

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2009-CA-001243-MR

WILTON WESTERFIELD

APPELLANT

v. APPEAL FROM WARREN CIRCUIT COURT  
HONORABLE JOHN R. GRISE, JUDGE  
ACTION NO. 02-CR-00245

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CAPERTON, COMBS, AND KELLER, JUDGES.

COMBS, JUDGE: Wilton Lane Westerfield appeals from a June 9, 2009, order of the Warren Circuit Court that denied his motion for post-conviction relief filed pursuant to the provisions of Kentucky Rules of Criminal Procedure (RCr) 11.42. After our review, we affirm.

Westerfield was convicted in the Warren Circuit Court of first-degree robbery, first-degree sodomy, two counts of kidnapping, three counts of first-

degree sexual abuse, one count of fourth-degree assault, and for being a second-degree persistent felony offender. His convictions arise from crimes that he committed in the late night of February 17, 2002.

On that evening, P.A. and her eleven-year-old daughter, J.W., had just finished shopping at a K-Mart in Bowling Green and had begun to enter their vehicle. Westerfield approached and forced his way inside the car at knifepoint. Westerfield sexually abused P.A. inside the vehicle. He also forced P.A. to drive to an ATM machine and withdraw money for him. J.W. was inside the car and witnessed the crimes committed against her mother. P.A. and J.W. eventually escaped from the car, ran through a wooded area, and came upon a house where they were able to call for help. As his primary defense, Westerfield claimed victim consent.

Following his conviction, Westerfield was sentenced to life imprisonment. In 2005, the judgment of conviction and sentence were affirmed by the Supreme Court of Kentucky.

On May 23, 2006, Westerfield filed a *pro se* RCr 11.42 motion alleging ineffective assistance of trial counsel. The circuit court appointed counsel to assist Westerfield in the post-conviction proceedings. Westerfield's counsel and the Commonwealth filed extensive memoranda. Following an evidentiary hearing, the circuit court denied Westerfield's motion. This appeal followed.

Westerfield makes three primary arguments on appeal. First, he asserts that counsel provided ineffective assistance by failing to object to the prosecutor's

allegedly inflammatory remarks. Second, he argues that trial counsel was ineffective by failing to convey to him the terms of the Commonwealth's plea agreement offers. Third, Westerfield claims that counsel failed to conduct a proper pretrial investigation of the facts and circumstances surrounding the incident.

The circuit court's denial of an RCr 11.42 motion will be disturbed only where the findings of fact are clearly erroneous or the conclusions of law are incorrect. *Johnson v. Commonwealth*, 180 S.W.3d 494 (Ky.App. 2005). The analysis of a claim of ineffective assistance of trial counsel begins with the two-prong test established by *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and adopted by the Kentucky Supreme Court in *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985). To prevail upon an RCr 11.42 motion, a defendant must show: (1) that trial counsel's performance was deficient, and (2) that this deficiency was prejudicial and deprived the defendant of a fair trial. *Strickland*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674.

The performance of trial counsel is deficient if it falls outside "the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690, 104 S. Ct. at 2066. When analyzing the performance of counsel, the court must "be highly deferential." *Id.* at 689, 104 S. Ct. at 2065. In order to succeed, a defendant "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Id.* at 690, 104 S. Ct. at 2066. As to counsel's trial strategy, the court generally affords counsel great discretion. *Harper v. Commonwealth*, 978 S.W.2d 311 (Ky. 1998). The defendant bears the

burden of overcoming the presumption that “the challenged action might be considered sound trial strategy.” *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065. Mere speculation that a different strategy may have been advantageous is insufficient. *Hodge v. Commonwealth*, 116 S.W.3d 463, 470 (Ky. 2003), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009).

To prove that any deficiency of counsel was prejudicial, a “defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068. In order to establish actual prejudice, a movant must show a reasonable probability that the outcome of the proceeding would have been different or that it was rendered fundamentally unfair and unreliable. Where the movant is convicted in a trial, a *reasonable probability* is a probability sufficient to undermine confidence in the outcome of the proceeding in light of the totality of the evidence before the jury. In effect, trial counsel's errors must have been so substantial that a “defeat was snatched from the hands of probable victory.” *Haight v. Commonwealth*, 41 S.W.3d 436, 441 (Ky. 2001), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009).

