

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2013-CA-001859-MR

TERRY L. AYERS

APPELLANT

v. APPEAL FROM DAVIESS CIRCUIT COURT  
HONORABLE JOSEPH W. CASTLEN III, JUDGE  
ACTION NO. 10-CR-00166

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS, NICKELL, AND VANMETER JUDGES.

COMBS, JUDGE: Terry Ayers appeals the order of the Daviess Circuit Court which denied his motion to vacate his conviction and sentence for burglary and rape. After our review, we affirm.

On February 19, 2010, Ayers's victim called 911 and reported that someone was breaking into her apartment. The burglar entered her home while she was on

the phone with 911. Police officers arrived approximately four minutes later. They found Ayers standing over the victim. She told police that Ayers had pulled her pants down and threatened to have sex with her. He had shoved her down and tried to smother her. She had several bruises, and her hair had been severely pulled.

Ayers told the officers that he had heard the victim being attacked by someone else and that he was in her apartment to render assistance. Officers took Ayers to police headquarters where he repeated his statement in a recorded interrogation. Ayers was unable to corroborate his alibi, and he was arrested.

On April 22, 2011, a jury convicted Ayers of first-degree burglary, attempted rape in the first degree, and being a persistent felony offender in the first degree. He was sentenced to an aggregate life sentence. The Supreme Court of Kentucky affirmed the conviction on March 21, 2013.

On October 10, 2013, Ayers filed a motion to vacate his conviction and sentence pursuant to Kentucky Rule[s] of Criminal Procedure (RCr) 11.42, alleging that his trial counsel had provided ineffective representation. Ayers requested an evidentiary hearing on his claims. The trial court denied the motion on October 11, 2013. This appeal followed.

In order to prove that he had received ineffective assistance of counsel, a convicted defendant “must show that counsel’s performance was deficient” **and** that he was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). The prejudice must be proven

by “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068.

On appeal, we may only review a trial court’s denial of a motion for an evidentiary hearing by determining whether the allegations are refuted by the record and, if true, whether they would nullify the conviction. *Lewis v. Commonwealth*, 411 S.W.2d 321, 322 (Ky. 1967). No evidentiary hearing is required if the record contradicts the allegations. *Sparks v. Commonwealth*, 721 S.W.2d 726, 727 (Ky. App. 1986).

In order to prevail on an RCr 11.42 motion, the appellant must overcome the presumption that counsel’s representation was effective. *Parrish v. Commonwealth*, 272 S.W.3d 161, 169 (Ky. 2008). Our review must be deferential. And we must examine claims of error within the context of the totality of the evidence. *Id.* Trial strategy which is reasonable according to “prevailing professional norms” is not deemed to be ineffective. *Brown v. Commonwealth*, 253 S.W.3d 490, 498-99 (Ky. 2008).

Ayers’s first allegation of error is that his counsel erred by not seeking a suppression hearing regarding his investigative interview with police. Statements taken in violation of a suspect’s Fifth Amendment rights are inadmissible. *Buster v. Commonwealth*, 406 S.W.3d 437, 439 (Ky. 2013).

In this case, the interview of Ayers took place shortly after the burglary and attempted rape. He claims that it is inadmissible because he did not understand the waiver of rights that he signed.

We have reviewed the video recording of the interview. Ayers had already given a statement to officers at the scene. The subsequent interview was conducted by Detective Godeke, who began by saying, "Before I ask you a question, I gotta read you your rights." Ayers asked if he was under arrest, and Detective Godeke responded in the negative. Detective Godeke went on to explain that he read rights to everyone whom he interrogated.

Detective Godeke presented a written form which was a waiver of rights. Ayers responded that he did not want to sign "that piece of paper like I'm saying I'm guilty of something." Detective Godeke explained again that the waiver meant Ayers would be willingly providing a statement without an attorney present but that it was not an admission of guilt. Ayers replied, "*I understand that.*"

Detective Godeke then read Ayers his rights. He asked, "Do you understand those rights?" Ayers response was "right." Before Ayers signed the waiver, the following exchange took place:

Det. Godeke: See what that says. All that says is I understand the above rights as they have been read to me.

You got that?

Ayers: Yeah.

Det. Godeke: Any questions about that so far?

Ayers: No.

Det. Godeke: Do you know what your rights are?

Ayers: Yeah.

