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NOT TO BE PUBLISHED OPINION

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RENDERED: DECEMBER 20, 2007
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2006-SC-000882-MR

JOHNNIE DOUGLAS — APPELLANT

V.

ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARTIN F. McDONALD, JUDGE
NOS. 05-CR-002357 AND 05-CR-003400

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

Johnnie Douglas appeals as a matter of right from an October 24, 2006 Judgment of the Jefferson Circuit Court convicting him of first-degree robbery (KRS 515.020) and two counts of kidnapping (KRS 509.040). Douglas received a twenty year prison sentence for each of those crimes, and, pursuant to the jury's further finding that he was a first-degree persistent felony offender (PFO), an enhanced thirty-five year term on each count, all to be served concurrently. The Commonwealth maintained and the jury found that on June 25, 2005, Douglas and an accomplice entered Cash Tyme, a check cashing business on Preston Highway in Louisville. Douglas brandished a handgun and demanded the company's money from the two cashiers on duty, and then the accomplice restrained the women in a back room before he and Douglas fled. Douglas contends that the trial court erred by (1) permitting the Commonwealth to

question him regarding his post-arrest silence; (2) failing to dismiss a prospective juror for cause or to award Douglas an additional peremptory strike to remove the juror; (3) denying Douglas's motion for a directed verdict with respect to the two kidnapping charges; (4) denying his motion to require compliance with Administrative Procedures regulating jury summonses; (5) denying his motion for a directed verdict with respect to the first-degree PFO charge; (6) permitting the Commonwealth to define "reasonable doubt"; and (7) permitting the Commonwealth to question him during the guilt phase of the trial regarding his prior felony convictions. We agree with Douglas that he was entitled to a directed verdict dismissing the two kidnapping charges and so must reverse the trial court's judgment with respect to those crimes. We affirm, however, Douglas's conviction of and enhanced sentence for the robbery.

RELEVANT FACTS

At Douglas's trial, the two Cash Tyme employees, Stephanie Hughes and La Nika Strawter, testified that not long after they had opened the store on the morning of June 25, 2005, two men entered, an older African American and his younger, lighter complected companion. The older man said he wished to open an account, but when Strawter asked him for identification he pulled out a silverish handgun and demanded the business's cash. As he did so, the younger man leapt across the service counter and forced Hughes into a back room where he used a plastic tie to bind her to a fence. When Strawter had given the older man about $2,700 from her cash drawer and a nearby pouch, the younger man led her, too, to the back room and restrained her in a similar manner. The two men then left the store.

Latoya Clemons testified that as she approached the store's entrance that day

she observed a man climb over the service counter into the employee's work area. Fearing that something was amiss, she returned to her car and called 911. She reported a possible robbery involving two men, one African-American and one Caucasian. Moments later, while she was still on the phone with the 911 operator, she observed the two men exit the store and walk around the side of the building toward a parking area. She described the younger, lighter complected man as wearing blue jeans and a blue shirt. Immediately thereafter, she saw an older model station wagon emerge from the side of the building, and, still on the phone, she followed it and reported its route to the police. As she followed, she saw the younger man remove his shirt.

Uniformed officers followed Clemons's directions and promptly located and stopped the older model station wagon. As soon as the vehicle stopped, a young, light complected man fled from its passenger side, jumped over a guard rail, and escaped. The officers then approached the driver, Douglas, ordered him from the car, and handcuffed him. They informed the detective assigned to the case of the apprehension, and a short time later that detective brought Hughes and Strawter to the scene where they both, independently, identified Douglas as the older of the two men who had robbed them. A search of Douglas's person revealed a silver handgun and about $1,200 in cash. A search of the station wagon revealed a blue t-shirt, a patterned shirt which Hughes and Strawter stated Douglas wore during the robbery, and lottery tickets, among other items.

Douglas testified in his defense and claimed that he had been mistakenly identified. He admitted that he had been in the parking lot near Cash Tyme on the

morning of June 25, 2005, but claimed that he had pulled in there to add a quart of oil to his old car. Another car had been there when he pulled in, with its engine running. Just as he had finished his chore, two men, whom he knew but refused to identify, came around the side of the building, apparently bickering. The younger man asked Douglas for a ride to the part of town where they both lived while the older man got into the car that had been left running. Douglas claimed he knew nothing of the robbery until he was pulled over by the police and the young man fled. Douglas testified that silver-colored handguns are common and that he kept his because he carried on his business—selling compact disks—in a rough part of town where he needed protection. He claimed that the cash in his possession was in part proceeds from his sales business but was primarily lottery winnings.

ANALYSIS

Douglas's Post-*Miranda* Silence Was Improperly Used for Impeachment But the Error was Harmless.

Douglas contends that his trial was rendered unfair when the Commonwealth cross-examined him about his failure to tell the police his version of events at the time of his apprehension or at any time prior to his testimony at trial. This cross-examination question, Douglas maintains, violated his right under the Fifth and Fourteenth Amendments to the United States Constitution to remain silent and not to incriminate himself. Douglas's counsel moved for a mistrial on this ground, but the trial court denied his motion. We agree with Douglas regarding the impropriety of the question but in light of the overwhelming evidence of Douglas's guilt, we are persuaded that the violation does not entitle Douglas to relief.

