

RENDERED: DECEMBER 9, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000518-MR

ANTHONY THOMAS GRIMES

APPELLANT

ON REMAND FROM KENTUCKY SUPREME COURT
2009-SC-000740-DG

v. APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE HENRY M. GRIFFIN III, JUDGE
ACTION NO. 03-CR-00078

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AND ORDER
AFFIRMING IN PART, VACATING IN PART, AND REMANDING;
AND DENYING MOTIONS TO DISMISS,
TO SET A BRIEFING SCHEDULE,
AND TO CLARIFY STATUS OF APPEAL

** ** * ** * ** *

BEFORE: CAPERTON, KELLER, AND LAMBERT, JUDGES.

KELLER, JUDGE: In this criminal post-conviction action, Anthony Grimes (Grimes), appeals from the Daviess Circuit Court order denying his motion for relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. On appeal,

Grimes contends the circuit court should have held an evidentiary hearing before dismissing his numerous claims of ineffective assistance of counsel. We previously affirmed in part, vacated in part, and remanded for additional proceedings. The Commonwealth sought discretionary review, which the Supreme Court granted. The Court then vacated our opinion and remanded this appeal to us for consideration of the Court's holding in *James v. James*, 313 S.W.3d 17 (Ky. 2010). We have reviewed *James* and, for the reasons set forth below, we reach the same conclusion as we previously did and affirm in part, vacate in part, and remand for additional proceedings.

FACTS

We adopt the facts as set forth by the Supreme Court of Kentucky on Grimes's direct appeal:

Grimes was indicted for eighteen counts of sexual offenses against his two stepdaughters. Thirteen of those counts related to the oldest stepdaughter and included two counts of first-degree rape, six counts of first-degree sodomy, four counts of first-degree sexual abuse, and one count of second-degree sexual abuse. The five other charges related to the youngest stepdaughter and involved first-degree sexual abuse. One of those charges was later dismissed at trial. Both victims, aged 18 and 12 at the time of the September 2003 trial, testified about the sexual acts committed by Grimes over a sixty-five month period that began in June 1997 and ended in October

2002. Their mother also testified that Grimes made certain admissions of sexual abuse to her after the

allegations came to light. Grimes testified in his own defense and completely denied the charges.

The jury convicted Grimes of all the submitted charges. The two rape charges (15 years each), two of the sodomy counts (10 years each), and two of the sexual abuse charges (five and four years) were ordered to run consecutive to the remaining counts which varied in terms of 12 months to twenty years. The total sentence was fifty-nine years in prison.

Grimes v. Commonwealth, 2005 WL 1185609 *1 (Ky. 2005)(2003-SC-001062-MR).

The Supreme Court upheld Grimes's conviction on direct appeal, holding that Grimes "received a fundamentally fair trial. He was not denied due process under either the state or federal constitutions." *Id.* at *5. Grimes then filed a motion pursuant to RCr 11.42, claiming ineffective assistance of counsel. The circuit court denied Grimes's motion without holding an evidentiary hearing. Grimes appealed from that order.

We note that the case did not follow the usual procedural pattern in the circuit court. The trial court denied Grimes's RCr 11.42 motion by order entered on November 20, 2006. Grimes did not file a notice of appeal within the thirty-day time limit following entry of that order. Counsel for Grimes stated in an affidavit that he did not receive a copy of the order and that he asked the court to fax a copy to him. The court record contains a fax cover sheet indicating that a fax with the order attached was sent to counsel for Grimes on March 23, 2007. On August 14, 2007, Grimes filed a motion pursuant to Kentucky Rules of Civil

Procedure (CR) 60.02, asking the court to enter a new date in the criminal docket regarding the date and manner of service or to vacate the November 20, 2006, order and enter a new order. Grimes noted that the net effect of either form of relief would be to provide him with time to file an appeal. We note that Grimes did not file his motion for relief for nearly five months after the circuit court faxed him the order, a delay which we would have had difficulty excusing. However, the Commonwealth did not respond or otherwise object to Grimes's motion, which the court granted stating as follows:

