

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001194-MR

JAMES KIRCHNER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE AUDRA J. ECKERLE, JUDGE
ACTION NO. 05-CR-001880

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: DIXON AND MOORE, JUDGES, AND ISAAC,¹ SENIOR JUDGE.

MOORE, JUDGE: James Kirchner, proceeding *pro se*, appeals the Jefferson Circuit Court's order denying his RCr² 11.42 motion to vacate, set aside, or correct his sentence. After a careful review of the record, we affirm because Kirchner failed to establish that he received the ineffective assistance of trial counsel.

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

² Kentucky Rule of Criminal Procedure.

I. FACTUAL AND PROCEDURAL BACKGROUND

Kirchner was charged with twenty-two counts of various sexual offenses against his step-daughter. Following a jury trial, Kirchner was convicted of two counts of second-degree rape, four counts of incest, two counts of second-degree sodomy, and one count of second-degree sexual abuse. He was acquitted of the remaining thirteen counts. Thereafter, Kirchner was sentenced to serve a total of fifteen years of imprisonment.

Kirchner appealed the circuit court's judgment, contending "that there was insufficient evidence produced at trial to separately identify the various offenses and that the verdict was not unanimous." This Court affirmed. Regarding Kirchner's claim that the evidence was insufficient, this Court held that although "the victim's testimony was not clear as to some issues," this was likely due to her "young age," and regardless, "there was sufficient testimony from other witnesses to support the multiple charges and to differentiate between the offenses."

Kirchner v. Commonwealth, No. 2006-CA-000774, 2008 WL 110657, *1, 2 (Ky. App. Jan. 11, 2008) (unpublished). As for Kirchner's allegation that he was denied a unanimous verdict, this Court held that "the victim's testimony, along with the testimony of other witnesses, was sufficient to guarantee a unanimous verdict on all counts." *Id.*

Kirchner subsequently filed his *pro se* RCr 11.42 motion to vacate, set aside, or correct his sentence in the circuit court. In his motion, Kirchner requested an evidentiary hearing and claimed that he received the ineffective assistance of

trial counsel when counsel: (a) failed to properly investigate and present exculpatory evidence which would have shown that the alleged victim was being untruthful; (b) failed to obtain the services of an expert witness to testify about unreliable reporting by child witnesses; and (c) failed to object to the sufficiency of the evidence or unanimity of the jury's verdict. Counsel was appointed to represent Kirchner in the RCr 11.42 proceedings, and counsel filed a supplement to Kirchner's RCr 11.42 motion, alleging that Kirchner had also received the ineffective assistance of trial counsel when counsel failed to interview and retain a medical expert to testify concerning what could have caused the injury to the victim's vagina.

The circuit court denied Kirchner's request for a hearing, reasoning that the court was able to determine the material issues from the face of the record. The court then denied Kirchner's RCr 11.42 motion after finding that his claims lacked merit.

Kirchner now appeals, contending that the circuit court erred in failing to hold an evidentiary hearing regarding his RCr 11.42 motion.

II. STANDARD OF REVIEW

In a motion brought under RCr 11.42, "[t]he movant has the burden of establishing convincingly that he or she was deprived of some substantial right which would justify the extraordinary relief provided by [a] post-conviction proceeding. . . . A reviewing court must always defer to the determination of facts and witness credibility made by the circuit judge." *Simmons v. Commonwealth*,

191 S.W.3d 557, 561 (Ky. 2006), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151, 159 (Ky. 2009). An RCr 11.42 motion is “limited to issues that were not and could not be raised on direct appeal.” *Id.* Kirchner alleges that the circuit court should have granted his request for an evidentiary hearing concerning his RCr 11.42 claims. Pursuant to RCr 11.42(5), if there is “a material issue of fact that cannot be determined on the face of the record[,] the court shall grant a prompt hearing. . . .”

III. ANALYSIS

Kirchner alleges that the circuit court erred when it failed to conduct an evidentiary hearing concerning his RCr 11.42 motion. However, the circuit court is only required to hold a hearing if there is some material issue of fact that cannot be resolved by the face of the record. Therefore, we will address each of the claims he raised in the circuit court in turn to determine whether the court should have held an evidentiary hearing.

