RENDERED: JULY 19, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000469-MR

CHARLES LAMAR JOHNSON — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A. C. MCKAY CHAUVIN, JUDGE
ACTION NOS. 04-CR-003220; 05-CR-000654; 06-CR-000291

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, MOORE, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Charles Lamar Johnson brings this *pro se* appeal from an order of the Jefferson Circuit Court entered January 10, 2011, denying his Kentucky Rules of Criminal Procedure (RCr) 11.42 motion. We affirm.

Johnson was indicted by a Jefferson County Grand Jury upon multiple counts of rape, incest, sexual abuse, and sodomy involving five minor females. Two of the

victims were Johnson's biological daughters, two were friends of his daughters, and one was a babysitter. A jury trial ensued. Testimony from the five victims was elicited at trial and has been summarized as follows:

> Both A.J. and C.J. testified at trial. A.J. testified that Appellant engaged in sexual intercourse with her on several occasions, sodomized her on one occasion, and touched her in a sexual manner more than twenty-five (25) times when she was between the ages of eight (8) and twelve (12). C.J. testified that Appellant engaged in sexual intercourse with her on at least seven specific occasions when she was between the ages of eleven (11) and fifteen (15).
>
> F.G., K.H., and C.R. testified as well. F.G. testified that she spent the weekend at Appellant's house in late October 2004, when she was eleven (11) years old, and she stated that Appellant engaged in sexual intercourse with her on each of the two nights she stayed in his home. A.J. witnessed one of the acts of sexual intercourse and corroborated F.G.'s testimony. K.H. frequently spent the night at Appellant's house on weekends, and testified as to two sexual encounters she had with Appellant when she was eleven (11) years old. C.R. testified that she babysat in Appellant's home when she was eight (8) or nine (9) years old, and recalled several sexual acts between her and Appellant during this time (including oral sex, sexual intercourse, sodomy, and fondling).

Johnson v. Commonwealth, 292 S.W.3d 889, 892 (Ky. 2009) (footnotes omitted).

Following the jury trial, Johnson was found guilty of five counts of rape in the first degree, two counts of incest, two counts of sexual abuse in the first degree, rape in the second degree, rape in the third degree, criminal attempt to commit rape in the first degree, and sodomy in the first degree. Johnson was

sentenced to life imprisonment. On direct appeal, Johnson's conviction was affirmed by the Kentucky Supreme Court (*Johnson v. Commonwealth*, 292 S.W.3d 889 (Ky. 2009)).

Subsequently, Johnson filed an RCr 11.42 motion claiming ineffective assistance of trial counsel. By order entered January 10, 2011, the circuit court denied Johnson's RCr 11.42 motion without an evidentiary hearing. This appeal follows.

Johnson contends that the circuit court erred by denying his RCr 11.42 motion without an evidentiary hearing. Johnson asserts that his claims of ineffective assistance of trial counsel were not refuted upon the face of the record, thus entitling him to a hearing. To prevail, Johnson must demonstrate that trial counsel's performance was deficient and that absent such deficiency, a reasonable probability exists that the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To be entitled to an evidentiary hearing, a movant must present claim of ineffective assistance of trial counsel that is not refuted upon the face of the record. *Fraser v. Commonwealth*, 59 S.W.3d 448 (Ky. 2001).

Johnson initially contends that his trial counsel was ineffective for failing to seek recusal of the trial judge. Johnson asserts that he informed trial counsel that the trial judge previously represented Johnson "in a criminal case in 1992." Johnson's Brief at 6. Thus, Johnson believes that trial counsel should have sought recusal of the judge.

To prevail on an RCr 11.42 motion, it is well-established that "movant must aver facts with sufficient specificity to generate basis for relief." *Lucas v. Commonwealth*, 465 S.W.2d 267, 268 (Ky. 1971) (citations omitted). In this case, Johnson makes only the general allegation that his trial counsel was ineffective for failing to pursue recusal of the trial judge who had represented Johnson in a previous criminal action in 1992. Johnson did not identify the previous criminal action or provide any details as to why the trial judge's impartiality might reasonably be questioned. In the absence of such showing, we are unable to conclude that trial counsel's failure to seek recusal of the trial judge constitutes ineffective assistance of trial counsel.

