

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-000212-MR

LASTAR ROCHELLE BALL

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
ACTION NO. 05-CR-00170

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: KELLER AND STUMBO, JUDGES; LAMBERT,¹ SENIOR JUDGE.

KELLER, JUDGE: LaStar Rochelle Ball (Ball) appeals from the trial court's denial of her Kentucky Rules of Criminal Procedure (RCr) 11.42 motion. On appeal, Ball argues that the trial court erred by not finding that her counsel was

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

ineffective. Ball cites eleven² instances of alleged ineffective assistance of counsel, which we set forth below. Having reviewed the record and arguments of the parties, we affirm.

FACTS

We take our recitation of the underlying facts from the Supreme Court of Kentucky's unpublished opinion affirming Ball's conviction.

On March 26, 2005, Dana Brian, a part-time security guard for Dillard's Department Store, observed [Ball] roll up several pairs of jeans and stuff them into a shopping bag. Ms. Brian approached [Ball], identified herself as a security officer, and asked [Ball] to accompany her to the back of the store. [Ball] refused and a scuffle ensued. In Brian's attempts to subdue [Ball], her knee popped. Ultimately, [Ball] was apprehended with the assistance of an onlooker and a police officer.

[Ball] was indicted for first-degree robbery and for being a first-degree PFO. After a two-day trial, [Ball] was found guilty of both charges. The trial court sentenced her in accordance with the jury's recommendation of twenty (20) years.

Ball v. Commonwealth, 2007 WL 2404492, at *1 (Ky. 2007)(2006-SC-000369-MR).

The Supreme Court affirmed Ball's conviction. She then filed her RCr 11.42 motion, which the trial court denied without a hearing. It is from that denial that Ball now appeals. We set forth additional necessary facts as we address each of Ball's claims of ineffective assistance of counsel.

² Ball has eight numbered headings in her brief; however, the third heading contains three issues – failure to seek recusal, failure to seek a change of venue, and failure to seek a speedy trial. We address those issues separately.

STANDARD OF REVIEW

Because this is an RCr 11.42 proceeding, Ball bears the burden of:

(1) identifying specific errors by counsel; (2) demonstrating that the errors by counsel were objectively unreasonable under the circumstances existing at the time of trial; (3) rebutting the presumption that the actions of counsel were the result of trial strategy; and (4) demonstrating that the errors of counsel prejudiced his right to a fair trial.

Simmons v. Commonwealth, 191 S.W.3d 557, 561-62 (Ky. 2006), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151, 159 (Ky. 2009).

In reviewing whether counsel was ineffective the court must determine if counsel's performance was deficient and so prejudicial that it deprived her of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064, 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 Kimmelman v. Morrison*, 477 U.S. 365, 381, 106 S. Ct. 2574, 2586, 91 L. Ed. 2d 305 (1986). While Ball was entitled to effective counsel, she was not entitled to "errorless counsel, or counsel judged ineffective by hindsight." *McQueen v. Commonwealth*, 949 S.W.2d 70 (Ky. 1997).

ANALYSIS

As noted above, Ball lists eleven instances of alleged ineffective assistance of counsel. We address each instance separately below in the order set forth in Ball's brief.

1. Jury Instructions

Ball provided jury instructions to the court prior to trial. In pertinent part, those instructions included first-degree robbery, second-degree robbery, theft over \$300, theft under \$300, attempt of each of the preceding, and fourth-degree assault. During an in-chambers conference, the parties and the court reviewed the proffered instructions. The Commonwealth objected to the giving of any instructions involving attempt. The court agreed, stating that the evidence would only support a finding that Ball committed or did not commit an offense. The evidence would not support a finding that she attempted to commit an offense but failed to complete it.

After approximately one-half hour of discussion, Ball advised her attorney that she wanted the instructions to be limited to first-degree robbery. Ball's attorney advised the court of her client's position and that she would advise her client not to pursue that course. The court then asked the Commonwealth's attorney if he was agreeable to giving only a first-degree robbery instruction to the jury. The Commonwealth's attorney shook his head and stated that he did not agree. Ball's attorney then stated that she believed that decisions regarding jury instructions were matters of strategy and "her call." After some additional

discussion, the court submitted the instructions regarding the lesser-included offenses to first-degree robbery to the jury.

