

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-002138-MR

ESAU M. MILLINER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN K. MERSHON, JUDGE
ACTION NO. 06-CR-000367

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: VANMETER, ACTING CHIEF JUDGE; COMBS AND KELLER,
JUDGES.

KELLER, JUDGE: Esau M. Milliner (Milliner) appeals from the circuit court's
order denying his motion for relief under Kentucky Rule of Criminal Procedure
(RCr) 11.42 and Kentucky Rule of Civil Procedure (CR) 60.02.¹ On appeal,

¹ We note that Milliner states in his brief that he is appealing the circuit court's order denying his RCr 11.42/CR 60.02 motion. However, he does not specifically address the court's findings regarding the CR 60.02 portion of his motion. Therefore, we will treat this as an appeal only from the court's denial of Milliner's RCr 11.42 motion.

Milliner argues that the circuit court should have held an evidentiary hearing on his motion because the issues he raised could not be resolved by reviewing the record. Milliner also argues that the circuit court erred by not finding that his trial counsel was ineffective: (1) for failing to present evidence in support of his defense of self-protection; (2) for failing to seek a jury instruction on extreme emotional distress; (3) for failing to object to comments made by the Commonwealth's attorney during closing argument; (4) for failing to object when the Commonwealth played a "911 tape;" and (5) for erroneously advising him that he waived his right to appeal the jury verdict by accepting the Commonwealth's sentencing offer. Having reviewed the record and the arguments of counsel, we affirm.

FACTS

Demetria Brock (Brock) had a sporadic relationship with Kendrick Coleman (Coleman) dating back to their days in high school. As a result of that relationship, the couple had three children together. In late 2003, Brock began dating Milliner and continued to date him for approximately one and a half years. During that time period, Brock also dated Coleman. Brock got pregnant and gave birth to her fourth child, a son, in late 2005. There was some dispute about whether Milliner or Coleman was the father of the child. According to Brock, Milliner was certain the child was his, but Coleman was not.² At the time of her son's birth, Brock and the other three children were living with Coleman; however,

² Brock has never definitively determined who is the father of her son.

she took her son to visit Milliner and his family and Milliner bought the child some clothing.

On January 25, 2006, Milliner made several telephone calls to Brock, apparently trying to arrange a visit with “his son.” Brock did not answer Milliner’s calls or respond until she answered his 8:30 p.m. call. During that call, Milliner told Brock not to hang up on him and threatened to kill her. At approximately 11:00 p.m., Milliner went to the Brock/Coleman residence, began knocking on the door, and ringing the doorbell. Coleman went to the door and, as he was unlocking the door, Milliner pushed his way into the house. Milliner asked, “Where’s my baby?” and then Milliner and Coleman began fighting in the hallway and living room of the house. At some point during the fight, Coleman broke away from Milliner, went into the kitchen, and grabbed at least two knives and a “meat fork.” When Coleman returned to the living room, Milliner threw a speaker at him and charged him. The two again began fighting and, according to Brock, Coleman swung a knife or knives at Milliner. However, Brock was not certain if Coleman struck Milliner. Milliner grabbed Coleman, and Coleman began laughing at him. According to Brock, Milliner then said, “Don’t laugh at me” and stabbed Coleman in the neck, which resulted in Coleman’s death. Milliner then said something to Brock and left the house. The next day, Milliner turned himself in to the police and received treatment for wounds to the back of his head, back, left hand, and side.

On February 2, 2002, a grand jury indicted Milliner for murder and burglary in the first degree. On May 1, 2006, the Commonwealth filed notice that it would be seeking the death penalty.

Following the guilt phase of the January 2007 trial, the jury convicted Milliner of all charges. Before the jury was called to hear testimony in the penalty phase of the trial, Milliner and the Commonwealth reached an agreement regarding sentencing. The Commonwealth agreed to recommend a sentence of twenty-five years' imprisonment without the possibility of parole for the murder conviction and twenty years for the burglary conviction, with the sentences to run concurrently. The court then dismissed the jury and sentenced Milliner consistent with the sentencing agreement reached by the parties.

