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RENDERED: DECEMBER 18, 2014
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2013-SC-000410-MR

TROY WADE — APPELLANT

V.

ON APPEAL FROM MEADE CIRCUIT COURT
HONORABLE ROBERT A. MILLER, JUDGE
NO. 12-CR-00030

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Troy D. Wade, appeals from a judgment of the Meade Circuit Court convicting him of first-degree trafficking in a controlled substance, tampering with physical evidence, and of being a first-degree persistent felony offender, and sentencing him to a total of twenty years imprisonment.

As grounds for relief Appellant contends that (1) the trial court erred by prohibiting defense counsel from discussing with the jurors during *voir dire* the "reasonable doubt" and "clear and convincing evidence" standards of proof; (2) the trial court erred in permitting the Commonwealth to introduce hearsay evidence to bolster the testimony of its investigating officer; (3) the Commonwealth violated the separation of witness rule when it questioned a witness after direct examination but before cross-examination; and (4) the cumulative effect of various errors requires reversal of the judgment. For the reasons stated below, we affirm the judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

According to the evidence presented at trial, John Fuquay was facing drug trafficking charges when he agreed to act as a confidential informant, assisting Detective Bart Ponder of the Meade County Sheriff's Office by making drug buys from other suspected drug traffickers. To that end, Fuquay arranged to meet Appellant at a place called "The Tree House" to purchase $100.00 worth of cocaine using a one-hundred dollar bill that Detective Ponder had marked with two circles drawn on the back.

After meeting with Appellant, Fuquay returned to Ponder with a quantity of cocaine that he allegedly purchased from Appellant, and without the $100 bill. Appellant was not immediately apprehended, and when he was found later and searched, he did not have the marked $100 bill.

Acting upon a tip the next morning, Ponder interviewed a woman who had been present at the Tree House the previous evening when Appellant was there. She told Ponder, and later testified at trial, that Appellant had asked her to take a $100 bill to a nearby store, buy him some cigarettes, and bring him back the change. Ponder then went to the store, and with the owner's assistance, he examined the $100 bills collected the prior evening and found the marked bill.

As a result of the drug deal and his prompt disposal of the purchase money, Appellant was convicted and sentenced as stated above. This appeal followed.

II. APPELLANT'S ATTEMPT DURING *VOIR DIRE* TO CONTRAST "REASONABLE DOUBT" FROM "CLEAR AND CONVINCING EVIDENCE"

Appellant contends that his attempt during *voir dire* to examine the prospective jurors about their understanding of the various standards of proof was improperly restricted by the trial court in reliance upon the Commonwealth's mischaracterization of the applicable case law. The trial judge, apparently as part of a standard pre-trial order, had instructed counsel that they "shall not attempt to define reasonable doubt . . . at any time during the trial."

During his *voir dire* examination, defense counsel said:

> Both people have talked about the burden of proof so far as the Judge and the Commonwealth [have] addressed. The burden of proof is beyond a reasonable doubt. The Commonwealth does have that proof. Have you guys heard of any other types of burdens that are used in the Court system? Anybody heard the term clear and convincing evidence?

At that point, the trial court *sua sponte* interrupted trial counsel and held a bench conference during which the following discussion occurred:

> *Defense Counsel*: Is this about defining. I don't feel like that was what I was doing judge. I am allowed to say that it is a higher standard than clear and convincing and preponderance than the evidence. That was all I was getting at. I was going to bring up those two different standards and say that it is a higher standard than that.
>
> *Prosecutor 1*: That is kind of defining it.

Prosecutor 2: The Court in *Johnson v. Commonwealth*, 184 S.W.3d 544 [Ky. 2005], specifically says you cannot compare differences of standards between civil and criminal cases.[1]

Defense Counsel: I had no idea about that case.

Trial Court: Well, he cited it. Objection sustained, so let's just move on.

Appellant now contends that the prosecutor mischaracterized the applicable law relating to defining reasonable doubt, and that the trial court, in turn, erroneously blocked Appellant's efforts to address and inquire about the jury's knowledge concerning the various standards of proof among criminal cases and varieties of civil cases.