On appeal to the Supreme Court, Ball argued that the court improperly instructed the jury on lesser-included offenses despite her opposition to those instructions. The Supreme Court held that, because the evidence supported instructions on the lesser-included offenses, the trial court was required to instruct on those offenses. Therefore, the court rejected Ball's argument that the instructions were inappropriate.

In her current appeal, Ball argues that her counsel was ineffective because she agreed to the instructions on lesser-included offenses. We disagree.

Initially, we note that the Supreme Court has already determined that the court was required to give the instructions regarding the lesser-included offenses. 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). Because the Supreme Court has determined that the instructions on lesser-included offenses were mandatory, any objection to those instructions by Ball's counsel would have been useless. Therefore, counsel's acquiescence in or even promotion of those instructions cannot be ineffective assistance of counsel.

Ball also argues the trial judge stated that, if all parties agreed, he would only give an instruction on first-degree robbery. Ball states that, because her attorney did not agree, the court gave the lesser-included offenses instructions. It is true the court stated it would only give the first-degree robbery instruction if

everyone agreed. However, it is also true that the Commonwealth did not agree. Therefore, whether Ball's attorney agreed with her request to limit the instructions is inconsequential and not evidence of ineffective assistance of counsel.

Finally, we note that Ball continues to argue that the evidence at trial was not sufficient to justify the giving of instructions on lesser-included offenses. As noted above, the Supreme Court determined that the evidence was sufficient to justify the giving of those instructions. Even if we disagreed with the Supreme Court's holding, which we do not, we could not disturb it. Supreme Court Rule (SCR) 1.030(8)(a). Based on the preceding we hold that Ball's counsel was not ineffective with regard to the jury instructions.

2. Use of Missouri Judgments

During the penalty phase of the trial, the Commonwealth introduced records of prior felony convictions Ball had in Missouri to support the PFO charge. Ball's attorney objected to the admission of those records because they did not comport with the indictment and they were not properly authenticated by the clerk of court. The Commonwealth moved to amend the indictment to conform with the evidence, and the court granted the motion. The court also determined that the records were admissible despite any irregularities with their authentication.

Ball appealed the court's admission of the Missouri convictions to the Supreme Court. On appeal, Ball argued, for the first time, that the records were not properly authenticated because they were not certified by the Missouri circuit court judge. Because Ball had changed her argument, the Supreme Court held that

the error was not properly preserved and analyzed the issue using a palpable error standard.

Applying that standard, the Supreme Court noted case law indicating that records from another jurisdiction should be authenticated so as to garner full faith and credit before being used to obtain a PFO conviction. *See Merriweather v. Commonwealth*, 99 S.W.3d 448, 452 (Ky. 2003). The Court also noted that the Commonwealth admitted that the evidence of the Missouri convictions was not properly authenticated so as to merit full faith and credit by Kentucky courts. *See* KRS 422.040. However, the Court determined that the Missouri records were properly admissible under Kentucky Rules of Evidence (KRE) 1005 and KRE 902(4). Because the records were admissible, the Court held that Ball did not suffer manifest injustice and affirmed her PFO conviction.

In this appeal, it appears that Ball is arguing that counsel was deficient because: (1) she did not object to the Commonwealth's motion to amend the indictment; and (2) she did not assert the proper grounds in objecting to the authentication of the Missouri records. The first argument is without merit because Ball's counsel objected to admission of the records that did not conform to the indictment. Counsel was not then required to object to the Commonwealth's motion to amend the indictment. Furthermore, even if counsel had objected, the trial court stated that, although the amendment was technically improper, the court was going to permit it. As noted above, counsel is not required to make useless

objections and failure to do so is not evidence of ineffective assistance of counsel.

Davis, 14 S.W.3d at 11.

Ball's second argument on this issue consists primarily of a reiteration of her argument on direct appeal that the trial court should not have admitted the improperly authenticated Missouri records. The Supreme Court decided against Ball on this issue and we cannot alter that decision, even if we were so inclined. Furthermore, the purpose of an RCr 11.42 action is not to re-argue issues previously raised on direct appeal. *See Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009). Therefore, we will not address Ball's arguments regarding the admissibility of the Missouri records.