In October 2007, Milliner filed a *pro se* motion to vacate his sentence under RCr 11.42 and CR 60.02. In that motion, Milliner argued that his trial counsel were ineffective because they: failed to adequately investigate; failed to move for a competency hearing; "failed to properly and adequately advise [him] with respect to the rights he would be waiving by accepting the Commonwealth's offer and by entering a plea of guilty during the sentencing phase;" and coerced him into entering into the sentencing agreement. Milliner also argued that his plea was the product of "proffered false testimony." Approximately six months later, court-appointed counsel amended Milliner's motion, arguing that trial counsel was deficient for: (1) failing to put forth evidence sufficient to support Milliner's defense of self protection; (2) failing to correct a jury instruction regarding the

“initial aggressor;” (3) failing to seek a jury instruction on extreme emotional distress; (4) failing to object to “improper” statements made by the Commonwealth during closing argument; (5) failing to object to the Commonwealth’s playing of recordings of several 911 calls; and (6) failing to adequately advise Milliner of the consequences of accepting the sentencing agreement. The trial court denied Milliner’s motion without holding a hearing. We set forth additional facts as necessary below.

STANDARD OF REVIEW

In order to be ineffective, performance of counsel must be below the objective standard of reasonableness and so prejudicial as to deprive a defendant of a fair trial and a reasonable result. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In considering ineffective assistance, the reviewing court must focus on the totality of evidence before the judge or jury and assess the overall performance of counsel throughout the case in order to determine whether the identified acts or omissions overcome the presumption that counsel rendered reasonable professional assistance. *See United States v. Morrow*, 977 F.2d 222, 230 (6th Cir. 1992); *Kimmelman v. Morrison*, 477 U.S. 365, 381, 106 S. Ct. 2574, 2586, 91 L. Ed. 2d 305 (1986).

In evaluating counsel’s failure to raise a defense, the court must determine if the failure was a tactical choice by counsel and, if not a tactical choice, whether there was a reasonable probability that the result would have been different. *Hodge v. Commonwealth*, 68 S.W.3d 338, 344 (Ky. 2001); *see also*

Wiggins v. Smith, 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003). In evaluating counsel's failure to object, the court must be mindful that counsel is not required to make useless objections and failure to do so is not ineffective assistance of counsel. *See Commonwealth v. Davis*, 14 S.W.3d 9, 11 (Ky. 1999). With these standards in mind, we address the issues raised by Milliner on appeal.

1. Failure to Introduce Evidence in Support of Self-Protection Defense

Documents in the record indicate that Milliner and Coleman had a previous physical confrontation in February 2005. During that confrontation, Coleman allegedly attacked Milliner with a knife. Milliner took the knife away from Coleman and neither man suffered any significant injuries. Other documents indicate that Coleman had, in the past, physically abused Brock.

Prior to trial, the Commonwealth made an oral motion *in limine*, seeking to keep Milliner from introducing any evidence of prior specific acts of violence committed by Coleman. In support of its motion, the Commonwealth stated that it believed that Milliner was not going to testify; therefore, only evidence regarding Coleman's propensity for violence would be admissible. Milliner's counsel stated that they did not intend to introduce any evidence of specific acts of violence by Coleman unless the Commonwealth opened the door by introducing evidence that Coleman was not a violent person. We note that, at that time, the only specific acts of violence Milliner's counsel discussed involved allegations that Coleman had physically abused Brock. We also note that, based

on the assertions by Milliner's counsel, the court did not specifically rule on the Commonwealth's motion.

While cross-examining Brock, Milliner's counsel asked why she and Coleman had dated "off and on." The Commonwealth's attorneys asked to approach the bench and stated they feared Milliner was going to get into specific acts of violence between Coleman and Brock. The trial judge stated that he thought the Commonwealth's motion *in limine* was related to testimony regarding specific acts of violence between Coleman and Milliner. Milliner's counsel stated that there had been at least one act of violence between Coleman and Milliner and that Brock had witnessed that act of violence. Milliner's counsel also noted that Coleman had beaten Brock in the past, broken into her house, and kidnapped her children. After this discussion, the court stated that Milliner could ask Brock why her relationship with Coleman had been sporadic and they would see what her response was. In response to the question, Brock stated that she and Coleman did not always get along. Milliner did not question Brock further.

Milliner argues on appeal, as he did before the trial court, that his counsel did not develop evidence to support his self-protection defense. In particular, Milliner notes the previous attack by Coleman. According to Milliner, this evidence was relevant to establish that he reasonably believed it was necessary to use deadly force to defend himself from Coleman. The Commonwealth argues here, as it did before the circuit court, that Milliner's counsel sufficiently emphasized Milliner's self-protection defense.