[I]t is ORDERED, pursuant to CR 60.02, made applicable to criminal cases by RCr 13.04,

That the Clerk of the Daviess Circuit Court ENTER ANEW the note in the criminal docket, required by RCr 12.06, with the notation showing the date and manner of service on movant/defendant's counsel of record of this Court's final order of November 20, 2006 denying movant/defendant's RCr 11.42 motion, and,

The granting of this relief will permit movant/defendant Grimes to file a timely notice of appeal during the thirty day period following the newly entered note and notation required by RCr 12.06 in the above-captioned case.

Two business days before oral arguments, the Commonwealth filed a motion to dismiss for lack of jurisdiction.¹ In its motion to dismiss, the Commonwealth argued that the circuit court improperly extended Grimes's time to appeal. We disagreed and held that the circuit court acted within its discretion

¹ While recognizing that jurisdiction can be raised at any time during the proceedings, we are somewhat dismayed by the Commonwealth's dilatoriness in raising this issue.

when it ordered a new entry date for its November 20, 2006, order. The Supreme Court's opinion in *James* is related to this portion of our earlier opinion and we address *James* and the circuit court's actions herein first.

STANDARD OF REVIEW

Whether the circuit court acted properly in ordering a change in the entry date of its order is a matter of law. We review such matters *de novo*.

Grange Mutual Insurance Co. v. Trude, 151 S.W.3d 803, 810 (Ky. 2004). Our review of Grimes's claims of ineffective assistance of counsel is governed by the standards set forth below.

We note that the parties submitted briefs in this case prior to the Supreme Court's decision in *Leonard v. Commonwealth*, 279 S.W.3d 151, 158 (Ky. 2009), which clarifies that appellate resolution of an alleged error on direct appeal cannot serve as a procedural bar to a related claim of ineffective assistance of counsel. *Leonard* overrules a long line of cases which barred ineffective assistance of counsel claims related to issues which were raised on direct appeal.

As the Supreme Court explained:

In most instances, a direct appeal allegation of palpable error is fundamentally a different claim than a collateral attack allegation of ineffective assistance of counsel based on the alleged palpable error. The issue “raised and rejected” on direct appeal is almost always not a claim of ineffective assistance of counsel. Instead, the palpable error claim is a direct error, usually alleged to have been committed by the trial court (e.g., by admitting improper evidence). The ineffective assistance claim is collateral to the direct error, as it is alleged against the trial attorney (e.g., for failing to object to the improper

evidence). Such a claim is one step removed from those that are properly raised, even as palpable error, on direct appeal. While such an ineffective-assistance claim is certainly related to the direct error, it is simply not the same claim. And because it is not the same claim, the appellate resolution of an alleged direct error cannot serve as a procedural bar to a related claim of ineffective assistance of counsel.

Id. at 158.

Therefore, as a matter of law, the failure to prevail on a palpable error claim on direct appeal does not preclude a claim of ineffective assistance of counsel raised under RCr 11.42. However, when raising such a claim, the movant must first satisfy the requirements of RCr 11.42 and then establish a claim for ineffective assistance of counsel.

In an RCr 11.42 motion, the movant has the burden “to establish convincingly that he was deprived of some substantial right which would justify the extraordinary relief afforded by the post-conviction proceedings provided in RCr 11.42.” *Dorton v. Commonwealth*, 433 S.W.2d 117, 118 (Ky. 1968). The motion “shall state specifically the grounds on which the sentence is being challenged and the facts on which the movant relies in support of such grounds. Failure to comply with this section shall warrant a summary dismissal of the motion.” RCr 11.42 (2). On an appeal from an order overruling an RCr 11.42 motion without an evidentiary hearing, “[o]ur review is confined to whether the motion on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction.” *Lewis v. Commonwealth*, 411

S.W.2d 321, 322 (Ky. 1967). Thus, a hearing is only required if an RCr 11.42 motion raises an issue that cannot be determined on the face of the record. RCr 11.42 (5); *Stanford v. Commonwealth*, 854 S.W.2d 742, 743 (Ky. 1993). A trial court's findings will not be disturbed absent a finding of clear error.