A. CLAIM THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO INVESTIGATE AND PRESENT EVIDENCE SHOWING VICTIM’S UNTRUTHFULNESS

Kirchner first alleges that he received the ineffective assistance of counsel when counsel failed to properly investigate and present exculpatory evidence which would have shown that the alleged victim was being untruthful. Specifically, Kirchner contended in his RCr 11.42 motion that he begged counsel “to send an independent investigator out to re-interview all of the witnesses listed

by the police as well as other[]s who could verify that he was in fact telling the truth.” Kirchner asserted

that his attorney failed to meet with him to discuss trial strategy in addition to failing to investigate and prepare for trial based on his most viable claim – that the alleged victim colluded with her friends in fabricating a story against him because she was unhappy with the rules, discipline and structure in their home.

To prove that he received the ineffective assistance of counsel, Kirchner must show that: (1) counsel’s performance was deficient, in that it fell outside “the wide range of reasonable professional assistance”; and (2) this deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 689, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984).

The circuit court held that this claim was too general, and that Kirchner failed to identify “any witnesses that trial counsel should have contacted, what information would have resulted or the effect such information would have had on his case.” The court also noted that although Kirchner alleged that the victim colluded with her friends and he contended that her friends’ testimony at trial differed from the information presented in police reports, Kirchner failed “to address how the testimony was different or what additional evidence would have been discovered through re-interview by counsel.” The circuit court found that although Kirchner argued that he had only met with his counsel once prior to trial, “multiple conferences were held in which Defendant was present in Court with counsel.” The court then noted that “trial counsel successfully avoided a potential

life sentence for Defendant who ultimately received only fifteen years.” Therefore, the court denied this claim.

“In seeking post-conviction relief, the movant must aver facts with sufficient specificity to generate a basis for relief.” *Lucas v. Commonwealth*, 465 S.W.2d 267, 268 (Ky. 1971). In the present case, Kirchner’s first claim of ineffective assistance of counsel was conclusory, in that he alleged that counsel should have re-interviewed all of the witnesses listed by police, as well as unspecified others, but he did not explain what evidence counsel would have obtained from this exercise and how it would have affected the outcome of his trial. Therefore, he did not allege facts with sufficient specificity to generate a basis for relief, and the circuit court did not err in failing to grant an evidentiary hearing concerning this claim.

B. CLAIM THAT COUNSEL WAS INEFFECTIVE BY FAILING TO OBTAIN THE SERVICES OF AN EXPERT REGARDING CHILD WITNESSES

Kirchner next alleges that he received the ineffective assistance of trial counsel when counsel failed to obtain the services of an expert witness to testify about unreliable reporting by child witnesses. Specifically, Kirchner contends that the victim initially told the police that she was not sexually active, but at trial she testified that she had been sexually active with a boyfriend.

Kirchner acknowledged in his RCr 11.42 motion that “KRE³ 412 would not have allowed [him] to delve into the alleged victim’s sexual past, [but] an expert should

³ Kentucky Rule of Evidence.

have been called to demonstrate the propensity of the alleged victim to lie under the circumstances.”

The circuit court found that the circumstances in *Mack v. Commonwealth*, 860 S.W.2d 275, 277 (Ky. 1993), which Kirchner had cited in his motion, were distinguishable from the present case in that “[h]ere, unlike in *Mack*, there was no evidence that the victim had suffered prior sexual abuse by anyone other than Defendant or that the victim had any pre-existing psychological condition that might affect her competency.” The court then held that Kirchner had “not demonstrated that he was entitled to have the victim examined by an independent expert, let alone that such examination would have been beneficial to his case.” The circuit court also noted that Kirchner had “an opportunity to challenge the victim’s testimony on cross-examination and through his own testimony at trial. Despite the victim’s admission of some prior untruthfulness, the jury still believed the victim’s version of events over that of Defendant.” Thus, the court denied relief based upon this claim.

As noted by the circuit court, the victim in *Mack* had suffered prior sexual abuse by someone other than the defendant and potentially had a pre-existing psychological condition. In the present case, there is no allegation that the victim had previously suffered sexual abuse by anyone other than defendant or that the victim had a pre-existing psychological condition. Thus, the circuit court properly found that this case is distinguishable from *Mack*. Additionally, Kirchner does not dispute the circuit court’s finding that the victim had admitted some prior

untruthfulness, yet the jury apparently still believed the victim's version of events over Kirchner's. Therefore, because the jury was made aware of the victim's prior untruthfulness, yet nevertheless chose to believe her over Kirchner, Kirchner is unable to show that the result of the trial would likely have been different if counsel had presented the testimony of an expert witness concerning the victim's propensity to lie. Consequently, this basis for his ineffective assistance of counsel claim lacks merit, and the circuit court did not err in failing to hold an evidentiary hearing on this ground.

