IMPORTANT NOTICE

NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: JUNE 16, 2005
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2004-SC-0269-MR

WILLIAM R. PAYNE — APPELLANT

V.

APPEAL FROM TAYLOR CIRCUIT COURT
HONORABLE ALLAN RAY BERTRAM, JUDGE
02-CR-00042

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

I. INTRODUCTION

Appellant, William Payne, was convicted of nine counts of First-Degree Rape and five counts of First-Degree Sodomy. The jury also found that Appellant was a persistent felony offender. He contends 1) that the trial court erred in overruling his motion for a directed verdict; 2) that he was denied the right to a fair trial based upon prosecutorial misconduct; and 3) that he was denied the right to a fair trial due to ineffective assistance of counsel. Because Appellant did not properly preserve the directed verdict and prosecutorial misconduct issues, and ineffective assistance of counsel claims cannot be raised on direct appeal, we reject Appellant's claims of error. Accordingly, we affirm Appellant's convictions.

II. BACKGROUND

Appellant met Brenda Hatfield, the victim's mother, in March or April of 1999. Later that year, in October, Appellant moved in with Brenda and her four children.

Although Appellant and Brenda had known each other for a few months before the move, the relationship did not become sexual until about three months after Appellant moved in. Appellant stayed with Brenda and her family until December of 2001, when he was arrested for violation of parole.

Two months later, the victim attended a church sponsored lock-in. While at the lock-in, Karen Benningfield, one of the church leaders, found the victim sitting alone in a pew, praying. When asked why she was in the sanctuary, the victim told Benningfield that men had been touching her in inappropriate ways. After their conversation, Benningfield called Child Protective Services and informed them of the victim's allegations.

After conducting an investigation, Appellant was indicted for fifty counts of First-Degree Rape, ten counts of First-Degree Sodomy, and one count of being a First-Degree Persistent Felony Offender. At trial, the Commonwealth called Brenda Hatfield to testify about her relationship with Appellant and the victim. Hatfield stated that she did not believe the allegations that her daughter had made concerning Appellant and that her daughter had a reputation for untruthfulness. The prosecution also asked Hatfield if she had ever referred to her daughter as a "whore," but she denied doing so. The prosecution also called Dr. Jasbir Dhillon, the E.R. physician who examined the victim on February 25, 2002, shortly after the allegations were made. According to Dr. Dhillon, the victim's hymen was perforated, indicating, though not proving, that she had engaged in sexual intercourse. Dr. Dhillon also said that the victim tested positive for chlamydia, a sexually transmitted disease, and that her cervix appeared "red and irritated." Based upon his examination, Dr. Dhillon prescribed medicine for the chlamydia. Next, the

prosecution called Dr. Kevin Dew, a gynecologist who examined the victim on March 7, 2002. Dr. Dew testified that the victim presented indications of sexual activity, including a perforated hymen and a condition known as bacterial vaginosis, which is caused by the transmission of foreign bacteria into the vagina.

Libby Caulk, a teacher at the victim's school whose daughter played volleyball with the victim, testified that she was with the victim at the initial visit from Child Protective Services and when the victim went to the Taylor Regional Hospital for an examination. Further, Caulk said that she had heard Brenda Hatfield refer to the victim as a "whore." The prosecution also called Elizabeth Shelton, the social worker assigned to the case, to testify. She, too, stated that she heard Hatfield refer to her daughter as a "whore." Shelton also said that she visited the victim at Campbellsville Middle School, finding her in "the fetal position, rocking, sucking her thumb, and crying." Based upon her interview with the victim, Ms. Shelton arranged for the victim's transfer to live with her father.

Finally, the prosecution called the victim. During direct examination, the victim testified to nine instances of rape and five instances of oral sodomy, describing the encounters and identifying Appellant as the alleged perpetrator.

At the close of the Commonwealth's case, Appellant's attorney made a motion for a directed verdict, arguing that the evidence was insufficient to support finding Appellant guilty of the charged offenses. The court, after listening to the prosecution's argument that the evidence was sufficient to support finding Appellant guilty, denied the motion. Appellant's attorney renewed the motion for a directed verdict at the close of all evidence, stating that the motion should be granted for the

reasons already articulated in the initial motion. Again, the court refused to grant Appellant's motion for a directed verdict, and the case went to the jury.

Although the indictment contained sixty-one counts, including fifty counts of First-Degree Rape, ten counts of First-Degree Sodomy, and one count of First-Degree Persistent Felony Offender Status, the trial court only instructed the jury on nine counts of First-Degree Rape and five counts of First-Degree Sodomy. The jury convicted Appellant of all fourteen counts in the instructions, found that he was a persistent felony offender, and recommended a total enhanced sentence of thirty years imprisonment. The trial court sentenced Appellant in accordance with the jury's recommendation. Appellant appeals to this court as a matter of right.[1]

III. ANALYSIS

We address the issues in the order in which they appear in Appellant's brief.

A. Directed Verdict

Appellant contends that the trial court should have granted his motion for a directed verdict because the evidence offered by the prosecution was insufficient to support a conviction on the charged offenses.

