

SUPREME COURT OF LOUISIANA

No. 16-KH-1108

STATE EX REL. RUSSELL GENE WARE, JR.

v.

STATE OF LOUISIANA

**ON SUPERVISORY WRITS TO THE NINTH
JUDICIAL DISTRICT COURT, PARISH OF RAPIDES**

PER CURIAM:

Denied. Relator fails to show he received ineffective assistance of counsel under the standard of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In addition, relator's claims regarding the sufficiency of the evidence, the admission of other crimes evidence, and prosecutorial misconduct are repetitive. La.C.Cr.P. art. 930.4. As to the remaining claims, relator fails to satisfy his post-conviction burden of proof. La.C.Cr.P. art. 930.2. We attach hereto and make a part hereof the district court's written reasons denying relief.

Relator has now fully litigated his application for post-conviction relief in state court. Similar to federal habeas relief, *see* 28 U.S.C. § 2244, Louisiana post-conviction procedure envisions the filing of a second or successive application only under the narrow circumstances provided in La.C.Cr.P. art. 930.4 and within the limitations period as set out in La.C.Cr.P. art. 930.8. Notably, the Legislature in 2013 La. Acts 251 amended that article to make the procedural bars against successive filings mandatory. Relator's claims have now been fully litigated in accord with La.C.Cr.P. art. 930.6, and this denial is final. Hereafter, unless he can show that one of the narrow exceptions authorizing the filing of a successive

application applies, relator has exhausted his right to state collateral review. The district court is ordered to record a minute entry consistent with this per curiam.

CRIMINAL DOCKET NUMBER: 293,902
DIVISION: "D"

STATE OF LOUISIANA

NINTH JUDICIAL DISTRICT

VERSUS

PARISH OF RAPIDES

RUSSELL GENE WARE, JR.

STATE OF LOUISIANA

**WRITTEN REASONS ON APPLICATION
FOR POST-CONVICTION RELIEF**

STATEMENT OF THE CASE

Russell Gene Ware, Jr. ("Mr. Ware") was indicted by the Rapides Parish Grand Jury on September 25, 2008, for the offenses of Aggravated Rape, in violation of La. R.S. 14:42, and Sexual Battery, in violation of La. R.S. 14:43.1. The victim in this case, M.H., was eleven years old at the time. On November 7, 2008, Mr. Ware was arraigned and entered pleas of not guilty to both charges. Attorney Bridget Brown was appointed to represent Mr. Ware on November 7, 2008. On January 22, 2009, a pre-trial conference was held, at which time Mr. Ware chose to proceed to trial, and both matters were set for trial on July 13, 2009. The State filed a Prieur Motion, and the hearing was conducted on May 26, 2009. At the hearing, the trial court granted the State's motion and filed written reasons in support thereof. On July 13, 2009, the trial in these matters was continued by joint motions of the State and Defense to September 14, 2009. The case proceeded to trial before the bench on September 16, 2009. On September 17, 2009, Mr. Ware was found guilty as charged on both counts of the indictment. At his sentencing hearing held on September 25, 2009, Mr. Ware was sentenced to life imprisonment without benefit of probation, parole, or suspension of sentence for the charge of Aggravated Rape, and to twenty-five (25) years at hard labor with the Louisiana Department of Corrections without benefit of probation, parole, or suspension

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of sentence. Mr. Ware's conviction and sentence were affirmed on appeal. He now applies for post-conviction relief.

LAW AND ARGUMENT

The Sixth Amendment to the United States Constitution affords every defendant in a criminal trial the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1987). In order to prove a claim of ineffective assistance of counsel, the defendant must establish: that 1) defense counsel's performance was deficient; and 2) counsel's deficient performance prejudiced the defendant. *Id.* The first prong of the *Strickland* standard requires a showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. *Id.* The defendant must establish that counsel's acts fell beneath an objective standard of reasonable professional assistance. *Gray v. Lynn*, 6 F.3d 265, 268 (5th Cir. 1993). The court gives great deference to counsel's assistance, making a strong presumption that the counsel exercised reasonable professional judgment. *Id.* (quoting *Ricaldy v. Procnier*, 736 F.2d 203, 206 (5th Cir. 1984)). The second prong requires a showing that the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687. The petitioner must demonstrate that there is a reasonable probability that, but for counsel's serious errors, the outcome of the proceedings would have been different. *Id.* Both components of this inquiry are mixed questions of law and fact; accordingly, this Court generally must make an independent determination of whether counsel's representation passed constitutional muster. *Id.* at 268 (quoting *Ricaldy*, 736 F.2d at 206).

ASSIGNMENT OF ERROR ONE

In his first assignment of error, Mr. Ware argues that his defense

counsel rendered ineffective assistance of counsel prior to and during trial. Mr. Ware's claim appears to rest on six separate arguments.

