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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001628-MR

CLARENCE D. CONLEY, JR. APPELLANT

v.

APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE FRED A. STINE, V, JUDGE
ACTION NO. 08-CR-00181

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: NICKELL AND VANMETER, JUDGES; LAMBERT,[1] SENIOR JUDGE.

VANMETER, JUDGE: Clarence D. Conley Jr. appeals from the final judgment of the Campbell Circuit Court sentencing him to ten years' imprisonment for

[1] Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

possession of a handgun by a convicted felon, following a jury trial. For the following reasons, we affirm.

On appeal, Conley raises three claims of error. First, he asserts that the trial court erred by overruling his objections to the prosecutor's allegedly impermissible remarks during voir dire. In particular, Conley argues that the prosecutor impermissibly defined reasonable doubt by advising the jury that reasonable doubt does not mean "beyond all doubt" or "beyond a shadow of a doubt." We disagree.

Recently, in *Cuzick v. Commonwealth*, 276 S.W.3d 260, 267 (Ky. 2009), the Kentucky Supreme Court reaffirmed the applicable law as follows:

> RCr[2] 9.56 sets forth the proposition that the jury should not be instructed as to the definition of reasonable doubt. In *Commonwealth v. Callahan*, 675 S.W.2d 391, 393 (Ky. 1984), this Court extended this well-settled prohibition of defining reasonable doubt to all points in a trial's proceedings. In *Johnson v. Commonwealth*, 184 S.W.3d 544, 549-550 (Ky. 2005), we reexamined *Callahan's* prohibition of defining reasonable doubt and determined, under the facts in that instance wherein the Commonwealth attempted to indicate what reasonable doubt was not, error, if any existed, was harmless.
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> The Commonwealth, in *Johnson*, 184 S.W.3d at 548-549, indicated to the jury in a colloquy during voir dire that reasonable doubt was not the same thing as "beyond a shadow of a doubt," and that the prosecution did not have to prove anything beyond a shadow of a doubt. To that end, we recognized, "in the very case that announced the prohibition against defining reasonable doubt [*Callahan*], we held that the prosecutor's allegedly improper statement, which, at most, attempted to show what reasonable doubt was *not*,

[2] Kentucky Rules of Criminal Procedure.

> did not amount to a violation of the rule against defining 'reasonable doubt.'" *Johnson*, 184 S.W.3d at 549.
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> . . . .
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> . . . Indeed, we have recently held that a prosecutor's comment that "beyond a reasonable doubt was not equivalent to beyond all doubt" did not rise to palpable error. *Brooks v. Commonwealth*, 217 S.W.3d 219, 225 (Ky. 2007); *see also Rice v. Commonwealth*, No. 2004-SC-1076-MR, 2006 WL 436123, at *7 (Ky. Feb. 23, 2006) ("Truthfully pointing out that a 'shadow of a doubt' is different from 'beyond a reasonable doubt' is not an attempt to define reasonable doubt. Using examples, however, to point out what is, or is not, reasonable doubt, is.").

In this case, the prosecutor stated to the jury during voir dire that "the standard is not beyond all doubt." Conley objected, to which the prosecutor responded that she also planned on telling the jury that reasonable doubt was not "beyond a shadow of doubt" or "beyond some doubt." Conley objected again. The court sustained his objection to the "beyond some doubt" terminology, but permitted the prosecutor to advise the jury that reasonable doubt did not mean "beyond all doubt" or "beyond a shadow of a doubt." The prosecutor also informed the jury that the attorneys could not define reasonable doubt for them.

Although Conley concedes that his case is governed by *Johnson*, he nonetheless cites its dissenting opinion, suggesting that *Johnson* violated United States Supreme Court precedent, to support his argument that *Johnson* should be overruled. However, "as an intermediate appellate court, this Court is bound by established precedents of the Kentucky Supreme Court." SCR[3] 1.030(8)(a); *Smith*

[3] Kentucky Rules of the Supreme Court.

v. Vilvarajah, 57 S.W.3d 839, 841 (Ky.App. 2000). This court, therefore, is not at liberty to overrule *Johnson* or to reject its application to the matter now before us.

Second, Conley avers that the court erred by addressing, in his absence, a written message sent to the court by the jury during its deliberations. Although this issue was not preserved below, Conley requests that it be reviewed pursuant to the palpable error rule. RCr 10.26. We do not agree that he is entitled to relief.

