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NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2008-CA-002212-MR

JEREMY RICE

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE PAMELA R. GOODWINE, JUDGE  
ACTION NO. 04-CR-00300

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
REVERSING AND REMANDING

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BEFORE: KELLER, MOORE AND STUMBO, JUDGES.

STUMBO, JUDGE: Jeremy Rice appeals from an order of the Fayette Circuit Court denying his RCr 11.42 motion alleging ineffective assistance of counsel. Rice makes a number of arguments, but one is dispositive of this appeal. He argues that he was denied his right to counsel when trial counsel failed to appear at a critical stage of the proceedings. We agree and reverse and remand this case for a new trial.

The facts as recited by our Supreme Court on direct appeal were as

follows:

On the night of April 24, 2003, Tammy Sanders and her boyfriend, Chris Manley, were inside their home when an unknown stranger knocked on their front door between 10:00 p.m. and 11:00 p.m. Ms. Sanders opened the door and let the stranger, Wanda Hughes, into her home. Ms. Hughes stated that she was lost and asked if she could use the telephone. Ms. Sanders obliged, and thus allowed Ms. Hughes to use her phone. Apparently, Ms. Hughes was unsuccessful in reaching the other party on the line, and she left the house shortly thereafter.

Shortly after 11:00 p.m. on that same night, Ms. Sanders and Mr. Manley heard another knock at their front door. Ms. Sanders answered the door and discovered that it was Ms. Hughes once again. This time, Ms. Hughes asked Ms. Sanders if she was familiar with the location of a particular address. She was not familiar with the address and then proceeded to call Mr. Manley from the bedroom to see if he possibly recognized it. At that point, a person entered into the house wearing a mask and carrying a gun. While being ordered to lie down on the floor, Ms. Sanders was hit in the back, causing her to fall and dislocate her arm. While on the ground, she noticed several other masked individuals entering her residence as well.

Mr. Manley was located in the hallway of the house, where he proceeded to raise both of his hands upon seeing the masked men. While on the floor, Ms. Sanders heard a loud noise followed by Mr. Manley yelling that he had been shot. The masked men asked both Manley and Sanders where they kept the drugs, money, and “good stuff.” Ms. Sanders told them she did not know what they were talking about, and offered them instead her purse and where to find her jewelry in the house. Eventually, the assailants picked up a few items and proceeded to leave the residence.

At trial, the testimony of Chris Manley and Tammy Sanders was very similar. Mr. Manley testified that he encountered one of the intruders in the hallway. This intruder pointed a gun at Mr. Manley, demanding that he give him money and drugs. The assailant backed Mr. Manley into the bedroom where he ordered him to get down on the floor. Soon after Mr. Manley complied, the burglar shot him in the leg. Mr. Manley testified at trial that two other assailants entered the bedroom, with one putting a gun to the victim's head and the other taking change that the couple had been saving.

Neither Ms. Sanders nor Mr. Manley could identify the individuals who violently entered their residence on the night of April 24, 2003. However, Ms. Sanders was able to recognize Wanda Hughes from a photographic line up. Following the identification, Ms. Hughes was arrested and agreed to help the local authorities find the other individuals involved. While Ms. Hughes aided the police in identifying three of the participants, she was not able to positively identify Appellant as being at the crime scene. However, a co-conspirator in the robbery, Arian Brown, did testify that the Appellant was an active participant in the robbery.

On March 8, 2004, a Fayette County Grand Jury indicted Appellant on one count of robbery in the first degree, one count of burglary in the first degree, and one count of being a persistent felony offender in the second degree. The indictment included several co-conspirators as well. In addition, Appellant was charged with assault in the first degree for shooting Mr. Manley. A trial commenced in July 2004, with Appellant and two other co-defendants being charged for their participation in the burglary. Appellant was ultimately acquitted of assault in the first degree, but the jury was hung on the remaining charges of robbery in the first degree, burglary in the first degree, and being a persistent felony offender in the second degree.

