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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001925-MR

NATHANIEL PRITCHETT — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARY M. SHAW, JUDGE
ACTION NO. 13-CR-002737

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JONES, MAZE AND STUMBO, JUDGES.

JONES, JUDGE: Appellant, Nathaniel Pritchett, appeals from the judgment of the Jefferson Circuit Court finding him guilty of one count of first-degree sexual abuse and one count of first-degree indecent exposure, and sentencing him to ten years' imprisonment. After a review of the record and applicable law, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

In October of 2013, Pritchett was indicted with one count of first-degree sexual abuse and one count of first-degree indecent exposure. The charges concerned the alleged sexual abuse of V.H., Pritchett's step-daughter, who was five years old at the time. At trial, Pritchett maintained he never touched V.H. Following a three-day trial, a jury found Pritchett guilty of one count of first-degree sexual abuse and one count of first-degree indecent exposure, and sentenced him to ten years' imprisonment.

At trial, Kyle Harilson, V.H.'s father, testified that V.H. walked in the bathroom while he was taking a shower on March 23, 2013. He indicated V.H. stared at his "private part" and after telling her to stop and closing the shower curtain, V.H. immediately pulled the curtain back again. When asked why she was so curious, V.H. stated she wanted to see the "good medicine" and demonstrated a hand-stroking motion.

Kyle indicated that he was concerned by V.H.'s statements and questioned her further. While Kyle did not immediately call the police, he did take V.H. to Kosair Children's Hospital. Hospital personnel then contacted the Louisville Metro Police Department. Detective Mike Dixon was assigned to investigate.

Kyle also disclosed V.H.'s statements to his mother, Pam Patterson. Together Pam and Kyle decided V.H. and T.H., V.H.'s younger brother, should not

return to their mother's condo, where Pritchett was living at the time.[1] They also notified V.H.'s mother, Emily Cunningham, of the accusation made by V.H.

The following day, Patterson met with Emily; Emily's mother, Carolyn Cunningham; Pam; and Pritchett. Pritchett was confronted with V.H.'s statements, at which time he responded that V.H. had walked in on him, in the bathroom, while he was masturbating and that this occurred at the moment of ejaculation. Patterson and Carolyn notified Pritchett that they were going to pursue charges.

On March 26, 2013, it was discovered that Pritchett and Emily had fled. Carolyn filed a missing persons report and a missing vehicle report on the vehicle Emily was driving. Approximately two to three weeks later, Emily and Pritchett were located out of the state and were brought back to Kentucky. Pritchett was indicted by a Jefferson County grand jury on October 15, 2013.

Prior to trial, on July 17, 2014, Pritchett moved for a competency hearing of V.H. The trial court granted the motion and conducted a competency hearing in chambers on July 21, 2014. At that hearing, V.H. was able to communicate to the trial court her age, birth date, address, and other information about herself, including her favorite and least favorite subjects in school. V.H. also identified the difference between a truth and a lie. V.H. initially stated that she could not recall what Pritchett had done. However, she did recall being five years old at the time and indicated she remembered "some stuff." V.H. was then

[1] At the time of V.H.'s disclosure, Pritchett shared a home with Emily who is V.H. and T.H.'s mother. That home, a condo, was owned by Carolyn Cunningham, Emily's mother.

questioned by her father and again indicated she could not recall what had happened to her. Her father explained that he believed V.H. did not want to talk about what had happened to her because she was unfamiliar with defense counsel and indicated that V.H. was "shutting down." At that point, the trial court asked V.H. if she recalled what Pritchett had done to her or if she recalled anything at all about the allegations. V.H. indicated that she could remember "some of it." By order rendered July 23, 2014, the trial court ruled V.H. competent to testify pursuant to KRE[2] 601.

Prior to the start of Pritchett's trial, Pritchett's counsel noted that discovery material obtained by the Commonwealth indicated that Pritchett may have been on probation or parole at the time of the allegations. His counsel then moved to exclude any mention of his past convictions pursuant to KRE 404(b) and KRE 404(c). No objection was made by the Commonwealth. The motion was granted and the Commonwealth's witnesses were advised not to discuss Pritchett's prior convictions.

