RENDERED: August 6, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-000240-MR

DICKIE HOLBROOK — APPELLANT

v.

APPEAL FROM PERRY CIRCUIT COURT
HONORABLE DOUGLAS C. COMBS, JR., JUDGE
ACTION NO. 00-CR-00005

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: McANULTY, AND MINTON, JUDGES; AND EMBERTON, SENIOR JUDGE.[1]

McANULTY, JUDGE. A Perry County Circuit jury found Appellant, Dickie Holbrook (Holbrook), guilty of flagrant nonsupport and fixed his punishment at a prison sentence of 3 ½ years. At final sentencing, the trial court imposed judgment in accordance with the jury's verdict. This is a matter-of-right appeal in

[1] Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

which Holbrook raises a number of issues for our review. Finding no error, we affirm.

Holbrook married Joanne Holbrook (Joanne) in June of 1986. The couple divorced in 1989. Together, they have three (3) sons. The oldest two (2) sons were born during the marriage, and the youngest son was born after the couple divorced. Pursuant to the divorce decree, Joanne was awarded sole custody of all three (3) children.

Initially, the court ordered Holbrook to pay Joanne forty-five dollars ($45.00) per week in child support. Holbrook failed to fulfill his child support obligation, and, eventually, Joanne had to rely on AFDC, Food Stamps and Medical Insurance to support the boys. Because she was receiving AFDC and medical benefits, the Perry County Child Support Agency (the Agency) became involved in Joanne's case. Joanne assigned her right to child support to the Agency for collection. Consequently, in 1991, the Agency then stepped in her shoes to attempt to recoup money from Holbrook for the state benefits Joanne had been receiving. Since 1991, the Agency had collected $210 from Holbrook. As of the date of trial, November 14, 2000, Holbrook owed $36,616.00 in child support. This number is broken down as follows: Holbrook owes $28,510.16 to the state for AFDC arrearage, $7,961.84 to Joanne for child support arrearage and $144 to the state for genetic testing of the last child.

On February 10, 2000, the Perry County Grand Jury returned an indictment charging Holbrook with one count of flagrant nonsupport, a class D felony pursuant to KRS 530.050. Holbrook entered a plea of "not guilty," and was released on bond. During the course of the proceedings, the trial court scheduled his jury trial for October 9, 2000. On September 29, 2000, Holbrook's counsel made a motion for a continuance on the grounds that Holbrook had a pending social security disability claim filed, the outcome of which would be evidence a jury could hear in determining whether Holbrook was in a position to work and provide support for his children. The trial court granted the motion for continuance and rescheduled the trial for November 13, 2000.

On November 13, 2000, Holbrook's counsel made another motion for a continuance on the grounds that on November 12, 2000, Holbrook voluntarily admitted himself into the ARH Psychiatric Center (ARH). Holbrook's counsel stated that a continuance was necessary because he could not communicate with his client, review the defense to be presented at trial, nor subpoena witnesses in a timely manner. Upon learning of Holbrook's whereabouts, the trial court issued an order to transport Holbrook to the Perry Circuit Courtroom on the following day, November 14, 2000, and to further release all records of admissions and treatment.

On November 14, 2000, the trial court heard Holbrook's motion to continue. Obviously, Holbrook's competency to stand trial became an issue at the hearing due to his voluntary admission to a psychiatric hospital just two days prior. The Commonwealth opposed the continuance and argued that the defense sought it the day of trial. Further, the Commonwealth contended that Holbrook purposefully absented himself from the proceedings by voluntarily checking himself in. Counsel for Holbrook responded that that argument might carry more weight if Holbrook had not voluntarily admitted himself to this same facility in July of 2000. Finally, Holbrook's counsel argued that he did not feel that Holbrook could contribute to his defense after being recently hospitalized.

