RENDERED: JULY 16, 2010; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000964-MR

JASPER POLLINI — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE IRV MAZE, JUDGE
ACTION NO. 02-CR-001146

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, KELLER, AND LAMBERT, JUDGES.

LAMBERT, JUDGE: Jasper Pollini appeals from the Jefferson Circuit Court's denial of his post-conviction motion for a new trial under Kentucky Rule of Criminal Procedure (RCr) 11.42. Pollini claims that his trial counsel rendered ineffective assistance of counsel; or at the very least, he was entitled to a hearing in which to more fully present his claims. Upon careful review, we affirm.

The pertinent facts of this case, as set forth by the Kentucky Supreme Court, are as follows:

> In the early morning hours of May 7, 2002, Appellant, who was seventeen years old at the time these crimes were committed, broke into Brian Murphy's garage and stole some tools and a generator. Apparently unable to transport the generator, Appellant returned to his nearby home and sought the assistance of Jason Edwards, the boyfriend of Appellant's sister, Crystal Plank. Edwards drove Appellant back to the area and the pair loaded the generator from Murphy's garage into the trunk of Edward's car. Appellant told Edwards to stay in the car and then proceeded to use a screwdriver to break into the nearby garage of Dan Ziegler.
>
> Ziegler awoke shortly after 5:00 a.m. to the sound of his alarm system beeping. While investigating the source for the alarm, Ziegler went into his garage and saw Appellant. Ziegler testified that he perceived Appellant to have a weapon in his hand, but was not sure what it was. Ziegler told Appellant to stop what he was doing or he would "blow his head off." Appellant fled from the scene and was chased into some nearby woods by Ziegler. Ziegler testified that he soon heard a car drive away after losing sight of Appellant in the woods. After returning to his home, Ziegler called 911 and his neighbor, Byron Pruitt, to report the incident and to advise Pruitt to check his property. After talking with Ziegler, Pruitt armed himself with an automatic pistol and a flashlight and began investigating the area.
>
> Meanwhile, Appellant and Edwards drove back to Appellant's house. Edwards removed the generator from his car, covered the car, and then went into the house. Shortly after retreating into the house, Appellant asked Edwards to take him back to Ziegler's residence to retrieve a toolbox he had left at the scene. When Edwards refused to return to Ziegler's residence, Appellant persuaded his sister, Crystal Plank, to drive him back to the scene to retrieve his toolbox.

> Between sixteen and thirty minutes after first being confronted by Zeigler, Appellant and Plank returned to the scene of the burglaries. Appellant stated that he armed himself with a semi-automatic pistol immediately before his return to the scene of the crimes because he had been threatened by Ziegler. Upon their return to the scene, Appellant instructed Plank to turn off the lights on the car because he was about to get out to retrieve the toolbox. As Plank stopped the car, she observed a flashlight coming toward the car. Appellant hurriedly instructed Plank to back up; however, Plank had difficulty doing so due to poor visibility. Appellant then fired his gun out the window of Plank's vehicle and the bullet pierced Pruitt in the throat. Pruitt died shortly thereafter from his injury. Immediately after the shooting, Appellant and Plank fled the scene, but were apprehended, along with Edwards, later that day.

Pollini v. Commonwealth, 172 S.W.3d 418, 421-22 (Ky. 2005).

Pollini and his sister, Plank, were tried together. Pollini was ultimately convicted of capital murder (complicity), first-degree burglary (complicity), second-degree burglary (complicity), and receiving stolen property over $300 (complicity). *Id.* at 421. On September 22, 2005, the Kentucky Supreme Court vacated Pollini's capital murder conviction and remanded his case for resentencing on noncapital murder. Pollini was resentenced, and that sentence was affirmed on direct appeal. *Pollini v. Commonwealth*, 2008 WL 203035 (Ky. 2008) (2006-SC-000835-MR).

Thereafter, Pollini filed this RCr 11.42 motion alleging ineffective assistance of counsel. Upon review, the trial court denied Pollini's motion without a hearing. An appeal to this Court now follows.

