

Commonwealth of Kentucky
Court of Appeals

NO. 2014-CA-000781-MR

SHELBY LEE SHELL

APPELLANT

v. APPEAL FROM HARLAN CIRCUIT COURT
HONORABLE HENRY S. JOHNSON, JUDGE
ACTION NO. 13-CR-00516

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: D. LAMBERT, MAZE, AND THOMPSON, JUDGES.

MAZE, JUDGE: On November 4, 2013, a Harlan County grand jury returned an indictment charging Shelby Lee Shell with one count each of Promoting Contraband in the First Degree, and being a Persistent Felony Offender in the Second Degree (PFO II). With regard to the first count, the indictment charged that, on October 17, 2013, Shell knowingly introduced dangerous contraband into

the Harlan County Detention Center where he was an inmate. The indictment identified the dangerous contraband as “a rope, an[] artificial knife, a gun made of cardboard and a sharp shank made of metal.”

Prior to trial, Shell moved to exclude evidence of his prior bad acts under KRE¹ 404(b), including evidence of prior jail disciplinary infractions and the reason he was incarcerated at the time of the charged offense. The trial court granted the motions. The matter then proceeded to a jury trial on March 4, 2014.

At the conclusion of the trial, the jury found Shell guilty of both offenses. The jury fixed his punishment at five years for promoting contraband, enhanced to ten years by virtue of his status as a PFO II. On April 3, 2014, the trial court entered a judgment imposing the jury’s sentence. This appeal followed.

Shell raises three allegations of error. He first argues that the order of the jury instructions was confusing, and that the instructions failed to define the term “contraband.” Shell concedes that this issue was not preserved for review by contemporaneous objection, but he argues that the alleged errors are reversible under the palpable error standard of RCr² 10.26. Palpable error is defined as an error that “affects the substantial rights of a party” and results in “manifest injustice.” *Schoenbachler v. Commonwealth*, 95 S.W.3d 830,836 (Ky. 2003) (citing RCr 10.26). Manifest injustice can be found by a showing of “probability

¹ Kentucky Rules of Evidence.

² Kentucky Rules of Criminal Procedure.

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).

Shell takes issue with the order of the instructions. He notes that the first instruction set out the statutory elements of promoting contraband in the first degree. That instruction was followed by instructions setting out definitions, the burden of proof, the presumption of innocence, and the requirement of a unanimous verdict. Those instructions were then followed by the statutory elements for the lesser-included offense of promoting contraband in the second degree. Shell maintains that the order of instructions was confusing and likely misleading to the jury. We disagree.

Shell does not object to the wording of the jury instructions, only the order in which they were given. We are not persuaded that the order of the instructions was so confusing as to lead the jury to apply a wrong standard to the elements of the charged offenses. Thus, even if the instructions were given out of their proper order, the unpreserved error was not a palpable one and does not entitle Shell to relief.

Shell also complains that, while the instructions defined the term “dangerous contraband,” there was no definition of the term “contraband.” He contends that the latter definition was necessary in order to allow the jury to consider whether his actions amounted to promoting contraband in the first degree or the second degree. Under the circumstances presented in this case, we disagree.

The terms “contraband” and “dangerous contraband” are defined in KRS³ 520.010(1) and (3), respectively. While the instruction on “dangerous contraband” did not further define the term “contraband,” we conclude that the meaning of the term was reasonably apparent from the context. Furthermore, the jury was separately instructed to determine whether each of the items were “dangerous contraband” or merely “contraband.” The jury found that two of the four items were dangerous contraband. Given this express finding, we conclude that any error in failing to define the term contraband did not result in manifest injustice.

Shell next argues that the trial court erred when it refused to permit his counsel to discuss the term “beyond reasonable doubt.” During his closing argument, Shell’s counsel attempted to discuss other burdens of proof and to argue that “beyond reasonable doubt” is a higher standard. The trial court sustained the Commonwealth’s objection to the argument.

