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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000150-MR

DARRYL A. GALLOWAY, JR. APPELLANT

v. APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN R. GRISE, JUDGE
ACTION NO. 11-CR-00560

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT AND L. THOMPSON, JUDGES; HENRY,[1] SPECIAL JUDGE.

HENRY, SPECIAL JUDGE: Darryl A. Galloway appeals *pro se* from the December 12, 2016, order of the Warren Circuit Court denying his RCr[2] 11.42

[1] Special Judge Michael L. Henry sitting by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

[2] Kentucky Rules of Criminal Procedure.

motion. On appeal, Galloway contends trial counsel failed to investigate his case, failed to move to suppress statements made to police before he was read his *Miranda* rights, failed to object to testimony from a sexual assault nurse examiner (SANE), failed to move for a *Daubert* hearing regarding the SANE nurse's qualifications as an expert, and failed to retain a true expert to aid in his defense. For the following reasons, we affirm.

I. BACKGROUND

Galloway lived with his girlfriend, L.S., and her two children. Galloway worked at Sun Products in Bowling Green and helped L.S. obtain a job there. Both Galloway and L.S. worked the night shift. During L.S.'s first shift, Galloway accused her of flirting with another man. Although Galloway became increasingly angry throughout the night, the two left together at the end of their shift.

As they drove away from Sun Products, Galloway struck L.S. in the face, which resulted in swelling and bruising to her face and nose. At trial, L.S. testified Galloway continued to hit her while driving, drove her to a secluded area, forced her to perform oral sex on him, and raped her. During the struggle, the necklace L.S. wore and an air vent in the vehicle were broken.

On the way back to their apartment, Galloway stopped at a gas station. He threatened L.S. with a knife and said he would kill her and her kids if she

moved. After they returned to their apartment, Galloway made L.S. bathe and then raped her again on a bare mattress. L.S. testified that after the second rape, Galloway stabbed the mattress with a knife and taunted her.

Immediately following these events, Galloway agreed to take L.S. to the hospital if she agreed to tell police she was injured during an attempted robbery. L.S. testified that Galloway staged a robbery before taking her to the hospital. When they arrived at the hospital, L.S. filled out an admission form on which she wrote "get him away from me please." L.S. was admitted to the emergency room, and Galloway waited. L.S. then informed medical personnel and the police that Galloway raped her.

Detective Michael Myrick of the Bowling Green Police Department was called to the hospital to investigate L.S.'s injuries and disclosures. At trial, the Commonwealth played a video of Detective Myrick's interview of Galloway at the hospital. The detective asked Galloway to explain his version of what happened to L.S., and Galloway told him that L.S. was robbed. Detective Myrick then ended the interview to take a call. When the detective returned, he informed Galloway that the investigation indicated that Galloway was not telling the truth. Galloway again denied assaulting L.S. and reiterated that she had been robbed. Officer Myrick then informed Galloway he was under arrest, was not free to leave, and read the *Miranda* warnings.

On August 17, 2012, a Warren County jury convicted Galloway of two counts of rape, sodomy, and fourth-degree assault, and the trial court sentenced him to forty-five years of imprisonment. On direct appeal, the Supreme Court of Kentucky reversed the assault conviction but affirmed all other convictions. *Galloway v. Commonwealth*, 424 S.W.3d 921 (Ky. 2014).

Galloway subsequently filed a timely motion to set aside his conviction and sentence pursuant to RCr 11.42. In his motion, Galloway argued trial counsel failed to move to suppress the statements he made to police prior to being read his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Second, Galloway argued trial counsel failed to object to the SANE nurse's ambiguous testimony and should have moved for a hearing pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). Third, Galloway argued trial counsel failed to move for an instruction for a lesser-included offense for first-degree sodomy.

The trial court appointed counsel to represent Galloway on his RCr 11.42 issues. Then, the Commonwealth filed a response to Galloway's motion, and the trial court set the matter for an evidentiary hearing. Appointed counsel filed a supplement to Galloway's motion prior to the hearing, and the court permitted both parties to file post-hearing memorandums before ruling on the

matter. On October 12, 2016, the trial court entered an order denying Galloway's RCr 11.42 motion. This appeal followed.

II. STANDARD OF REVIEW

"[W]e apply the de novo standard when reviewing counsel's performance under *Strickland* [*v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)]." *Commonwealth v. McGorman*, 489 S.W.3d 731, 736 (Ky. 2016) (citation omitted). To succeed on a claim of ineffective assistance of counsel pursuant to RCr 11.42, a movant must fulfill two requirements:

> 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. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland, 466 U.S. at 687, 104 S. Ct. at 2064. As such, the trial court's inquiry is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S. Ct. at 2068.

III. ANALYSIS

On appeal, Galloway claims trial counsel was ineffective for the following reasons: (1) counsel failed to investigate his case; (2) counsel failed to move to suppress statements made to police before he was read the *Miranda* warnings; (3) failed to object to testimony from a SANE nurse; and (4) failed to move for a *Daubert* hearing regarding the SANE nurse's qualifications as an expert.

First, we address Galloway's contention that trial counsel failed to investigate his case. Galloway specifically argues counsel should have investigated whether he was in custody before he was read his *Miranda* rights by obtaining surveillance footage from the hospital quiet room and seeking interviews of the hospital security officer or the detective who questioned him. Galloway also argues counsel should have gathered surveillance footage from the gas station, interviewed the gas station attendant, and interviewed witnesses from the apartment complex.

