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IN THE
COURT OF APPEALS OF INDIANA

JORDAN M. WOODWARD,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 08A02-0812-CR-1091
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE CARROLL CIRCUIT COURT
The Honorable Donald E. Currie, Judge
Cause No. 08C01-0508-FA-10

July 16, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Jordan M. Woodward appeals the trial court's order denying his petition for post-conviction relief.

We affirm in part and remand in part.

ISSUES

1. Whether the post-conviction court erred when it found that Woodward failed to establish juror misconduct that warranted a new trial.

2. Whether the post-conviction court erred when it found without merit Woodward's post-conviction claim that he had been erroneously determined to be a Sexually Violent Predator ("SVP").

FACTS

On August 17, 2005, the State charged Woodward (age twenty-three) with Counts I and II, both child molestation as class A felony offenses, alleging sexual intercourse and deviate sexual conduct with thirteen-year old K.H. On October 17, 2005, the State filed Counts III and IV, also child molestation as class A felony offenses, alleging additional acts of deviate sexual conduct with K.H.

On September 18, 2006, *voir dire* of the prospective jurors was conducted. The trial court asked if any juror knew Karen H.[1] ("Mother"), and James Wanagitis volunteered that she was "a friend." (Ex. A at 16). When asked if any knew K.H., Wanagatis volunteered that she "ha[d] grown up with [his] daughter." (*Id.* at 17). Later, defense counsel inquired further, asking whether K.H. "was a very close friend" of his daughter, and Wanagatis answered that "they go to school together," but that he "ha[d]n't

[1] She is K.H.'s mother.

seen [K.H.] or [Mother] since [his family] moved to Flora" from Burlington approximately three years earlier. *Id.* at 100. Wanagitis explained that when his family lived in Burlington, his wife worked in a bar there – which is where he would see Mother. When asked whether he and Mother had "an acquaintance relationship [or] a friendship relationship," he answered, "acquaintanceship," and stated that he had not "talked to her in three or four years." *Id.* at 101. When asked whether his "knowledge or acquaintanceship with either [K.H.] or [Mother] would cause Mr. Woodward concern about [his] being able to sit and serve fairly and impartially," Wanagitis answered,

> Not at all. I haven't even heard anything about this. I don't think my daughter hangs around with her anymore because I haven't even heard her name brought up in our house for three years probably. Not at all.

Id. at 101-02. In response to questions from defense counsel, Wanagitis indicated that his only child was a fourteen-year old daughter. Defense counsel then asked whether his "child's age and the nature of these charges . . . should create concern for [Woodward]" regarding Wanagitis as a juror. *Id.* at 106. Wanagatis answered, "No, none at all." *Id.* Wanagitis was seated as a juror, without being challenged for cause or use of peremptory challenge by Woodward.

Woodward's jury trial was held on September 18-20, 2006. The following evidence was presented, as summarized by another panel of this court on his first appeal.

> In April 2004, [Mother] was involved in a car accident and broke her back. [Mother]'s daughter, K.H., was twelve years old at the time. Woodward, who had known [Mother] and K.H. for eight years, began visiting [Mother]'s home "almost every night . . . or several nights a week at least" to help her with errands. [Mother] began to notice that K.H. had a "crush" on Woodward and knew that K.H. had "liked him even from the time she was little."

> In January 2005, K.H.'s feelings toward Woodward intensified and she began "liking him more." [Mother] noticed that her daughter was spending a lot of time with Woodward and she became suspicious of their relationship. In May 2005, [Mother] searched K.H.'s purse and found a letter from Woodward expressing his feelings for K.H. Woodward wrote that he was "really glad that [he and K.H. were] officially back together" and that he was "still very confused as to how [he] fell in love with [K.H.]." Infuriated, [Mother] confronted Woodward about the letter and asked him if he was having sex with her daughter. Woodward admitted that he wrote the letter but denied having sex with K.H.
>
> [Mother] confronted her daughter and instructed her to stay away from Woodward. Nevertheless, K.H. continued to call Woodward at work every day. K.H. and Woodward met in person on June 26, 2005, and were intimate.
>
> In August, K.H. went to Florida to visit her father. During that trip, K.H. told her father's girlfriend, Kathleen Johnson, about her relationship with Woodward. K.H. told Johnson that she and Woodward had had sex on June 26, 2005.
>
> * * *
>
> At trial, K.H. testified that she and Woodward had sex on June 26, 2005. K.H. also testified that Woodward performed oral sex on her at various times during their relationship. She testified that Woodward first performed oral sex on her at his house after she finished swim practice sometime before February 2005. K.H. did not remember the exact date of the incident. K.H. testified that she didn't know when the second incident of oral sex was but that it happened at Woodward's house after she was diagnosed with mononucleosis in February 2005. K.H. ultimately testified that Woodward performed oral sex on her four times, "twice at [Mother's] house and twice at Woodward's house" and that the "third time was at [her] house." . . . .

