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RENDERED: DECEMBER 15, 2016
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2015-SC-000445-MR

DIONTRAY JACKSON — APPELLANT

V.

ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A.C. MCKAY CHAUVIN, JUDGE
NO. 12-CR-002663-001

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A jury in Jefferson County convicted Diontray Jackson (Jackson) of first-degree sodomy, first-degree rape, first-degree criminal attempt sodomy, first-degree sexual abuse, distribution of obscene matter to a minor with regard to a child, Emily. He was convicted of first-degree wanton endangerment and fourth-degree assault with regard to a child, Andrew.[1] Additionally, Jackson was convicted of being a first-degree persistent felony offender. Consistent with the jury's sentencing recommendations, the trial court fixed his sentence at fifty years' imprisonment.

Jackson now appeals as a matter of right, Kentucky Constitution § 110(2)(b), arguing that the trial court erred by: (1) refusing to take judicial notice of his unsuccessful efforts to have DNA testing performed on others who lived in the apartment where the charged crimes occurred; (2) ruling that

[1] Pseudonyms are used to protect the children's identities.

Jared, a child witness, was competent to testify; (3) denying his motion for a mistrial following Jared's non-responsiveness on the witness stand; (4) allowing a police officer and a forensic interviewer to improperly bolster Emily's testimony through hearsay testimony; and (5) denying his request to admonish the jury following the Commonwealth's attempt to define "beyond a reasonable doubt" during closing argument. For the reasons set forth below, we affirm.

I. BACKGROUND

Jackson first became acquainted with the child-victims in this matter when he began staying with their mother, Veneeta Darnley-David (Veneeta). Veneeta was the mother of four children who all lived at the residence, including the child-victims, Emily and Andrew. At the time Jackson committed the crimes charged, Emily, was six years old and, Andrew, was between eleven and twelve years old. The other children who lived at the residence were Jared, Rodney, and Patricia.

At trial, Andrew testified that Jackson beat him and pulled a gun on him, threatening to shoot him. Patricia testified that she heard Jackson say, "I'll kill you," as he pulled out the gun. Shortly thereafter, Andrew, Rodney, and Patricia moved out of the apartment, leaving Emily and her little brother, Jared, alone with Veneeta and Jackson. Emily testified that, during this time, Jackson raped her, sodomized her, and forced her to watch two pornographic movies.

After Andrew learned of Emily's sexual abuse at the hands of Jackson, Andrew devised a plan to "break out" his brother and sister from the

apartment. Andrew retrieved them via the apartment's fire escape while Veneeta and Jackson were in the front of the apartment. Once outside, Andrew took Emily and Jared to a nearby Thornton's gas station where a friend of Patricia's called the police.

Sergeant Oberhausen responded to the call. Upon her arrival, Emily told Sergeant Oberhausen that she had been sexually abused and that the children were starving. Based on the information Sergeant Oberhausen received, she determined that an emergency custody order was warranted rather than attempting to take the children home. She then contacted the Home of the Innocents, a support home for abandoned, abused, and neglected children, which took custody of the children.

About a month later, Louisville Metro Police executed a search warrant of Veneeta's apartment and took cuttings from both the mattress and the carpeting of the room that they believed was Emily's bedroom. The Commonwealth then obtained comparative DNA samples from Jackson and Emily. The cutting from the carpeting, which contained sperm, was linked to Jackson. One of the cuttings from the mattress also contained evidence of Jackson's sperm. A second cutting from the bed, described as a non-sperm "mixture of at least three individuals" contained Emily's DNA. The Commonwealth did not obtain any comparative samples from others who had been present in the apartment, and it did not identify the other two individuals whose DNA was in that mixture.

Jackson was arrested the next month, and these proceedings followed. We set forth additional facts as necessary below.

II. STANDARD OF REVIEW

Because the issues presented require us to apply different standards of review, we set forth the appropriate standard as necessary when addressing each issue.

III. ANALYSIS

A. The trial court acted within its discretion in refusing to take judicial notice of Jackson's attempts to obtain comparative DNA samples from other occupants in Veneeta's apartment.