The circuit court found that counsel made “repeated efforts and substantial argument that the evidence established a self-protection defense.” Furthermore, the court found that Milliner’s counsel made a strategic decision not to introduce evidence of the prior confrontation so as not to give the jury “the impression that [Milliner] deliberately went to Brock and Coleman’s home to kill Coleman out of revenge.” The court also found that counsel “would not have wanted the Jury to make presumptions about [Milliner’s] own character, based upon his prior history.”

At the outset, we note that we agree with Milliner that the trial court’s findings regarding counsels’ motivation for not introducing evidence of the prior fight are not supported by the record. However, those findings, to the extent they are erroneous, are harmless.

In order to successfully challenge counsel’s conduct, a convicted defendant must overcome the presumption that actions of counsel were the result of trial strategy. *Simmons v. Commonwealth*, 191 S.W.3d 557, 561-62 (Ky. 2006), *overruled on other grounds*, *Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009). Milliner’s counsel indicated that they were aware of the previous altercation between their client and Coleman. They also indicated that they had chosen not to put on that evidence. Therefore, it is clear from the record that counsel made a tactical choice to avoid this evidence, rather than simply ignoring it.

Milliner argues that his counsel refrained from putting on the evidence not for tactical reasons but because they did not understand the law. In support of this argument, Milliner points to the discussion among counsel and the trial court regarding the Commonwealth's motion *in limine*. During that discussion, the Commonwealth stated that Milliner should be prohibited from putting on evidence of specific bad acts by Coleman unless he testified. Milliner's trial counsel responded that they had no intention of putting on such evidence, unless the Commonwealth "opened the door." According to Milliner, this exchange shows that Milliner's counsel believed that they could only introduce evidence of prior bad acts and/or reputation if Milliner testified or if the Commonwealth opened the door. However, a more likely explanation is that Milliner's counsel had made the tactical decision not to introduce such evidence and would only do so if the Commonwealth attempted to prove that Coleman had a reputation for being peaceful. There is no evidence, other than Milliner's supposition, that counsel did not understand the law. Milliner's supposition regarding counsel's motives is not sufficient to overcome the presumption that the choice was tactical; therefore, we discern no reason to disturb the trial court's ruling on this issue.

2. Jury Instruction on Extreme Emotional Disturbance

Milliner argues that counsel should have requested a jury instruction on extreme emotional disturbance. Kentucky Revised Statute 507.020(1)(a) provides that a person shall not be guilty of murder "if he acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or

excuse.” Reasonableness “is to be determined from the viewpoint of a person in the defendant’s situation under the circumstances as the defendant believed them to be.” *Id.* To prove extreme emotional disturbance a defendant must establish that there was a triggering event that caused extreme emotional disturbance and that he acted while under the influence of that disturbance. *Spears v. Commonwealth*, 30 S.W.3d 152, 155 (Ky. 2001). The triggering event must be sudden and uninterrupted; however, “[n]o definite time frame between the triggering event and the killing is required, so long as the [extreme emotional disturbance] remains uninterrupted.” *Id.*

The circuit court stated that Milliner argued that the triggering event occurred when he was repeatedly stabbed by Coleman. The court was unconvinced, finding that Milliner

threatened Brock, drove to her house, forced his way inside and assaulted her boyfriend. Under such circumstances, the deliberate and consistent course of conduct by [Milliner] prior to the so-called “triggering event” here contradicts [Milliner’s] theory.

Furthermore, the court noted that the “violent history between [Milliner] and Coleman also appear[ed] to remove the required element of suddenness.” Based on the preceding findings, the court determined that an instruction on extreme emotional disturbance would not have been warranted. Therefore, the court concluded that counsel was not deficient for failing to request such an instruction.

On appeal, Milliner continues to argue that the stabbing by Coleman was a triggering event sufficient to support a claim of extreme emotional disturbance. We disagree.

In *Hodge v. Commonwealth*, 17 S.W.3d 824 (Ky. 2000), Hodge and another man broke into the home of Edwin and Bessie Morris, with the intention of robbing them. The Morrises were killed during the robbery. Hodge offered testimony by way of a witness that “he killed [Mr.] Morris during a scuffle which ensued when [Mr.] Morris reached for a gun on the refrigerator.” *Id.* at 850. Hodge requested an instruction on extreme emotional disturbance, which the trial court refused to give. The Supreme Court of Kentucky held that the trial court’s refusal to give that instruction was not error because

[m]ere resistance by the victim of an armed robbery does not suffice to override the evil and malicious purpose which triggered that resistance. Nor does it constitute a reasonable explanation or excuse for an emotional state so enraged, inflamed or disturbed as to cause the perpetrator to kill the victim.

