

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000618-MR

RICHARD WELLS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BRIAN C. EDWARDS, JUDGE
ACTION NO. 06-CR-00544

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON AND KELLER, JUDGES; ISAAC,¹ SENIOR JUDGE.

KELLER, JUDGE: Richard Lee Wells (Wells) appeals from the circuit court's denial of his Kentucky Rule of Criminal Procedure (RCr) 11.42 motion. On appeal, Wells argues that his trial counsel was ineffective for failing to object to alleged hearsay testimony; for failing to object to alleged Kentucky Rule of Evidence (KRE) 404(b) evidence; for failing to object to an *ex parte*

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.

communication between the court and the jury; and for failing to object to questioning by the Commonwealth of his wife about sex toys. Wells also argues that the trial court should have granted his RCr 11.42 motion because of the cumulative impact of counsel's errors. For the following reasons, we affirm.

FACTS

We take our recitation of the underlying facts from the Opinion of the Supreme Court of Kentucky affirming Wells's conviction.

When T.M. was very young - less than eight years old - she and her sister J.M. lived with their father. They would frequently visit their grandmother and step-grandfather – [Wells] - on weekends. Their grandmother would regularly be absent from the home for work, and the girls would be left in the care of [Wells]. T.M. testified that when her grandmother was gone, she would often sleep upstairs in her grandmother's bed with [Wells]. When T.M. was in bed with [Wells], J.M. would sleep on the couch downstairs. Likewise, if J.M. slept in the bed with [Wells], T.M. [sic] would sleep on the couch downstairs.

When T.M. slept in the bed with [Wells], he would touch her breasts and vaginal area. [Wells] also put a vibrator inside T.M.'s vagina. [Wells] raped T.M. on more than one occasion. When T.M. was eight or nine years old, the abuse stopped because her grandmother was in an automobile accident and was no longer absent from the home. T.M. never told anyone about the abuse except for a few close friends whom she told to keep the information secret. T.M.'s father found out about the abuse when he found a letter that T.M. had written to her boyfriend. At trial, T.M. - then fifteen years old - identified this letter and read a portion of it, including a claim that [Wells] had raped her. T.M. further testified that she had never discussed the letter or the abuse with her sister J.M.

J.M. also testified at trial. J.M. stated that she was around seven years old when she began sleeping in the bed with [Wells]. She testified that [Wells] would touch her with his hands and his penis. [Wells] would also put his fingers inside her vagina. J.M. further stated that [Wells] raped her, and that it caused her severe pain. J.M. related that she was forced to perform oral sex on [Wells], and that [Wells] would perform oral sex on her. J.M. also testified that [Wells] had pornographic pictures of her on his computer. J.M. recalled that the abuse occurred over a two-to-three-year period and that the abuse would always occur while her grandmother was at work. She was around ten years old when the abuse ended. J.M. never talked to her sister about the abuse. On the day that her father discovered T.M.'s letter, he brought the letter into J.M.'s room. When asked if the same thing had happened to her, J.M. began crying and told her father that [Wells] had abused her.

A medical expert and pediatrician, Dr. Lisa Pfitzer, testified at trial for the Commonwealth. Pfitzer testified that she examined J.M. and saw tearing on an area of J.M.'s hymen that had healed. She further testified that it was consistent with J.M.'s statement that she experienced "major pain" during penetration, and with J.M.'s statements that she was repeatedly raped from the ages of seven to nine.

[Wells] took the stand at trial, denying all allegations of abuse. He testified that he was strict with the girls and speculated that J.M. and T.M. were mad at him when they were teenagers. T.M.'s friends, C.R. and N.J., also testified at trial. C.R. testified that T.M. made her aware of the sexual assault some three years prior, and that T.M. had asked her not to tell anyone. N.J. testified that she first learned about the allegations by T.M. in a health class at school. N.J. recounted that T.M. looked very upset, like she was about to cry, during a presentation about rape in their school health class. T.M. disclosed to N.J. that [Wells] had sexually assaulted her.

[Wells] was indicted for one count of Rape in the First Degree for J.M.; one count of Rape in the First Degree

for T.M.; two counts of Sodomy in the First Degree for J.M.; two counts of Sexual Abuse in the First Degree for J.M.; and one count of Possession of a Matter Portraying a Sexual Performance by a Minor. In the indictment, only count five (Rape in the First Degree) named T.M. as a victim. Apparently, this was a typographical error and the Commonwealth moved to amend count six of the indictment (Sexual Abuse in the First Degree) to include T.M. as a victim. The court denied the Commonwealth's motion to amend the indictment.

At trial, [Wells's] counsel discovered a piece of paper signed by the judge after the jury went back to deliberate. The paper contained a question from a juror about a verdict form that was a duplicate of another form. The judge indicated that he had mistakenly sent back two copies of verdict form six. Defense counsel indicated that he did not believe the question was ever presented in open court, to which the trial judge replied: "They sent out two verdict forms and one was obviously a duplication of the other, so I just sent them back and told them that I had mistakenly sent back two, and to disregard the verdict form six which included [T.M.]." Defense counsel then requested that the court mark the piece of paper for the record. However, defense counsel did not object to the judge's contact with the jury.

