

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2002-CA-002204-MR

BENNIE BAILEY

APPELLANT

v. APPEAL FROM THE MARTIN CIRCUIT COURT  
HONORABLE DANIEL REID SPARKS, JUDGE  
ACTION NO. 91-CR-00015 & 91-CR-00025

COMMONWEALTH OF KENTUCKY

APPELLEE

### OPINION

#### REVERSING AND REMANDING

\*\* \*\* \* \* \*

BEFORE: BAKER,<sup>1</sup> SCHRODER AND MINTON, JUDGES.

BAKER, JUDGE: Bennie Bailey brings this appeal from an October 8, 2002, order of the Martin Circuit Court denying his Ky. R. Crim. P. (RCr) 11.42 motion. We reverse and remand.

The facts are these: Bailey was indicted on various sexual abuse charges. Evidence was presented to the jury that Bailey had raped and sodomized his three children, a daughter and two sons. On December 12, 1991, a Martin County jury found

---

<sup>1</sup> This opinion was prepared and concurred in prior to Judge Baker's

Bailey guilty of one count of rape in the first degree, two counts of sexual abuse in the first degree, and two counts of sodomy in the first degree. The jury recommended a sentence of twenty years for the rape charge, twenty years for each count of sodomy, and one year for each count of sexual abuse. On January 30, 1992, the trial court imposed the sentences recommended by the jury and ordered the sentences to be served consecutively for a total of sixty-two years imprisonment.

The trial court's judgment was affirmed in Appeal No. 1992-SC-000116-MR by the Supreme Court on November 19, 1992. On February 28, 1995, Bailey moved the Martin Circuit Court to vacate the order of conviction pursuant to RCr 11.42. The trial court denied Bailey's motion on February 12, 1998, without conducting an evidentiary hearing. Bailey appealed to this Court, and we reversed and remanded in Appeal No. 1998-CA-000465-MR with directions to conduct an evidentiary hearing. A hearing was held on October 27, 2000, during which Bailey was represented by counsel. On September 10, 2002, the Martin circuit court again denied Bailey's motion. Bailey, pro se, supplemented his RCr 11.42 motion. On October 8, 2002, the trial court denied his supplemented motion. This appeal follows.

---

leaving the Court effective December 17, 2003.

Bailey raises eight issues in his brief. All are predicated on the argument that his trial counsel's representation was ineffective. We need only discuss his first assertion that his counsel was ineffective for not objecting to witnesses' improper bolstering of the victims' testimony.

Before we analyze the merits of Bailey's claim, we must examine the Commonwealth's argument that Bailey is procedurally barred from raising this issue. The Commonwealth contends that the Supreme Court's decision in Haight v. Commonwealth, Ky., 41 S.W.3d 436 (2001), prohibits Bailey from bringing an ineffective assistance of counsel claim because improper bolstering of the victims' testimony by other witnesses was raised on direct appeal. The Commonwealth cites the following language from Haight: "[I]neffective assistance of counsel is limited to the issues that were not and could not be raised on direct appeal. An issue raised and rejected on direct appeal may not be relitigated in these proceedings by simply claiming that it amounts to ineffective assistance of counsel." Id. at 441. The Commonwealth construes the Court's language in Haight too broadly. Even though Bailey raised the issue of improper bolstering of witnesses on direct review, this does not preclude him from collaterally attacking his counsel for ineffectiveness based on the counsel's failure to object to the improper bolstering. This right of collateral attack is given

to the movant under RCr 11.42 and is separate from his right of direct appeal. Certainly, if an issue raised on direct appeal by the movant was upheld by the appellate court, it is likely that an ineffectiveness claim based on the same foundation will also be found to not rise to the level needed to provide the movant relief. However, this will not always be the case. Thus, we reject the Commonwealth's argument that Bailey is procedurally barred from bring this issue on collateral review.

Now we turn to Bailey's substantive argument. Bailey alleges that his counsel was ineffective for failing to object when six different witnesses improperly testified to the truthfulness of the victims' out-of-court statements. To demonstrate ineffective assistance of counsel, Bailey must show that his attorney was both deficient in performance and that his attorney's deficient performance prejudiced his defense. See Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Evaluation of defense counsel's performance must be "highly deferential" to the judgment of counsel in light of the circumstances at the time. It is easy to find fault with the benefit of hindsight, and courts must thus accord counsel's conduct "a strong presumption that [it] falls within the wide range of reasonable professional assistance." Id. at 689.

The six witnesses consisted of a Clyde Steiner, an investigator for the Department of Social Services, Marsha

Castle and Lorna Cassady, two child protection workers for the department, Keith Scott, a Kentucky State Police Detective, and Dr. Daniel L. Kinzie and Dr. Stephen Croley, two child psychiatrists. "The general rule is that opinion evidence, in order to be admissible, must not decide an ultimate issue of fact." Hall v. Commonwealth, Ky., 862 S.W.2d 321, 322 (1993)(citation omitted). This rule holds true whether the witness is an expert or a lay witness. "A witness's opinion about the truth of the testimony of another witness is not permitted. Neither expert nor lay witnesses may testify that another witness or a defendant is lying or faking. That determination is within the exclusive province of the jury." Moss v. Commonwealth, Ky., 949 S.W.2d 579, 583 (1997). Conversely, neither expert nor lay witness may testify that a victim/witness is telling the truth. Thus, we need not determine which witnesses were testifying as experts and which were testifying as lay witnesses. We must, however, examine the statements of the witnesses to determine if these statements amounted to improper vouching for the truth of the victims' testimony.