As Douglas correctly observes, in Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49

L. Ed. 2d 91 (1976), the United States Supreme Court held that it was a violation of the Due Process Clause of the Fourteenth Amendment for the State to use a defendant's post-arrest and post-*Miranda*[1] silence to impeach his trial testimony. The Court explained that because *Miranda* warnings implicitly assure their recipient that his silence will not be used against him, it would be fundamentally unfair to allow a defendant's post-*Miranda* silence to be used for impeachment. In Fletcher v. Weir, 455 U.S. 603, 102 S.Ct. 1309, 71 L. Ed. 2d 490 (1982), however, the Court held that the federal constitutional proscription applies only to post-*Miranda*-warning silences and left it to the states to fashion their own rules with respect to whether pre-arrest or post-arrest but pre-*Miranda* silences could be used for impeachment. A few states have since held that their state constitutions, see e.g. Sanchez v. State, 707 S.W.2d 575 (Tex. 1986), or state evidentiary rules, see People v. Clark, 781 N.E.2d 1126 (Ill.App. 2002), proscribe impeachment even by use of pre-*Mirandized* silence. Although Douglas relied exclusively on his federal rights at trial, he now contends that Kentucky law, too, provides broader protection for pre-*Miranda* silence than does the federal Constitution. Because the state law question was not properly raised and has not been adequately briefed, we decline to address it.

As to Douglas's federal rights, the question before us is whether Doyle or Fletcher controls given the facts of this case. The Commonwealth contends that because Douglas was not *Mirandized* immediately upon apprehension but only after he was formally arrested following Hughes's and Strawter's identifications, Fletcher permitted it to impeach his trial testimony on the basis of his silence during the brief

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1Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

pre-*Miranda* detention. Had the Commonwealth's questioning been limited to that period, we would agree. However, the Commonwealth's Attorney asked Douglas not only whether he had "immediately" told the detaining officers of the allegedly exculpatory circumstances, but she also asked him whether he had *ever*, from the day of his arrest until his testimony at trial, told her or any of the investigating officers his account of the events leading up to his arrest. This question clearly tended to impeach Douglas on the basis of his post- as well as his pre-*Miranda* silence, and thus constituted a Doyle violation.

We agree with Douglas, therefore, that a violation occurred, but we do not agree that the violation entitled him to a mistrial, the only relief he sought. Doyle violations are subject to harmless error analysis. Green v. Commonwealth, 815 S.W.2d 398 (Ky. 1991); Niemeyer v. Commonwealth, 533 S.W.2d 218 (Ky. 1976). Pursuant to that analysis, a constitutional violation may be deemed harmless only if there is no substantial possibility that absent the violation the result would have been any different; the error must appear harmless beyond a reasonable doubt. Green v. Commonwealth, supra, (citing Abernathy v. Commonwealth, 439 S.W.2d 949 (Ky. 1969) and Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L. Ed. 2d 705 (1967)). We are persuaded that the violation was harmless in this case. Although the improper impeachment may have had some effect on the jury's assessment of Douglas's credibility, this was not a case, like Hall v. Commonwealth, 862 S.W.2d 321 (Ky. 1993), in which the defendant's credibility was pitted against that of a sole complaining witness. Here, both victims independently identified Douglas as the robber and their identifications were corroborated by several facts: (1) Douglas was near the scene of the crime at the time

it occurred; (2) Douglas's companion fled when he and Douglas were stopped by police; (3) clothing like that described by the victims was found in Douglas's car; (4) a gun like that described by the victims was found in Douglas's possession; and (5) a large amount of cash, roughly half the amount stolen, was also found in Douglas's possession. In light of this formidable evidence, the Commonwealth's Doyle violation is not likely to have affected the result and was harmless beyond a reasonable doubt. This conclusion makes it clear that the Doyle violation did not create a manifest necessity for a mistrial, and thus Douglas was not entitled to that relief. Radford v. Lovelace, 212 S.W.3d 72 (Ky. 2006).

One Juror's Belatedly Discovered Status As a Victim in One of Douglas's Prior Crimes Provides No Grounds For Relief.

During *voir dire,* Juror 151651 acknowledged that he had been the victim of an armed bank robbery several years earlier when he had worked one summer as a bank teller. He expressed confidence that that remote experience would not bias his assessment of the evidence in this case, although he did laughingly note that following the robbery he had decided to avoid a retail banking career. One of the prior convictions allegedly justifying an enhanced sentence against Douglas was for a 1985 bank robbery. Nevertheless, neither counsel followed up Juror 151651's examination to determine when and where he had been robbed. Douglas's counsel apparently intended to strike this particular juror, but inadvertently struck the juror sitting next to him instead. When Juror 151651 was selected to hear the case, counsel realized his mistake and moved the court for an extra peremptory challenge. The court denied the motion. When the trial was over and apparently after the jury had been released, Juror 151651 informed the court that Douglas's 1985 bank-robbery indictment, given to the

jury when it retired to consider sentencing, was for the very robbery in which the juror had been involved. The trial court notified the parties of this revelation and at the sentencing hearing permitted them to respond. At that time, Douglas and his counsel expressly declined to move for a new trial or for any other relief on this ground. No issue concerning this juror's belated revelation is thus before us, and Douglas's arguments based on Morgan v. Commonwealth, 189 S.W.3d 99 (Ky. 2006), to the effect that the sentencing jury was tainted, are unpreserved and misplaced.

