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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000343-MR

PAUL HURT — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN K. MERSHON, JUDGE
ACTION NO. 00-CR-000487

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, MOORE, AND NICKELL, JUDGES.

MOORE, JUDGE: Paul Hurt appeals the Jefferson Circuit Court's order denying his RCr[1] 11.42 motion to vacate, set aside, or correct his sentence. He asks this Court to vacate the judgment of conviction and grant him a new trial. After a careful review of the record, we affirm because Hurt cannot meet the requirements

[1] Kentucky Rule of Criminal Procedure.

for relief under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984).

I. FACTUAL AND PROCEDURAL BACKGROUND

Following a jury trial, Hurt was convicted of three counts of first-degree sodomy and two counts of first-degree sexual abuse against his step-daughter.[2] He was sentenced to life imprisonment. Hurt appealed, and the Kentucky Supreme Court affirmed the circuit court's judgment. *See Hurt v. Commonwealth*, No. 2002-SC-0209-MR, 2003 WL 22417232, *1 (Ky. Oct. 23, 2003) (unpublished).

Hurt then filed a RCr 11.42 motion in the circuit court. The circuit court initially denied the motion without holding an evidentiary hearing. Hurt appealed, and this court affirmed the circuit court's decision. The Kentucky Supreme Court granted discretionary review, vacated this Court's opinion, vacated the circuit court's order denying Hurt's RCr 11.42 motion, and remanded the case with the direction that the circuit court should hold an evidentiary hearing on the motion before ruling on it. An evidentiary hearing was then held, and the circuit court again denied Hurt's motion.

Hurt now appeals, contending as follows: he received ineffective assistance of counsel and his due process rights were violated when trial counsel failed to properly investigate and prepare for the Commonwealth's case, especially

[2] Due to the sexual nature of the crimes, we will simply refer to the victim in this case as "the child."

the testimony of Dr. Sally Perlman. Other pertinent facts will be discussed in our analysis, *infra*.

II. STANDARD OF REVIEW

In a motion brought under RCr 11.42, "[t]he movant has the burden of establishing convincingly that he or she was deprived of some substantial right which would justify the extraordinary relief provided by [a] post-conviction proceeding. . . . A reviewing court must always defer to the determination of facts and witness credibility made by the circuit judge." *Simmons v. Commonwealth*, 191 S.W.3d 557, 561 (Ky. 2006), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151, 159 (Ky. 2009). An RCr 11.42 motion is "limited to issues that were not and could not be raised on direct appeal." *Id*.

III. ANALYSIS

We first note that Hurt raised various claims of the ineffective assistance of trial counsel in the circuit court. However, the only claim he raises on appeal is his allegation that he received ineffective assistance of trial counsel and his due process rights were violated when counsel failed to properly investigate and prepare for the Commonwealth's case, especially the testimony of Dr. Sally Perlman. Specifically, Hurt contends that his counsel rendered ineffective assistance by failing to consult a forensic expert and by failing to challenge the admissibility of Dr. Perlman's opinions on the basis that she was not qualified to testify as an expert on the child's behavior. Because Hurt's remaining claims that he asserted in the circuit court were not raised in his appellate brief,

those claims are deemed waived on appeal. *See Grange Mut. Ins. Co. v. Trude*, 151 S.W.3d 803, 815 (Ky. 2004).

To prove that he received the ineffective assistance of counsel, thus warranting a reversal of his conviction, Hurt must show that: (1) counsel's performance was deficient, in that it fell outside "the wide range of reasonable professional assistance;" and (2) this deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

During the jury trial, Dr. Perlman, who is board-certified in obstetrics and gynecology, attested that she had performed thousands of gynecological examinations. Dr. Perlman examined the child in this case after the child alleged that she had been sexually abused by Hurt. Dr. Perlman first obtained the child's history before she performed the examination. She explained to the jury the physical examination that she performed on the child, and stated that during the examination, the child laid "there like a wet noodle," which concerned her because children "in [her] experience who have had frequent manipulations of this area [*i.e.*, the genitalia and anus] by strangers are a lot more easy to examine, unfortunately, than kids that have not." Thus, Dr. Perlman testified that she became very concerned about the child because she observed that the child was very relaxed during the examination. Her physical examination findings were that the child appeared normal for someone of her age and physical development. However, Dr. Perlman stated that simply because there were "no findings" of

sexual abuse in this case, that does not mean that there was no abuse. She explained that, unless there is penetration of the vagina, which was not alleged in this case, there would likely be no findings during a physical examination of abuse. Therefore, Dr. Perlman opined that her findings based on the child's physical examination were consistent with the child's sexual history.

Dr. Perlman testified that it was her opinion, based on the child's very relaxed state during the examination, that the child had been sexually abused. She stated that her opinion concerning the child's behavior was based on her experiences as a doctor and on a book she had read by experts in the field of sexual abuse, but she was unable to provide the name of the book. Dr. Perlman explained that there was a "one in a million" chance that a child of that age would act as relaxed as this child did during the examination, and not have been abused.

