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Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000355-MR

JASON LEE TODD — APPELLANT

v.

APPEAL FROM WOODFORD CIRCUIT COURT
HONORABLE ROBERT G. JOHNSON, JUDGE
ACTION NOS. 06-CR-00081 & 06-CR-00097

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, MAZE, AND TAYLOR, JUDGES.

MAZE, JUDGE: Jason Lee Todd appeals from an order of the Woodford Circuit Court which denied his motion to alter, amend or vacate his conviction pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42. He argues that his trial counsel was ineffective for failing to subpoena a non-testifying witness for a competency hearing. Based on the prior ruling by the Kentucky Supreme Court on direct

appeal, we agree with the trial court that Todd did not suffer any prejudice as a result of his trial counsel's actions. Hence, we affirm.

On November 1, 2006, a Woodford County grand jury returned an indictment charging Todd with Murder and Tampering with Physical Evidence. The indictment alleged that, on August 4, 2006, Todd strangled Valerie Monjure and then concealed physical evidence of the crime. In a separate indictment, the grand jury charged Todd with first-degree assault, arising from the stabbing of Patricia "June" Brown. Since the charges arose on the same date and out of the same series of events, the trial court ordered the indictments consolidated.

The matter proceeded to a jury trial in April of 2008. In a prior appeal, the Kentucky Supreme Court summarized the evidence against Todd as follows:

> The evidence at trial established that Valerie was strangled to death, and that Patricia was stabbed in the neck with a two-prong barbecue fork. At the time of the crime, Valerie was living with her friend Patricia. Patricia's daughter, Whitney, also lived with them, as did Valerie's adult daughter, Jennifer Brown.
>
> According to Patricia's testimony, on the night of the crimes, she and Valerie fell asleep in the living room. In the early morning hours, Patricia awoke to find she was being attacked by a man whom she described as having strawberry blond hair. During her testimony, Patricia had difficulty remembering what happened and the order of the events, including when she suffered the stab wound. She first testified that when she awoke, she had a burning sensation in her neck and was covered in blood. But when she complained that she had difficulty remembering, and her memory was refreshed by an earlier statement she had given to police right after the incident, she claimed that she awoke with a plastic bag

on her face and she pulled it off. According to the statement, the man with the strawberry blond hair then attacked her with an item that turned out to be a barbecue fork, implying that the stabbing occurred after she awoke. She fought the man off, taking the barbecue fork from his hand and stabbing him with it. She testified that the man then left the house.

As the attack was occurring, Jennifer Brown came into the living room. She testified that she had been awakened by a scream from the living room. When she walked into the living room, she saw a stocky white man with strawberry blond hair standing over her mother. The man looked startled, and Patricia yelled, "You were trying to kill me ..., you were trying to smother me!" Jennifer testified that the man claimed that a black man had assaulted Patricia and that he had only come into the house to assist her. He then walked out of the house and drove away in an orange or red pickup truck.

Jennifer testified that Patricia had been stabbed in the neck with the barbecue fork and that Valerie was lying on the floor. Valerie had no pulse and felt warm but clammy to the touch. She had urinated and had foam at the corners of her mouth. Patricia called 911.

Both Jennifer and Patricia identified Appellant as the man who had been in the house, both in a photo line-up and in court during their testimony.

In the course of the subsequent investigation of the crime, Appellant's name came up. Detective Beth Thompson discovered that Appellant owned a truck matching the description given by Jennifer Brown. Detective Thompson went to Appellant's house to question him. Appellant admitted that he knew Valerie Monjure and that they had "messed around," but he claimed it had been several months since he had been in her home. After asking some questions, Detective Thompson noticed two drops of blood on Appellant's shorts. She told him she "needed those shorts." She also asked to search Appellant's truck and home. Appellant consented to the search and even signed a consent form. Detective Thompson first searched his truck, but found nothing. When she returned to the house, Appellant's wife, who appeared very upset, brought out a bloody t-

shirt that had been in the washing machine. Appellant was then taken into custody.