First, we note that this issue has not been properly preserved for review. CR 50.01,[2] which is applicable in criminal cases,[3] says that "[a] motion for a directed

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[1] KY. CONST. §110(2)(b).

[2] Rules of Civil Procedure.

[3] RCr 1.02(2) ("These rules govern procedure and practice in all criminal proceedings in the Court of Justice. To the extent that they are not inconsistent with these rules, the regulations, administrative procedures, and manuals published by the Administrative Office of the Courts upon authorization of the Supreme Court relating to internal policy and administration within the Court of Justice shall have the same effect as if incorporated in the rules.").

verdict shall state the specific grounds therefore."[4] In this case, Appellant's attorney moved for a directed verdict, arguing only that no reasonable jury could find the defendant guilty of the crimes with which he had been charged. Even if true, Appellant's attorney had the obligation, under CR 50.01, to direct the court's attention to specific elements of the crime that the prosecution had not proved beyond a reasonable doubt. Just last year, in Pate v. Commonwealth,[5] a case involving prosecution for the manufacture of methamphetamine, we held that a general motion for directed verdict was insufficient, stating, "CR 50.01 requires that a directed verdict motion 'state the specific grounds therefor[,]' and Kentucky appellate courts have steadfastly held that failure to do so will foreclose appellate review of the trial court's denial of the directed verdict motion."[6] In this case, instead of citing specific elements of the charges, Appellant's attorney relied on the vague assertion that no reasonable jury could find Appellant guilty, thus depriving the trial court of the opportunity to rule on specific elements of the charges. Therefore, we hold that Appellant's motion for a directed verdict was not preserved for appellate review.

Nevertheless, despite Appellant's failure to preserve this issue for review, we have reviewed the record and conclude that the trial judge properly denied Appellant's motion for directed verdict. "On appellate review, the test of a directed

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[4] CR 50.01 ("A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefore. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.").

[5] 134 S.W.3d 593 (Ky. 2004).

[6] Id. at 597-98 .

verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then is the defendant entitled to a directed verdict of acquittal."[7] Additionally, the Court of Appeals has fleshed out this rule: "[I]n ruling on a directed verdict motion, the trial court must draw all reasonable inferences from the evidence in favor of the Commonwealth and assume that the Commonwealth's evidence is true, leaving questions of weight and credibility to the jury."[8] In this case, Appellant was charged with numerous counts of rape and sodomy. The prosecution called two doctors, Dr. Dhillon and Dr. Dew, to testify about their examination of the victim. Both doctors testified that there was evidence of sexual activity, e.g. perforated hymen, chlamydia, and bacterial vaginosis. In fact, although the defense attacked the use of the perforated hymen as incontrovertible evidence of sexual activity, no one disputed Dr. Dhillon's statement that chlamydia is a sexually transmitted disease. Of course, evidence of sexual activity does not prove that the victim was raped by Appellant. It is, however, evidence of sexual activity, which, depending on the credibility of the witnesses, could be used to prove the defendant's guilt.

Appellant has gone to great lengths to impeach the credibility of the victim, arguing that her testimony was replete with contradictions, inconsistent statements, and implausible scenarios, specifically citing four factors that, allegedly, render the victim's claims wholly improbable. First, Appellant mentions the fact that no person saw or heard anything unusual in the Hatfield home when these events allegedly occurred, despite the fact that there were four people in a relatively small house. Although Appellant is correct that the prosecution did not call any witnesses to the

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[7] Commonwealth v. Benham, 816 S.W.2d 186,187 (Ky. 1991).

[8] Slaughter v. Commonwealth, 45 S.W.3d 873,875 (Ky.App. 2000); see also Nichols v. Commonwealth, 657 S.W.2d 932, 934 (Ky. 1983).

alleged offenses, the jury could still choose to believe the testimony of the victim even in the absence of corroborating testimony from other witnesses. Indeed, the jury must determine whether, and to what extent, a witness's testimony is to be believed. [9]

Second, Appellant argues that the victim's decision not to tell anyone about these incidents for more than two years strains credulity. Specifically, Appellant contends that the prosecution had a responsibility to offer evidence of a psychological syndrome that would explain the victim's reticence on this sensitive subject. We acknowledge the fact that the prosecution did not offer any substantive evidence that the victim was afflicted with a psychological disorder, but we do not agree with Appellant's assertion that this was necessary or that the absence of such evidence rendered the victim's claims implausible. As a technical matter, nowhere in the statute is there any requirement that the prosecution in a rape case offer evidence of a psychological disorder. Such evidence, if offered, would go to the credibility of the witness, which, as we have said, must be left to the jury. Moreover, in this case, Appellant's argument that no substantive evidence of a psychological disorder was offered, though technically true, is misleading. In fact, the victim, during direct examination, explained her reluctance to tell her mother about these acts, saying that she knew that her mother was fond of Appellant and, consequently, would probably accuse the victim of fabricating the claims (as she did at trial).