Douglas also argues, apparently, that in light of the juror's revelation, the trial court's denial of the motion for an extra strike to exclude that juror was an abuse of discretion. However, hindsight is not the standard. As the Commonwealth correctly notes, although the trial court is authorized to grant additional peremptory challenges, whether it does so is a matter left entirely to its discretion. Perdue v. Commonwealth, 916 S.W.2d 148 (Ky. 1995). There was no abuse of that discretion here. The trial court is not omniscient, of course, and is not to be faulted because it did not anticipate the juror's belated discovery that he had been involved in one of Douglas's prior crimes. Victims of crimes, even crimes similar to those being tried, are not for that reason disqualified from sitting on the jury. Bowling v. Commonwealth, 942 S.W.2d 293 (Ky. 1997). At the time the trial court made its ruling in this case, the juror had convincingly demonstrated that his having been a victim in a similar crime several years before had not left him biased, and thus there was no "cause" to exclude him. Nor was counsel's inadvertent failure to exclude him peremptorily a compelling reason to grant additional strikes. On the contrary, not only had the court to be cautious about encouraging such "mistakes" by counsel, but at the time of counsel's motion the petit jury had been

selected and the remainder of the jury panel had been excused. Granting counsel's motion at that point would have meant proceeding without an alternate juror (one of the two alternates had already been removed), and would have given the defense one strike more than the Commonwealth received. In these circumstances, the trial court did not abuse its discretion by denying Douglas's motion for an extra strike to remove Juror 151651.

The Kidnapping Exemption Applies and Precludes the Two Kidnapping Charges.

Douglas next contends that the trial court erred when it denied his motions for a directed verdict of acquittal with respect to the two counts of kidnapping as to Hughes and Strawter. The kidnapping statute, KRS 509.040, provides in part that "a person is guilty of kidnapping when he unlawfully restrains another person and when his intent is: . . . (b) To accomplish or to advance the commission of a felony." Lest this and the statutes outlawing unlawful imprisonment be misused, however, "to secure greater punitive sanctions for rape, robbery and other offenses which have as an essential or incidental element a restriction of another's liberty," Gilbert v. Commonwealth, 637 S.W.2d 632, 635 (Ky. 1982), KRS 509.050 provides that

> [a] person may not be convicted of unlawful imprisonment in the first degree, unlawful imprisonment in the second degree, or kidnapping when his criminal purpose is the commission of an offense defined outside this chapter and his interference with the victim's liberty occurs immediately with and incidental to the commission of that offense, unless the interference exceeds that which is ordinarily incident to commission of the offense which is the objective of his criminal purpose.

Douglas contends that the restraint of Hughes and Strawter was merely incidental to the robbery, and thus did not amount to the separate offenses of kidnapping. We

agree.

As this Court has often reiterated, the exemption statute does not apply unless each of its elements is satisfied:

> First, the underlying criminal purpose must be the commission of a crime defined outside of KRS 509. Second, the interference with the victim's liberty must have occurred immediately with or incidental to the commission of the underlying intended crime. Third, the interference with the victim's liberty must not exceed that which is ordinarily incident to the commission of the underlying crime.

Wood v. Commonwealth, 178 S.W.3d 500, 515 (Ky. 2005) (citing Griffin v. Commonwealth, 576 S.W.2d 514 (Ky. 1978)). Temporary restraint, of course, is an ordinary incident of robbery, an offense defined outside KRS Chapter 509, but in Timmons v. Commonwealth, 555 S.W.2d 234, 241 (Ky. 1977), the Court further ruled that to invoke the exemption statute the restraint must have been "close in distance and brief in time." The restraint in this case meets this description.

Hughes and Strawter testified that Douglas's accomplice moved them within the business premises from the public service counter to a storage area at the back of the office's kitchen. The movement was short in distance and did not expose the women to any risk of injury beyond that of the robbery itself. The restraint was also brief. The women were bound with "twisty ties," plastic bands similar to the notched plastic bands often used to secure large garbage bags. Each woman was easily able to free herself as soon as the robbers left the store. The women were not left vulnerable and in precarious circumstances as was the securely tied victim in Murphy v. Commonwealth, 50 S.W.3d 173 (Ky. 2001), whose restraint continued some ten hours after the crime until she was discovered by a neighbor. Here, rather, the restraint essentially lasted no

longer than the robbery, which is the sort of restraint ordinarily incident to that crime. Because in these circumstances it would be unreasonable for a jury to find Douglas guilty of kidnapping separate and apart from the robbery, the trial court erred when it denied Douglas's motions for directed verdicts on the kidnapping charges. Commonwealth v. Benham, 816 S.W.2d 186 (Ky. 1991).