During the RCr 11.42 evidentiary hearing, Don Major, a trial attorney who testified that he had tried over 100 cases including death penalty cases and sex offense cases, was called to testify as an expert on behalf of Hurt. Major testified that he would have contacted Dr. Perlman soon after her report was issued because she works for Children First, which is an advocacy group. He attested that he would have asked people that he knew if Dr. Perlman's opinion concerning the child's behavior was based on expert opinions, and he would have hired an expert concerning that behavioral opinion. Major said he would have objected more strongly to Dr. Perlman being the last witness the jury heard before deliberations.[3]

[3] Dr. Perlman was a witness for the Commonwealth at trial, but she was called out of order (*i.e.*, after the defense had presented its case) due to her schedule. According to the circuit court's

Major opined that he believed the fact that there was no expert testimony to contradict Dr. Perlman's testimony had a great impact on the jury's verdict. He further testified that he would have requested a hearing under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), to make certain that Dr. Perlman was qualified to provide the behavioral opinion she gave.

Dr. George R. Nichols, II, also testified at the evidentiary hearing. Dr. Nichols is a licensed physician and a board certified forensic pathologist. Dr. Nichols was the Chief Medical Examiner for the Commonwealth of Kentucky for twenty years. He was a founding member of Children First.[4]

Dr. Nichols stated that he had reviewed Dr. Perlman's testimony. Defense counsel asked Dr. Nichols about Dr. Perlman's testimony wherein Dr. Perlman opined that although there was no physical evidence and "no findings," the examination was "absolutely consistent" with sexual abuse because the child was "exceptionally relaxed" during the examination. Dr. Nichols acknowledged that he was aware Dr. Perlman had made those statements during her testimony, and he noted that Dr. Perlman had also stated on cross-examination that there was a "one in a million" chance that a child as relaxed as this one was during her physical examination was not abused.

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opinion, Hurt asserted a claim in the circuit court regarding his counsel's alleged failure to object to Dr. Perlman being called out of order, but he did not assert this claim on appeal. Therefore, it is waived. *See Grange Mut. Ins. Co.*, 151 S.W.3d at 815.

[4] During the hearing, in the interest of full disclosure, the circuit court judge also said that he had been on the initial Board of Children First.

However, Dr. Nichols did not know on what basis Dr. Perlman determined that her interpretation of the child's behavior was valid and that the child's behavior was related to prior sexual activity, let alone sexual abuse. He stated that he also did not know where she came upon "the magic number of one in a million." Dr. Nichols testified that he reviewed the scientific literature concerning child sexual abuse and its determination, and he could find no information to support Dr. Perlman's conclusion concerning the child's behavior.

Dr. Nichols noted that he is not a behaviorist,[5] but he did not believe that Dr. Perlman was either. Dr. Nichols stated it was important that neither he nor Dr. Perlman was a behaviorist because behaviorists were the only types of scientists who were able to determine the evidentiary status of the behavior of a human being. Dr. Nichols thought that Dr. Perlman had improperly embarked in the realm of forensic psychiatry or forensic psychology by providing her opinion of the child's behavior as she was not trained in those fields. Therefore Dr. Nichols's opinion was that based on Dr. Perlman's background, she was not qualified to give an opinion concerning the child's behavior during the examination; however, she was qualified to state that there were "no findings" during the physical examination. On cross-examination, Dr. Nichols acknowledged that Dr. Perlman's determination that there were "no findings" could be consistent with either sexual abuse or no sexual abuse.

[5] Dr. Nichols explained that when he used the term "behaviorist" during his testimony, he was referring to a forensic psychiatrist or forensic psychologist who could determine why someone would behave a certain way.

Hurt's mother also testified. She attested that she heard two of the jurors originally voted "not guilty," but they were subsequently convinced by the other jurors to vote "guilty." Hurt's mother attempted to contact both of those jurors, but she was only able to get in touch with one of them, Roberta Pruitt. Pruitt agreed to testify during the evidentiary hearing. She testified by telephone, and admitted that if a forensic expert had attested that there was no scientific basis for Dr. Perlman's opinion that the child's relaxed behavior during the physical examination was typical for an abused child, she would have voted "not guilty."

Following the evidentiary hearing and further briefing by the parties, the circuit court denied Hurt's RCr 11.42 motion, reasoning in pertinent part as follows:

> At trial, Dr. [Perlman[6]] confirmed that there was no physical evidence indicating that [the child] was sexually abused. [Trial counsel] testified that when there is no physical evidence to support the allegation he would not consider consulting a forensic expert. Further, [trial counsel] was able to elicit testimony from Dr. [Perlman] supporting his theory that [the child] was a poor historian (as indicated in Dr. [Perlman's] report). This had been part of his theory of defense, during the competency hearing for [the child], his cross-examination of her, and throughout most of the trial. Given this, the Court concludes that [trial counsel] was not ineffective for deciding not to consult with or call an expert to testify. Furthermore, Dr. Nichols conceded that the medical exam and findings could not reasonably be disputed. Thus, the outcome of the proceedings was unaltered by [trial counsel's] decision not to call an expert.