[Wells] was convicted of two counts of Rape in the First Degree, two counts of Sodomy in the First Degree, and two counts of Sexual Abuse in the First Degree for illegal sexual contact with his step-grandchildren. [Wells] was sentenced to 20 years on each of the rape charges, 20 years on each of the sodomy charges, and 5 years on each of the sexual abuse charges, to run concurrently for a total of 20 years. [Wells] now appeals as a matter of right pursuant to Ky. Const. § 110(2) (b). [Wells] argues that the Jefferson Circuit Court erred by: (1) engaging in a "question and answer" session with the jury off the record; (2) improperly admitting hearsay evidence; and (3) allowing the Commonwealth to introduce Kentucky Rule of Evidence (KRE) 404(b) evidence of prior bad acts without giving notice to [Wells].

Wells v. Commonwealth, 2009 WL 160372, at *1-2 (Ky. January 22, 2009).

The Supreme Court held that: (1) the *ex parte* communication between the judge and jury was improper; (2) the trial court improperly admitted hearsay evidence; and (3) the Commonwealth improperly introduced evidence of prior bad acts without giving notice to Wells. However, because Wells had not properly preserved these issues for review, the Supreme Court also held that he was required to establish that the errors were palpable. The Supreme Court determined that Wells had not met that burden and affirmed his conviction.

Subsequently, Wells filed an RCr 11.42 motion arguing, in pertinent part, that he had received ineffective assistance of counsel because of counsel's failure to object and preserve the identified errors for review. Without holding a hearing, the trial court denied that motion. It is from the court's order denying his motion that Wells appeals.

STANDARD OF REVIEW

In considering ineffective assistance of counsel, the reviewing court must focus on the totality of evidence before the judge or jury and assess the overall performance of counsel throughout the case in order to determine whether the identified acts or omissions overcome the presumption that counsel rendered reasonable professional assistance. *See United States v. Morrow*, 977 F.2d 222, 230 (6th Cir. 1992); *Kimmelman v. Morrison*, 477 U.S. 365, 381, 106 S. Ct. 2574, 2586, 91 L. Ed. 2d 305 (1986). With this standard in mind, we address the issues raised by Wells on appeal.

ANALYSIS

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction . . . has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984).

As noted by the parties, the issues Wells raised on direct appeal are intertwined with the issues he raises here. The Supreme Court addressed those issues, holding that errors occurred, but that the errors were not palpable.

When an appellate court engages in a palpable error review, its focus is on what happened and whether the defect is so manifest, fundamental and unambiguous that it threatens the integrity of the judicial process. However, on collateral attack, when claims of ineffective assistance of counsel are before the court, the inquiry is broader. In that circumstance, the inquiry is not only upon what happened, but why it happened, and whether it was a result of trial strategy, the negligence or indifference of counsel, or any other factor that would shed light upon the severity of the defect and why there was no objection at trial. Thus, a palpable error claim imposes a more stringent standard and a narrower focus than does an ineffective assistance claim.

Leonard v. Commonwealth, 279 S.W.3d 151, 157-158 (Ky. 2009) (citing *Martin v. Commonwealth*, 207 S.W.3d 1, 4-5 (Ky. 2006)).

The Supreme Court previously determined that the trial court erred when it admitted hearsay testimony from two of T.M.'s friends; when it admitted evidence of prior bad acts; and when it engaged in *ex parte* communication with the jury. The Supreme Court further held that, because counsel failed to object, the errors were not properly preserved for review. Therefore, counsel's performance was deficient. However, deficient is not synonymous with ineffective. Having reviewed the record as a whole, and for the reasons set forth below, we hold that counsel's assistance was not ineffective.

1. *Ex Parte* Communication

After beginning deliberations, the jury asked the court whether it intended to submit two copies of verdict form number six, one for J.M. and one for T.M. The court advised the jury that it had mistakenly submitted two copies of verdict form

number six to the jury and that the jury should disregard verdict form number six as applied to T.M. The parties agree that the court did not advise them that the jury had asked a question regarding verdict form six or that the court had responded to that question. When counsel for Wells discovered the question and answer after the jury had been dismissed, he asked the court to mark the question and response for the record but did not raise any objection.

On direct appeal, the Supreme Court held that the trial court committed error by reviewing and responding to the jury's question outside the presence of the parties and counsel. However, because counsel had not preserved the error, the Court applied the palpable error standard and affirmed Wells's conviction.

