IMPORTANT NOTICE

NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: FEBRUARY 23, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2004-SC-001028-MR

DATE 3-16-06 ATG

GLEN LEE RICHARDSON — APPELLANT

V.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE REBECCA M. OVERSTREET, JUDGE
NO. 04-CR-00364

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Glen L. Richardson, was convicted of first-degree manslaughter and of tampering with physical evidence. He received a sentence of twenty years imprisonment on the former conviction and five years imprisonment on the latter conviction, the sentences to run consecutively for a total of twenty-five years.

On January 12, 2004, the victim, Clifford Mackey, was shot four times, twice in the head, behind his grandmother's residence in Lexington, Kentucky. After receiving reports of the shooting, police officers and emergency personnel responded but unfortunately Mackey was pronounced dead at the scene. An investigation led the officers to suspect Appellant, one of the victim's co-workers. Appellant denied shooting the victim and asserted that he had not seen the victim in days and that he and his friend, Leslie Bolin, had been together at Bolin's residence the night of the shooting.

Initially, Bolin corroborated Appellant's alibi. Subsequently, however, Bolin admitted that Appellant had called her just before midnight on the night in question. Appellant had left his own vehicle at Bolin's residence and had been driving Bolin's vehicle but had lost the key. The purpose of the phone call was to ask Bolin to accompany him to retrieve the vehicle with her key. Shortly after the call, Appellant arrived at Bolin's residence, in a car being driven by Appellant's father. Appellant's father then drove the couple to Bolin's vehicle which was parked in the vicinity of the crime scene. The couple retrieved the vehicle and Bolin began driving Appellant back to her residence. During the drive Appellant asked her to stop and he got out of the vehicle and placed one of his shoes in a sewer drain. She resumed driving and Appellant threw his other shoe out of the car window.

After Appellant discovered that Bolin had disclosed the foregoing information to the police, he recanted his original statement and admitted that he had seen the victim on the night in question outside the victim's residence, which was in the vicinity of the crime scene. He also admitted that he disposed of his shoes in the manner Bolin described and that he had asked Bolin to provide him with an alibi.

Appellant was arrested and, ultimately, a jury convicted him of manslaughter in the first degree as well as tampering with physical evidence. Because the sentence imposed on Appellant exceeds twenty years, he appeals to this Court as a matter of right.[1]

Appellant's only claim of error in this appeal is that he was prejudiced by the trial court's limitation on his counsel's closing argument. Specifically, after explaining to the jury that "reasonable doubt" would not be defined for them, Appellant's

[1] Ky. Const. § 110(2)(b).

counsel suggested that the question in their minds should be whether there was "reason to doubt" Appellant's guilt. After counsel repeated the phrase "reason to doubt," the prosecutor objected to use of the phrase as an impermissible attempt to define "reasonable doubt." The trial court instructed Appellant's counsel to "stay away" from that particular phrase, but did not grant the prosecutor's request to admonish the jury. Appellant contends that the limiting instruction was erroneous and that he was prejudiced by such error.

RCr 9.56 provides in pertinent part that the instructions to the jury "should not attempt to define the term 'reasonable doubt.'" Because counsels' arguments may not substitute for the instructions by the court, the prohibition on defining the term "reasonable doubt" logically extends to counsel.[2] In Commonwealth v. Callahan[3] this Court explicitly stated:

> Having prohibited the court from definition of the term "reasonable doubt" in the instructions, by RCr 9.56(2), we can hardly condone a client-serving definition by defense counsel or prosecutor in either voir dire, opening statement or closing argument. As stated in Taylor, supra [Taylor v. Kentucky, 436 U.S. at 488-89, 98 S.Ct. at 1936], "... arguments of counsel cannot substitute for instructions by the court." We do not intend by this holding that counsel cannot point out to the jury which evidence, or lack thereof, creates reasonable doubt, but all counsel shall refrain from any expression of the meaning or definition of the phrase "reasonable doubt."
>
> . . . .
>
> Prospectively, trial courts shall prohibit counsel from any definition of "reasonable doubt" at any point in the trial, and any cases in this jurisdiction to the contrary are specifically overruled.

---

[2] Commonwealth v. Callahan, 675 S.W.2d 391 (Ky. 1984).
[3] Id. at 393.

This issue has typically been presented to this Court in a different posture. Generally, the alleged error has been the trial court's failure to limit counsel's argument or during voir dire where possible Callahan violations have occurred. Conversely, in the instant case, the trial court did limit counsel's argument to prevent a possible Callahan violation, Appellant claims to his prejudice.

Appellant argues that the phrase "reason to doubt" is not an attempt to define "reasonable doubt," but rather a permissible attempt to flesh out its meaning for the jury. He further contends that Sanders v. Commonwealth[4] and Caudill v. Commonwealth,[5] two post-Callahan decisions, allow counsel some latitude in attempting to flesh out the "reasonable doubt" instruction. We cannot agree.

Even though we refused to hold various descriptions or elaborations on the term "reasonable doubt" as reversible error in Sanders and Caudill, both are distinguishable from this case. The comments made in those two cases allegedly violated Callahan by attempting to define "reasonable doubt" by negative implication, i.e., not beyond a shadow of a doubt or not beyond all doubt. Thus, counsel offered examples of what "reasonable doubt" did *not* mean, but in this case counsel affirmatively offered other words to tell the jury what "reasonable doubt" really meant, "reason to doubt." Notably, however, the alleged errors in Sanders and Caudill were unpreserved. Thus, we explained that the error, if any, would not have prevented the appellants' convictions or the imposition of the death penalty. Accordingly, we did not determine whether a Callahan violation had occurred.

[4] 801 S.W.2d 665 (Ky. 1990).
[5] 120 S.W.3d 635 (Ky. 2003).

Likewise, Appellant's reliance on Howell v. Commonwealth[6] is misplaced. In Howell, we did not explicitly determine whether a Callahan violation had occurred because the trial court granted counsel's request for an admonishment and no further relief was sought.

In the case at bar, the trial court firmly enforced the rule in Callahan and cautioned counsel about repeating a phrase that could be construed as an attempt to define "reasonable doubt." Thus, we are not convinced that any error occurred, but even assuming error, such was harmless under RCr 9.24. Callahan clearly allows counsel to express to the jury which evidence or lack of evidence that he believes constitutes a "reasonable doubt," and in this case, counsel did so. Therefore, Appellant was in no way prejudiced by the limitation.

For the foregoing reasons, we affirm the Appellant's conviction and sentence.

All concur.

[6] 163 S.W.3d 442 (Ky. 2005).

COUNSEL FOR APPELLANT:

Donald P. Cetrulo
Lexington Financial Center
250 West Main Street
Suite 1910
Lexington, KY 40507

COUNSEL FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Clint E. Watson
Assistant Attorney General
Criminal Appellate Division
Office of the Attorney General
1024 Capital Center Drive
Frankfort, KY 40601-8204