Id.

Although there is no evidence that Milliner intended to rob Brock or Coleman, Milliner did force his way into their home. As with Mr. Morris, Coleman’s resistance to this intrusion did not “suffice to override the evil and malicious purpose” of Milliner in making that intrusion. Furthermore, the un rebutted evidence is that, at some point, Coleman broke free from Milliner and went into the kitchen. Rather than leaving, Milliner remained and, when

confronted by Coleman, who was armed with knives and a meat fork, Milliner attacked. Again, Coleman's resistance to this attack by Milliner was not sufficient to override Milliner's invasion of Coleman's and Brock's house or to explain or excuse Milliner's emotional state, whatever it may have been. Therefore, we discern no error in the trial court's denial of Milliner's RCr 11.42 motion on the extreme emotional disturbance instruction issue.

3. Closing Argument by the Commonwealth

Milliner argues that counsel should have objected when the Commonwealth attributed various forms of the statement "How dare you disrespect me" to him, because there was no evidence he made any such statement. The Commonwealth agrees that there was no such evidence. However, the Commonwealth argues that Milliner's statement to Coleman, "Don't laugh at me," and his statement to Brock, "Don't hang up the phone," supported its theme that Milliner acted as he did because he felt disrespected.

During closing argument, "[a] prosecutor may comment on tactics, may comment on evidence, and may comment as to the falsity of a defense position." *Slaughter v. Commonwealth*, 744 S.W.2d 407, 411-12 (Ky. 1987). Milliner may not agree with the theme of the Commonwealth's case; *i.e.* that he acted out of a feeling that he was not being respected. But that theme is supported by the evidence. Therefore, we agree with the Commonwealth that, given the totality of the evidence, the statements made during closing argument were not inappropriate.

4. The 911 Tapes

After Milliner entered the residence and throughout the course of the fight between Milliner and Coleman, Brock made three calls for assistance to the 911 operator. In the first call, Brock said that Milliner was in her house and she wanted him to leave. In the second call, Brock asked when the police would arrive. In the third call, Brock stated that Milliner had stabbed Coleman in the neck and that Coleman was bleeding. During that call, which was significantly longer than the previous two, Brock can be heard crying and screaming hysterically and Coleman can be heard groaning and asking for assistance. The operator attempted, mostly unsuccessfully, to calm Brock so that she could provide some assistance to Coleman. Counsel for Milliner did not object to the playing of the 911 tapes.

Milliner now argues that counsel should have objected because Brock's hysterical crying and screaming and Coleman's pleas for assistance were so prejudicial that they outweighed any probative value. Milliner also argues that Brock testified to what occurred, and the tapes did not add anything to that testimony, other than substantial prejudice. The Commonwealth argues that the information in the calls was necessary for a full understanding of the case, particularly with regard to Brock's credibility and her emotional state at the time.

The circuit court determined that the prejudicial value of the 911 tapes did not substantially outweigh their probative value. Therefore, the circuit court concluded that the Commonwealth would have been permitted to play the tapes for the jury and any objection would have been pointless.

The parties do not dispute that the tapes are relevant. However, even if relevant, “evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice . . . or needless presentation of cumulative evidence.” Kentucky Rule of Evidence (KRE) 403.

It is generally accepted that evidence depicting gruesome, heinous, or unsettling portrayals of the crime or of the victim, while prejudicial to the defendant, is not excludable from the consideration of the jury unless such evidence becomes *overly* prejudicial to the defendant because it is (1) irrelevant; or (2) relevant, yet unnecessary for a full understanding of the case.

Pollini v. Commonwealth, 172 S.W.3d 418, 423 (Ky. 2005).

Brock testified about the events that occurred that night and some of that testimony was cumulative of the information contained on the tapes. However, we note that Brock was not able to testify regarding the exact timing of the events and she was unable to provide many details regarding the fight between Coleman and Milliner. The tapes were necessary to establish the timeframe within which events took place. Furthermore, they were necessary to show how chaotic the scene was and Brock’s emotional state in order to explain her inability to recall specific details of the fight. The tapes, although cumulative in part, were necessary to a full understanding of the case. Therefore, their prejudicial quality did not

outweigh their probative value, and we discern no error in the trial court's finding on this issue.