On appeal to this Court, Pollini alleges several errors which alone, or in accumulation, entitle him to relief. The standard of review for claims of ineffective assistance of counsel is well-known. "In order to show ineffective assistance, a defendant must demonstrate that his trial attorney's performance was both deficient and prejudicial." *Commonwealth v. York*, 215 S.W.3d 44, 47 (Ky. 2007).

"A defendant is not guaranteed errorless counsel, or counsel judged ineffective by hindsight, but counsel likely to render and rendering reasonably effective assistance." *Id.* (quoting *Haight v. Commonwealth*, 41 S.W.3d 436, 442 (Ky.2001)). When assessing an attorney's performance, "a strong presumption exists that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.*

Even when trial counsel's performance falls below the minimum standards of conduct, relief is not available unless such conduct resulted in actual prejudice to the defendant. Actual prejudice is defined as "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Bowling v. Commonwealth*, 80 S.W.3d 405, 412 (Ky. 2002) (quoting *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674, (1984)). "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." *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)).

In his first assignment of error, Pollini claims his counsel was ineffective for failing to timely notice an allegedly erroneous jury instruction. Regarding Pollini's right to self-defense, the jury was instructed as follows:

> Even though the defendant might otherwise be guilty of [other offenses], if at the time he killed Byron Pruitt he believed that Mr. Pruitt was about to use *unlawful* physical force upon him, he was privileged to use such physical force against Mr. Pruitt as he believed to be necessary in order to protect himself against it, but including the right to use deadly physical force only if he believed it to be necessary in order to protect himself from death or serious physical injury at the hands of Mr. Pruitt.

(Emphasis added).

Pollini's trial counsel submitted instructions without the word "unlawful" inserted into it; however, these instructions were not used. Trial counsel did not realize the discrepancy until after the instructions had already been submitted to the jury.

On direct review, Pollini attempted to argue that use of the word "unlawful" in the jury instructions was reversible error. Pollini cited to the language of the specimen self-protection instruction recommended in 1 William S. Cooper, *Kentucky Instructions to Juries (Criminal)* § 11.07 (4th ed.1993), and *Commonwealth v. Hager*, 41 S.W.3d 828, 846 (Ky. 2001), which omits the statutory term. According to the concurring opinion in *Pollini*, the word was

omitted from the specimen instruction because it was determined to be generally superfluous and its inclusion could result in unnecessary confusion or speculation by the jury. 172 S.W.3d at 433 (Cooper, J., concurring). The Kentucky Supreme Court declined to address the issue for two reasons: (1) trial counsel failed to object to the instruction in a timely manner; and (2) the alleged error was not palpable. *Pollini*, 172 S.W.3d at 428.

Pollini contends that the above circumstances unequivocally entitle him to a new trial. We must disagree. As to whether error occurred in the submission of these self-defense instructions to the jury, we find it significant that use of the word "unlawful" is in compliance with Kentucky Revised Statutes (KRS) 503.050(1). As reaffirmed in *Hager*, 41 S.W.3d at 835, "all substantive law related to criminal responsibility, including general principles of liability, accountability, justification and responsibility[,] is now statutory, and instructions should be stated within the context of the statutory framework." *Id.* (quoting *McGuire v. Commonwealth*, 885 S.W.2d 931, 936 (Ky. 1994)). We are unaware of any court in this jurisdiction that has reversed a conviction for improperly including statutory terminology within the instructions submitted to a jury.

And even if inclusion of the word in the jury instructions was error, Pollini has failed to establish that this alleged error resulted in "defeat [being] snatched from the hands of probable victory." *Haight*, 41 S.W.3d at 441. Pollini's only claim of prejudice is that "[t]he court's instruction in [his] case impermissibly required [him] to show that Pruitt's use of physical force was unlawful in order for

the self-preservation defense to be available." Yet, nothing in Cooper's Jury Instruction treatise purports to set aside a defendant's burden to show that physical force by the victim must be unlawful in order to prevail on grounds of self-defense.

