

RENDERED: JUNE 23, 2017; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000128-MR
AND
NO. 2015-CA-000094-MR
AND
NO. 2015-CA-000095-MR

BLAINE BRAY

APPELLANT

v.

APPEALS FROM JEFFERSON CIRCUIT COURT
HONORABLE A. C. MCKAY CHAUVIN, JUDGE
ACTION NO. 12-CR-003839 & 12-CR-003839-001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: D. LAMBERT, STUMBO AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Blaine Bray appeals from the Jefferson Circuit Court's orders denying his Kentucky Rules of Criminal Procedure (RCr) 10.02 motion,

RCr 11.42 motion and Kentucky Rules of Civil Procedure (CR) 60.02 motion following evidentiary hearings.

On August 18, 2012, several people were involved in a fight at Spectators Bar and Grill in Louisville, Kentucky. Bray was indicted jointly with his girlfriend, Carolyn Logsdon, for first-degree assault of Joshua Masingo and indicted alone in the first-degree assault of Patrick Kelly. Following a jury trial, on July 1, 2013, Bray was convicted of first-degree assault of Masingo and acquitted of first-degree assault of Kelly. Logsdon was convicted of complicity to first-degree assault of Masingo. Bray and Logsdon agreed to waive their rights to have the penalty phase before the jury and to a direct appeal in exchange for a plea agreement and recommendation on sentencing by the Commonwealth for twelve years' incarceration for Bray and ten years for Logsdon.¹

The jury heard conflicting testimony about what occurred from witnesses, including Bray and Logsdon. The jury also viewed high quality video from Spectator's surveillance cameras showing the fight from two different angles, albeit without any sound. The jury saw these videos numerous times, at normal

¹ While Bray entered into a sentencing agreement waiving his right to appeal, he did not waive the right to appeal the limited issues that cannot be waived: "competency to enter a plea, validity of the plea, subject matter jurisdiction . . . sentencing issues[.]" *Simms v. Commonwealth*, 354 S.W.3d 141, 144 (Ky. App. 2011), or that his waiver "was made without the effective assistance of counsel." *United States v. Rhodes*, 330 F.3d 949, 952 (7th Cir. 2003). Bray's right to file a motion for a new trial, an RCr 11.42 motion and a CR 60.02 motion were not barred when he gave up his right to file a direct appeal, so long as any issues brought in these motions could not have been brought on direct appeal.

speed and slowed down. Witnesses narrated what was happening on the video as the jury watched.

The video showed a confrontation between Kelly and Bray in which Kelly was pulled off Bray by two other men and the three fell to the floor. It was alleged that before they were separated, Bray stabbed Kelly with a knife. There were conflicting opinions as to whether a knife was involved or a key merely scratched him and whether it could be seen on the video.

The video also showed a separate conflict involving Masingo, Logsdon and Bray. Masingo grabbed Logsdon and later, Logsdon hit the back of Masingo's head with a pool cue. Bray then hit Masingo in the face with a pool cue.

Expert witness Dr. Smock testified Bray's blow was the source of Masingo's serious bodily injuries, which included a fracture to his eye socket, broken forehead and nose, and tooth loss. Masingo's injuries required multiple surgeries and included the insertion of a plate and screws in his head.

Following the trial and plea agreements, Bray's and Logsdon's separate counsel were granted leave to withdraw and Bray and Logsdon retained joint counsel. Before sentencing, on September 12, 2013, new counsel filed a joint motion for new trial pursuant to RCr 10.02.² Bray and Logsdon argued there was newly discovered evidence: (1) Dennis Beavers, a bouncer at Spectators, and

² Initially this motion also included an RCr 11.42 motion, but Bray and Logsdon ultimately conceded that the RCr 11.42 motion was premature because they had not yet been sentenced.

