RENDERED: SEPTEMBER 30, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001352-MR

ANTHONY WARREN — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
ACTION NO. 03-CR-001687

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, MOORE AND THOMPSON, JUDGES.

DIXON, JUDGE: Anthony Lavelle Warren appeals *pro se* from an opinion and order of the Jefferson Circuit Court denying his Kentucky Rules of Civil Procedure (RCr) 11.42 motion without an evidentiary hearing. Finding no error, we affirm.

Following a jury trial, Warren was found guilty of robbery in the first degree, unlawful imprisonment in the first degree, wanton endangerment in the

first degree, and of being a persistent felony offender in the second degree. He received a total sentence of sixty-five years. His convictions were affirmed on direct appeal. *Warren v. Commonwealth*, 2007 WL 541918 (Ky. 2007) (2005-SC-00723-MR). On March 12, 2010, Warren filed a *pro se* RCr 11.42 motion raising multiple arguments, including several claims of ineffective assistance of counsel. The motion was denied without a hearing. This appeal followed.

Warren's arguments relate primarily to the prosecution's attempts to impeach the testimony of the victim of the robbery, Everett Hunter. Hunter was robbed in the Park Hill neighborhood of Louisville by two men, one of whom was carrying a gun. After the robbery, Hunter was forced at gunpoint into the trunk of his car where he remained imprisoned for some time until the fire department was able to assist him in releasing the trunk lid.

Detective John Keeling of the Louisville Metro Police Department testified that he interviewed Hunter on the evening of the robbery. Hunter told him that he knew the man who robbed him, and that he knew him because he hung out at Park Hill and the liquor store across the street. Hunter did not know the man's name but he told Warren to give him a couple of days and he would find out the robber's identity. A few days later, Hunter called the detective and told him that the name of the man who robbed him was Anthony Warren. Keeling prepared a photo pack of pictures of six men similar in description to Warren. Keeling testified that Hunter was able to positively identify Warren as the man who robbed him within seconds of being shown the photo pack lineup.

Assistant Commonwealth Attorney Van De Rostyne, who was not acting as the prosecutor in the case, testified that he spoke with Hunter on the day before trial. According to Van De Rostyne, Hunter expressed extreme reluctance to testify against Warren, and stated that he might change his testimony because he feared retribution against his family.

At trial, Hunter testified that he could not see the robbers' faces clearly because they wore hoodies. He admitted that he thought Warren was the robber, but that this identification was based in part on what he was told by others.

The prosecution attempted to impeach Hunter by pointing out discrepancies between his trial testimony and the earlier statements he had made to Keeling and Van De Rostyne. The prosecution argued that Hunter made a less-definite identification of Warren at trial because he feared retaliation against his family. In his closing argument, the Commonwealth Attorney stated that Hunter had "lied" on the witness stand.

Warren raises three arguments on appeal: (1) that the trial court erred in admitting the testimony of Keeling and Van De Rostyne to impeach Hunter without laying a proper foundation; (2) that Warren's trial counsel rendered ineffective assistance by failing to object to their testimony; and (3) that trial counsel was ineffective for failing to move for a mistrial after the Commonwealth Attorney's statement that Hunter had lied.

Warren's first argument, that the trial court erred in admitting the testimony regarding inconsistencies in Hunter's identification of his assailant, is barred from

our consideration because the claim could have been raised on direct appeal. "It is not the purpose of RCr 11.42 to permit a convicted defendant to retry issues which could and should have been raised in the original proceeding, nor those that were raised in the trial court and upon an appeal considered by this court." *Leonard v. Commonwealth*, 279 S.W.3d 151, 156 (Ky. 2009) *quoting Thacker v. Commonwealth*, 476 S.W.2d 838, 839 (Ky.1972).

We may, however, consider Warren's second argument, that his trial counsel rendered ineffective assistance by failing to object to the testimony.

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), sets forth the standards which measure ineffective assistance of counsel claims. In order to be ineffective, performance of counsel must fall below the objective standard of reasonableness and be so prejudicial as to deprive a defendant of a fair trial and a reasonable result. *Id.* "Counsel is constitutionally ineffective only if performance below professional standards caused the defendant to lose what he otherwise would probably have won." *United States v. Morrow*, 977 F.2d 222, 229 (6th Cir.1992), *cert. denied*, 508 U.S. 975, 113 S.Ct. 2969, 125 L.Ed.2d 668 (1993). Thus, the critical issue is not whether counsel made errors, but whether counsel was so "*manifestly* ineffective that defeat was snatched from the hands of probable victory." *Id.*

In considering ineffective assistance, the reviewing court must focus on the totality of evidence before the trial court or jury, and assess the overall performance of counsel throughout the case in order to determine whether the

alleged acts or omissions overcome the presumption that counsel rendered reasonable professional assistance. *Strickland; see also Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986). A defendant is not guaranteed errorless counsel, or counsel judged ineffective by hindsight, but counsel likely to render reasonably effective assistance. *McQueen v. Commonwealth*, 949 S.W.2d 70 (Ky.1997), *cert. denied*, 521 U.S. 1130, 117 S.Ct. 2536, 138 L.Ed.2d 1035 (1997). The Supreme Court in *Strickland* noted that a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065.

