

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2002-CA-001265-MR

BOBBY RAY DICKS

APPELLANT

v. APPEAL FROM WARREN CIRCUIT COURT  
HONORABLE THOMAS R. LEWIS, JUDGE  
ACTION NO. 01-CR-00402

COMMONWEALTH OF KENTUCKY

APPELLEE

### OPINION

### VACATING AND REMANDING

\*\* \*\* \* \* \*

BEFORE: COMBS, McANULTY, AND PAISLEY,<sup>1</sup> JUDGES.

McANULTY, JUDGE. Bobby Ray Dicks (hereinafter appellant) appeals his conviction in the Warren Circuit Court for two counts of assault in the first degree, operating a motor vehicle while under the influence of intoxicants, and operating on a suspended license. Appellant was sentenced to eighteen years imprisonment. On appeal, appellant raises various claims of error. We agree that there was error in the trial of this case, and so we vacate the conviction and remand for retrial.

---

<sup>1</sup> Judge Paisley voted in this matter prior to his retirement effective December 1, 2003.

On April 3, 2001, at approximately 8:30 a.m., the truck in which appellant and his friend, Mark Oakes, were driving crossed the center line of Scottsville Road in Warren County and struck a vehicle driven by Christy York. York was accompanied by her fiancé and two-year-old child. A third vehicle operated by Julie Garmon then crashed into those vehicles after the truck and York's car collided. Appellant admitted at the scene that he had been drinking, but his defense at trial was that he was not the driver that morning. Numerous witnesses testified that appellant was in the driver's seat after the wreck, but only Oakes testified to observing him driving the vehicle.

Appellant first argues that his due process right to a fair trial was violated when the prosecutor discussed reasonable doubt during voir dire. Appellant made no objection, however, at the time of the prosecutor's statements, but argues that it was a palpable error pursuant to RCr 10.26. The rule is that counsel shall refrain from any expression of the meaning or definition of the phrase "reasonable doubt," although counsel can point out to the jury whether or not the evidence creates reasonable doubt. Commonwealth v. Callahan, Ky., 675 S.W.2d 391, 393 (1984).

The prosecutor did not define reasonable doubt in this case so much as inform the jury what reasonable doubt is *not*.

The Commonwealth Attorney told the jury that the burden of proof in Kentucky is not "beyond a shadow of a doubt." He explained that the standard is beyond a reasonable doubt, but that the phrase would not be defined for the jury. The Commonwealth Attorney continued by saying that he had heard of a jury acquitting because they were not "100% sure." He stated that the prosecution did not have to prove "100%", but to prove the case beyond a reasonable doubt.

In Sanders v. Commonwealth, Ky., 801 S.W.2d 665, 671 (1990), a prosecutor similarly informed the jury during voir dire that "beyond a reasonable doubt" was not the same as beyond all doubt or beyond the shadow of a doubt. There was no contemporaneous objection in that case. The Supreme Court did not decide whether it would have been error if properly objected to, but concluded that it was harmless in that case. Id. In the case at bar, we do not need to reach the decision whether it was palpable error because we reverse on other grounds. We advise, however, that the parties should refrain from any sort of explanation of reasonable doubt, even by discussing other standards relative to it, in order to follow the directives of Callahan and its progeny.

Appellant next argues that his due process rights were violated by the Commonwealth's failure to preserve the truck from the accident as evidence. Appellant stated he wanted to

run tests on the truck for fingerprint and DNA evidence. He filed a motion in district court to preserve the truck, but the court never entered an order to that effect. Appellant relies on a district court order, entered before his preliminary hearing, for the Commonwealth to "preserve all evidence being held by them." The Commonwealth responds that the truck was not in the custody of the police at the time of the order to preserve, but was being held by a towing company. The truck was owned by Mark Oakes. Oakes sold the truck after it was returned to him.

The rule governing this situation is that absent a showing of bad faith, the Due Process clause is not implicated by the state's failure to preserve "evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." Collins v. Commonwealth, Ky., 951 S.W.2d 569, 572 (1997); Estep v. Commonwealth, Ky., 64 S.W.3d 805, 809-10 (2002). Appellant alleges bad faith on the part of the Commonwealth, but we do not agree that bad faith was shown. The truck was not in the possession of the Commonwealth, and the district court did not enter an order requiring that the Commonwealth impound the truck or otherwise preserve that evidence. Furthermore, appellant's argument that the truck contained exculpatory evidence was merely speculative. We agree

with the circuit court that appellant's claim of a due process violation is unfounded.

Appellant's third claim of error was that the trial court erred in overruling his request for a mistrial after the Commonwealth improperly introduced other crimes evidence. The Commonwealth called Mark Oakes to testify. During cross-examination, defense counsel asked Oakes how late he had been drinking in the hotel room the night before the accident. Oakes responded that he may have fallen asleep that night, then got up and fixed himself another drink, but did not think he was still drinking after midnight. Defense counsel stated, "Well, I'm kind of confused because after midnight you were in the Warren County jail, is my understanding. Is that correct?" The witness responded that might have been what occurred that night, but he did not think he was still drinking after midnight.

On redirect examination, the Commonwealth Attorney, to refresh the witness' recollection, showed him the Warren County jail intake form which showed that Oakes was in jail on April 2 at 12:42 a.m., not April 3. The witness said he thought it was the night before. The Commonwealth Attorney continued, "And by the way, there is an identical intake form for Bobby Ray Dicks so I take it y'all were arrested together." The witness responded affirmatively. Appellant objected to the prior crimes evidence and the lack of KRE 404(c) notice. The trial court

overruled on the basis that appellant opened the door to the information that he was in jail. Appellant again objected, stating that appellant only opened the door to evidence that the witness was in jail, and asked for a mistrial. The court denied the motion for mistrial. The Commonwealth's redirect went on to clarify that appellant and Oakes were not in the jail the night before the accident, but two nights prior.

