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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001160-MR

KENNETH GATEWOOD — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BRIAN C. EDWARDS, JUDGE
ACTION NO. 08-CR-001184

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, COMBS AND STUMBO, JUDGES.

STUMBO, JUDGE: Kenneth Gatewood appeals from an order of the Jefferson Circuit Court which denied his motion to vacate judgment pursuant to RCr 11.42. Appellant alleged that his trial counsel was ineffective; therefore, his conviction should be vacated. We find no error in the judgment of the trial court and affirm.

Appellant was charged with the murder of Kerivan Vargas. At trial, Rochelle Jackson testified that she witnessed Appellant shoot and kill Mr. Vargas. Additionally, Ron and Nina Stevenson testified that Appellant confessed to them that he had killed Mr. Vargas. Derrick Smalls testified on behalf of the defense and stated that Ms. Jackson was with him at the time of the shooting; therefore, she could not have witnessed the murder. Appellant also testified at trial and denied shooting Mr. Vargas. A jury convicted Appellant of the murder and he was sentenced to thirty years' imprisonment. His conviction was subsequently affirmed by the Kentucky Supreme Court. Appellant then filed a motion pursuant to RCr 11.42 in which he alleged multiple instances of ineffective assistance of counsel. After holding a hearing on the issues, the trial court denied the motion and this appeal followed. Further facts will be discussed as they become relevant to our analysis.

To prevail on a claim of ineffective assistance of counsel, Appellant must show two things:

> 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.

Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). "[T]he proper standard for attorney performance is that of reasonably effective assistance." *Id.*

> An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.

Id. at 691-692 (citations omitted). "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693. "The 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." *Id.* at 694.

> 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." There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.

Id. at 689-690 (citations omitted). "Appellant is not guaranteed errorless counsel or counsel that can be judged ineffective only by hindsight, but rather counsel rendering reasonably effective assistance at the time of trial." *Parrish v. Commonwealth*, 272 S.W.3d 161, 168 (Ky. 2008) (citations omitted).

> At the trial court level, "[t]he burden is upon the accused to establish convincingly that he was deprived of some substantial right which would justify the extraordinary relief afforded by ... RCr 11.42." On appeal, the reviewing court looks *de novo* at counsel's performance and any potential deficiency caused by counsel's performance.
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> And even though, both parts of the *Strickland* test for ineffective assistance of counsel involve mixed questions of law and fact, the reviewing court must defer to the determination of facts and credibility made by the trial court. Ultimately however, if the findings of the trial judge are clearly erroneous, the reviewing court may set aside those fact determinations. CR 52.01 ("[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witness.") The test for a clearly erroneous determination is whether that determination is supported by substantial evidence. This does not mean the finding must include undisputed evidence, but both parties must present adequate evidence to support their position.

Brown v. Commonwealth, 253 S.W.3d 490, 500 (Ky. 2008) (citations omitted).

Appellant's first argument on appeal is that his trial counsel was ineffective for failing to follow the procedures set forth in RCr 9.04 regarding a missing witness. RCr 9.04 states:

> The court, upon motion and sufficient cause shown by either party, may grant a postponement of the hearing or trial. *A motion by the defendant for a postponement on account of the absence of evidence may be made only upon affidavit showing the materiality of the evidence expected to be obtained, and that due diligence has been used to obtain it*. If the motion is based on the absence of a witness, the affidavit must show what facts the affiant believes the witness will prove, and not merely the effect of such facts in evidence, and that the affiant believes them to be true. If the attorney for the Commonwealth consents to the reading of the affidavit on the hearing or trial as the deposition of the absent witness, the hearing or trial shall not be postponed on account of the witness's absence. If the Commonwealth does not consent to the reading of the affidavit, the granting of a continuance is in the sound discretion of the trial judge. (Emphasis added).

Trial counsel had subpoenaed Antonio Williamson to testify at trial for the defense. Mr. Williamson was to testify on June 24, 2009. Mr. Williamson did not appear to testify. After making his opening statement, Appellant's trial counsel called two witnesses to the stand to testify. At the conclusion of the second witness' testimony, Appellant's trial counsel asked the trial court to break for lunch because Mr. Williamson was not present. During a bench conference, defense counsel stated that Mr. Williamson would testify that he was inside his mother's home when he heard the gunshots that killed Mr. Vargas. Further, when he heard the gunshots, he ran outside and encountered Appellant. Based on his location,

Mr. Williamson would have testified that there is no way Appellant could have been the shooter. Mr. Williamson would have testified that it would have been impossible for Appellant to have shot Mr. Vargas and made it to Mr. Williamson's mother's house by the time he got outside.

The trial court did not grant a continuance, but allowed the Commonwealth to put on a rebuttal witness. The court then broke for lunch in part to allow defense counsel time to locate Mr. Williamson. After lunch, Appellant took the stand and testified on his own behalf. Toward the conclusion of the cross-examination of Appellant, a bench conference was called. Defense counsel asked for a continuance until the following day in order to find Mr. Williamson. The trial court denied the motion. Following Appellant's testimony, defense counsel went into the hallway to see if Mr. Williamson was present. He was not and Appellant's case was concluded.