Rickie Riordan, a patron at the bar, would testify that the physical altercation was started by Kelly and not Bray, and support Bray's and Logsdon's claims that they were defending themselves; and (2) the Commonwealth did not disclose information that Kelly killed a man in a motor vehicle collision by running over his scooter just days prior to trial and, thus, had a motive to curry favor with the prosecution to avoid being prosecuted for homicide. Bray and Logsdon also argued the Commonwealth withheld this exculpatory evidence.

The Commonwealth opposed the motion. It argued the potential evidence of Beavers and Riordan was not newly discovered as trial counsel planned to call them to testify at trial but choose not to do so after learning of negative information their testimony would allow into evidence. It also argued the auto accident was not exculpatory because no charges were anticipated.

On December 20, 2013, the trial court held an evidentiary hearing on the RCr 10.02 motion. Bray and Logsdon called Beavers and Riordan to testify.

Beavers testified about Kelly's reputation for being aggressive regarding pool, Kelly being the aggressor in the confrontation between Kelly and Bray, and that he had to pull Kelly off Bray and was assisted by his cousin Riordan in doing so. He and Riordan's legs became tangled and they fell to the floor with Kelly, so he did not see the interaction between Bray and Masingo, but he heard a man yell something like "get your hands off her neck" or "get your hands off her throat" and he heard a woman yell "get the f*** off me." After the fighting ended

and Beavers told everyone involved to leave, Bray, Logsdon and Kelly left. Beavers testified he told the investigating police officer, the bar owner and the detective that Kelly was the aggressor and Bray and Logsdon were defending themselves. Beavers testified that although he was subpoenaed, he never spoke with the attorneys representing Bray and Logsdon before the trial.

Riordan testified consistently with Beavers about Kelly's reputation, his aggression that night and having to subdue him and then falling. Riordan testified he saw a small blood spot on Kelly, and Kelly was unaware he was hurt until Riordan told him, but that when Kelly lifted his shirt the wound was small and did not look like a stab wound. Riordan denied telling Bray to get rid of a knife. He testified that he also told Bray and Logsdon to leave. He testified he was never interviewed by the police or the attorneys.

During the hearing, there was discussion about when the judge and attorneys became aware of the traffic collision involving Kelly. The judge recalled Kelly disclosed it himself in a conference with the judge after an altercation occurred outside the courtroom between him and Bray's father. The Commonwealth stated the defense attorneys were told that another witness overheard Riordan having a conversation with the defendants about getting rid of the knife and because Riordan could be impeached by this testimony, the defense attorneys chose not to call him as a matter of trial strategy.

On December 26, 2013, the trial court denied Bray's and Logsdon's joint motion for a new trial and sentenced Bray to twelve years' incarceration and Logsdon to ten years' incarceration in accordance with their plea agreements. On January 17, 2014, Bray and Logsdon timely filed separate appeals.

On February 21, 2014, Bray and Logsdon filed a joint motion for relief of judgment pursuant to CR 60.02. They argued the jury instructions were erroneous as to Logsdon and this error also prejudiced Bray.

On March 14, 2014, Bray and Logsdon filed a joint motion to vacate, set aside or correct their judgments pursuant to RCr 11.42. They argued numerous errors by trial counsel and also raised the issue of the Commonwealth withholding exculpatory evidence.

While the CR 60.02 and RCr 11.42 motions were pending, Bray requested and the Court of Appeals granted his motion that the appeal of the order denying his motion for new trial be held in abeyance.

On June 27, 2014, the trial court held an evidentiary hearing on the RCr 11.42 motion. Mark Hall, Logsdon's trial counsel, testified regarding his conduct in defending her including that it was his strategy to separate Logsdon's conduct from Bray's. While Logsdon also struck Masingo with a pool cue in the back of the head, the Commonwealth's expert, Dr. Smock, testified this blow could not have caused Masingo's injuries.

Hall testified, once he saw the proposed jury instructions, he believed he made a tactical mistake in not focusing on defending Logsdon on complicity. He believed he could have improved her outcome by focusing on also defending Bray's actions.