Commonwealth v. Payton, 945 S.W.2d 424, 425 (Ky. 1997).

If the requirements of RCr 11.42 are satisfied, the movant must then establish a claim for ineffective assistance of counsel by proving: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *accord Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985), *cert. denied*, 478 U.S. 1010, 106 S. Ct. 3311, 92 L. Ed. 2d 724 (1986).

ANALYSIS

With the above standards in mind, we first address the Commonwealth's motion to dismiss and the Supreme Court's opinion in *James*. Thereafter, we address the ineffective assistance of counsel issues.

I. Motion to Dismiss

In *James*, the appellant did not timely receive a copy of the circuit court's order denying his motion for judgment notwithstanding the verdict. When he did receive a copy of the order, the appellant filed a notice of appeal and a motion under CR 73.02(1)(d) asking the court for ten additional days to file his appeal. The court granted that motion and, in the alternative, vacated its original

order, reinstated that order for a later date, and ordered the circuit court clerk (the clerk) to change the filing date on the appellant's notice of appeal to comport with the reinstated order.

The Supreme Court, in pertinent part, held that a circuit court lacks the authority to order the clerk to alter "[t]he date a pleading or other document has been filed with the clerk." *James*, 313 S.W.3d at 26. However, the Supreme Court held that the circuit court appropriately granted the appellant's motion for additional time to file his appeal pursuant to CR 73.02(1)(d).

In the case before us, Grimes did not file his notice of appeal from the circuit court's denial of his RCr 11.42 motion within thirty days of its finality. Furthermore, Grimes did not seek an extension of time to file an appeal under CR 73.02(1)(d), because that time had long passed by the time Grimes's counsel received the circuit court's order. Instead, Grimes filed a CR 60.02 motion asking the court to either enter a new date in the criminal docket or to vacate the initial order and enter a new order. As noted above, the circuit court did not vacate its November 2006 order, choosing instead to order the clerk to "enter anew" the notation regarding the date of service of the order on Grimes's counsel.

We do not believe that *James* is applicable to the case herein for three reasons. First, the Supreme Court's holding in *James* only addresses the filing of pleadings or other documents with the clerk. It does not address or even mention entry of court orders. "The terms [filing and entry] are not synonymous As used in the *Kentucky Rules of Court*, the word 'entry' is a term of art which refers

specifically to a notation in the docket.” *Staton v. Poly Weave Bag Co., Incorporated/Poly Weave Packaging, Inc.*, 930 S.W.2d 397, 399 (Ky. 1996). Had the Supreme Court wanted to extend its holding in *James* to the entry of a court order, it could have stated as much; however, it did not.

Second, by altering the date of entry, the circuit court, in effect, vacated its prior order and reissued it, which is acceptable under *Kurtsinger v. Board of Trustees of Kentucky Retirement Systems*, 90 S.W.3d 458 (Ky. 2002). Reversing the circuit court and depriving Grimes of his right to appeal would elevate form over substance. As noted by this Court in *First Nat. Bank of Grayson v. Citizens Deposit Bank and Trust*, 735 S.W.2d 328, 330 (Ky. App. 1987), pleadings should be judged by their substance rather than by their form, we owe no less deference to a court’s orders. The circuit court herein clearly intended to grant to Grimes the opportunity to appeal its order. Holding in the Commonwealth's favor simply because the circuit court chose a less than optimal path to give Grimes that opportunity would be the epitome of elevating form over substance.

