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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001562-MR

JONATHAN LEVI JOHNSON — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BRIAN C. EDWARDS, JUDGE
ACTION NO. 09-CR-000191

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, DIXON, AND VANMETER, JUDGES.

VANMETER, JUDGE: Jonathan Levi Johnson appeals from the Jefferson Circuit Court's order which denied his RCr[1] 11.42 motion for post-conviction relief. For the following reasons, we affirm.

Johnson was convicted by a Jefferson Circuit Court jury of first-degree robbery, first-degree assault, second-degree assault, first-degree persistent felony

[1] Kentucky Rules of Criminal Procedure.

offender, and sentenced to twenty-four years' imprisonment. His conviction and sentence were affirmed on direct appeal by the Kentucky Supreme Court. *Johnson v. Commonwealth*, 2009-SC-000727-MR, 2011 WL 1103346 (Ky. Mar. 24, 2011). In that opinion, the Supreme Court described the facts underlying the crimes as follows:

> On September 18, 2008, Appellant forced his way into Gerald Kleinhenz' home. He encountered Kleinhenz' friend, Bridget Elder, just inside the door. Elder recognized Appellant from times when she had observed him smoking cocaine. Appellant attempted to shoot her point-blank in the head, but his shotgun misfired. After this shooting failure, he stabbed her multiple times in the chest. Appellant then turned to Kleinhenz, knocked him to the floor, and attempted to shoot him as well, but once again, the gun misfired. Undeterred by his malfunctioning shotgun, Appellant demanded money from Kleinhenz, who tossed him $40 in cash. Appellant grabbed the money and left.
>
> After Appellant fled, Elder called 911 to report the incident. On the call, Elder described how she had been stabbed multiple times in the chest. She further exclaimed that she was dying from the wounds and wanted to talk to her mother and children. A recording of this call was played for the jury at trial.

Id. at *1. Following the Supreme Court's affirmation of his conviction and sentence on direct appeal, Johnson filed an RCr 11.42 motion with the trial court, which the court denied. Johnson now appeals.

On appeal, Johnson alleges that he received ineffective assistance of both trial and appellate counsel. He claims that his convictions of first-degree robbery and second-degree assault, both pertaining to Kleinhenz, violate the double

jeopardy provision of the Kentucky Constitution and that his attorneys violated his constitutional right to effective assistance of counsel by failing to object or raise this issue. We disagree.

In order to prove ineffective assistance of counsel, a defendant must show: (1) that counsel's representation was deficient in that it fell below an objective standard of reasonableness, measured against prevailing professional norms; and (2) that he was prejudiced by counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); adopted by *Gall v. Commonwealth,* 702 S.W.2d 37, 39 (Ky. 1985). In determining whether the specified errors resulted in the required prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland,* 466 U.S. at 694, 104 S.Ct. at 2068. Judicial review of performance of defense counsel is deferential to counsel and a strong presumption exists that the conduct of counsel falls within the wide range of reasonable professional assistance. *Id.* at 689, 104 S.Ct. at 2065.

In order to establish the deficient performance of appellate counsel, a defendant "'must first show that his counsel was objectively unreasonable . . . in failing to find arguable issues to appeal – that is, that counsel unreasonably failed to discover nonfrivolous issues and to file a merits brief raising them.'" *Hollon v. Commonwealth*, 334 S.W.3d 431, 436 (Ky. 2010) (quoting *Smith v. Robbins*, 528

U.S. 259, 285, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000)). If the defendant can make such a showing, "the defendant must also establish that he or she was prejudiced by the deficient performance, which, as noted, requires a showing that absent counsel's deficient performance there is a reasonable probability that the appeal would have succeeded." *Hollon*, 334 S.W.3d at 437.

