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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001671-MR

SHAWN WILLIAM ERNST

APPELLANT

v. APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JAMES R. SCHRAND II, JUDGE
ACTION NO. 00-CR-000154

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS AND MOORE, JUDGES; ISAAC,¹ SENIOR JUDGE.

ISAAC, SENIOR JUDGE: Shawn William Ernst appeals from the denial of his motion for post-conviction relief pursuant to Kentucky Rule(s) of Criminal Procedure (RCr) 11.42. He argues that his trial counsel was ineffective for failing to pursue a defense theory of extreme emotional disturbance (EED) and failing to present mitigation evidence. For the reasons stated below, we affirm.

¹ Senior Judge Sheila R. Isaac sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 1.580.

Ernst was convicted by a Boone County jury of kidnapping and murdering Sandra Kay Roberts. He received a sentence of life imprisonment for murder and life imprisonment without the possibility of parole for capital kidnapping. In a published opinion affirming the convictions, the Supreme Court of Kentucky stated the facts underlying Ernst's conviction as follows:

Roberts and her sister, Betty Davidson, resided together in a house in Florence, Kentucky, that they rented from Roberts's ex-husband. Neither was employed and both drew social security disability benefits. For additional income, they subleased a room in their home to Donald Durbin. On March 18, 2000, Roberts subleased another room to Appellant. At that time, Davidson was an inpatient at a rehabilitation clinic on the campus of the St. Elizabeth's Medical Center. Roberts visited Davidson at the clinic virtually every day and also talked to her on the telephone several times a day.

Appellant's fiancée, Denise Arrington, had moved to Texas and a dispute arose between Appellant and Roberts concerning a \$145.00 long-distance telephone bill that Appellant incurred without Roberts's permission. The disagreement escalated, and by the weekend of April 1-2, 2000, Roberts decided to evict Appellant from her residence and confiscated his television and videocassette recorder (VCR) as collateral for the payment of the telephone bill. She began locking her purse and Davidson's purse in the trunk of her automobile. On the evening of April 2, 2000, while Appellant was engaged in another long-distance telephone conversation with Arrington, Roberts picked up an extension phone and berated Appellant about incurring long-distance telephone bills.

The following day, several members of Roberts's family attempted to contact her to no avail. They went to her residence where they noticed several things out of place, including that Roberts's dentures were still in a cup beside her bed even though her automobile was not in the garage. They also found Appellant's room completely

empty of his belongings. They reported Roberts as a missing person to the Florence Police Department and identified Appellant as a possible suspect. In the early morning of April 4, 2000, police officers found Appellant's automobile parked behind his place of employment, the "Just For Fun" arcade in Dayton, Kentucky, and noted that it was filled with clothing and other personal belongings, including a television and a VCR. Unable to locate anyone inside the arcade, the officers impounded the vehicle. Police officers also found Roberts's vehicle in the parking garage of St. Elizabeth's Hospital, and a hospital employee found Roberts's and Davidson's purses in a trash receptacle inside the hospital.

Florence Police Department detectives interviewed Appellant later in the day on April 4, 2000. Appellant initially denied any involvement in Roberts's disappearance; but upon being advised (as a ruse) that a security camera at St. Elizabeth's had filmed him exiting Roberts's vehicle, Appellant responded, "I goofed," and told the detectives where they could find Roberts's body. He gave the detectives a statement in which he claimed that Roberts had collapsed on the floor of his bedroom during an argument over a telephone bill and that he had panicked and driven her body to property in Gallatin County owned by relatives of Mark Crossen, a co-worker of Appellant's, where he set it afire and attempted to conceal it under some debris.

The police found Roberts's dead and partially burned body at a salvage yard in Gallatin County. An autopsy revealed that she died as a result of asphyxia due to a compression injury to her neck. Because there was no soot in Roberts's lungs, the medical examiner concluded that she died before being set afire. The autopsy also revealed an elevated level of carbon monoxide in Roberts's blood, indicating she was exposed to carbon monoxide gas while still alive.