Hall also testified regarding issues impacting Bray. Bray is severely disabled and his previous back injury makes him more susceptible to paralysis if he receives additional injury to it. If Bray's medical condition was disclosed to the jury, his counsel could argue Bray had a compelling reason not to instigate a conflict and, therefore, all his actions were in response to the actions of others. Hall and Bray's trial counsel should have requested disclosure of the Commonwealth's experts regarding serious physical injury in order to prepare for their testimony and possibly call witnesses to rebut it. An objection should have been made when Detective Hedges gave an opinion as to serious physical injury on the grounds he was not qualified. Counsel should have asked for a missing evidence instruction regarding Kelly's handwritten statement which was given to Det. Hedges and then never disclosed. Bray's attorney erred by asking a question which would disclose that Bray and Logsdon exercised their right to remain silent, there was no basis for asking about that and Hall objected and received an admonishment for the jury. Hall opined that he should have asked for a mistrial, but only for Logsdon. It would have been helpful to investigate what Beavers could have testified. He did not call Riordan because the Commonwealth would

have impeached him. Beavers was problematic because he attended court with counsel due to pending charges against him.

The trial court orally denied the RCr 11.42 motion as to Logsdon, ruling there was no flaw in Hall's representation of Logsdon which was a matter of trial strategy. However, the trial court, after noting that the hearing and argument focused on Logsdon's counsel, invited Bray's current counsel to develop a record on ineffective assistance of Bray's trial counsel at the upcoming CR 60.02 hearing and reserved ruling on Bray's RCr 11.42 motion.

On July 25, 2014, the trial court held a hearing on the CR 60.02 motion. The argument from counsel focused on improper jury instructions as to Logsdon, by failing to include a self-defense instruction and allowing the jury to convict her of complicity with a reckless or wanton state of mind. As to Bray, counsel argued that the trial court should assume Logsdon's erroneous instruction was prejudicial to him and, if the jury was deprived of the opportunity to consider whether Logsdon's actions were justified, it may have impacted its decision as to Bray and requested that he also receive a new trial.

At the conclusion of argument, the trial court called a bench conference and urged that counsel find an alternative solution as to Logsdon to avoid either a lengthy appellate process or a new trial. The Commonwealth offered to amend Logsdon's charges down to criminal facilitation to assault in the

first degree, a D felony, and recommend a five-year sentence, probated for five years.

Logsdon accepted this plea agreement and consequently, the trial court granted the CR 60.02 to vacate Logsdon's conviction and Logsdon entered into an *Alford* plea to the amended charge. In accordance with the agreement, Logsdon was sentenced to five years, probated.

While the trial court invited counsel to present evidence on Bray's RCr 11.42 motion after Logsdon was sentenced, his current counsel declined to do so. Counsel asked that the motion as to Bray stand as submitted.

On January 6, 2015, the trial court denied Bray's RCr 11.42 motion without addressing his claims individually:

While the Court recognizes that trial did not turn out well for Mr. Bray, there is nothing in the record to suggest that the jury found him guilty because of anything that trial counsel did at trial as opposed to what they believed Mr. Bray did at Spectator's bar on the night the prosecuting witness was injured . . . all of which was captured on high-quality surveillance video for the jury to see. The assignments of error culled from the record are, despite current counsel's considerable best efforts, of no consequence. There is nothing in the record to reasonably suggest that trial counsel committed any error that was objectively unreasonable under the circumstances presented at trial, or that Mr. Bray did not receive a fair trial as a result.

In a separate order entered on the same day, the trial court denied Bray's CR 60.02 motion, stating that "despite any concerns or reservations the

Court may have with respect to the jury's ability to appreciate the legal nuances of the instructions for Ms. Logsdon (the co-Defendant), the Court is wholly satisfied with the relatively straight-forward jury instructions for Mr. Bray.”

