

Commonwealth of Kentucky
Court of Appeals

NO. 2011-CA-001647-MR

MARK ADKINS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE SUSAN SCHULTZ GIBSON, JUDGE
ACTION NO. 06-CR-002208

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: COMBS, LAMBERT, AND NICKELL, JUDGES.

COMBS, JUDGE: Mark Adkins appeals the order of the Jefferson Circuit Court denying his motion for relief filed pursuant to Kentucky Rule[s] of Criminal Procedure (RCr) 11.42. Following our review, we affirm.

Adkins was initially indicted for sexually and otherwise abusing three victims – K.M., A.A., and H.M. A.A. and H.M. are sisters; K.M. is their distant

cousin. K.M. had resided in the same home with Adkins, who is her uncle, for several years. Adkins's mother (K.M.'s grandmother) also lived in the house and babysat the other two girls. The victims alleged that the abuse took place in Adkins's home between 1998 and 2005. In 2005, K.M., the oldest victim, disclosed the abuse to her mother. A.A. and H.M. then reported that Adkins had also abused them.

Following a jury trial, in October 2007, Adkins was convicted of three counts of sexual abuse in the first degree and one count of second-degree unlawful imprisonment. The convictions were related to H.M. and K.M.; Adkins was acquitted of all charges that related to A.A. He received a sentence of six-years' incarceration. In October 2009, Adkins filed a motion to vacate, set aside, or correct his conviction pursuant to RCr 11.42. The court denied the motion on August 3, 2011. This appeal follows.

On appeal, Adkins alleges that the court erred by not finding that trial counsel had represented him ineffectively when counsel failed to persuade the court to allow admission of an alternative-perpetrator theory. Additionally, he alleges that the trial court erroneously overruled his request for an evidentiary hearing.

Our standard of review of an RCr 11.42 motion is governed by rules set forth by the Supreme Court of the United States. It has prescribed a two-pronged test governing the defendant's burden of proof in these cases:

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 (1984), adopted in Kentucky by *Gall v. Commonwealth*, 702 S.W.2d 37, 39-40 (Ky. 1985). Both criteria must be met in order for the test to be satisfied. The *Strickland* Court emphasized that reviewing courts should assess the effectiveness of counsel in the light of the totality of the evidence presented at trial and the fundamental fairness of the challenged proceeding. *Id.* at 695-96.

On appeal, we must determine whether the allegations contained in an RCr 11.42 motion are refuted by the record and whether, if they were true, they would be substantial enough to nullify the conviction. *Lewis v. Commonwealth*, 411 S.W.2d 321, 322 (Ky. 1967). No evidentiary hearing is required if the face of the record contradicts the allegations. *Sparks v. Commonwealth*, 721 S.W.2d 726, 727 (Ky. App. 1986).

Adkins argues that the defense presented to the jury was inadequate because it did not include his alternative-perpetrator theory. During A.A.'s forensic interview, she told the interviewer that she had been touched inappropriately by Mark Adkins. In addition, she stated that her Uncle Nicky had also touched her.

The trial court excluded the statement about Uncle Nicky, citing Kentucky Rule[s] of Evidence (KRE) 412, also known as the Rape Shield Law.

The Rape Shield Law prohibits evidence of a victim's sexual activity other than that pertaining to the alleged crime. KRE 412(a)(1). An exception is provided for "evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence." KRE 412(b)(1)(A). In order to invoke the exception, the defendant must file a motion and provide notice to all parties of his intent to do so at least fourteen days prior to trial. KRE 412(c)(1)(A) and (B). Adkins argues that the failure to file a proper motion and notice rendered his counsel's representation ineffective, essentially depriving him of an adequate defense.

In order to be admitted, evidence must be relevant. KRE 402. *Relevant evidence* is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." KRE 401. However, even relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." KRE 403.

In this case, the testimony concerning Uncle Nicky was irrelevant. Only one of the victims mentioned Uncle Nicky in her interview. One of the other victims

was barely acquainted with Uncle Nicky. However, all three victims were adamant that they had been molested by Adkins. Whether Uncle Nicky had molested one of them additionally was irrelevant and would have potentially confused the issues. Adkins does not offer any proof that he was prejudiced by the omission of the Uncle Nicky theory. Parenthetically but significantly, we note that the jury acquitted him of all charges relating to the victim who had mentioned Uncle Nicky.

Furthermore, this Court has reviewed the entirety of Adkins's trial, and we are not persuaded that he did not receive an adequate defense. Adkins's counsel presented a theory that the adults in the family had conspired to fabricate the charges against him. His counsel also attacked inconsistencies in the victims' testimony. The defense was so successful that, as we have pointed out, the jury acquitted Adkins of all charges relating to one of the victims. The jury also acquitted Adkins of a kidnapping charge, finding him guilty of second-degree unlawful imprisonment instead. The record clearly shows that his defense was quite adequate and that his counsel's representation was effective. Because the record is so clear on its face, we also hold that the trial court correctly denied Adkins's motion for an evidentiary hearing. He has not presented any allegations which are not refuted by the face of the record.

Accordingly, we affirm the Jefferson Circuit Court.

ALL CONCUR.

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