Ayers claims that Detective Godeke forced him to sign the waiver without informing him that he could have an attorney. However, after reading Ayers his rights, Detective Godeke continued to explain, “If you want an attorney, you are more than welcome to it. You understand and know what you’re doing?”

Then once again, after reviewing the waiver of rights, Detective Godeke asked, “Do you want to talk with me without an attorney?” Ayers answered, “Yeah.” Detective Godeke again asked Ayers to confirm that he understood his rights and that he did not have questions. Ayers agreed and said that he had nothing to hide. The interview proceeded, and Ayers reiterated his version of the events; *i.e.*, he had been in the victim’s apartment in order to render aid.

Based on the thoroughness of Detective Godeke’s explanation of rights and his carefully asking Ayers multiple times if he understood his rights, we conclude that Ayers’s argument on this issue is without merit. He averred several times that he understood that he was entitled to an attorney during the interrogation. Nonetheless, he declined to request one or to accept the offer that an attorney was a welcome and an available option. Ayers instead adamantly declared that he had nothing to hide.

Furthermore, Ayers has not shown how the admission of the interview into evidence prejudiced him. It was virtually contemporaneous with the attack, bolstering his defense that he was trying to help the victim. Thus, Ayers’s trial counsel was not ineffective for refraining from filing a motion to suppress his statement.

Ayers's second claim of error is that his counsel should have utilized a peremptory strike on a particular juror. During *voir dire*, the potential juror informed the court that his wife's cousin is the wife of Officer Warren Yonts, who would be testifying. Ayers's counsel made a motion to strike the juror for cause based upon the familial relationship. The trial court denied the motion.

Our Supreme Court has already addressed the significance of the relationship between the juror and Officer Yonts in Ayers's direct appeal. *Ayers v. Commonwealth*, 2013 WL 1188011 (Ky. March 21, 2013). It held that no prejudice was created by the juror's service.

The relationship between Officer Yonts and the juror was not one of consanguinity; their wives are cousins. The juror described their relationship as that of friendly acquaintances who only socialized at family gatherings. Furthermore, as the Supreme Court noted, Officer Yonts was not a key witness. Ayers has not presented grounds to allow us to distinguish this matter from the precedent already announced by the Supreme Court. Therefore, we cannot conclude that counsel was ineffective by failing to exercise a peremptory strike.

Next, Ayers claims that his counsel should have made a motion for a mistrial because of "prosecutorial misconduct." Our Supreme Court has held in clear, admonitory language that a mistrial is:

an extreme remedy and should be resorted to only when there is a fundamental defect in the proceedings which will result in a manifest injustice. The occurrence complained of must be of such character and magnitude

that a litigant will be denied a fair and impartial trial and the prejudicial effect can be removed in no other way.

*Gould v. Charlton Co., Inc.*, 929 S.W.2d 734, 738 (Ky. 1996).

The basis for Ayers's contention is that during the victim's testimony, she stated that she was unable to identify her attacker. However, that morning, a person from the Commonwealth Attorney's office showed her a picture of Ayers, telling her that it was Ayers but not naming him as her assailant.

We cannot agree that this allegation of error or prejudice warrants the "extreme remedy" of a mistrial. Ayers's counsel rigorously cross-examined the victim concerning her identification of the attacker. The victim's testimony was inherently contradictory. She had described her attacker both as being twenty-five years old and as being older than forty-four years old. She had said that he had facial hair and that he did not have facial hair. Ayers's counsel diligently questioned the victim concerning her inconsistencies.

Additionally, Ayers's counsel elicited testimony from the victim that on the night of the attack, she had taken several medications, including Klonopin, Xanax, Ritalin, and hydrocodone. The victim testified that she had a mental disability. Ayers's counsel used this testimony to disparage the victim's testimony.

Furthermore, our review of the trial reveals that the Commonwealth emphasized the testimony from the police officers about the scene of the attack. The Commonwealth also heavily relied on the 911 call made by the victim. Ayers presents no proof that he was prejudiced by the victim's inconsistent testimony --

especially not to the extent to warrant a mistrial. His counsel did not act ineffectively.

Ayers next argues that his counsel should have objected to statements made by the Commonwealth during its closing argument. It is fundamental that prosecutors enjoy great latitude in what they may include in closing arguments. *Berry v. Commonwealth*, 84 S.W.3d 82, 90 (Ky. App. 2001). They also have a broad prerogative as to how they may comment on the evidence that was presented. *Maxie v. Commonwealth*, 82 S.W.3d 860, 866 (Ky. 2002). We may only reverse if the “alleged prosecutorial misconduct is so egregious as to render the trial fundamentally unfair.” *Berry, supra.* (quoting *Partin v. Commonwealth*, 918 S.W.2d 219, 224 (Ky. 1996)).