The issue as to whether the witnesses' statements were improper bolstering of the victims' testimony was brought up on

direct appeal (Appeal No. 1992-SC-000116-MR).<sup>2</sup> Our Supreme Court refused to review four of the five statements because they had not been properly preserved and did not constitute palpable error as required by RCr 10.26. The Court did declare that Bailey's counsel's objection to Cassady's statement that the children "were telling the truth" was a proper objection and should have been sustained. However, when the Court considered "all the other similar testimony admitted without objection," it held the improper statement to be harmless error.

We cannot perceive how our Supreme Court did not find the unobjected to statements as palpable error. Palpable error is error that affects the substantial due process rights of a defendant and results in a manifest injustice. RCr 11.42; Turpin v. Commonwealth, Ky., 780 S.W.2d 511 (1989). After examining the case as a whole, the reviewing court must find that a substantial possibility exists that the result of the trial would have been different. Jackson v. Commonwealth, Ky.App. 717 S.W.2d 511 (1986). This standard is exceedingly similar to the standard for measuring prejudice under Strickland. The inquiry under Strickland is whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. 446 U.S. at 694. As our

---

<sup>2</sup> On direct appeal, Bailey set forth only five witness statements, not six. He later added the social services detective's statements in his RCr 11.42 motion.

examination below demonstrates, Bailey's counsel committed serious error by not objecting to testimony by several witnesses that improperly bolstered the victims' testimony. Furthermore, we are of the opinion that if this testimony had been excluded from evidence that there is a reasonable probability that the proceeding would have been different.

The import of the bolstering testimony cannot be underestimated. The truth of the victims' testimony was affirmed by witnesses that the jury would have seen as credible lay witnesses or at even as credible experts. Thus, we would have recognized the unobjected to statements made by the witnesses as palpable error. It is evident that a substantial possibility exists that the proceeding would have been different absent the statements. We now turn to our analysis of this issue.

We first must examine the statements of the other witnesses to determine if Bailey's counsel was deficient for not objecting to their admission and if this deficiency prejudiced Bailey's trial. Cassady, Steiner and Castle were asked if the victims were "forthcoming" or "forthright" in their testimony. The prosecution defined the words' meaning in its examination of Cassady:

Q: Now, in interviewing Teareen and Benjamin, did they appear to you to be forthright?

A: Do you mean, telling the truth?

Q: Yes.

A: Yes.

(Trial TR at 129-30).

While the prosecution defined the word "forthright" only when questioning Cassady, we believe the jury could also have reasonably applied this definition to Steiner and Castle's answers that the victims were "forthcoming" or "forthright." Thus, we are of the opinion that the statements of Cassady, Steiner, and Castle unequivocally vouched for the truth of the victim

The two child psychiatrists, Kinzie and Croley, also testified to the veracity of the victims' testimony, as noted by the Supreme Court. Kinzie stated: "This, by all accounts, this is bonafide actual testimony, that seems to ring true to me." (Trial TR at 178). Croley, speaking of the youngest victims' testimony stated that "our evaluation did not indicate that he was fabricating information" and that "I don't believe he was fabricating this [testimony]." (Trial TR at 197-98). Again, we believe that these statements can be construed no other way than as impermissible bolstering of the victims' testimony.

However, we do not believe that the statements made by Scott, the state police detective, amounted to testimony supporting the veracity of the victims' statements. Scott said



that the victims' stories "compared pretty well" with each other, and that "nothing stood out in their testimony to indicate falsehoods." (Trial TR at 159). These statements are more ambivalent than those made by the other five witnesses and do not constitute an unequivocal endorsement of the truthfulness of the victims' statements.

Bailey's counsel's failure to object to the statements of Steiner, Castle, Cassady, Kinzie and Croley was ineffective in that it fell outside the range of reasonable professional assistance. Thus, he failed to meet the first part of the Strickland test. We must now look at the second prong of the Strickland test and determine if this deficient performance prejudiced Bailey's trial.

There were no eyewitness to the crimes charged nor was any physical evidence introduced. The trial hinged upon the credibility of the testimony of the victims and their supporting witnesses versus the testimony of the defendant and his supporting witnesses.

Thus, the credibility of the victims was of paramount importance to the jury. Undoubtedly, the testimony of the witnesses discussed above concerning the truthfulness of the victims weighed heavily on the mind of the jury during deliberations. We believe that the trial counsel's errors were so serious that they deprived Bailey of "a fair trial, a trial

whose result is reliable." Strickland, 466 US. at 687. As such, we hold that Bailey's trial counsel was indeed ineffective.

For the foregoing reason, the order of the Martin Circuit Court is reversed and this case is remanded for proceedings consistent with this opinion.

SCHRODER, JUDGE, CONCURS.

MINTON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

MINTON, JUDGE, DISSENTING: I would affirm the trial court's denying Bailey's RCr 11.42 motion. The overarching prejudice analysis under Strickland, has failed to demonstrate unprofessional performance by trial counsel that was constitutionally defective. On a direct appeal concluded more than ten years ago our Supreme Court determined that the trial testimony elicited from these witnesses did not rise to the level of substantial or palpable error applied by the Supreme Court to these facts is any less stringent than the standard for finding ineffective assistance of counsel.

BRIEFS FOR APPELLANT:

Richard Edwin Neal  
Assistant Public Advocacy  
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Wm. Robert Long, Jr.  
Assistant Attorney General  
Criminal Appellate Division  
Frankfort, KY