The Deviations From Administrative Procedures Regarding Jury Selection Were Insufficient To Justify a New Trial.

The Due Process provisions of both the state and federal Constitutions require that petit juries be drawn from a fair cross section of the community. Ford v. Commonwealth, 665 S.W.2d 304 (Ky. 1984) (citing Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692, 42 L. Ed. 2d 690 (1975)). To ensure compliance with this constitutional requirement, KRS Chapter 29A and Part II of the Administrative Procedures of the Court of Justice (II AP) provide for jury selection procedures governing each step in the selection process, from compilation of the master list of potentially eligible jurors to seating of the petit jury. For the most part, the statutory and administrative provisions are parallel to and mirror images of one another. This Court has held that a defendant's Due Process rights are violated and a new trial required when a trial court deviates substantially from these jury selection procedures, provided, of course, that the deviation was objected to before the trial court. Commonwealth v. Nelson, 841 S.W.2d 628 (Ky. 1992); Robertson v. Commonwealth, 597 S.W.2d 864 (Ky. 1980). Minor deviations, on the other hand, do not entitle a defendant to relief unless the deviation actually prejudiced the defendant's right to an unbiased jury drawn from a fair cross section of the community. Sanders v. Commonwealth, 801 S.W.2d 665 (Ky. 1990). Douglas contends that the jury selection process in Jefferson County employed in his

case deviates from that mandated by the Administrative Procedures and that the deviation was substantial enough to entitle him to a new trial. We disagree.

For each thirty-day jury period, the Jefferson County Jury Administrator obtains a computer-generated, random list of potential jurors and summons them for jury duty. The number of potential jurors summoned depends on the trial courts' anticipated needs for the coming thirty days as well as the number of those summoned who, because of ineligibility, hardship, or some other reason, are ultimately likely not to serve. In Jefferson County, apparently, the summons is generally served by first-class mail and, pursuant to II AP § 7 and KRS 29A.070, is accompanied by a juror qualification form. The potential juror is to return the completed form within five days of its receipt, and on the basis of the information so provided the summoned panel is initially screened so that persons ineligible for jury service can be excused. The summoning procedure is governed by II AP § 6, which, at the time of Douglas's trial provided in pertinent part as follows:

> (1) When the names are obtained from the randomized jury list, the judge thereafter shall cause each person obtained for jury service to be served with a summons requiring that person to report for jury service at a specified time and place, unless otherwise notified by the court, and to be available for jury service for thirty (30) judicial days thereafter. . . . (2) The juror qualification form required by § 7 shall be enclosed with the summons. If the summons is served by mail, a prospective juror who does not return the juror qualification form within ten (10) days or such other time as may be specified in the summons shall be personally served by the sheriff.

The parallel statutory provision is slightly different. Instead of mandating that non-responsive prospective jurors be personally served, KRS 29A.060 (4) provides that

> any prospective juror who does not return the juror qualification form within ten (10) days may be personally

> served by the sheriff at the discretion of the Chief Circuit Judge or Chief Circuit Judge's designee.

A few days before the jury pool from which his jury would be drawn first convened, Douglas moved for an order directing the Jefferson County Jury Pool Administrator to comply with II AP § 6 by having the sheriff personally serve summons upon prospective jurors who had not returned their juror qualification forms. His motion alleged that standard practice in Jefferson County was to ignore non-responsive prospective jurors with the result being a substantial reduction in the size of the summoned jury pool. Douglas later submitted the Jury Pool Administrator's affidavit, which noted that 1095 jury summonses had been mailed for the August 28, 2006 jury panel with the following responses:

> a. 296 summonses were returned by the postal service as not deliverable;
> b. 45 persons have replied and have been automatically disqualified as not eligible for service;
> c. 92 persons have replied and successfully sought postponement;
> d. 182 have replied and have been excused by the court for various reasons;
> e. 3 have been returned as deceased; [and]
> f. 248 persons personally appeared as directed by their summons. . . .
>
> We have not been ordered to have any jurors personally served in this case, and we have not done so.

Douglas noted that about 229 summonses were unaccounted for, which, together with the 296 summonses returned as undeliverable, meant, he alleged, that about 525 prospective jurors, or almost half (48%) of the potential pool had not responded. He contended that this "reduction" in the pool "affects the accused's right to a random selection from a fair cross section of the community," and amounted to a substantial

deviation from the jury selection procedure mandated by II AP § 6. As noted, however, we disagree.

Even if, as Douglas contends, the mandatory provision of II AP § 6 applies rather than the discretionary provision of KRS 29A.060(4), and the Jefferson Circuit Court deviated from that mandatory provision when it failed to have the sheriff attempt to serve the 229 prospective jurors whose summonses were not returned and who made no response to them, we are convinced that the deviation was not substantial. The principal purpose of Part II of the Administrative Procedures is to ensure an adequately sized jury pool randomly selected from a fair cross section of the community. In determining the number of summonses to issue, the Jury Pool Administrator apparently allows for a likely number of non-responders, so that even without the 229 non-responders in August 2006, the nearly 250 persons who did respond were adequate for the court's jury needs. Although the Jefferson Circuit Court's failure to comply strictly with II AP § 6's mandatory summoning provision and the fact that many prospective jurors shirk their civic duty are matters of concern, the Jefferson County summoning process, which achieves the paramount goal of a sufficient number of qualified jurors, substantially complies with the Administrative Procedures.