Ayers claims that the Commonwealth made four statements which incorrectly reiterated some of the evidence. Two of the statements concerned DNA evidence. Ayers alleges that the Commonwealth told the jury that tufts of hair that were found at the scene belonged to the victim -- even though DNA tests had been inconclusive. The Commonwealth also commented on a crowbar which was found at the scene. It said that the victim’s DNA was on the crowbar and that the jury could draw its own conclusions about Ayers’s DNA.

We have reviewed the closing arguments. Ayers has cited the DNA comments out of proper context. The Commonwealth acknowledged that the DNA evidence was not strong. However, it discussed the physical evidence in conjunction with witness testimony and the pictures of the scene. DNA evidence



is not required to obtain a conviction; indeed, convictions have occurred for countless years prior to the advent of DNA evidence. The Commonwealth is permitted to comment on the evidence. *See Maxie, supra*. We are not persuaded that Ayers's counsel was inefficient for not objecting to the statements about DNA evidence.

Ayers further contends that the Commonwealth committed egregious error by appealing to the common sense of the jury. The Commonwealth told the jurors that they did not abandon their common sense at the courtroom doors. We are unable to hold this conduct to constitute error because the predecessor to our Supreme Court has specifically written that “[j]urors are not expected to lay aside their common sense or experience upon entering the jury box. . . .” *Louisville & Interurban R.R. Co. v. Roemmele*, 157 Ky. 84, 88, 162 S.W. 547, 549, (1914). The Commonwealth merely reiterated this truism to the jury, and Ayers's counsel was not remiss in not objecting.

Ayers's final claim regarding the Commonwealth's closing arguments is that it vouched for the victim's credibility. As discussed earlier in this opinion, the victim's testimony was not consistent with her statements to police officers on the night of the attack. Accordingly, Ayers's counsel vigorously cross-examined her. The victim explained that she suffered mental problems which affected her memory. The Commonwealth acknowledged the weakness of the victim's testimony and repeated her explanation. It speculated before the jury that based on her mental condition, she probably had not purposely committed perjury.

Our Supreme Court has held that it was not improper for a prosecutor to tell the jury that a particular witness did not have a reason to lie. In *Carver v. Commonwealth*, 303 S.W.3d 110, 118 (Ky. 2010), the Supreme Court stated as follows:

This was a fair comment on the credibility of his witnesses in light of Appellant's trial strategy to show that all of them were lying. The jury had previously been instructed by the trial judge that they are the ultimate judge of a witness's credibility. These statements did not undermine the fairness of Appellant's trial or his due process rights.

We believe that the same reasoning applies in this case. Ayers's counsel had emphasized the inconsistent statements in closing arguments for the defense. The Commonwealth did not err by responding to his defense. The statement did not undermine the fundamental fairness of the trial and none of the Commonwealth's closing arguments was objectionable.

Ayers also argues that his trial counsel should have requested jury instructions for the lesser included offense of criminal trespass. However, Ayers's defense was one of complete innocence; *i.e.*, that he was only present as a Good Samaritan. A request for an instruction on a crime of less culpability would undermine a defense of utter innocence. As a reviewing court, we must be highly deferential to trial counsel's strategy and refrain from second-guessing it. *Harper v. Commonwealth*, 978 S.W.2d 311, 315 (Ky. 1998). Accordingly, we are unable to agree that counsel erred in this respect.

Ayers's final argument is that his counsel was ineffective by not filing a motion for a competency examination of the victim. Kentucky Rule[s] of Civil Procedure (CR) 35.01 allows for a competency examination of a witness when that witness's "mental or physical condition (including the blood group) . . . is in controversy . . . ."

In this case, no such controversy existed. There is no dispute that the victim's accounts of the attack were inconsistent and that she was under the influence of numerous medications on the night of the assault. However, these circumstances were developed at trial and were addressed both by the Commonwealth and by Ayers. We are unable to conclude that any prejudice to Ayers was created by the victim's mental state. In fact, he relied upon her frailties to bolster his defense.

Ayers has not demonstrated that he received effective assistance of counsel at his trial. Thus, we affirm the Daviess Circuit Court.

ALL CONCUR.

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