However, as the Supreme Court stated in *Leonard*, the standard of review for a palpable error differs from that for ineffective assistance of counsel. Therefore, although the Supreme Court determined that admission of the Missouri records did not rise to the level of palpable error, we must determine if counsel's failure to cite the correct reason for her objection to the admission of those records rises to the level of ineffective assistance of counsel. Having reviewed the record and case law, we hold that it does not.

In order to establish ineffective assistance of counsel, a defendant must demonstrate "that the errors of counsel prejudiced his right to a fair trial." *Simmons*, 191 S.W.3d at 561-62 (Ky. 2006). As noted above, the trial court admitted the Missouri records over counsel's objection with regard to their authentication. The Supreme Court held that the Missouri records were properly

admissible. Ball has failed to establish that if counsel had objected to the admission of the Missouri records for the correct reason, the trial court or Supreme Court would have reached a different result. In fact, taking the Supreme Court's opinion as a whole, it is likely that it would have determined any error was harmless. Therefore, Ball has not met her burden of proving that this error by counsel prejudiced her right to a fair trial.

3. Failure to Seek Recusal of District and Circuit Judges

On direct appeal, Ball argued that the trial judge should have *sua sponte* recused himself. The Supreme Court held that this argument was both unpreserved and without merit.

Ball now argues that counsel should have asked the district court judge who presided over her arraignment to recuse because he is related to the Commonwealth's primary witness, Dana Brian (Brian). She also now argues that counsel should have asked the trial judge to recuse because Brian is a long-time employee at the courthouse, with whom the judge had a working relationship. According to Ball, these relationships tainted the judges' handling of her case.

A judge is required to disqualify himself in a proceeding “[w]here he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings, or has expressed an opinion concerning the merits of the proceedings.” KRS 26A.015(a). Other than pointing out the relationships between Brian and the district court judge, Ball has not cited any evidence of bias or prejudice by the district court judge. Furthermore, she has

not indicated how, if at all, the relationship between Brian and the district court judge prejudiced her. Because she has failed to meet this requirement for relief, we discern no merit in this argument. *See Gall v. Commonwealth*, 702 S.W.2d 37, 39 (Ky. 1985).

As to recusal of the trial judge, Ball points to a number of rulings by the court that she claims showed the judge's bias. The Supreme Court addressed Ball's arguments on the court's rulings and found no error. Because Ball has not shown any bias on the part of the trial judge, she cannot show how any deficiency by counsel in failing to seek his recusal prejudiced her. Therefore, this argument likewise is without merit.

4. Failure to Seek a Speedy Trial

Although Ball listed this as an issue in her third heading, she did not make any argument regarding this issue in her brief. If a party does not cite to any authority for an argument, we are not required to address that argument. *See* Kentucky Rule of Civil Procedure (CR) 76.12 and *Cherry v. Augustus*, 245 S.W.3d 766, 781 (Ky. App. 2006). Because Ball has cited no authority with regard to this issue, we will not address it.

5. Change of Venue

Ball argues that her counsel was deficient for failing to seek a change of venue. In support of this argument, Ball states that one potential juror stated during *voir dire* that there is a history of "racial verdicts" in Paducah, Kentucky, a comment with which her attorney allegedly agreed. Ball finds additional support

by citing to cases involving white defendants Sarah Greenup, Kayla Newton, Tammy Jackson Ingram, and the Grays. According to Ball, these defendants received either more favorable plea offers or sentences than she did.

Initially, we note that the Commonwealth states that Ball only raises this issue in a heading of an argument, not in the body of that argument. However, we note that Ball lists venue as an issue in her third heading but argues the issue under the seventh heading. Therefore, we will not summarily dismiss this argument. With that clarification, we hold that counsel's failure to move for a change of venue was not ineffective assistance.

“The determination of whether to request a change of venue addresses itself to the discretion of the trial lawyer.” *McKinney v. Commonwealth*, 445 S.W.2d 874, 877 (Ky. 1969). As previously noted, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Morrison*, 477 U.S. at 381, 106 S. Ct. at 2586.

