

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000033-MR

STACY SAVAGE

APPELLANT

v. APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE RODERICK MESSER, JUDGE
ACTION NO. 05-CR-00048-002

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: KELLER AND NICKELL, JUDGES; KNOPF,¹ SENIOR JUDGE.

KELLER, JUDGE: Stacy Savage has directly appealed from the judgment of the Laurel Circuit Court convicting him on charges of Second-Degree Burglary and Theft by Unlawful Taking over \$300 and sentencing him to a total of ten years' imprisonment. We affirm.

¹ Senior Judge William L. Knopf, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

On February 4, 2005, the Laurel County Sheriff's Office was called to investigate an early morning burglary at the residence of Ted Hammonds on Hopper Creek Road. The investigation led to Jeffrey Sasser's house, which was across the street from the victim's residence. From Sasser's house, the deputies recovered the following stolen items: a television and stand, a VCR, a refrigerator, a washer and dryer, a lawnmower, a weed eater, a bench grinder, a hutch, and various items in plastic tubs. Sasser later acknowledged his involvement in the burglary and told the deputies that Savage was with him when the crime occurred. While a third person, Donnie Fields, initially admitted to being only a lookout, he later admitted to being involved in the burglary. Fields also implicated Savage in the crime, although he testified on cross-examination at trial that Savage was not involved. Savage denied any involvement in the burglary. He maintained that he did not leave his home on the evening of February 3/morning of February 4, except to go to his mother's home to report a power outage and to call a wrecker to remove his nephew's truck from a culvert.

The Laurel County grand jury indicted Savage and three other co-defendants, including Sasser and Fields, in a six-count indictment. Savage was charged with Burglary in the Second Degree pursuant to KRS 511.030 and Theft by Unlawful Taking of the Value of \$300 or More pursuant to KRS 514.110.² While his co-defendants entered guilty pleas, Savage opted to proceed with a jury trial. At the

² Co-defendants Jeffery Scott Sasser and Donnie Fields were charged with the same crimes, as well as for being persistent felony offenders. Sasser and Fields both entered guilty pleas and were sentenced to a total of six years' imprisonment. Co-defendant Junior Ray Jones was charged with Receiving Stolen Property and for being a persistent felony offender. He also entered a guilty plea and was sentenced to one year in prison.

conclusion of the trial, the jury returned guilty verdicts on both charges and recommended sentences of ten years on the burglary count and five years on the theft count, to be served concurrently. The circuit court entered a judgment and sentenced Savage in conformity with the jury's recommendation. This appeal followed.

On appeal, Savage raises several unpreserved, or partially unpreserved, claims of error. The claims of error include: 1) permitting Donnie Fields to testify while in prison garb; 2) Detective Phelp's coercive questioning of Rachel Kyc;³ 3) permitting the Commonwealth's Attorney to ask a defense witness irrelevant questions; 4) the Commonwealth's Attorney's misstatement of the burden of proof in his closing argument; and 5) permitting the Commonwealth's Attorney to present statements of a non-testifying co-defendant during his cross-examination of a defense witness. Having reviewed the trial of this matter, we hold that no error, palpable or otherwise, exists to support a reversal of Savage's conviction.

We are permitted to review unpreserved errors for substantial error:

A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

RCr 10.26. In *Schoenbachler v. Commonwealth*, 95 S.W.3d 830 (Ky. 2003), the Supreme Court of Kentucky described the palpable error rule, stating that “[w]hat it really boils down to is that if upon a consideration of the whole case this court does not

³ The parties refer to Rachel Kyc as Rachel Kye in their briefs. However, Kyc is the correct spelling.

believe there is a substantial possibility that the result would have been any different, the irregularity will be held nonprejudicial.” *Id.* at 836, quoting *Abernathy v. Commonwealth*, 439 S.W.2d 949, 952 (Ky. 1969), overruled in part on other grounds, *Blake v. Commonwealth*, 646 S.W.2d 718 (Ky. 1983). With this standard in mind, we shall review the issues Savage has raised in his appeal.

1. WITNESS TESTIFYING IN PRISON GARB

Savage's first argument addresses the testimony of Donnie Fields. Fields, subpoenaed by the Commonwealth, had already pled guilty to charges related to the same burglary and appeared at Savage's trial in an orange prison jumpsuit. While he implicated Savage in the crime on direct examination, he changed his testimony on cross-examination to state that Savage was not involved with the burglary. Savage was not aware of the potential change in Fields' testimony until the morning of trial. Because the recanting witness was in prison garb, Savage asserts that he was prejudiced, especially in light of what he describes as scanty evidence against him.⁴ The Commonwealth, on the other hand, asserts that Fields' clothing had no additional impact on the jury because it already knew that he was in prison for his admitted involvement in the burglary.

We agree with the Commonwealth that no palpable error arose when Fields was permitted to testify in his prison clothing. We note that defense counsel was aware that Fields had changed his story as of the morning of trial and that defense counsel did not voice any objection during a bench conference when the Commonwealth stated it

⁴ It appears that Savage is attempting to attack the sufficiency of evidence used to convict him. However, he failed to move for a directed verdict during the trial, precluding his right to do so. *Schoenbachler*, 95 S.W.3d at 836.

would be calling Fields to the witness stand in the orange jumpsuit. Even if he had been wearing street clothes, the fact that he was serving a prison sentence related to the same crime was brought to the attention of the jury. Any prejudice that might have been caused by the clothing he wore would have been injected into the proceedings purely by his testimony about his own involvement and subsequent felony conviction. Therefore, there is not a substantial possibility that the result would have been different had Fields not been wearing prison clothing. For these reasons, we hold that Savage has not established any palpable error related to this issue.

