

RENDERED: DECEMBER 29, 2005; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-001183-MR

ANTHONY GAMBLE

APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE STEVEN R. JAEGER, JUDGE
INDICTMENT NO. 97-CR-00396

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; McANULTY, JUDGE; PAISLEY, SENIOR JUDGE.¹

PAISLEY, SENIOR JUDGE: Anthony Gamble was convicted by a jury of several counts of sexual misconduct including first degree sexual abuse, first and second degree rape, and first and second degree sodomy. He appeals from an order and judgment of the Kenton Circuit Court, denying his Kentucky Rules of Criminal Procedure (RCr) 11.42 motion to vacate his conviction on the

¹ Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

ground that he was denied effective assistance of counsel. Gamble claims that his trial counsel was ineffective for failing (1) to procure an expert defense witness; (2) to challenge the admissibility of a videotaped interview between one of the victims and a social worker; (3) to call character witnesses on Gamble's behalf; and (4) to present an affirmative defense.

In 1993, Gamble began living with his girlfriend, Nancy Perkins, her four children, and her younger sister. The charges against Gamble involved Perkins' sister, K.J., and her daughter, J.F. Gamble's sexual activity with K.J. began in May, 1993, when K.J. was fourteen years old. K.J. moved out of the house in August 1994. Gamble's sexual contacts with J.F. began in March 1995, when J.F. was eleven years old. On August 29, 1997, Gamble was indicted on charges of sexual abuse, rape, and sodomy.

Following a jury trial, Gamble was convicted of first degree sexual abuse, first and second degree rape, and first and second degree sodomy for the offenses committed against J.F.. For the offenses committed against K.J., he was convicted of third degree rape and two counts of third degree sodomy. He was sentenced to serve a total of fifty-five years. His conviction

was affirmed on direct appeal to the Kentucky Supreme Court in an unpublished opinion rendered on October 21, 1999.²

On July 15, 2002, Gamble filed a pro se RCr 11.42 motion with accompanying memorandum of law, alleging ineffective assistance of counsel. He made three claims: (1) that his counsel had failed to present a defense, assuring him that the trial proceedings were a "kangaroo court" and that a conviction would be overturned on appeal; (2) that his counsel failed to challenge the indictment, which Gamble claimed was based on perjured testimony; and (3) that his counsel had not succeeded in getting his conviction overturned on appeal.

Shortly after the filing of the motion and memorandum, the trial court ordered counsel to be appointed to assist Gamble. About four months later, his appointed counsel filed a supplemental memorandum to the RCr 11.42 motion, and simultaneously withdrew her representation because her contract with the Department of Public Advocacy had ended.

The supplemental memorandum raised the following additional arguments: that Gamble's trial counsel was ineffective for failing to obtain an expert witness to refute the testimony of Dr. Segal, the prosecution's medical expert witness, and for failing to object on hearsay grounds when Dr. Segal read from a social worker's medical history of one of the

² 98-SC-0278-MR.

victims; for failing to challenge the admissibility of a videotaped interview between one of the victims and the social worker; and finally, for failing to call readily available witnesses, such as Gamble's employer, to testify on his behalf regarding his good character.

The trial court ordered an evidentiary hearing on the motion, and appointed new counsel for Gamble. Gamble's new attorneys made a motion to withdraw two of the arguments made in the memorandum outlined above. The motion stated that

Movant did have the right to call an expert witness on his behalf at trial under KRE 702. However, present counsel, upon appointment by the court, consulted with a medical expert, and has concluded that the movant is unable to prove movant's claim.

As to the claim regarding trial counsel's failure to call character witnesses, the motion stated that

[a] defendant is entitled to present character witnesses on his behalf, (See KRE 608). However, any such witnesses would be limited to testifying to the movant's general reputation in the community, and would expose the movant to any known unflattering reputation in the community as well. Further, establishing at trial that the movant, accused of serious sexual assault offenses, was nevertheless a good employee and family provider, is unlikely to have created a different result.

