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Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-002206-MR

ROBERT DENNIS APPELLANT

v.

APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE THOMAS O. CASTLEN, JUDGE
ACTION NO. 06-CR-00760

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; J. LAMBERT AND VANMETER, JUDGES.

ACREE, CHIEF JUDGE: Appellant, Robert Dennis, appeals from the November 9, 2012 Order of the Daviess Circuit Court denying his motion to set aside his conviction under RCr[1] 11.42. Finding no error, we affirm.

[1] Kentucky Rules of Criminal Procedure.

I. **Background**

Dennis's conviction stems from allegations made by S.J., his stepdaughter by his marriage to Elaine Dennis.[2] In March 2006, S.J. complained to Elaine that Dennis had routinely subjected her to sex acts over the past four years. Although S.J. was unsure of the specific dates of each assault, she recalled that Dennis had last molested her sometime in December 2005. Elaine reported S.J.'s allegations to police, prompting an investigation. During that investigation, police discovered an eye witness, James Goins, who claimed to have witnessed one assault. Based on that investigation, a grand jury indicted Dennis in December 2006 on three counts of first-degree sodomy and one count of first-degree sexual abuse.

On October 4, 2007, Dennis's case was tried before a jury. The circuit court instructed the jury that they must agree unanimously to convict Dennis on any charge. The court then issued four instructions based on the four counts of abuse alleged in the indictment. The trial court's first instruction dealt with S.L.'s allegation of anal sodomy, reading:

> That in Daviess County, Kentucky, on or about or during and between January 21, 2001, and December 31, 2005, and before finding of the Indictment herein, [Dennis] engaged in deviate sexual (anal) intercourse with [S.J.]. . . .

The second and third instructions dealt with S.J.'s allegations of oral sodomy and were worded identically, as follows:

[2] The Kentucky Supreme Court addressed Dennis's direct appeal. *Dennis v. Commonwealth*, 306 S.W.3d 466, 468 (Ky. 2010).

> That in Daviess County, Kentucky, on or about or during and between January 21, 2001, and December 31, 2005, and before the finding of the Indictment herein, he engaged in deviate sexual (oral) intercourse with [S.J]. . . .

The fourth instruction addressed S.J.'s allegation that Dennis sexually abused her in ways other than sodomy:

> That in Daviess County, Kentucky, on or about or during and between January 21, 2001, and December 31, 2005, and before the finding of the Indictment herein, he had sexual contact with [S.J]. . . .

The trial court submitted these instructions to the jury without objection from Dennis's counsel.

Evidence supported each instruction at trial. S.J. testified that Dennis first performed oral sex on her in the living room of their shared house when she was between six and eight years old. S.J. recounted that the first assault emboldened Dennis, and when she was between nine and ten years old, he forced her to perform oral sex on him. From then on, S.J. said that Dennis also fondled and licked her breasts on occasion. Finally, S.J. recalled one incident when a man walked into the house and discovered Dennis anally sodomizing her. Witness, James Goins, corroborated this incident by testifying that he walked into Dennis's home where he saw Dennis rocking S.J. back and forth on his lap while Dennis had his hand up S.J.'s dress. Both S.J. and Goins recalled that Dennis screamed at Goins to leave when Dennis realized that Goins had witnessed the event.

After hearing testimony, the jury convicted Dennis on all counts. Dennis appealed to the Supreme Court as a matter of right. Like Dennis's trial counsel, his appellate counsel did not identify any error with regard to the circuit court's jury instructions.[3]

In his Rule 11.42 motion, Dennis challenged his conviction by claiming both his trial and appellate counsel were ineffective in assisting him in his defense. In Dennis's view, trial counsel provided ineffective assistance when he failed to challenge the jury instructions used at his trial, and appellate counsel provided ineffective assistance by failing to raise the issue on direct appeal. The circuit court denied Dennis's motion without an evidentiary hearing. This appeal followed.

I. **Standard of Review**

In reviewing trial counsel's alleged ineffective assistance, we ask whether counsel committed errors so grievous as to violate petitioner's "right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. The United States Supreme Court has long interpreted the Sixth Amendment to mean "that 'the right to counsel is the right to the effective assistance of counsel.'" *Strickland v. Washington,* 466 U.S. 668, 686 (1984) (quoting *McMann v. Richardson,* 397 U.S. 759, 771, n.14 (1970)). To successfully assert a violation of this right, petitioners must demonstrate "that counsel's performance was deficient"

[3] Before the Supreme Court, Dennis's appellate counsel successfully argued other points of law not relevant here and his conviction was vacated and the case remanded. *Dennis*, 306 S.W.3d at 477. This success was short-lived, however. *Dennis v. Commonwealth*, 2010-SC-000425-MR, 2011 WL 4430881 (Ky. 2011) (affirming circuit court's reinstatement of his conviction).

and "that the deficient performance prejudiced the defense." *Strickland,* 466 U.S. at 687. To qualify as deficient, counsel's performance must fall "below an objective standard of reasonableness" measured "under prevailing professional norms." *Id.* at 688.