The t-shirt had two holes in it that, according to testimony from the crime lab, were consistent with being made by the barbecue fork. The blood on Appellant's shorts was found to be a mixture of his own and Patricia's. He also had a pair of puncture wounds under his left arm.

During a subsequent police interview, Appellant admitted to having been at Valerie's home the day of the crime. He had been drinking and had taken Xanax. He claimed he had sex with Valerie and then passed out on a loveseat in the living room but was awakened some time later by a commotion. He saw a "dark" man with tattoos on his stomach and arms run out the door. He tried to grab an object in the man's hand, but it slipped out of his grasp. He claimed that he then noticed a woman on the couch with blood on her and that she and another woman present were pointing at him. He left because he did not want to be blamed for the attack. During the interview, Appellant also explained that the holes in his shirt and the wounds under his arm must have come from barb wire that he had been working with earlier in the week.

Appellant's defense theory was presented through cross-examination of the prosecution's witnesses, primarily of Detective Thompson. Defense counsel elicited testimony about a man named Julian Kemeny, who had been a person of interest early in the investigation. Kemeny had a history of strange behavior, including strange diary entries about sacrificing people. He had also claimed to have been at Patricia's home the night before or possibly the night of the crimes, and that something like an affair had been going on between him and Patricia. Detective Thompson had not investigated him further, however, because he did not match the description of the other man given by Appellant, as he had no tattoos, and the women stated that there was only one man in the house. This latter point was contradicted at least once at trial by one of the officers who went to the hospital. He testified that Patricia had stated that a black male and a white male had been in the house.

Todd v. Commonwealth, No. 2008-SC-000410-MR, 2009 WL 3526650 at 1-2 (Ky. 2009).

The jury found Todd guilty of murder, first-degree assault, and tampering with physical evidence. He was sentenced to twenty-eight years in prison. The Kentucky Supreme Court affirmed his conviction on direct appeal. *Id.*

Subsequently, on March 29, 2010, Todd filed a motion to vacate, set aside or correct his sentence pursuant to RCr 11.42. In his motion, Todd alleged that he had received ineffective assistance from his trial counsel. The court appointed counsel, who supplemented Todd's *pro se* motion. The trial court conducted an evidentiary hearing on the motion. Following that hearing, the trial court issued findings of fact, conclusions of law, and an order denying Todd's motion. This appeal followed.

Todd argues that his trial counsel provided him with ineffective assistance, and that he was substantially prejudiced as a result. In order to prevail on an ineffective assistance of counsel claim, a movant must show that his counsel's performance was deficient and that, but for the deficiency, the outcome would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). The standard for assessing counsel's performance is whether the alleged acts or omissions were outside the wide range of prevailing professional norms based on an objective standard of reasonableness. *Id.* at 688–89, 104 S. Ct. at 2065. A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.

Id. The defendant bears the burden of identifying specific acts or omissions alleged to constitute deficient performance. *Id.* at 690, 104 S. Ct. at 2066.

In measuring prejudice, the relevant inquiry is whether "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." *Id.* at 694, 104 S. Ct. at 2068. The burden is on the movant to overcome a strong presumption that counsel's performance was constitutionally sufficient. *Id.* at 689, 104 S. Ct. at 2065; *Commonwealth v. Pelfrey*, 998 S.W.2d 460, 463 (Ky. 1999). When an evidentiary hearing is held in an RCr 11.42 proceeding, RCr 11.42(6) requires the trial court to make findings on the material issues of fact, which we review under a clearly erroneous standard. Kentucky Rule of Civil Procedure (CR) 52.01; *Haight v. Commonwealth*, 41 S.W.3d 436, 442 (Ky. 2001).