A second trial was scheduled for December 14, 2005, in which Appellant was to be tried along with another co-defendant. However, the other co-defendant accepted a

plea agreement with the Commonwealth prior to the commencement of trial. Appellant was therefore tried on the charges by himself. The jury found Appellant guilty of robbery in the second degree and burglary in the second degree. In addition, the jury found Appellant to be a persistent felony offender and recommended that the ten year sentence for robbery and ten year sentence for burglary both be enhanced to twenty years. Thus, the jury recommendation, accepted by the trial judge, was that Appellant serve a total of forty years.

*Rice v. Commonwealth*, 199 S.W.3d 732, 733 -734 (Ky. 2006).

Rice appealed his conviction, but it was affirmed by the Kentucky Supreme Court. Rice thereafter filed a motion to vacate his conviction pursuant to RCr 11.42 on the grounds that he had ineffective assistance of counsel. The circuit court denied the motion without a hearing. This appeal followed.

The only argument we need address is Rice's first one. He argues that he was denied assistance of counsel at a critical stage in his trial when his trial counsel missed a pretrial hearing. "It is well-settled that a criminal defendant has a right to be represented by counsel that extends beyond the actual trial to every critical stage of the proceedings." *Stone v. Commonwealth*, 217 S.W.3d 233, 237 (Ky. 2007).

. . . The U.S. Supreme Court has defined a 'critical stage' in various terms: "any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial; a "moment when available defenses may be irretrievably lost, if not then and there asserted[;]" a period when counsel's attendance is necessary to "mount a meaningful defense[;]" a stage when "potential substantial prejudice to defendant's rights inheres in the . . . confrontation and the ability of counsel to help avoid that prejudice[.]"

Thus, an analysis of a critical stage necessarily involves a retrospective inquiry as to the nature and consequences of each step in the proceedings. Particular attention must be given to how counsel would have benefited the defendant at these moments. In other words, was there the likelihood that representation by counsel would have benefited Appellant?

The denial of counsel at a critical stage is not subject to harmless error analysis once a lawyer-less stage has been deemed as critical. “It is settled that a complete absence of counsel at a critical stage of a criminal proceeding is a *per se* Sixth Amendment violation warranting reversal of a conviction, a sentence, or both, as applicable, without analysis for prejudice or harmless error.” (Internal citations omitted).

*Id.* at 238.

Our analysis begins with discussing what took place during the pretrial hearing. The hearing took place the day before trial. During that hearing, a number of evidentiary issues were discussed; primary among them was whether the fact that Rice had been acquitted of the assault could be disclosed to the jury. Connected to that was the issue of whether it could be testified to that Rice was the one who shot Mr. Manley. Since Rice had been acquitted of the assault, the court found these issues too prejudicial to the two defendants. The shooting was prejudicial to Rice because he had been acquitted. The trial judge felt it was prejudicial to Rice’s co-defendant because the jury may want to punish him for the assault since Rice could not be. However, since the shooting occurred during the robbery, the Commonwealth argued the shooting should be allowed to be discussed. The judge crafted a solution, allowing testimony that Rice had a gun,

went toward the back of the house to where Mr. Manley was located, and that a shot was heard. Rice was not able to fully participate in these discussions because he was without counsel. At one point, Rice requested that the trial judge explain her ruling stating that he was confused and that without his counsel being present he was having a hard time understanding.

Also, during this hearing, Rice's co-defendant moved to exclude evidence that Ms. Sanders was pregnant at the time of the burglary. Because Rice's counsel was not present at this hearing, he was unable to join in the motion. The trial court refused to exclude this evidence. Rice appealed this issue to the Kentucky Supreme Court which held that because he did not join in the motion, it was not preserved for review, *Rice* at 738, but ultimately held it was still admissible.

