napier's home in a truck and Napier appeared on his motorcycle. Wooten estimated the truck and Napier's motorcycle were separated by 20 yards. Holbrook exited the truck and Napier got off his motorcycle and approached Holbrook pointing a gun at his forehead. Wooten warned Napier they had a gun. After hostile words were again exchanged, Napier shot Holbrook in the leg. As Holbrook attempted to enter the truck, Napier shot him in the back and Holbrook fell to the ground. Napier then shot him again.

Wooten threw Holbrook a gun and when Holbrook fired, Napier shielded himself behind his motorcycle. Napier drove away threatening he would return and "finish Holbrook." Wooten called 911 and attempted to stop Holbrook's bleeding.

Napier was also interviewed and detailed a markedly different version of events than provided by Wooten. Napier stated he was riding his motorcycle in a trailer park and, when he attempted to leave, the road was blocked by a landscape timber. When he stopped, Holbrook approached. Following a verbal confrontation and as Napier departed, Holbrook warned that he knew Napier and where he lived.

Upon arriving at his home at the end of a long driveway, Napier heard his dog barking causing him to ride down his driveway. Approximately halfway down, Holbrook and Wooten appeared in a truck. Upon seeing Napier, Holbrook exited the truck and walked toward Napier. Holbrook reached for a gun from his pocket and began shooting at Napier: Napier shot back.

Napier retreated and drove to his father's home. After Napier informed his father Holbrook had been wounded, Napier's father called 911. Napier then drove to his brother's home, which was close to his own, and waited on the road to flag the police officers responding to the 911 call.

At this point in the interview, Detective Combs informed Napier that the location of the shell casings at the scene indicated Napier could not have been near his motorcycle when he first started shooting and the shell casings were very close to Holbrook's truck. He informed Napier of Wooten's statement that Napier shot first.

Having set forth the events leading to the shooting as told by Napier and Wooten, we address the use of an unclean laptop by the jury in the privacy of

the jury deliberation room. During deliberations, the jury requested to replay the CD of Wooten's interview with Detective Combs. Apparently, the only device available to replay the CD was a computer. After the trial court stated it could not spare its computer, the prosecutor volunteered her laptop, which the trial court ordered the bailiff to take to the jury deliberation room. Defense counsel did not object to the use of the prosecutor's laptop by the jury or request the jury replay Wooten's interview in the courtroom.

In *McAtee v. Commonwealth*, 413 S.W.3d 608 (Ky. 2013), rendered after the trial in this case, our Supreme Court had the opportunity to address the use of a laptop in the jury deliberation room to view testimonial evidence. Although not without factual distinctions from this case, its facts are strikingly similar and the law espoused therein is pivotal to our analysis. More than a cursory discussion of that case is warranted.

The jury expressed to the trial court its desire to review a witness's videotaped statement given to a detective investigating a murder allegedly committed by McAtee and admitted as evidence. The trial court did not contact either party regarding the jury's request and provided a DVD player. *Id*. at 619. However, the jury sent a second note to the trial court indicating the DVD player would not read the disc. The trial court then contacted the Commonwealth and requested it provide a "clean" computer on which the jury could review the statement. The Commonwealth provided the computer and informed defense counsel it had provided the computer. *Id*. at 620.

Based on these facts, the Court analyzed whether the trial court erred when, without notifying defense counsel of the request, it provided a clean computer to the jury for it to view a witness's videotaped statement in the jury deliberation room without the presence of the trial judge, counsel or McAtee. Because of the danger that the jury will place undue emphasis on testimony re-examined as compared to the live testimony, the Court held our rules of criminal procedure prohibit the review of a witness's testimonial statement in the privacy of the jury room.

It began with Kentucky Rules of Criminal Procedure (RCr) 9.72 which provides in part: "Upon retiring for deliberation the jury may take all papers and other things received as evidence in the case." Although the rule uses permissive language, "it is error to permit the jury to take certain *testimonial* evidence to the jury room." *Id*. at 621. Noting that it previously decided in *Tanner v. Commonwealth*, 2011-SC-000364, 2013 WL 658123 (Ky. 2013), a jury is not permitted to take a recorded testimonial witness statement to the jury deliberation room, the Court stated with clarity: "[A]lthough RCr 9.72 by its terms, permits the trial court to exercise discretion over the evidence the jury may take with it to deliberations, the court abuses that discretion when it permits the jury to take testimonial witness statements to the jury room[.]" *Id*. at 622 (internal citation omitted). Having concluded the trial court erred, the Supreme Court addressed whether the error required reversal. In doing, it applied a harmless error standard to the trial court's violation of RCr 9.72.