Woodward v. State, No. 08A05-0612-CF-702, slip op. at *2-3, *6 (October 16, 2007) (internal transcript citations omitted), *trans. denied*. The jury acquitted Woodward of the first three counts but found him guilty of Count IV, class A felony child molesting for an act of deviate sexual conduct committed between April 1, 2005 and June 26, 2005.

On November 8, 2006, the trial court sentenced Woodward. It ordered him to serve twenty-three years, with three years suspended to probation. We affirmed his conviction on direct appeal. *Id.* at *7.

On August 22, 2008, Woodward filed his petition for post-conviction relief, raising two claims: (1) that Wanagitis lied and made false statements in *voir dire* so as to misrepresent his relationship with K.H. and her family, which amounted to misconduct that entitled Woodward to a new trial; and (2) that he had "been erroneously determined to be a Sexually Violent Predator." (App. 32). In support of his first claim, Woodward submitted affidavits from Joanna McKenzie and Anita Schaeffer.

The post-conviction hearing was held on October 17, 2008. The transcript reflecting the above statements of Wanagitis during *voir dire* was admitted into evidence.

Wanagitis testified at the hearing that he had known K.H.'s grandmother, Lorraine, for twenty years and socialized in a group that included Lorraine for ten to fifteen years. He further testified that he saw Mother between the years of 1989 and 2004 at the Burlington bar/restaurant where his wife worked. He testified that his statement made at the original trial -- that he had not talked to Mother recently -- was "true," because at that time, he "hadn't talked to her in three" or four years. (Tr. 18).

With respect to his daughter K.W., Wanagitis testified she was in the same grade and attended the same school as K.H., and that at age nine or ten -- when his family lived in Burlington, his daughter was a close friend of K.H., who had visited his home several times and had spent the night there on occasion. He testified that since his family moved to Flora, K.H. and his daughter were no longer "hanging out," and that K.H. had told him

nothing about the allegations that were the subject of the trial. (Tr. 28). Wanagitis testified that he recently learned that K.H. had visited his daughter one time at his Flora home; however, he was not home on that occasion and had no knowledge of her visit at the time of the trial.

Joanna McKenzie testified that she had known Wanagitis since 2001 or 2002, and they were good friends. She testified that on two occasions in the "early '90's," she had seen Wanagitis and Mother in a Burlington bar. (Tr. 49). She also testified that "in the early 2000's," she had seen Wanagitis in a group of people that included Lorraine. (Tr. 63). McKenzie further testified that in the spring of 2006 and again in late August of 2006, she had driven Wanagitis to pick up his daughter and K.H. at the high school, and had driven all three to Wanagitis' Flora home. She also testified that on two occasions in the summer of 2006, Wanagitis was among a group of people "discussing in general how many sexual cases were" pending in the county. (Tr. 45). McKenzie, however, could not remember any specific participation of Wanagitis in the discussions.[2]

In his testimony, Wanagitis denied ever being in a vehicle with McKenzie along with his daughter, and K.H.; and further denied that K.H. had ever been to his home in Flora for a pajama party. His daughter K.W. also testified that McKenzie did not give her, K.H. and her father a ride to her Flora home; and denied that K.H. had ever come to her home in Flora for a pajama party. Moreover, Wanagitis denied knowing about or discussing with McKenzie the allegations of Woodward's criminal acts.

[2] She acknowledged that on one occasion, she had been "really drunk and really didn't remember very much of it." (Tr. 55).

In addition, McKenzie testified that the "night after they convicted [Woodward]," she heard Wanagitis "saying that . . . he had took care [sic] of [Woodward]," and then saw him "s[i]t down with [Mother]." (Tr. 42). Wanagitis denied that he saw Mother or talked to her at the conclusion of the September trial, but testified that he did speak to her subsequent to the November sentencing.

Anita Schaeffer testified that she had known Wanagitis, Mother, and Lorraine for many years, and that she had seen them among the people at various places, including a bar. She testified that she had seen K.H. and K.W. walking together in 2004 or 2005. She also testified that in the summer of 2007, she told Wanagitis that she "felt like . . . he was a juror on a trial that he had no business being on" because he knew the family, and Wanagitis "said it was okay for – he felt like it was okay because he ha[d] a daughter and any person with daughters would want that." (Tr. 59, 60).

Wanagitis testified that Schaeffer had "yelled at [him]" after the trial about his serving on the jury. He testified that he "never" told her that "it was okay for [him] to serve on the jury because [he] ha[d] a daughter that age." (Tr. 16).

Wanagitis' daughter testified that since their friendship at age nine or ten, and subsequent to her family's move to Flora, she and K.H. were "not close friends, just acquaintances." (Tr. 70). She further testified that K.H. had only been to her Flora home once, when Wanagitis was not home. She also testified that K.H. did not talk to her about the allegations against Woodward.

