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NOT TO BE PUBLISHED OPINION

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RENDERED: MAY 5, 2016
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2015-SC-000038-DG

NITA HACKER — APPELLANT

V.

ON REVIEW FROM COURT OF APPEALS
CASE NOS. 2013-CA-000557-MR AND 2013-CA-000566-MR
JACKSON CIRCUIT COURT
NOS. 12-CR-00003 AND 12-CR-00003-002

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Nita Hacker appeals from the Jackson Circuit Court's judgment sentencing her to a ten-year prison term for complicity to first-degree robbery of her landlord, Doug Vaughn. Hacker argues that the trial court erred when it attempted to correct what it believed to be a misstatement made by defense counsel during closing arguments. According to Hacker, the court did not actually correct a misstatement of fact made by counsel but rather improperly commented on the evidence presented. Thus, Hacker argues that the court's statement to the jury deprived her of due process because it "destroyed" defense counsel's credibility in front of the jury. The Court of Appeals disagreed, holding that, while defense counsel's comments were in error, the trial court properly corrected this error and Hacker failed to show how the trial court's comments prejudiced her. For the following reasons, we affirm.

I. BACKGROUND

The parties dispute the majority of the facts; however, they agree on certain facts, which we set forth first.

In May 2011, Hacker rented an apartment owned by Vaughn. Michael Sams subsequently moved into the apartment with Hacker. Both Sams and Hacker were unemployed and, as a result, were struggling to pay rent, and Vaughn agreed to hire Sams to do some weed-eating work at Vaughn's farm. On the morning of June 23, 2011, Vaughn arrived at Hacker's apartment with the intention of picking up Sams to take him to the farm, but Hacker told Vaughn that Sams had decided to go "junking"[1] instead.

Later that day, Sams and Hacker went to a nearby auto-parts store to place a phone call to Vaughn. Hacker borrowed the phone from the store manager, went outside, called Vaughn, and asked him to return to her apartment. She then went back to the apartment with Sams. Shortly thereafter, Vaughn returned to the apartment. The parties dispute the events that took place in the apartment, but they agree that, when Jackson County Sheriff Denny Peyman and Deputy Keith Berry arrived, Sams was pointing a makeshift spear[2] at Vaughn, who was sitting on the couch.

A. Commonwealth's Facts

Vaughn testified that he arrived at Hacker's apartment at 8:20 a.m. on June 23, 2011, to pick up Sams so he could do weed-eating work. Hacker told

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[1] At trial, Sams described junking as scrap metal recycling.

[2] The spear in question is a long stick with what appears to be a kitchen knife duct taped to the end of it. Sams testified that he used it to hunt snakes with his son.

Vaughn that Sams was not there, so Vaughn left. Vaughn testified that he spent no more than eight to ten minutes at the apartment. At around 10:00 a.m. that day, Vaughn received a phone call from Hacker. She asked him to return to her apartment saying she wanted to talk and that her faucets were leaking. Vaughn claims that he was unarmed and brought only his tools with him to the apartment.

When Vaughn arrived at the apartment, Hacker insisted Vaughn sit down so they could talk before he fixed the faucets. Hacker sat across from Vaughn and exposed herself to him. Vaughn then indicated that he was leaving, at which point Hacker exclaimed, "Well, here we go!" Sams then rushed out of the bedroom while holding the spear and pointed it at Vaughn. Sams held the spear to Vaughn's stomach and face, cursed at him, and accused him of trying to rape Hacker. Sams told Vaughn to, "Pay the lady. Treat her like a whore, pay her like one." Sams also told Vaughn that he would kill him and get away with it because he would make it look as if Vaughn was trying to rape Hacker. Sams demanded Vaughn write a $10,000 check and pull his pants down, but Vaughn refused to do either. Sams also told Hacker to take $85 from Vaughn's right shirt pocket and $300 from his left shirt pocket, which Hacker did.

Shortly thereafter, Sheriff Peyman and Deputy Berry, who testified they were responding to a complaint that a man was being held at knife-point, arrived at the scene. It is unclear under this set of facts who placed the call to the police. Regardless, when the officers arrived at the apartment, they heard

loud screams coming from inside. Upon entry, the officers saw Sams pointing the spear at Vaughn, who was sitting on the couch, and Hacker, who was standing nearby. The officers disarmed Sams and ultimately arrested both him and Hacker and charged them with attempted robbery.

A witness for the Commonwealth, William Pogue, testified that he saw Hacker and Sams arrive at the auto-parts store that day. Pogue stated that he saw Hacker: come into the store; ask to use the phone; take the phone outside to place a call; and return the phone before leaving with Sams. Pogue also testified that Sams was carrying the spear.