RCr 8.28(1) provides, in pertinent part:

> The defendant shall be present at the arraignment, at every critical stage of the trial including the empaneling of the jury and the return of the verdict, and at the imposition of the sentence. The defendant's voluntary absence after the trial has been commenced in his or her presence shall not prevent proceeding with the trial up to and including the verdict.

In *Soto v. Commonwealth*, 139 S.W.3d 827 (Ky. 2004), the Kentucky Supreme Court recognized that "[s]o far as the Fourteenth Amendment is concerned, the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." *Id.* at 852 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 107-08, 54 S.Ct. 330, 333, 78 L.Ed. 674 (1934), *overruled on other grounds by Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964)). *See also See v. Commonwealth*, 746 S.W.2d 401, 402-03 (Ky. 1988) (exclusion of defendant from witness competency hearing did not violate rights under Kentucky Constitution). In *Soto*, a juror notified the court that, while the trial was ongoing, his brother-in-

law had discussed the case with him outside the court and over the juror's protests. "The judge held an in-chambers hearing on this issue with the juror, the prosecutor, and defense counsel while Appellant remained in the courtroom." *Soto*, 139 S.W.3d at 853. The juror informed the court as to the substance of the discussion and confirmed that his impartiality would not be affected. *See id.* "After questioning [the juror] and eliciting no additional information, defense counsel moved that he be excused as the alternate juror." *Id.* The court denied the motion.

The appellant in *Soto* argued not that the court erred by overruling his motion to excuse the juror, "but only that he was entitled to be present at the hearing on the motion." *Id.* However, the Supreme Court held that "Appellant did not object to his exclusion, and does not suggest how a fair and just hearing on this issue was thwarted by his absence." *Id.* (internal citations omitted).

Here, the jury sent the court a note stating that one of the jurors knew the Commonwealth's penalty phase witness "very well" but didn't feel any concerns; rather, the juror merely wished to advise the judge. In response, the court went on the record to address the matter in the presence of counsel for the defense and the Commonwealth. After the court read the note in its entirety, the Commonwealth stated it had no objections, and noted that the witness was a neutral witness. Defense counsel disagreed as to the witness's neutrality, but acknowledged that the witness's credibility was never challenged. Thereafter, with counsels' approval, the court sent a written response to the jury, stating: "So long as juror # [ ] can be objective in determining the appropriate sentence, there is no

problem." Subsequently, the jury recommended a sentence of ten years' imprisonment.

Conley maintains that had he been present when the court addressed the jury's note, he could have conferred with counsel as to whether the juror should be brought into the courtroom for questioning, or whether a mistrial should be sought. Conley attempts to distinguish the Supreme Court's holding in *Soto* from the case *sub judice* by arguing that in *Soto*, the defendant knew he was being excluded from an in-chambers hearing and failed to object, whereas here, Conley had no knowledge that the jury sent a note to the court and that the court subsequently addressed the matter. However, Conley fails to suggest how his presence would have changed the outcome, given that the witness testified during the penalty phase of the trial only as to matters of record, such as prior offenses and parole eligibility. The witness's credibility was not challenged by Conley, and it apparently was not at issue. Thus, the court's decision to retain the juror, in Conley's absence, was not erroneous.

Finally, Conley contends that the court erred by recommending parole conditions in its judgment and sentence. Conley objected to the court's recommendation that, as a condition of his future parole, he should be required to participate in a violent offender treatment program. Thus, recommendation of this condition was preserved for our review.

Regardless of whether the other conditions to which Conley now objects are properly before us, "the power to grant parole is a purely executive

function." *Prater v. Commonwealth*, 82 S.W.3d 898, 902 (Ky. 2002) (citing *Commonwealth v. Cornelius*, 606 S.W.2d 172, 174 (Ky.App. 1980) ("It has been settled for many years that the decision as to whether a person serving a sentence of imprisonment should be paroled is an executive function, not a judicial one[.]")). Conley has provided no legal authority to support his contention that a presiding judge in a case may not recommend conditions to the Parole Board. Moreover, pertaining to all recommended conditions, whether or not preserved for appeal purposes, clearly the Parole Board is not obligated to follow any such recommendation.

The judgment of the Campbell Circuit Court is affirmed.

NICKELL, JUDGE, CONCURS.

LAMBERT, SENIOR JUDGE, CONCURS WITH RESULT ONLY AND FILES SEPARATE OPINION.

LAMBERT, SENIOR JUDGE, CONCURRING: I concur in result only in observance of SCR 1.030(8)(a). My views are expressed in Justice Cooper's dissenting opinion in *Johnson v. Commonwealth*, 184 S.W.3d 544 (Ky. 2005).

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