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Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001461-MR

ROBERT L. ROLAND — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
INDICTMENT NO. 99-CR-00608

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MINTON AND TACKETT, JUDGES; HUDDLESTON, SENIOR JUDGE.[1]

HUDDLESTON, SENIOR JUDGE: On March 1, 2000, in Kenton Circuit Court, Robert L. Roland was tried and convicted of rape in the second degree and sentenced to serve seven years in prison. After this Court affirmed Roland's conviction, he filed, pursuant to Kentucky Rules of Criminal Procedures (RCr) 11.42, a motion to alter, amend or vacate his conviction. In his

[1] Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

seventy-nine page motion, Roland presented multiple allegations of ineffective assistance of counsel. When the circuit court denied Roland's RCr 11.42 motion without appointing counsel or affording him a hearing, he appealed to this Court.[2]

At trial, the victim, W.E., testified that she was twelve years old when she and Roland had sexual intercourse eight times over several months. Most importantly for the present appeal, W.E.'s testimony in conjunction with the testimony of Detective Ray Haley, the investigating officer, revealed that, on March 11, 1999, Roland took W.E. to the Lookout Motel where they stayed in room 23. While there, they had sexual intercourse three times. Roland, on the other hand, testified that he never took W.E. to the Lookout Motel and never had intercourse with her. He claimed that on March 11th, he took "Shelly", a woman he had met that day at a local Sunoco gas station, not W.E., to the Lookout Motel. Because Roland's trial counsel neither called Shelly as a witness nor even tried to search for her, Roland had no one to corroborate his alibi; therefore, he says, his trial counsel rendered ineffective assistance of counsel.

Roland claims that, after he was convicted, he, with the help of his family, found Shelly. As proof, Roland has produced a handwritten affidavit from Shelly Trautman who claims

[2] In his *pro se* brief, Roland raises numerous issues. We shall only address Roland's major arguments since the remaining ones lack merit.

that, on March 17, 1999, she met Roland at a local Sunoco service station, and, later that day, they checked into the Lookout Motel for a one-night stay.

According to Strickland v. Washington,[3] a movant who contends that his trial counsel rendered ineffective assistance of counsel must show that (1) counsel's performance was deficient and (2) that the deficient performance actually prejudiced the movant and rendered his trial fundamentally unfair.[4]

In Wiggins v. Smith,[5] the United States Supreme Court re-affirmed Strickland and held that a movant must show with reasonable probability that but for counsel's errors the results of his trial would have been different.[6] The Court defined "reasonable probability" as a probability sufficient to undermine confidence in the outcome.[7]

The evidence adduced at trial revealed that Roland had taken W.E. to the Lookout Motel on March 11, 1999. In contrast, Shelly Trautman stated in her affidavit she and Roland went to the same motel on March 17, 1999, not March 11th. So, even if Roland's trial attorney had found Trautman and called her as a witness, her testimony would not have supported Roland's alibi.

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[3] 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1986).
[4] Id., 466 U.S. at 687.
[5] 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003).
[6] Id., 539 U.S. at 534.
[7] Id., quoting Strickland, 466 U.S. at 694.

Therefore, Roland's attorney did not render ineffective assistance in failing to locate Trautman and call her as a witness at trial.

During her testimony, W.E. told the jury that Roland gave her his pager number and that she used it to contact him. Roland testified that he did not know how W.E. obtained his number. Now, Roland insists that his attorney rendered ineffective assistance when he failed to call his friend, Miguel Johnson, as a witness. This is so because, according to Roland, Johnson would have testified that it was he who gave Roland's number to W.E. Roland did not tender an affidavit from Johnson in support of his RCr 11.42 motion; thus, we are left to speculate whether Johnson would have supported Roland's assertion that it was not he, but Johnson, who provided W.E. with the pager number. In any event, Roland does not claim, and it is improbable, to say the least, that Johnson's testimony on this relatively minor point would have had any effect on the outcome of the trial. Thus, Roland has failed to show his trial counsel's performance was deficient.

At trial, during the testimony of lead investigator Detective Ray Haley, the Commonwealth introduced a completed guest registration card containing Roland's name, his personal information and the date, March 11, 1999. While the card did not contain the name of the motel from which it came, the

prosecutor stated that it came from the “Denlou” Motel. Now, Roland argues that his attorney rendered ineffective assistance when he failed to object to the introduction of the card. It had no probative value, according to Roland, and its introduction was prejudicial.

At trial, both W.E. and Detective Haley offered the same information in their testimony that was found on the registration card. Their testimony corroborated the information on the card, and the evidence strongly implied that Detective Haley actually obtained the card from the Lookout Motel, not the “Denlou” Motel. So, Roland has failed to show that his attorney rendered ineffective assistance in failing to object to the introduction of the registration card.

While receiving treatment for chlamydia and gonorrhea, W.E. told Child Protective Services that she had been having sexual intercourse with Roland. At trial, Roland wanted to offer proof of W.E.’s past sexual conduct, but the trial court sustained an objection to such evidence. On appeal, he claims that W.E. likely contracted gonorrhea and chlamydia from her stepfather, who, Roland says, had been previously convicted of molesting W.E. And he argues that his attorney was ineffective because he failed to tell the circuit court that he needed to present evidence of W.E.’s sexual history to show that W.E.’s stepfather, not Roland, had infected her with venereal diseases.