The Jefferson Circuit Court being in substantial compliance with the Administrative Procedures, Douglas is entitled to relief only if he was actually prejudiced by the Court's deviation. Douglas, however, has made no showing that the 250 persons who responded for jury service the month he was tried failed to represent either a random selection or a fair cross section of the community, and the burden of such a showing is his. Peterson v. Commonwealth,160 S.W.3d 730 (Ky. 2005).

Because Jefferson County's insubstantial deviation from the regulations has not been shown to have prejudiced Douglas's jury rights, that deviation does not entitle Douglas to relief.

Valid Prior Convictions Support the Persistent Felony Offender Conviction.

The Commonwealth charged Douglas as a first-degree Persistent Felony Offender (PFO), alleging that he had twice before been convicted of felony offenses. The first offense occurred in 1978 when the Jefferson Circuit Court convicted him of a December 31, 1977 armed robbery against several victims, and the second occurred in 1985 when the United States District Court for the Western District of Kentucky convicted him of a May 24, 1985 armed bank robbery. The Commonwealth further alleged, pursuant to KRS 532.080, the persistent felony offender statute, that Douglas, (who was born in 1953) was over twenty-one years of age and had been over eighteen years of age at the times of his prior offenses, that he had been sentenced to forty years in prison for his 1977 state offenses and to twenty years in prison for his 1985 federal offense, and that at the time of his present offense he had been on parole for the 1977 offense.

After the guilt phase of Douglas's trial and before the sentencing phase began, Douglas moved to suppress the 1978 conviction because the certified judgment upon which the Commonwealth relied as proof of that conviction had not been signed by the original trial judge. Douglas correctly noted that RCr 11.04 requires that judgments be "signed by the judge and entered by the clerk," and argued that until signed the judgment was ineffective and could not be used as evidence of the 1978 conviction. The Commonwealth moved the trial court to sign the judgment *nunc pro tunc,* but the

trial court refused apparently concerned that supplying the omitted signature might affect the finality of the judgment. At the PFO trial, consequently, the Commonwealth proved all of the above listed allegations, with the exception of the 1978 judgment itself, through the testimony of Douglas's state parole officer and through the introduction of certified copies of the federal judgment. The Commonwealth sought to prove the 1978 conviction itself by what it characterizes as circumstantial evidence, including the unsigned judgment; a signed, certified copy of the trial report noting the jury's verdict; and the fact that Douglas had duly appealed his 1978 conviction, which this Court affirmed. Douglas v. Commonwealth, 586 S.W.2d 16 (Ky. 1979). Douglas moved for a directed verdict, on the ground that without a judge's signature the 1978 judgment had not been proven, but the trial court denied the motion. As noted, the jury then determined that Douglas was a first-degree PFO and enhanced his twenty-year sentences for robbery and two counts of kidnapping to thirty-five years each.

On appeal, Douglas reiterates his contention that the unsigned 1978 judgment was invalid for PFO purposes and further contends that because the Commonwealth did not introduce competent evidence of his federal parole status, that conviction, likewise, is not adequate to support a PFO conviction. Although we agree with Douglas that the unsigned judgment was defective, we are convinced that in this case any error stemming from the use of the defective judgment was harmless beyond a reasonable doubt, because the defect could, and should, have been corrected.

In Hargrave v. Commonwealth, 724 S.W.2d 202 (Ky. 1986), this Court ruled that the omission from a judgment of the judge's signature is a clerical error correctable under RCr 10.10 and that a successor judge may supply the omission for PFO

purposes without thereby calling into question the judgment's finality, at least where, as here, the judgment has already been upheld on appeal. Under Hargrave, therefore, the trial court should have granted the Commonwealth's motion to sign and validate the 1978 judgment, which would then have supplied appropriate proof of Douglas's 1978 conviction.

At trial, Douglas argued that supplying the omitted signature would not save the PFO evidence, because the unsigned judgment would only become effective when signed and thus could not be deemed a *prior* conviction for PFO purposes. Under Hargrave again, however, for PFO purposes at least, the corrected judgment "bec[omes] valid for all purposes and adequately evidence[s] the [prior] conviction." 724 S.W.2d at 205 (quoting from Spears v. Commonwealth, 462 S.W.2d 931 (Ky. 1971)). Because Douglas's 1978 judgment should have been corrected, its admission into evidence uncorrected amounted at most to harmless error. Finally, because the 1978 state conviction was admissible, the Commonwealth's proof that Douglas was on parole for that offense at the time of the June 25, 2005 robbery satisfies the requirement of KRS 532.080(3)(c) and makes its failure to prove Douglas's federal parole status immaterial. Accordingly, we affirm the PFO enhancement of Douglas's sentence.