In order to determine who besides Emily had contributed to the DNA mixture, Jackson sought to have additional comparative DNA samples collected from Veneeta, Patricia, Rodney, Andrew, and Jared, all of whom had resided in the apartment. The Commonwealth refused to collect any additional comparative samples and the court refused to order the Commonwealth to do so. Jackson then filed a motion asking the court to take judicial notice of the "adjudicative facts" that he had been thwarted in his attempt to obtain additional comparative DNA samples. The court refused to take judicial notice of these adjudicative facts noting that, while it could do so, it questioned the admissibility of those facts. However, it permitted Jackson to question the Commonwealth's witnesses about the issue and to comment about the issue in his closing argument.

Jackson now argues that the trial court erred by not taking judicial notice of these adjudicative facts, as it was compelled to do so by KRE 201.

KRE 201(d) provides in pertinent part that "[a] court shall take judicial notice if requested by a party and supplied with the necessary information." Once the court takes judicial notice of an adjudicative fact, it then "instruct[s] the jury to accept as conclusive any fact judicially noticed." KRE 201(g). Jackson is correct that he provided the court with all of the necessary information to enable it to take judicial notice. However, his argument that the court's failure to take judicial notice impeded his ability to present exculpatory evidence is without merit.

Initially, we note, as the trial court did, any judicially noticed facts must be admissible. To be admissible, evidence must be relevant, i.e., it must have some "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." KRE 401. Jackson has not shown how obtaining comparative samples that would have identified the contributors to the DNA mixture would have made his guilt any more or less probable. It was undisputed that numerous people were in and out of Emily's bedroom and could have contributed to the DNA mixture. Tying specific individuals to that mixture would have done nothing to exonerate Jackson. Therefore, we fail to see how the court could have abused its discretion by failing to take judicial notice that Jackson was thwarted in an attempt to obtain evidence that would not have been admissible. Having reached the aforementioned conclusion we need not address Jackson's other arguments; however, we briefly do so for the sake of completeness.

Jackson argues that judicial notice was required because Emily was the only witness to the events, she had a normal physical examination, and his sperm was found on her bed and carpet. We fail to see, and Jackson has not specified, how identifying who contributed to the DNA mixture would have had any impact on Emily's eyewitness testimony or her physical examination findings.

As to the presence of Jackson's sperm, Veneeta testified that she and Jackson had sexual intercourse on Emily's bed multiple times, and she had seen Jackson ejaculate on the carpet. Jackson argues that it was important to verify Veneeta's testimony with DNA evidence. However, since Veneeta's testimony was unrebutted, we fail to see how verifying that testimony with DNA evidence would have made Jackson's guilt any more or less probable.

Jackson also argues that the Commonwealth "opened the door" to this evidence when its forensic expert testified that defense counsel can request DNA testing. According to Jackson, this left the jury with the impression that "defense counsel had run away from additional DNA testing, when, instead, the opposite is true." However, whether Jackson could have asked for additional testing was not the issue, the issue was whether the court, at Jackson's behest, could compel the Commonwealth to obtain and submit for testing comparative DNA samples from other individuals. As the court noted, Jackson did not offer, and has yet to offer, any authority permitting the court to do so. Furthermore, the court stated that Jackson could get the evidence before the jury through his and the Commonwealth's witnesses if he chose to do so and

that he could argue the issue in closing. Thus, Jackson could have overcome any negative impression the jury might have had regarding his failure to obtain additional DNA testing.

For the foregoing reasons, we discern no error in the court's failure to take judicial notice of "adjudicative facts" as offered by Jackson.

B. The trial court did not err by denying Jackson's motion for a directed verdict.

During trial, the Commonwealth called Jared, who was nine years old, to testify. After answering general background questions about his family, Jared became essentially unresponsive.

> **Commonwealth:** And what about, did he ever, did you ever see him do anything bad with [Emily]?
>
> **Jared:** I don't remember.
>
> **Commonwealth:** What about body parts? Do you know about body parts that people aren't supposed to touch or look at?
>
> **Jared:** Yes.
>
> **Commonwealth:** Do you remember ever seeing Dion's body parts?
>
> **Jared:** I don't remember.
>
> **Commonwealth:** Do you remember, and I got [sic] to ask, [Jared], is it because you don't remember or because you don't want to talk about it?
>
> **Jared:** I don't remember.
>
> **Commonwealth:** [Jared], do you remember speaking with somebody about all these events almost right after it happened?
>
> **Jared:** Yes.
>
> **Commonwealth:** Yea, you sat down and you were interviewed, right?

