RENDERED: OCTOBER 7, 2005; 2:00 P.M.
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

# Court of Appeals

NO. 2004-CA-001256-MR

ERIC ELLSWORTH CLARK — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NO. 98-CR-002424

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI, JOHNSON, AND McANULTY, JUDGES.

JOHNSON, JUDGE: Eric Ellsworth Clark, pro se, has appealed from the May 27, 2004, order of the Jefferson Circuit Court which denied his pro se motion to vacate, set aside, or correct the trial court's final judgment and sentence of imprisonment pursuant to RCr[1] 11.42, without holding an evidentiary hearing. Having concluded that the trial court did not err in denying

[1] Kentucky Rules of Criminal Procedure.

Clark's claims of ineffective assistance of counsel without holding an evidentiary hearing, we affirm.

Because Clark directly appealed his conviction and life sentence to the Supreme Court of Kentucky,[2] we quote the pertinent facts of this case from its Opinion as follows:

> Clark and the victim divorced in 1997 after approximately 7 years of marriage. They reconciled in June 1998 and lived together in an apartment. The victim was an assistant store manager at the Disabled American Veterans store near their home. Clark had been terminated from his position there in early September 1998 after he walked off the job.
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> The victim was found dead in the apartment by an EMT shortly after 11 p.m. on September 21, 1998. She was lying on her stomach just inside the front door and a large kitchen butcher knife was next to her. Medical testimony was that the victim died of a sharp force injury to her left upper chest that penetrated her heart.
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> At trial, the evidence showed that Clark was seen exiting the victim's apartment and was overheard saying that he had "killed the bitch, are you happy." After leaving the victim's apartment, Clark returned to his friend's apartment where he again acknowledged that he had killed his ex-wife. Ultimately, Clark went to his sister's house and asked her to take him to the police station because he had "done something" to the victim. He was arrested and his clothing was taken as evidence. Testing of the blood stains on the clothing indicated that the blood was consistent with that of the victim.

[2] Case No. 2002-SC-0755-MR, rendered September 18, 2003, not-to-be published.

> Clark was convicted of murder and entered a plea agreement with the Commonwealth whereby he would plead guilty to being a second-degree persistent felony offender, forego jury sentencing and agree to a life sentence.

The Supreme Court Opinion became final on October 9, 2003.

On April 2, 2003, Clark filed a pro se motion to vacate, set aside, or correct his sentence pursuant to RCr 11.42, as well as a motion for appointment of counsel, and a request for an evidentiary hearing. In a letter dated April 7, 2003, from the trial judge to the Commonwealth's Attorney the trial court stated that it granted Clark's request for counsel; however, there is no order to that effect in the record on appeal. On July 16, 2003, Clark filed a motion for the trial court to rule on his RCr 11.42 motion.[3] Clark filed a pro se motion on October 3, 2003, wherein he asked to supplement his RCr 11.42 motion. The Commonwealth filed its response to Clark's RCr 11.42 motion on October 20, 2003. Clark filed a reply to the Commonwealth's response on November 5, 2003. The trial court denied Clark's RCr 11.42 motion on May 27, 2004, without holding an evidentiary hearing.[4] This appeal followed.

[3] Clark's direct appeal to the Supreme Court was still pending during this time.

[4] On October 15, 2003, Clark filed a petition for writ of mandamus with the Court of Appeals to compel the trial court to rule on his pending RCr 11.42 motion. The trial court responded on October 29, 2003, by stating that it was unable to rule on Clark's motion because it did not have the case file, pending finality of Clark's direct appeal to the Supreme Court. The Court of Appeals entered an order on December 10, 2003, passing the petition for 90

In this appeal Clark claims trial counsel was ineffective (1) for failing to investigate and to advise him of the defense of extreme emotional disturbance; (2) for failing to request an instruction on all degrees of homicide; and (3) for failing in several aspects to vigorously defend Clark.[5] He also claims that all errors enumerated in his arguments had the effect of reversible cumulative error. Finally, he asserts the trial court erred in failing to appoint counsel to represent him following the filing of his RCr 11.42 motion, and in failing to conduct an evidentiary hearing on his RCr 11.42 motion.