The trial court read into the record pertinent portions of Holbrook's records from his November 12, 2000, admission. The medical records indicated that Holbrook reported that the reason for his admission was that his ex-wife was trying to take away his kids. Holbrook commented that "they're going to send me to prison and I'd rather be dead." Prior to his transfer to police custody, after his two-day stay in the hospital, Holbrook was diagnosed with poly-substance dependence and substance-induced mood disorder.

After reviewing Holbrook's medical records, the court directed its attention to Holbrook and asked him a number of

questions. The court asked him if he knew why he was there that day, to which Holbrook responded "yeah." The court then specifically asked Holbrook why he thought he was there, and Holbrook replied, "To send me to jail." The court responded that he was there for a trial, not necessarily to be sent to jail. When asked if Holbrook knew the charges against him, Holbrook stated "non-support. Child support." The court further asked about Holbrook's attorney and whether Holbrook had had a chance to speak with his attorney about the case, and Holbrook replied that he had. The court than proceeded to inquire about a witness named Beulah Turner, who was Holbrook's girlfriend at the time and who was prepared to testify on Holbrook's behalf as to money Holbrook had spent on his children during various visits. Beulah Turner was present to testify because Holbrook requested that she do so. Ultimately, the trial court denied Holbrook's motion to continue, and the trial commenced.

On appeal, Holbrook raises four arguments for our review. First, Holbrook argues that the trial court's ruling to exclude testimony as to Holbrook's mental condition substantially prejudiced his right to present an adequate defense. Second, Holbrook argues that the trial court erred in failing to adequately instruct the jury on the charged offense and further erred in failing to instruct on the lesser-included

offense of non-support as set out in KRS 530.050(1)(a), (b). Third, Holbrook contends that the trial court's failure to admonish the jury after the Commonwealth violated the "Golden Rule" substantially prejudiced his right to a fair trial. Finally, Holbrook argues that the trial court erred in failing to hold a competency hearing pursuant to KRS 504.100 after being confronted with reasonable grounds to question Holbrook's competency to stand trial.

Taking Holbrook's arguments in order, we begin with the argument that the trial court prevented him from introducing evidence of his inability to pay child support due to a mental condition. Holbrook asserts that this argument is properly preserved in pre-trial motions. Having reviewed the record, we are not convinced that: (1) Holbrook's counsel made this argument, nor that (2) the trial court prevented Holbrook from presenting testimony that a car accident in 1989 left Holbrook physically incapable of performing work.

The pertinent pre-trial discussions are as follows. After the court heard the issue of the continuance and one other matter pertaining to privileged marital communications, Holbrook's attorney stated:

> There is one other matter I would like to address that we enter the records from the psychiatric hospital. Those are protected in the [transcript indicates inaudible] you see afar. Unless we talked [transcript

> indicates inaudible] we didn't subpoena the records [transcript indicates inaudible] requested the records…

The trial court responded: "You request that those records be introduced?" Holbrook's counsel answered, "Yeah. Yes." The Commonwealth's Attorney then interjected:

> Commonwealth does not intend to introduce those. While we are on the subject the Commonwealth now moves for a Motion in Liminine [sic] to prohibit the Defendant from offering into evidence any testimony from the Defendant or any other person regarding the defendant's mental condition. No notice has been given. He is also wanting to exclude the records and I have absolutely no intention to sit there, your Honor, and allow this man to get up and testify that he hasn't supported his children because he has been crazy.

Holbrook's counsel replied, "You [sic] Honor, we have no expert witness to the affect [sic] to support that." The trial court then asked "Alright anything else?" to which counsel for both sides answered, "No."

In this appeal, Holbrook asserts that his trial counsel interpreted the court's ruling "as precluding any and all testimony as to Mr. Holbrook's physical and psychological disabilities." We do not believe that the discussion above supports Holbrook's argument that he was prepared at trial to counter the Commonwealth's proof that Holbrook could "reasonably provide" child support and the trial court prevented him from doing so. See Schoenbachler v. Commonwealth, Ky., 95 S.W.3d

830, 832 (2003). (In a prosecution for flagrant nonsupport under KRS 530.050, the Commonwealth is required "to prove, beyond a reasonable doubt, that the defendant can reasonably provide the support ordered.")