At Pritchett's trial, V.H. was the first witness called by the Commonwealth to testify. V.H. initially testified regarding her age, her upcoming birthday, and school. However, when first questioned about whether anyone had touched her inappropriately, V.H. initially stated that she could not remember. V.H. then became upset and stated that it was "hard to talk about" and that she "didn't want to talk about it." During a bench conference, Pritchett's counsel again

[2] Kentucky Rules of Evidence.

questioned whether V.H. was competent to testify. The trial court ruled that V.H. was competent. It then told V.H. that she was "doing a fantastic job" and asked her to "answer a few more questions." V.H. then went on to testify that she had been abused by Pritchett.

Carolyn also testified on behalf of the Commonwealth. During her testimony, Carolyn discussed being unable to get a hold of Emily the day after confronting Pritchett about V.H.'s allegations. Carolyn described going over to the condo and finding Emily's clothes gone. She indicated that it appeared Emily and Pritchett had left. Carolyn testified she called Pritchett's father trying to locate Emily and Pritchett. Carolyn testified that after several days of being unable to find Emily, her concern grew. She indicated she filed a missing persons report, contacted Emily's friends, and "called the parole officer for. . . ." At this point, Pritchett's counsel objected. Counsel then moved the trial court for a mistrial. A bench conference was held and the court took a brief recess in order to determine how to proceed.[3] After returning, the trial court denied the motion for a mistrial, but admonished the jury as follows:

> You have heard testimony that Carolyn Cunningham contacted a parole officer. No person in this case has ever been on parole. Furthermore, Mr. Pritchett, here, is not a convicted felon, therefore would not have been subject to parole.

[3] Prior to the taking a recess the trial court remarked that it was hesitating on declaring a mistrial because V.H. had already gone through the ordeal of testifying. The trial court remarked: "[T]he only reason I'm even hesitating is, um, because, you know, we've had this little girl testify and it's been one of those, so let's take ten minutes."

During closing arguments, the prosecutor made several remarks regarding her opinion that Pritchett was guilty. She then described her personal experiences of prosecuting DUI offenders and made an analogy to those accused of a DUI offense and Pritchett. Specifically, the Commonwealth stated, "everybody" who has been accused of "drinking too much always says, 'I had two drinks officer.' Every time." She explained, "the reason people say that is because it's really hard to lie right a hundred percent. So what they do is they think of a half-truth." She explained that the same was true of Pritchett when confronted with V.H.'s allegations, he told a half truth.

The Commonwealth concluded its closing arguments with a power point slide. The slide raised questions to the jury such as, "Do you believe he did it?" And, noted that: "Proof does not need to eliminate all possible or imaginary doubt." The Commonwealth went on to state to the jury that "just because there's a trial does not mean that there's a doubt and I ask you to use your common sense, go back into the jury deliberation room and think to yourself, do I believe he committed the crime?"

Following the jury's deliberations, Pritchett was convicted of one count of first-degree sexual abuse and one count of first-degree indecent exposure. The trial court imposed a sentence of ten years' imprisonment.

This appeal followed.

II. ANALYSIS

A. Mistrial Motions

"A manifest necessity for a mistrial must exist before it will be granted." *Martin v. Commonwealth*, 170 S.W.3d 374, 381 (Ky. 2005). "For the purpose of appellate review, the trial judge is recognized as the person best situated to properly evaluate. . . when a mistrial is required." *Kirkland v. Commonwealth*, 53 S.W.3d 71, 76 (Ky. 2001). A trial court's decision to declare or deny a mistrial should not be disturbed absent an abuse of discretion. *Clay v. Commonwealth*, 867, S.W.2d 200, 204 (Ky. App. 1993), and *Woodard v. Commonwealth*, 147 S.W.3d 63, 68 (Ky. 2004). To amount to an abuse of discretion, the trial court's decision must be "arbitrary, unreasonable, unfair, or unsupported by sound legal principals." *Clark v. Commonwealth*, 223 S.W.3d 90, 95 (Ky. 2007) (citing *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)).

On appeal, Pritchett asserts the trial court erred when it denied his motion for a mistrial following the testimony of Carolyn and her disclosure regarding calling the "parole officer for N . . ." Specifically, he alleges that the trial court abused its discretion when it allegedly considered the fact that V.H. had already testified in its determination of whether to declare a mistrial.