Although Ball cites to specific cases of alleged racial bias, she does not give any specific details of the crimes with which those defendants were charged or of the evidence against them. Furthermore, Ball has not provided any documentation supporting her allegations of disparate treatment or performed even a cursory statistical analysis to support her claim of racially biased criminal prosecution in Paducah. Ball has failed to establish any deficiency on the part of counsel regarding this issue because she has failed to provide sufficient information to determine how the cited defendants' cases might be similar to hers,

and she has failed to perform any statistical analysis. For these reasons, we hold that this argument by Ball is without merit.

6. Failure to Call Witnesses

Ball argues that counsel was deficient for failing to call her and two other witnesses, Antuan Elliot and Nikki Pritchard, to testify. She also argues that counsel was deficient for failing to put into evidence the store's policy for security officers when dealing with suspected shoplifters. As noted by the Commonwealth in its brief, Ball did not raise these issues before the trial court; therefore, we will not address them. *See Kaplon v. Chase*, 690 S.W.2d 761, 763 (Ky. App. 1985).

7. Failure to Call Ball

At the end of the Commonwealth's case, the trial court asked Ball's counsel if she would be presenting any proof. Counsel indicated that she did not believe she would be doing so but asked for time to consult with her client. After a brief consultation with Ball, counsel announced that Ball would not be presenting any witnesses. Ball argues that she wanted to testify but her counsel did not permit her to do so and that the trial court did not confirm on the record that Ball did not want to testify.

Initially, we note that whether the trial court should have asked Ball if she was waiving her right to testify is an issue that should have been raised on direct appeal, not one for resolution in an RCr 11.42 action. Therefore, we will not address whether the trial court erred in that regard. *See Sanborn v.*

Commonwealth, 975 S.W.2d 905 (Ky. 1998), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151, 159 (Ky. 2009).

Second, we note that, with Ball's prior criminal history, advising her not to testify was reasonable trial strategy, and Ball has offered nothing to refute that. Third, when consulted by counsel in open court, Ball did not state that she wanted to testify.

A defendant who wants to testify can reject defense counsel's advice to the contrary by insisting on testifying, communicating with the trial court, or discharging counsel. At base, a defendant must "alert the trial court" that he desires to testify or that there is a disagreement with defense counsel regarding whether he should take the stand. When a defendant does not alert the trial court of a disagreement, waiver of the right to testify may be inferred from the defendant's conduct. Waiver is presumed from the defendant's failure to testify or notify the trial court of the desire to do so.

United States v. Webber, 208 F.3d 545, 551 (6th Cir. 2000) (internal citations omitted). Because Ball did not give the trial court any reason to believe that she did not knowingly and voluntarily waive the right to testify, she cannot now claim that counsel's failure to present her testimony amounted to ineffective assistance.

8. Prior Bad Acts Evidence

Ball argues that counsel was ineffective for failing to prevent the introduction of prior bad acts. Before trial, the Commonwealth advised the court and Ball's counsel that it intended to introduce the recording of a telephone call

Ball made while in custody. During an in-chambers conference, Ball's counsel stated that she had prepared a written response but had left it at home. However, she orally objected to introduction of the recording and argued the reasons it should be excluded. Following that argument, the trial court ruled against Ball. Ball appealed the trial court's ruling to the Supreme Court, which held that the evidence was properly admitted.

By objecting to the admission of the recording, Ball's counsel did all that was required of her. While Ball may disagree with the Supreme Court's holding regarding the admissibility of the recording, the fact remains that the trial court correctly ruled against Ball. Counsel cannot be faulted for losing an argument the Supreme Court held she should have lost.

9. Failure to Present Defense During Penalty Phase

Although Ball captions this argument as one regarding a failure to present a defense, she only makes two arguments: (1) that her counsel was ineffective because she mentioned in her penalty phase closing argument that Ball had two prior felony convictions; and (2) that the Commonwealth's attorney made impermissible statements during his closing argument. As to the first argument, Ball's counsel did not make a penalty phase closing argument. She did state during her penalty phase opening statement that the jury would be asked to determine if Ball had two prior felony convictions. However, she did not concede that those convictions existed. Because the record reflects that Ball's counsel did not make the complained of statements, Ball's first argument is without merit.

