RENDERED: November 2, 2001; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-001777-MR

PATRICIA WHITELOW — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE REBECCA M. OVERSTREET, JUDGE
ACTION NO. 00-CR-00578

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING
** ** ** ** **

BEFORE: KNOPF AND SCHRODER, Judges; and MARY COREY, Special Judge.[1]

KNOPF, JUDGE: Patricia Whitelow appeals from a judgment of the Fayette Circuit Court, entered June 27, 2000, convicting her of first-degree possession of a controlled substance (cocaine).[2] In accord with the jury's decision, the court sentenced Whitelow to four years' imprisonment. Whitelow contends that she is entitled to a new trial for any one of three reasons: (1) the jury's verdict cannot be reconciled with the evidence; (2) the trial

[1]Senior Status Judge Mary Corey sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

[2]KRS 218A.1415 (1998).

court erred by permitting a police detective to characterize the building wherein Whitelow was arrested as a "crack house" and to describe in general terms what occurs in such houses; and (3) the Commonwealth's Attorney attempted during *voir dire* to define the phrase "reasonable doubt," and the trial court erred by overruling Whitelow's objection. This last allegation of error, we are convinced, does entitle Whitelow to a new trial. We are constrained, therefore, to reverse and remand.

At about 4:30 or 5:00 o'clock on the morning of December 15, 1999, in response to an informant's tip, Andrea Carter, a narcotics detective with the Lexington Fayette Urban County Police Department, and several uniformed officers forcibly entered the residence at 155 Rand Avenue in Lexington and arrested a man they had long suspected of trafficking in large quantities of illegal drugs. In the course of the officers' protective sweep of the other rooms of the residence, Officer Todd Johnson came upon the appellant lying on a sofa. According to Johnson, Whitelow's hands were extended toward a washcloth that lay partially concealed between a cushion and the sofa's arm. Johnson described Whitelow as starting when she heard him, "like a kid caught with h[er] hand in a candy jar." Wrapped in the washcloth were two small pipes allegedly like those often used for smoking crack cocaine. Johnson arrested Whitelow, and she was duly indicted on the charge of possession of drug paraphernalia.[3] When laboratory analysis of the pipes revealed the presence of cocaine residue, the grand jury reindicted

[3]KRS 218A.500 (1992).

Whitelow for possession not only of the alleged paraphernalia but also of the alleged controlled substance. She stood trial at the end of May 2000. The jury acquitted her of the paraphernalia charge, but found her guilty of having possessed cocaine. It is from that verdict, upheld by the court, that Whitelow has appealed.

During his *voir dire* of the jury panel, the Commonwealth's Attorney said,

> We can't define "beyond a reasonable doubt" for you, but does everyone agree that there are usually going to be facts in dispute? That's why there is a case. The fact that you have some dispute or facts that are contested, that doesn't mean that you automatically have reasonable doubt. Can everyone agree with that?

Whitelow promptly objected on the ground that the prosecutor had violated the rule, well established at the time of Whitelow's trial, forbidding either court or counsel from trying to explain or define the phrase "beyond a reasonable doubt." The trial court overruled the objection. Whitelow contends that the prosecutor's violation was patent and that it entitles her to a new trial. We agree.

RCr 9.56 prescribes the manner in which the Commonwealth's burden of proof shall be stated to the jury and provides expressly that "[t]he instructions should not attempt to define the term 'reasonable doubt.'" In Commonwealth v. Callahan,[4] our Supreme Court, noting that counsels' tactical commentaries on the meaning of "reasonable doubt" required far

[4]Commonwealth v. Callahan, Ky., 675 S.W.2d 391 (1984).

more judicial resources to police and review than they were worth, construed RCr 9.56 as eliminating all such commentary from criminal trials. "Prospectively," held the court, "trial courts shall prohibit counsel from **any** definition of 'reasonable doubt' at any point in the trial."[5] Four years later, in Simpson v. Commonwealth,[6] the court reaffirmed this rule. Although deciding that the prosecutor's request of the jury in that case not to hold the Commonwealth to a standard of proof "higher than 'beyond a reasonable doubt'" did not amount to a violation, the court pointedly observed that

> [i]n Commonwealth v. Callahan, , , , we denounced the practice of defining or attempting to define reasonable doubt. We followed the Callahan rule in Commonwealth v. Goforth, Ky., 692 S.W.2d 803 (1985), and in our recent decision, Marsch v. Commonwealth, Ky., 743 S.W.2d 830 (1988). In all of those cases, some attempt was made to use other words to convey to the jury the meaning of "beyond a reasonable doubt." In this case, there was no such effort.
>
> By this we intend no retreat from our previous decisions on this issue. Counsel should be mindful that upon occurrence of a bona fide violation of the Callahan rule, a reversal will result.[7]

We are confronted here with what inescapably is a violation of the Callahan rule, an attempt to convey to the jury, in counsel's words, what "reasonable doubt" is or is not. Under Callahan, therefore, and Simpson, a reversal must result.