As to Woodward's post-conviction claim that his SVP determination was erroneous, no evidence was presented. His counsel argued that the statute at the time of

the offense required "the procedure of appointing two experts to determine" whether he was an SVP. (Tr. 76, 82).

On October 20, 2008, the post-conviction court entered its order denying Woodward's petition.

DECISION

In a post-conviction relief proceeding, the petitioner bears the burden of establishing the grounds for relief by a preponderance of the evidence. *Henley v. State*, 881 N.E.2d 639, 643 (Ind. 2008). When appealing the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. *Id.* Therefore, in order to prevail on his appeal from the denial of post-conviction relief, the petitioner must show that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. *Id.* at 643-44. The post-conviction court "is the sole judge of the weight of the evidence and credibility of witnesses." *Fisher v. State*, 810 N.E.2d 674, 679 (Ind. 2004). Further, we consider "only the probative evidence and reasonable inferences that support the decision of the post-conviction court." *Stephenson v. State*, 864 N.E.2d 1022, 1028 (Ind. 2007), *cert. denied*.

1. Juror Misconduct

We have held that it "is misconduct for a juror to make false statements in response to questions on *voir dire* examination." *Dickenson v. State*, 732 N.E.2d 238, 241 (Ind. Ct. App. 2000), *trans. denied*. Generally, proof that a juror was biased or "lied on *voir dire* entitles the defendant to a new trial." *Id.* (citing *Lopez v. State*, 527 N.E.2d 1119, 1130 (Ind. 1988)). However, "there must be a showing that the misconduct was

gross, and that it probably harmed the defendant." *Id.* Further, the "issue of juror misconduct is a matter within the trial court's discretion." *Id.*

Woodward argues that he "was denied an impartial jury because Mr. Wanagitis materially concealed information about his close personal relationship with K.H. and her family." Woodward's Br. at 13. We cannot agree. The post-conviction court heard evidence that for several years before trial, Wanagitis had had no contact with Mother or Lorraine, and his daughter had had no close friendship with K.H; as well as evidence that his relationship with neither Mother nor Lorraine was ever more than a casual social relationship. Without reweighing the evidence or witness credibility, this evidence supports the reasonable inference that in responding to *voir dire* questions, Wanagitis did not misrepresent his relationship with Mother and K.H.

Woodward further argues that the post-conviction court erroneously "made a distinction between juror Wanagitis making directly false statements and failing 'to volunteer additional details about his relationship with the victim's family.'" Woodward's Brief at 21 (citing order's finding that unlike in *Dickenson*, "the juror in this case did not make false statements about his relationship but only failed to volunteer additional details about his relationship with the victim's family." (App. 281)). Woodward cites to the statement in *Pearcy v. The Michigan Mutual Life Insurance Co.*, 111 Ind. 59, 63 (1886), that a "general question on *voir dire* that 'fairly arouses the juror's attention and directs it to the information desired, . . . is enough without specific questions covering minute phases of the subject.'" Woodward's Br. at 21. Woodward then argues that when Wanagitis was queried about his knowledge of Mother and K.H.,

he was required to come forth with the details of his previous social contacts and his daughter's former close friendship with K.H.

In *Pearcy*, the jurors were asked in *voir dire* "whether any of you hold a policy of life insurance policy issued by the defendant." 111 Ind. at 60. Bowman answered "no" and proceeded to serve as a juror. However, Bowman "had taken out a policy on his life for the benefit of his wife" with the defendant company. *Id.* Our Supreme Court observed that although "in exact technical strictness [an insurance] policy belongs to the beneficiary," it was "common for one who has his life insured for the benefit of his wife . . . to regard himself as holding the policy." *Id.* at 63. Accordingly, it held "that the question asked Bowman required him to answer as to a policy taken out on his own life, although the policy was for the benefit of his wife." *Id.* at 63-64.[3] We cannot agree with the premise underlying Woodward's argument: that pursuant to *Pearcy*, Wanagatis should have volunteered specific details of when and how he had met K.H. and her family and the frequency of their contact. Moreover, the evidence presented to the post-conviction court supports the reasonable inference that Wanagitis had no close relationship with them.

Finally, Woodward directs our attention to "numerous and material inconsistencies" in the *voir dire* statements and testimony at the post-conviction relief hearing. Woodward's Br. at 1. We do not find the argument in this regard developed.

[3] Woodward also asserts that pursuant to *Pearcy*, Wanagitis "had a duty to disclose the nature and extent of" his relationship with K.H. and her family. Woodward's Br. At 22. We do not find *Pearcy* to hold that such extensive disclosure is warranted in response to a general question.