Wells now argues that his counsel was ineffective because he did not object to this *ex parte* communication. As noted by the Supreme Court in Wells's direct appeal, not all *ex parte* communications between the court and jury "impugn the fundamental fairness of an otherwise constitutionally acceptable trial." *Welch v. Commonwealth*, 235 S.W.3d 555, 558 (Ky. 2007). Other than pointing out the error, Wells has not set forth with any specificity what impact, if any, that error had on the outcome in his trial. Furthermore, the trial court's communication with the jury herein was not substantive in nature but clerical. Therefore, although it was error for counsel to fail to object, that error was not so serious as to deprive Wells of a fair trial and did not amount to ineffective assistance of counsel.

2. Failure to Object to Hearsay

T.M. testified that she had told several friends three years earlier that Wells had sexually abused her. Two of T.M.'s friends, C.R. and N.J., testified at trial. C.R. testified that T.M. told her about the alleged sexual abuse three years earlier, and Wells's counsel objected. The court sustained the objection and admonished the jury to disregard C.R.'s statement. The Commonwealth then asked C.R. and N.J. when they first learned of the sexual abuse allegations. Both girls stated that they learned of the abuse three years earlier. Wells's counsel did not object to this line of questioning or to the witnesses' responses.

The Supreme Court determined that the testimony by C.R. and N.J. about when they learned of the sexual abuse was inadmissible hearsay. However, because Wells's counsel had not preserved the issue, the Court applied the palpable error standard of review and affirmed. In doing so, the Court noted that the testimony by C.R. and N.J. did not contribute to the verdict because it was simply cumulative of T.M.'s testimony.

Having reviewed the record, we agree that counsel for Wells should have objected to the introduction of this evidence and his failure to do so was error. However, we also agree with the Supreme Court's assessment that the testimony from C.R. and N.J. did not contribute to the verdict. Therefore, counsel's failure to object was not so serious an error as to deprive Wells of a fair trial and did not amount to ineffective assistance of counsel.

3. 404(b) Evidence

KRE 404(b) provides that, under certain circumstances, evidence of other crimes, wrongs, or acts may be admissible. However, before the Commonwealth can introduce such evidence in a criminal matter, it must give reasonable pre-trial notice to the defense. If the Commonwealth fails to give that notice, the court may exclude the evidence. KRE 404(c).

The indictment charged Wells with raping both T.M. and J.M. and with sexual abuse of J.M. However, it did not charge Wells with sexual abuse of T.M. Immediately prior to trial, the Commonwealth made a motion to amend the indictment to add sexual abuse charges of T.M. The court denied the Commonwealth's motion.

The Commonwealth called T.M. as its first witness. In response to questioning by the Commonwealth, T.M. testified about inappropriate touching by Wells. After T.M. had testified about the inappropriate touching at some length, counsel for Wells objected arguing that, because the Commonwealth had not charged Wells with sexual abuse of T.M., her testimony amounted to evidence of prior bad acts. Counsel for Wells noted that the Commonwealth had not provided the notice required by KRE 404(c) and that any such testimony was inappropriate. The court sustained Wells's objection; however, counsel for Wells did not ask the court to admonish the jury regarding testimony T.M. had already given.

On direct appeal, the Supreme Court affirmed Wells's conviction, noting that the issue had not been preserved for review, that Wells had not requested palpable

error review, and that there had been "no substantial miscarriage of justice." *Wells*, 2009 WL 160372, at *4.

In this appeal, Wells argues that counsel was ineffective because of his failure to timely object to T.M.'s testimony about sexual abuse. We agree that counsel should have objected to T.M.'s testimony. However, in light of all of the evidence presented at trial, including T.J.'s detailed testimony regarding Wells's use of the vibrator, we cannot say that counsel's failure to object was so serious as to deprive Wells of a fair trial.

4. Cumulative Impact of Errors

Wells argues that because of the cumulative impact of the preceding errors the results of the trial were unreliable. We disagree. Taking into consideration the evidence as a whole, in particular the testimony of T.M. and J.M., we hold that counsel's minor errors, even when viewed cumulatively, did not act to deprive Wells of a fair trial.

5. Testimony by Evelyn Wells

Finally, we note that Wells argues in his brief that the Commonwealth improperly inquired into his wife's "sexual and marital privacy." On direct examination, Evelyn Wells admitted that the couple owned several sex toys, including a white vibrator. However, she testified that the couple did not purchase the sex toys until a year after any abuse stopped. On cross-examination, the Commonwealth asked several questions regarding the timing of the purchase of the

sex toys. Wells now complains that the Commonwealth's cross-examination was improper.

We note that the propriety of the court's admission of this evidence should have been raised on direct appeal and cannot be properly raised in an RCr 11.42 proceeding. *See Sanborn v. Commonwealth*, 975 S.W.2d 905, 909 (Ky. 1988), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009). Additionally, we note that the Commonwealth's cross-examination of Evelyn was limited to issues Wells raised on direct examination and was proper. Therefore, even if Wells had raised this issue on direct appeal, he would not have been successful.

CONCLUSION

Although counsel for Wells made mistakes, those mistakes were not so significant, singly or cumulatively, to deprive him of a fair trial. Therefore, we affirm.

ALL CONCUR.

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