At trial, Appellant testified that Roberts came to his bedroom on the evening of April 2, 2000, yelling and swinging a vase at him. The argument became physical, and, according to Appellant, he accidentally choked

Roberts while trying to push her away. Believing he had killed her and fearing that he would be arrested, Appellant loaded the body into the trunk of his car and drove it to Gallatin County where he set it afire. The Commonwealth presented evidence of prior statements by Appellant that conflicted with his trial testimony. Arrington testified that Appellant told her several different versions of how he killed Roberts. Richard Siegel, a jailhouse informant, testified that Appellant told him that he shook Roberts to death during an argument over a telephone bill. Samuel O'Koon, another jailhouse informant, testified that Appellant told him that he confronted Roberts after she interrupted his telephone conversation with Arrington, that he choked her, and that he believed she was dead because she urinated on the bed while he was choking her. Starrett Palmer, another cellmate, testified that he overheard the conversation between Appellant and O'Koon.

Ernst v. Commonwealth, 160 S.W.3d 744, 749-50 (Ky. 2005). Subsequently, Ernst filed a motion for post-conviction relief alleging numerous instances of ineffective assistance of counsel, which the trial court denied without an evidentiary hearing. This appeal followed.

Ernst first argues that counsel was ineffective for failing to pursue an EED defense.

As a preliminary matter, the Commonwealth asserts that Ernst failed to preserve his EED claim for appeal because he failed to raise the issue before the trial court. However, our review of the record reveals that Ernst raised the issue in item four of his memorandum supporting his RCr 11.42 motion. Therefore, we will address it.

To prevail on a claim of ineffective assistance of counsel, Appellant must show two things:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693, 104 S. Ct. at 2067. "The 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S. Ct. at 2068. Additionally, "a hearing is required only if there is an issue of fact which cannot be determined on the face of the record." *Stanford v. Commonwealth*, 854 S.W.2d 742, 743-744 (Ky. 1993).

Ernst was charged with both intentional and wanton murder under alternative theories as well as capital kidnapping. The jury was instructed on both murder theories in a single instruction. The verdict did not state under which murder theory the jury convicted. While Ernst correctly states that EED is available to mitigate intentional offenses under certain circumstances, and theories of self-defense and EED are not necessarily incompatible, we nevertheless agree

with the trial court that Ernst failed to demonstrate any prejudice resulting from counsel's failure to pursue an EED defense.

Ernst was not legally entitled to an EED instruction even under his version of the events. However, had the trial court allowed that instruction and had the jury decided that Ernst was acting under EED and convicted him of first-degree manslaughter instead of murder, conviction of the lesser offense would not have invalidated the capital kidnapping conviction in any way. Kentucky Revised Statute(s) (KRS) 509.040(2) states in part:

Kidnapping is a capital offense when the victim is not released alive or when the victim is released alive but subsequently dies as a result of:

- (a) Serious physical injuries suffered during the kidnapping; or
- (b) Not being released in a safe place; or
- (c) Being released in any circumstances which are intended, known or should have been known to cause or lead to the victim's death.

Assuming *arguendo* that Ernst did, in fact, attack Roberts under EED, the Commonwealth put on evidence, which the jury believed, that Roberts was still alive after the initial attack while she was transported in Ernst's trunk before he disposed of her body. As our Supreme Court held on direct appeal, "the jury necessarily found, beyond a reasonable doubt, that Roberts was not released alive before it convicted [Ernst] of capital kidnapping." *Ernst, supra*, at 765. Therefore, the ultimate outcome of the trial would not have been different because, even if Ernst had received a lesser sentence for manslaughter, he still would have received

a sentence of life imprisonment without the possibility of parole for capital kidnapping. We hold that the trial court did not err by denying relief or an evidentiary hearing on this issue.

Ernst next argues that counsel was ineffective for failing to present mitigation evidence during the sentencing phase of trial. He asserts that his grandfather, father, and brothers could have testified on his behalf during sentencing. He also asserts, for the first time on appeal, that his former girlfriend could have testified on his behalf. However, he does not indicate what their possible testimony would have been or how their testimony would affect the outcome of the sentencing. Failure to present more than bare allegations in an RCr 11.42 motion is grounds for summary dismissal. *Stanford v. Commonwealth*, *supra*, at 748. Therefore, the trial court properly dismissed this claim without an evidentiary hearing.

Accordingly, the order of the Boone Circuit Court is affirmed.

ALL CONCUR.

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