5. Sentencing Agreement/Waiver of Appeal

As noted above, the parties notified the court that they had reached an agreement regarding sentencing. The agreement was memorialized on the standard plea agreement form. The parties and the court acknowledged that this form was intended to reflect an agreement on a guilty plea, not an agreement as to sentencing. However, everyone agreed that the form, although not perfect, would be acceptable. After reviewing the written agreement, the trial court conducted a "plea colloquy." During the colloquy, Milliner testified that he understood the terms of the agreement; that he had enough time to talk with his attorneys; that he was pleased with his attorneys' representation; and that he had reviewed the agreement, understood its terms, and signed it. Notably, Milliner also testified that he understood he was waiving his right to appeal. After the colloquy, the trial court found that Milliner had freely and knowingly entered into the agreement. Milliner then waived his right to a separate sentencing hearing and agreed to let the court pronounce his sentence immediately. Acceding to Milliner's wishes, the court imposed a sentence consistent with the terms of the agreement.

After sentencing Milliner, the court asked the parties what should be done with the evidence, since Milliner had waived his right to appeal. The parties agreed that the physical evidence should be returned to the police department. We note that no one indicated to the trial court, either during the colloquy or during the

post-sentencing discussion regarding the evidence, that Milliner retained the right to appeal the jury's verdict.

Milliner argues on appeal that his counsel incorrectly advised him that he was waiving his right to appeal the jury's finding of guilt by entering into the sentencing agreement. In support of this argument, Milliner notes that entering into a sentencing agreement does not automatically waive the right to appeal a finding of guilt. We agree. However, Milliner has cited no authority that states a criminal defendant cannot waive the right to appeal a guilty plea as part of a sentencing agreement.

The two cases Milliner does cite are not dispositive or even instructive. In *Hulett v. Commonwealth*, 834 S.W.2d 688 (Ky. App. 1992), the defendant entered into a post-conviction sentencing agreement with the Commonwealth. On appeal, the defendant challenged the validity of that agreement and the sentence the court imposed. He did not appeal the validity of his conviction. Herein, Milliner is challenging the validity of his waiver of the right to appeal his conviction. He is not appealing the validity of the terms of his sentence. Therefore, *Hulett* is not applicable.

In *Savage v. Commonwealth*, 2006 WL 1291738 (Ky. App. 2006)(2005-CA-000839-MR), a jury convicted Savage of promoting contraband and of being a persistent felony offender. Savage entered into a post-conviction sentencing agreement. The trial court specifically noted that the agreement did not include a waiver by Savage of his right to appeal his conviction. Unlike Savage,

Milliner did waive his right to appeal when he entered into his sentencing agreement. That waiver is evidenced by Milliner's testimony during the colloquy and in his signature on the plea agreement form.

Based on the preceding, and noting Milliner's admission that his counsel advised him that waiver of the right to appeal was part of the agreement, we discern no error in the trial court's finding on this issue.

6. Failure to Hold a Hearing

A hearing on a post-conviction motion for relief under RCr 11.42 is required if an answer to the motion "raises a material issue of fact that cannot be determined on the face of the record." RCr 11.42(5). "If the record refutes the claims of error, there is no need for an evidentiary hearing. A hearing is also unnecessary where the allegations, even if true, would not be sufficient to invalidate the conviction." *Harper v. Commonwealth*, 978 S.W.2d 311, 314 (Ky. 1998) (internal citations omitted). As set forth above, the record refutes Milliner's claims of error. Furthermore, even if those claimed errors were true, they would not invalidate Milliner's conviction. Therefore, the trial court correctly denied Milliner's request for a hearing on his motions.

7. Cumulative Error

Finally, Milliner argues that the cumulative effect of the alleged errors deprived him of his right to due process. Since we have determined that the trial court did not commit any errors, there can be no cumulative effect. *McQueen v. Commonwealth*, 721 S.W.2d 694, 701 (Ky. 1986).

CONCLUSION

Having determined that Milliner's trial counsel either was not deficient or that correction of any deficiencies would not have made a difference in the outcome, we affirm the order of the Jefferson Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Linda Dixon Bullock
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General

W. Bryan Jones
Assistant Attorney General
Frankfort, Kentucky