Third, Appellant points out the fact that no evidence was offered to corroborate the victim's claim that she was a virgin at the time of the first rape. Again, the statute under which Appellant was convicted says nothing about proof of

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[9] Slaughter, 45 S.W.3d at 875.

virginity. Furthermore, even if the victim was not a virgin, such a fact would have no effect on the jury's decision in this case. The victim was alleging rape, i.e. non-consensual sex, and not violation of her chastity. Finally, Appellant cites to the witnesses who testified to the victim's lack of truthfulness. While we recognize the value in impeaching the credibility of witnesses, we also believe that the jury must be the final arbiter of witness credibility.

Ultimately, contradictions in the victim's testimony go to her credibility, which must be weighed by the jury and not the judge. Thus, a motion for directed verdict, unless accompanied by proof that the prosecution has failed to offer any credible evidence, must be rejected, and the jury must be allowed to determine what weight, if any, to ascribe to the testimony of the victim. The motion for directed verdict, therefore, was properly denied by the trial judge.

B. Prosecutorial Misconduct

Appellant asserts that the prosecutor's conduct in this case was sufficiently egregious to amount to prosecutorial misconduct. We disagree.

Appellant's claim of prosecutorial misconduct is based upon the Commonwealth's decision to call Brenda Hatfield as a witness. During direct examination, the prosecutor asked Hatfield if she had ever referred to the victim as a "whore," to which she responded with an unequivocal denial. Then, based upon Ms. Hatfield's denial, the Commonwealth called two witnesses, Libby Calk and Elizabeth Shelton, who testified that they had heard Hatfield say that the victim was a "whore." The Commonwealth did nothing improper, either in asking Hatfield this question on direct examination or in impeaching her credibility by calling witnesses to testify to a prior inconsistent statement. The Commonwealth asked Hatfield whether she had

ever called her daughter a "whore" to show bias, which, as Professor Lawson has correctly noted,[10] is admissible. Indeed, during direct examination, Hatfield admitted that she and Appellant were romantically involved at the time of the alleged acts and remained so at the time of trial. Further, Hatfield testified that, in her opinion, the victim was untruthful and that the claims that had been made against Appellant could not be trusted. Thus, based upon this testimony, which, we believe, reveals evidence of bias in favor of the Appellant, the Commonwealth's question about Hatfield referring to the victim as a "whore" was proper. When Hatfield denied making this statement, the Commonwealth called other witnesses to impeach her credibility. According to KRE 607, "the credibility of a witness may be attacked by any party, including the party calling the witness." The Commonwealth gave Hatfield the opportunity to address her prior statement as required by the Rules of Evidence.[11] Thus, the Commonwealth's impeachment of Brenda Hatfield's credibility was proper.

But even assuming, arguendo, that the prosecution had engaged in impermissible trial practices, the error was not properly preserved for review. In fact, Appellant concedes this point in his brief, claiming that the error, though

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[10] Robert G. Lawson, Kentucky Evidence Law Handbook, §4.15[1], at 183 (3d ed. 1993) ("No doubt exists about the admissibility of evidence bearing on what is commonly referred to as the 'bias' of witnesses. . . .There is no explicit treatment of impeachment by bias in the Kentucky Rules of Evidence . . . .Admissibility of such evidence, said the [United States Supreme] Court, is governed by provisions on relevancy (Rules 401 and 402) . . . .).

[11] See KRE 613 ("Examining witness concerning prior statement. Before other evidence can be offered of the witness having made at another time a different statement, he must be inquired of concerning it, with the circumstances of time, place, and persons present, as correctly as the examining party can present them.").

unpreserved, should be reviewed by this Court as palpable error.[12] But RCr 10.26 is only applicable when the error is so egregious that the defendant was deprived of the right to a fair trial. At the most, any prosecutorial misconduct in this case would fall within the category of harmless error, and therefore, Appellant's argument that there was evidence of prosecutorial misconduct must be rejected.

C. Ineffective Assistance of Counsel

Appellant contends that his attorney's performance during trial was deficient, thus depriving him of his constitutional right to effective assistance of counsel.

"As a general rule, a claim of ineffective assistance of counsel will not be reviewed on direct appeal from the trial court's judgment, because there is usually no record or trial court ruling on which such a claim can properly be considered."[13] We have held that an ineffective assistance of counsel claim must be raised in a post-conviction Rule 11.42 motion rather than on direct appeal, thus we decline to review the issue on direct appeal.[14]

IV. CONCLUSION

Appellant did not properly preserve his directed verdict claim or his claim of prosecutorial misconduct, and Appellant's claim of ineffective assistance of counsel can only be raised as a post-conviction Rule 11.42 motion. Thus, the trial court did not commit error in this case, and we affirm Appellant's convictions.

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[12] RCr 10.26 ("A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.").

[13] Humphrey v. Commonwealth, 962 S.W.2d 870, 872 (Ky. 1998).

[14] Id. at 872.

Cooper, Graves, Johnstone, Scott and Wintersheimer, JJ., concur. Lambert, C.J., concurs in result only.

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