RENDERED: FEBRUARY 1, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000741-MR

LESTER BOBBITT — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE SUSAN SCHULTZ GIBSON, JUDGE
ACTION NO. 04-CR-1509

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; CAPERTON AND TAYLOR, JUDGES.

CAPERTON, JUDGE: Appellant, Lester Bobbitt, appeals from the denial of his motion for post-conviction relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. He argues that the trial court improperly denied him an evidentiary hearing on his claims that: (1) trial counsel was ineffective for failing to adequately investigate the co-defendant and alibi witnesses; (2) trial counsel was

ineffective for failing to object to the introduction of certain evidence; (3) trial counsel was ineffective for failing to request jury instructions on conspiracy and attempted robbery; (4) trial counsel was ineffective for failing to alert the court of jury misconduct; (5) trial counsel was ineffective for failing to submit more than a perfunctory argument for directed verdict; (6) trial counsel was ineffective for failing to object to the Commonwealth's closing argument; and (7) the trial court failed to consider claims that appellate counsel was ineffective for failing to raise the issues of an improper *Allen*[1] charge to the jury and jury misconduct on direct appeal. After a thorough review of the parties' arguments, the record, and the applicable law, we affirm in part, reverse in part, and remand.

The Supreme Court of Kentucky set forth the underlying facts in an unpublished opinion affirming Bobbitt's conviction on direct appeal as follows:

> On April 2, 2004, the Family Dollar Store on Portland Avenue in Louisville, Kentucky was robbed. Soon after the store had closed for the evening, the assistant manager, Daphne Clarkson, locked the doors and placed the day's cash on top of the safe, while waiting for the time-delay lock to open. Nikisha Robinson, a cashier at the store, told Clarkson she saw money lying outside on the sidewalk. When she unlocked the front door to get the money, a man wearing a ski mask entered the store, grabbed Clarkson's arm, and yelled "Go Go!" Clarkson told the man where the money was and he let her go. She ran to the office and triggered the silent alarm. While in the office, she saw Robinson, on the security monitor, hide behind a jewelry case while the man emptied the cash from the safe. The man took $5280.91 and fled the store.
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> When Detectives Bryan Arnold and Dwane Colebank of the Louisville Metro Police Department arrived at the store, they took a statement from Clarkson. She told them Robinson acted suspiciously that day and she received

[1] *Allen v. United States*, 164 U.S. 422, 17 S.Ct. 154, 41 L.Ed. 528 (1896).

several phone calls at work, including one around 8 p.m. from her boyfriend, William Kinnard. Clarkson also said the voice that yelled “Go Go” was the same as Kinnard's.

When the detectives interviewed Robinson, she admitted she had a role in the robbery. She said the Appellant, a friend of Kinnard's, had approached her about setting up a robbery. She agreed to help and they set up the robbery without Kinnard's knowledge. She said the robbery was supposed to have occurred between 4-5 p.m. The plan was that she would tell Clarkson she needed change, and then, signal the Appellant that the safe was open. However, the Appellant got scared and did not enter when Clarkson saw him approaching the store. She also said she did not know that the Appellant was going to return to the store that evening, and that when she opened the door to get the money on the sidewalk, she did not know he would enter wearing a ski mask and take the cash.

After Robinson's statement, the detectives executed a search of the room she shared with Kinnard at his mother's house. On the front porch, the police found a sweatshirt and headband which was worn by the suspect during the robbery. Inside Kinnard and Robinson's padlocked room, the detectives found two handguns, spent shell casing, and three bindies [sic] of crack cocaine.

Based on the evidence found during the search, Robinson was charged with robbery in the first degree. On the same day, Kinnard was arrested and charged with trafficking in a controlled substance and possession of a firearm by a convicted felon. However, he was not charged in connection with the robbery, even though Clarkson identified him as the perpetrator.
The detectives learned that the Appellant had an outstanding warrant and went to arrest him. However, the Appellant did not surrender and a foot chase pursued. After he was apprehended, Det. Arnold attempted to question him about the robbery, but instead could not since Appellant had to first be treated for injuries he incurred when he was eluding the police. Then, at the

hospital, Det. Arnold read the Appellant his *Miranda* rights and questioned him about the robbery. He stated that he knew of the robbery, but was not involved. He was then arrested and charged with robbery in the first degree. Indictments were returned charging the Appellant and Robinson, each with one count of complicity to robbery in the first degree.