Warren contends that the prosecution failed to lay a proper foundation for Keeling and Van De Rostyne's testimony pursuant to Kentucky Rules of Evidence (KRE) 613(a), which governs the examination of a witness concerning a prior statement. The Rule states in pertinent part:

> Before other evidence can be offered of the witness having made at another time a different statement, he must be inquired of concerning it, with the circumstances of time, place, and persons present, as correctly as the examining party can present them[.]"

The purpose of the rule has been explained thusly by the Kentucky Supreme Court:

> Where it is intended to impeach the witness by proving that he made statements out of court contrary to what he has testified in court, the witness should be asked whether he said or declared that which it is proposed to prove by the impeaching witness, that he did say or

> declare, and the time and place and person to whom the declaration was made should be stated in the question.
>
> The object of the question is to contradict him, and it is but fair to the witness to refresh his recollection as to the declaration or words used and proposed to be proved, and also by stating time, place and other circumstances calculated to refresh his memory.

Noel v. Commonwealth, 76 S.W.3d 923, 930 (Ky. 2002) (citations omitted).

Our review of the record reveals that the requirements of KRE 603(a) were met regarding the testimony of Detective Keeling. On direct examination, Hunter was asked about the time and place of his meeting with Keeling. He testified that he discussed the robbery with Keeling and told him that he probably knew the guys who did it. He further testified that six days later he selected Warren's photo from the lineup, and that the photo was marked with a star. Warren was also examined as to whether he feared retaliation by Warren and whether a court order had been necessary to force him appear in court. This examination adequately fulfills the requirements of KRE 603(a).

Hunter was not, however, directly examined about the time, place and circumstances of the statements he made to Van De Rostyne. But when Van De Rostyne testified as to Hunter's fear of retaliation by Warren, Warren's trial counsel did raise an objection on the grounds that it was improper impeachment because Hunter had never had a chance to explain whether any specific threat against him had been made. Although the objection was not made expressly

pursuant to KRE 603, the aim was substantially the same: to point out that Hunter had not had an opportunity to explain any contradictions in his testimony.

Thus, the trial court correctly concluded that Warren's trial counsel did not render ineffective assistance in her treatment of Keeling and Van De Rostyne's testimony.

Thirdly, Warren argues that his defense counsel was ineffective for failing to move for a mistrial when, during closing arguments, the prosecutor stated that Hunter lied in his trial testimony regarding his identification of Warren. "Opening and closing statements are not evidence and wide latitude is allowed in both." *Wheeler v. Commonwealth*, 121 S.W.3d 173, 180 (Ky.2003). "A prosecutor may comment on tactics, may comment on evidence, and may comment as to the falsity of a defense position." *Slaughter v. Commonwealth*, 744 S.W.2d 407, 412 (Ky. 1987). The statements in this case were made in the context of emphasizing to the jury the prosecution's contention that Hunter and Coleman, another witness to the robbery, were intimidated by Warren and consequently altered their testimony. "Counsel may draw reasonable inferences from the evidence and propound their explanations of the evidence and why the evidence supports their particular theory of the case." *Wheeler*, 121 S.W.3d at 181. We agree with the trial court that the prosecutor properly argued the inferences and evidence before him. The remarks were within the scope of what is permissible in closing arguments and Warren's trial counsel was not therefore ineffective for failing to object.

Finally, an evidentiary hearing on an RCr 11.42 motion "is only required when the motion raises an issue of fact that cannot be determined on the face of the record. To do this, the court must examin[e] whether the record refuted the allegations raised[.]" *Parrish v. Commonwealth*, 272 S.W.3d 161, 166 (Ky.2008) (internal citations and quotation marks omitted). The record clearly refutes Warren's allegations and therefore the trial court correctly determined that an evidentiary hearing on his RCr 11.42 motion was not required.

The order of the Jefferson Circuit Court denying Warren's RCr 11.42 motion without a hearing is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Anthony L. Warren, *Pro se*
Eddyville, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Matthew R. Krygiel
Assistant Attorney General
Frankfort, Kentucky