The treatise simply explains that "situations when a defendant would believe the victim was about to lawfully use physical force against him are rare."[1] *Pollini*, 172 S.W.3d at 433 (citing John S. Palmore & Robert G. Lawson, 1 Kentucky Instructions to Juries (Criminal) § 10.01 cmt., at 341 (3rd ed.1975)) (Cooper, J., concurring). Thus, in most cases, use of this word in the jury instructions is simply extraneous; and where use of the word is necessary, the treatise advises that confusion may best be avoided by specifically setting forth the circumstances in which lawful force may have been utilized by the victim. *Id.*

In this case, Pollini fails to set forth any evidence suggesting that this jury was somehow confused or misled by the extraneous word in the self-defense instruction. The primary issue regarding self-defense before this jury was whether Pruitt was about to use physical force when he approached Pollini with his flashlight. Pollini claimed that Pruitt was about to attack him; the Commonwealth claimed he was not. Neither party's brief mentions any discussion before the jury concerning the lawfulness of any attempted use of physical force against Pollini.

Presuming such arguments were made, Pollini fails to demonstrate how this instruction, if any, prejudiced him. As set forth above, use of the extraneous word is problematic only in cases where the jury is misled or likely to

[1] The typical exception is when a police officer or a person acting under official authority is affecting a lawful arrest. *Id.*

be confused as to the lawfulness or unlawfulness of any particular use of physical force. No such circumstances have been presented or even suggested in this case. Simply setting forth a possibly erroneous jury instruction without any demonstration of actual prejudice is not sufficient to establish ineffective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 690, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Commonwealth v. Harris*, 250 S.W.3d 637, 642 (Ky. 2008) (defendant bears burden of proving actual prejudice).[2] Accordingly, we hold that Pollini has failed to establish actual prejudice resulting from his trial attorneys' failure to object to insertion of the word "unlawful" into the KRS 503.050(1) self-defense jury instruction.

In his next assignment of error, Pollini contends his trial counsels' performance was deficient because they failed to object to the submission of an "initial aggressor" instruction to the jury. Pursuant to KRS 503.060(3), self-protection shall not be available as a defense if the defendant was the initial aggressor in his confrontation with the victim. The two exceptions to this rule are as follows: (1) when the defendant's initial physical force was non-deadly, and the force returned by the victim is such that the defendant believes himself to be in imminent danger of death or serious physical injury; or (2) when the defendant

[2] We are aware of the case law set forth in *Harp v. Commonwealth*, 266 S.W.3d 813 (Ky. 2008), holding that erroneous jury instructions shall be considered presumptively prejudicial on direct review and that the burden rests with the Commonwealth to establish harmless error in order to avoid reversal. *Id.* 818. However, this is a collateral appeal where burdens necessarily change due to the extraordinary nature of the proceeding. *See Commonwealth v. Bussell,* 226 S.W.3d 96, 103 (Ky. 2007) ("[I]n an RCr 11.42 proceeding, the movant has the burden of establishing that he was 'deprived of some substantial right which would justify the extraordinary relief afforded by the post-conviction proceeding.'") (quoting *Dorton v. Commonwealth*, 433 S.W.2d 117, 118 (Ky. 1968)).

withdraws from the encounter and effectively communicates to the victim his intent to do so and the victim nevertheless continues or threatens the use of unlawful physical force. *Id.*

Pollini contends there was insufficient evidence to support an initial aggressor instruction in this case. *See Stepp v. Commonwealth*, 608 S.W.2d 371, 374 (Ky. 1980) (qualifying instructions should not be submitted to the jury unless there is evidence to support them). Upon review of these circumstances, we disagree.