Third, we note that the Commonwealth did not object to Grimes's motion and did not challenge the circuit court's re-docketing order. The Commonwealth has been aware of the issues raised by Grimes in this matter since he filed his RCr 11.42 motion and has not been surprised nor prejudiced by the circuit court's re-docketing order. In fact, the Commonwealth did not raise any objection to Grimes's appeal until two days before oral arguments. As noted by the Supreme Court in *James*, “[W]e seek to recognize, to reconcile and to further three

significant objectives of appellate practice: achieving an orderly appellate process, deciding cases on the merits, and seeing to it that litigants do not needlessly suffer the loss of their constitutional right to appeal." *James*, 313 S.W.3d at 27 (Ky. 2010) quoting *Ready v. Jamison*, 705 S.W.2d 479, 482 (Ky. 1986). By interpreting the circuit court's order based on its substance rather than its form, we forward those objectives.

Therefore, we deny the Commonwealth's motion to dismiss. Next, we address the ineffective assistance of counsel issues raised by Grimes.

II. Ineffective Assistance of Counsel

Grimes contends the circuit court erred when it dismissed all of the claims in his RCr 11.42 motion without an evidentiary hearing. Grimes raised numerous claims in his RCr 11.42 motion, alleging that his trial counsel failed to render effective assistance: (A) by failing to investigate the victims' mother for her alleged past propensity to accuse individuals of abusing her children; by failing to investigate potential guilt phase witnesses and evidence; and by failing to investigate potential mitigation evidence and to present available mitigation evidence during the sentencing phase; (B) by conceding Grimes's guilt to those offenses involving the older victim; (C) by failing to request lesser-included offense instructions; by failing to request a consent instruction; and by failing to request an instruction on the separate nature of each count; (D) by failing to object to the prosecutor's leading questions; by failing to object to a statement not in

evidence during the prosecutor's closing argument; by failing to object to an allegedly impermissible inference made by the prosecutor during closing argument; and by failing to object to the prosecutor's questioning of Grimes; (E) by failing to object to a nonresponsive lay opinion; (F) by failing to request a physical examination; and (G) by failing to inform Grimes of an alleged plea offer from the Commonwealth.

A. Court Error in Standard for Evidentiary Hearing

Grimes contends the circuit court erred when it dismissed his claims without an evidentiary hearing based on a legally erroneous standard. Grimes directs us to the circuit court's statement that, "Nearly all of the Defendant's arguments and allegations have been or could have been presented on direct appeal of the judgment in this case. The Court will briefly address the Defendant's other arguments in this order." However, the circuit court also stated that, "[t]here is no reason for an evidentiary hearing on any matter raised by the Defendant's motion."

A hearing is only required if an RCr 11.42 motion raises an issue that cannot be determined on the face of the record. RCr 11.42 (5); *Stanford v. Commonwealth*, 854 S.W.2d 742, 743 (Ky. 1993). A review of the record resolves the majority of Grimes's claims. Having reviewed the parties' briefs, we believe Grimes's claims are best analyzed according to the order of the RCr 11.42 requirements. The claims must: (1) specifically state the grounds on which the

sentence is being challenged and the facts in support of such grounds; and (2) state grounds which, if true, would invalidate the conviction.

B. Whether Grimes's Claims are Sufficiently Specific

RCr 11.42(2) requires that the movant “state specifically the grounds on which the sentence is being challenged and the facts on which the movant relies in support of such grounds.” As noted in *Hodge v. Commonwealth*, 116 S.W.3d 463, 467 (Ky. 2003), in a post-conviction relief motion, the court “will not presume that facts omitted from the motion establish the existence of such a violation.”