On August 27, 2004, Robinson entered a plea of guilty to complicity to robbery in the first degree. In her plea agreement, she agreed to cooperate and testify truthfully in all proceedings related to this matter and to not commit any new offenses. In return, the Commonwealth agreed to amend the charge to facilitation to robbery in the first degree and to recommend a sentence of five years. Further, the Commonwealth agreed not to object to supervised probation or her being released from jail on her own recognizance pending sentencing. Although the plea was being made pursuant to *North Carolina v. Alford*, she admitted that in Jefferson County on April 2, 2004, she knowingly assisted Appellant in carrying out a robbery of employees at the Family Dollar store at 3022 Portland Avenue.

However, the night before she was scheduled to testify against the Appellant she changed her story. She called Det. Arnold and admitted that Kinnard had planned the robbery, not the Appellant. She stated that Kinnard recruited the Appellant to perform the robbery, but she was not sure whether the Appellant or Kinnard entered the store and stole the money. As a result of this new information, the trial was continued for two weeks, until November 30, 2004.

On the morning of trial, the court noted that Kinnard had entered a plea agreement and his case would be continued for a separate sentencing. Upon hearing this information, the Appellant moved to continue the trial pursuant to *Eldred v. Commonwealth*, 906 S.W.2d 694 (Ky. 1994), arguing that he would need to conduct additional investigations. The motion was denied and jury selection began.

> Trial started on March 3, 2005. The Commonwealth called Clarkson, whose testimony was the same as what she had told them previously. She also testified that earlier on the day of the robbery, she saw the Appellant come to the window in a hooded sweatshirt.
>
> When Robinson took the stand, she testified that Kinnard had discussed, planned, and executed the robbery. She claimed that the initial plan was devised on April 2, 2004, when they decided that Kinnard would stay in the car while the Appellant robbed the store. She testified that the Appellant, however, got spooked when he started to execute the plan because Clarkson had got "two good looks at his face." She admitted she lied to the detectives previously because, at the time, she was in a relationship with Kinnard and was pregnant with his baby, and he had threatened her to keep her from telling the police about his role. At the time of the interview, she had a black eye from an assault by Kinnard. She also admitted to receiving approximately $300 from the robbery.
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> On March 14, 2005, the jury found the Appellant guilty of complicity to robbery in the first degree. The jury recommended a sentence of twenty years but enhanced the sentence to thirty years based on the Appellant's conviction as a PFO.

Bobbitt v. Commonwealth, 2006 WL 2708534 (Ky. 2006)(2005-SC-000487-MR)(footnotes omitted). Bobbitt subsequently filed a motion for post-conviction relief pursuant to RCr 11.42, which the trial court denied without an evidentiary hearing in an order entered on March 28, 2011. This appeal followed.

In order to successfully establish a claim of ineffective assistance of counsel, a movant must satisfy the two-pronged test as outlined in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985):

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland, 466 U.S. at 687, 104 S.Ct. at 2064. The relevant inquiry of the trial court is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694, 104 S.Ct. at 2068. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Evidentiary hearings are not mandatory, but rather only required when "the answer raises a material issue of fact that cannot be determined on the face of the record." RCr 11.42(5). We review a trial court's judgment on an RCr 11.42 motion for abuse of discretion. *Bowling v. Commonwealth*, 981 S.W.2d 545 (Ky. 1998). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Miller v. Eldridge*, 146 S.W.3d 909, 914 (Ky. 2004)(citation omitted). Further, "Conclusionary allegations which are not supported by specific facts do not justify an evidentiary hearing because RCr 11.42 does not require a hearing to serve the function of discovery." *Haight v. Commonwealth*, 41 S.W.3d 436, 442 (Ky. 2001), *overruled on other grounds by*

Leonard v. Commonwealth, 279 S.W.3d 151 (Ky. 2009). Moreover, when the moving party offers no factual support for his assertions, summary dismissal is warranted. *Hensley v. Commonwealth*, 305 S.W.3d 434, 436 (Ky.App. 2010) (citation omitted).