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[5] *Id.* at 393 (emphasis in original).

[6] Simpson v. Commonwealth, Ky., 759 S.W.2d 224 (1988).

[7] *Id.* at 226.

This is not to say that the trial court could never remedy a Callahan violation by admonishing the jury. As there was no admonition in this case, that question is not before us. It is to say, however, contrary to the Commonwealth's urging, that we may not excuse the violation as a harmless error. Not only would such an excuse run counter to the Supreme Court's stark warning in Simpson, but it would also tend to defeat what we understand to be the purpose of RCr 9.56 and Callahan. That purpose is to stop counsel from sparring over how to express the Commonwealth's burden of proof, and to spare judges from having to decide when such sparring has crossed the line from the merely useless to the potentially misleading. To give Callahan violations the benefit of harmless-error analysis would serve only to move the sparring to a different arena; it would not stop the sparring or spare anyone the futile effort.

Having decided that Whitelow is entitled to relief because of the prosecutor's Callahan violation, we need address her other contentions only to the extent that they may bear on a new trial. Her next contention does not do so at all. Whitelow maintains that the jury's verdict was inconsistent. How, she wonders, could a reasonable jury have concluded that she possessed cocaine residue, but did not possess the paraphernalia on which the residue was found? Was the jury's verdict flawed, and, if so, was the court's response improper? Because Whitelow cannot be retried on the paraphernalia charge, of which she was acquitted, there is no chance that the alleged inconsistency will recur. We are thus not called upon to address these questions.

It does behoove us, however, to address briefly Whitelow's remaining contention, which concerns the scope of Detective Carter's testimony. Over Whitelow's objection, Detective Carter was permitted to testify that she had visited the Rand Avenue residence on numerous occasions, that she was familiar with its owners, and that it functioned as a crack house. She testified that, in general, a crack house, among other things, is a place where people go to smoke crack cocaine. She also described how a cocaine smoker might typically proceed. Whitelow contends that none of this testimony was relevant, or that, if relevant, it was nonetheless inadmissible under KRE 403 because its relevance was outweighed by its tendency unfairly to associate her with the criminal acts of others. This court reviews evidentiary rulings under an abuse-of-discretion standard,[8] and we are not persuaded that the trial court abused its discretion in this instance.

The weakness of Whitelow's argument appears in her assertion that

> the Commonwealth could not and did not offer a single shred of proof that Whitelow had any contact with or knowledge of the criminal activity the Detective alleged occurred at the residence.

If this were an accurate characterization of the Commonwealth's case, then the relevance of Detective Carter's testimony might justly be questioned. Contrary to Whitelow's assertion, however, Officer Johnson, who testified that he came upon Whitelow with her hands just inches away from a washrag wrapped around two

[8]Barnett v. Commonwealth, Ky., 979 S.W.2d 98 (1998).

crack pipes, provided far more than a shred of proof that Whitelow was involved in the very sort of criminal activity that had led to Detective Carter's familiarity with the Rand Avenue residence. The detective's testimony was plainly relevant to the issue of Whitelow's knowing possession of the cocaine residue, and, in conjunction with Officer Johnson's testimony, it was not unfairly prejudicial. Should there be a retrial, therefore, Detective Carter's testimony is not to be excluded for any reason Whitelow has thus far put forth.

In sum, we understand our Supreme Court to have declared a policy of no tolerance for counsel's telling the jury what "reasonable doubt" does or does not mean. The benefits of such biased explanations are minimal, at best, and are out of all proportion to the large risk that they will confuse the jury and the significant costs that stem from having to respond to them or to review them. The Commonwealth's disregard of that policy in this case requires that the June 27, 2000, judgment of the Fayette Circuit Court be reversed and the matter remanded for a new trial. If the evidence is substantially the same on retrial as it was originally, the trial court will again admit the testimony of Detective Carter concerning her experience with cocaine users in general and with cocaine use at 155 Rand Avenue in particular.

ALL CONCUR.

BRIEF FOR APPELLANT:

Matthew W. Boyd
Lexington, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General of Kentucky

Matthew Nelson
Assistant Attorney General
Frankfort, Kentucky