B. Hacker's Facts

According to Hacker, Vaughn did not arrive at her apartment at 8:20 a.m. to pick up Sams, but at 10:00 a.m. Sams was in the apartment, but had already made plans to go junking and did not want Vaughn to know that he was home, so he stayed in the bedroom. Hacker answered the door and told Vaughn that Sams had gone junking. At that point, Vaughn attempted to solicit sex from Hacker, offering a "price list" for various sexual acts. Hacker refused, telling Vaughn that she was "not for sale." After roughly 30 to 40 minutes, Vaughn left the apartment.

After Vaughn left the apartment, Sams and Hacker decided they needed to confront Vaughn about his behavior and tell him that it needed to stop. The couple drove to the local auto-parts store to borrow a phone. Hacker used this phone to call Vaughn, telling him he needed to return to the apartment.

Hacker and Sams then returned to their apartment and waited for Vaughn. Both Hacker and Sams deny that Sams took the spear to the auto-parts store.

Shortly thereafter, Vaughn returned to Hacker's apartment. Vaughn arrived much quicker than either Sams or Hacker anticipated, and Sams was in the bedroom changing his clothes. Vaughn, unaware that Sams was in the other room, again attempted to solicit sex from Hacker. Hacker again refused, and Vaughn pulled down his pants and tried to push her head towards him. Hacker then screamed and Sams came out of the bedroom, grabbed the spear, pointed it at Vaughn, and demanded that Vaughn pull his pants up. Sams testified that he feared for his life because Vaughn had a gun, so Sams kept the spear pointed at Vaughn to keep him from reaching for his gun. Vaughn then offered to pay the couple $10,000 to keep his wife and the community from finding out what he had done.

Hacker, at Sams's direction, then ran to a neighbor's apartment and told her to call the police. Sams kept the spear pointed at Vaughn until the police came.

C. Trial, Sentencing, and Appeal

The Jackson County Grand Jury indicted Sams for first-degree robbery and Hacker for complicity to first-degree robbery. Sams and Hacker agreed to be tried together. On October 11, 2012, five days before the initial trial date, the Commonwealth advised Hacker's counsel that Pogue, who had not been mentioned in any discovery from the Commonwealth, had been subpoenaed to testify. Hacker's counsel attempted to speak with Pogue but he refused,

stating he had "been advised" not to speak with her or with her investigator. Defense counsel did not know who advised Pogue not to speak with her, but suspected it was someone from the Sheriff's office. Therefore, on the morning of the initial trial date, Hacker moved to dismiss the case or, in the alternative for an order excluding Pogue's testimony.

During a hearing on Hacker's motion, the Commonwealth's attorney indicated that he had never spoken with Pogue, he did not know Pogue, and he never advised him not to speak with anyone. When asked who had asked him to appear, Pogue stated that Vaughn's wife had subpoenaed him. When asked who advised him not to speak with the defense, Pogue stated that he "advised himself." Hacker's counsel then stated that she was withdrawing her motion to dismiss the case.[3] As to the defense's motion to exclude Pogue's testimony, the Commonwealth's attorney objected and stated that Pogue "apparently saw Mr. Sams with the knife and the stick . . . earlier in the day." When the court asked if this information was ever provided to the defense, the Commonwealth's attorney responded that "the Commonwealth did not know of Mr. Pogue's involvement in this case until last week." The court then gave the Commonwealth the option of continuing the trial or excluding Pogue's testimony from its case since Pogue had never been disclosed to the defense as a witness. The Commonwealth moved for the case to be continued, and the court denied Hacker's motion to exclude Pogue's testimony and continued the

[3] Although defense counsel stated that she was withdrawing her motion to dismiss, the record indicates that the court denied this motion.

trial until February 12, 2013. The court then "recognized"[4] Pogue and the other witnesses and advised them they were obligated to appear on February 12.

The parties appeared for trial again in February, and Pogue testified that he saw Sams holding the spear at the auto-parts store. During the defense's closing argument, counsel attempted to portray Pogue as a witness planted by Vaughn and Sheriff Peyman, who she claimed was a friend of Vaughn, stating as follows:

> The Sheriff told you that he talked to witnesses in this case: [Sams] and [Hacker], [Vaughn], and two neighbors. Nowhere did the Sheriff mention he talked to Bill Pogue. Bill Pogue, who says that he saw [Sams] with that stick and knife in front of the car parts store. 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. All of a sudden a year and a half later this man comes out of the blue, says he has got evidence which, if you believe it's true, doesn't look good for [Sams] and [Hacker]. Yet, a man with 20 years' law enforcement experience knows better, knows that if he has evidence, testimony he can bring, he needs to report it to someone. He can't keep it to himself. He knew better. Yet, he came into this court and told you the story that he did today.