1. Denial of Defense Motion to Continue Trial

Mr. Ware argues that defense counsel was ineffective because his motion to continue the trial was denied by the court, and further, that Mr. Malone was not prepared. The record reflects that Mr. Ware chose to go to trial with new counsel of his own choosing immediately before the trial date. In *State v. Leggett*, 363 So.2d 434, 436 (La. 1978), the Louisiana Supreme Court stated:

Both the federal and state constitutions provide that the accused has the right to counsel of his own choosing to defend him on a criminal charge. However, this right does not permit arbitrary action which obstructs orderly procedures in the courts. *State v. Dickerson*, 353 So.2d 262 (La. 1977); *State v. Mackie*, 352 So.2d 1297 (La. 1977). Rather the right to choose one's attorney is a right to be exercised at a reasonable time, in a reasonable manner, and at an appropriate stage within the procedural framework of the criminal justice system. There is no constitutional right to make a new choice of counsel on the very date the trial is to begin, with the attendant necessity of a continuance and its disrupting implications to the orderly trial of cases. Once the trial day has arrived, the question of withdrawal of counsel rests largely within the discretion of the trial judge. *State v. Cousin*, 307 So.2d 326 (La. 1975); *State v. Amand*, 274 So.2d 179 (La. 1973).

Cited in *State v. Nickles*, 60 So.3d 728, 735 (La. App. 2 Cir. 4/13/11).

In the instant case, counsel Bridgett Brown, was appointed to represent Mr. Ware on November 7, 2008. Ms. Brown filed a number of pre-trial motions filed on Mr. Ware's behalf. The matter was first set for trial on July 13, 2009, and later continued to September 14, 2009. On the date of trial, Ms. Brown was present with Mr. Ware in court, and ready to proceed to trial. Mr. Ware then informed the court that he had hired private counsel, Robert Malone, to represent him. The trial court determined private counsel had been provided with a copy of the file and had also met with Mr. Ware. Thus Mr. Malone was allowed to enroll as counsel. The defense was given a continuance to

September 16, 2009. (*Transcript, Proceeding held September 14, 2009, pp. 45-46*). Once enrolled, Mr. Malone requested a continuance for a later date, which was denied. Prior to enrolling, Mr. Ware and his private counsel had been advised by the court that a continuance of the trial would not be granted. However, Mr. Ware chose to proceed to trial with his private counsel. Furthermore, Mr. Malone was provided with all documents contained within the State's file and indicated he would be ready to try the case by September 16, 2009. (*Transcript, Proceeding held September 14, 2009, pp. 45-46*).

The Third Circuit Court of Appeal also addressed this issue on appeal, and after a review of the record, the court found that Mr. Malone had at least eight days to discuss the case with Mr. Ware and six days to review the documents and prepare for trial. *State v. Ware*, 2011-337, p.14 (La. App. 3 Cir. 11/23//11); 80 So.3d 593, 603. Moreover, the record also reflects that the trial court advised Mr. Ware to discuss going to trial with his private counsel some more after warning that a continuance would not be granted. (*Transcript, Proceeding held September 14, 2009, pp. 47-48*). When Mr. Ware and Mr. Malone returned, Mr. Ware indicated to the court he was comfortable with Mr. Malone trying the case on September 16, 2009. *Id.* Based on this discussion, the Third Circuit held that Mr. Ware

"[cannot] now avail himself of the argument that the trial court erred when it permitted him to go to trial with his newly enrolled counsel, after he war repeatedly warned that he would not get a continuance and yet insisted on gong to trial."
Ware, 80 So.3d at 604.

Therefore, Mr. War's argument is without merit.

2. *Defense counsel failed to perform proper pre-trial discovery, failed to investigate, and failed to interview and call witnesses.*

The Third Circuit also addressed this issue in connection with Mr.

Ware's current first argument in assignment of error one. Once the appellate court reviewed the record, determined that Mr. Malone had received all documents in Mr. Ware's file and that Mr. Malone had sufficient time to prepare for trial, the court concluded that Mr. Ware could not now argue that the trial court erred in denying counsel's motion for continuance. Thus, the court held that Mr. Ware "cannot argue his counsel was ineffective when he cannot show defective performance as a result of the trial court's denial of counsel's motion to continue the trial." *Id.* The Third Circuit also held that Mr. Malone's decision to not cross-examine one witness when another witness's testimony was sufficient to establish proper foundations could have been trial strategy. *Id.* at 603. As such, trial strategy cannot form the basis for a claim of ineffective assistance of counsel. *Id.*

Therefore, this argument is without merit.

3. Other Crimes Evidence

Mr. Ware contends his counsel was ineffective in failing to keep out other crimes evidence during the proceedings.