To establish ineffective assistance of counsel, a movant must satisfy a two-part 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 a result that was unreliable.[6] The burden is on the movant to overcome a strong presumption that counsel's

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days from the date the record is returned to the circuit court. Clark filed a "petition for final disposition of pending mandamus" on April 14, 2004. The trial court ruled on his RCr 11.42 motion on May 27, 2004.

[5] Specifically, Clark argues that trial counsel was ineffective (1) for failing to give an opening statement; (2) for advising him to plead guilty following his conviction for murder; (3) for failing to call expert witnesses in psychiatry and forensic pathology to testify; (4) for failing to request suppression of blood evidence; and (5) for failing to prevent hearsay testimony at trial.

[6] Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984); Commonwealth v. Tamme, 83 S.W.3d 465, 469 (Ky. 2002); Foley v. Commonwealth, 17 S.W.3d 878, 884 (Ky. 2000).

assistance was constitutionally sufficient or that under the circumstances counsel's action might be considered "trial strategy."[7] A court must be highly deferential in reviewing defense counsel's performance and should avoid second-guessing counsel's actions based on hindsight.[8] In assessing counsel's performance, the standard is whether the alleged acts or omissions were outside the wide range of prevailing professional norms based on an objective standard of reasonableness.[9] "'A defendant is not guaranteed errorless counsel, or counsel adjudged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance.'"[10] In order to establish actual prejudice, a movant must show a reasonable probability that the outcome of the proceeding would have been different or was rendered fundamentally unfair and unreliable.[11] Where the movant is convicted in a trial, a reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceeding considering the

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[7] Strickland, 466 U.S. at 689; Moore v. Commonwealth, 983 S.W.2d 479, 482 (Ky. 1998); Sanborn v. Commonwealth, 975 S.W.2d 905, 912 (Ky. 1998).

[8] Haight v. Commonwealth, 41 S.W.3d 436, 442 (Ky. 2001); Harper v. Commonwealth, 978 S.W.2d 311, 315 (Ky. 1998).

[9] Strickland, 466 U.S. at 688-89; Tamme, 83 S.W.3d at 370; Commonwealth v. Pelfrey, 998 S.W.2d 460, 463 (Ky. 1999).

[10] Sanborn, 975 S.W.2d at 911 (quoting McQueen v. Commonwealth, 949 S.W.2d 70 (Ky. 1997)).

[11] Strickland, 466 U.S. at 694; Bowling v. Commonwealth, 80 S.W.3d 405, 411-12 (Ky. 2002).

totality of the evidence before the jury.[12] A movant is not automatically entitled to an evidentiary hearing on an RCr 11.42 motion unless there is an issue of fact which cannot be determined on the face of the record.[13] "Where the movant's allegations are refuted on the face of the record as a whole, no evidentiary hearing is required."[14]

Clark's first argument is that counsel was ineffective for failing to investigate his claims that he was under extreme stress at the time he murdered his ex-wife and that counsel should have requested an instruction for extreme emotional disturbance. Clark claims under Spears v. Commonwealth,[15] that evidence of his ex-wife having an affair was sufficient evidence to support an instruction for extreme emotional disturbance. We disagree.

Our Supreme Court has defined extreme emotional disturbance as "a temporary state of mind so enraged, inflamed, or disturbed as to overcome one's judgment, and to cause one to act uncontrollably from the impelling force of the extreme emotional disturbance rather than from evil or malicious

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[12] Strickland, 466 U.S. at 694-95. See also Bowling, 80 S.W.3d at 412; and Foley, 17 S.W.3d at 884.

[13] Stanford v. Commonwealth, 854 S.W.2d 742, 743-44 (Ky. 1993).

[14] Sparks v. Commonwealth, 721 S.W.2d 726 (Ky.App. 1986) (citing Hopewell v. Commonwealth, 687 S.W.2d 153, 154 (Ky.App. 1985)).