But Gamble refused to sign this motion to withdraw the arguments. At the RCr 11.42 evidentiary hearing, his attorneys made a motion on his behalf to be allowed to proceed pro se as

to these two issues. The court initially ruled that it would reserve its judgment on whether to grant the motion, and would address only the issue of whether Gamble's trial counsel, Harry M. Hellings, deliberately chose not to present a defense and tried the case for appellate purposes only. Ultimately, at the end of the hearing, Gamble's pro se objection to the withdrawal of his arguments was overruled by the court. The final order and judgment of the court denying Gamble's motion states that Gamble withdrew his arguments relating to his trial counsel's failure to obtain an expert witness and to call readily available witnesses to testify on Gamble's behalf at trial.

Gamble has nonetheless raised these issues in his appellate brief. The Commonwealth has responded by arguing that these issues are not preserved for our review. We are troubled by the fact that Gamble insisted that these issues not be withdrawn, and refused to sign his attorneys' motion to that effect. Although we are "without authority to review issues not raised in or decided by the trial court[,]" Regional Jail Authority v. Tackett, 770 S.W.2d 225, 228 (Ky. 1989), our review of the record indicates that Hellings was specifically questioned about these allegations at the evidentiary hearing. We will therefore review these issues under the palpable error standard. See RCr 10.26; Bowling v. Commonwealth, 981 S.W.2d 545, 552 (Ky. 1998).

Our standard of review for claims of ineffective assistance of counsel was established in Strickland v. Washington, 466 U.S. 668 (1984) and adopted by the Supreme Court of Kentucky in Gall v. Commonwealth, Ky., 702 S.W.2d 37 (1985). Strickland requires a movant to establish two prongs: first, that the performance of counsel was deficient; and second, that the deficient performance prejudiced the defendant to such an extent that he was deprived of a fair trial. 466 U.S. at 687. Establishing prejudice requires showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different." Brewster v. Commonwealth, Ky.App., 723 S.W.2d 863, 864 (1986). A reasonable probability is a probability sufficient to undermine confidence in the outcome considering the totality of the evidence before the jury. Strickland, 466 U.S. at 694-95.

Moreover, "a defendant is not guaranteed errorless counsel, or counsel judged ineffective by hindsight, but counsel likely to render and rendering reasonably effective assistance. Strickland notes that a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Haight v. Commonwealth, 41 S.W.3d 436, 442 (Ky. 2001)(citations omitted).

Furthermore, when the trial court conducts an evidentiary hearing, as it did in this case, "the reviewing court must defer to the determinations of fact and witness credibility made by the trial judge." Sanborn v. Commonwealth, Ky., 975 S.W.2d 905, 909 (1998)(citations omitted).

I. EXPERT TESTIMONY

Gamble's first argument on appeal is that his counsel was ineffective for failing to procure an expert witness to rebut the testimony of the Commonwealth's medical expert witness, Dr. Segal. He does not, however, provide any further explanation of why this constituted ineffective assistance of counsel. "In attempting to obtain post-conviction relief, the movant must present facts with sufficient particularity to generate a basis for relief." Foley v. Commonwealth, 17 S.W.3d 878, 890 (Ky. 2000)(citations omitted). We also agree with the Commonwealth that such an expert was not required because the testimony of the prosecution's own medical expert witness, Dr. Segal, did not substantiate the allegations of sexual contact. At the evidentiary hearing, Hellings testified that he did not see the necessity for an expert. Under the palpable error standard, Gamble has failed to show that "manifest injustice" resulted from his defense counsel's decision not to present expert rebuttal testimony. See RCr 10.26.

Gamble also argues that his defense counsel improperly allowed Dr. Segal to "invade the province of the jury" by bolstering the testimony of one of the victims, J.F. Dr. Segal testified that his genital examination of J.F. offered no "conclusive" indication that J.F. had been sexually abused. He explained that even with a "clear history of abuse" most such examinations are normal. Dr. Segal testified that J.F.'s genital examination was normal, that her vaginal structure was "very normal for her age" and that she easily accommodated the speculum. He concluded that this was "a typical exam for a girl who is either sexually active or not. The fact that she did accommodate the speculum so easily does go along with an object in the past had been placed there, but it's really no guarantee. This just may be the way she is." After J.F. had testified, Dr. Segal was recalled and stated that "virtually any teenage exam could be consistent with abuse."