Grimes contends that his trial counsel failed to render effective assistance of counsel: (1) by failing to investigate potential guilt phase witnesses and evidence; and (2) by failing to investigate potential mitigation evidence. However, a vague allegation that counsel failed to investigate, without offering specific facts as to what such an investigation would have revealed, is insufficient to support an RCr 11.42 motion. *Sanders v. Commonwealth*, 89 S.W.3d 380, 390 (Ky. 2002) *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009). In his RCr 11.42 motion, Grimes only offered conclusory assertions that his trial counsel should have investigated potential guilt phase witnesses and mitigation witnesses. Grimes did not state with specificity what evidence either investigation would have revealed. Therefore, we hold the circuit court did not err in dismissing these claims without an evidentiary hearing.

C. Whether Grimes's Claims Would Invalidate His Conviction

Because Grimes's remaining claims meet the specificity requirement of RCr 11.42, we must determine whether these claims state grounds that are not "conclusively refuted by the record and which, if true, would invalidate the conviction." *Lewis v. Commonwealth*, 411 S.W.2d at 322.

(1) Failure to Investigate Mother

Grimes contends that his trial counsel rendered ineffective assistance by failing to investigate the victims' mother's alleged past propensity to accuse individuals of abusing her children. Given the totality of the evidence presented, including the testimony of the two victims, the mother's testimony would not be sufficient to invalidate Grimes's conviction. We hold that the trial court did not err when it summarily dismissed this claim without an evidentiary hearing.

(2) Conceding Guilt

Grimes contends that his trial counsel was ineffective by "conceding movant's guilt" to those offenses involving the older victim. In his RCr 11.42 motion, Grimes argued that during cross-examination of the older victim, trial counsel asked her whether, at the time of each incident, she was "in fear of death or physical injury" or "suffered substantial physical pain or impairment of her body." Grimes further argued that his trial counsel "did little or nothing to impeach her credibility or her testimony," and, thus, was ineffective.

In *Wiley v. Sowders*, 647 F.2d 642, (6th Cir. 1981), the Sixth Circuit determined that the defendant had received ineffective assistance of counsel because trial counsel had conceded his guilt to the jury. In reaching this conclusion, the Court stated:

Here, however, the admissions of Wiley’s counsel constituted a surrender of the sword.

. . . .

Throughout the closing arguments, both attorneys for petitioner repeatedly stated to the jury that petitioner was “guilty,” “guilty as charged,” and “guilty beyond reasonable doubt.” Counsel’s argument represented the precise admission which the defendant rejected in making his earlier plea of “not guilty.” Counsel made his

remarks with knowledge of petitioner’s earlier “not guilty” plea, and without petitioner’s consent.

Id. at 649-650.

Here, trial counsel’s questioning of the victim on cross-examination was appropriate and does not remotely approach a “surrendering of the sword.” Trial counsel reasonably questioned the victim based on the elements of the charged crimes. Such questioning does not amount to an admission of guilt or serve to invalidate Grimes’s conviction. Therefore, we hold that the trial court did not err when it summarily dismissed this claim without an evidentiary hearing.

(3) Jury Instructions

(a) Failure to request lesser-included offense instructions

Grimes contends that his trial counsel rendered ineffective assistance by failing to request lesser-included offense instructions on those charges

involving the older victim on the basis that the victim's testimony raised a factual issue of whether there was forcible compulsion or consent.

Counsel is not required to make useless requests and failure to do so is not ineffective assistance of counsel. *See Commonwealth v. Davis*, 14 S.W.3d 9, 11 (Ky. 1999). An instruction on a lesser-included offense is required only if, based on the evidence presented at trial, “a reasonable juror could entertain reasonable doubt of the defendant's guilt of the greater charge, but believe beyond a reasonable doubt that the defendant is guilty of the lesser offense.” *Thompkins v. Commonwealth*, 54 S.W.3d 147, 151 (Ky. 2001). The Supreme Court found on Grimes's direct appeal that there was no factual basis to support an instruction on lesser-included offenses to first-degree rape. *Grimes v. Commonwealth*, 2005 WL 1185609 at *2. The Supreme Court also noted that the entire import of the defense presented was that the events alleged had not in fact occurred. *Id.* Therefore, any request for a lesser-included offense instruction would have been futile. Because Grimes fails to state any grounds with regard to this issue which would invalidate his conviction, we hold that the circuit court did not err in summarily dismissing this claim without an evidentiary hearing.