[15] 30 S.W.3d 152 (Ky. 2001).

purposes."[16] For an instruction on extreme emotional disturbance to be justified the evidence must show: (1) a sudden and uninterrupted triggering event; (2) that resulted in the defendant being extremely emotionally disturbed; and (3) that the defendant acted under the influence of this disturbance.[17]

In the instant case, Clark claims that he discovered his ex-wife "fooling around" with another man, which had begun to cause problems in their cohabitating relationship, and that he told police he eventually went "ballistic." However, Clark's statements to the police immediately following the murder make no reference to discovering his ex-wife with another man.

Furthermore, Clark did not testify at trial or produce any evidence in an attempt to connect the discovery of his ex-wife having an affair with her murder. The trial court noted that Clark "would argue no evidence was presented about the [extreme emotional disturbance] defense because his counsel advised him not to testify, and thus [Clark] was cheated out of a chance to let the jury know[ ] what happened on the night of the murder. The jury not having heard this evidence, he argues, led him to be convicted of a higher degree of murder than he was guilty of." The trial court further stated:

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[16] McClellan v. Commonwealth, 715 S.W.2d 464, 468-69 (Ky. 1986).

[17] Spears, 30 S.W.3d at 155.

> The Court, as noted, is bound to give deference to counsel's tactical decisions and strategy. [Clark's] counsel was well aware that this was a violent killing and that [Clark], had he taken the stand, would have been exposed to the [jury] as a prior felon. Moreover, the Commonwealth would have been granted the opportunity to cross-examine [Clark], thus adding to the heavy weight of evidence against him. In light of these facts, the Court does not find counsel's advice not to testify unreasonable. Nor does the Defendant offer the Court any solid evidence that his failure to testify prejudiced him in some way. . . . [Clark], had he been so dissatisfied with counsel's advice not to testify, had ample opportunity to speak to the Court about his problems and request new counsel. . . .

Thus, Clark failed to produce any credible evidence that a triggering event actually occurred, that he was extremely emotionally disturbed by the event, and that he acted under the influence of such a disturbance. Accordingly, not only has Clark failed to show that his trial counsel's performance was deficient, but he also failed to show with any degree of probability that his trial counsel's alleged deficient performance undermined the confidence in the outcome of his trial. Neither the first nor second prong of Strickland has been met.

Further, there is no basis to Clark's claim that his counsel was ineffective for failing to request an instruction on extreme emotional disturbance. Even if his counsel had

requested the instruction for extreme emotional disturbance, there was no evidence presented at trial to support the instruction.

Clark next argues that trial counsel was ineffective for failing to request jury instructions on all degrees of homicide. Our Supreme Court has already thoroughly reviewed and discussed a portion of this argument when it ruled that Clark was not entitled to an instruction on manslaughter in the second degree, and we will not revisit that issue. However, we will discuss whether Clark was entitled to jury instructions on manslaughter in the first degree and reckless homicide.

In Kentucky, it is well-established that "it is the duty of the trial judge to prepare and give instructions on the whole law of the case . . . [including] instructions applicable to every state of the case deducible or supported to any extent by the testimony."[18] It is fundamental in a criminal case that the trial court must instruct the jury on all of a defendant's lawful defenses.[19] An instruction for a lesser-included offense is required only if, considering the totality of the evidence, a reasonable jury could acquit the defendant of the greater

[18] Taylor v. Commonwealth, 995 S.W.2d 355, 360 (Ky. 1999) (citing Kentucky Rules of Criminal Procedure (RCr) 9.54(1); and Kelly v. Commonwealth, 267 S.W.2d 536, 539 (Ky. 1954)).

[19] Sanborn v. Commonwealth, 754 S.W.2d 534, 550 (Ky. 1988) (citing Curtis v. Commonwealth, 169 Ky. 727, 184 S.W. 1105, 1107 (1916)).

offense and yet believe, beyond a reasonable doubt, that he is guilty of the lesser offense.[20] Thus, it is the trial court's duty to instruct the jury on every possible offense supported by the evidence.