Jared: (Mouthed yes)

Commonwealth: And they videotaped that interview? And you got to watch that videotape last week? Do you remember watching it?

Jared: Yes.

Commonwealth: Do you remember telling the interviewer about how Dion took his . . .

At that point, Jackson objected and the court held a bench conference. During the bench conference, the court instructed the Commonwealth to ask, in a non-leading way, what Jared remembered telling the interviewer. The Commonwealth continued:

Commonwealth: [Jared], do you remember telling the interviewer, do you remember what you told the interviewer about Dion doing something to [Emily]?

Jared: Yes.

Again, Jackson objected and the trial court held a bench conference. During the bench conference, the parties disagreed as to whether Jared told the interviewer that he witnessed Jackson abuse Emily or that Emily told him about the abuse. The Commonwealth made one more attempt to question Jared but he again became essentially non-responsive, and the Commonwealth stopped its examination.

Following the Commonwealth's examination, Jackson moved for a mistrial, citing his Sixth Amendment right under the United States Constitution to confront witnesses against him, as well as his Fourteenth Amendment due process rights. Additionally, Jackson expressly advised the court that he did not believe an admonition would be appropriate.

Nonetheless, the trial court admonished the jury to ignore all of Jared's testimony.

Jackson asserts that the trial court erred by failing to grant his motion for a mistrial. We disagree.

Jackson argues that a mistrial was necessary because the jury was prejudiced by seeing Jared "sit on the stand, falling apart . . . it's pretty obvious the break was taken to deal with [Jared], . . . and what the jurors are going to take away from that, regardless of what the court tells them to do, is [sic] very likely that he's afraid of [Jackson], he's afraid to sit here, he's afraid to testify." Thus, Jackson's complaints do not stem from anything that Jared said on the stand, rather, they stem from Jackson's speculation about the impression that Jared's demeanor would have on the jury.

"It is well established that the decision to grant a mistrial is within the trial court's discretion, and such a ruling will not be disturbed absent a showing of an abuse of that discretion." *Woodard v. Commonwealth*, 147 S.W.3d 63, 68 (Ky. 2004). A mistrial is an extreme remedy and should not be used unless there is a fundamental defect resulting in manifest necessity for such an action. *Id.* (internal citation omitted). "The occurrence complained of must be of such character and magnitude that a litigant will be denied a fair and impartial trial and the prejudicial effect can be removed in no other way." *Gould v. Charlton Co., Inc.*, 929 S.W.2d 734, 738 (Ky. 1996).

The trial court was in the best position to determine if Jared's testimony and subsequent non-responsiveness warranted a mistrial. The trial court appropriately admonished the jury to ignore all of Jared's testimony. "Jurors are presumed to have followed an admonition." *Tamme v. Commonwealth*, 973 S.W.2d 13, 26 (Ky. 1998). We discern no fundamental defect in the proceedings springing from Jared's testimony or lack thereof. Here, the trial court was correct in admonishing the jury to disregard Jared's testimony *in toto*. In doing so, the court sanitized the possibility of prejudice that Jackson argues arose in the minds of the jurors. Therefore, we hold that the trial court did not err in denying Jackson's motion for a mistrial.

C. Whether the trial court erred by finding Jared competent to testify is moot.

Prior to trial, the court held a hearing to determine if Jared, who was nine years old at the time, was competent to testify. Jackson argues that the trial court's determination that Jared was competent was erroneous. Because the trial court struck the entirety of Jared's testimony and admonished the jury to ignore it, this issue is moot. However, for the sake of completeness, we address it.

When questioned by the court during a competency hearing, Jared stated numerous times that he understood he was to tell the truth on the stand and that if he couldn't remember something, he must say, "I can't remember," and that if he didn't know something, he must say, "I don't know."

Additionally, Jared answered many miscellaneous questions the trial court posed to him in order to gauge his competence.

However, when the court began to ask Jared more specific questions regarding this case, Jared became essentially unresponsive. The court then, over Jackson's objection, permitted the Commonwealth to question Jared. Jared responded to the Commonwealth's leading questions, some of which dealt directly with issues in the case. The court then asked another series of questions, and when Jackson asked if he could cross-examine Jared, the court refused. Jackson argued that, because Jared initially refused to answer the court's questions about the case, he had shown that he would not be competent to testify at trial. However, the court stated that competency is "a continuing issue" and the parties could address any issues regarding Jared's reluctance to testify as they arose at trial.