Galloway did not make this argument in the underlying motion, so the trial court did not rule on the issue in its order. "When an issue has not been addressed in the order on appeal, there is nothing for us to review. Our jurisprudence will not permit an appellant to feed one kettle of fish to the trial judge and another to the appellate court." *Owens v. Commonwealth*, 512 S.W.3d

1, 15 (Ky. App. 2017) (citation and footnote omitted). As we can only address arguments raised before the trial court, we decline to address this issue.

Second, Galloway argues trial counsel failed to move to suppress statements made to police before his *Miranda* rights were read. The trial court denied this part of Galloway's motion, finding Galloway was not in custody during this part of the interview. Reasonable minds could differ as to whether Galloway was "free to leave" when Detective Myrick began interviewing Galloway. *Commonwealth v. Lucas*, 195 S.W.3d 403, 405 (Ky. 2006) (citation omitted). However, we agree with the trial court's ruling for a different reason.

"The Fifth Amendment guarantees that '[n]o person . . . shall be compelled in any criminal case to be a witness against himself.'" *New York v. Quarles*, 467 U.S. 649, 654, 104 S. Ct. 2626, 2630, 81 L. Ed. 2d 550 (1984) (quoting U.S. CONST. amend. V). The Supreme Court of the United States has held "[t]he harm caused by failure to administer Miranda warnings relates only to admission of testimonial self-incriminations[.]" *Id.*, 467 U.S. at 669, 104 S. Ct. at 2638. "[T]he *Miranda* exclusionary rule [is] a prophylactic measure [designed] to prevent violations of the right protected by the text of the Self-Incrimination Clause—the admission into evidence in a criminal case of confessions obtained through coercive custodial questioning." *Chavez v. Martinez*, 538 U.S. 760, 772, 123 S. Ct. 1994, 2004, 155 L. Ed. 2d 984 (2003) (citations omitted).

As previously stated, Galloway repeatedly informed Detective Myrick of his innocence during the interview at the hospital. *Miranda* warnings are given to protect the privilege against self-incrimination, and Galloway did not make any self-incriminating statements before the detective read his rights. Thus, even if trial counsel had moved to suppress Galloway's statements made prior to *Miranda* warnings, suppression would have been unwarranted because Galloway made no self-incriminating statements.

Finally, we will address Galloway's remaining arguments in tandem. Galloway argues the SANE nurse who examined L.S. at the hospital and testified regarding her injuries during trial was not qualified to testify as an expert. Galloway further argues trial counsel failed to move for a *Daubert* hearing regarding the SANE nurse's qualifications as an expert, and counsel should have hired a true expert to aid in his defense.

Kentucky recognizes SANE nurses as a distinct professional nursing certification.

> "Sexual assault nurse examiner" means a registered nurse who has completed the required education and clinical experience and maintains a current credential from the board as provided under KRS 314.142 to conduct forensic examinations of victims of sexual offenses under the medical protocol issued by the Justice and Public Safety Cabinet in consultation with the Sexual Assault Response Team Advisory Committee pursuant to KRS 216B.400(4)[.]

KRS 314.011(14). To become a certified SANE nurse, one must be a registered nurse with at least a baccalaureate degree, "complete[] a board SANE educational course or comparable course," and "complete at least five (5) contact hours of continuing education" annually. 201 KAR 20:411; *see* KRS 314.142. The Supreme Court of Kentucky has explained that "[a] SANE nurse serves two roles: providing medical treatment and gathering evidence. SANE nurses act to supplement law enforcement by eliciting evidence of past offenses with an eye toward future criminal prosecution. . . . [T]he SANE nurse [is] an active participant in the formal criminal investigation." *Hartsfield v. Commonwealth*, 277 S.W.3d 239, 244 (Ky. 2009). Our Supreme Court has further held that SANE nurses "working in an emergency room, [have] training and experience related to abrasions similar to those on the victim, and [can] testify that the victim's injuries were consistent with injuries to other victims[.]" *Edmonds v. Commonwealth*, 433 S.W.3d 309, 317 (Ky. 2014).

Here, the SANE nurse testified that she met all the requirements and was certified as a SANE nurse. The focus of the SANE nurse's testimony was her observation of the injuries L.S. sustained. During trial, the SANE nurse identified pictures of L.S.'s injuries, which mainly depicted bruising of multiple parts of L.S.'s body. Only once did the SANE nurse provide an opinion as to the cause of

an injury when she stated the line on L.S.'s neck was likely where a necklace would have been.

In Kentucky, SANE nurses are permitted to testify, based on their experience, regarding the likely cause of an injury. The SANE nurse who examined L.S. had been certified as such for approximately seven years and had performed hundreds of sexual assault examinations. We conclude the SANE nurse was qualified to opine that a line on L.S.'s neck was consistent with where a necklace would have been, and that she was also qualified to testify that marks on various parts of L.S.'s body were bruises. Thus, the trial court correctly concluded the SANE nurse was qualified to provide testimony regarding L.S.'s injuries, and a *Daubert* hearing was unnecessary because the SANE nurse met the statutory requirements.

As to Galloway's argument that trial counsel should have hired an expert witness to testify in his defense, the record reflects that he did not raise this argument in his motion before the trial court. Therefore, we decline to address this issue. *Owens*, 512 S.W.3d at 15. In conclusion, the trial court did not err in denying Galloway relief under RCr 11.42.

IV. CONCLUSION

For these reasons, we affirm the order of the Warren Circuit Court.

ALL CONCUR.

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