

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000557-MR

MICHAEL SAMS

APPELLANT

v. APPEAL FROM JACKSON CIRCUIT COURT
HONORABLE OSCAR G. HOUSE, JUDGE
ACTION NO. 12-CR-00003-001

COMMONWEALTH OF KENTUCKY

APPELLEE

AND

NO. 2013-CA-000566-MR

NITA HACKER

APPELLANT

v. APPEAL FROM JACKSON CIRCUIT COURT
HONORABLE OSCAR G. HOUSE, JUDGE
ACTION NO. 12-CR-00003-002

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON, LAMBERT, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Michael Sams appeals from the March 6, 2013, judgment and sentence of the Jackson Circuit Court which found him guilty of first-degree robbery and sentenced him to twelve-years' imprisonment. Nita Hacker appeals from the March 6, 2013, judgment and sentence of the Jackson Circuit Court which found her guilty of criminal complicity to commit first-degree robbery and sentenced her to ten-years' imprisonment. We affirm both judgments.

The underlying events from which appellants' indictments arose took place on June 23, 2011, when Jackson County Sheriff Denny Peyman and Deputy Keith Berry responded to a call that a man was being held at knife-point in an apartment located in the Annville community in Jackson County. Appellants lived together in the apartment. Upon arrival, the officers heard loud shouting coming from the apartment. The officers entered the apartment, where they witnessed Sams holding a long stick with a knife attached on one end towards Doug Vaughn, appellants' landlord, who was sitting on a couch. Both Sams and Hacker were yelling at Vaughn. The officers disarmed Sams and proceeded to investigate the dispute.

The parties' versions of the relevant facts are in dispute. We will examine Vaughn's version first. Vaughn told the officers that he had been called

to the apartment by appellants, where he was robbed at knife point. At trial, Vaughn testified that he rented the apartment to Hacker and Sams moved in with Hacker shortly thereafter. After moving in, Sams inquired of Vaughn as to whether he had any work that Sams could perform for him. Vaughn eventually agreed to hire Sams to perform weed-eating work on Vaughn's farm. On the morning of June 23, 2011, Vaughn arrived at the apartment to pick up Sams to take him to his farm. Vaughn was informed by Hacker that Sams had gone "junking" with his friend. Vaughn then left the premises. About two hours later, Vaughn claims he received a phone call on his cell phone from Hacker who was calling from a local auto-parts store. Hacker asked Vaughn to return to the apartment so they could talk. Hacker also indicated to Vaughn that her faucets were leaking and Vaughn agreed to return. Vaughn arrived at the apartment and Hacker asked him to sit down. Hacker then exposed herself to Vaughn and Vaughn said he was leaving. Hacker then said "well, here we go!" At that time, Sams appeared from the bedroom brandishing a stick with the knife attached. Vaughn testified that Sams held the knife at Vaughn's stomach, accused him of trying to rape Hacker, and threatened to kill him. Sams told Vaughn to "pay the lady; treat her like a whore, pay her like one." Vaughn further testified that Sams explained his plan to kill Vaughn and say he had done it after discovering Vaughn raping Hacker. Sams then told Vaughn to pull down his pants and write a check to Hacker for \$10,000, to which Vaughn refused. Vaughn further testified that while being held at knife-point, Sams removed approximately \$385 from his shirt pockets. He estimated

that he was held for about forty minutes until Sheriff Peyman and Deputy Berry arrived.

Sams and Hacker's version of the facts is totally different from Vaughn's version. At trial, both Sams and Hacker testified that Vaughn had been making verbal and physical sexual advances towards Hacker after the couple had moved into the apartment. They further testified that Vaughn was late to pickup Sams for the weed-eating job on the day in question and arrived at the apartment at approximately 10:00 a.m., at which time Sams had made other plans to go junking. When Vaughn arrived at the door, Sams went to the bedroom but had instructed Hacker to get rid of Vaughn. Hacker testified that Vaughn entered the apartment and began discussing a price list for her to perform various sexual acts. Hacker informed Vaughn that she was not for sale and Vaughn continued to proposition Hacker for approximately forty-five minutes. After Vaughn left, the couple decided to call Vaughn back to the apartment to confront him and request that he stop harassing Hacker. Sams and Hacker went to a nearby auto-parts store where Hacker called Vaughn and requested that he return to the apartment. When Vaughn arrived at the apartment for the second time, appellants alleged that Vaughn propositioned Hacker again, placed money on a table and dropped his pants. Hacker further testified that Vaughn attempted to pull Hacker towards him. When this occurred, Sams alleged that he emerged from the bedroom and held Vaughn at bay with his knife until the police could arrive. Hacker and Sams

further testified that Vaughn threatened to kill them and that Vaughn subsequently offered to write them a check for \$10,000 for their silence.

Sams and Hacker were arrested and jointly indicted for first-degree robbery. Upon signing a waiver of multiple representation, both parties were represented by attorney Audrey Woosnam at trial.¹ A jury trial was held on February 12, 2013, during which the disputed facts were entered into evidence through the testimony of Sams, Hacker, and Vaughn. Sheriff Peyman and Deputy Berry also testified. In addition, William Pogue testified on behalf of the Commonwealth. Pogue testified that he was present inside the auto-parts store on the day in question when Sams and Hacker entered and asked to use the telephone. Pogue indicated that the store manager dialed a number for Hacker on a portable phone and then handed it to Hacker, whereupon she carried the phone outside. Pogue further testified that he witnessed Sams holding what appeared to be a stick with a knife attached to the end while standing with Hacker outside the store.