The Court perused established precedent for guidance. It observed that in cases where the violation was deemed prejudicial, mere error in allowing the jury to take evidence into deliberations was not a basis for reversal absent "additional factors and errors[.]" *Id*. at 622 (quoting *Tanner*, 2013 WL 658123 at 9). The Court concluded that in McAtee's case, "the judgment was not substantially swayed by the error." *Id*.

The Court then turned its attention to RCr 9.74 which 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.

It concluded that the trial court committed two violations of the rule: First, when it received the jury's request and delivered its response without the presence of McAtee and defense counsel. *McAtee*, 413 S.W.3d at 625. We are not concerned with the first violation because Napier and defense counsel were present when the request was made and the trial court delivered its response. We focus on the second violation of RCr 9.74.

In addition to a violation of RCr 9.72, the Court held it was a violation of RCr 9.74 to permit the jury to review the statement in the privacy of the jury room and indicated that this violation presented "a more difficult question" in applying the harmless error standard. *Id*. at 627. It repeated that the danger presented is the "great weight" the jury may place on testimony reviewed during deliberation. *Id.* at 627-28.

The Court articulated the applicable standard to determine if reversal was required:

> Although this type of RCr 9.74 violation will sometimes implicate constitutional rights, . . . this case does not present such a scenario; thus, we may deem the error harmless if we can say with fair assurance that the judgment was not substantially swayed by the error. The inquiry is not simply whether there was enough evidence to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

Id. at 627 (internal quotations, citations and brackets omitted). The Court reiterated that it "takes concerns of undue emphasis seriously[.]" *Id*. at 628. However, it could not say with fair assurance that merely because testimonial evidence was reviewed in the jury deliberation room, the jury's verdict was substantially swayed. *Id*.

Finally, the Court addressed whether RCr 8.28(1) was violated. The rule provides: "The defendant shall be present at the arraignment, at every critical stage of the trial including the empanelling of the jury and the return of the verdict, and at the imposition of the sentence." The Court declined to decide whether re-watching a witness's videotaped statement during deliberations is a "critical stage of the trial" as used in the rule. Instead, it concluded the error was harmless. *McAtee*, 413 S.W.3d at 628. The Court reasoned McAtee was "present when the video was originally played for the jury, and he was afforded a constitutionally adequate opportunity to defend against the statements made therein." *Id*.

Although the most recent published case dealing with testimonial evidence, *McAtee* is not the Supreme Court's last word on the use of a laptop during jury deliberations. In *Crews v. Commonwealth*, 2012-SC-000596, 2013 WL 6730041 (Ky. 2013), the Court considered whether the review of non-testimonial evidence by the jury during deliberations on a laptop provided by the Commonwealth was error. The laptop was not clean as in *McAtee* and, therefore, the *device used*, rather than the nature of the evidence itself created error. *Id*. at 7. In that case, as here, the issue was unpreserved. *Id*. at 6.

The Court began by stating the obvious risk of the jury's use of the Commonwealth's unclean laptop. "In its cloistered deliberation, the jury might access inadmissible evidence on an unclean laptop." *Id*. at 7. However, ultimately the Court held there was no palpable error because the appellant had not demonstrated "the occurrence of improper conduct by the jurors or any actual prejudice resulting from the jurors' *limited* use of the laptop." *Id*. (emphasis added). However, in concluding, the Court emphasized its decision turned on the measures taken by the trial court to guard against the inherent danger of a jury's unfettered access to the Commonwealth's unclean laptop. It stated:

> The equipment available to play DVDs introduced into evidence will undoubtedly vary across the Commonwealth. In a perfect world, all DVDs intended to be introduced into evidence will be converted into a format playable in a clean and regular DVD player available to the jury. But we do not live in a perfect world. In sum, the rule of law is not discarded by simply employing pragmatic measures, so long as such measures are *properly mitigated and accompanied by a proper*

> *admonition from the trial judge*. Thus, we find no error requiring reversal.

Id. (emphasis added).

Based on our Supreme Court's most recent decisions cited, we reach three conclusions. First, a trial court commits error when it permits the jury to review testimonial evidence in the privacy of the jury deliberation room. Second, the trial court commits error when it permits the jury to review testimonial evidence after it has retired for deliberation without the presence of the defendant. Third, the trial court's use of an unclean laptop to review non-testimonial or testimonial evidence during deliberations is error. Here, all three errors occurred: The jury viewed *testimonial* evidence in the jury deliberation room *without the presence of defense counsel or Napier* and was provided the Commonwealth's *unclean* laptop.

The Commonwealth concedes error and Napier concedes the error was unpreserved. The question is whether we may reverse under the palpable error rule.