Further, during this hearing, the trial court stated that an admonishment would be given to the jury that neither of the defendants was on trial for the shooting of Mr. Manley. This admonishment was never given at trial. This issue was also appealed to the Supreme Court. The Court found no error, but also stated that Rice had a duty to speak up and remind the court about the admonition. *Id.*

A number of evidentiary matters were discussed and Rice was unable to meaningfully participate in the hearing because he was without counsel. Evidentiary issues are important to trials. Had Rice's counsel been at the hearing, Rice's defense could have benefited. Counsel may have reminded the court about

the promised admonishment, helped craft the shooting evidence in a more favorable way for Rice, and joined in the motion regarding the pregnancy.

Although the Kentucky Supreme Court discussed some of these issues and found no prejudice to Rice or no trial court error, we do not analyze this lack of counsel issue in terms of prejudice or error. If this was a critical stage of the proceedings, the lack of counsel was a *per se* violation of the Sixth Amendment. We find this was a critical stage and reverse Rice's conviction.

Rice's other arguments are moot because we are granting him a new trial.

For the forgoing reasons, we reverse and remand this case to the trial court for a new trial.

KELLER, JUDGE, CONCURS IN RESULT ONLY.

MOORE, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

MOORE, JUDGE, DISSENTING: Respectfully, I must dissent. I do not believe that the pre-trial hearing for which Rice's counsel was absent constituted a "critical stage" of the proceedings, pursuant to *Van v. Jones*, 475 F.3d 292, 312 (6th Cir. 2007). *See also Stone v. Commonwealth*, 217 S.W.3d 233, 238 (Ky. 2007). There is no reason why Rice's attorney could not have objected to the admission of the evidence during trial, or requested admonitions to the jury concerning the evidence. Therefore, because there was a chance to rectify during trial the fact that the evidence was introduced, the pre-trial hearing that was

conducted the day before trial cannot constitute a “critical stage” of the proceedings.

Alternatively, even though the “absence of counsel at a critical stage of a criminal proceeding is a *per se* Sixth Amendment violation warranting reversal of a conviction, a sentence, or both, as applicable, without analysis for prejudice or harmless error,” the Kentucky Supreme Court has explained that “in determining whether a particular stage was critical, [the] Court must undertake an analysis that is similar to an inquiry for actual prejudice.” *Stone*, 217 S.W.3d at 238. In the present case, on direct appeal, the Kentucky Supreme Court determined that the trial court did not err in admitting the evidence at issue. Therefore, because the trial court committed no error in admitting the evidence, it logically follows that Rice was not prejudiced by the admission of that evidence. Consequently, because there was no actual prejudice, the pre-trial hearing, where the court determined that the evidence was admissible, was not a critical stage. Thus, the absence of Rice’s counsel from that hearing did not constitute a constitutional violation.

Moreover, based upon the circuit court’s order denying Rice’s RCr 11.42 motion and the Commonwealth’s brief on appeal, I question whether Rice’s arguments on appeal regarding the absence of his counsel from the second pre-trial hearing are the same arguments that he raised in the circuit court. The Commonwealth contends that Rice’s bases for his absence of counsel arguments are different on appeal than those that he presented in the circuit court.



Additionally, regarding his claim that his counsel was absent from the second pre-trial hearing, the circuit court's order denying his RCr 11.42 motion states as follows:

Rice alleges that trial counsel was not aware of the existence of an audiotape interview between [his co-defendant] and a detective. Rice has not provided any evidence to support his argument that trial counsel did not know about the tape. . . . Rice has failed to show what new information would have been obtained by trial counsel had he been present at [the] hearing[.]

Based on the circuit court's foregoing analysis, it does not appear that Rice presented the same arguments regarding his absence of counsel claim in the circuit court as he raises on appeal. Thus, we should not consider these arguments for the first time on appeal. *See Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976) ("The appellants will not be permitted to feed one can of worms to the trial judge and another to the appellate court."). Accordingly, I would not reverse for a new trial based upon this issue.

I pause to note that while the appellate court should not micromanage the circuit court's controlling of its own docket, holding a pre-trial hearing in the absence of defense counsel lends itself to the likelihood of a request for appellate review.

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