

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2005-CA-001053-MR

DWAYNE ANTHONY BRUCE

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE LISABETH HUGHES ABRAMSON, JUDGE  
ACTION NO. 96-CR-000344

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING IN PART,  
VACATING IN PART,  
AND  
REMANDING

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BEFORE: TAYLOR AND SCHRODER, JUDGES; BUCKINGHAM,<sup>1</sup> SENIOR JUDGE.

BUCKINGHAM, SENIOR JUDGE: Dwayne Anthony Bruce appeals from an order of the Jefferson Circuit Court denying his motion to vacate his convictions and sentences pursuant to RCr<sup>2</sup> 11.42. Bruce claims he received ineffective assistance of counsel. We affirm in part, vacate in part, and remand.

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<sup>1</sup> Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

<sup>2</sup> Kentucky Rules of Criminal Procedure.

In February 1996, Bruce was indicted by a Jefferson County grand jury on four counts of first-degree rape, ten counts of first-degree sodomy, and one count of first-degree criminal abuse. The victim was Bruce's adopted daughter. A jury tried Bruce in November 1996, and it convicted him of three counts of first-degree rape, six counts of first-degree sodomy, and one count of first-degree criminal abuse. The jury recommended a sentence of 270 years, and the trial court sentenced Bruce in that manner. The Kentucky Supreme Court affirmed the convictions and sentences on Bruce's direct appeal. See 97-SC-85-MR.

In January 1999, Bruce filed a motion to vacate his convictions and sentences pursuant to RCr 11.42. The trial court denied the motion without an evidentiary hearing. This court affirmed the trial court's order, but the Kentucky Supreme Court reversed and remanded the case to the trial court for further consideration. See 2001-SC-0359-D.

In an order entered on October 8, 2004, the trial court granted Bruce's motion in part and denied it in part. The court granted the motion to the extent it ruled that Bruce should have been granted a directed verdict at trial on Count 9 in the indictment. Thus, the court vacated the conviction and 20-year sentence on that count. As the court otherwise denied Bruce's motion, the effect of the court's order was that Bruce's

sentence was reduced from 270 years to 250 years. Bruce's appeal herein followed.

Bruce's first argument is that he was denied his right to a speedy trial. As has been noted, Bruce was indicted on the charges in February 1996 and was tried in November of the same year. Bruce states in his brief that "[t]he number of times the Appellant in this case demanded that counsel demand his right to a speedy trial are too numerous to mention on this appeal."

A few days before his trial, Bruce filed a pro se motion to dismiss the charges on the ground he had been denied a speedy trial. As the court did not grant the motion, Bruce could have raised that issue on direct appeal. Therefore, he was precluded from raising it in an RCr 11.42 motion. See Gross v. Commonwealth, 648 S.W.2d 853, 856 (Ky. 1983). Furthermore, we are not persuaded that Bruce was denied a speedy trial or that his counsel may have rendered ineffective assistance in failing to move the trial court for an earlier trial date.

Bruce's second argument is that he was improperly subjected to multiple sentences in light of KRS<sup>3</sup> 532.080 and KRS 532.110(1)(c). He claims that the maximum sentence he should have received was 50 years. Bruce did not raise this issue in his initial RCr 11.42 motion. Rather, he raised it later in a separate motion. The trial court overruled the later motion as

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<sup>3</sup> Kentucky Revised Statutes.

a successive RCr 11.42 motion, and this court affirmed the trial court's order in that regard. Furthermore, this court rejected Bruce's argument on the merits when it affirmed the trial court's order. See 2001-CA-001190-MR. Therefore, this issue is not properly before this court.

Bruce's third argument is that he received the ineffective assistance of counsel due to counsel's failure to move the court for a directed verdict or to request instructions for lesser-included offenses with respect to counts 1 and 2 of the indictment. The record indicates that Bruce's trial counsel did move the court for a directed verdict. Thus, that portion of the argument is without merit.

However, we believe that the portion of Bruce's argument alleging ineffective assistance due to counsel's failure to request lesser-included instructions on counts 1 and 2 has merit. As to this argument, we conclude that the matter should be vacated and remanded for an evidentiary hearing.

According to Bruce, the victim testified that he began having intercourse with her when she was 12 or 13 years old. Detective Atkins testified, however, that the victim told her in an interview that intercourse began prior to her first menstrual period, which occurred when she was 12 years old. In denying Bruce's motion, the trial court noted this "apparent

inconsistency."<sup>4</sup> The significance of this inconsistency is that an element of both first-degree rape and first-degree sodomy (counts 1 and 2) is that the victim was less than 12 years of age. See KRS 510.040 and KRS 510.070.

In rejecting Bruce's argument, the trial court stated, "given the fact that the jury convicted Mr. Bruce of the offense with which he was charged, there is simply no basis for concluding that lesser included offense instructions would have altered the outcome of the trial." In short, the trial court seemed to say that if the jury convicts of the greater offense, then the defendant could suffer no prejudice from the failure to give a lesser-included instruction. We believe this statement is contrary to the law in Kentucky concerning lesser-included instructions. See Slaven v. Commonwealth, 962 S.W.2d 845, 857 (Ky. 1997)(failure to give lesser-included instruction was prejudicial error).