RCr 10.26 provides an error is palpable if it "affects the substantial rights of a party" and a "manifest injustice has resulted from the error." It is an error that is "easily perceptible, plain, obvious and readily noticeable." *Brewer v. Commonwealth,* 206 S.W.3d 343, 349 (Ky. 2006) (citation omitted). Relief may be granted for palpable error only upon a showing of "probability of a different result or error so fundamental as to threaten a defendant's entitlement to due process of law." *Martin v. Commonwealth,* 207 S.W.3d 1, 3 (Ky. 2006). We

conclude the cumulative effect of the errors in this case rises to the level of palpable error.

As in the first trial that resulted in a hung jury, the evidence against Napier was not overwhelming and Wooten's statement to Detective Combs was more than merely cumulative. It directly contradicted Napier's statement and undermined his defense that Holbrook was the aggressor. With the exception of the forensic evidence, Wooten's statement was perhaps the most damaging evidence to Napier's defense because if believed, it presented him as the aggressor and as a liar.

Obviously, the jury had some disagreement regarding the content of Wooten's statement and found the statement significant or it would not have requested that it be replayed. Because the jury viewed Wooten's statement in the jury room, it is unknown what parts of Wooten's statement were replayed or how frequently. We can say with fair assurance that permitting the jury to replay the statement in violation of RCr 9.72 and RCr 9.74 substantially influenced the jury's decision. Therefore, the violations of our criminal rules rose to the level of reversible error under the standard set forth in *McAtee*. The question is whether those violations, combined with the use of the Commonwealth's unclean laptop, requires we reverse under the palpable error standard.

To be candid, we have difficulty with permitting the jury to retire to the deliberation room with any electronic device from which outside information, including the internet, can be accessed. The jury room is the courtroom's

sanctuary, a place where the jury is to perform its most sacred duty without outside influences and information. However, we glean from *McAtee* that our Supreme Court does not share our view that such devices, clean or unclean, are not proper in the jury deliberation room.

Here, the use of the Commonwealth's unclean laptop presents an even more vexing problem. Not only was it possible for the jury to access outside information from internet sources, without restriction it had access to the Commonwealth's computer data, including information particular to Napier's case.

It is fundamental to our jury system that the jury consider only evidence presented at trial in the presence of the defendant and subject to cross-examination. As observed in *Crews*, not all recordings used as evidence are in a format playable on a clean and regular CD or DVD player available in our courtrooms. However, a trial court must preserve the integrity of the jury to ensure it considers only the evidence requested during its deliberations. We conclude that providing the jury with unrestricted use of the Commonwealth's unclean laptop is simply not a constitutionally sound solution to a technological deficiency. To ensure a defendant receives true due process and that our criminal rules are not violated, the solution in such situations is simply to replay a witness's statement in open court with the trial judge and the parties present.

We conclude that the cumulative effect of the errors in this case requires reversal. The errors were "jurisprudentially intolerable." *Martin*, 207 S.W.3d at 4.

Although we reverse the judgment and sentence of conviction, we address an additional issue presented. On remand, it is probable the Commonwealth will introduce ballistic analysis evidence and, therefore, we resolve whether ballistic analysis remains scientifically reliable in this Commonwealth.

Jessica Copeland is a forensic scientist specialist II who specializes in firearms identification, which she explained involves determining if a bullet or cartridge case was fired from a particular firearm. She testified that in Napier's case, she received two guns from the Kentucky State Police to examine; Holbrook's Smith & Wesson and Napier's Ruger. Based on her training, experience and testing of the weapons, Copeland identified from which weapon the spent cartridge cases were fired.

Although Napier does not dispute the relevance of Copeland's testimony or her qualifications, he presents two issues pertaining to Copeland's testimony. First, he contends firearm identification evidence is not a valid scientific method and her testimony was inadmissible under *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

In *Daubert*, the United States Supreme Court held the trial court is the gatekeeper to ensure the reliance and reliability of expert scientific testimony prior to admitting it into evidence. The relevance and reliability of such testimony is determined by conducting what is commonly referred to as a *Daubert* hearing. Factors to be considered as outlined by the Supreme Court include: "(1) whether a theory or technique can be and has been tested; (2) whether the theory or technique

has been subjected to peer review and publication; (3) whether, with respect to a particular technique, there is a high known or potential rate of error and whether there are standards controlling the technique's operation; and (4) whether the theory or technique enjoys general acceptance within the relevant scientific, technical, or other specialized community." *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 578-79 (Ky. 2000) (quoting *Daubert,* 509 U.S. at 592–94, 113 S.Ct. at 2796–97, 125 L.Ed.2d at 482–83)).

Our Supreme Court adopted the *Daubert* factors in *Mitchell v. Commonwealth,* 908 S.W.2d 100 (Ky. 1995) (*overruled on other grounds, Fugate v. Commonwealth,* 993 S.W.2d 931 (Ky. 1999)), to determine the admissibility of scientific evidence pursuant to Kentucky Rules of Evidence (KRE) 702. However, the test of reliability is a flexible one, and although *Daubert* identifies a list of factors to consider, those factors are not exclusive. *Goodyear Tire and Rubber Co.*, 11 S.W.3d at 577.