Pursuant to KRS 503.050 Commentary, "the justification afforded ordinarily for self-defense is denied to a defendant who was the initial aggressor." *Id.* The Commentary explains that the initial aggressor limitation applies to "the situation where a defendant, not having an intent to cause death or serious physical injury, starts an encounter with another and subsequently finds himself believing in a need to use physical force, perhaps deadly, to protect himself from the other's attack." *Id.*

Pollini argues that a reasonable juror could not have concluded from the evidence submitted at trial that he "started an encounter" with Pruitt. We disagree. Pollini conceded that he intentionally returned to an active crime scene for the purpose of retrieving his toolbox. He further admitted arming himself with a loaded semi-automatic pistol because he expected to have another confrontation with Ziegler or others due to Ziegler's earlier threat. After careful review of the

statute and its commentary, we hold that such evidence is sufficient to conclude that Pollini "started an encounter" with Pruitt.

In making the above determination, we consider the persuasive authority set forth in *Bailey v. Commonwealth*, 2009 WL 1830808 (Ky. 2009) (2006-SC-000785-MR). In that case, the Kentucky Supreme Court held that an initial aggressor instruction was appropriate where the defendant did not use physical force in his initial encounter with the victim, but did, after an earlier nonphysical encounter, approach the victim in a "threatening manner." *Id.* at 3. When these facts are viewed in their totality, we find Pollini's return to this crime scene to be similarly threatening. *Cf. Stepp*, 608 S.W.2d at 374 (victim found to have been initial aggressor during second encounter when he fled after first encounter, but then returned "apparently looking for trouble"). For all Pruitt knew, Pollini was returning to assault or even kill him or his neighbor due to the earlier confrontation. Under these unique circumstances, we hold that the evidence was sufficient to justify the submission of an initial aggressor instruction to the jury.

Pollini counters that while he knowingly returned to the crime scene after having a confrontation with the homeowner, he did not knowingly start an encounter with Pruitt. In fact, it is undisputed that he attempted to flee once he saw Pruitt. Even so, such a fact is not dispositive because, at this point in time, the encounter with Pruitt had already begun. In any event, the jury was instructed upon the two exceptions to the initial aggressor limitation. Thus, the jury freely considered but rejected Pollini's withdrawal defense. *See* KRS 503.060(3)(b).

Pollini also complains that his trial counsel was ineffective for failing to raise an objection to an improper *ex parte* contact between the trial judge and the jury. During deliberations, the jury asked the following question, "Does there exist a transcript of the Plank conversation with police? Difficult to locate on the tape. If so, can we please request?" Without notifying either counsel, the trial judge replied, "There's none available." At some point after the verdict, Plank's counsel discovered this *ex parte* contact; and according to Pollini, they notified Pollini's counsel.

Plank raised the issue on appeal. In addressing Plank's appeal, the Court of Appeals found that the trial court's failure to notify counsel of this *ex parte* contact was a violation of RCr 9.74 (no information may be given to a jury except in open court and in presence of defendant and counsel). *Plank v. Commonwealth*, 2005 WL 1313838 (Ky. App. 2005) (2003-CA-001861-MR). This Court did not determine whether the error was reversible because it already reversed Plank's conviction on other grounds. *Id.* at 9.

Pollini now argues that both his trial and his appellate counsel were ineffective for failing to raise the issue either before the trial court or the appellate courts. As to his appellate counsels' failure to raise the issue on appeal, "[i]neffective assistance of appellate counsel is not a cognizable issue in this jurisdiction." *Lewis v. Commonwealth*, 42 S.W.3d 605, 614 (Ky. 2001).

As for his trial counsels' failure to raise the issue, Pollini concedes that his counsel[3] were not notified of the violation until sometime after the verdicts were rendered. Pollini does not set forth when this notification took place and what, if anything, his trial counsel could have or should have done to either discover the error earlier or bring it to the attention of the trial court.[4] Thus, Pollini fails to demonstrate any kind of deficient performance on the part of his trial counsel.