On January 15, 2016, Bray filed separate appeals from the trial court's orders denying his RCr 11.42 motion and CR 60.02 motion.

In regard to his RCr 10.02 motion, Bray argues the trial court erred in denying him a new trial because the Commonwealth failed to disclose the exculpatory evidence that prior to trial, Kelly killed another individual in a motor vehicle collision.

We review the trial court's denial of Bray's motion for new trial under the abuse of discretion standard. *Hall v. Commonwealth*, 337 S.W.3d 595, 613 (Ky. 2011).

The defendant in a “discovery” case . . . must demonstrate that the newly discovered evidence, if it had been known to the jury, would have created a reasonable doubt as to guilt which would not otherwise have existed without the evidence. This standard is both difficult for the defendant to meet . . . and difficult for a reviewing court to apply, in that it requires a subjective appraisal of the evidence and its possible effect on the jury.

Williams v. Commonwealth, 569 S.W.2d 139, 143-44 (Ky. 1978) (internal citation omitted). Indirect exculpatory evidence which has the potential to impeach a witness's credibility is only significant if that witness's testimony is determinative of whether the defendant was guilty or innocent. *Id.* at 143.

The trial court did not abuse its discretion by denying Bray's motion for a new trial. Information about the auto accident could only be used to impeach the credibility of Kelly. By acquitting Bray of the assault of Kelly, the jury may have already made a credibility determination against Kelly and in favor of Bray. Many witnesses testified about the assault of Masingo. Therefore, Bray's guilt or innocence as to that charge did not hinge upon Kelly's testimony. Moreover, because there was no evidence that any charges were contemplated against Kelly for the accident, any motivation he may have had to curry favor with the Commonwealth was limited. Finally, the accident was revealed prior to the conclusion of the trial. Under these circumstances, especially where the jury was able to observe footage of Bray striking Masingo, Bray failed to establish that questioning Kelly about this matter would have created a reasonable doubt as to Bray's guilt in the assault of Masingo. Therefore, the trial court did not err in denying his motion for a new trial.

Bray argues he received ineffective assistance from trial counsel as follows: (1) trial counsel failed to investigate and present evidence from favorable eyewitnesses including Beavers and Riordan; (2) trial counsel repeatedly promised the jury the testimony from the bouncers at Spectators bar and then failed to present it; (3) trial counsel failed to request proper jury instructions or object to improper jury instructions on complicity regarding Logsdon; (4) trial counsel failed to present proof to the jury that Bray is severely disabled and had fear of

reinjuring his back; (5) trial counsel failed to request disclosure of the names, opinions or bases for the opinions of the expert witnesses for the Commonwealth to allow adequate preparation for trial and to consider presenting a defense expert witness; (6) trial counsel failed to object when Det. Hedges testified that in his opinion the injuries to Masingo and Kelly constituted serious physical injury; (7) trial counsel failed to request a missing evidence instruction after Det. Hedges testified that Kelly gave him a written statement but he did not recall what he did with it; and (8) trial counsel erred by introducing evidence that Bray and Logsdon asserted their right to remain silent and Logsdon's counsel erred by failing to request a mistrial.

In order to be entitled to the extraordinary relief of RCr 11.42, Bray must establish he was deprived of his constitutional right to counsel. *Brown v. Commonwealth*, 253 S.W.3d 490, 499-500 (Ky. 2008). Under *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984), Bray must show his counsel's performance was incompetent and prejudiced him because it fell below an object standard of reasonableness and there is a reasonable probability that the result of the proceeding would have been different but for counsel's errors.

“In determining whether the degree of skill exercised by the attorney meets the proper standard of care, the attorney's performance is judged by the degree of

its departure from the quality of conduct customarily provided by the legal profession.” *Centers v. Commonwealth*, 799 S.W.2d 51, 55 (Ky. App. 1990).