The double jeopardy clause of the Fifth Amendment to the United States Constitution guarantees that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb[.]" U.S. Const. Amend. V. Section 13 of the Kentucky Constitution includes a virtually identical provision. *Commonwealth v. Burge*, 947 S.W.2d 805, 809 (Ky. 1996). Kentucky employs the *Blockburger* "same-elements test" to determine whether multiple convictions have been improperly imposed for the same conduct in violation of the double jeopardy clause. *Kiper v. Commonwealth*, 399 S.W.3d 736, 741 (Ky. 2012) (citing *Burge*, 947 S.W.2d at 811 (reinstating double jeopardy analysis set forth in *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306, 309 (1932))). Under the *Blockburger* analysis,

> where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. Pursuant to this test, [a] defendant is put in double jeopardy when he is convicted of two crimes with identical elements, or where one is simply a lesser-included offense of the other.

Kiper, 399 S.W.3d at 742 (internal citations and quotations omitted).

With regards to Johnson's conviction of robbery in the first degree, KRS[2] 515.020(1) defines that offense as follows:

> A person is guilty of robbery in the first degree when, in the course of committing a theft, he uses or threatens the immediate use of physical force upon another person with intent to accomplish the theft and when he:
>
> (a) Causes physical injury to any person who is not a participant in the crime; or
>
> (b) Is armed with a deadly weapon; or
>
> (c) Uses or threatens the use of a dangerous instrument upon any person who is not a participant in the crime.

In this case, the Commonwealth pursued a theory of guilt for first-degree robbery under KRS 515.020(1)(a), which requires a finding by the jury that Johnson caused Kleinhenz physical injury during the course of and with the intent to accomplish a theft. Accordingly, the jury was instructed to find Johnson guilty if (a) he stole money from Kleinhenz and (b) in the course of doing so and with the intent to accomplish the theft caused physical injury to Kleinhenz by striking him in the head with a gun and/or by cutting him with a knife. The key elements of this instruction were the theft and the physical injury caused during the course of the theft. KRS 515.020(1)(a) does not require the use of or threat to use a dangerous instrument.

KRS 508.020(1) defines assault in the second degree as follows:

> A person is guilty of assault in the second degree when:

[2] Kentucky Revised Statutes.

> (a) He intentionally causes serious physical injury to another person; or
>
> (b) He intentionally causes physical injury to another person by means of a deadly weapon or a dangerous instrument; or
>
> (c) He wantonly causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument.

The Commonwealth sought to convict Johnson of second-degree assault pursuant to KRS 508.020(1)(b) under a theory that he intentionally caused Kleinhenz physical injury by means of a dangerous instrument. The assault instruction required the jury to find that Johnson (a) intentionally caused physical injury to Kleinhenz by striking him in the head with a gun and (b) the gun was a dangerous instrument. The key elements of this instruction were the intentional infliction of physical injury and the use of a dangerous instrument.

Contrary to Johnson's assertion, the first-degree robbery and second-degree assault convictions each required proof of an element the other did not. The robbery conviction required an element of theft that the assault conviction did not require. And the physical injury for the robbery conviction need not have been intended. By contrast, the assault conviction required the use of a dangerous instrument that the robbery conviction did not require and the physical injury must have been intentional. The fact that the robbery instruction identified a gun and/or knife as the weapon used to inflict the injury is immaterial. As charged in this case, the second-degree assault was not a lesser-included offense of first-degree

robbery. *See Howell v. Commonwealth*, 296 S.W.3d 430, 433 (Ky. App. 2009) ("if robbery requires an element of proof that assault does not, and if assault requires an element of proof that robbery does not, assault cannot be a lesser-included offense of robbery[]") (citing *Taylor v. Commonwealth*, 995 S.W.2d 355, 358-60 (Ky. 1999); *Polk v. Commonwealth*, 679 S.W.2d 231, 233-34 (Ky. 1984)). In the present case, each offense required proof of an element not required by the other so no double jeopardy violation occurred. Since Johnson has failed to show a violation of double jeopardy, neither his trial nor appellate counsel could have been ineffective for failing to object or otherwise raise the issue.

The Jefferson Circuit Court's order denying Johnson's motion for RCr 11.42 relief is affirmed.

ALL CONCUR.

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