Although the Commonwealth Attempted to Define Reasonable Doubt, the Trial Court's Admonition Cured the Error.

During general *voir dire,* the Commonwealth acknowledged that it was obliged to prove Douglas's guilt beyond a reasonable doubt and then asked the panel whether anyone believed that that meant that the Commonwealth had to put on "the perfect case . . . 100% signed, sealed, and delivered." Douglas objected that the Commonwealth's question breached the long-standing prohibition against defining

"reasonable doubt" and moved for a mistrial. The court denied the mistrial motion, but, agreeing with Douglas that the Commonwealth had strayed into forbidden territory, informed the panel that it was for the jurors to determine the meaning of "reasonable doubt" and admonished the panel to disregard the Commonwealth's question. On appeal, Douglas contends that the court abused its discretion by refusing to declare a mistrial. His argument, apparently, is that any breach of the prohibition against defining reasonable doubt "dilutes" the reasonable doubt standard and thus undermines one of the basic Constitutional guarantees meant to ensure a fair criminal trial. We disagree.

In Commonwealth v. Callahan, 675 S.W.2d 391 (Ky. 1984), this Court prohibited counsel "from *any* definition of 'reasonable doubt' at any point in the trial." 675 S.W.2d at 393 (emphasis in original). In Brooks v. Commonwealth, 217 S.W.3d 219 (Ky. 2007), we recently reiterated that prohibition and made clear that it includes comments or questions purporting or tending to indicate what "reasonable doubt" is *not*, such as attempts to contrast "reasonable doubt" with "any doubt," "all doubt," "a shadow of a doubt," or, as in this case, a "perfect case" "100% signed, sealed, and delivered." We agree with Douglas and the trial court, therefore, that the Commonwealth's "perfect case" question constituted a Callahan violation, but we do not agree with Douglas that the violation necessitated a mistrial.

As he acknowledges, a mistrial is an extreme remedy and is warranted only in the face of manifest necessity, when something improper has occurred that is "of such magnitude that a litigant would be denied a fair and impartial trial and the prejudicial effect could be removed in no other way." Matthews v. Commonwealth, 163 S.W.3d 11, 17 (Ky. 2005). This Court reviews a trial court's mistrial rulings for abuse of

discretion. *Id.* Curative admonitions, of course, are "another way" of removing the prejudicial effect of trial improprieties, Maxie v. Commonwealth, 82 S.W.3d 860 (Ky. 2002), and we are convinced that the trial court's admonition in this case was reasonably calculated to cure whatever prejudicial effect the Commonwealth's "perfect case" question might have had. The Commonwealth's question, though improper, was not an egregious violation likely to dilute the reasonable doubt standard, and the trial court's admonition made clear that the jury, and the jury alone, was to determine what that standard means. Because the admonition was well-suited to ensure that the Commonwealth's question did not undermine the fairness of Douglas's trial, the trial court did not abuse its discretion when it gave the admonition rather than declare a mistrial.

The Impeachment of Douglas With His Prior Offenses Was Not Improper.

Prior to trial, Douglas successfully moved to exclude from the guilt phase of the trial all evidence of his 1978 and 1985 robbery convictions because both fell outside KRE 609(b)'s ten-year window of admissibility. At trial, Douglas testified in his defense, and during his direct examination the following exchange took place:

> Defense Counsel: Ok, we're going to back up. Did you ever go in the check cashing store?
>
> Douglas: I never knew it was a check cashing store right there.
>
> Defense Counsel: Did you rob either of the two people who pointed the finger at you yesterday.
>
> Douglas: No.
>
> Defense Counsel: Did you steal anything from them?
>
> Douglas: No, I don't steal anything from anybody.

Before beginning its cross-examination, the Commonwealth argued that this last remark opened the door to questions regarding Douglas's character for thievery and that cross-examination as to the earlier robberies should be allowed. Counsel for Douglas argued that, considered in context, Douglas's remark meant only that he did not steal anything from anybody *that day,* June 25, 2005. The trial court disagreed and allowed the Commonwealth to elicit Douglas's admission that he had been convicted of two prior robberies, one of which was a bank robbery. On appeal, Douglas again contends that given the context of the question and his manner of speaking, his apparently general denial and disapproval of theft was in fact a limited denial of the robbery at Cash Tyme. We disagree.