A deficient performance causes a “defendant to lose what he otherwise would have probably won” and results in a “defeat . . . snatched from the hands of probable victory.” *Bronk v. Commonwealth*, 58 S.W.3d 482, 487 (Ky. 2001) (quoting *Foley v. Commonwealth*, 17 S.W.3d 878, 884 (Ky. 2000) *overruled on other grounds by Stopher v. Conliffe*, 170 S.W.3d 307, 310 (Ky. 2005)).

“There are no set rules or guidelines for analyzing counsel's performance” *Brown*, 253 S.W.3d at 498. “A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.”

Strickland, 466 U.S. at 689, 104 S.Ct. at 2065. “Hence, the defendant must overcome the presumption that counsel provided a reasonable trial strategy.” *Brown*, 253 S.W.3d at 499.

On appeal, we examine counsel’s performance and any resulting deficiencies *de novo*. *Id.* at 500. However, we must defer to the trial court’s findings of fact and determinations as to witness credibility. CR 52.01; *Commonwealth v. Bussell*, 226 S.W.3d 96, 99 (Ky. 2007). Mere doubt in the correctness of a finding is an insufficient basis for overruling it, only clearly erroneous factual findings which lack adequate evidentiary support or result from

an erroneous application of the law will be overruled. *Commonwealth v. Harrelson*, 14 S.W.3d 541, 548-49 (Ky. 2000).

Bray argues that his trial counsel was ineffective for failing to investigate and present evidence from favorable eyewitnesses including Beavers and Riordan, and for repeatedly promising the jury the testimony from the bouncers at Spectators bar and then failing to present it. At the first evidentiary hearing, Bray presented testimony from Beavers and Riordan that they were not contacted by counsel and presented potentially favorable testimony they could have given. However, counsel for Logsdon testified in the second evidentiary hearing that he had strategic reasons for not calling either of them because Riordan's testimony could have been impeached by a Commonwealth witness (he appears to be referring to a claim referenced in the first evidentiary hearing that another witness would testify that Riordan told the defendants to get rid of the knife) and Beavers was problematic because he had pending charges against him and was accompanied by counsel (implying Beavers could have refused to answer questions so as to not incriminate himself).

While Bray's trial counsel did not testify at the postconviction hearings, the trial court could infer the same considerations likely caused Bray's counsel not to call these witnesses, despite assurances to the jury that they would be called and, thus, were the result of reasonable trial strategy. Although it would have been preferable for counsel to decide not to call these witnesses before

promising the jury that they would hear from the bouncers, it is unclear when Bray's counsel learned of the problematic nature of their testimony. The strategy of electing not to call them under these circumstances cannot be faulted.

Additionally, Bray's claim that he was defending Logsdon was presented through other witnesses and was consistent with the video recordings which the jury viewed multiple times. Therefore, the testimony Beavers and Riordan would have presented was cumulative. Any error in failing to interview and present them as witnesses was not prejudicial because it is not clear that absent the error, the outcome of Bray's trial would have been different. *See Logan v. Commonwealth*, 446 S.W.3d 655, 661-62 (Ky. App. 2014).

Bray argues he received ineffective assistance of counsel because his trial counsel failed to request proper jury instructions for Logsdon or object to the improper jury instructions on complicity Logsdon received. He argues the error as to Logsdon's jury instruction could have prejudiced him.

Bray's jury instructions were proper. The jury was instructed that in convicting Bray of assault in the first degree, it specifically had to find that Bray was not privileged to act in protection of another. The claimed error in Logsdon's instructions, allowing the jury to convict her of complicity to Bray's assault of Mansingo with a reckless or wanton state of mind, did not impact whether or not Bray was guilty of the assault. *See Lomax v. Commonwealth*, 581 S.W.2d 27, 29

(Ky. App. 1979). Bray was not charged with complicity. Bray's guilt was determined based on his actions, not Logsdon's.