Our review affords counsel wide berth, and we "indulge a strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance." *Id.* at 689; *Knowles v. Mirzayance,* 556 U.S. 111, 124 (2009); *Premo v. Moore,* 131 S.Ct. 733, 739 (2011). Moreover, we must resist "the distorting effects of hindsight" by "evaluat[ing] the conduct from counsel's perspective at the time." *Strickland,* 466 U.S. at 689; *Bell v. Cone,* 535 U.S. 685, 702 (2002); *Harrington v. Richter,* 131 S.Ct. 770, 789 (2011).

If we determine that counsel's conduct was deficient, we must then consider whether it prejudiced petitioner. This prejudice inquiry must assess whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694. And, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

We evaluate the effectiveness of appellate counsel's representation under *Strickland*'s performance and prejudice standard. *Hollon v. Commonwealth*, 334 S.W.3d 431, 436 (Ky. 2010), *as modified on denial of reh'g* (Apr. 21, 2011). Appellate counsel's failure to raise a particular issue on direct appeal may constitute deficient performance but, petitioners who allege their appellate

counsel's deficiency must overcome the "strong presumption that [their counsel's] choice of issues to present [on appeal] was a reasonable exercise of appellate strategy." *Id.* at 436. To overcome this strong presumption, Petitioner must show that the omitted issue was a "clearly stronger" issue than those presented. *Id.* Prejudice must ensue from counsel's omission, and so we ask whether "absent counsel's [omission,] there is a reasonable probability that the appeal would have succeeded." *Id.* at 437.

II. Discussion

Dennis focuses his appeal on the failure of both his trial counsel and appellate attorney to challenge the propriety of the jury instructions used at his trial. While Dennis attacks each instruction individually, his arguments share a common theme – the instructions did not differentiate the alleged incidents with enough specificity, and thus failed to ensure that the jury would reach a unanimous verdict on each act or failed to ensure that the jury would not convict him twice for the same act. In order to "evaluate the conduct from counsel's perspective *at the time*" of trial, *Strickland,* 466 U.S. at 689, we must determine the state of the law on this issue as it then existed.

Dennis points out that, in 2002, the Supreme Court said: "[W]hen multiple offenses are charged in a single indictment, the Commonwealth must introduce evidence sufficient to prove each offense and to differentiate each count from the others, and the jury must be separately instructed on each charged offense." *Miller v. Commonwealth*, 77 S.W.3d 566, 576 (Ky. 2002). However, identical jury

instructions – the problem Dennis claims his attorneys failed to protest – is not the focus of *Miller*. Rather, this quote and this case center on the problematic use of "'combination' instructions [for] offenses of two different classes [and] evidence . . . by mathematical extrapolation to support more than thirty [counts]. For both reasons, Appellant [in *Miller*] was denied his right to unanimous verdicts . . . ." *Id.* at 574.

A more accurate picture of our jurisprudence on this issue, as it was when Dennis was tried in 2007, is illustrated by a 2008 Supreme Court case, *Bell v. Commonwealth*, 245 S.W.3d 738 (Ky. 2008), *overruled by Harp v. Commonwealth*, 266 S.W.3d 813 (Ky. 2008). Like Dennis, Bell was charged with multiple sex offenses against a minor.

> The jury was instructed on . . . five counts of sexual abuse . . . and five counts of sodomy. Ultimately, the jury returned a verdict of guilt on five counts of sexual abuse in the first-degree and one count of sodomy in the first-degree. Bell was acquitted on the other charges. . . .
>
> Bell argues that because the jury instructions failed to identify each specific incident of abuse, they . . . deny him a unanimous verdict, and violate his right against double jeopardy. . . . [E]ach sexual abuse instruction was identical . . . . Bell's complaint centers on the fact that [the] instructions contain[] no differentiating factors whatsoever and do[] not attempt to identify each particular instance of abuse.
>
> The problem herein does not involve the sufficiency of the evidence. *Cf. Miller v. Commonwealth,* 77 S.W.3d 566 (Ky. 2002). The Commonwealth, during its opening and closing arguments, identified five distinct instances during which K.T. was allegedly sodomized and raped.