"An instruction on a lesser included offense is required only if, considering the totality of the evidence, the jury might have a reasonable doubt as to the defendant's guilt of the greater offense, and yet believe beyond a reasonable doubt that he is guilty of the lesser offense." Houston v. Commonwealth, 975 S.W.2d 925, 929 (Ky. 1998). Assuming the

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<sup>4</sup> We are unaware of whether this accurately characterizes the trial testimony or not. The trial court appeared to accept Bruce's characterization, and the Commonwealth has not disputed it on appeal.

trial testimony as represented by Bruce to this court and the trial court was accurate, then Bruce was entitled to lesser-included offense instructions on counts 1 and 2. The jury might have believed that Bruce had intercourse with the victim when she was 12 years old or older, but it might have had a reasonable doubt, in light of the victim's own testimony, as to whether intercourse occurred prior to that time. Further, the fact that Bruce was actually convicted of the offenses does not remove the fact that he may have suffered prejudice. See Slaven, supra. Thus, we must remand this matter to the trial court for an evidentiary hearing to determine whether Bruce's counsel rendered ineffective assistance in this regard.<sup>5</sup>

Bruce's fourth argument is that he received ineffective assistance of counsel when his counsel failed to move the trial court to remove a juror who stated to the court during the trial that she worked with and knew the victim's step-grandmother. The juror stated that she and the victim's step-grandmother did not work directly around each other and that the relationship was purely a work relationship that would not affect her impartiality as a juror. The juror also related that she was not aware of those facts until she had heard part of the trial testimony. Bruce's trial counsel did not object to

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<sup>5</sup> Merely because counsel may not have requested lesser-included instructions does not necessarily mean ineffective assistance was rendered. For example, counsel may not have requested those instructions due to trial strategy.

the juror remaining on the case, and the court did not remove the juror.

The mere fact that the juror knew and worked with the victim's step-grandmother does not raise a constitutional question or form the basis for relief under RCr 11.42. See Dupin v. Commonwealth, 404 S.W.2d 280, 281 (Ky. 1966). In short, Bruce has not demonstrated that the failure of his counsel to object to the juror remaining on the case resulted in prejudice to him.<sup>6</sup>

Bruce's fifth argument is that he received ineffective assistance of counsel because his trial counsel failed to investigate, interview, and subpoena favorable defense witnesses. In rejecting Bruce's argument on this ground, the trial court cited Robbins v. Commonwealth, 719 S.W.2d 742, 743 (Ky.App. 1986), wherein this court stated that "(m)erely failing to produce witnesses in the appellant's defense is not error in the absence of any allegation that their testimony would have compelled an acquittal." The trial court overlooked, however, that the Robbins case, and its requirement that the allegedly deficient performance by trial counsel compel acquittal, was overruled by Norton v. Commonwealth, 63 S.W.3d 175, 177 (Ky.

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<sup>6</sup> We also reject Bruce's argument that he was deprived of a fair trial because he would have exercised a preemptory challenge and struck the juror in voir dire had he known of the relationship between the juror and the victim's step-grandmother.

2001). We remand this issue for reconsideration in light of the Norton case.<sup>7</sup>

Next, Bruce argues that he was entitled to relief pursuant to his motion because he had received ineffective assistance of appellate counsel on his direct appeal. "Ineffective assistance of appellate counsel is not a cognizable issue in this jurisdiction." Lewis v. Commonwealth, 42 S.W.3d 605, 614 (Ky. 2001). Thus, we reject this argument.

Bruce also argues that his trial counsel acted improperly by not objecting to the Commonwealth calling two witnesses, who had not been previously disclosed, to testify. The witnesses were the victim's sister, who testified that she had also been sexually abused by Bruce, and the victim's grandfather.

First, there is no requirement that the prosecution provide a list of its witnesses in advance of trial. See Weaver v. Commonwealth, 955 S.W.2d 722 (Ky. 1997). Second, the victim's sister and the nature of her testimony had been disclosed by the Commonwealth. Third, any failure to disclose the victim's grandfather as a witness, even if otherwise required of the Commonwealth, was not prejudicial in light of the limited nature of his testimony.

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<sup>7</sup> We note that when the supreme court remanded this case to the trial court, it directed the court to reconsider Bruce's motion in light of two cases, one of which was Norton.

Bruce next argues that the Commonwealth was erroneously allowed to withhold one envelope of confidential exhibits which were allegedly used to convict him but which were never revealed to him. We reject this argument because Bruce did not raise it in his RCr 11.42 motion. Rather, he raised it in his CR 60.02 motion, which is the subject of a separate appeal.

Finally, Bruce argues that the court erred in not granting him an evidentiary hearing. When this case was remanded from the Kentucky Supreme Court to the trial court, the trial court was directed to reconsider the issue in light of the then-recent cases of Fraser v. Commonwealth, 59 S.W.3d 448 (Ky. 2001), and Norton, supra. To the extent set forth above, we agree that Bruce should be granted an evidentiary hearing.

The order of the Jefferson Circuit Court is affirmed in part, vacated in part, and remanded.

ALL CONCUR.

BRIEF FOR APPELLANT:

Dwayne Anthony Bruce, *Pro Se*  
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo  
Attorney General of Kentucky

James C. Shackelford  
Assistant Attorney General  
Frankfort, Kentucky