2. DETECTIVE PHELPS' INTERROGATION OF RACHEL KYC

For his next argument, Savage argues that Detective Phelps used intimidation and coercive techniques during his interrogation of Rachel Kyc, in order to force her to change her story to the one the detective wanted to hear, thereby depriving Savage of a fair trial. The Commonwealth asserts that Detective Phelps' methods did not make Kyc's statement involuntary or coerced.

We agree with the Commonwealth that Savage has failed to establish that Kyc's statement was obtained through coercive means, or that Savage's rights were prejudiced as a result. In her statement recorded the day of the burglary, Kyc testified that she and Savage went to Jeff Sasser's house to talk about purchasing a car. The three of them returned to her and Savage's house in Jeff Sasser's truck to look at fishing rods Kyc had to sell. However, at trial, Kyc testified that she and Savage were never in a truck with Jeff Sasser and that Jeff Sasser stopped by their house to inquire about buying

a washer from them. Although they did not have a washer to sell him, Jeff Sasser purchased four fishing poles from Kyc for \$20. There were also minor discrepancies as to what Kyc did the morning after the burglary. When the Commonwealth's Attorney brought the differences between her recorded statement and her testimony to her attention on cross-examination, Kyc stated that Detective Phelps made her change her story by making threats both to herself and to Savage.

We agree with the Commonwealth that Savage has failed to establish that Detective Phelps' techniques were coercive or that Kyc's statement was in any way involuntary. For this reason, we hold that Savage was not deprived of a fair trial or that there was any palpable error necessitating a reversal of his conviction.

3. TRIAL TESTIMONY OF RACHEL KYC

Savage's next argument is partially preserved, and it addresses the Commonwealth's Attorney's cross-examination of Kyc at trial. He argues that the Commonwealth's Attorney repeatedly and unnecessarily asked her questions about the fishing rods as well as about her living arrangements with Savage. The Commonwealth points out that Savage objected to a question concerning whether they had scheduled a date for their wedding. The objection was sustained, and he requested no further relief. For this reason, the Commonwealth asserts that Savage is not entitled to seek further relief on appeal. Regarding the fishing poles, the Commonwealth asserts that such questioning constituted proper cross-examination of her version of the day's events.

We shall first address the living arrangement questions. We agree with the Commonwealth that Savage is not entitled to seek additional relief on appeal, as he sought and obtained relief at trial from the question about when their wedding was scheduled. Furthermore, we note that Savage raised the issue of their marital status on direct examination when his attorney elicited testimony from Kyc that she was Savage's fiancée and that they lived together.

Regarding the unpreserved claim of error related to the fishing rod questions, we again agree with the Commonwealth that such questioning happened during her cross-examination in an attempt to elicit the true version of events from the day before the burglary. Kyc clearly testified differently at trial than she did in her recorded statement taken the day of the burglary, and the Commonwealth properly explored this on cross-examination.

4. CLOSING ARGUMENT

For this argument, Savage asserts that the Commonwealth's Attorney impermissibly attempted to shift the burden of proof by asking during closing argument why Savage failed to call either his mother or the wrecker serviceman to testify about his activities the night of the burglary. The Commonwealth argues that no prejudice attaches to comments on the defendant's failure to produce a witness favorable to him when the witness is available.

The disputed portion of the Commonwealth's Attorney's closing argument reads as follows:

Who saw Mr. Savage at the key times? The fellow at the wrecker. He's the one that pulled the car out. Now, he is still here. He is, by the young boy's account, he's still operating a business. We know where he is. He obviously saw Mr. Savage there that night. His mother saw him there that night and she still lives at her same location. The only two people who testified other than Mr. Savage are his girlfriend and his nephew. What does that say about the story that is being told by these three people?

The Commonwealth relies upon the Supreme Court of Kentucky's opinion of *Minor v. Commonwealth*, 478 S.W.2d 716 (Ky. 1971), to support its argument. In *Minor*, the Supreme Court held that the Commonwealth's comment on Minor's failure to call a co-defendant to testify for him did not prejudice his substantial rights. Likewise, in this case, we perceive no palpable error in the Commonwealth's Attorney's rhetorical question during closing argument regarding Savage's failure to call potential witnesses in his defense. Furthermore, we decline to view these comments as an attempt to shift the burden of proof; the Commonwealth's Attorney was merely attempting to weaken Savage's defense.

5. CONFRONTATION CLAUSE

Finally, Savage argues that the Commonwealth violated the Confrontation Clause during the cross-examination of Rachel Kyc when it brought in a statement by a non-testifying witness (Jeff Sasser) inculcating Savage in the burglary. In support of this argument, he relies upon the U.S. Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). The Commonwealth argues that the information in the question did not constitute either evidence or hearsay, but was

merely intended to challenge Kyc's testimony regarding what Detective Phelps said to her during her interrogation the day of the burglary.

The question at issue is: “Ma'am, in fact, you were told by Officer Phelps during this conversation that Mr. Sasser had implicated Mr. Savage in this burglary, did he not?” We agree with the Commonwealth that this question by the Commonwealth did not result in a violation of the Confrontation Clause, nor did the question constitute inadmissible hearsay. The question was necessary to delve into Kyc's testimony concerning her interrogation by Detective Phelps. We perceive no palpable error.

CONCLUSION

Based upon our review of the record and the applicable law, we cannot identify any error that would affect Savage's substantial rights or hold that any manifest injustice resulted. Accordingly, we affirm the judgment of the Laurel Circuit Court.

ALL CONCUR.

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