We have reviewed the video tape of Douglas's trial testimony and are convinced that the trial court did not clearly err when it understood Douglas's remark as an assertion that he opposed stealing in general and so could not have been the Cash Tyme robber. This Court has recognized that, as in this case, otherwise inadmissible evidence of prior crimes may become admissible to impeach this sort of exonerating character claim. Commonwealth v. Higgs, 59 S.W.3d 886 (Ky. 2001). *See also,* Wright and Gold, *Federal Practice and Procedure,* § 6096 (discussing impeachment by contradiction). "[T]he target of this kind of impeachment evidence is the credibility of the character witness, not the prior conduct of the defendant." Commonwealth v. Higgs, 59 S.W.3d at 895 (citation omitted). Upon request, therefore, a defendant is entitled to an admonition limiting the evidence to that purpose. *Id.* This kind of impeachment is proper, moreover, only to the extent necessary to prevent undue prejudice to the Commonwealth from the defendant's self-serving claims; *i.e.* this

evidence is subject to the usual KRE 403 balancing test between probative worth and prejudicial effect, *Id.,* but the test should be applied with sensitivity to the fact that the evidence is otherwise inadmissible and so should be strictly limited to the Commonwealth's legitimate needs. Cf. United States v. Winston, 447 F.2d 1236, 1240 (D.C. Cir. 1971) ("Opening the door is one thing. But what comes through the door is another.") Here, Douglas does not contend that the trial court misapplied the balancing test, and he did not request a limiting admonition. Because impeachment by contradiction was warranted once Douglas offered the jury a picture of himself as one who would not "steal anything from anybody," the trial court did not abuse its discretion by permitting the Commonwealth to elicit on cross-examination that Douglas had committed in prior robberies.

CONCLUSION

In sum, we agree with Douglas that, under the kidnapping exemption statute, his brief restraint of Hughes and Strawter incidental to the Cash Tyme robbery did not amount to separate kidnapping offenses. The portion of the trial court's judgment convicting him of those crimes, therefore, cannot stand. However, none of the other errors raised by Douglas entitles him to relief. Accordingly, we affirm the October 24, 2006 Judgment of the Jefferson Circuit Court to the extent that it convicts Douglas of first-degree robbery and sentences him therefore as a first-degree persistent felon to an enhanced term of thirty-five years' imprisonment, we reverse the Judgment to the extent that it convicts Douglas of two counts of kidnapping, and we remand for entry of a new Judgment reflecting this result.

All sitting. Lambert, C.J., Abramson and Minton, JJ., concur. Cunningham, J., concurs in result only by separate opinion in which Scott, J., joins. Noble, J., concurs in part and dissents in part by separate opinion. Schroder, J., concurs in part and dissents in part by separate opinion.

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Supreme Court of Kentucky

2006-SC-000882-MR

JOHNNIE DOUGLAS — APPELLANT

V.

ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARTIN F. McDONALD, JUDGE
NOS. 05-CR-002357 AND 05-CR-003400

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION BY JUSTICE CUNNINGHAM

CONCURRING IN RESULT ONLY

I concur in result. While I find the opinion well written and supported, I write separately on the Callahan issue. I do not believe the Commonwealth Attorney's question on voir dire was either inappropriate, or in violation of Callahan or Brooks. I'm afraid this Court is meandering down a trail which stretches Callahan to the absurd. Justice Scott and I concurred in result only in Brooks. In doing so, we expressed the view that saying what is not "reasonable doubt" does not define that term. This is the position which was supported by a majority of this Court in Johnson v. Commonwealth, 184 S.W.3d 544 (Ky. 2005). Significantly, the decision in that case makes it clear that "reasonable doubt" cannot be defined and is left to the jury to determine. Id. at 550. Common sense would suggest that saying a dog is not a cat does not define the dog.

This case goes a step further. The prosecutor acknowledged the Commonwealth was obligated to prove Douglas's guilt beyond a reasonable doubt. The prosecutor did not define "reasonable doubt," nor did the prosecutor say what the term

was not. Instead, the prosecutor asked the jury panel if anyone believed the Commonwealth had to put on "the perfect case ... 100% signed, sealed, and delivered." In this day and age, when television and movie dramas portray all guilty verdicts as founded on absolutes and scientific certainties, prosecutors are in need of some leeway in working with the standard of proof. This is especially critical when, as here, the term is dealt with on voir dire. The Commonwealth has a right to explore the possibility that a juror would impose a higher standard of proof than required by law – a standard of proof coming from prime time television rather than reality.

Therefore, I conclude a Callahan error did not occur. For this reason, I concur in result only on this issue.

Scott, J., joins.

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COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION BY JUSTICE NOBLE

CONCURRING IN PART AND DISSENTING IN PART

First, I agree that the kidnapping convictions must be reversed based on the statutory kidnapping exemption. However, I would reverse this case in its entirety because the trial court allowed the Commonwealth to impeach the Appellant on his pre- and post-Miranda silence. Further, I agree with Justice Cunningham's statements regarding the Callahan issue.

After the robbery at Cash Advance, a bystander called police to state that a robbery was in progress. A car driven by Appellant pulled out of the parking lot and was followed by another small vehicle. Following the description of Appellant's car, the police found Appellant and stopped him. A young man who was also in the car jumped out, ran off and was not caught. Appellant was removed from the vehicle, handcuffed, and searched. A "silver" handgun was found on his person as well as a significant sum of money. In the backseat of the

car a flowered shirt similar to one worn by one of the robbers was found. Appellant was detained while another police officer went to the business and picked up two store clerks who observed the robbery. These clerks were brought to the scene where Appellant was being held, and both positively identified him. The record does not reveal the length of time of this transaction, but it does state that the business was approximately three miles away.

