

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001172-MR

RUSSELL ADKINS

APPELLANT

v. APPEAL FROM MADISON CIRCUIT COURT
HONORABLE WILLIAM T. JENNINGS, JUDGE
ACTION NO. 01-CR-00151

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: EMBERTON, CHIEF JUDGE; SCHRODER AND TACKETT, JUDGES.
EMBERTON, CHIEF JUDGE. Russell Adkins was convicted of second-degree burglary, second-degree assault, and violation of a protective order. The victim, Adkins' ex-wife, testified that on the evening of September 5, 2001, Adkins entered her residence, viciously beat her, struck her in the head with a hard object, choked her, and threatened to kill her. Adkins alleges that during voir dire the trial court erroneously permitted the Commonwealth to define reasonable doubt; an

instruction should not have been given on second-degree assault; and, that the trial court erred in refusing to give a missing evidence instruction. We affirm.

The Commonwealth asked prospective jurors whether any "would hold the Commonwealth to some higher standard such as beyond all doubt or beyond a shadow of a doubt." In Commonwealth v. Callahan,¹ the court established the precedent that:

Prospectively, trial courts shall prohibit counsel from any definition of "reasonable doubt" at any point in the trial, and any cases in this jurisdiction to the contrary are specifically overruled. (Emphasis original.)

Subsequently, in Marsch v. Commonwealth,² the court held it error when counsel explained to the jury that there is a significant distinction between reasonable doubt and beyond all, or a shadow of, a doubt. However, in a capital murder case, Sanders v. Commonwealth,³ the court considered the following question posed by the Commonwealth during voir dire:

In a criminal trial, do you realize that the Commonwealth has the burden of proving the defendant guilty beyond a reasonable doubt, that does not mean beyond all doubt or a shadow of a doubt? Would any of you all hold the Commonwealth to a higher

¹ Ky., 675 S.W.2d 391, 393 (1984).

² Ky., 743 S.W.2d 830, 833 (1987).

³ Ky., 801 S.W.2d 665, 671 (1990).

standard of proof than the reasonable doubt standard?

In response to the appellant's allegation of unpreserved error, the court stated:

Appellant now insists (although the issue was not preserved by contemporaneous objection) that within the first quoted question lies an attempted definition of the phrase "reasonable doubt," in violation of the rule established in *Commonwealth v. Callahan*, Ky., 675 S.W.2d 391 (1984), that "all counsel shall refrain from any expression of the meaning or definition of the term 'reasonable doubt.'" Assuming, without deciding, that an error would have occurred had objection been raised and overruled, we are wholly unconvinced, considering the circumstances, that absent this putative error the defendant may not have been found guilty of a capital crime, or the death penalty may not have been imposed.⁴ (Footnote omitted.)

We do not believe that simply asking prospective jurors if they could decide the case according to the reasonable doubt standard is tantamount to offering a definition of the term. Even if we were to assume, however, that stating that reasonable doubt is a lower standard than beyond all doubt or beyond a shadow of a doubt, without further definition, violates the prohibition stated in Callahan, under Sanders it does not constitute reversible error. Absent the Commonwealth's question concerning reasonable doubt, we are not convinced that the

⁴ Id.

result in this case would have been different and any error was harmless.

Adkins' complaint regarding the second-degree assault instruction is unpreserved. Not only did he not object to the instruction but also tendered a second-degree assault instruction.⁵ Adkins contends that this court should review the error under the palpable error rule.⁶ Even a cursory review of the record demonstrates that the instruction was warranted. The victim testified that she was struck in the head with a hard object and the photographs depicted that her injuries were severe. There was sufficient evidence to support a reasonable juror's conclusion that Adkins used a dangerous instrument to attack his victim.

It was the Commonwealth's position at trial that Adkins forcibly entered the victim's residence through a trailer door. Marks on the doorframe were linked to a screwdriver found in close proximity to the trailer. Also found near the trailer was a black hat identified by the victim as one worn by Adkins. Photographs of the doorframe were taken but prior to trial, and during a relocation of the police department, the doorframe was thrown away. The police apparently lost the black hat. Adkins maintains that he was entitled to a missing evidence

⁵ Kentucky Rules of Criminal Procedure (RCr) 9.54.

⁶ See RCr 10.26.

instruction. In Estep v. Commonwealth,⁷ the court set forth the standard for determining whether an accused is entitled to such an instruction:

Several principles emerge from the evolution of our case law on this subject. First, the purpose of a "missing evidence" instruction is to cure any Due Process violation attributable to the loss or destruction of *exculpatory* evidence by a less onerous remedy than dismissal or the suppression of relevant evidence. Thus, there is no basis for an instruction permitting the jury to infer that missing evidence, if available, would be adverse to the defendant and favorable to the Commonwealth. See *South Carolina v. Katzenbach*, 383 U.S. 301, 323-24, 86 S.Ct. 803, 816, 15 L.Ed.2d 769 (1966). ("The word 'person' in the context of the Due Process Clause of the Fifth Amendment [and, presumably, the Fourteenth Amendment] cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union. . . ."). Second, the Due Process Clause is implicated only when the failure to preserve or collect the missing evidence was intentional and the potentially exculpatory nature of the evidence was apparent at the time it was lost or destroyed. None of the above precludes a defendant from exploring, commenting on, or arguing inferences from the Commonwealth's failure to collect and preserve *any* evidence. It just means that absent some degree of "bad faith," the defendant is not entitled to an instruction that the jury may draw an adverse inference from that failure. (Emphasis original.)

The Due Process Clause is not implicated by the failure of the state to preserve evidentiary material so that it

⁷ Ky., 64 S.W.3d 805, 810 (2002).

could be subjected to tests, the results of which might, or might not, have exonerated the defendant.⁸ The evidence in this case, the doorframe and the hat, were unintentionally lost or destroyed by officers or non-official personnel. In neither event is it alleged that the acts were done with the intent to destroy exculpatory evidence. Critical to Adkins' argument is his failure to demonstrate how the presence of the missing items or test results would exonerate him. We find no error.

The judgment is affirmed.

ALL CONCUR.

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⁸ Collins v. Commonwealth, Ky., 951 S.W.2d 569, 572 (1997).