K.T.'s testimony provided sufficient evidence as to each incident to overcome a motion for a directed verdict.

The wording of the instructions, however, calls into question the unanimity of the verdict. A criminal defendant, of course, is entitled to a unanimous verdict. Ky. Const. § 7, as interpreted in *Cannon v. Commonwealth*, 291 Ky. 50, 163 S.W.2d 15 (1942); RCr 9.82(1). When the evidence is sufficient to support multiple counts of the same offense, the jury instructions must be tailored to the testimony in order to differentiate each count from the others. While the Commonwealth differentiated the offenses during its closing arguments, there is nothing in the written instructions to distinguish each count of . . . sexual abuse and sodomy.

It was error for the trial court in this case to deliver multiple instructions that failed to distinguish in some fashion each incident of . . . sexual abuse, or sodomy. We note that a simple parenthetical notation within each instruction identifying the location of the offense (*i.e.*, in K.T.'s living room), or the general time period of the offense (*i.e.*, before K.T. confessed the abuse to Ms. Tennyson), could have easily cured this problem. The trial court might also have used a heading or label for each instruction to differentiate the various counts.

Though we have reversed Bell's convictions for sexual abuse [on other grounds], we note that the error in the instructions with respect to these convictions would have been harmless. The jury was instructed on five counts of rape, with sexual abuse as a lesser-included offense. The Commonwealth, in its closing, identified the five distinct incidents. Because the jury ultimately found Bell guilty of all five counts of sexual abuse, it can be rationally and fairly deduced that each juror believed Bell was guilty of the five distinct incidents identified by the Commonwealth.

Bell, 245 S.W.3d at 741, 743-44.

We glean from *Bell* that, at the time of Dennis's trial, a "simple parenthetical notation within each instruction" was enough to "easily cure[] this problem" of otherwise identical instructions. *Id.* at 744. In Dennis's case, the parenthetical in the first instruction ("(anal)") distinguished it from the three other instructions. The parenthetical in the second and third instructions ("(oral)") distinguished them from the first and fourth instructions. Therefore, the only remaining problem was the two, truly identical instructions, the second and third.

According to *Bell* again, when Dennis's case was tried, "[i]t was error for the trial court . . . to deliver multiple instructions that failed to distinguish in some fashion each incident of . . . sexual abuse, or sodomy." *Id.* However, that kind of "error in the instructions with respect to these convictions would have been harmless [because t]he Commonwealth, in its closing, identified the . . . distinct incidents [and] the jury ultimately found [the defendant] guilty of all . . . counts of sexual abuse . . . ." *Id.* In Dennis's case, both occurred; the Commonwealth's closing distinguished the incidents and Dennis was found guilty of all charges.

We cannot say that by failing to object to these instructions, trial counsel's representation fell "below an objective standard of reasonableness" as measured "under prevailing professional norms." *Strickland*, 466 U.S. at 688. In fact, it could be argued that a conscious decision not to object to the identical second and third instructions would have been a reasonable trial tactic. If the jury convicted Dennis on only one of those two instructions, that would have set the stage to

argue a reversible, *palpable* error on appeal. We know this because, again, *Bell* says so.

Bell says that the defendant's "single conviction for sodomy [on multiple identical instructions for each count of sodomy] presents a different scenario" than that presented by his convictions on all five identical instructions on sexual abuse. The Supreme Court explained:

> The Commonwealth argues that, because the jury ultimately found Bell guilty of only one count of sodomy, they must have differentiated each instance and agreed upon one that had occurred. Satisfaction of Kentucky's unanimity requirement cannot be based on this type of conjecture. Rather, it must be evident and clear from the instructions and verdict form that the jury agreed, not only that Bell committed one count of sodomy, but also *exactly* which incident they all believed occurred. Otherwise, Bell is not only denied a unanimous verdict, but is also stripped of any realistic basis for appellate review of his conviction for sodomy. In other words, without knowing which instance of sodomy is the basis of his conviction, Bell cannot rationally challenge the sufficiency of the evidence on appeal. Accordingly, had Bell's sodomy conviction not already been reversed for the foregoing reasons, *the instructional error explained above would have constituted palpable, reversible error*.

Bell, 245 S.W.3d at 744 (emphasis in original; double emphasis added).