C. CLAIM THAT COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO THE SUFFICIENCY OF EVIDENCE OR UNANIMITY OF THE JURY'S VERDICT

Kirchner next contends that he received the ineffective assistance of counsel when counsel failed to object to the sufficiency of evidence or unanimity of the jury's verdict. He alleges that "there was insufficient evidence produced at trial to separately identify the various offenses and that the verdict was not unanimous."

The circuit court properly noted that this Court previously determined, on direct appeal, that the testimony of the victim and witnesses was sufficient to separately identify the offenses and to ensure a unanimous verdict for each count. The circuit court then held that because this Court had already determined that Kirchner's objections regarding the sufficiency of the evidence and the unanimous verdict would not have been sustained, Kirchner was not prejudiced by his counsel's failure to raise such objections. We agree with the circuit court and find

that this claim of ineffective assistance of counsel lacks merit because Kirchner cannot show that he was prejudiced by counsel's failure to raise these objections. Consequently, the circuit court did not err in failing to hold an evidentiary hearing on this ground.

D. CLAIM THAT COUNSEL WAS INEFFECTIVE IN FAILING TO INTERVIEW AND RETAIN A MEDICAL EXPERT REGARDING THE VICTIM'S INJURY

Finally, Kirchner asserted that he had received the ineffective assistance of trial counsel when counsel failed to interview and retain a medical expert to testify concerning the defense's theory of what could have caused the injury to the victim's vagina. In his supplemental RCr 11.42 motion, Kirchner contended that his defense counsel's theory was that the reason "why the Commonwealth's gynecological exam of the alleged victim showed injury was that it was caused by the sexual contact the alleged victim admitted to having with her boyfriend or self-inflicted through masturbation." Kirchner alleged that defense counsel should have retained an independent medical expert to rebut the testimony of the Commonwealth's expert, Dr. Linda Fitzer, a pediatrician, who attested "that the alleged victim's injury to her vagina was consistent with an adult male penis or vibrator being inserted." Trial counsel objected to the "characterization of the object of insertion being a[n] 'adult male penis,'" but the testimony was admitted nonetheless.

The circuit court held that this claim was not proper under RCr 11.42 because it was a claim concerning trial strategy, and "[t]here is a strong

presumption that counsel's decision in this regard falls within the wide range of reasonable professional assistance." The court also found that Kirchner's claim was not supported by specific facts to warrant a reversal of his convictions, and that during his cross-examination of Dr. Fitzer, defense counsel "suggested that the victim's injury was caused by sexual contact with her boyfriend or through masturbation." The court stated that

Dr. Fitzer did not identify Defendant as the perpetrator. Thus, because the testimony and the results of the victim's physical examination did not identify the person who caused the injury, even if a medical expert were to challenge the findings of Dr. Fitzer, Defendant could not have been excluded as the perpetrator and the jury would still have been free to draw its own conclusions.

Therefore, the court denied relief based on this claim.

We agree with the circuit court. First, it was likely defense counsel's trial strategy not to retain a medical expert, and there is a strong presumption in counsel's favor concerning matters of trial strategy.

Second, even if defense counsel had introduced testimony from a medical expert to challenge Dr. Fitzer's testimony concerning what caused the victim's injury, the expert could not have ruled Kirchner out as the person who caused her injury. Furthermore, the court found and Kirchner does not deny, that defense counsel suggested that the victim's injury could have been caused by sexual contact she had with her boyfriend or through masturbation. Therefore, the jury was free to decide who caused the victim's injury, and Kirchner was not prejudiced by the fact that he did not have an independent medical expert to testify

on his behalf. Thus, Kirchner's claim of ineffective assistance of counsel lacks merit, and the circuit court did not err in failing to hold an evidentiary hearing based upon this claim.

Accordingly, the order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

James Kirchner
Pro se
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky
Frankfort, Kentucky

Perry T. Ryan
Assistant Attorney General
Frankfort, Kentucky