Bobbitt first argues that trial counsel was ineffective for failing to adequately investigate his co-defendant, Kinnard, and two alibi witnesses. Bobbitt stated that had trial counsel investigated Kinnard, Kinnard would have admitted that Bobbitt was not involved in the robbery. Bobbitt also gave the names of two alibi witnesses and the address of the one of these witnesses who would have testified that Bobbitt was painting a house at the time of the robbery.

Bobbitt's statement that Kinnard would have exculpated him is purely speculative and without a factual basis in the record. However, Bobbitt has sufficiently raised an issue regarding the investigation of the named alibi witnesses. The question of whether the named witnesses would have produced alibi testimony had trial counsel properly investigated cannot be conclusively refuted by the record. Therefore, we reverse and remand to the trial court for an evidentiary hearing on this issue.

Second, Bobbitt argues that trial counsel was ineffective for failing to object to the introduction of evidence that Kinnard possessed multiple weapons in his home and that another individual had stolen a car that was later used in the robbery.

Bobbitt's theory of the case was that Kinnard and Nikisha Robinson committed the robbery themselves and used a car that Robinson's brother had stolen. Declining to object to evidence of the stolen car and the weapons found in Kinnard's possession may have been a trial strategy because the evidence could be viewed as deflecting blame from Bobbitt and was consistent with his defense. The court can decide this issue on remand upon hearing the testimony and evidence.

When reviewing ineffective assistance of counsel claims, appellate courts must give wide latitude to trial counsel's judgment and strategies:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. 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. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.

Strickland, 466 U.S. at 689, 104 S.Ct. at 2065 (internal citations and quotations omitted). Nevertheless, we find that a hearing will be necessary to determine this issue.

Bobbitt's third argument is that trial counsel was ineffective for failing to request jury instructions on conspiracy and attempted robbery. Kentucky Revised Statutes (KRS) 506.110 states:

> (1) A person may not be convicted on the basis of the same course of conduct of both the actual commission of a crime and:
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> (a) A criminal attempt to commit that crime; or
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> (b) A criminal solicitation of that crime; or
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> (c) A criminal facilitation of that crime; or
>
> (d) A conspiracy to commit that crime, except as provided in subsection (2) of this section.
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> (2) A person may be convicted on the basis of the same course of conduct of both the actual commission of a crime and a conspiracy to commit that crime when the conspiracy from which the consummated crime resulted had as an objective of the conspiratorial relationship the commission of more than one (1) crime.
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> (3) A person may not be convicted of more than one (1) of the offenses defined in KRS 506.010, 506.030, 506.040 and 506.080 for a single course of conduct designed to consummate in the commission of the same crime.

In this case, the robbery was completed. Therefore, under KRS 506.110, the doctrine of merger eliminates the charges of conspiracy and attempt when the crime is committed. *Wyatt v. Commonwealth,* 219 S.W.3d 751, 759-760 (Ky. 2007). Bobbitt has failed to cite to any authority justifying an exemption from the merger doctrine under the circumstances of this case. Trial counsel was not ineffective for failing to request jury instructions on conspiracy and attempt.

Bobbitt's fourth argument is that trial counsel was ineffective for failing to alert the court of juror misconduct and failing to move for a mistrial. During a recess during the guilt phase of the trial, a juror approached Bobbitt and told him to "watch who he runs with." Bobbitt informed trial counsel, who did not alert the court.

We are persuaded by the reasoning of the First Circuit Court of Appeals which held that unethical conduct by an attorney is not *per se* ineffective:

> If unprofessional conduct (say, shortstopping a rule of court or subornation of perjury), deliberately employed as a means of thwarting the prosecution, was to be deemed per se ineffective assistance, then the accused would be placed in an idyllic situation. If counsel successfully cut the corner, the client would unfairly benefit. On the other hand, if counsel was caught in the act and the stratagem aborted, then the client could fall back on a claimed abridgement of his sixth amendment right to reasonably proficient representation. Either way, the accused would reap a windfall. The notion that this sort of "heads-I-win, tails-you-lose" approach is doctrinally required by the sixth amendment is, we suggest, "a proposition more suitable to Lewis Carroll" than to the lexicon of federal constitutional law.

