

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-000033-MR

JERRY ENDSLEY

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE JULIE REINHARDT WARD, JUDGE
ACTION NO. 03-CR-00225

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: CAPERTON, LAMBERT, AND NICKELL, JUDGES.

LAMBERT, JUDGE: Jerry Endsley appeals *pro se* from the Campbell Circuit Court's November 21, 2008, order denying his post-conviction motion under Kentucky Rule of Criminal Procedure (RCr) 11.42. After careful review, we affirm.

On Friday, May 2, 2003, at approximately 2:45 a.m., Highland Heights police officers responded to 911 calls reporting a disturbance at an apartment on Meadow Vista Drive, Highland Heights, Kentucky. While responding to the call, Sergeant David Lawson received a second call that multiple shots had been fired at the scene. Upon approaching the scene, Sergeant Lawson observed a vehicle leaving the apartment complex at a high rate of speed. Following a pursuit, the vehicle wrecked in the parking lot of the Cold Springs Road House. The driver ran from the vehicle between the building and a lake and was captured by Sergeant Lawson's canine. The subject was identified as James Payne. Payne had been shot in the abdomen and was transported to the hospital for treatment. No weapon was found in the wrecked vehicle or on Payne, but a later search of the lake near where Payne was apprehended located a 9mm automatic pistol with a fired casing in the chamber.

In the investigation that followed Detective Robert Thomas determined that the apartment was rented by a cousin of Isaiah Young. The initial investigation revealed that Isaiah Young had been shot multiple times in the stairwell outside the apartment, and a female acquaintance of Young, Stephanie Hearn, had also been shot. Young, Hearn, and Payne were all admitted to the University of Cincinnati Hospital.

Shell casings and spent bullets from a 9mm and a .380 caliber pistol were recovered at the scene. The bullets and shell casings, along with the 9mm recovered from the lake, were submitted to the Kentucky State Police Forensic

Laboratory for examination. Firearms Examiner Jeffrey Doyle found five .380 cartridge casings, two 9mm casings, two fired 9mm bullets, and three .380 caliber bullets recovered at the scene. Doyle determined that the 9mm pistol had fired the two 9mm bullets and further determined that the .380 casings and bullets had been fired from a High Point 9mm semi-automatic pistol, but as no second gun had been recovered, he could make no further determination.

In Young's interview, he stated that in the early morning hours of May 2, 2003, he was at Oscars, a club on Pete Rose Way in Cincinnati. While there he met a girl named Stephanie, and she agreed to go home with him. They left the club at about 2:30 a.m., and he dropped a friend off in Covington, Kentucky. He then drove to his cousin's apartment in Highland Heights. After he and Stephanie entered the apartment, she told him she forgot something in the car, which he believed to be her cigarettes. When Young opened the door to go get them, he observed three men standing outside, with one man near the door. Young was then shot, and he struggled with the man who shot him. Young observed another man pull out a gun, and that man also shot him several times. According to Young, the men then fled, but before leaving, the man who shot him last said "where is the money?" This man then took \$300.00 Young had in his pocket and Young's car keys.

Young was shown a photo lineup and identified James Payne as the man right outside his door who shot him first. Young identified Endsley as the subject who was on the steps, shot him multiple times, and who then took his

money and car keys. Young's 1998 Chevrolet Malibu was also stolen from the parking lot and was later recovered from an open garage in Cincinnati, three blocks from Endsley's residence.

Young was treated at University of Cincinnati Medical Center by Dr. Amy McDonald, a trauma surgeon. Dr. McDonald indicated Young had been shot multiple times, with nine bullet holes in his body. All bullets exited the body. Damage was noted to the liver and stomach, with long term scarring to exist. Dr. McDonald could not state with certainty how many of the bullet holes were entry wounds. Young was hospitalized for four days with follow-up treatment indicated.

Officers also received information that Endsley may have been at a used car lot in Alexandria, Kentucky at approximately 8:30 a.m. on May 2, 2003. An employee, Ron Woodall, identified Endsley as being one of two subjects who were on the lot looking at vehicles. He observed the men in a vehicle which displayed Ohio registration plates. Woodall believed the vehicle the men were driving to be the one stolen from Young.

Following Payne and Endsley's arrest, Stephanie Hearn was interviewed. She informed officers that she went to Oscar's with Payne and Endsley to find someone to rob. The plan was for her to lure someone out of the club, and Payne and Endsley, who both had weapons, were to rob that person. The group picked Young after observing he had a wad of money on his person with a hundred dollar bill on top. Hearn stated that she was behind Young when the

shooting occurred and could only see shadows outside. However, she heard the voices of Payne and Endsley.

Following Endsley's arrest, the police obtained a search warrant and searched Endsley's residence and Endsley's property, which was at the Campbell County jail. Neither search revealed any evidence, and no other weapon was ever recovered.

On June 5, 2003, authorities presented the evidence to the Campbell County grand jury, which returned a multi-count indictment charging Endsley, Payne, and Hearn with first-degree robbery and charging Payne and Endsley with attempted murder and wanton endangerment. Payne was charged with first-degree fleeing, evading police, and tampering with physical evidence. Endsley was charged with being a first-degree persistent felony offender (PFO 1st).