Often, there is a "natural reluctance to grant a mistrial after substantial time and resources have been expended." *Sharp v. Commonwealth*, 849 S.W.2d 542, 547 (Ky. 1993). Concerns of economy, however, must give way when the violations are "so egregious and inimical to the concept of a fair trial" that justice cannot be achieved in the absence of a mistrial. *Id.* In such a case, the trial court abuses its discretion if it does not declare a mistrial. *Id.*

The conduct in this case is in no way analogous to *Sharp.* In *Sharp*, a bystander in the courtroom was found to have coached a child witness with hand gestures during the child's testimony. We fail to see how any admonishment could have cured the prejudice resulting from a witness being coached on the stand. Here, however, Carolyn briefly mentioned that she contacted a probation officer, but did not even finish stating whose officer it was prior to an objection. Additionally, the trial court gave an admonishment to the jury that: "Mr. Pritchett, here, is not a convicted felon, therefore would not have been subject to parole." We believe the trial court properly exercised its discretion to deny a mistrial and that the trial court's admonishment was curative of any potential prejudice. *See Matthews v. Commonwealth*, 163 S.W.3d 11, 17 (Ky. 2005).

Next, Pritchett alleges that the Commonwealth's closing argument denied him a fair trial. Pritchett alleges the trial court erred when it denied two motions for a mistrial after the prosecutor allegedly provided her personal opinion that V.H. had been abused and that Pritchett had told "half-truths."

Prosecutorial misconduct is "a prosecutor's improper or illegal act involving an attempt to persuade the jury to wrongly convict a defendant or assess an unjustified punishment." *Noakes v. Commonwealth*, 354 S.W.3d 116, 121 (Ky. 2011). It includes improper closing argument. *Duncan v. Commonwealth*, 322 S.W.3d 81, 87 (Ky. 2010).

We will reverse for prosecutorial misconduct only if the misconduct was "flagrant" or if we find all of the following to be true: (1) the proof of guilt is

not overwhelming, (2) a contemporaneous objection was made, and (3) the trial court failed to cure the misconduct with a sufficient admonition. *Mayo v. Commonwealth*, 322 S.W.3d 41, 55 (Ky. 2010). We use the following four-factor test to determine whether a prosecutor's improper comments constitute reversible flagrant misconduct: "(1) whether the remarks tended to mislead the jury or to prejudice the accused; (2) whether they were isolated or extensive; (3) whether they were deliberately or accidentally placed before the jury; and (4) the strength of the evidence against the accused." *Id.* at 56 (quoting *Hannah v. Commonwealth*, 306 S.W.3d 509, 518 (Ky. 2010)). In the end, our review must center on the essential fairness of the trial as a whole, with reversal being justified only if the prosecutor's misconduct was "so improper, prejudicial, and egregious as to have undermined the overall fairness of the proceedings." *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006) (citing *Soto v. Commonwealth*, 139 S.W.3d 827, 873 (Ky. 2004)).

"Counsel has wide latitude during closing arguments." *Padgett v. Commonwealth*, 312 S.W.3d 336, 350 (Ky. 2010). "A prosecutor may comment on tactics, may comment on evidence, and may comment on the falsity of a defense position." *Wheeler v. Commonwealth*, 121 S.W.3d 173, 189 (Ky. 2003) (quoting *Slaughter v. Commonwealth*, 744 S.W.2d 407, 411–12 (Ky. 1987)).

We believe the prosecutor's comments rationally related to the evidence of record and amounted to no more than her opinion that Pritchett had

come up with a half-truth to explain V.H.'s allegations against him. We cannot discern any true prejudice that resulted from the argument.

Next, we turn to Pritchett's argument concerning the slide the prosecutor presented to the jury during closing as to the burden of proof. Pritchett did not object to the slide during trial making this alleged error unpreserved. Such errors do not justify reversal unless they are palpable. A palpable error is one that is: 1) clearly contrary to existing law; 2) substantial (meaning that it probably--not just possibly--affected the result or denied the defendant due process; and 3) so sufficiently egregious that leaving it uncorrected would constitute a manifest injustice. *See Commonwealth v. Jones*, 283 S.W.3d 665 (Ky. 2009).

During its closing argument the Commonwealth used the following power point slide:

> Proof Beyond a Reasonable Doubt
>
> - Ask yourself: Do you believe he did it?
> - Proof does not need to eliminate all possible or imaginary doubt.