On appeal, appellant argues that the Commonwealth failed to give proper KRE 404(c) notice and the evidence admitted on redirect did not fall into any of the KRE 404(b) exceptions. The Commonwealth did not have to give notice in this instance. KRE 404(c) only requires pretrial notice when the prosecution intends to introduce other crimes evidence as part of its case-in-chief. This clearly was not introduced during the Commonwealth's case-in-chief.

We agree with appellant that evidence that appellant was in jail with Oakes did not fit within any of the KRE 404(b) exceptions for other crimes evidence. Moreover, we do not agree with the trial court that appellant's cross-examination opened the door to this evidence. Appellant only asked the witness about his own confinement in the jail. Furthermore, it was gratuitous for the Commonwealth to ask the witness about appellant's being in jail since it was not essential for clarification of defense questioning of the Commonwealth's

witness. We believe that the only purpose of the evidence was to show the criminal disposition of appellant. On retrial, this type of evidence which does not comply with KRE 404(b) must be excluded.

Next, appellant argues that the trial court erred in denying his motion to exclude his medical records on the ground that the Commonwealth did not properly comply with KRS 422.315 in obtaining them. The trial court concluded after a hearing that non-compliance with the statute did not require exclusion. This was error. The Kentucky Supreme Court has held that the result of noncompliance is exclusion of the records. Smith v. Commonwealth, Ky., 788 S.W.2d 266 (1990). Thus, it was reversible error to allow the evidence in this case. On remand, the evidence may be admissible if the Commonwealth properly complies with the applicable statutes.

Appellant also argues that it was error for the Commonwealth to call a witness in rebuttal that it should have called during its case-in-chief. We agree and conclude that this was also reversible error. The Commonwealth called in rebuttal an emergency room nurse who treated appellant to testify that appellant had admitted to her that he had been driving the morning of the accident.

Kentucky's highest court has held that the Commonwealth should not be permitted to withhold important

evidence until near the close of the trial, and then introduce it in the guise of rebuttal evidence. Wager v. Commonwealth, Ky., 751 S.W.2d 28, 29 (1988), citing Gilbert v. Commonwealth, Ky., 633 S.W.2d 69, 71 (1982). In Wager, the Commonwealth introduced surprise evidence of a jailhouse confession as rebuttal evidence rather than in its case-in-chief. The Court noted that any out-of-court statement that may reasonably be interpreted as an admission of guilt is admissible in chief as affirmative evidence of guilt, and "should not be introduced in rebuttal under the guise of contradicting or impeaching the defendant in his capacity as a witness." Id.; see also Robinson v. Commonwealth, Ky., 459 S.W.2d 147 (1970). The Court also found that the evidence was highly prejudicial and was introduced at the point where it would have the most impact. Wager, 751 S.W.2d at 29. Such evidence may be deemed non-prejudicial, nevertheless, if the substantive evidence introduced in rebuttal was cumulative of that presented during the Commonwealth's case-in-chief. Humphrey v. Commonwealth, Ky., 836 S.W.2d 865 (1992).

We agree that in this case the disputed evidence, in the nature of an admission, was of the type to be introduced in the Commonwealth's case-in-chief. Wager and Robinson instruct that the Commonwealth's use of it as rebuttal evidence was unfairly prejudicial. We further conclude that the evidence was

not merely cumulative of the evidence in the case-in-chief. Other Commonwealth witnesses placed appellant in the driver's seat in the accident, but this was the sole evidence that appellant acknowledged driving. The use of this evidence as rebuttal was error.

Finally, appellant argues that during the persistent felony offender portion of sentencing, the Commonwealth presented impermissible evidence of facts underlying a previous felony conviction. Appellant did not object, but argues that this occurrence created a manifest injustice pursuant to RCr 10.26. We find no error. The disputed evidence was admitted when the deputy circuit court clerk read the record of appellant's conviction in Tippecanoe County, Indiana, for operating a motor vehicle while intoxicated. The clerk read the following condition: "Further condition of the defendant's probation is that the defendant make restitution to American States Insurance Company in the sum of \$540.00. Said restitution to be supervised by the Probation Department of Tippecanoe County." In closing argument, the Commonwealth informed the jury that the restitution order meant that appellant was involved in a motor vehicle accident as part of that conviction. There was no objection to the evidence or the argument.

On appeal, appellant argues that the Commonwealth may not discuss prior convictions at length during the persistent felony offender portion of the trial, and information about the facts and circumstances surrounding the charge are disallowed. He claims he was prejudiced by the information that his prior offense also involved a car crash.

Under the Truth-in-Sentencing statutes, the Commonwealth may offer evidence relating to the nature of prior offenses for the combined PFO/Truth-in-Sentencing phase of trial. Maxie v. Commonwealth, Ky., 82 S.W.3d 860, 865-66 (2002). Evidence which provides a "general description" of the crime charged is within the scope of admissible evidence. Id. at 866. We conclude that the evidence provided by the circuit court clerk which referred to restitution was proper evidence relating to the nature of the prior offense.

For the foregoing reasons, we vacate and remand for further proceedings consistent with this opinion.

COMBS, JUDGE, CONCURS.

PAISLEY, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:

Linda Roberts Horsman  
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III  
Attorney General of Kentucky  
Frankfort, Kentucky

George G. Seelig  
Assistant Attorney General  
Frankfort, Kentucky