As to whether Pollini was prejudiced by this inability to advance the RCr 9.74 violation, he cites to *Welch v. Commonwealth*, 235 S.W.3d 555 (Ky. 2007). In *Welch*, the Kentucky Supreme Court found reversible error where the trial judge communicated with the full jury regarding a substantive issue in the case. *Id.* at 558. The circumstances in this case are easily distinguished.

Here, nothing of a substantive nature was transmitted to the jury outside the presence of Pollini. The trial judge informed the jury, correctly, that a transcript of Plank's interview with police was not available for them to review. The court had ruled earlier that the transcript was not admissible into evidence, despite the fact that the Commonwealth was permitted to blow up a portion of the transcript and use it during closing argument. However, as noted in the *Plank* opinion, the trial court's ruling may have been premised on the fact that Pollini's

[3] It is unclear whether Pollini's trial counsel, appellate counsel, or both were notified of this discrepancy.

[4] Plank only raised the issue on direct appeal, which suggests that by the time the error was discovered, trial counsel were no longer working on the case.

counsel was "opposed [to] the admission of the transcript of Crystal's statement." *Plank*, 2005 WL at 9.

In *Welch*, the Kentucky Supreme Court held that *ex parte* contacts which do "not impugn the fundamental fairness of an otherwise constitutionally acceptable trial" are harmless. 235 S.W.3d at 558. Pollini sets forth nothing to suggest that this error impugned the fundamental fairness of his trial. He complains about not being able to litigate the issue, but that is not grounds for relief without a showing of prejudice. He further states that "Plank was the only eyewitness to the shooting and her testimony was crucial as to whether Pollini acted in self-defense." However, as set forth in the *Plank* opinion, it appears that Pollini would have opposed submission of Plank's transcript to the jury had he been present when the question was submitted and answered by the trial judge. Accordingly, even if there was some deficient performance on the part of Pollini's trial counsel in not discovering the violation, we discern no prejudice in any event.

In his next assignment of error, Pollini claims his trial counsel erred to his substantial prejudice "because they were unaware that Pollini's juvenile charges . . . were to be tried in conjunction with his trial for murder and first-degree burglary until the day of trial." Because of this, Pollini claims his trial counsel "could not have prepared a proper defense." However, as argued by the Commonwealth, this record conclusively refutes Pollini's allegations.

When Pollini's counsel asserted ignorance about the juvenile charges being consolidated with the murder and first-degree burglary charges on the first

day of trial, the trial judge offered Pollini a continuance over the objection of Plank's counsel. Both Pollini and his counsel expressly refused the continuance, asserting that they were ready to proceed with trial.

Pollini's only claim of prejudice is that his trial counsel failed to move to separate his juvenile offenses from the non-juvenile offenses pursuant to RCr 9.16. RCr 9.16 provides that offenses may be separated for trial if joinder of said offenses will prejudice the Commonwealth or the defendant. *Id.* However, as noted by the Commonwealth, Pollini's trial counsel did object to the offenses being consolidated prior to trial. Moving to separate the offenses again at trial would have been futile and possibly, vexatious. In any event, our Supreme Court determined on direct review that the charges arose out of the "same course of conduct" and thus, there is no question that joinder was proper in this case. *Pollini*, 172 S.W.3d at 425. Accordingly, we discern neither deficient performance nor prejudice in this instance.

Pollini also argues his trial counsel was defective for failing to introduce evidence showing "the presumptive presence of cocaine and benzodiazepine" in the victim's urine. As set forth by the Commonwealth, this claim is also conclusively refuted by the record. Pollini's counsel did oppose a motion by the Commonwealth to bar such evidence from being admitted at trial. The trial court deferred its ruling until testimony from a toxicologist could be heard.

According to the physician who performed the victim's autopsy, she found nothing in the victim's blood to alter his behavior at the time of death. Cocaine in one's urine, the physician stated, has no effect on the mind or body. Upon considering this testimony, the trial court sustained the Commonwealth's motion and prohibited the defendants from introducing evidence showing that the victim had drugs in his urine. Pollini's trial counsel was therefore not deficient in this instance.