Moreover, it appears to implicitly ask that we reweigh the evidence and witness credibility, which we do not do.[4] *See Fisher*, 810 N.E.2d at 679.

The evidence presented does not lead unerringly to the conclusion opposite to the post-conviction court's conclusion that Wanagitis "did not make false statements about his relationship" with the family of K.H. (App. 281). Therefore, the post-conviction court did not err when it concluded that Woodward had failed to meet his burden on his claim of juror misconduct.

2. Sexually Violent Predator

Woodward also argues that he was erroneously determined to be an SVP. He notes that there was no mention in the sentencing order of his being an SVP, and he asserts that he "learned for the first time that he had been determined to be a[n] SVP at the Department of Correction[]."[5] Woodward's Br. at 26. Woodward's record does not include the transcript of the sentencing hearing, and the sentencing order does not indicate an SVP determination. Woodward argues that the trial court failed to follow the statutory procedure for making an SVP determination.

The post-conviction court's order held that "the jury's verdict resulted in a[n] SVP determination by operation of law," (App. 282), citing Indiana Code section 35-38-1-7.5.

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[4] As the State notes, testimony at the post-conviction court revealed that Woodward was a good friend of McKenzie's son, and that she herself had been a friend of Woodward's family for years; that her son had attended Woodward's trial; that at the end of his trial, both McKenzie and her son were crying; and that her post-conviction hearing testimony controverted some of the statements contained in her affidavit. As to Schaeffer, she admitted at the post-conviction hearing that Woodward's mother was her supervisor, and that her knowledge "was based on what the Defendant's mother ha[d] told [her], (Tr. 61); and that her own son was a friend of Woodward.

[5] The assertion does not specify when he learned this.

The current version of the statute provides that a person over the age of eighteen who commits one of certain enumerated offenses, including child molesting as a class A felony, "is a sexually violent predator . . . by operation of law." I.C. § 35-38-1-7.5(b). However, this version of the statute was not in effect when Woodward committed the offense in 2005. Rather, as Woodward correctly asserts, the version of the statute in effect in 2005 provided that for a defendant convicted of certain offenses (including child molesting as a class A felony),

> [a]t the sentencing hearing, the court shall determine whether the person is a sexually violent predator. Before making a determination under this section, the court shall consult with a board of experts consisting of two (2) board certified psychologists or psychiatrists who have expertise in criminal behavioral disorders.

Ind. Code § 35-38-1-7.5(c) (repealed 2006, *see* P.L. 6-2006 Sec. 5). Subsequent to the date that Woodward committed the offense but before his trial and sentencing, this statute was amended (effective July 1, 2006), such that the SVP determination was made as a matter of law upon conviction of certain offenses. *See* P.L. 6-2006, Sec. 5.

In *Gutermuth v. State*, 868 N.E.2d 427 (Ind. 2007), our Supreme Court reiterated "the long-standing rule that the sentencing statute in effect at the time a crime is committed governs the sentence for that crime." *Id.* at 431 n.4 (citing *Smith v. State*, 675 N.E.2d 693, 695 (Ind. 1996)). Indiana Code section 35-38-1-7.5 clearly states that the SVP determination is a sentencing matter. Hence, pursuant to *Gutermuth*, consistent with the statute in effect at the time of his 2005 offense, the determination that Woodward was an SVP was to be made by the trial court at sentencing after having consulted two experts in criminal behavioral disorders. *See also Jones v. State*, 885 N.E.2d 1286, 1289 (Ind.

2008) (former statute required SVP determination after consultation with two experts at "initial sentencing proceedings").

In appealing the denial of his petition for post-conviction relief in this regard, Woodward bore the burden of showing that the evidence as a whole led unerringly and unmistakably to a conclusion that he was erroneously determined an SVP. *See Henley*, 881 N.E.2d at 643-44. By failing to provide the transcript of his sentencing hearing or any evidence that he had been determined an SVP, Woodward did not bear his burden. Nevertheless, having reviewed the substance of his argument and the applicable statutory framework for the SVP sentencing determination, conscious of the need for the economical use of judicial resources, and acknowledging that the evidence, if any, supporting an SVP determination exists in the now-closed record of the original sentencing hearing, we remand to the post-conviction court to review that evidence and determine whether sufficient evidence was presented at that time to declare Woodward an SVP pursuant to the version of Indiana Code section 35-38-1-7.5 in effect at the time of this offense. If the post-conviction court concludes there was not sufficient evidence presented at the original sentencing hearing to support an SVP determination, the post-conviction court should issue an order granting Woodward's petition for post-conviction relief as to this issue, amend the sentencing order to specifically state that Woodward is not an SVP, and forward the order to the Department of Correction, as the Department of Correction apparently believes that Woodward is already classified an SVP.

Affirmed in part and remanded in part.

BAILEY, J., and ROBB, J., concur.