Roland offers no proof by affidavit or otherwise to support his allegation that W.E.'s stepfather had either chlamydia or gonorrhea or that W.E. contracted either of these diseases from him. Roland has thus failed to show that his trial counsel rendered ineffective assistance when he did not advise the circuit court why the proffered evidence of W.E. prior sexual activity was relevant.

Roland also claims that his attorney rendered ineffective assistance when he failed to move the court to instruct the jury that it could find him guilty of either the lesser-included offense of rape in the third degree or sexual misconduct if it had a reasonable doubt that the Commonwealth had proved all of the elements of second-degree rape. Roland argues that evidence supported such instructions because W.E. testified that, when she met Roland, she told him that she was seventeen years old.

KRS 510.050 sets forth the elements of rape in the second degree as it applies in this case:

> (1) A person is guilty of rape in the second degree when:
>
> (a) Being eighteen (18) years old or more, he engages in sexual intercourse with another person less than fourteen (14) years old[.]

The elements of rape in the third degree are set forth in KRS 510.060 as it would apply in this case:

> (1) A person is guilty of rape in the third degree when:
> . . .
> (b) Being twenty-one (21) years old or more, he engages in sexual intercourse with another person less than sixteen (16) years old[.]

According to the commentary following the second-degree rape instruction found in Cooper's Kentucky Instructions to Juries,

> [i]f there is an issue whether the victim was less than fourteen years of age and if the defendant was at least twenty-one years of age, an instruction on Third-Degree Rape should be given as a lesser included offense[.][8]

So, to justify an instruction on rape in the third degree, the evidence would have to have placed into issue W.E.'s age, *i.e.*, that she was greater than fourteen but less than sixteen years of age. But the unchallenged evidence was that W.E. was twelve years old when Roland had sex with her. According to Justice Cooper, an instruction for second-degree rape is appropriate when

> the evidence would support a verdict that the defendant, being eighteen years of age or older, engaged in sexual intercourse with a victim, who was less than fourteen years of age.[9]

[8] 1 WILLIAM S. COOPER, KENTUCKY INSTRUCTIONS TO JURIES, § 4.28 (Revised 4th ed. 1999).
[9] Id.

This is precisely what the evidence adduced at trial established. That evidence did not support an instruction for rape in the third degree.

KRS 510.140 sets forth the elements of sexual misconduct:

> (1) A person is guilty of sexual misconduct when he engages in sexual intercourse or deviate sexual intercourse with another person without the latter's consent.

At first blush, Roland's argument appears to have merit. But the commentary following KRS 510.140 undermines his position:

> KRS 510.140 represents the basic crimes of rape and sodomy and, therefore, includes all of the higher degrees of each of these crimes. It provides a useful plea-bargaining tool for the prosecutor in certain cases even though some degree of forcible compulsion or incapacity to consent may be present.
>
> But the basic purpose of KRS 510.140 is to preserve the concept of statutory rape and statutory sodomy. When read in conjunction with the rape and sodomy statutes, KRS 510.140 is designed primarily to prohibit nonconsensual sexual intercourse or deviate sexual intercourse under two circumstances: when the victim is 14 or 15 and the defendant is less than 21; or when the victim is 12, 13, 14, or 15 and the defendant is less than 18 years of age. **In this context the ages of the defendant and the victim are critical.**
>
> If the accused is 21 or over and the victim is less than 16, the offense constitutes third degree rape. **If the accused is 18 or**

> **older and the victim is under 14, the offense constitutes second degree rape.**[10]

If there is a question whether the victim was actually under fourteen and

> if the defendant was less than twenty-one years of age, an instruction on Sexual Misconduct should be given as a lesser included offense [of rape in the second degree].[11]

For Roland to have been entitled to an instruction for sexual misconduct, the evidence would have to have shown that he was less than eighteen years old or, in the alternative, that W.E. was fourteen or older and he was less than twenty-one years old. But the evidence established that Roland was twenty-six years old, while W.E. was only twelve. Accordingly, he was not entitled to an instruction on sexual misconduct. His attorney did not render ineffective assistance in failing to move the court to give lesser-included instructions.

At trial, Roland denied having gonorrhea, but he later admitted during cross-examination that he had contracted gonorrhea nine years earlier. The prosecutor then remarked that it was possible for Roland to have infected W.E. Roland's attorney did not object to this remark. According to Roland, this remark was medical evidence which the prosecutor introduced

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[10] Emphasis supplied.
[11] COOPER, supra, note 8.

without using an expert witness to which his trial counsel should have objected.

In actuality, Roland is arguing that this remark amounted to prosecutorial misconduct and that his trial counsel rendered ineffective assistance when he failed to object to it. On direct appeal, we may only reverse a conviction for prosecutorial misconduct when the misconduct was so serious that it rendered the entire trial fundamentally unfair.[12] However, Roland has not shown either that his trial was unfair or that the result would probably have been different had his attorney objected to the prosecutor's statement. Thus, he has failed to meet the requirements of Strickland.

While Roland has raised numerous allegations of ineffective assistance of counsel, he has failed to meet the requirements set forth in Strickland. Thus, the order denying Roland's RCr 11.42 motion is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Robert L. Roland, *pro se*
West Liberty, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Susan R. Lenz
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[12] Partin v. Commonwealth, 918 S.W.2d 219, 224 (Ky. 1996).