From the time he was stopped until the date of his trial, the Appellant did not provide any explanation to police officers or the Commonwealth about why he was at the store. At trial, he presented a version of events wherein he claimed to essentially be an innocent bystander. He claimed that he had pulled into the parking lot at the back of the store in order to add oil to his car. At about that time two men came around the corner of the building arguing. He knew both of them. One of them lived in his neighborhood and asked if he could get a ride home with Appellant. Appellant agreed, the young man got in his car, and they pulled out. The other vehicle pulled out behind them. Appellant indicated that this vehicle had been left with its motor running behind the store. Appellant and his passenger proceeded some distance when he was pulled over by a police car. At that time, his passenger jumped from the vehicle and ran away. When the officers got the Appellant out of his car they hand-cuffed him, and he kept silent, offering no explanation to the officers because he wanted to exercise his right to remain silent.

When Appellant presented this version of events at trial, the Commonwealth objected, stating that he had never told this story before. The Commonwealth wanted to impeach the Appellant with his silence at the time of

arrest up to the date of the trial. The trial court permitted the Commonwealth to question Appellant about his silence. Defense counsel objected, claiming that his client had the right to remain silent at any time during the proceedings and that this could not be used against him.

The Appellant continues this argument on appeal. In response the Commonwealth makes as its sole argument that it was entitled to question the Appellant based on pre-Miranda silence. The majority in this cases focuses on the propriety of post-Miranda silence as impeachment, but does not adequately address the problem of pre-Miranda silence, since the Appellant focused his argument on post-Miranda silence.

A Supreme Court case, Fletcher v. Weir, 455 U.S. 603 (1982), reiterated the holding in Doyle v. Ohio, 426 U.S. 610 (1976), that "because of the nature of Miranda warnings it would be a violation of due process to allow comments on the silence which the warnings may well have encouraged. . . ." Fletcher, 455 U.S. at 493. Taking Doyle literally, the Fletcher court reviewed the Miranda warnings as inducing silence by implicitly assuring the defendant that his silence would not be used against him. The Court noted that in previous cases where failure to speak occurred before the defendant was taken into custody and given Miranda warnings, no governmental action had induced him to remain silent. The Supreme Court held that it is up to the state courts to establish the extent to which post-arrest silence may be used to impeach a criminal defendant's own testimony when he remains silent post-arrest but pre-Miranda. A logical extension of this would be that when a defendant is "detained" but not arrested,

the use of silence to impeach, when it occurs during this period of time, must also be governed by state law.

The competing interest is the evidentiary value of silence as an admission or inference of guilt. In Doyle, the Supreme Court held that this value must take a back seat to an individual's right not to incriminate himself. Even when viewed in light of the reliance caused by the Miranda warnings, there is nothing in either Doyle or Fletcher that mandates that the evidentiary value of silence as proof of guilt should trump the right to remain silent as a matter of law. Instead, pre-Miranda silence was either not addressed at all, or was referred to peripherally. In leaving the use of post-arrest (but pre-Miranda) silence as impeachment to the states, the Fletcher court logically implied that post-detention, but pre-arrest or pre-Miranda silence also must be governed by state law.

To date, Kentucky has not specifically addressed this question. However, since it is the sole basis of the Commonwealth's argument that its questions were proper because they addressed pre-Miranda silence, it cannot be ignored here. Because I agree with Doyle that an evidentiary matter cannot outweigh a constitutional right, I would hold that it is error to have allowed any questioning about Appellant's silence. Since he maintained his silence from the beginning, it is error to use his silence as impeachment whether it is pre- or post-Miranda.

The question then is whether this error is harmless. Since Appellant's silence was used to impeach his entire defense, there is a substantial probability that it affected the verdict. By implying that Appellant manufactured his version of events subsequent to his arrest, the Commonwealth cast doubt on his defense because he chose not to explain himself to police in the face of eyewitness

identification by two witnesses. It was certainly not irrational for him to think that anything he might say to the police would make any difference in his arrest or subsequent prosecution. He merely exercised his right to remain silent. Yet by doing so, the Commonwealth was allowed to argue guilt by silence. Not unlike many others in our history, he simply waited for his day in court. Such error cannot be harmless. Consequently, I would reverse.

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COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION BY JUSTICE SCHRODER

CONCURRING IN PART AND DISSENTING IN PART

I agree that Douglas should not have been convicted of kidnapping incident to the robbery. That being said, the numerous other errors - the prosecutor's comments on Douglas's silence; the prior victim becoming a juror; Jefferson County's failure to comply with the administrative procedures for jury selection; the prosecutor's attempt to define reasonable doubt; and the use of old convictions - cumulatively are not harmless. Funk v. Commonwealth, 842 S.W.2d 476, 483 (Ky. 1992). As to the old convictions, even assuming Douglas "opened the door" by his statement "I don't steal anything from anybody," I believe the use of the 1978 and 1985 robbery convictions violated KRE 609(b), in that the probative value of these 20 and 27 year old convictions did not substantially outweigh their prejudicial effect.

Douglas, who could have easily been convicted with a fair trial, was convicted unfairly as a result of cumulative error. I would reverse and remand for a new trial.