The Commonwealth did not object to these statements, nor did it address any arguments concerning Pogue's testimony during its closing argument. However, following the conclusion of the Commonwealth's closing argument, the trial judge made the following comment at roughly 3:10 p.m.:

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[4] Kentucky Rule of Criminal Procedure (RCr) 3.20 permits a trial judge to have each witness enter into a recognizance before the judge that they will appear to testify at the next trial date.

> Ladies and gentlemen of the jury, in federal court, trial judges get to comment on the evidence. In state courts of Kentucky, trial judges do not. However, I would like to correct a statement Ms. Woosnam[5] made in her closing. And, while I'm going to correct her statement, I would say that I find no reason to ever think Ms. Woosnam is nothing but honest and very upright in her integrity. But, I think she made a misstatement about Mr. Pogue. She said she didn't know how he got here, where he came from. He was recognized by me to be here today along with Doug Vaughn, Sheriff Peyman, Keith Berry, and Mr. Pogue back on October the 16th to be here today at 9:00.

Defense counsel did not object to these comments before the jury retired to deliberate. However, at roughly 4:28 p.m., near the end of jury deliberations, defense counsel moved for a mistrial claiming the trial judge's comments were unduly prejudicial. The court denied this motion, and immediately thereafter, the jury notified the court that it had reached a verdict.

The jury found Sams guilty of first-degree robbery and Hacker guilty of complicity to first-degree robbery, sentencing them to 12 and 10 years' imprisonment respectively. Hacker and Sams moved for a new trial arguing that the trial court's comments to the jury were unfairly prejudicial. The court denied this motion, and both Hacker and Sams appealed their convictions claiming they were denied due process based on the trial court's comments. The Court of Appeals held that defense counsel's argument "that Pogue was not properly present at trial" was in error and that "the trial judge, knowing this statement to be in error, informed the jury that the court had previously recognized Pogue to appear." The Court also held that Hacker and Sams failed

[5] Ms. Woosnam was defense counsel.

to show how the trial court's comments prejudiced their defense. Hacker, without Sams, then sought discretionary review from this Court.

II. STANDARD OF REVIEW

As noted above, Hacker argues that, by commenting on counsel's closing argument, the trial court denied her of due process. She properly preserved this issue by filing her motion for a new trial. *Collins v. Sparks*, 310 S.W.2d 45, 49 (Ky. 1958). A trial judge "is vested with a large discretion in the conduct of the trial of causes and an appellate court will not interpose to control the exercise of such discretion by a court of original jurisdiction, unless there has been an abuse or a most unwise exercise thereof." *Transit Authority of River City (TARC) v. Montgomery*, 836 S.W.2d 413, 416 (Ky. 1992). Therefore, we review the trial court's statement for an abuse of discretion, which occurs when the court acts arbitrarily, unreasonably, unfairly, or in a manner not supported by sound legal principles. *Clark v. Commonwealth*, 223 S.W.3d 90, 95 (Ky. 2007) (citing *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)).

III. ANALYSIS

"In this jurisdiction[,] comments by a trial judge which may reflect upon the credibility of a witness or tend to indicate the court's view of the quality or weight of the evidence are considered improper." *Chism v. Lampach*, 352 S.W.2d 191, 194 (Ky. 1961). However, "[n]ot every utterance of doubtful propriety made by the court during the course of the trial results in prejudice[.]" *Preston v. Commonwealth*, 406 S.W.2d 398, 405 (Ky. 1966) (quoting *State v. Ross, Mo.*, 371 S.W.2d 224, 228 (1963)). As noted above, at

trial, defense counsel stated the following: "Where did Mr. Pogue come from? . . . How did he know to be here? Someone had to tell him to be here. Mr. Vaughn told him to be here."

Although perhaps not as artfully as possible, Hacker's counsel was attempting to point out that Pogue had not been subpoenaed by her or by the Commonwealth, but by Vaughn.[6] This argument supported her theory that Vaughn and Sheriff Peyman, who were friends, had conspired against Hacker and Sams. The trial judge, attempting to correct what he perceived as a misstatement, appears to have taken counsel's statement out of context when he stated: "[defense counsel] said she didn't know how [Pogue] got here, where he came from. He was recognized by me to be here today along with Doug Vaughn, Sheriff Peyman, Keith Berry, and Mr. Pogue back on October the 16th to be here today at 9:00." Although the judge was correct that he had recognized Pogue on October 16th and told him to appear at trial in February, the judge failed to note who had first subpoenaed Pogue.