At the trial's conclusion, defense counsel made a statement in her closing argument regarding Pogue's testimony, which included the following:

Where did Mr. Pogue come from? He never talked to the sheriff. He never talked to the prosecutor before today. How did he know to be here? Someone had to tell him to be here. Mr. Vaughn told him to be here.

Sams' Brief at 7.

¹ The written waiver of multiple representation was tendered in open court by appellants' attorney on October 16, 2012, the original trial date set by the court.

Thereafter, following the Commonwealth's closing argument, the trial court commented on defense counsel's statement regarding Pogue, and instructed the jury that Pogue had been "recognized" by the trial court on October 16, 2012, to appear for trial, along with Vaughn, Sheriff Peyman, and Deputy Berry.² Following deliberations, the jury found Sams guilty of first-degree robbery and Hacker guilty of complicity to commit first-degree robbery. A sentence of twelve years was recommended for Sams and a sentence of ten years was recommended for Hacker. The trial court accepted the jury's recommendations and final judgment and sentencing was entered on March 5, 2013. These appeals followed.

Hacker and Sams first argue that the trial court's comments to the jury following defense counsel's closing argument constituted reversible error. Specifically, defense counsel argued to the jury that Pogue was not properly present at trial and his presence was effectively contrived by Vaughn to bolster his version of the facts in the case. The trial judge, knowing this statement to be in error, informed the jury that the court had previously recognized Pogue to appear. The judge's brief comments were prefaced with the acknowledgement that trial judges may not comment on the evidence to the jury. Hacker and Sams argue that

² At the original trial date on October 16, 2012, William Pogue was subpoenaed to the trial by Mrs. Vaughn. Kentucky Rules of Criminal Procedure 3.20 permits the trial judge to have each witness to enter into a recognizance before the judge that they will appear to testify at trial. All of the parties' witnesses, including Pogue, were recognized before the court on October 16, 2012, subject to a personal recognizance bond of \$500 for each witness to attend the trial, which was continued to February 12, 2013. All witnesses, including Pogue, appeared at the trial pursuant to the trial judge's recognizance.

the judge's comments misled the jury and impugned the credibility of their attorney in the eyes of the jury. We disagree.

It is well established that “a trial judge should remember that undue importance and great weight may be attached by the members of the jury to any remark made by [the trial judge] in their presence.” *Allen v. Com.*, 286 S.W.3d 221, 231 (Ky. 2009) (citation omitted). “However, [n]ot every utterance of doubtful propriety made by the court during the course of the trial results in prejudice.” *Id.*

Our review of the October 16, 2012, court proceedings confirm that Pogue was verbally instructed or recognized by the trial court to return to court to testify at the trial. The witnesses were sworn to a \$500 recognizance bond. Defense counsel was present in the courtroom on October 16, 2012, when Pogue was recognized to appear at the February trial. Defense counsel's comments in her closing argument regarding Pogue's appearance at trial were clearly in error and arguably misleading. More importantly, Sams and Hacker have failed to demonstrate how the trial court's comments prejudiced their defense. Pogue was on the stand for less than ten minutes and the trial court's statement was only directed at counsel's misstatement regarding Pogue's presence, not the substance of his testimony or any evidence presented. To the extent the trial court may have erred, that error was harmless. *Crossland v. Com.*, 291 S.W.3d 223 (Ky. 2009). Accordingly, Sams and Hacker's argument on this issue is without merit.

Sams and Hacker next assert that the trial court committed reversible error when it failed to explain to them the possibility of conflict that could arrive as a result of being jointly represented by the same attorney. Hacker further argues that as a result of the trial court's error, she did not knowingly and voluntarily waive her right to separate counsel, and further, she suffered actual prejudice as a result of the joint representation. Again, we disagree.

It is well-established that joint representation of criminal defendants is looked upon with disfavor in the Kentucky. Kentucky Rules of Criminal Procedure (RCr) 8.30. However, it is also well established that joint representation does not constitute a *per se* violation to the right of effective legal representation. *White v. Com.*, 671 S.W.2d 241 (Ky. 1983). Such representation is permissible, when two requirements are fulfilled:

(a) the judge of the court in which the proceeding is being held explains to the defendant or defendants the possibility of a conflict of interests on the part of the attorney in that what may be or seem to be in the best interests of one client may not be in the best interests of another, and

(b) each defendant in the proceeding executes and causes to be entered in the record a statement that the possibility of a conflict of interests on the part of the attorney has been explained to the defendant by the court and that the defendant nevertheless desires to be represented by the same attorney.

RCr 8.30(1). Here, the record contains the statement required of the defendants, but does not contain the verbal judicial explanation.

[The Supreme Court of Kentucky] held, however, that where neither the defendant nor his counsel objected to the representation, the trial court's failure to give the warning required by the rule and to obtain the defendant's waiver did not entitle the defendant to a new trial, **unless the defendant showed that his attorney's potential conflict of interest had materialized and had adversely affected his performance.**

Bartley v. Com., 400 S.W.3d 714, 719 (Ky. 2013) (emphasis added). In this case, counsel for Sams and Hacker filed the waiver in open court in October 2012, with the trial judge without any request or admonition. The trial proceeded in February 2013, accordingly. Contrary to her argument, Hacker has failed to show the materialization of any conflict of interest. She maintains that the joint representation made it impossible for her to engage in any potential plea agreement with the Commonwealth. This argument, however, is purely speculative and does not demonstrate that the alleged conflict affected her trial counsel's performance. *Id.* Accordingly, the trial court's failure to verbally caution Sams and Hacker against joint representation does not constitute reversible error.

For the foregoing reasons, the March 6, 2013, judgment and sentence of the Jackson Circuit Court is affirmed.

ALL CONCUR.

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