Gamble has argued that his defense counsel failed to defend him adequately when he permitted Dr. Segal to give the opinion that the absence of any physical evidence of sexual abuse was consistent with sexual abuse. Gamble claims that this testimony forced an inference that J.F. had been abused and unfairly bolstered J.F.'s testimony. He points out that Dr. Segal's examination was made nearly seven months after the last alleged sexual encounter between Gamble and J.F., and that the

jury might reasonably have concluded that any trauma resulting from a sexual assault might have healed.

We disagree. As the Commonwealth has aptly argued, Dr. Segal's testimony was as consistent with the defense theory that Gamble had no sexual contact with the child as with the prosecution's theory that he did. Gamble's defense counsel emphasized this point in his closing statements, stressing to the jury that Dr. Segal's trial testimony was that the evidence was negative or neutral as to sexual abuse. Dr. Segal's testimony regarding J.F.'s examination was inconclusive, and we fail to see how Gamble's trial counsel could have made a legitimate objection to it, or how it could possibly have provided the grounds for a mistrial. Indeed, Gamble himself testified at the RCr 11.42 evidentiary hearing that Hellings had told him that Dr. Segal's testimony had helped his case because he had stated that J.F. displayed no physical signs of abuse.

Gamble next argues that his defense counsel was ineffective for failing to object when Dr. Segal read from a "medical history" provided by a social worker who had examined J.F. Gamble maintains that the medical history constituted impermissible hearsay. The record indicates that the portion read by Dr. Segal consisted only of a brief summary of the victim's age and her allegations. The record also shows that Gamble's defense counsel was able to use this history to point

out inconsistencies in the victim's trial testimony. Because the credibility of the victims was such a critical aspect of the proof in this case, counsel's treatment of this evidence cannot be said to constitute ineffective assistance of counsel.

II. VIDEOTAPED INTERVIEW WITH SOCIAL WORKER

Gamble's next argument is that his counsel was ineffective for failing to object to the introduction into evidence of a videotaped interview between J.F. and a social worker, Vickie Henderson. The record on appeal does not include a copy of this videotape. "[W]hen the complete record is not before the appellate court, that court must assume that the omitted record supports the decision of the trial court. Commonwealth v. Thompson, 697 S.W.2d 143, 145 (Ky. 1985). Notwithstanding this procedural defect, Gamble's arguments regarding the videotape are without merit.

He first argues that the tape was hearsay, and an improper use of a prior consistent statement. He claims that his counsel was ineffective for failing to object to the introduction of the tape, which in effect allowed J.F. to tell her story twice.

We note as a preliminary matter that the introduction of the tape does not appear to violate the Kentucky Rules of Evidence governing the admissibility of prior statements by witnesses. Under KRE 801(a)(2) a prior statement of a witness

is not excluded by the hearsay rule, even if the declarant is available as a witness, if the declarant testifies at the trial and the prior statement is "[c]onsistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive[.]" Clearly this is applicable to the videotaped interview, since Gamble's defense was that J.F. had either fabricated the charges against him, or had been improperly influenced to do so.

More importantly, the record indicates that Gamble's trial counsel used the introduction of the videotape as an opportunity to attempt to undermine the credibility of J.F., specifically regarding the fact that J.F. did not initially make any allegations that she and Gamble had engaged in anal sex. In the interview, J.F. did not report that Gamble had anal intercourse with her, even though Henderson had asked her repeatedly whether Gamble had asked her to do anything else or had touched her in any other way. Defense counsel emphasized to the jury that at the time of her interview with Henderson, J.F. had responded no to these questions. Similarly, defense counsel was able to use this evidence to obtain an admission from Detective Lucas, the first police officer to interview J.F., that J.F. did not initially report any anal sex. Rather than bolstering J.F.'s testimony, the videotaped interview appears to

have been used by defense counsel to attempt to undermine the credibility of the Commonwealth's key witnesses.