As to the second argument, Ball is correct that the Commonwealth stated in its penalty phase closing argument that Ball had not expressed any regret. Ball's counsel objected and moved for a mistrial. The court overruled Ball's objection. Again, Ball's counsel did all that was required of her and was not ineffective.

Based on the preceding, we discern no error with regard to counsel's actions during the penalty phase of Ball's trial.

10. *Batson* Hearing

Following *voir dire*, counsel for Ball requested a *Batson* hearing because the Commonwealth had stricken three African-Americans. During the hearing, counsel for the Commonwealth stated that he struck one juror because the juror had three citations/convictions, and he had been hesitant when questioned if a person had to be outside a store before she could be found guilty of theft. The Commonwealth stated that it struck the second juror because she had been a former classmate of a member of Ball's defense team. The Commonwealth indicated that it struck the third juror because he had one-half dozen charges, some of which were still pending. Furthermore, that juror shook his head when the Commonwealth asked if it was acceptable for a store employee to stop someone suspected of shoplifting. The court determined that the Commonwealth had offered legitimate non-racially motivated reasons for striking the three jurors.

Ball raised this issue on direct appeal and the Supreme Court held that the trial court did not err in finding that the Commonwealth offered

nondiscriminatory reasons for striking the jurors in question. Ball now argues that counsel was ineffective because she did not obtain documentary proof from the Commonwealth regarding the jurors' prior criminal histories; and she did not question the Commonwealth regarding whether it had performed background checks on white jurors. We discern no error on the part of Ball's counsel for three reasons.

First, as with Ball's other arguments, her argument regarding this issue goes primarily to whether the trial court erred in finding for the Commonwealth, not to some shortcoming of counsel. That argument is not appropriate in an RCr 11.42 proceeding.

Second, Ball states that other jurors had histories of criminal activity which her counsel failed to investigate. However, Ball does not identify those jurors or what that criminal activity was. Ball is required "to establish convincingly that [s]he was deprived of some substantial right which would justify the extraordinary relief afforded by the post-conviction proceedings" *Dorton v. Commonwealth*, 433 S.W.2d 117, 118 (Ky. 1968). Simply making the bare assertion that other jurors had histories of criminal activity which her counsel failed to discover is not sufficient to meet that burden.

Third, Ball argues that counsel was ineffective because she failed to get documentation supporting the Commonwealth's assertion that the dismissed African American jurors had criminal records. Ball has not presented any evidence that the statement by the Commonwealth's attorney regarding those criminal

records was not true. In fact, the judge indicated that he was familiar with one of the potential jurors because of that juror's criminal record. Whether Ball's counsel obtained documentation from the Commonwealth about the jurors' criminal activity would have had no impact on the outcome. Therefore, her failure to do so is not evidence of ineffective assistance. *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).

11. Brian's Testimony

As previously noted, Brian worked as a part-time security guard and as a full-time bailiff. When she testified at trial, Brian wore her uniform. Ball argues that permitting Brian to testify in uniform impermissibly bolstered her credibility. Having reviewed the record, we can find no evidence that Ball presented this issue to the trial court. Therefore, we need not address it. *See Kaplon*, 690 S.W.2d at 763.

Furthermore, we note that, as with the majority of Ball's other arguments, she raised this issue on direct appeal. Using a palpable error standard, the Supreme Court held that, because Ball "did not introduce any evidence or produce any testimony which required the jury to make a determination of fact on the basis of one witness's credibility over another's" she failed to show any undue prejudice or manifest injustice. *Ball*, 2007 WL 2404492, at *10. Because Ball did not call into question Brian's credibility, whether Brian's uniform bolstered or detracted from her credibility is irrelevant. Therefore, any objection by Ball's

counsel would have been useless and unnecessary and counsel is not required to make such objections to be effective. *See Commonwealth v. Davis*, 14 S.W.3d 9, 11 (Ky. 1999).

CONCLUSION

For the foregoing reasons, we hold that Ball has failed to establish that her counsel rendered ineffective assistance. Therefore, we affirm the trial court's denial of her RCr 11.42 motion.

ALL CONCUR.

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