We review a trial court's ruling regarding the competency of a witness to testify for an abuse of discretion. *Swan v. Commonwealth*, 384 S.W.3d 77, 97 (Ky. 2012). "Pursuant to [KRE] 601, a witness is competent to testify if she is able to perceive accurately that about which she is to testify, can recall the facts, can express herself intelligibly, and can understand the need to tell the truth." *Pendleton v. Commonwealth*, 83 S.W.3d 522, 522 (Ky. 2002). The trial court has the discretion to determine whether a witness is competent to testify. *Pendleton v. Commonwealth*, 685 S.W.2d 549, 549 (Ky. 1985). Absent an abuse of discretion, the trial court's determination will not be disturbed on appeal. *Id.* at 551.

During a pre-trial competency hearing, the court examined Jared at length regarding his ability to recollect facts, and his ability to differentiate between truth and fiction. Jared testified intelligently to numerous questions about these subject matters. While Jared became non-responsive during the court's questioning, he answered the Commonwealth's questions, thus, evidencing an ability to competently testify. We discern no error in the court's finding that Jared was competent, which was based on Jared's responses at the competency hearing. The court could not have predicted how Jared would respond at trial, and it was not required to do so.

Finally, we have some concerns regarding the court permitting the Commonwealth to question Jared but denying Jackson's request to do so. However, as noted above, because Jared's testimony was stricken, Jackson cannot show that he was, in any way, harmed by the court's actions.

D. Sergeant Oberhausen's and Kimberly Cook's testimony did not include inadmissible hearsay testimony and did not bolster Emily's testimony.

Jackson argues that the testimony of Sergeant Oberhausen and forensic interviewer, Kimberly Cook, included inadmissible hearsay and bolstered the testimony of Emily and Andrew. While Jackson preserved some of these issues at trial, others were unpreserved. We address each in turn.

1. Jackson's Unpreserved Challenges.

Jackson makes three unpreserved challenges to testimony by Kimberly Cook and Sergeant Oberhausen. Generally, an unpreserved error may be noticed on appeal if the error is "palpable" and if it "affects the substantial

rights of a party." RCr 10.26. However, Kentucky Rule of Civil Procedure (CR) 76.12(4)(c)(v) clearly requires "an 'ARGUMENT' conforming to the statement of Points and Authorities, . . . which shall contain at the beginning of the argument a statement with reference to the record showing whether the issue was properly preserved for review, and if so, in what manner." (emphasis in original). Jackson aggregates five evidentiary challenges, some of which were preserved and some were not. In regard to three of his challenges, Jackson either does not indicate where or how the challenge was preserved at the trial court, or he inaccurately cites to the challenge's preservation.

We also note that, "[a]bsent extreme circumstances amounting to a substantial miscarriage of justice," we need not engage in palpable error unless we are requested to do so. *See Dant v. Commonwealth*, 258 S.W.3d 12, 21 (Ky. 2008). Jackson did not request palpable error review of any of his evidentiary challenges.

i) Forensic Interviewer, Kimberly Cook's testimony.

Cook testified that before interviewing children, she informs them "that one of [her] rules is to tell the truth." Jackson argues that this testimony constituted improper bolstering.

We first note that Jackson did inform this Court that this issue was unpreserved. However, this information was provided only by footnote, which was attributed to assorted video transcript citations, and was placed on the second to last page of an eight-page section within Jackson's brief that began "A. Preservation. This issue is preserved." Because Jackson has failed to

comply with the substantial requirements of CR 76.12, we need not address this argument. *See* CR 76.12(8)(a).

However, we note that, even if this issue had been properly brought before this Court, it would not have constituted error. Whether Cook, prior to the interview, tells children her rule is to tell the truth, does not equate to her testifying that, in fact, a particular child has told the truth. Thus, this testimony did not bolster any witness's testimony.

ii) "They said they were starving."

When asked by the Commonwealth why Sergeant Oberhausen bought Andrew, Emily, and Jared food, she responded, "They said they were starving." Jackson did not object to this statement; thus, this challenge is unpreserved.