Throughout the trial, defense counsel introduced evidence to support her conspiracy theory: Sheriff Peyman and Vaughn were friends; Pogue was a former law enforcement officer with ties to Sheriff Peyman; Pogue was not involved with the case until approximately a year and a half after the date of the alleged robbery; and Sheriff Peyman and his office had been investigated

[6] As noted above, Pogue, when he appeared for the initial trial date, stated that he had been subpoenaed by Vaughn's wife. Having noted that Vaughn's wife allegedly issuing a subpoena in the Commonwealth's case would be unusual, we reviewed the record for indication of the subpoena in question. Having found neither a returned summons nor any other explanation in the record, we cannot comment further on the propriety of the subpoena, in general.

regarding a number of alleged improprieties. The fact that Pogue had been subpoenaed by Vaughn rather than by the Commonwealth was a significant part of this conspiracy theory. By *sua sponte* stating that he was responsible for Pogue's appearance at trial, the trial judge discredited Hacker's argument that Pogue was at trial because Vaughn wanted him there. The judge's comments, therefore, were improper, if not accidental, commentary on Pogue's credibility.

However, Hacker has failed to show how this commentary prejudiced her. Pogue's testimony was, at best, tangentially relevant to the outcome of this case. Although Hacker was charged with complicity to first degree robbery, we first examine the evidence regarding the robbery.

> A person is guilty of robbery in the first degree when, in the course of committing theft, he uses or threatens the immediate use of physical force upon another person with intent to accomplish the theft and when he . . . [u]ses or threatens the immediate use of a dangerous instrument upon any person who is not a participant in the crime.

Kentucky Revised Statute (KRS) 515.020(1)(c). Sams and Hacker both testified that Sams constructed the spear on a previous date and that he had used it to hunt snakes. Neither Sams nor Hacker ever denied the spear's existence. Furthermore, Sheriff Peyman and Deputy Berry saw Sams wielding the spear when they entered his apartment. The Commonwealth also put forth evidence showing that: Sams and Hacker were unemployed and poor; Sams was behind on child support payments; Vaughn had offered Sams work which Sams refused to do; Hacker had taken money from Vaughn's pockets while Sams pointed the spear at him; and Sams intended to steal $10,000 from Vaughn

before killing him. This is more than enough evidence for a reasonable jury to find Sams guilty of first degree robbery without Pogue's testimony.

This leads us to Hacker's complicity. "A person is guilty of an offense committed by another person when, with the intention of promoting or facilitating the commission of the offense, [s]he . . . [a]ids, counsels, or attempts to aid such person in planning or committing the offense[.]" KRS 502.020(1)(b). Hacker has failed to show how Pogue's testimony that Sams had the spear at the auto-parts store further implicated her in the crime. Hacker admits that she called Vaughn from the auto-parts store in order to persuade him to return to her apartment, which was Pogue's only testimony concerning her. Whether Sams was carrying the spear at the auto-parts store was immaterial to her involvement. The Commonwealth also produced evidence that Hacker exposed herself to Vaughn in an attempt to seduce him and, in turn, make it seem as if he was raping her, and that she took roughly $385 from his shirt pockets at Sams's direction. Therefore, the trial judge's comments, while in error, were harmless.

While the judge's *sua sponte* comments were ultimately harmless, their timing was admittedly problematic. The judge waited until the defense and the Commonwealth had finished their closing statements to correct the perceived misstatement by defense counsel. The judge's comments were the last thing the jury heard before beginning deliberations, which no doubt highlighted their significance. If the judge believed that defense counsel had made a misstatement, he should have: called the attorneys to the bench; explained to

them what he perceived to be the nature of the misstatement; permitted counsel to explain her comments; and then taken any corrective measures he deemed necessary.

Since Pogue's testimony was ultimately not determinative of the outcome, we cannot conclude that Hacker was prejudiced by the trial judge's comments. However, 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. This is due to the confidence in and esteem for a judge and respect for his position." *Allen v. Commonwealth*, 286 S.W.3d 221, 231 (Ky. 2009) (citing *Collins*, 310 S.W.2d at 47.)

IV. CONCLUSION

For the reasons stated herein, we affirm.

All sitting. All concur.

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