

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2002-CA-001434-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v. APPEAL FROM JACKSON CIRCUIT COURT  
HONORABLE R. CLETUS MARICLE, JUDGE  
ACTION NO. 99-CR-00054

CARLOS CREECH

APPELLEE

OPINION

REVERSING

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BEFORE: BUCKINGHAM, GUIDUGLI, AND McANULTY, JUDGES.

McANULTY, JUDGE. The Commonwealth of Kentucky appeals the order of the Jackson Circuit Court which granted appellee Carlos Creech a new trial based on a separation of jurors during deliberations, which the trial court found violated RCr 9.66. We have reviewed the record on appeal, and we reverse.

Appellee was tried by a jury in the Jackson Circuit Court on the charges of murder and criminal mischief. While the jury was out for deliberations, appellee moved for mistrial on

the basis that his counsel had seen jurors outside of the jury room, and walking in the hallways. Defense counsel stated that he heard talking and some laughter. Appellee argued that separation of the jurors had occurred in violation of RCr 9.66, which requires sequestration of the jurors after the case is submitted for their verdict.<sup>1</sup> The Commonwealth asked to question the officials who were placed in charge of the jury. The trial court held a hearing on the motion for mistrial.

The Commonwealth first called Deputy Fred Cornett of the Jackson County Sheriff's Office to the stand. Deputy Cornett testified that he had been the custodian of the jurors since they began their deliberations. He stated that the women on the jury were permitted to go to the bathroom. He testified that there was no bathroom located in the jury room. He stated that the women insisted on going to the bathroom despite being asked to wait. He stated that they were taken to a bathroom on the same floor as the courtroom. He testified that he made sure that there was no one in the bathroom before allowing the women jurors to enter. He said he did so by walking in the room before they went in and looking below to make sure there were no feet visible. He did not enter the bathroom stalls. He said that he remained outside the door. He stated that he did not

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<sup>1</sup> RCr 9.66 states: Whether the jurors shall be sequestered shall be within the discretion of the court, except that in the trial of a felony charge, after the case is submitted for their verdict, they shall be sequestered unless otherwise agreed by the parties with approval of the court.

hear them discussing the case. He testified that they were kept together during that time, and he had them stand in the hall until all of them came out of the bathroom. He further testified that there were no other individuals in the hall besides him and the jurors. He stated that they returned to the jury room.

He testified that the men wanted to leave the jury room at that time but that he did not allow them to leave. He stated that the men were not permitted to leave the jury room until Deputy Sams returned with their meals, and then Deputy Cornett and Deputy Sams took the male jurors to the bathroom one floor below the courtroom. He stated that there were other people on that floor, but they did not talk to anyone. He stated that there was no one in the bathroom. When asked if he looked in to see if anyone was in the bathroom, Deputy Cornett testified, "I think Deputy Sams did that."

Deputy Sams testified at the hearing that when the male jurors went down to the bathroom, he went down behind them.<sup>2</sup> Deputy Sams testified that Deputy Cornett was the one who checked the men's restroom to make sure there were no persons inside and stated that it was clear. Deputy Sams stated that they waited for them while the jurors were in the restroom. He

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<sup>2</sup> Appellee states that the deputy "changed his course" during this testimony because when he was first asked if he went down with the male jurors he stated that he did not. The Commonwealth Attorney asked, "Was it the men...?" and the deputy responded, "I'm sorry, I did go down behind them." We do not believe this reflects a change of testimony so much as confusion as to which group of jurors the Commonwealth was inquiring about.

stated that he did not hear the jurors discussing anything. He testified that they were kept together.

The trial court denied the motion for a mistrial. The jury returned with its verdict and found appellee guilty of manslaughter in the second degree. Appellee filed a motion for acquittal notwithstanding the verdict and a motion for new trial. In a supplemental motion for mistrial, appellee alleged as an additional ground for mistrial that Deputy Cornett had not been sworn as a bailiff. The trial court granted the motion for a mistrial on the basis of jury separation. The Commonwealth appeals.

