RENDERED: November 21, 2001; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000499-MR

MICHAEL ANDREW NELSON — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
ACTION NO. 97-CR-00466

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: BARBER, BUCKINGHAM, AND MILLER, JUDGES.

BARBER, JUDGE: Michael Andrew Nelson ("Nelson") appeals pro se from an order of the Fayette Circuit Court denying his Kentucky Rules of Criminal Procedure (RCr) 11.42 motion to alter, amend or vacate his conviction for first-degree rape, first-degree sodomy, and first-degree kidnapping. After reviewing the record, we affirm.

On March 22, 1997, Nelson, Stanley Wilson, and Wilson's girlfriend, L.S., went to Nelson's apartment after spending several hours in a Lexington bar. After Nelson and Wilson left the apartment to purchase more alcohol, L.S. fell asleep. Wilson and Nelson got into an argument, and only Nelson returned to his apartment. Early the next morning, L.S. was seen running out of the apartment naked from the waist down, screaming in a highly excited state, and being pursued by Nelson. When he placed L.S.

in a choke hold, several neighbors came to her aid. Nelson then fled the scene. L.S. told the police that Nelson had raped her twice, sodomized her, strangled her, and forcibly prevented her from leaving the apartment. When Nelson was apprehended, he made a statement to the police claiming the pair had engaged in consensual sex.

In April 1997, the Fayette County Grand Jury indicted Nelson on two counts of first-degree rape (KRS 510.040), one count of first-degree sodomy (KRS 510.070), and one count of kidnapping (KRS 509.040). Following the trial, the jury found him guilty on all four counts and recommended sentences of fifteen years on each count to run consecutively for a total sentence of sixty years. On September 26, 1997, the trial court sentenced Nelson to serve sixty years in prison consistent with the jury's recommendation. In September 1998, the Kentucky Supreme Court affirmed the conviction on direct appeal. Nelson v. Commonwealth, 1997-SC-000834-MR (unpublished opinion rendered September 3, 1998).

On August 2, 1999, Nelson filed an RCr 11.42 motion alleging errors by the trial court and ineffective assistance of trial counsel. He presented five grounds for relief: (1) the trial court's failure to grant him a directed verdict, (2) an erroneous kidnapping instruction, (3) counsel's failure to request a mistrial, (4) counsel's failure to call him as a witness, and (5) cumulative error. Following a response by the Commonwealth, the trial court summarily denied the motion without a hearing. This appeal followed.

Nelson raised the same issues on appeal that he raised in the circuit court. First, he contends the trial court erred by not granting the defense motion for directed verdict because there was insufficient evidence to support a verdict. Second, he claims the trial court's jury instruction on kidnapping was erroneous for failing to name the conduct or felony constituting the kidnapping and failing to include the element of intent.

These two issues fail on both procedural and substantive grounds. RCr 11.42 is limited to issues which were not and could not be raised on direct appeal. Sanborn v. Commonwealth, Ky., 975 S.W.2d 905, 908-09 (1998), cert. denied, 526 U.S. 1025, 119 S.Ct. 1266, 143 L.Ed.2d 361 (1999); Baze v. Commonwealth, Ky., 23 S.W.2d 619, 626 (2000), cert. denied, _____ U.S. _____, 121 S.Ct. 1109, 148 L.Ed.2d 979 (2001); Haight v. Commonwealth, Ky., 41 S.W.3d 436, 443 (2001). More specificially, sufficiency of the evidence cannot be raised in a post-judgment motion under RCr 11.42. Brock v. Commonwealth, Ky., 479 S.W.2d 644, 645 (1972); Bartley v. Commonwealth, Ky., 463 S.W.2d 321, 322 (1971). Since both of these issues could and should have been raised in the direct appeal, they are not reviewable in an RCr 11.42 motion.

Moreover, a review of the record indicates that these complaints are without substantive merit. The victim's testimony alone provided sufficient evidence to withstand a directed verdict motion. The kidnapping instruction does contain all the necessary elements, including intent, to support that offense.

Nelson argues his attorney rendered ineffective assistance for failing to request a mistrial and failing to call him as a witness to testify on his own behalf. In order to establish ineffective assistance of counsel, a person must satisfy a two-part test showing both that counsel's performance was deficient and that the deficiency resulted in actual prejudice resulting in a proceeding that was fundamentally unfair. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); accord Gall v. Commonwealth, Ky., 702 S.W.2d 37 (1985), cert. denied, 478 U.S. 1010, 106 S.Ct. 3311, 92 L.Ed.2d 724 (1986); Foley v. Commonwealth, Ky., 17 S.W.3d 878, 884 (2000), cert. denied , _____ U.S. _____ , 121 S.Ct. 663, 148 L.Ed.2d 565 (2000). The burden is on the defendant to overcome a strong presumption that counsel's assistance was constitutionally sufficient or that under the circumstances counsel's action might be considered "trial strategy." Strickland, 466 U.S. at 689, 104 S.Ct. at 2065; Moore v. Commonwealth, Ky., 983 S.W.2d 479, 482 (1998), cert. denied, 528 U.S. 842, 120 S.Ct. 110, 145 L.Ed.2d 93 (1999); Sanborn v. Commonwealth, 975 S.W.2d at 912. A court must be highly deferential in reviewing defense counsel's performance and should avoid second-guessing counsel's actions based on hindsight. Harper, 978 S.W.2d 311, 315 (1998), cert. denied, 526 U.S. 1056, 119 S.Ct. 1367, 143 L.Ed.2d 537 (1999); Russell, Ky. App., 992 S.W.2d 871, 875 (1999). In order to establish actual prejudice, a defendant must show a reasonable probability that the outcome of the proceeding would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. at 2068;