Gamble further claims that his attorney was ineffective for failing to request a pretrial taint hearing. He notes that by the time J.F. testified at trial, she had told or confirmed her story at least seven times to various adults. He contends that on these grounds his defense counsel should have moved the trial court to conduct an evidentiary hearing to determine whether her testimony should have been suppressed due to the use of improper or coercive interview techniques.

Taint hearings are not required under Kentucky law. See Pendleton v. Commonwealth, 83 S.W.3d 552 (Ky. 2002). Furthermore, Gamble's claim that such a hearing was required is completely speculative; he offers no evidence to suggest that J.F.'s testimony was tainted in any way. His attorney conducted a vigorous cross-examination of J.F. in which he stressed potential inconsistencies in her account of the abuse; the jury was able to assess her truthfulness for itself in light of these revelations. Gamble's defense counsel was not ineffective for failing to request a taint hearing.

Gamble has also argued that the social worker, Vickie Henderson, was allowed to comment on his guilt at the end of the videotaped interview, and thereby violated his rights of confrontation and cross-examination. The specific remarks he

objects to consist of Henderson telling J.F. that she should "stay away from this guy [Gamble]. He's the one who's got the problem. You don't." Henderson also discussed with J.F. the chances of the case going to trial and how if that happened J.F. would be protected because a police detective would be in the courtroom and "he wouldn't let him get to you." Gamble claims his counsel was ineffective for failing to object and request a mistrial when this tape was played for the jury. As we have already noted, Gamble's trial counsel used the videotaped interview as a means of attacking the credibility of the victim and the integrity of the police investigation. There was very little other evidence he could have used for this purpose. Since the most powerful evidence against Gamble was the testimony of his victims, we cannot say that counsel erred in deciding to use the interview as a means of casting doubt on J.F.'s credibility. As Hellings testified at the hearing, if the videotape was admitted at trial without objection, it would have been because there was something in it that he deemed helpful to Gamble's case. It is well-established that "it is not the function of [the reviewing court] to usurp or second guess counsel's trial strategy." Baze v. Commonwealth, 23 S.W.3d 619, 624 (Ky. 2000).

Moreover, even if trial counsel erred in not challenging the admission of the videotape, Gamble has failed to

show that it would have had an effect on the outcome of his trial. "It is not enough for the defendant to show that the error by counsel had some conceivable effect on the outcome of the proceedings." Sanders v. Commonwealth, 89 S.W.3d 380, 386 (Ky. 2002). "The critical issue is not whether counsel made errors but whether counsel was so thoroughly ineffective that defeat was snatched from the hands of probable victory." Foley v. Commonwealth, 17 S.W.3d 878, 884 (Ky. 2000), overruled on other grounds by Stopher v. Conliffe, 170 S.W.3d 307 (Ky. 2005).

III. FAILURE TO CALL WITNESSES

Gamble's third argument is that his counsel was ineffective for failing to call witnesses who could testify to his good character. We review this issue under the palpable error standard as discussed in the first part of this opinion. He refers specifically to Dennis Stamper, his former employer, who attended the trial and was prepared to testify that Gamble was a good employee who was dependable, consistent and reliable. But Gamble has failed to show how testimony regarding these traits was relevant to the offenses with which he was charged or how such testimony could have served an exculpatory function. Furthermore, the introduction of such evidence would have allowed the Commonwealth to present rebuttal character evidence under KRE 404(a)(1). The record contains evidence that Gamble was openly affiliated with the Ku Klux Klan. At the evidentiary

hearing, Gamble's trial counsel testified that he was aware of this and concerned about it prior to trial. It was clearly not ineffective assistance of counsel for Gamble's attorney to avoid putting Gamble's character at issue by permitting Stamper to testify.