Additionally, Bray cannot claim that his trial counsel was ineffective for essentially failing to act as an advocate for Logsdon. Bray's counsel had no duty to object to jury instructions regarding Logsdon because Logsdon's instruction did not impact Bray. Therefore, Bray's counsel did not err in failing to request different instructions for Logsdon.

Bray argues his trial counsel was ineffective for failing to present proof to the jury that Bray is severely disabled and had a fear of reinjuring his back. Bray argues evidence about his injury was important for the jury to know that he had a motive not to get involved in any conflict. The lack of this evidence could not have prejudiced Bray. There was conclusive video evidence that despite any reasons that Bray had not to get involved, he did get involved in the conflict with Masingo. The jury had to resolve whether he did so to protect Logsdon or for other non-privileged reasons.

Bray argues his trial counsel was ineffective for failing to request disclosure of the names, opinions or bases for the opinions of the expert witnesses for the Commonwealth to allow adequate preparation for trial and failing to consider presenting a defense expert witness. Bray is correct that his counsel was entitled to receive discovery as to the Commonwealth's experts upon written request pursuant to RCr 7.24(1)(c). However, there is no reason to believe that had

his counsel made such a request and received this information, it would have changed the outcome of his trial. Thus, even if Bray's counsel erred by failing to make such a discovery request, prejudice cannot be assumed. It is pure speculation on Bray's part that perhaps the Commonwealth would have failed to properly respond to such a discovery request, thus prohibiting the testimony of Dr. Smock.

Receiving discovery as to the anticipated testimony of Dr. Smock or other experts regarding Masingo's injuries, would have no impact as to how those experts would testify at trial. Bray does not claim that his counsel was surprised by any expert's testimony or that his counsel was unable to vigorously cross-examine due to lack of preparation.

Bray's argument that a defense expert witness should have been hired is insufficient to establish either error or prejudice. Instead, it appears that defense counsel's failure to call an expert witness was the result of trial strategy. Bray's trial counsel's theory of the case focused not on disproving that Bray was the source of the injuries, but instead on whether his actions were privileged as being in defense of himself or another. Calling an expert would not have aided in establishing this theory.

While Bray argues that a defense expert may have helped his case, Bray fails to state how such an expert's testimony would have helped him. He does not argue that such an expert could have testified that Masingo's injuries were not serious.

Bray's related argument that his trial counsel was ineffective for failing to object when Det. Hedges testified that in his opinion the injuries to Masingo and Kelly constituted serious physical injuries also fails because Bray cannot establish prejudice. Pursuant to Kentucky Rules of Evidence (KRE) 701, lay witness opinion testimony is allowed under the following circumstances:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are:

- (a) Rationally based on the perception of the witness;
- (b) Helpful to a clear understanding of the witness' testimony or the determination of a fact in issue; and
- (c) Not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Although medical testimony is preferred when establishing serious physical injuries, lay testimony may be considered. *Brooks v. Commonwealth*, 114 S.W.3d 818, 824 (Ky. 2003); *Johnson v. Commonwealth*, 926 S.W.2d 463, 465 (Ky. App. 1996). A victim can testify to his or her own injuries, as can someone who observed the victim's injuries soon after they occurred. *Swan v. Commonwealth*, 384 S.W.3d 77, 100-01 (Ky. 2012); *Commonwealth v. Hocker*, 865 S.W.2d 323, 325 (Ky. 1993).

Masingo's testimony regarding his own injuries could be sufficient to establish that he suffered a serious physical injury. *See Anderson v. Commonwealth*, 352 S.W.3d 577, 582 (Ky. 2011) (reviewing cases in which the

evidence was sufficient to establish serious physical injury). Det. Hedges could also properly testify as to what he observed regarding Masingo's injuries as they occurred on video. Therefore, there was nothing improper about having Det. Hedges testify as to his observations, and the opinions he formed about how serious Masingo's injuries were based on those observations. *See Claxton v. Commonwealth*, No. 2006-CA-001420-MR, 2008 WL 5191192, 4 (Ky. App. 2008) (unpublished) (concluding a lay person could look at the victim's injuries either at the scene or through pictures and form an opinion that they were severe).³ However, to the extent that Bray is arguing that Det. Hedges's opinion went beyond his personal opinion and strayed into a prohibited conclusion of law by using wording that matched the statute, he must establish the required prejudice prong.

