

RENDERED: AUGUST 8, 2008; 10:00 A.M.
 NOT TO BE PUBLISHED

**Commonwealth of Kentucky
Court of Appeals**

NO. 2006-CA-001769-MR

LEONARD BAILEY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANN O'MALLEY SHAKE, JUDGE
ACTION NO. 03-CR-000041

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

*** * * * *

BEFORE: CAPERTON AND VANMETER, JUDGES; GUIDUGLI,¹ SENIOR JUDGE.

GUIDUGLI, SENIOR JUDGE: Leonard Bailey appeals from an order of the Jefferson Circuit Court denying a motion for relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. We affirm.

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

Bailey and his wife had been estranged for over nine years. On October 23, 2002, Bailey forced open the door of his wife's apartment, entered, and struck her on the head with a metal car jack. Bailey was convicted of first-degree burglary, second-degree assault, and for being a persistent felony offender (PFO) in the first-degree. He was sentenced to a total of twenty years' imprisonment. The Supreme Court of Kentucky affirmed his convictions on direct appeal in an unpublished opinion. *Bailey v. Commonwealth*, 2003-SC-000523-MR, (rendered December 16, 2004). On July 11, 2005, Bailey filed a motion for relief pursuant to RCr 11.42 alleging various errors. The trial court denied the motion without an evidentiary hearing. This appeal followed.

The sole issue in this appeal is whether Bailey's trial counsel was ineffective for failing to secure a jury instruction on extreme emotional disturbance (EED). The standard for evaluating claims of ineffective assistance of counsel is well established. "In order to be ineffective, performance of counsel must be below the objective standard of reasonableness and so prejudicial as to deprive a defendant of a fair trial and a reasonable result." *Haight v. Commonwealth*, 41 S.W.3d 436, 441 (Ky. 2001). "The critical issue is not whether counsel made errors but whether counsel was so thoroughly ineffective that defeat was snatched from the hands of probable victory." *Id.* There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.

Id. Further, the trial court is not required to conduct an evidentiary hearing if the allegations are refuted on the face of the record. *Id.*

The Commonwealth has conceded that the evidence at trial might have supported an EED instruction. An EED instruction was originally tendered in a draft of instructions to the trial court. However, defense counsel informed the court in the presence of Bailey that “in consulting with Mr. Bailey” they had decided not to request an EED instruction. Bailey voiced no concerns regarding the decision at that time.

We are convinced that the decision to forego an EED instruction was a reasonable trial strategy under the circumstances of this case. During the course of the trial, Bailey developed a theory of innocence with regard to the assault of his wife. While testifying on his own behalf, Bailey claimed he considered his wife’s apartment to be his residence. He claimed that he heard noises inside the apartment. Bailey stated that he encountered a man, Joe Yarbrough, and that Yarbrough struck him first. A struggle ensued between the two men. Bailey also testified that he did not cause any injuries to his wife. An EED defense would have been inconsistent with Bailey’s “all or nothing” theory of the case. Trial counsel was not ineffective.

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

ALL CONCUR.

BRIEFS FOR APPELLANT:

Leonard Bailey, pro se
Central City, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

James C. Shackelford
Assistant Attorney General
Frankfort, Kentucky