IV. FAILURE TO PRESENT AN AFFIRMATIVE DEFENSE

Gamble's final argument is that his trial counsel did not investigate his case prior to trial, and deliberately failed to present a defense because he believed any conviction would be overturned on appeal. This was the primary issue considered by the trial court at the evidentiary hearing. "When an evidentiary hearing is held in an RCr 11.42 proceeding, a review court must defer to the determination of facts and witness credibility made by the trial judge. Haight, 41 S.W.3d at 442. "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Kentucky Rules of Civil Procedure (CR)52.01.

Gamble refers first to affidavits of family and friends claiming that they were available to offer exculpatory testimony but were never called by Hellings. Larry Hamilton's affidavit states that he could have testified that one of the victims, K.J., was upset when Gamble stopped "seeing her" and that her sister, Gamble's girlfriend, knew of this but forgave

Gamble. As the Commonwealth has pointed out, since K.J. was under sixteen years of age at the time of the offenses, and Gamble was charged with third degree rape and sodomy as a result of his sexual contact with her, it is understandable that defense counsel would have elected not to call Hamilton as a witness. Similarly, George Phillips' affidavit stating that K.J. was interested in meeting his "older guy friends" could only be viewed by defense counsel as being detrimental to Gamble's defense. Under the palpable error standard, Gamble has failed to demonstrate any manifest injustice caused by his attorney's decision not to call these witnesses.

Gamble's next allegation is that Hellings told him that he was being tried in a "kangaroo court" where he would be unable to get a fair trial, and that Gamble should just wait for his new trial when Hellings would get the case "thrown out."

At the evidentiary hearing, Hellings denied Gamble's claims. Hellings testified that as far as he could remember, he would have given Gamble his opinion that severance of the counts relating to each of the two victims was potentially a strong issue on which to appeal, but he would not have assured him that the case would be reversed on appeal. Hellings also testified that he had never said that the court was a "kangaroo court." Although Hellings testified that he had no specific recollection of what his trial preparation had been in Gamble's case, he

described his usual practice of meeting with the client before and after the preliminary hearing, discussing the charges and the grand jury process, securing grand jury and preliminary hearing transcripts, and discussing with his client and his family possible defenses and potential defense witnesses. Based on the evidence presented in Hellings' testimony, the trial court did not err in finding that Hellings' performance was neither incompetent nor ineffective.

Gamble also claims that Hellings failed to challenge the constitutional validity of the indictment against him. He claims that Detective Lucas swore to the Grand Jury that there was evidence that J.F. had been sexually penetrated. He then points to the inconclusive testimony of Dr. Segal in this regard as proving that Lucas lied. At the evidentiary hearing, Hellings had no specific memory of any false testimony by detective Lucas, but the trial record shows that Hellings cross-examined Lucas to determine how his grand jury testimony differed from the doctor's conclusions. If anything, therefore, Hellings used these alleged inconsistencies to impeach the detective's credibility.

Gamble next claims that Hellings erred in not striking Mary Middleton, a juror with whom he was personally acquainted. Gamble claims that Hellings should have stricken her because he had no way of knowing if she harbored an "unknown personal

vendetta" against him, and accordingly persuaded the jury to convict Gamble. At the evidentiary hearing, Hellings explained that he felt Middleton was non-judgmental, and that she may have been able to elicit some sympathy from the jury on behalf of his client. This claim of Gamble's is therefore utterly speculative and without merit.

Gamble claims that he has made a clear showing under Strickland that had it not been for trial counsel's errors, there was a "reasonable probability" of a different result in his trial. We are in accord with the trial court, which stated as follows in its order denying Gamble's RCr 11.42 motion:

[Gamble] has failed to establish incompetency or ineffectiveness of Mr. Hellings. There has been no showing that the defense was prejudiced by the performance of Mr. Hellings. There is a total lack of evidence to show that the outcome of this trial would have been any different no matter who represented Mr. Gamble. The evidence overwhelmingly establishes beyond a reasonable doubt that Anthony Gamble committed these offenses.

For the foregoing reasons, the order and judgment of the Kenton Circuit Court is affirmed.

ALL CONCUR.

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