Johnson next asserts that he received ineffective assistance when trial counsel elected not to call certain witnesses at trial. Johnson asserts that four witnesses "possessed exculpatory evidence regarding these allegations, either as to place, time or persons present . . . ." Johnson's Brief at 8. According to Johnson, one such witness was Shawn Bush, who lived with Johnson from 1995 to 1996. Johnson claims that Bush would have testified that C.R. never babysat for Johnson during the time she claims to have been victimized and "to his knowledge" was never left alone with Johnson. However, it is evident that Bush's proposed testimony merely demonstrates that Bush was not present when the acts occurred and that Bush only possessed limited knowledge of the circumstances surrounding the criminal acts. The proposed testimony of the other three witnesses again only demonstrates that these witnesses were unaware of the criminal acts but does not

demonstrate whether the criminal act occurred. At trial, five different victims testified in detail as to how Johnson raped, sodomized, and sexually abused them over a period of several years. Considering the great weight of evidence amassed against Johnson at trial, we do not believe that a reasonable probability exists that the outcome of the trial would have been different if the proposed witnesses testified. *See Strickland*, 466 U.S. 668. Thus, we are unable to conclude that trial counsel was ineffective for failing to call the proposed witnesses.

Johnson next maintains that trial counsel was ineffective for failing to object to the jury instruction on criminal attempt to commit rape as to K.H. The jury acquitted Johnson of rape as to K.H. but convicted him of criminal attempt to commit rape as to K.H. Johnson argues that the jury instruction as to criminal attempt to commit rape was "not permissible as [a] lesser included offenses [sic]," and his trial counsel was ineffective by failing to object at trial. Johnson's Brief at 12.

At trial, K.H. testified regarding two instances where Johnson attempted to engage in sexual intercourse with K.H. when she was under twelve but was unsuccessful in penetrating her. Considering this testimony alone, we think that sufficient evidence existed to support the jury instruction of criminal attempt to commit rape. Accordingly, Johnson's contention that trial counsel was ineffective for failing to object to the giving of the instruction on criminal attempt to commit rape as to K.H. is also without merit.

Johnson also alleges that his trial counsel was ineffective for failing to challenge the racial composition of the grand jury as violative of *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). Johnson fails, however, to specifically identify any African-American juror that the Commonwealth struck by peremptory challenge. Johnson's mere conclusory allegation is insufficient to demonstrate a violation of *Batson*, 476 U.S. 79, occurred. *See Lucas*, 465 S.W.2d 267. Thus, trial counsel was not ineffective for failing to challenge the racial composition of the grand jury.

Johnson next asserts that his trial counsel was ineffective for failing "to fully investigate his . . . absence of 'chlamydia.'" Johnson's Brief at 17. Johnson specifically alleges that during F.G.'s testimony she claimed to have been infected with "chlamydia" and that the Commonwealth averred Johnson transmitted this disease to her. Johnson further asserts that he was not infected with chlamydia and that trial counsel did nothing at trial to present this evidence to the jury.

A review of the record reveals that F.G. did not claim to have chlamydia. F.G. merely testified that when she went for her sixth-grade physical a urine test revealed she had contracted a sexually transmitted disease; F.G. did not identify the disease. The doctor who conducted F.G.'s sixth-grade physical testified, as did the forensic sex examiner, that F.G.'s urine test was positive for trichomonas, it was not positive for chlamydia. Consequently, we do not believe

trial counsel was ineffective for failing to present evidence at trial that Johnson was not infected with chlamydia.

Johnson next contends that trial counsel was ineffective for failing "to fully investigate his sleeping disorder 'somnambulism.'" Johnson's Brief at 17. Johnson believes that an effective defense was that he committed the alleged criminal acts while sleeping. At trial, the parties stipulated that Johnson suffered from problems with sleepwalking. During closing argument, trial counsel argued that Johnson did not possess the required mental state for commission of the crimes. The extent of which trial counsel argued this "sleepwalking defense" is purely a matter of trial strategy. As to issues of trial strategy, trial counsel is generally afforded great discretion. *Harper v. Commonwealth*, 978 S.W.2d 311 (Ky. 1998). And, mere speculation that a different strategy may have been advantageous is insufficient. *Hodge v. Commonwealth*, 116 S.W.3d 463 (Ky. 2003) *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009). Therefore, Johnson's claim that counsel was ineffective for failing to raise the issue of his sleeping disorder is without merit.

Johnson also contends that the "trial judge abused his discretion when he refused to provide complete findings of fact" and that the "trial court denied his Fifth Amendment right against double jeopardy, his Sixth Amendment right to a fair trial and his Fourth Amendment right to due process and equal protection" by giving erroneous instructions. Johnson's Brief at 7, 13. Both of these claims focus upon errors of the trial court and not errors of trial counsel. As both claims are as

to a "direct error . . . alleged to have been committed by the trial court," the claims are not properly raised by a motion pursuant to RCr 11.42. *Leonard v. Commonwealth*, 279 S.W.3d 151, 158 (Ky. 2009). Rather, these are claims that should have been raised in Johnson's direct appeal. *Id*.

We view any remaining contentions to be without merit.

In sum, we hold that the circuit court properly denied Johnson's RCr 11.42 motion without an evidentiary hearing.

For the foregoing reasons, the order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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