Todd focuses on his trial counsel's failure to subpeona Whitney Monjure for a competency hearing. Whitney was 19 years old at the time of the crime and has Down's Syndrome. Whitney made statements to Patricia and Jennifer Brown that "Jason hurt me," and "Jason hurt her." Prior to trial, Todd's counsel moved to have these statements excluded on the ground that Whitney was incompetent. The trial court declined to declare Whitney incompetent without holding a competency hearing, and declined to hold a hearing because Whitney was not going to testify at trial. Patricia and Jennifer Brown both testified concerning Whitney's statements to them. On both occasions, the trial court

admonished the jury that the witnesses' mention of Todd's name was admissible but that they should disregard the rest of the statement as it was inadmissible.

Todd argues that his trial counsel should have subpoenaed Whitney for a competency hearing pursuant to Kentucky Rule of Evidence (KRE) 601. Had he done so, Todd asserts that her hearsay statements would not have been admissible for any purpose. Along similar lines, Todd contends that Whitney's hearsay statements to Patricia and Jennifer Brown would not have been admissible as excited utterances if his counsel had obtained a competency ruling prior to trial.

On direct appeal, the Kentucky Supreme Court suggested that the statements may not have been admissible as excited utterances if Whitney had been found to be incompetent. *Id.* at 5-6. However, the Court could not determine whether Whitney was incompetent because no hearing was conducted. At the subsequent hearing on the RCr 11.42 motion, Todd's counsel did not attempt to introduce any new evidence regarding Whitney's testimonial competence at the time the statements were introduced. Consequently, we still lack a sufficient record to determine whether trial counsel had a reasonable basis to subpoena Whitney for a competency hearing.

Moreover, the Supreme Court concluded that Todd was not prejudiced from the trial court's failure to conduct a competency hearing:

> [A]ny error related to the trial court's failure to evaluate Whitney's testimonial competency was cured by the admonitions given to the jury when the out-of-court statements were repeated by Jennifer and Patricia Brown. Both times the trial court instructed the jury not to

> consider the substance of the statements, going so far the second time as to tell that jury that Whitney had not been injured, thus undermining the assertion in the statement. "A jury is presumed to follow an admonition to disregard evidence and the admonition thus cures any error." *Johnson v. Commonwealth*, 105 S.W.3d 430, 441 (Ky. 2003).

Todd, 2009 WL 3526650 at 7.

The Supreme Court further found that the exception to the curative admonition rule does not apply because Whitney's statement was not "devastating to the defendant[.]" *Id.*, citing *Johnson*, 105 S.W.3d at 441. Given the law of the case, we cannot find that Todd suffered any prejudice from his trial counsel's failure to subpoena Whitney for a competency hearing.

Todd also asserts his trial counsel improperly elicited Whitney's hearsay statements from Detective Thompson. Several days after the attack, Whitney made several statements to Detective Thompson during an interview in which she said the name "Jason Todd." At trial, Detective Thompson testified on cross-examination that she first heard Todd's name during the interview with Whitney, and she commenced her investigation of him based on that lead.

In rejecting Todd's claim of ineffective assistance of counsel, the trial court again noted that the Kentucky Supreme Court had addressed this issue on direct appeal. The Supreme Court noted that the parties had agreed that Whitney's mention of Todd's name to Detective Thompson would be admissible to explain why she began to investigate Todd. Detective Thompson did not repeat the actual statements which Whitney made. *Id.* at 4-5. Given the limited scope of this

testimony and the parties' pre-trial agreement, we cannot find that Todd suffered any prejudice as a result of his trial counsel's cross-examination.

Finally, Todd argues that he was prejudiced by the cumulative effect of these errors by trial counsel. Since Todd has failed to show prejudice from the individual allegations of ineffective assistance of counsel, we likewise find no cumulative effect justifying relief. *Simmons v. Commonwealth*, 191 S.W.3d 557, 568 (Ky. 2006).

Accordingly, the order of the Woodford Circuit Court denying Todd's RCr 11.42 motion is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Amy Robinson Staples
Margaret Ann Ivie
Christine Jane Foster
Assistant Public Advocates
Department of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

James Havey
Assistant Attorney General
Frankfort, Kentucky