Despite the undeniable significance of a *Daubert* hearing, trial courts are not required to conduct such a hearing if the scientific methods, techniques and theories are so firmly entrenched as to be proper subjects of judicial notice. *Johnson v. Commonwealth*, 12 S.W.3d 258, 261 (Ky. 1999).

In *Johnson*, our Supreme Court held a trial court may "admit or exclude much evidence without 'reinventing the wheel' every time by requiring the parties to put on full demonstrations of the validity or invalidity of methods or techniques that have been scrutinized well enough in prior decisions to warrant

taking judicial notice of their status." *Id*. at 261 (quoting 3 C. Mueller and L. Kirkpatrick, *Federal Evidence* § 353, at 657 (2d ed. 1994)). Among the methods and techniques subject to judicial notice, is ballistics analysis. *Id*. (citing *Morris v. Commonwealth*, 306 Ky. 349, 208 S.W.2d 58 (1948)).

Napier does not dispute that ballistic analysis has been identified as achieving the status of scientific reliability. He argues that recent scrutiny of ballistics analysis requires a change in this long standing rule. In support of his contention, he cites to a 2009 National Academy of Sciences (NAS) report, *Strengthening Forensic Science in the United States: A Path Forward*. From that report he cites the following quotations:

> A fundamental problem with . . . firearms analysis is the lack of a precisely defined process.
>
> Sufficient studies have not been done to understand the reliability and repeatability of the [firearms identification] methods.
>
> [S]ignificant amount of research would be needed to scientifically determine the degree to which firearms-related toolmarks are unique or even to quantitatively characterize the probability of uniqueness.

We agree ballistic analysis is not "forevermore beyond the reach of the application" of the *Daubert* factors. *Goodyear Tire and Rubber Co.,* 11 S.W.3d at 579. Indeed, our Supreme Court made that very point when it stated:

> [T]he fact that a particular scientific method, technique or theory was once deemed scientifically reliable does not preclude subsequent proof that it is no longer deemed reliable. In this respect, however, judicial notice relieves the proponent of the evidence from the obligation to prove in court that which has been previously accepted as fact by the appropriate appellate court. It shifts to the opponent of the evidence the burden

> to prove to the satisfaction of the trial judge that such evidence is no longer deemed scientifically reliable. The proponent may either rest on the judicially noticed fact or introduce extrinsic evidence as additional support or in rebuttal.

Johnson, 12 S.W.3d at 262.

The difficulty here is that Napier has not offered any persuasive evidence that ballistic analysis is a dinosaur in the modern day. Napier has offered no assistance in understanding the NAS report's content and purpose other than reference to a website where the entire report can be found. A review of the report educates it was authorized by Congress and authored by an independent forensic science committee formed to study and opine on the state of forensic science in the United States. It questioned the scientific validity of not only ballistic analysis but many long-recognized forensic science disciplines.

As the Commonwealth points out, Napier has not cited any case before or after the 2009 NAS report holding that ballistic analysis is itself scientifically unreliable. The cases cited by Napier, including *Sexton v. State,* 93 S.W.3d 96 (Tex. Crim. App. 2002) and *Ramirez v. State*, 810 So.2d 836 (Fla. 2001), decided prior to 2009, obviously did not turn on the NAS report. Moreover, in both cases, the particular forensic technique used was questioned as accepted by scientists active in the field. Napier does not challenge that the method or technique used by Copeland is accepted in the field of forensic science but challenges, in general, that such evidence is scientifically reliable.

A thorough analysis of the report and its effect on the legal question of whether ballistic analysis remains sufficiently reliable to be admissible in a criminal case is found in *State v. Langlois*, 2 N.E.3d 936 (Ohio Ct. App. 6th Dist. 2013). Although the report called for more research on the "variability in marks made by an individual tool," the Court rejected the notion that the report "makes what firearms examiners do junk science or 'voodoo[.]"' *Id*. at 946. We reach the same conclusion.

It was not the purpose of the report "to opine on the long-established admissibility of tool mark and firearms testimony in criminal prosecutions, and indeed the … authors made no recommendation in that regard." *Id*. at 945. We conclude that while ballistic analysis may not be infallible, it remains a reliable method for the purposes of KRE 702. The NAS report does not require a trial court to "reinvent the wheel." There was no error in taking judicial notice of scientific reliability of ballistic analysis.

Napier's remaining contentions are rendered moot by our reversal of his judgment of conviction and sentence and, because we cannot assuredly say they will arise on remand, we refrain from offering advisory comments on those issues.

Based on the foregoing, the judgment of conviction and sentence of the Perry Circuit Court is reversed and the case remanded for further proceedings.

ALL CONCUR.

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