During its presentation of the above slide, the Commonwealth stated: "Proof beyond a reasonable doubt. I ask you members of the jury, do you believe he did it? That's it. Do you believe he did it?" The Commonwealth then concluded its closing argument with the following statement:

> Members of the jury, just because there's a trial does not mean that there's a doubt and I ask you to use your common sense, go back into the jury deliberation room and think to yourself, do I believe he committed the

> crime? And find the defendant guilty, give [V.H.] some justice. Thank you.

Pritchett argues the power-point slide, coupled with the Commonwealth's statements during its closing argument, was an attempt to define reasonable doubt.

Recently, in *Cuzick v. Commonwealth,* 276 S.W.3d 260 (Ky. 2009), the Kentucky Supreme Court reaffirmed the applicable law regarding the prohibition of defining reasonable doubt. Specifically, the Court stated as follows:

> RCr 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,* did not amount to a violation of the rule against defining 'reasonable doubt.'" *Johnson,* 184 S.W.3d at 549. (emphasis in original).
>
> More significantly, however, *Johnson* squarely addressed whether alleged impermissible attempts to define reasonable doubt could be subject to harmless error analysis. Appellant now argues that such error can never

> be harmless. However, this Court's pronouncement in *Johnson,* in that regard, was clear: while we fundamentally upheld our prior decisions in *Callahan* and its progeny, we rejected the notion that any such error in defining reasonable doubt was *per se* prejudicial and not subject to harmless error analysis. *See id.* at 550–551. "[E]ven if one is convinced that the statement by the prosecutor in this case constituted error, that error was harmless. We have applied harmless error on this precise issue, even in capital murder cases, each time affirming a conviction and sentence of death." *Id.* at 550; *see also Sanders v. Commonwealth,* 801 S.W.2d 665, 671 (Ky.1990); *Caudill v. Commonwealth,* 120 S.W.3d 635 (Ky.2003); *Howell v. Commonwealth,* 163 S.W.3d 442, 447 (Ky.2005).
>
> . . . .
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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 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."). Thus, we find no palpable error here.

Id. at 267-68.

Having reviewed the comments in conjunction with the slide we do not believe the prosecutor ran afoul of the prohibition that reasonable doubt shall not be defined. "[T]he prosecutor's allegedly improper statement, which, at most, attempted to show what reasonable doubt was not, did not amount to a violation of the rule against defining 'reasonable doubt.'" *Rogers v. Commonwealth*, 315 S.W.3d 303, 308 (Ky. 2010) (quoting *Cuzick*, 276 S.W.3d at 269)).

Pritchett's final argument on appeal is that the trial court erred when it determined that V.H. was competent to testify. Having reviewed the record, we do not believe the trial court abused its discretion in this regard.

KRE 601[4] presumes that a witness is competent to testify and "permits disqualification of a witness only upon proof of incompetency." *Price v. Commonwealth,* 31 S.W.3d 885, 891(Ky. 2000). Pursuant to KRE 601, a witness is competent to testify if she is able to perceive accurately that about which she is to testify, can recall the facts, can express herself intelligibly, and can understand the need to tell the truth. "The competency bar is low with a child's competency depending on her level of development and upon the subject matter at hand." *Pendleton v. Commonwealth*, 83 S.W.3d 522, 525 (Ky. 2002).

The trial court correctly sought to establish whether V.H. could appreciate what it meant to tell the truth, was able to understand and respond to questions, and had a general recollection of the events in question. The fact that V.H. equivocated concerning her memory of the events was not a basis for

[4] KRE 601 provides as follows:

> (a) General. Every person is competent to be a witness except as otherwise provided in these rules or by statute.
> (b) Minimal qualifications. A person is disqualified to testify as a witness if the trial court determines that he:
> (1) Lacked the capacity to perceive accurately the matters about which he proposes to testify;
> (2) Lacks the capacity to recollect facts;
> (3) Lacks the capacity to express himself so as to be understood, either directly or through an interpreter; or
> (4) Lacks the capacity to understand the obligation of a witness to tell the truth.

deeming her incompetent. Rather, we believe in this situation, any equivocation on the stand went to V.H.'s credibility, not her general competency. Therefore, we find no error.

III. CONCLUSION

For the reasons set forth above, we affirm the decision of the Jefferson Circuit Court.

ALL CONCUR.

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