As stated above CR 76.12(4)(c)(v) requires that each argument section "shall contain at the beginning of the argument a statement with reference to the record showing whether the issue was properly preserved for review, and if so, in what manner." Jackson, however, inserted this challenge under the caption of a preserved issue. Whether this was an effort to mislead the Court or a drafting oversight, the result is the same and we need not address this challenge for failure to comply with the substantial requirements of CR 76.12. *See* CR 76.12(a).

However, even if Jackson had properly brought this challenge before this Court, it, too, would not have constituted error. Sergeant Oberhausen's testimony that the children told her they were starving does not bolster the

veracity of any witness's testimony and, indeed, Jackson does not direct this Court to the testimony he claims was bolstered.

iii) Emily's disclosure to Sergeant Oberhausen that she had been abused.

At trial, Sergeant Oberhausen testified that Emily made a disclosure of sexual abuse when she first responded to the children's call to police. She later testified that Emily had made a disclosure of abuse to her, which prompted her to call the police's Crimes Against Children unit. Jackson did not object to either of Sergeant Oberhausen's statements. As such, these challenges are unpreserved. Again, Jackson's brief included these challenges under the guise of a preserved error. As such, neither challenge complies with CR 76.12 and, therefore, we need not address them. *See* CR 76.12(a).

However, had these issues been properly challenged before this Court, there would have been no error. As we stated above, Jackson does not direct this Court to whose testimony was bolstered by Sergeant Oberhausen's testimony; however, we presume he is referring to Emily's testimony. If that is the case, then Sergeant Oberhausen's testimony did not bolster Emily's because Sergeant Oberhausen made no comment about Emily's veracity nor did she provide any details of Emily's disclosure. Furthermore, this testimony does not constitute hearsay as it was not offered for the truth of the matter asserted, i.e., that Emily had been sexually abused. It was offered to show why Sergeant Oberhausen requested emergency custody orders. As such, the testimony did not contain hearsay. *See* KRE 401.

2. Jackson's Preserved Challenges.

i) "Wrote out emergency custody orders."[2]

Jackson argues that Sergeant Oberhausen bolstered Emily's testimony by stating that, after speaking with Andrew and Emily, the police "wrote out emergency custody orders."[3] He argues that Sergeant Oberhausen's testimony constituted inadmissible hearsay.

"A trial court's evidentiary rulings are reviewed for an abuse of discretion." *Walker v. Commonwealth*, 288 S.W.3d 729, 739 (Ky. 2009). "Hearsay" is "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). A "statement" consists of an oral or written assertion, or a person's nonverbal conduct, if intended as an assertion. KRE 801(a). In the instant matter, Sergeant Oberhausen's complained-of testimony does not contain an out-of-court statement. Therefore, the testimony did not constitute impermissible hearsay.

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[2] We note that Jackson's arguments on this issue evolved between his first brief and his reply brief. In his first brief, Jackson began his argument section: "Sergeant Oberhausen bolstered Emily's testimony by stating that, after speaking with Andrew and Emily, the police 'wrote out emergency custody orders.' Hearsay is an out-of-court 'statement [. . .] offered to prove the truth of the matter asserted' . . . ." The Commonwealth, in its brief, challenged Jackson, arguing that this statement was not hearsay. Subsequently, in his reply brief, Jackson honed his argument: "It is not Mr. Jackson's position that Sgt. Oberhausen's act of writing the custody order was inadmissible hearsay; instead, it is his position that Sergeant Oberhausen telling the jury what the children had told the police was inadmissible hearsay." Because Jackson's argument in his initial brief overarches that of his reply brief, we address his initial argument while not excluding his latter argument.

[3] We presume that, when Sergeant Oberhausen testified that she "wrote out custody orders," she meant that she completed the appropriate forms required to obtain an emergency order.

Additionally, we note that this testimony did not bolster Emily's or Andrew's testimony. Regardless of the truth of Emily's and Andrew's statements to Sergeant Oberhausen, she testified that the police's procedure was to complete an emergency custody order if the police "respond to the scene of a situation that [they] believe to be a dangerous situation . . . ." This testimony does not demonstrate whether or not Emily's and Andrew's testimony was true, rather, it demonstrates that – true or false – the information Sergeant Oberhausen received required her to complete an emergency custody order. Furthermore, the circumstances of Sergeant Oberhausen's response to the children's call to police warranted her belief that a potentially dangerous situation may have existed: the children were found alone, outside of a gas station in downtown Louisville, in the middle of the night. Therefore, Sergeant Oberhausen's testimony was directed at explaining police procedure at the time in issue, rather than pertaining to the ultimate question of abuse of the children or guilt or innocence of Jackson. We hold that the trial court's admission of this testimony was not an abuse of discretion.

ii) Why Sergeant Oberhausen remembered the night that the children made contact with the police.