It is well established defining reasonable doubt at any time during trial is prohibited. *Commonwealth v. Callahan*, 675 S.W.2d 391, 393 (Ky. 1984); *see also* RCr 9.56(2) ("The instructions should not attempt to define the term 'reasonable doubt.'"). As differentiated from *defining* reasonable doubt, we have more recently held that attempts to show what reasonable doubt is *not* do not violate the rule against defining reasonable doubt. *Rogers v. Commonwealth*, 315 S.W.3d 303 (Ky. 2010); *Cuzick v. Commonwealth*, 276 S.W.3d 260 (Ky. 2009); *Brooks v. Commonwealth*, 217 S.W.3d 219 (Ky. 2007).

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[1] As a matter of clarification, *Johnson* does *not*, as the prosecutor suggests, state that "you cannot compare differences of standards between civil and criminal cases." To the contrary, *Johnson* simply holds that, notwithstanding the prohibition against defining reasonable doubt, it is permissible to inform the jury that reasonable doubt is not the same thing as "beyond a shadow of a doubt," and that the proper standard is proof beyond a reasonable doubt. *Johnson v. Commonwealth*, 184 S.W.3d 544, 550 (Ky. 2005). Moreover, in *Rogers v. Commonwealth*, 315 S.W.3d 303, 307 (Ky. 2010) we recognized that "concern for a juror's inclination to apply the reasonable doubt standard of proof may" justify inquiry on *voir dire* about various standards of proof to "ascertain if any prospective juror would be unable to apply the reasonable doubt standard." *Id.* at 308.

In any event, trial courts are granted broad discretion and wide latitude in their control of the *voir dire* examination under RCr 9.38, though that discretion is not boundless. *Hayes v. Commonwealth*, 175 S.W.3d 574, 583 (Ky. 2005) (citing *Webb v. Commonwealth*, 314 S.W.2d 543, 545 (Ky. 1958)).

In *Rogers*, 315 S.W.3d at 307, we made a vital distinction between using *voir dire* as intended by RCr 9.38 for "an 'examination of the prospective jurors' by which the court and counsel seek information *from* the prospective jurors" and attempting to use *voir dire* as a means "to educate the jury panel regarding legal concepts." *Id.* Citing to *Lawson v. Commonwealth*, 53 S.W.3d 534, 539 (Ky. 2001), (*quoting Thomas v. Commonwealth*, 864 S.W.2d 252, 259 (Ky. 1993)) we said, "[t]he principal purpose of *voir dire* is to probe each prospective juror's state of mind and to . . . allow counsel to assess suspected bias or prejudice." *Id.*

Because of the judge's directive to "move on," and because no avowal or other preservation was made of defense counsel's intended line of questioning, we do not know defense counsel's intended course of *voir dire* on the point at issue. If his intended purpose was to *inquire* to discover if any juror would be unable to follow the criminal standard of proof of beyond a reasonable doubt or would instead be inclined to apply the standard used in civil trials so as to justify a strike for cause, then his line of inquiry would have been appropriate. However, as transcribed above, defense counsel's statement, "I was going to bring up those two different standards and say that it is a higher standard than that," suggests the principal objective was, as in *Rogers*, to "educate the

jury," and thus not a proper use of *voir dire* under RCr 9.38. *Rogers*, 315 S.W.3d at 307 ("[e]ducating the jury on legal concepts is the function of the trial court.").

In either event, we are persuaded that the trial court did not abuse its discretion by short-circuiting trial counsel's attempt to discuss the differences between the various standards of proof applied in criminal and civil trials. We note that the trial court itself during *voir dire* explained to the jury that the proper standard of proof was the beyond a reasonable doubt standard and asked the venire if they would hold the Commonwealth to that standard. The trial court further admonished the jury that the burden remained on the Commonwealth throughout the trial and inquired if anyone on the venire would require the defendant to prove his innocence. No potential juror indicated any hesitation about any of the preceding. And finally, the jury instructions required the jury to find each element of each crime to have been proven beyond a reasonable doubt.