Louisiana Code of Evidence, Art. 404 (B)(1) provides:

B. Other crimes, wrongs, or bad acts.

- (1) Except as provided in Article 412, evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, provided that upon request by the accused, the prosecution in the criminal case shall provide reasonable notice in advance of trial for such purposes, or when it relates to conduct that constitutes an integral part of the act or transaction that is the subject of the present proceeding.

The "other crime" allowed in to evidence was also an Aggravated Rape reduced to an Indecent Behavior with a Juvenile. In the Prieur hearing, L.L.

testified that between July 11, 1992 and September 28, 1993, she lived with her mother, brother, and Mr. Ware. She further testified when her mother was gone from the residence Mr. Ware would "mess with [her]" and that "he would put it in [her] vagina." (*See Transcript, Prieur Proceeding held May 26, 2009, p.5*) L.L. testified that Mr. Ware put his penis in her vagina, and this occurred when they were in his bedroom. (*See Transcript, Prieur Proceeding, p. 6*) L.L. also testified relative to her ethnic bi-racial background. (*See Transcript, Prieur Proceeding, p. 10*) She also testified she was between the ages of three and five at the time of the incidents. (*See Transcript, Prieur Proceeding, p. 9*)

The trial court, after taking this testimony, was provided with the statement that M.H. made to the Rapides Children's Advocacy Center on May 30, 2008. As the State argued during the Prieur hearing, this information taken together showed that both victims were multi-cultural or bi-racial, both lived with Mr. Ware, who had supervision over them while their mothers were absent from the home, Mr. Ware had knowledge that the mothers would be absent from the home, and he utilized his bedroom in both instances. These factors demonstrated motive, opportunity, intent, knowledge, preparation and planning on his part. Moreover, herein, the crimes are much the same. The other crimes evidence was substantially relevant to the instant case. It also tended to prove a material fact and the method of the commission of both crimes was distinctly similar. Furthermore, the other crimes' probative value outweighed any prejudicial effect. Thus the factors in *State v. Prieur*, 277 So.2d 126 (La. 1973), were proven. In the instant case, the prior rape was relevant to show Mr. Ware's propensity to sexually assaulting minor girls who are the children of women he cohabitates with while the adult women are absent from the home. See *State v. Olivieri*, 03-563, 860 So.2d 207 (La. App. 5

Cir. 10/28/03); *State v. Mayeux*, 2006-944 (La. App. 3 Cir. 1/10/07); 949 So.2d 520.

Most importantly, the ruling of the trial court in regard to this issue was upheld on appeal. When the Third Circuit reviewed this matter on appeal, the court held that there was no error in the trial court's ruling that the testimony of the previous victim (L.L.) was relevant, its probative value substantially outweighed any prejudice or confusion, and therefore was admissible to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake under La. Code of Evid. art. 404(B) and art. 412.2. *Ware*, 80 So.3d at 598-99.

Therefore, the other crimes evidence claim has no merit.

4. *Mr. Ware claims defense counsel was ineffective for his failure to prepare and present a defense.*

This assignment of error was largely addressed in both claim one and two under Assignment of Error One. As the Third Circuit ruled when it also addressed this issue, Mr. Malone, private counsel hired by Mr. Ware, had sufficient time after enrolling as counsel and receiving the files to prepare for trial. Further, Mr. Ware and Mr. Malone were notified by the trial court that no continuance would be granted beyond the two days allowed from the trial date of September 14 to September 16, 2009. The appellate court held that Mr. Ware could not argue that his counsel was ineffective "when he cannot show defective performance as a result of the trial court's denial of counsel's motion to continue the trial." *Ware*, 80 So.3d at 604. In addition, the record reflects that Mr. Malone stated to the court that he would be ready to go to trial by September 16, 2009.

Therefore, this claim has been resolved and has no merit.

5. *Mr. Ware claims that defense counsel was ineffective for his failure to secure an expert to assist in preparing and presenting the defense.*

This issue involves trial strategy, to which the court generally gives great deference to defense counsel, with a strong presumption that counsel provided reasonable professional assistance. *Strickland*, 466 U.S. 668. The decision of Mr. Ware's retained counsel not to hire an expert would be considered trial strategy. As such, the matter of trial strategy cannot form the basis of an ineffective assistance of counsel claim.

Therefore, this claim is without merit.