Sergeant Oberhausen testified during trial that she "very vividly" remembered the night that Emily, Andrew, and Jared called the police. The Commonwealth then asked her why she remembered that night, and Jackson objected. At the subsequent bench conference, Jackson argued that "why Sergeant Oberhausen remembered that night" was irrelevant to prove the

elements of the crimes for which Jackson was charged. The Commonwealth responded that the testimony's relevancy went to the credibility of Sergeant Oberhausen's testimony. The Court then ruled that, because Jackson, in his opening statement, challenged the accuracy of Andrew's characterization of the events that occurred that night, it would overrule his objection. Jackson now argues that the testimony's admission was error because it was not relevant and improperly bolstered Emily's testimony.

Jackson does not direct this Court to what portion of Emily's testimony Sergeant Oberhausen bolstered, and our review of the record does not uncover any improper bolstering within her testimony. Thus, we discern that Sergeant Oberhausen's testimony did not bolster Emily's testimony.

However, we agree that the complained-of testimony was not relevant. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." KRE 401. "Evidence which is not relevant is not admissible." KRE 402.

Sergeant Oberhausen's testimony about why she remembered the night in question did not make any fact of consequence to the determination of this action more or less probable. *See* KRE 401. Therefore, the testimony was not relevant and its admission constituted error. However, this error was harmless because Sergeant Oberhausen did not indicate what significance her vivid memory of the children's call had. She merely stated that some calls "stick with you" more than others, not why this run stuck with her. Furthermore, we

note that Jackson, during his opening statement, commented about the children living a "chaotic" life, in addition to alluding to the heartbreaking conditions of the children. Thus, Jackson was not disadvantaged by Sergeant Oberhausen's testimony. We hold that, while error, this error was harmless.

E. The trial court erred by refusing to admonish the jury following the Commonwealth's attempt at defining "reasonable doubt." However, that error was harmless.

During closing argument, the Commonwealth's Attorney stated: "Reasonable doubt. It is not beyond all possible doubt, it's not beyond a shadow of a doubt." Jackson objected, the parties approached the bench, and the trial court sustained the objection. Jackson then requested that the court admonish the jury. The court refused to admonish the jury, instead, instructing the Commonwealth's attorney to "clean it up a bit."

This Court reviews improper comments regarding reasonable doubt for harmless error. *Johnson v. Commonwealth*, 184 S.W.3d 544, 550 (Ky. 2005). "Once it bec[omes] clear that an improper argument ha[s] been made, it [i]s error for the trial court to deny the request for an admonition. Delegating the task of correcting the mistake to the prosecutor [i]s an unacceptable alternative." *Commonwealth v. Tramble*, 409 S.W.3d 333, 339 (Ky. 2013).

However, this court has held that "[t]ruthfully pointing out that a 'shadow of a doubt' is different from 'beyond a reasonable doubt' is not an attempt to define reasonable doubt." *Rice v. Commonwealth*, No. 2004-SC-1076-MR, 2006 WL 436123, at *7 (Ky. Feb. 23, 2006). In *Rice*, the Commonwealth stated: "I can't tell you what 'beyond a reasonable doubt' is. I

can't define it. I can tell you it is not 'beyond a shadow of a doubt, . . .'" *Id.* at *5. We discern no difference between the substance of the Commonwealth's comments in *Rice* and its comments in the present matter. The Commonwealth's comments were extremely brief and were cut short prior to the Commonwealth's attorney completing her thought; thus, her comments were not improper.

Therefore, we hold that the trial court did not err in refusing to admonish the jury following the Commonwealth's comments. We note, however, that, while the facts of the instant matter are such that reversal is not warranted, we caution that "[c]ounsel should be mindful that upon the occurrence of a bona fide violation of the *Callahan* rule, a reversal will result." *Simpson v. Commonwealth*, 759 S.W.2d 244, 226 (Ky. 1988).

IV. CONCLUSION

For the foregoing reasons, the judgment of the Jefferson Circuit Court in this matter is affirmed.

All sitting. All concur.

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