The primary flaw in Holbrook's argument is that the trial court did not rule on anything. The more accurate characterization is that the parties agreed that Holbrook would not be presenting a mental health expert to testify regarding Holbrook's mental condition. Although Holbrook may have made a motion to admit the psychiatric records, the trial court did not rule on the matter, therefore it is not properly preserved for our review. See Luttrell v. Commonwealth, Ky., 952 S.W.2d 216, 218 (1997). Moreover, Holbrook testified in his own defense about the 1989 motor vehicle accident that allegedly left him incapable of holding a job. The first substantive questions asked of him pertained to his employment history. Holbrook's testimony was as follows:

> Q: Have you had a steady job since 1999?
> A: No. No I have not had a steady job.
> Q: Would you tell the jury what's happened in your employment?
> A: I got in a car wreck about eleven (11) years ago and my head went through the windshield, and I got two (2) ruptured disks, slipped disk in my back. When I work, I get migraine headaches, and I go in for short periods of time and therefor I cannot hold a job down but I do love my kids and I do pay. I do give them money. I have bought them clothes. No matter what was

> said here today here in Court I have done that and that's the honest to God's truth.

Thus, the record refutes Holbrook's assertion that the trial court prevented him from presenting evidence regarding his automobile accident and its impact on his employability. The Commonwealth presented evidence that Holbrook had obtained jobs, however, he did not hold them very long. Holbrook's brother, a defense witness, testified that every time Holbrook would get a job, Holbrook would end up in jail for "drinking and not paying child support." In short, there was conflicting testimony among the defense witnesses as to why Holbrook could not maintain steady employment. The one constant was the fact that Holbrook had been employed at various times. Finally, the issue of Holbrook's ability to pay is a jury question, and, from the jury's verdict, in light of all the evidence, it is clear that they did not believe that Holbrook was unable to reasonably provide for his three children the sum of $45 per week.

We turn to Holbrook's second argument -- the trial court erred in failing to adequately instruct the jury on the charged offense and further erred in failing to instruct on the lesser-included offense of non-support as set out in KRS 530.050(1)(a), (b).

> No party may assign as error the giving or the failure to give an instruction unless the party's position has been fairly and adequately presented to the trial judge by an offered instruction or

> by motion, or unless the party makes objection before the court instructs the jury, stating specifically the matter to which the party objects and the ground or grounds of the objection.

RCr 9.54(2).

In this case, there is no record of Holbrook's counsel either objecting to the jury instructions or requesting a lesser-included offense instruction. To that end, because the record is void of any indication that Holbrook ever requested a lesser-included instruction or raised any objection before the court instructed the jury, this error is unpreserved and does not warrant consideration upon review. See Blades v. Commonwealth, Ky., 957 S.W.2d 246, 248-49 (1997).

We move to Holbrook's argument that the Commonwealth's Attorney violated the "Golden Rule" in his opening statement.

> In a criminal case a golden rule type of argument is one that urges the jurors collectively or singularly to place themselves or members of their families or friends in the place of the person who has been offended and to render a verdict as if they or either of them or a member of their families or friends was similarly situated.

Lycans v. Commonwealth, Ky., 562 S.W.2d 303, 305 (1978) (The statement at issue in this armed robbery case was, "Suppose that you run a store and somebody comes in on you and does that to you. What's it worth?"). The prohibition stems from the idea

that such arguments cajole or prejudicially coerce a jury to reach a verdict. See id. at 306.

In his opening statement to the jury, the record reflects that the Commonwealth's Attorney said,

> We are here because he will not pay his child support. That is the only reason we are here today. You will hear testimony and evidence that he will not pay his ex-wife. He will not pay [transcript indicates inaudible] will not pay Division of Child Support Enforcement for the welfare that Mrs. Holbrook collected which comes out of your and my pocket as taxpayers.