On February 23, 2004, Endsley's trial began. The Commonwealth presented seven witnesses. Detective Thomas and Sergeant Lawson testified as to the results of their investigation. Jeffrey Doyle testified about his examination of the casings, bullets, and recovered 9mm weapon. Isaiah Young testified as to the identity of the two individuals who shot him and the theft of his money and car keys by Endsley. Stephanie Hearn testified about the plan she, Payne, and Endsley made to find someone to rob because they needed money. She testified that she did not know that anyone, including herself, would be shot. Dr. McDonald testified about Young's injuries. At the close of the Commonwealth's case, the

defense moved to dismiss, arguing that the Commonwealth had not met its burden of proof. The trial court denied the motion.

Endsley did not testify, but he called two witnesses. Tabatha Davidson, Endsley's girlfriend, testified that Endsley was with her on the night of May 1, 2003, and the morning of May 2, 2003. Diane Burns testified that at about 9:00 a.m. on the morning of May 2, 2003, she took Endsley to Enterprise Car Rental in Cincinnati to rent a car. After presenting his proof, Endsley renewed his motion to dismiss, and the trial court denied the motion, finding sufficient evidence to submit the case to the jury.

On February 24, 2004, the jury found Endsley guilty of first-degree robbery and attempted murder. Count three of the indictment was dismissed. On February 25, 2004, Endsley appeared out of the presence of the jury, entered a plea of guilty to count six, persistent felony offender in the first degree, and accepted the Commonwealth's offer of twenty-five years to serve. Endsley was sentenced on March 17, 2004, and final judgment was entered on March 19, 2004. A timely notice of appeal was filed on March 30, 2004.

The Supreme Court affirmed the trial court's decision on February 17, 2005. Endsley then filed a RCr 11.42 motion with the Campbell Circuit Court, which held an evidentiary hearing on Endsley's 11.42 claims on October 17, 2008. After the hearing, the Campbell Circuit Court denied his RCr 11.42 motion, and Endsley now appeals.

On appeal, Endsley argues that his counsel was ineffective for failing to call James Payne as a witness. Endsley argues that Payne would have testified that he (Endsley) was not present when the crime occurred, and he therefore could not have committed the charged offenses. Endsley also contends that Payne would have impeached the Commonwealth's witnesses' credibility by testifying that Endsley was not present during the shooting.

At the hearing on Endsley's 11.42 motion, his trial counsel explained his decision not to call Payne as a witness. Trial counsel explained that he did not speak with Payne prior to trial because Payne's attorney did not want him to speak with Payne. Endsley's counsel further stated that he was informed Payne would be testifying against Endsley, that he spoke with Endsley about this, and Endsley agreed they should not place Payne on the witness stand. Trial counsel explained that he was worried that if he called Payne to testify, it would undermine Endsley's alibi defense, because other witnesses were going to testify that Endsley was the shooter.

To establish an ineffective assistance of counsel claim under RCr 11.42, a movant must satisfy a two-prong test showing both that counsel's performance was deficient, and that the deficiency caused actual prejudice resulting in a proceeding that was fundamentally unfair, and as a result was unreliable. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *See also Commonwealth v. Tamme*, 83 S.W.3d 465, 469 (Ky. 2002). The burden is on the movant to overcome a strong presumption that counsel's

assistance was constitutionally sufficient or that under the circumstances counsel's action "might have been considered sound trial strategy." *Strickland*, 466 U.S. at 689.

Where the court has held an evidentiary hearing, as in the instant case, the issue on appeal becomes whether the court was clearly erroneous in finding that the defendant received effective assistance of counsel. *Commonwealth v. Payton*, 945 S.W.2d 424, 425 (Ky. 1997) (internal citation omitted). A finding is not clearly erroneous if supported by substantial evidence. *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998).

We agree with the Campbell Circuit Court that based on the testimony presented at the hearing, trial counsel was not deficient in failing to call Payne as a witness. Rather, the decision not to have Payne testify was sound trial strategy based on the fact that trial counsel reasonably believed Payne was going to testify against Endsley and would have contradicted Endsley's alibi defense. Thus, the circuit court's findings were supported by substantial evidence and were not clearly erroneous.¹

Endsley next argues that his trial counsel was ineffective for not requesting lesser included jury instructions. However, given that Endsley's defense strategy was to argue that he was not actually at the scene of the crime,

¹ Furthermore, we also point out that at the time of Endsley's trial, Payne had not been tried yet, and thus any testimony for or against Endsley would have implicated Payne in the crime. Thus, it is highly likely that Payne would not have testified due to his right against self-incrimination.

lesser included instructions were not warranted in this case. The Campbell Circuit court addressed this exact issue, stating:

[T]he Defendant claimed he did not commit any crimes because he was not present. Even in his 11.42 motion he argues that he was not present and provided the Court with an affidavit from his co-defendant in support. The Court does not believe that trial counsel's strategy was deficient or ineffective by failing to seek lesser included offenses.