[6] The circuit court spelled Dr. Perlman's name as "Pearlman." In the Commonwealth's brief in this appeal, the Commonwealth at times spells her name "Perlman" and at other times spells her name "Pearlman." Hurt spells her name "Perlman" in his appellate brief, and that is how we have chosen to spell her name in this opinion.

We first note that Dr. Perlman did not testify that her opinion concerning the child's behavior was based entirely on a book that she read, which was written by experts in the field of sexual abuse. Rather, as we quoted above from her trial testimony, she attested that during the examination, the child laid "there like a wet noodle," which concerned her because children "in [her] experience who have had frequent manipulations of this area [*i.e.*, the genitalia and anus] by strangers are a lot more easy to examine, unfortunately, than kids that have not." Therefore, her opinion that the child's relaxed behavior during the examination was consistent with a child who had been sexually abused was also based on her own experiences in examining children throughout her medical career.

Regardless, the Kentucky Supreme Court has stated as follows: "[W]e have consistently held as inadmissible, evidence of a child's behavioral symptoms or traits as indicative of sexual abuse . . . on grounds that this is not a generally accepted medical concept." *Bell v. Commonwealth*, 245 S.W.3d 738, 745 (Ky. 2008), *overruled on other grounds by Harp v. Commonwealth*, 266 S.W.3d 813 (Ky. 2008). Although *Bell* was rendered in 2008, and the trial in the present case occurred in 2001, the Court in *Bell* cited various cases from years before the trial in this case occurred as support for the above holding, including: *Brown v. Commonwealth*, 812 S.W.2d 502 (Ky. 1991), *overruled on other grounds by Stringer v. Commonwealth*, 956 S.W.2d 883 (Ky. 1997); *Hellstrom v.*

Commonwealth, 825 S.W.2d 612, 613-14 (Ky. 1992); *Hester v. Commonwealth*, 734 S.W.2d 457 (Ky. 1987); *Lantrip v. Commonwealth*, 713 S.W.2d 816 (Ky. 1986); and *Bussey v. Commonwealth*, 697 S.W.2d 139 (Ky. 1985). *See Bell*, 245 S.W.3d at 745. Therefore, Dr. Perlman's testimony that the child's relaxed behavior was consistent with that of a child who had been sexually abused was inadmissible. Consequently, trial counsel performed deficiently in failing to object to this testimony on this ground.

However, Hurt does not base his present ineffective assistance of trial counsel claim on the ground that counsel failed to object to this testimony from Dr. Perlman because such behavioral testimony concerning sexual abuse is inadmissible. Rather, Hurt bases his ineffective assistance of trial counsel claim on counsel's failure to properly investigate and prepare for the testimony of Dr. Perlman, and on counsel's failure to consult a forensic expert and to challenge the admissibility of Dr. Perlman's opinions on the basis that she was not qualified to testify as an expert on the child's behavior. Therefore, the issue of counsel's failure to object to the behavioral testimony as inadmissible is not before us.

Nevertheless, even if this claim was before us and even if we were to find that counsel performed deficiently (1) in failing to investigate and prepare for Dr. Perlman's testimony, (2) in failing to consult a forensic expert, and (3) in failing to challenge the admissibility of Dr. Perlman's opinions on the basis that she was not qualified to testify as an expert on the child's behavior, Hurt's ineffective assistance of counsel fails because he cannot show that counsel's

deficient performance prejudiced his defense. Specifically, he cannot show that the result of his trial likely would have been different if counsel had not performed deficiently, as discussed in the following paragraphs.

During the evidentiary hearing on his RCr 11.42 motion, Hurt attempted to show prejudice by having a juror from his trial attest that she would have voted "not guilty" if a forensic expert had testified that there was no scientific basis for Dr. Perlman's opinion that the child's relaxed behavior was typical for an abused child. However, RCr 10.04 states: "A juror cannot be examined to establish a ground for a new trial, except to establish that the verdict was made by lot." Thus, this juror testimony should not have been admitted because it is incompetent evidence. *See McQueen v. Commonwealth*, 721 S.W.2d 694, 701 (Ky. 1986). Furthermore, this type of testimony is akin to the juror's "secret thoughts," which the Kentucky Supreme Court has held is a type of testimony that may not be heard. *See Commonwealth v. Wood*, 230 S.W.3d 331, 333 (Ky. App. 2007) (discussing *Bowling v. Commonwealth*, 168 S.W.3d 2, 7 (Ky. 2004)). Therefore, it was inadmissible testimony, and we will not consider it in determining whether Hurt suffered any prejudice.

Finally, given the graphic and detailed testimony of the child regarding the abuse as set forth in *Hurt*, No. 2002-SC-0209-MR, 2003 WL 22417232, at *1 (Ky. Oct. 23, 2003) (unpublished), Hurt cannot show prejudice arising from counsel's allegedly deficient performance. Therefore, even if we were to assume Hurt could show that trial counsel had performed deficiently, he

cannot show that the result of his trial likely would have been different due to the fact that the child testified in detail at trial concerning the abuse. Consequently, he cannot show that he was prejudiced by counsel's allegedly deficient performance.

Accordingly, the order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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