(b) Failure to request consent instruction

Grimes contends that trial counsel rendered ineffective assistance by failing to request an instruction, pursuant to Kentucky Revised Statutes (KRS) 510.020, to inform the jury that a person is deemed capable of consenting to any sexual act when sixteen years of age or older. In his RCr 11.42 motion, Grimes

argued that a comment made by the prosecutor in closing argument raised a factual issue concerning the possibility of the older victim's consent. The prosecutor, using a statement attributed to the victims' mother, stated: "[The oldest victim's] like you, she said no, she told me no, I'd leave her alone."

As the Supreme Court noted on Grimes's direct appeal, statements made by the prosecution in the closing argument are not evidence. *Grimes* at *2. Therefore, there was no factual basis to give an instruction on consent based on the prosecutor's statement. Because Grimes fails to state any grounds on this issue which would invalidate his conviction, we hold that the circuit court did not err in summarily dismissing this claim without an evidentiary hearing.

(c) Failure to request separate instruction

Grimes contends that his trial counsel rendered ineffective assistance of counsel by failing to request an instruction on the separate nature of each count of the seventeen-count indictment. In his RCr 11.42 motion, Grimes did not cite to any Kentucky law in support of this contention. A review of William S. Cooper, *Kentucky Instructions to Juries* confirms there is no such instruction in Kentucky. Furthermore, although there is no individual instruction as to the separate nature of each count, each of the jury instructions specifically sets forth the date and place of the charged offense. The net effect of each jury instruction's specificity is the same as if an individual instruction had been provided. Because the requested instruction was not available to Grimes, he cannot allege that his conviction would be invalidated by the failure to provide such an instruction. Therefore, we hold the

circuit court did not err in summarily dismissing this claim without an evidentiary hearing.

(4) Prosecutorial Misconduct

Grimes argues that his trial counsel rendered ineffective assistance of counsel by failing to object to four instances of prosecutorial misconduct.

(a) Failure to object to the prosecutor's leading questions

Grimes contends that his trial counsel was ineffective by failing to object when the prosecutor used leading questions during his direct examination of both victims, who were eighteen years old and twelve years old at the time of trial.

Grimes failed to point to specific examples of the prosecutor's leading questions. Having reviewed the record of the trial, we discern no error. We hold the circuit court did not err in summarily dismissing this claim without an evidentiary hearing.

(b) Failure to object to statement not in evidence during closing argument

Grimes contends that his trial counsel was ineffective by failing to object when the prosecutor, during closing argument, used a statement neither in evidence nor reasonably inferable from the evidence. In his RCr 11.42 motion, Grimes cited the fact that the prosecutor told the jury that Grimes had said to the victims' mother on the telephone that "[The oldest victim's] like you, she said no, she told me no, I'd leave her alone."

It is well established that attorneys, including prosecutors, are afforded great latitude in making their closing arguments. *Slaughter v.*

Commonwealth, 744 S.W.2d 407, 412 (Ky. 1987). When the alleged misconduct occurs during closing arguments, “we must determine whether the conduct was of such an ‘egregious’ nature as to deny the accused his constitutional right of due process of law.” *Id.* at 411-12. On appeal, we focus on the overall fairness of the trial. *Id.*

On direct appeal, the Supreme Court found that this “isolated misstatement by the prosecutor did not prejudice Grimes in any manner.” *Grimes* at *3. Therefore, the prosecutor’s statement could not have invalidated Grimes’s conviction, and we hold the circuit court did not err in summarily dismissing this claim without an evidentiary hearing.