After denying Clark's motion for a directed verdict of acquittal, the trial court indicated that it would only instruct the jury on intentional murder.[21] The jury instructions provided, in relevant part, as follows:

> INSTRUCTION NO. 1 – MURDER
>
> You will find the defendant, Eric E. Clark, guilty under this Instruction if you believe from the evidence beyond a reasonable doubt, all of the following:
>
> (A) That in this county, on or about the 21st day of September, 1998, he stabbed [the victim], resulting in her death;
>
> AND
>
> (B) That in so doing, he intentionally caused [the victim's] death.
>
> If you find the defendant guilty under this Instruction, you will say so by your verdict and no more.
>
> INSTRUCTION NO. 2 – DEFINITIONS
>
> (A) "Intentionally" – A person acts intentionally with respect to a

[20] Taylor, 995 S.W.2d at 362 (citing Skinner v. Commonwealth, 864 S.W.2d 290 (Ky. 1993); and Luttrell v. Commonwealth, 554 S.W.2d 75 (Ky. 1977)).

[21] Clark argued for an intoxication instruction as well as an instruction for manslaughter in the second degree.

> result or to conduct described by a statute defining an offense when his conscious objection is to cause that result or to engage in that conduct.

In any prosecution a defendant is entitled to have the jury instructed "on a lesser-included offense if the evidence would permit a jury to rationally find him guilty of the lesser-offense and acquit him of the greater."[22] KRS 507.020 provides, in relevant part, as follows:

> (1) A person is guilty of murder when:
>
> (a) With intent to cause the death of another person, he causes the death of such person or of a third person; except that in any prosecution a person shall not be guilty under this subsection if he acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. . . .[23]

KRS 507.030(1) provides that "[a] person is guilty of manslaughter in the first degree when: (a) With intent to cause serious physical injury to another person, he causes the death of such person or of a third person[.]" KRS 507.050(1) provides

[22] Smith v. Commonwealth, 737 S.W.2d 682, 687 (Ky. 1987).

[23] As discussed infra, Clark was not entitled to an instruction on extreme emotional disturbance because his case was based on an intoxication defense, and he did not request such an instruction.

that "[a] person is guilty of reckless homicide when, with recklessness he causes the death of another person." KRS 501.020(4) provides:

> A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

"Proof of intent in a homicide case may be inferred from the character and extent of the victim's injuries. Intent may be inferred from actions because a person is presumed to intend the logical and probable consequences of his conduct and a person's state of mind may be inferred from actions preceding and following the charged offense" [citations omitted].[24] In this case, the evidence only supports a finding that Clark intended to kill the victim since he stabbed her through the heart. Since there is no evidence to support a finding that Clark did not intend to stab the victim in the heart, there was no factual basis to support instructions on manslaughter in the first degree and reckless homicide.

Again, Clark would argue that his trial counsel was ineffective for not allowing him to testify as to his state of

[24] Parker v. Commonwealth, 952 S.W.2d 209, 212 (Ky. 1997).

mind at the time the murder occurred and that the trial court erred in not providing him an evidentiary hearing to determine whether he voluntarily waived his right to testify. "The right of a defendant to testify at trial is a fundamental constitutional right and is subject only to a knowing and voluntary waiver by the defendant."[25] "The right to testify is personal to the defendant and the defendant's relinquishment of that right must be knowing and voluntary. Generally, a trial court does not need to address the voluntariness of a defendant's waiver sua sponte unless there are statements or actions from the defendant indicating disagreement with counsel or the desire to testify."[26]

In this case, Clark was present when his trial counsel announced that he would not testify and that no witnesses would be called on his behalf. The trial court then stated that the case would be submitted to the jury. Clark never showed any desire that he wished to testify, and there was no indication that he disagreed with trial counsel's strategy or was prevented from testifying by trial counsel.

[25] Watkins v. Commonwealth, 105 S.W.3d 449, 453 (Ky. 2003) (citing Rock v. Arkansas, 483 U.S. 44, 49-53, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987); and United States v. Webber, 208 F.3d 545 (6th Cir. 2000)).