Accordingly, we are satisfied that given the repeated emphasis that the burden the Commonwealth bore was the beyond a reasonable doubt standard, that there is no possibility that the jury rendered a verdict based upon any standard of proof other than beyond a reasonable doubt. Therefore, even if Appellant's right to examine the prospective jurors had been erroneously restricted, under the circumstances of this case, any such error was harmless beyond a reasonable doubt. *Brecht v. Abrahamson*, 507 U.S. 619, 622 (1993) ("[T]he standard for determining whether a conviction must be set aside

because of federal constitutional error is whether the error 'was harmless beyond a reasonable doubt.'").

III. THE STORE OWNER'S TESTIMONY WAS A VERBAL ACT, NOT HEARSAY, AND WAS NOT USED TO BOLSTER THE OFFICER'S TESTIMONY

Appellant next contends that the trial court erred by permitting the Commonwealth to introduce hearsay evidence to bolster Detective Ponder's testimony about the recovery of the $100 bill.

At trial, Ponder testified about his tracing of the marked $100 bill to the store where Appellant's friend used it to buy cigarettes. He described the conversation he had with the store owner when he went to locate and recover the marked money for use as evidence. Later in the trial, the store owner testified, repeating to a large extent Ponder's effort to recover the marked bill, as follows:

> *Store Owner*: I told him [Detective Ponder] that yes I was getting ready to leave to take the deposit to my other partner for him to take to the bank. And *he told me that he had a bill that he needed to see* if it was in there and *asked if he could meet me at my partner's store,* and I told him yes, that I would be over there, and then he met me there. And he explained to me that . . . .
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> *Trial Counsel*: Objection. Hearsay.
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> [The trial court overruled the objection.]
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> *Store Owner*. He *explained to me that there was . . . that he had a marked bill, and he said that if I would let him have access to my money he would tell me what the mark was and where it was at on the bill* of what he was looking for. And after he told me that, I gave him the $100.00 bills and he went through it and he came to a bill that had a mark on it, where he said it would be at. What it looked like. And he gave me a $100.00 bill to replace it. To replace the money he was taking.

Hearsay is defined as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." KRE 801(c). Hearsay is inadmissible unless otherwise provided by the Kentucky Rules of Evidence or the Rules of the Supreme Court of Kentucky. KRE 802; *see Wiley v. Commonwealth*, 348 S.W.3d 570, 580 (Ky. 2010).

As we construe his arguments, Appellant identifies three out-of-court statements by Ponder that were repeated by the storeowner: (1) "he told me that he had a bill that he needed to see if it was in there and asked if he could meet me at my partner's store"; (2) "he explained to me that there was . . . that he had a marked bill"; and (3) "he said that if I would let him have access to my money he would tell me what the mark was and where it was at on the bill." Each of these statements serves to explain why the store owner searched through her funds to locate and turn over to Ponder a particular $100 bill.

The verbal acts doctrine provides that testimony is not hearsay when it is "not admitted for the purpose of proving the truth of what was said, but for the purpose of describing the relevant details of what took place." *Sanborn v. Commonwealth*, 754 S.W.2d 534 (Ky. 1988);[2] *Preston v. Commonwealth*, 406 S.W.2d 398, 401 (Ky. 1966) ("This is not hearsay evidence; it is not admitted for

[2] In *Brewer v. Commonwealth*, 206 S.W.3d 343, 351 (Ky. 2006), we accepted the plurality holding of *Sanborn* regarding hearsay and the verbal acts doctrine, therefore establishing it as a binding precedent. *See Chestnut v. Commonwealth*, 250 S.W.3d 288, 294 (Ky. 2008); *Sanborn* was overruled on other grounds in *Hudson v. Commonwealth*, 202 S.W.3d 17, 22 (Ky. 2006).

the purpose of proving the truth of what was said, but for the purpose of describing the relevant details of what took place."); *See* ROBERT G. LAWSON, THE KENTUCKY EVIDENCE LAW HANDBOOK, § 8.00 (2d ed. 1984), ("[a]n extrajudicial statement has a proper nonhearsay use when its utterance (not its substance) is a part of the issues of the case.").

The store owner's repetition of Detective Ponder's out-of-court statements fits comfortably into the verbal acts construct. Here, the purpose of the store owner's testimony was not to "prove the truth of what was said," but rather, "for the purpose of describing the relevant details of what took place." *Brewer v. Commonwealth*, 206 S.W.3d 343, 351-52 (Ky. 2006) (statements are not hearsay when they are admitted for the purpose of explaining one's actions rather than for proving the truth of the matter asserted so long as the actions taken are at issue in the case). Therefore, no error occurred in the introduction of that testimony.