(c) Failure to object to impermissible inference during closing argument

Grimes contends that his trial counsel was ineffective by failing to object during closing argument when the prosecutor argued facts not reasonably inferable from the evidence. In his RCr 11.42 motion, Grimes cited the fact that the prosecutor told the jury that it was Grimes’s “job as a salesman to try to sell to [the jury] that he is not guilty.”

During closing argument, “[a] prosecutor may comment on tactics, may comment on evidence, and may comment on the falsity of the defense position.” *Slaughter v. Commonwealth*, 744 S.W.2d 407, 412 (Ky. 1987), *cert. denied*, 490 U.S. 1113, 109 S.Ct. 3174, 104 L.Ed.2d 1036 (1989). Grimes testified that he was a sales representative for a company that sold construction equipment. In his closing argument, the prosecutor addressed the defense theory that Grimes

was telling the truth and that the victims and their mother were lying. The prosecutor discussed the possibility that some jurors might not believe the victims because they thought that Grimes did not look like a child molester. The prosecutor stated:

No, he looked well. He dressed well. He testified professionally. His chosen profession is a salesman. I'm not knocking salesmen. But it's his job as a salesman to try and sell to you that he is not guilty. But the evidence, the proof and the details show otherwise. You know, he looks good. He's dressed up now, but how did he look to . . . [the two victims] when he was abusing them?

Grimes at *4.

Having reviewed the video of the trial, we discern no error in the prosecutor's closing argument. Furthermore, we note that the Supreme Court cited to references to a criminal defendant as "a bit of evil," a "beast," and "worse than all the convicts and traitors in hell" as acceptable. *Id.* at *5. Therefore, we hold the circuit court did not err in summarily dismissing this claim without an evidentiary hearing.

(d) Failure to object to the prosecutor's questioning of Grimes

Grimes contends that his trial counsel was ineffective by failing to object when the prosecutor required Grimes, on cross-examination, to characterize the testimony of the victims' mother as "not true" and to state whether there was anything in her testimony about his alleged telephone confession that she was "telling the truth about."

“A witness should not be required to characterize the testimony of another witness . . . as lying. Such a characterization places the witness in such an unflattering light as to potentially undermine his entire testimony.” *Moss v. Commonwealth*, 949 S.W.2d 579, 583 (Ky. 1997).

As the Supreme Court noted on Grimes’s direct appeal, a review of the trial video reveals that the prosecutor was attempting to clarify the differences in Grimes’s and the victims’ mother’s testimony, some of which Grimes admitted was accurate. *Grimes* at *5. The prosecutor did not ask Grimes to characterize the testimony of the victims’ mother as lying. Therefore, because Grimes fails to state any grounds which would invalidate his conviction, the circuit court did not err in summarily dismissing this claim without an evidentiary hearing.

(5) Nonresponsive Lay Opinion

Grimes contends that his trial counsel was ineffective by failing to object when the victims’ mother said that the early development of her daughters’ breasts were physical evidence that both daughters had been sexually abused.

As the Supreme Court noted on Grimes’s direct appeal, this testimony was offered on cross-examination when trial counsel asked the mother a series of questions regarding whether her daughters had reported any abuse to her in the last five years or whether she noticed any changes in their behavior. Trial counsel then asked the mother whether there were any emotional indications of any kind, and she responded that her daughters developed early. Grimes’s trial counsel did not object to the response, but commented that he thought the youngest victim looked

more mature than she did a year before. The Supreme Court held that Grimes could not reasonably claim palpable error. *Grimes* at *5. In light of all of the other evidence, there is no likelihood that exclusion of this testimony would have resulted in a different outcome. Therefore, because Grimes fails to state any grounds which would invalidate his conviction, we hold the circuit court did not err in summarily dismissing this claim without an evidentiary hearing.