6. *Mr. Ware claims that defense counsel was ineffective for denying confrontation and cross-examination of witnesses.*

The Third Circuit partially addressed this issue on appeal in its discussion of the claims of ineffective assistance of counsel and denial of the motion to continue. This issue is also discussed above in claim two of Assignment of Error One, with regard to whether counsel provided ineffective assistance by failing to interview or call witnesses. On appeal, the Third Circuit held that Mr. Malone's decision to not cross-examine one witness when another witness's testimony was sufficient to establish proper foundations could have been trial strategy. *Ware*, 80 So.3d at 603. In reviewing the victim's statement and the testimony of the witnesses at trial, the appellate court stated, "[t]here was nothing to impeach these two witnesses on and nothing which would have aided Defendant's defense." *Id.* Finally, Mr. Ware had already pled guilty to a sexual offense against another witness. As such, the court held that the trial strategy employed by Mr. Malone could not form the basis for a claim of ineffective assistance of counsel. *Id.*

Therefore, this claim is also without merit.

ASSIGNMENT OF ERROR TWO

In his second assignment of error, Mr. Ware argues that defense counsel refused to let him testify.

The record does not reflect a clear discussion between defense counsel and Mr. Ware or between the trial judge and Mr. Ware on this matter. Therefore, the Court will hold a hearing on this issue.

ASSIGNMENT OF ERROR THREE

In his third assignment of error, Mr. Ware argues that La. Code of Evidence art. 412.2 is unconstitutional as applied. Mr. Ware has not properly raised this argument. Therefore, the Court will not consider this assignment of error.

ASSIGNMENT OF ERROR FOUR

In his fourth assignment of error, Mr. Ware argues that victim testimony alone without corroborating evidence is unconstitutional as applied. Mr. Ware has not properly raised this argument.

Louisiana jurisprudence has consistently held that victim testimony alone can be sufficient to establish elements of a sexual offense, even without physical evidence. *State v. Schexnaider*, 03-144 (La. App. 3 Cir. 6/4/03), 852 So.2d 450; *State v. Mayeux*, 2006-944 (La. App. 3 Cir. 1/10/07), 949 So.2d 520.

Therefore, Error Four has no merit.

ASSIGNMENT OF ERROR FIVE

In his fifth assignment of error, Mr. Ware argues that his criminal proceedings were adjudicated by a biased judge, which is structural error not subject to jurisdictional or procedural bar and mandates automatic reversal.

Mr. Ware's argument is not supported by appropriate factual or legal basis. Further, Mr. Ware raised this argument on appeal, and the Third Circuit

ruled that although one of the judge's comment could be construed as an opinion or a comment on the evidence, the rule that a judge may not comment on evidence is inapplicable in a bench trial. *Id.* at 604. Therefore, Error Five is also without merit.

ASSIGNMENT OF ERROR SIX

In his sixth and final assignment of error, Mr. Ware alleges prosecutorial misconduct on the part of the State.

There is no evidence to support a finding of any hint of prosecutorial misconduct. Moreover, the Third Circuit partially addressed this issue on appeal and did not conclude, as Mr. Ware alleged, that the State misrepresented any facts in order to admit evidence. *Id.* at 599. Therefore, Error Six is without merit.


CONCLUSION

This Court will hold an evidentiary hearing in this matter to address the following claim:

1. Did defense counsel refuse to let Mr. Ware testify?

All other claims are denied.

Written Reasons issued this 2 day of April, 2015, in
Alexandria, Louisiana.



JUDGE JOHN C. DAVIDSON
Ninth Judicial District Court
Division "D"

CLERK: PLEASE SERVE:

State of Louisiana

Through its Attorney-of-Record:
J. Phillip Terrell, Jr.

Counsel for Defendant

Robert Malone

Russell Gene Ware, Jr.

DOC #118323

Louisiana State Penitentiary

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STATE OF LOUISIANA
COURT OF APPEAL, THIRD CIRCUIT

NO: KH 15-01149

Judgment rendered and mailed to all
parties or counsel of record on May 4,
2016.

STATE OF LOUISIANA
VERSUS
RUSSELL GENE WARE, JR.

FILED: 12/09/15

On application of Russell Gene Ware, Jr. for Writ of Review in No. 293-902 on the
docket of the Ninth Judicial District Court, Parish of Rapides, Hon. John C.
Davidson.

Pro se

Counsel for:
Russell Gene Ware, Jr.

Hon. Phillip Terrell, Jr.

Counsel for:
State of Louisiana

Lake Charles, Louisiana, on May 4, 2016.

WRIT DENIED: We find no error in the trial court's ruling of April 2, 2015.
Accordingly, Relator's writ application is denied as to the issues addressed in that
ruling. Regarding the trial court's ruling of November 9, 2015, the writ application is
deficient in that it fails to contain the transcript of the evidentiary hearing, which is
essential to review the issue of whether Relator was denied his right to testify at trial.
City of Baton Rouge v. Plain, 433 So.2d 710 (La.), *cert. denied*, 464 U.S. 896, 104
S.Ct. 246 (1983). Thus, we deny Relator's writ application on that issue on the
showing made.

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Ezell, J., dissents in part and would grant the writ and remand assignment of error
number four to the trial court for consideration and ruling.

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