Though not cited as grounds for relief at trial, Appellant now also argues that the store owner's testimony improperly bolstered Ponder's testimony. "Generally, a witness may not vouch for the truthfulness of another witness." *Stringer v. Commonwealth*, 956 S.W.2d 883, 888 (Ky. 1997). Here, however, the store owner did not in any manner attempt to testify that Ponder was "telling the truth" in his testimony; rather, she merely testified consistently with the Detective's version of events. Two witnesses describing the same event with consistent testimony does not violate the rule prohibiting a witness from

vouching for the truthfulness of another witness. Appellant's argument is meritless.

IV. SEPARATION OF WITNESS RULE

Appellant next argues that the Commonwealth committed prosecutorial misconduct when it flagrantly violated the separation of witnesses rule by talking to Meade County Chief Deputy Sheriff, Dan McCubbin, during a recess after he had testified on direct examination but before he had been cross-examined by the defense.

At the conclusion of McCubbin's direct examination, a brief recess in the trial was taken. The trial judge directly and specifically instructed McCubbin not to speak to anyone during the recess. During the recess, however, the trial judge saw the prosecutor and Detective Ponder talking to McCubbin. The judge assembled counsel in his chambers and took the prosecutors to task for violating his order.[3] The prosecutor explained that he had spoken to McCubbin only to clarify his own misunderstanding about a chain of custody issue.

Following the discussion, and upon hearing the Commonwealth's explanation for the episode, the trial judge determined that any failings on the Commonwealth's part were inadvertent. As a sanction for the violation, the judge restricted further testimony by McCubbin regarding chain of custody issues. Although Appellant now contends that the only appropriate remedies

[3] We do not address the Commonwealth's argument that the trial court abused its discretion when it restricted the prosecutor from communicating with its own witness. The Commonwealth did not present that argument to the trial court, and our disposition of the case does not require us to address that argument.

for the perceived misconduct were the declaration of a mistrial or exclusion of McCubbin's testimony, he requested neither of those avenues of relief. He asked only whether he could "cross-examine [McCubbin] on some of this," to which the trial judge responded "Absolutely."

It is well settled that a party seeking a mistrial must timely request that the court grant such relief. *West v. Commonwealth*, 780 S.W.2d 600, 602 (Ky. 1989) (citing *Jenkins v. Commonwealth*, 477 S.W.2d 795 (Ky. 972)); *see also* RCr 9.22 (requiring a party to make known to the court the action which that party desires the court to take). A timely motion for a mistrial provides the trial court the opportunity to correct an error. *Olden v. Commonwealth*, 203 S.W.3d 672, 675 (Ky. 2006).

In summary, while the trial court expressed strong disapproval of the fact that the prosecutor spoke to McCubbin during the recess, there was no request for an admonition, mistrial, or any other relief by defense counsel in direct response to that violation. Indeed, the trial court did exclude further questioning to McCubbin on the issue and sustained Appellant's request to cross-examine the officer regarding the matter. Since no other relief was requested, there is nothing for this Court to review. *Davis v. Commonwealth*, 967 S.W.2d 574, 580 (Ky. 1998). Accordingly, we find no error on this issue.

V. CUMULATIVE ERROR

Appellant's final argument is that cumulative error occurred as a result of the various arguments raised above. *See Funk v. Commonwealth*, 842 S.W.2d 476, 483 (Ky. 1992) (noting that the cumulative prejudicial of multiple

errors which are, individually, harmless, can require reversal). However, as demonstrated by our discussion above, no specific individual errors occurred in this case; as such, there is no cumulative prejudice for amassing into reversible cumulative error. *Elery v. Commonwealth*, 368 S.W.3d 78, 99-100 (Ky. 2012).

VI. CONCLUSION

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

All sitting. All concur.

COUNSEL FOR APPELLANT:

Jason Apollo Hart
Assistant Public Advocate
Department Of Public Advocacy

COUNSEL FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Bryan Darwin Morrow
Assistant Attorney General
Office of Criminal Appeals
Office of the Attorney General