(6) Failure to Request Physical Examination

Grimes next alleges that his trial counsel was ineffective by failing to move the circuit court to have the victims medically examined to properly determine whether abuse had ever occurred. The Supreme Court has held that “due process and fundamental fairness may, depending on the circumstances, entitle the defendant to have the alleged victim examined by an independent expert.” *Mack v. Commonwealth*, 860 S.W.2d 275, 277 (Ky. 1993). “[T]he critical question is whether the evidence sought by the appellant is of such importance to his defense that it outweighs the potential for harm.” *Turner v. Commonwealth*, 767 S.W.2d 557, 559 (Ky. 1988).

In this case, no medical evidence was presented by the Commonwealth to support the allegation that sexual abuse occurred. Therefore, because there was no medical examination being offered by the Commonwealth to rebut, Grimes has failed to show any probability that the outcome of the trial would have been different had a medical examination been sought. Additionally, there

existed great potential for harm. Thus, we hold the circuit court did not err in summarily dismissing this claim without an evidentiary hearing.

(7) *Evidentiary Hearing on Alleged Plea Offer*

Grimes contends that his trial counsel failed to inform him of a plea offer from the Commonwealth. According to Grimes, but for trial counsel's failure to communicate this alleged offer, he would have entered a guilty plea and received a significantly lighter sentence.

There is nothing in the record to refute this allegation. Furthermore, contrary to the Commonwealth's argument that there is no evidence of a plea offer, the Commonwealth's response to Grimes's RCr 11.42 motion indicates a plea offer of five years was made: "First of all, the Commonwealth never offered a five-year plea agreement to defense counsel. The offer was to serve five years, with the defendant serving five years before being eligible for release." We hold that the record does not refute Grimes's allegation, but, at least in part, supports it.

However, to be entitled to a hearing, Grimes must also show that his trial counsel's failure to advise him of the plea would have made a difference sufficient to result in a reversal of his conviction. Therefore, Grimes must meet the standards set forth in *Strickland*.

Using the *Strickland* standard, the Sixth Circuit in *Griffin v. United States*, 330 F.3d 733 (6th Cir. 2003), held that "[a] defense attorney's failure to

notify his client of a prosecutor's plea offer constitutes ineffective assistance of counsel under the Sixth Amendment and satisfies the first element of the *Strickland* test." *Griffin* at 737. In determining whether the alleged failure to communicate a plea offer meets the second element of the *Strickland* test, the Sixth Circuit looked to objective evidence in the record. In *Griffin*, as in this case, there was a substantial disparity between the alleged plea offer and the ultimate sentence. The Sixth Circuit held this factor alone could be sufficient to overcome the second hurdle of the *Strickland* test. Therefore, we hold that Grimes is entitled to a hearing on this aspect of his RCr 11.42 motion. However, while we have noted the possibility of ineffective assistance of counsel with regard to the alleged plea offer, we cannot and do not hold that ineffective assistance existed. This is a matter for the circuit court to address following an evidentiary hearing. Therefore,

we vacate the judgment and remand for proceedings by the circuit court on this single issue.

CONCLUSION

For the foregoing reasons, we affirm in part, vacate in part, and remand the Daviess Circuit Court's order denying relief under RCr 11.42. Furthermore, the Commonwealth's motion to dismiss and Grimes's motion to set briefing schedule, and to clarify status of appeal, are hereby denied.

LAMBERT, JUDGE, CONCURS.

ENTERED: December 9, 2011

/s/ Michelle M. Keller
JUDGE, COURT OF APPEALS

CAPERTON, JUDGE, DISSENTS AND FILES SEPARATE
OPINION.

CAPERTON, JUDGE, DISSENTING: The opinion of the majority is well reasoned but for the singular aspect of overruling the motion of the Commonwealth to dismiss. I dissent and would sustain the Commonwealth's motion to dismiss for the reason that I do not believe the mere reentry of a judgment, for the stated purpose of restarting time for appeal, is appropriate under our rules of civil or criminal procedure.

BRIEF AND ORAL ARGUMENT
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