Next, Pollini asserts his counsel was deficient for failing to introduce medical records indicating that he suffered from post-traumatic stress disorder one year prior to killing Pruitt. The Commonwealth argues that this claim should not be considered because it was not verified and because accompanying medical records were not timely submitted to the trial court. We need not address the Commonwealth's arguments because our substantive review of Pollini's claim reveals that any prejudice suffered by Pollini from his trial counsel's failure to introduce these records into evidence was not substantial enough to warrant post-conviction relief.

Pollini's trial counsel introduced the testimony of Dr. Alan Josephson. Dr. Josephson diagnosed Pollini with post-traumatic stress disorder. This diagnosis stemmed from an incident where Pollini sustained a gunshot wound approximately one year prior to the shooting in this case. According to Dr. Josephson, Pollini began exhibiting symptoms immediately after this incident. Dr.

Josephson informed the jury that he relied on "University of Louisville hospital records" to substantiate his diagnosis.

The Commonwealth attempted to discredit Dr. Josephson's testimony by pointing out that Dr. Josephson had only met Pollini subsequent to the shooting in this case and that Pollini's diagnosis was made in preparation of a criminal trial. Pollini argues that the records would have bolstered Dr. Josephson's credibility as they reflect a diagnosis of post-traumatic stress disorder approximately one year prior to the shooting in this case.

We agree that introduction of the records would have been helpful in rebutting the Commonwealth's argument at trial. However, in light of Dr. Josephson's testimony that he relied on these records to substantiate his diagnosis, the records would have been cumulative to some extent. In presenting this "extreme emotional disturbance" defense, Pollini's counsel not only presented the expert testimony of Dr. Josephson, but also had Pollini remove his shirt so that the jury could see the physical effects of his earlier gunshot wound. Clearly, this defense was robustly presented. When these circumstances are considered in their totality, we cannot say that failure to submit these records in rebuttal was so deficient as to have altered the result of the proceeding. While we agree that error was likely committed, we do not believe it was egregious enough to have resulted in defeat being "snatched from the hands of probable victory." *Haight*, 41 S.W.3d at 441.

Pollini also argues that he should have been granted a hearing so that issues of fact may have been further developed in this proceeding. Inmates are entitled to a hearing under RCr 11.42 "if there is a material issue of fact that cannot be conclusively resolved; i.e. conclusively proved or disproved, by an examination of the record." *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001). Pollini does not set forth any factual issues that are not conclusively resolved by an examination of this record, and accordingly we reject his claim that a hearing was required.

In his final assignment of error, Pollini alleges his "trial counsel failed to investigate exculpatory facts and failed to present evidence supporting [his] self-defense claim." Pollini opines that his trial counsel should have insisted on testing the gunshot residue sample taken from Pruitt's hands to determine whether Pruitt ever fired his gun. He further contends it was ineffective assistance of counsel not to have obtained a ballistics expert to determine whether Pruitt's gun had been fired that night. Finally, Pollini claims that his trial counsel should have cross-examined his sister, Plank, and elicited exculpatory testimony from her.

The Commonwealth counters that this record conclusively demonstrates that trial counsels' decision not to pursue the above measures was legitimate trial strategy. We must agree. Pollini sets forth nothing specific to suggest that any of the above maneuvers would have resulted in favorable evidence. In fact, upon review of the facts in this case, it seems most probable that taking such steps would have further incriminated Pollini. Accordingly, Pollini has

failed to overcome the strong presumption that trial counsels' actions were nothing less than sound trial strategy. *See Strickland*, 466 U.S. at 689.

Having been presented with no reversible error, we hereby affirm the Jefferson Circuit Court's April 21, 2009, order denying Pollini's motion for RCr 11.42 relief.

ALL CONCUR.

BRIEF FOR APPELLANT:

R. Kenyon Meyer
Louisville, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General

Jeffrey A. Cross
Assistant Attorney General
Frankfort, Kentucky