Chapee v. Vose, 843 F.2d 25, 33 (1st Cir. 1988). In the present case, trial counsel stated on the record at the sentencing phase that the comment was not disclosed because the juror's comment was just as likely to be favorable to Bobbitt as unfavorable in that the juror believed others were more culpable than Bobbitt. Therefore, the failure to disclose the comment was part of trial strategy and was not ineffective assistance.

Bobbitt's fifth argument is that trial counsel was ineffective for failing to submit more than a perfunctory argument for a directed verdict. Bobbitt's argument that trial counsel failed to argue that he lacked the intent that Kinnard commit the robbery as the principal actor is refuted by the record. Our review of the record indicates that trial counsel argued for a directed verdict based on the facts that Bobbitt had only approached the store hours previous to the actual robbery and that there was insufficient evidence to link him to the actual robbery. Trial counsel argued that the evidence implicated only Kinnard and Robinson in the crimes and that there was no evidence that a gun was used in the commission of the robbery. Trial counsel was not ineffective in this regard.

Bobbitt's sixth argument is that trial counsel was ineffective for failing to object to the Commonwealth's closing argument. Bobbitt specifically argues that the Commonwealth referred to a theory of the crime under which Bobbitt was the getaway driver, which was unsupported by the evidence.

It is well-established that attorneys, including prosecutors, are afforded great latitude in making their closing arguments. *Slaughter v. Commonwealth*, 744 S.W.2d 407, 412 (Ky. 1987). When the alleged misconduct occurs during closing arguments, "we must determine whether the conduct was of such an 'egregious' nature as to deny the accused his constitutional right of due process of law." *Id.* at 411–12. During closing argument, "[a] prosecutor may comment on tactics, may comment on evidence, and may comment on the falsity

of the defense position." *Id.* On appeal, we focus on the overall fairness of the trial. *Id.*

Trial counsel objected to remarks about the danger of conspiracies at the outset of the closing argument, which the trial court overruled. The Commonwealth went on to state that the roles in a conspiracy are flexible and often interchange. Trial counsel again objected at the conclusion of the closing argument alleging that the Commonwealth had presented a "golden rule" argument. Upon review of the closing argument as a whole, we find that the statements were a permissible interpretation of the evidence. Trial counsel was not ineffective.

Bobbitt argues that the trial court failed to consider his claims that appellate counsel was ineffective for failing to raise the issues of an improper *Allen* charge[2] to the jury and jury misconduct on direct appeal.

While the trial court did not expressly consider these claims as ineffective assistance of appellate counsel, it nevertheless considered and rejected the arguments under the *Strickland* ineffective assistance of trial counsel standard. This Court can affirm the trial court on any basis supported by the record. *Lee v. Farmer's Rural Elec. Co-op Corp*., 245 S.W.3d 209, 218 (Ky.App. 2007).

[2] We note that the " Allen charge" referred to by the trial court in this case stems from *Allen v. United States*, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896), wherein the United States Supreme Court approved a set of lengthy instructions given to a deadlocked jury. *Id.* at 501–02, 17 S.Ct. at 157. While the " Allen charge" enjoyed a period of acceptance in this Commonwealth, *Earl v. Commonwealth*, 569 S.W.2d 686, 688 (Ky.App. 1978), the wide discretion previously afforded to trial judges in instructing deadlocked juries has since been superseded by RCr 9.57(1).

In *Hollon v. Commonwealth*, 334 S.W.3d 431 (Ky. 2010), the Kentucky Supreme Court held that ineffective assistance of appellate counsel was a proper basis for a motion filed pursuant to RCr 11.42. However, the Court cautioned that a "defendant must establish that counsel's performance was deficient, overcoming a strong presumption that appellate counsel's choice of issues to present to the appellate court was a reasonable exercise of appellate strategy." *Id.* at 436. The Court further stated that a defendant must prove that he was prejudiced by the deficient performance, requiring him to demonstrate that absent the errors, there is a reasonable probability that the appeal would have succeeded. *Id.* at 437.