At the conclusion of the Commonwealth's opening statement, Holbrook's counsel made a motion for a mistrial on the grounds that the reference to the state benefits coming out of the juror's pockets violated the "Golden Rule." The trial court agreed that the statement was inappropriate, but denied the motion for a mistrial. Instead, the court informed the attorneys that he would admonish the jury that it was not to take that statement into consideration in making a decision on the case.

The record does not reflect that the trial court ever gave the admonition, which would have been the appropriate remedy in this case. See id. at 305. In light of the overwhelming evidence against Holbrook, however, we conclude the statement was not of such significance as to prejudice the jury. While we acknowledge that the statement did violate the "Golden

Rule," we believe the error in allowing the statement without admonishing the jury was harmless under RCr 9.24. See id. at 306.

Finally, we address Holbrook's argument that the trial court erred in failing to hold a competency hearing after being confronted with reasonable grounds to question Holbrook's competency to stand trial. KRS 504.100(1) requires the trial court to order a mental health examination or report when the trial court has "reasonable grounds to believe the defendant is incompetent to stand trial[.]" Moreover, it is well accepted that "criminal prosecution of a defendant who is incompetent to stand trial is a violation of due process of law under the Fourteenth Amendment." Mills v. Commonwealth, Ky., 996 S.W.2d 473, 487 (1999).

RCr 8.06 goes further than KRS 504.100 in identifying those factors that indicate a defendant is incompetent to stand trial. RCr 8.06 is as follows:

> If upon arraignment or during the proceedings there are reasonable grounds to believe that the defendant lacks the capacity to appreciate the nature and consequences of the proceedings against him or her, or to participate rationally in his or her defense, all proceedings shall be postponed until the issue of incapacity is determined as provided by KRS 504.100.

KRS 504.100 and RCr 8.06 allow the trial judge "a wide latitude in determining in the first instance whether or not to

require that the accused be examined." Conley v. Commonwealth, Ky. App., 569 S.W.2d 682, 685 (1978); see Dye v. Commonwealth, Ky., 477 S.W.2d 805, 806 (1972). In this case, the trial judge elicited responses from Holbrook that indicated he had the capacity to appreciate the nature and consequences of the proceedings against him and to participate rationally in his defense. The trial judge had the opportunity to observe Holbrook and review the records from his recent psychiatric admission. The entry that apparently stood out above all others was that Holbrook stated his reason for admission was that his ex-wife was trying to take away his kids and they were going to send him to prison and he'd rather be dead.

Holbrook had voluntarily admitted himself to the same facility on July 14, 2000, after the death of his mother in May of 2000. Holbrook stated that he had increased his use of cocaine and alcohol and wanted help to quit. He was diagnosed with poly-substance dependence and discharged on August 4, 2000.

During his two-day visit in November, the psychological screening noted that Holbrook was a former patient of ARH and the reason for his relapse or readmission was substance abuse. The facility monitored him because it considered him a suicide risk. Holbrook admitted to hearing voices, although, the care provider noted that his speech was coherent and his conversation was relevant. The day after his

admission, he reported that he felt better, but he just had a lot going on his life. The physician diagnosed him with poly-substance dependence and substance-induced mood disorder and prescribed Depakote (a mood stabilizer taken twice daily) and Zoloft (an anti-depressant taken once daily). On the day the psychiatric center discharged Holbrook, he was interviewed and denied suicide ideation, homicidal/aggressive ideation, hallucinations, and delusions. Further, the staff assessment noted that his mood and affect seemed within normal limits.

When we look at the entire situation in this case, we cannot say that the trial judge abused his discretion in determining that Holbrook was competent to stand trial. Instead of having reasonable grounds to believe Holbrook was incompetent, it seems the trial judge had reasonable grounds to believe that Holbrook voluntarily admitted himself to a psychiatric hospital to delay his trial.

For the foregoing reasons, the judgment of the Perry Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Dennis Stutsman
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General of Kentucky

Janine Coy Bowden
Assistant Attorney General
Frankfort, Kentucky