[26] Watkins, supra (citing United States v. Joelson, 7 F.3d 174, 177 (9th Cir. 1993); Riley v. Commonwealth, 91 S.W.3d 560, 562 (Ky. 2002); and Webber, supra).

Clark's next five arguments each pertain to his allegations that trial counsel was ineffective for failing to vigorously represent him at trial. The trial court's findings on these issues are thorough and, for the most part, persuasive, and we adopt them, with one exception, as our own:

> RCr 9.42 permits defense counsel to present an opening argument, reserve opening until the conclusion of the Commonwealth's case, or waive opening entirely. The failure to make an opening statement does not automatically establish ineffective assistance of counsel. See Moss v. Hofbauer, 286 F.3d 851 (6th Cir. 2002); Lewis v. United States, 11 F.2d 745, 747 (6th Cir. 1926) (noting that "an opening statement should not have been made by counsel, if he did not expect to introduce evidence tending to substantiate it"). Counsel here made a professional judgment not to make an opening statement, and the Court finds this was not unreasonable, in that [Clark] did not testify, nor were any defense witnesses called. Further, [Clark] has failed to articulate specifically how this prejudiced him in such a way as to prejudice him [sic]. In Moss, the Court stated: "Moss's conclusory allegations are insufficient to justify a finding that an opening statement would have created the reasonable probability of a different outcome in his trial." Moss, 286 F.3d at 864. [Clark] cannot satisfy his burden of proving a different outcome would have been reached by the presentation of an opening statement by mere conjecture and conclusory statements.
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> [Clark] claims counsel was ineffective for failing to call an[ ] expert witness to testify as to "all that was going on with him at the time of this incident," which would, he asserts, have led to him being

found guilty of a lesser offense of homicide. The Court has at its discretion the power to fund independent experts when a defendant has shown these services are reasonably necessary. Hicks v. Commonwealth, Ky., 670 S.W.2d 837 (1984). The right to this funding arises only when a defendant's mental state is "seriously in question." Haight v. Commonwealth, Ky., 41 S.W.3d 436 (2001). [Clark's] assertion that an expert could have found out "all that was going on with him" is not sufficient to base a claim that expert funds for mental testing were necessary. This claim, without more, gave his counsel no reasonable basis for concluding an examination was warranted. Nor would a forensic pathologist, who [Clark] claims would have testified about the autopsy results and interpreted the Commonwealth's evidence, have made a difference in this case. The state pathologist provided her conclusions in the discovery phase of this case, and no challenges were made to her report's cause of death or conclusions. [Clark] does not explain how an independent pathologist would have reached a different conclusion or how the expert could have convinced the jury another outcome was plausible. No prejudice to [Clark] was engendered by the failure to present expert medical and pathological testimony.

[Clark] argues ineffective assistance of counsel by counsel's failure to move for suppression of the blood evidence in this case. "Even with respect to substances which are not clearly identifiable or distinguishable (like blood), it is unnecessary to establish a perfect chain of custody or to eliminate all possibility of tampering or misidentification, so long as there is persuasive evidence that 'the reasonable probability is that the evidence has not been altered in any respect.'" Rabovsky v. Commonwealth, Ky., 973 S.W.2d 6, 8 (1998) (Citations omitted). Gaps in the

chain of custody go to weight, rather than admissibility, of evidence. Id. In this case, the Commonwealth presented evidence from Detective John Tarter, who collected [Clark's] blood sample and placed it in the property room, and Evidence Technician Joan Parrish, who removed it from the property room and submitted it to the Kentucky State Police Lab. Dawn Katz, who tested the sample, was present to testify, and [Clark] stipulated to the remaining proof of chain of custody, and Ms. Katz was limited on examination to her results of the blood analysis. The Court is not convinced by [Clark's] argument that there is no telling whose blood was on that floor, in that Raymond Barber cut himself climbing through a window in the room. The Commonwealth satisfied its burden of presenting persuasive evidence that the sample was not misidentified or altered, and [Clark] cannot show that a motion to suppress would have been upheld.