During the trial, defense counsel became seriously ill and the case was continued several times. The court instructed the jury to report on their last day of service and explained that if the case was not concluded on that day, then the case would have to be retried before another jury.

Before RCr 9.57 is implicated, the jury must be deadlocked. The jury was not deadlocked in this case. When a trial court makes a statement that does not discuss the desirability of a verdict, the issue is not whether the statement complies with RCr 9.57(1), but whether the statement was coercive. *Mills v. Commonwealth*, 996 S.W.2d 473, 493 (Ky. 1999), *overruled on other grounds by Padgett v. Commonwealth*, 312 S.W.3d 336 (Ky. 2010). As set forth in *Bell v. Commonwealth*, 245 S.W.3d 738, 742 (Ky. 2008), *overruled on other grounds by Harp v. Commonwealth*, 266 S.W.3d 813 (Ky. 2008):

> When analyzing whether a trial court has coerced a jury verdict, this Court has explained that the "ultimate test of coercion is whether the instruction actually forces an agreement on a verdict or whether it merely forces deliberation which results in an agreement." We analyze the totality of the circumstances. The time lapse between the alleged coercive comment and the verdict may be relevant as part of the totality of circumstances, though not decisive. "[S]tatements which merely impress upon the jury the propriety and importance of coming to an agreement do not rise to the level of reversible error." At the same time, however, it must be remembered that "the words and acts of a presiding judge have great weight with juries, and for that reason we have often written that he should at all times be cautious in what he says or does in the presence of the jury."

The statement by the court was made four days before the jury retired to deliberate and no comments were made once the jury began its deliberations. The comment to the jury did not prescribe a time limit. The jury returned with its verdict after two hours of deliberation. The jury did not present any questions during its deliberations or otherwise indicate that it encountered difficulties in reaching a verdict. No objection was made to the comment by the trial court. Therefore, upon direct appeal, any argument would have to be reviewed for palpable error. *Schoenbachler v. Commonwealth*, 95 S.W.3d 830, 836 (Ky. 2003). We find that the comment by the trial court was not coercive under *Bell, supra.* Therefore, appellate counsel was not ineffective for failing to raise the unpreserved issue on direct appeal because the argument would not have been successful.

Finally, Bobbitt argues that appellate counsel was ineffective for failing to raise the issue of juror misconduct concerning the comment by a juror that Bobbitt

should "watch who he runs with." As discussed above, the comment was not unduly prejudicial on its face and trial counsel admitted on the record that a conscious decision was made not to reveal the comment to the court because counsel perceived the comment to be favorable to Bobbitt. Because trial counsel viewed the comment as possibly favorable, no contemporaneous objection or motion for a mistrial was raised. The issue would have been reviewed for palpable error. Trial counsel stated on the record that the failure to disclose the comment was a matter of strategy because she thought the comment indicated that the juror was favorable to Bobbitt.

"[T]he trial judge is in the best position to determine the nature of alleged juror misconduct and the appropriate remedies for any demonstrated misconduct." *Ratliff v. Commonwealth*, 194 S.W.3d 258 (Ky. 2006)(quoting *United States v. Sherrill*, 388 F.3d 535, 537 (6th Cir. 2004)). Here, trial counsel was aware of the issue during the guilt phase and chose not to seek disqualification or request other relief. The trial court was not made aware of the issue until the sentencing phase. Certainly, any conversation between a juror and party is improper. However, we cannot conclude that the comment rose to the level of manifest injustice especially as trial counsel conceded during sentencing that the comment was favorable to Bobbitt and counsel admitted making a strategic decision on the issue. Therefore, appellate counsel was not ineffective for failing to raise the unpreserved issue on direct appeal because the argument would have been rejected.

Accordingly, the order of the Jefferson Circuit Court is affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion.

ACREE, CHIEF JUDGE, CONCURS.

TAYLOR, JUDGE, CONCURS IN RESULT ONLY.

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