Masingo's personal observations, Det. Hedges's personal observations and Dr. Smock's expert testimony provided substantial admissible evidence that would allow the jury to conclude that Masingo's injuries were serious. *See Biederman v. Commonwealth*, 434 S.W.3d 40, 46 (Ky. 2014). In light of this evidence, Det. Hedges's brief opinion testimony even if erroneously admitted, did not prejudice Bray.

³ We may properly cite this unpublished opinion because there are no published opinions which adequately address this issue. CR 76.28(4)(c).

Bray argues his trial counsel erred by failing to request a missing evidence instruction after Det. Hedges testified that Kelly gave him a written statement but he did not recall what he did with it. However, there is no evidence to suggest that this missing information was exculpatory or that Det. Hedges acted with bad faith in failing to preserve it and, therefore, there is no basis for a missing evidence instruction. *Estep v. Commonwealth*, 64 S.W.3d 805, 810 (Ky. 2002). Bray's trial counsel did not err and Bray could not be prejudiced by his counsel's failure to ask for an instruction to which he was not entitled.

Bray's final RCr 11.42 arguments are that his trial counsel was ineffective by introducing evidence that Bray and Logsdon asserted their right to remain silent and Logsdon's counsel was ineffective for failing to request a mistrial after this occurred. We agree that Bray's counsel erred in asking a question that invited Det. Hedges to comment on Bray's and Logsdon's assertion of their right to remain silent. However, Bray cannot establish the prejudice necessary for RCr 11.42 relief.

Here, the comment that Det. Hedges made regarding the defendants' assertion of their right to remain silent was fleeting and isolated, and immediately addressed when Logsdon's attorney objected and received an admonishment for the jury. Under these circumstances and in light of the substantial evidence of Bray's guilt, this comment was harmless and Bray was not prejudiced by his trial counsel's action.

Bray cannot successfully argue that Logsdon's counsel erred by failing to ask for a mistrial. As discussed earlier, a co-defendant's counsel has no duty to act effectively towards another defendant that is not being represented by that counsel.⁴ Therefore, Logsdon's counsel's failure to request a mistrial for both defendants cannot constitute ineffective assistance of counsel towards Bray.

Finally, Bray argues the trial court should have granted the CR 60.02 motion as to him because the trial court erred in improperly instructing the jury on complicity and self-protection in Logsdon's jury instructions. He argues this error impacted him because it prevented the jury from considering that Logsdon could be acting in defense of herself or Bray, arguing "[a] jury that believed Ms. Logsdon was justified in her actions, could find that Mr. Bray was justified in attempting to help her defend herself."

We review denials of CR 60.02 motions for abuse of discretion.

White v. Commonwealth, 32 S.W.3d 83, 86 (Ky. App. 2000). As discussed above, Bray's instructions permitted the jury to find that he was privileged in using force to defend Logsdon. The trial court did not abuse its discretion in declining to relieve Bray of his conviction because any possible error in Logsdon's instructions did not impact Bray.

⁴ Logsdon's counsel testified that he may have erred by failing to request a mistrial solely for Logsdon. Thus, requesting a mistrial for both defendants would not be in Logsdon's best interest since a request for a mistrial for both may have had less of a chance for success because Bray's counsel invited the error. Logsdon's counsel would not be an effective advocate if he pursued a strategy beneficial to Bray at the expense of Logsdon.

Accordingly, we affirm the Jefferson Circuit Court's orders denying
Bray's RCr 10.02, RCr 11.42 and CR 60.02 motions.

ALL CONCUR.

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