Under Kentucky law, a defendant is afforded a lesser included offense instruction if the evidence in the case warrants a finding of guilt of the lesser included offense. *Reed v. Commonwealth*, 738 S.W.2d 818, 822-23 (Ky. 1987). In the instant case, the evidence did not warrant a finding of guilt of a lesser included offense, because either Endsley was there and committed the offenses charged, or he was not there, as he claims, and thus could not have committed any offenses, either charged or lesser. The trial court did not err in ruling that lesser included offenses were not proper, and Endsley's counsel was not ineffective for failing to request such an instruction.

Endsley next argues that prosecutorial misconduct occurred, and as such, his counsel was ineffective for failing to object to the conduct. Endsley argues that the prosecutor made improper statements regarding the fact that Endsley's co-defendants were shot during the commission of the crime and also improperly commented on the number of shots fired at the victim. However, Endsley concedes that these allegations are not properly preserved for appellate review and asks us to review these claims for palpable error under RCr 10.26.

“RCr 10.26 provides that an alleged error improperly preserved for appellate review may be revisited upon a demonstration that it resulted in manifest injustice.” *Butcher v. Commonwealth*, 96 S.W.3d 3, 11 (Ky. 2002), *cert. denied*, 540 U.S. 864, 124 S.Ct. 174, 157 L. Ed. 2d 116 (2003). “Palpable error affects the substantial rights of a party and, under *Partin v. Commonwealth*, relief will only be granted if the reviewing court concludes ‘that a substantial possibility exists that the result would have been different’ absent the error.” *Id.* (Internal citation omitted).

Reversal based on misconduct of the prosecutor is only warranted if the misconduct is so severe as to render the entire trial fundamentally unfair. *Partin v. Commonwealth*, 918 S.W.2d 219, 224 (Ky. 1996) (overruled on other grounds by *Chestnut v. Commonwealth*, 250 S.W.3d 288 (Ky. 2008)). We agree with the Commonwealth that there is no substantial possibility that the outcome in this case would have been different absent the prosecutor’s statements about Endsley’s co-defendants being shot. In fact, this information was already admitted into evidence, and thus it was permissible for the prosecutor to comment on the evidence. *See Slaughter v. Commonwealth*, 744 S.W.2d 407, 411-412 (Ky. 1987) (internal citation omitted) (“A prosecutor may comment on tactics, may comment on evidence, and may comment as to the falsity of a defense position.”).

There is likewise no substantial possibility that the outcome would have been different absent the prosecutor’s comments concerning the number of times the victim was shot. Endsley argues that when the prosecutor stated during

closing arguments that the victim was shot more than five times, it insinuated that the intention was to kill the victim. Endsley argues that the record did not support that the victim was shot five times; however, the evidence revealed that there were nine bullet holes in the victim's body. Thus, a reasonable conclusion was that the victim was shot numerous times, and the prosecutor was free to comment on the evidence during opening and closing statements. Endsley was not prejudiced by the prosecutor's statements concerning the number of times the victim was shot, and there is no proof that absent such a statement, the outcome of Endsley's trial would have been different. In sum, Endsley's prosecutorial misconduct claims were not preserved for appellate review and do not constitute palpable error.

Finally, Endsley argues that his counsel did not offer specific exhibits and did not request any curative measures be taken regarding events during jury deliberation and that such conduct amounts to ineffective assistance of counsel. Specifically, Endsley argues that his trial counsel was ineffective because he did not present Endsley's pay-stub into evidence, did not object to a note written by the jury on a campaign pamphlet for the prosecutor, and did not explain a map introduced into evidence. Regarding the pay-stub, Endsley seems to argue that he could not have robbed and shot the victim because he had just gotten paid and did not need money. Given the amount of evidence presented against Endsley, the inclusion of this evidence would not have substantially changed the outcome of Endsley's trial, and counsel was not ineffective for failing to introduce such evidence.

As for the note written on the campaign pamphlet, Endsley does not make any specific argument as to how the note actually prejudiced him. Merely stating that one was prejudiced is not enough to establish an ineffective assistance of counsel claim under *Strickland*. Endsley must not only point out perceived errors by counsel, but must also show how those errors prejudiced him. *See Strickland*.

In his final argument, Endsley argues that his counsel was ineffective for introducing a map of the area in which the crime occurred without further explaining the map to the jury. However, while the jurors may not have had specific personal knowledge of the locations in which the crime occurred, surely they had the capability to read a map and were free to ask questions about the map or write notes to the defense and have such questions answered during deliberations. Thus, we cannot say that counsel was ineffective for failing to explain the map further, and Endsley has not demonstrated how he was actually prejudiced by the admission of the map into evidence.

Based on the foregoing, the November 21, 2008, order of the Campbell Circuit Court denying Endsley's RCr 11.42 motion after a hearing is affirmed.

NICKELL, JUDGE, CONCURS.

CAPERTON, JUDGE, CONCURS IN RESULT ONLY.

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