[Clark] next argues ineffective assistance of counsel in that he was advised to plead guilty to a PFO offense, waive jury sentencing and accept the Commonwealth's sentencing offer. Advising a defendant to plead guilty does not automatically constitute ineffective assistance of counsel, and, again, such advice can be considered trial strategy. See Russell v. Commonwealth, Ky. 992 S.W.2d 871 (1999). To who actual prejudice in the context of a guilty plea, a defendant must show that there is a reasonable probability that but for counsel's errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52 (1985).

The Court closely questioned [Clark] as to his decision to plead guilty, and the colloquy showed that he did so knowingly and voluntarily. Defense counsel moved the Court to find KRS 439.3401 unconstitutional

prior to trial, which motion this Court denied. [Clark] then entered the sentencing agreement which shows absolutely no prejudice to him[;] not only did the Commonwealth agree not to enhance his penalty despite his PFO status, he also received a straight life sentence, which allows him to see the parole board in 20 years, as opposed to 85% of whatever term of years a jury might have imposed. This does not even take into account that the jury could have sentenced him to life without the possibility of parole or life without parole for 25 years. Nor did [Clark] have to face a jury who, during a sentencing phase, would have learned of his prior felony[.] [emphasis original].

[Clark] contends without jury sentencing he was precluded from presenting witnesses who loved him and who would have testified that they wanted him out of prison. The Court is convinced by the Commonwealth's argument that any of this testimony would have been offset by any number of the victim's relatives or friends testifying against [Clark's] release. Even more damaging would have been the Commonwealth, and these witnesses, pointing out that they loved [the victim] and wanted her with them, but that she was never coming back. [Clark] cannot show prejudice by agreeing to plead guilty and accept the Commonwealth's sentencing offer; the Court finds, if anything, his acceptance of such was a wise decision.

Finally, [Clark] argues counsel's failure to prevent hearsay testimony from being admitted was ineffective assistance. [Clark] raised this argument on appeal, and the [Supreme Court] found it had not been properly preserved for review. This Court will not, and indeed, pursuant to RCr 11.42, cannot relitigate an issue which has already been dealt with or should have been dealt

> with on direct appeal.[27] The fact that Justice Cooper concurred in the opinion, as opposed to joining the majority, adds no weight to [Clark's] argument, especially since Justice Cooper acknowledged that no manifest injustice resulted from the unpreserved error, as the evidence against [Clark] was "absolutely overwhelming."

As for Clark's claim that the trial court erred in not appointing counsel to represent him on his RCr 11.42 motion, we note that Fraser v. Commonwealth,[28] states that "[i]f an evidentiary hearing is not required, counsel need not be appointed, 'because appointed counsel would [be] confined to the record.'"[29] Since none of Clark's claims merited an evidentiary hearing, the trial court did not err by refusing to appoint counsel.

Finally, Clark asserts that the cumulative effect of the aforementioned errors resulted in a violation of his constitutional rights and as a result his conviction and sentence should be set aside. This argument is meritless. Each of the allegations made by Clark has been thoroughly reviewed and discussed in this Opinion and each one is refuted by the record. "Repeated and collective reviewing of alleged errors

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[27] We disagree with this statement by the trial court since RCr 11.42 is the proper procedure for reviewing an error by trial counsel that precluded review on direct appeal of an issue that would otherwise have been subject to review on direct appeal. Nevertheless, we agree with the result based on the overwhelming evidence of guilt.

[28] 59 S.W.3d 448, 453 (Ky. 2001).

[29] Id. (quoting Hemphill v. Commonwealth, 448 S.W.2d 60, 63 (Ky. 1969)).

does not increase their validity."[30] Clark has failed to demonstrate any basis for his claims that counsel's performance was deficient. He received a fundamentally fair trial.

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

ALL CONCUR.

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BRIEF FOR APPELLEE:

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[30] Parrish v. Commonwealth, 121 S.W.3d 198, 207 (Ky. 2003).