Westerfield’s first contention is that trial counsel provided ineffective assistance by failing to object to numerous impermissible statements made by the prosecutor. He complains that the Commonwealth unfairly “likened [him] to infamous serial killers John Wayne Gacey, Ted Bundy, and Jeffrey Dahmer” and

to Don Juan during the guilt/innocence phase of the proceedings. Appellant's brief at 2. Westerfield claims that these remarks were perceived by the jury as an attempt to convey something about Westerfield that had not been included in the evidence and of which they were otherwise unaware.

Next, he points to the Commonwealth's "golden rule" style argument made both during the guilt/innocence and the sentencing phase of the trial. Westerfield contends that this argument inflamed the jury and injected a sense of fear into its deliberations.

Finally, Westerfield refers to a point in the Commonwealth's closing argument where the prosecutor referred to his decision to clean out the trunk of the vehicle and suggested that Westerfield would likely have killed the adult victim (in an effort to get to the child) had she not escaped into the woods with her daughter. Westerfield cites the court to a point during the closing argument of the sentencing phase where the Commonwealth's attorney incorrectly stated that Westerfield had "repeatedly sexually abuse[d] *them* and physically abuse[d] *them*." In fact, Westerfield had been convicted of assaulting and sexually abusing only the adult victim and not the child victim. Westerfield contends that his counsel's failure to object to these many instances of prosecutorial misconduct indicated and established that he was not adequately represented during the proceedings.

Even if we were to assume that trial counsel's performance was deficient in not objecting to the prosecutor's statements in this matter, we could not conclude that the deficiency prejudiced the defense. We agree with the trial court's

assessment that, given the overwhelming evidence against Westerfield, there is simply no likelihood that the disputed arguments affected the result of the trial.

The outcome of the proceedings was dictated by the evidence presented and was not rendered fundamentally unreliable by the prosecutor's comments.

Consequently, Westerfield's claim of ineffective assistance on this point must fail.

Westerfield's second contention involves the so-called plea negotiations that preceded trial. Westerfield contends that trial counsel was ineffective for failing to convey to him the terms of the Commonwealth's "*probable* plea offer in this case." Appellant's brief at 10. (Emphasis added.) We disagree.

Following the evidentiary hearing on Westerfield's motion for post-conviction relief, the trial court found that there had been but a single formal plea offer in this case and that the offer had been duly communicated to Westerfield by counsel. These findings are supported by substantial evidence in the record and cannot be disturbed. Thus, Westerfield's claim of ineffective assistance of counsel on this point must fail.

Finally, Westerfield contends that his trial counsel failed to conduct a proper pretrial investigation of the facts and circumstances surrounding the incident. He argues that counsel hired an unreliable and unethical private investigator who failed to discover any relevant, inappropriate behavior in the adult victim's past. He also contends that counsel failed to follow up on a lead that Westerfield himself provided indicating that Westerfield's brother's friend believed that the adult

victim's husband was a drug user.<sup>1</sup> Westerfield contends that counsel should have hired an expert witness in support of his intoxication defense and that counsel should have called Westerfield's mother and others to supply mitigating evidence during the sentencing phase of the proceedings.

With respect to these contentions, the trial court concluded as follows:

[Westerfield's] arguments regarding counsel's failure to investigate and failure to call particular witnesses on [his] behalf are an attempt to assess the performance of his trial counsel with hermetic hindsight. Moreover, [he] seeks to establish a standard of review that demands complete defensive perfection and ignores the contextual reality of the case at bar and the overwhelming and egregious nature of the evidence against him. The court concludes that [Westerfield's] trial counsel did not err in his investigation of this case, nor did he err by declining to call particular witnesses for mitigative purposes at trial. The performance and decisions of [Westerfield's] trial counsel were strategically sound and squarely within the range of reasonable and professionally acceptable service to his client.

The trial court did not err by concluding that counsel was not deficient for failing to conduct a different investigation, by failing to secure the testimony of an expert witness to support the defense of intoxication, or by failing to present the designated witnesses in mitigation. Westerfield's counsel chose a trial strategy which is not subject to second-guessing at this juncture. *Strickland, supra*. In this case, defense counsel's decisions were objectively reasonable, and Westerfield relies entirely on hindsight to claim that counsel used the wrong strategy. "A fair assessment of attorney performance requires that every effort be made to eliminate

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<sup>1</sup> Westerfield also emphasizes counsel's inability to articulate his belief that the adult victim was an "evil-doer."

the distorting effects of hindsight . . . .” *Id.* at 689, 104 S. Ct. at 2065.

Accordingly, the trial court did not err by concluding that Westerfield failed to establish his claims of ineffective assistance of counsel.

We affirm the denial of Westerfield’s post-conviction motion by the Warren Circuit Court.

ALL CONCUR.

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