The general rule regarding separation of a jury is that it is prejudicial error where there has been sufficient opportunity afforded for the exercise of improper influence on one or more jurors. Flannery v. Commonwealth, Ky., 443 S.W.2d 638, 641 (1969). In such a case, the burden is upon the Commonwealth to show that no opportunity for the exercise of improper influence existed, and a mere showing that no improper influence actually took place will not prevent a reversal where the opportunity itself has been shown. Sizemore v. Commonwealth, Ky., 357 S.W.2d 322, 344 (1962). A person claiming a violation of the rule of sequestering the jury "should point out some fact or facts from which it might be inferred that the protection intended by the requirement was

violated." Minix v. Commonwealth, Ky., 249 S.W.2d 48, 51 (1952). The rule regarding sequestration of the jurors is "for the purpose primarily of assuring freedom from influence or the reception of information concerning the case other than during the progress of the trial in open court." Howard v. Commonwealth, Ky., 255 S.W.2d 629, 631 (1953). In Gabow v. Commonwealth, Ky., 34 S.W.3d 63, 73 (2000), the Kentucky Supreme Court stated that the rule requiring sequestration of jurors,

. . . does not mean that each juror must remain constantly in the presence of the others. If that were so, jurors would not be permitted to take restroom breaks or to sleep in separate rooms during an overnight sequestration. The general rule is that a mere temporary separation of the jury is not grounds for reversal if it appears that no definite prejudice resulted and there was no opportunity to tamper with the jurors.

The trend of rulings on this question has been for some time toward a liberal application and a construction that a substantial compliance with the rule was sufficient unless there was some fact or circumstances disclosed which indicated that a juror had been approached or an opportunity was afforded for influencing him. Howard, 255 S.W.2d at 631.

The granting or refusing of a new trial for violation of RCr 9.66, or on other grounds, rests largely in the discretion of the trial judge, and his decision will not be disturbed unless it clearly appears to be in error. Hudson v.

Commonwealth, Ky., 449 S.W.2d 218, 220 (1969). Of controlling importance in reaching a conclusion under the rule is whether the transaction adversely affected the substantial rights of the accused. Howard, 255 S.W.2d at 631.

The trial court stated in its order granting a new trial: "the Court finds, and the Commonwealth does not dispute, that during deliberations the jury did separate in violation of RCr 9.66 and that the Commonwealth has not shown that during the separation there was no opportunity for the exercise of improper influence." We do not agree that the facts from the hearing revealed any opportunity for the exercise of improper influence. It was not shown, in fact, that the bathroom break accompanied by the deputies constituted a separation. We believe that it was an abuse of discretion for the trial court to grant a new trial on the basis of a separation of jurors in this case. Appellee argues that the male jurors were allowed to go to a bathroom on the first floor where spectators were assembled and the Commonwealth did not show that they were supervised. On appeal, as in the court below, appellee stresses that the standard is that the Commonwealth must show that not just an absence of tampering but that no opportunity was afforded for improper influence with any juror. He refers to the testimony of Deputies Sams and Cornett in which their testimony conflicted as to which man checked the men's restroom. Nonetheless, they

both agreed that the bathroom was checked before the jurors were allowed to proceed. They both testified that no one was in the bathroom and they heard no conversation in the bathroom. We do not perceive any opportunity to influence the jurors from the circumstances described by the deputies' testimony.

Furthermore, we are not persuaded by the authority cited by appellee that this situation requires a new trial. In the cases cited by appellant, the trial court found there was an opportunity for influence with a juror when there was separation from the remainder of the jury panel for some length of time. Gay v. Commonwealth, 303 Ky. 572, 198 S.W.2d 308 (1946) (juror departed from the courtroom for an undisclosed length of time); Adams v. Commonwealth, 310 Ky. 506, 221 S.W.2d 81 (1949) (juror absent for five or more minutes); Hamilton v. Commonwealth, Ky., 285 S.W.2d 156 (1955) (four jurors left unguarded for as long as 15 minutes, and a phone call made in absence of guard). In such a case, when it is not known where a juror went or what might have been said, it is clear that it could not be shown that there was a lack of opportunity to influence a juror. We are not faced with such a situation here. The jurors were kept together, under guard, and away from others in the courthouse.

Finally, we note that appellee argued in its response that the Commonwealth's argument was not preserved for appellate review. We find no basis for that contention.

For the foregoing reasons, we find that the trial court abused its discretion in granting a new trial, and we reverse and set aside the order, and direct the trial court to reinstate the jury's verdict and sentence.

ALL CONCUR.

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