RCr 9.56(2) specifically provides that “[t]he instructions shall not attempt to define the term ‘reasonable doubt.’” Likewise, it is well-established that “trial courts shall prohibit counsel from any definition of reasonable doubt at any point in the trial....” *Johnson v. Commonwealth*, 184 S.W.3d 544, 549 (Ky. 2005), quoting *Commonwealth v. Callahan*, 675 S.W.2d 391, 393 (Ky. 1984). However, in *Johnson*, the Kentucky Supreme Court held that a prosecutor may generally discuss what does not constitute reasonable doubt, as long as the

³ Kentucky Revised Statutes.

discussion does not attempt to define the term for the jury. *Johnson*, 184 S.W.3d at 549-50. Shell argues that defense counsel should also be permitted to make the same argument to the jury.

More recently, in *Rogers v. Commonwealth*, 315 S.W.3d 303 (Ky. 2010), the Court reaffirmed the holding in *Johnson* that comparing “reasonable doubt to other standards of proof does not violate RCr 9.56’s prohibition against defining reasonable doubt.” *Id.* at 308. However, the Court expressly limited this holding, stating,

Subject always to the trial court’s sound discretion, such statements to the jury, if limited to the bare comment illustrated in the preceding sentence, *are permissible during voir dire when used as the factual predicate for a question seeking to ascertain if any prospective juror would be unable to apply the reasonable doubt standard.*

Id. (Emphasis added).

In the current case, Shell’s counsel attempted to make the argument during closing argument, rather than during *voir dire*. We conclude that the discussion was clearly outside of the scope permitted by *Rogers*. Moreover, the trial court was within its sound discretion to determine whether the discussion amounted to a definition of reasonable doubt and to limit the argument accordingly. Consequently, we find no error or abuse of discretion.

Finally, Shell argues that the trial court permitted testimony and references to prior bad acts which had been previously excluded from trial. During the testimony of Sergeant Derrick Moore, a Detention Center employee, Sergeant

Moore mentioned that Shell had filed a lawsuit against the jail. Sergeant Moore also stated that Shell was confined in his own cell “for reasons I’m not allowed to mention.” At the completion of Sergeant Moore’s testimony, the trial court cautioned the Commonwealth against allowing witnesses to make such comments.

Shell contends that these statements amounted to violations of the court’s pretrial motion *in limine*. Although Shell raised the issue generally in his pretrial motion, he did not make a contemporaneous objection to the particular statements by Sergeant Moore, nor did he request an admonition to the jury. KRE 103(d) states that “[a] motion *in limine* resolved by order of record is sufficient to preserve error for appellate review.” The Supreme Court has qualified this broad rule by stating that a motion *in limine* will preserve an error absent a contemporaneous objection only when the motion (1) specifically identifies the evidence to which the party objects; (2) provides a specific reason why the party believes the evidence should not be admitted; and (3) is resolved by an order of the trial court. Such motions cannot be blanket motions, but must “specify the evidence objected to” in order to render a contemporaneous objection unnecessary. *Lanham v. Commonwealth*, 171 S.W.3d 14, 22 (Ky. 2005).

In the current case, the testimony which Shell complains did not so clearly violate the pretrial motion as to eliminate the requirement of a contemporaneous objection. Indeed, the reference to Shell’s civil claim was outside of the scope of the matters which he sought to have excluded prior to trial. Sergeant Moore’s other reference to “reasons I’m not allowed to mention” was

unfortunate because it alluded to Shell's prior conduct that caused him to be housed separately within the Detention Center. However, this brief reference did not so clearly violate the pretrial order as to dispose of the need for a contemporaneous objection or some other request for relief. Furthermore, we cannot find that the reference was so unfairly prejudicial as to result in manifest injustice. Therefore, we decline to consider the issue further.

Accordingly, the judgment of conviction by the Harlan Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jason A. Hart
Assistant Public Advocate
Department of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Gregory C. Fuchs
Assistant Attorney General
Frankfort, Kentucky