Dennis's trial counsel's failure to object to the identical instructions, whether by oversight or intention, did not constitute ineffective assistance.

For many of the same reasons, Dennis's appellate counsel's representation was not ineffective. We discussed *Bell* earlier in this opinion because it reflected the state of the law when Dennis was tried, less than a year before *Bell* was

rendered on February 21, 2008. When appellate counsel filed Dennis's brief in his direct appeal on August 7, 2008, *Bell* still was the law.

When Dennis's appellate counsel was considering issues to raise on appeal, he would have been aware of what issues trial counsel preserved by objection or otherwise. The issue of identical instructions was not preserved and palpable error only existed under *Bell* if Dennis had been convicted on only one of the identical instructions. But Dennis was convicted of both. Therefore, there was no palpable error. Appellate counsel's attention was obviously and appropriately focused on other errors.

Again we note that there is a "strong presumption that appellate counsel's choice of issues to present to the appellate court was a reasonable exercise of appellate strategy." *Hollon*, 334 S.W.3d at 436. "Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance be overcome." *Smith v. Robbins*, 528 U.S. 259, 288, 120 S.Ct. 746, 765 (2000) (quoting *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986)). An ineffective assistance of appellate counsel claim will succeed only when the reviewing court concludes that appellate counsel "omitted completely an issue that should have been presented on direct appeal." *Hollon*, 334 S.W.3d at 437. Dennis's claim does not clear that threshold.

As noted earlier, Dennis's appellate counsel successfully argued other issues on direct appeal and the Supreme Court remanded Dennis's case for additional consideration in accordance with its opinion. Given the state of the law as

expressed in *Bell*, we do not find that appellate counsel's prosecution of Dennis's appeal constituted ineffective assistance of counsel.

We acknowledge that two months after appellate counsel filed Dennis's brief, the Supreme Court overruled *Bell* in *Harp v. Commonwealth*, 266 S.W.3d 813 (Ky. 2008), stating:

> *Bell* is overruled to the extent that its dictum suggests that a failure to include the requisite specific identifying language in jury instructions can be rendered a harmless error by the curative powers of counsel's closing argument.

Id. at 821. This does not change our analysis but strengthens it. If *Bell* had not represented the state of the law when it was rendered, there would have been no need to overrule it. Furthermore, the claimed error in Dennis's case was unpreserved and it was not until May of 2009 that the Supreme Court determined such an error in instructions was palpable. In *Miller v. Commonwealth*, 283 S.W.3d 690 (Ky. 2009), the Court laid out the jurisprudential history on this issue most clearly, stating:

> Prior to our recent decision in *Harp v. Commonwealth*, 266 S.W.3d 813 (Ky. 2008), it was possible for an instructional error such as this to be "cured" by the Commonwealth's introduction and explanation of the identifying characteristics from which the jury could determine the existence of facts proving each of the offenses, rendering any error in the instructions harmless. *See Bell v. Commonwealth*, 245 S.W.3d 738, 744 (Ky. 2008). Then, in *Dixon v. Commonwealth*, 263 S.W.3d 583, 593 (Ky. 2008) [after Dennis was convicted], we recognized that "the arguments of counsel are not [now] sufficient to rehabilitate otherwise erroneous or imprecise jury instructions" because the arguments of counsel are

> not evidence. *Harp* further corrected dictum in *Bell* which supported the proposition that counsel could "cure" defects in identical instructions in closing argument . . . .
>
> Thus, it is now settled that a trial court errs in a case involving multiple charges if its instructions to the jury fail to factually differentiate between the separate offenses according to the evidence. [citation omitted] . . . . [I]dentical jury instructions . . . cannot be considered harmless. . . .
>
> Being error, we *now* hold such instructional error as this to be palpable error . . . .

Miller, 283 S.W.3d at 695-96 (emphasis added).

Clearly this error was not deemed palpable when appellate counsel filed a brief for Dennis in the Supreme Court. Counsel chose to argue other issues – and succeeded – rather than arguing an unpreserved, non-palpable error. We reiterate; appellate counsel's representation was not ineffective.

The trial court was capable of resolving the allegations in Dennis's Rule 11.42 motion on the face of the record, just as this Court was capable of reviewing that decision. In such a case, an evidentiary hearing is not required. *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001). Dennis's argument that he was entitled to one fails.

III. **Conclusion**

For the reasons discussed above, we affirm the November 9, 2012 Order of the Daviess Circuit Court denying Dennis's motion pursuant to RCr 11.42 for relief from his conviction.

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