Bowling v. Commonwealth, Ky., 981 S.W.2d 545, 551 (1998), cert. denied, 527 U.S. 1026, 119 S.Ct. 2375, 144 L.Ed.2d 778 (1999). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceeding considering the totality of the evidence before the jury. Strickland, 466 U.S. at 964-95, 104 S.Ct. at 2068-69. See also Moore, 983 S.W.2d at 484. 488; Foley, 17 S.W.3d at 884.

During L.S.'s direct examination, she stated that when she ran from Nelson's apartment, a neighbor helped her and notified the police. She testified that when she described the perpetrator to the police, neighbors stated they knew who she was describing because he had played with their children. At that point, defense counsel voiced an objection based on hearsay, which the court granted, thereby preventing L.S. from testifying further about the neighbor's statements. Nelson argues that counsel rendered ineffective assistance for failure to request a mistrial based on this hearsay testimony.

A trial court may declare a mistrial based on a manifest necessity. Miller v. Commonwealth, Ky., 925 S.W.2d 449, 453 (1996); Skaggs v. Commonwealth, Ky., 694 S.W.2d 672, 678 (1985), cert. denied, 476 U.S. 1130, 106 S.Ct. 1998, 90 L.Ed.2d 678 (1986). Manifest necessity has been defined as an "urgent or real necessity" sufficient to so seriously prejudice a party that he is unable to obtain a fair trial. See, e.g., Commonwealth v. Scott, Ky., 12 S.W.3d 682 (2000); United States v. Phibbs, 999 F.2d 1053 (6th Cir. 1993); Grundy v. Commonwealth, Ky., 25 S.W.3d 76 (2000). Declaration of a mistrial is "an extreme remedy that

should be resorted to only when there is a fundamental defect in the proceedings which will result in manifest injustice." Gould v. Charlton Co., Inc., 929 S.W.2d 734, 738 (1996). See also Gosser v. Commonwealth, Ky., 31 S.W.3d 897 (2000). A trial court has discretion in deciding whether a particular situation constitutes sufficient manifest necessity to justify declaring a mistrial. Scott, supra; Gosser, supra; Miller, supra.

In the current case, defense counsel objected to L.S.'s testimony concerning statements made by Nelson's neighbors but chose not to move for a mistrial.[1] The trial court sustained the hearsay objection, and L.S. made no further statements on this subject. Clearly, the testimony was a single, isolated incident involving an innocuous piece of information. The neighbors who made the statements testified at trial concerning their familiarity with Nelson from his presence in the neighborhood. Defense counsel's failure to request a mistrial was reasonable in light of the testimony's lack of prejudice to the defendant or the existence of a manifest necessity. Nelson has not shown either deficient performance by counsel or actual prejudice in that a mistrial motion likely would have been granted.

Nelson also maintains that defense counsel rendered ineffective assistance of by not calling him as a witness. Nelson states that because the defense theory was that he and L.S. had had consensual sex, it was necessary for him to testify on his version of the incident to counter act L.S.'s testimony.

[1]The Attorney General in his brief erroneously states that his testimony does not exit.

Just prior to the close of the evidence, defense counsel informed the trial court that Nelson would not be called to testify and requested the court to question Nelson on the issue. The court asked Nelson if he knew he had a right to testify and that if he did not testify the jury would be instructed not use that against him. Nelson responded affirmatively and indicated that he did not desire to testify. He also stated that he was not being forced by anyone or promised anything to persuade him not to take the stand. The court made a finding on the record that Nelson had voluntarily, knowingly, and intelligently waived his right to testify. Nelson has presented nothing on appeal to undermine the validity of his waiver of his right to testify.

In addition, Nelson's statement to the police containing his version of the facts and his defense of consent was admitted into evidence. Whether to call a defendant to testify, especially one with Nelson's extensive criminal history, is always a difficult decision of trial strategy for an attorney. Given Nelson's waiver and the facts of this case, we believe he has demonstrated neither deficient performance nor actual prejudice with respect to counsel's failure to call him to testify.

Finally, because Nelson has not established any individual constitutional errors, his claim of cumulative error also fails. See, e.g., Sanborn, 975 S.W.2d at 913, 914 (no cumulative effect where individual claims of ineffective assistance of counsel are unconvincing); Sholler v. Commonwealth,

Ky., 969 S.W.2d 706 (1998). The trial court properly denied the RCr 11.42 motion without a hearing because Nelson's claims were refuted on the record. See Sanborn, supra; Haight, 41 S.W.3d at 442; Baze, 23 S.W.3d at 622.

The order of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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