The Commonwealth then called a rebuttal witness to testify. After this witness testified, another bench conference ensued. Appellant's counsel again asked for a continuance until the next day in order to locate Mr. Williamson and allow him to testify. The trial court denied the motion stating that the case had been ongoing for more than a year, that this was the second trial date scheduled, and that the trial had been set six months prior. The court believed defense counsel had sufficient time to ensure Mr. Williamson's testimony, but failed to do so.

On direct appeal, Appellant argued that the trial court had erred by denying trial counsel's request for a continuance in order to locate Mr. Williamson. The

Kentucky Supreme Court rejected the argument because trial counsel did not submit an affidavit in support of his motion to continue as required by RCr 9.04. Appellant now argues that if trial counsel had submitted the affidavit it would have been reversible error for the trial court to deny the continuance request.

"The granting of a continuance on account of absent witnesses rests within the sound discretion of the trial court, and his action will not be disturbed except where it is clearly shown that there has been an abuse of discretion." *Cornwell v. Commonwealth*, 523 S.W.2d 224, 227 (Ky. 1975) (*citing Toler v. Commonwealth*, 295 Ky. 105, 173 S.W.2d 822 (1943)). We believe that Appellant cannot satisfy the prejudice prong of *Strickland* because the trial court did not abuse its discretion in denying the continuance.

Defense counsel fully believed that Mr. Williamson would cooperate and comply with the subpoena to testify. Also, counsel tried to locate Mr. Williamson on the day he was to testify. Counsel called the phone number Mr. Williamson had given to him. The person who answered stated that Mr. Williamson was not there and they did not know where he currently was. It is also worth noting that the trial court did not deny the motions for continuance because defense counsel failed to file an affidavit. The court denied the motions because it believed it was unlikely Mr. Williamson could be located and the court desired to move forward with the trial. Finally, even if defense counsel had submitted an affidavit, the Kentucky Supreme Court might have still affirmed the trial court's decision.

"The 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. This is a high standard to meet. We do not believe Appellant has met it.

Appellant's next argument on appeal is that his trial counsel was ineffective for failing to investigate and call Monte Turner as a witness. Two defense witnesses, Derrick Smalls and Concha Robinson, testified that Ms. Jackson was with them when the shooting occurred and that she could not have witnessed it as she testified. These two individuals also testified that Monte Turner was with them. This testimony revealed that Mr. Smalls, Ms. Robinson, Mr. Turner, and Ms. Jackson were allegedly on the back porch of a residence near the location of the shooting when the murder occurred. Appellant argues that Ms. Jackson's eyewitness testimony would have been further called into question if Mr. Turner had also testified she could not have witnessed the murder.

In the trial court's order denying Appellant's RCr 11.42 motion, it stated that the evidence Mr. Turner would have proffered at trial was already before the jury through the testimony of the two other defense witnesses. It also stated that the testimony would have only been cumulative and not changed the outcome of the proceeding. We agree. Mr. Smalls and Ms. Robinson had testified that Ms. Jackson could not have witnessed the murder. Further, this court has watched the video recording of the RCr 11.42 hearing. During the hearing, Mr. Turner testified

that while he was initially on the porch with the other individuals, he left the porch before the shooting. Had Mr. Turner testified to this at the trial, this could have undermined the testimony of Mr. Smalls and Ms. Robinson. Mr. Turner's testimony would have contradicted that of Mr. Smalls and Ms. Robinson. Appellant was not prejudiced by defense counsel's failure to call Mr. Turner as a witness.

Appellant next argues that his trial counsel was ineffective for failing to object to three alleged instances of prosecutorial misconduct. The first instance occurred when defense counsel failed to object to the Commonwealth asking Mr. Smalls whether Detective Hoffman was lying in regard to whether Mr. Smalls made statements inconsistent with his trial testimony when he was interviewed by the detective during the investigation of the shooting. Specifically, when Mr. Smalls was interviewed by the detective, he stated that he was inside his mother's house at the time of the shooting and heard two shots. During the trial, his testimony was that he was on the porch of his mother's house at the time of the shooting and only heard one shot.

The Commonwealth's question was clearly a violation of *Moss v. Commonwealth*, 949 S.W.2d 579 (Ky. 1997), and trial counsel should have objected. In *Moss*, the Kentucky Supreme Court stated that "[a] witness should not be required to characterize the testimony of another witness, particularly a well-respected police officer, as lying. Such a characterization places the witness in

such an unflattering light as to potentially undermine his entire testimony." *Id.* at 583.

Although trial counsel should have objected to this question, we do not believe his failure to do so prejudiced Appellant. The defense counsel in *Moss* also failed to object to this type of question, so the Kentucky Supreme Court analyzed it using the palpable error standard.

> A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

RCr 10.26. "[I]f upon consideration of the whole case the reviewing court does not conclude that a substantial possibility exists that the result would have been any different, the error complained of will be held to be nonprejudicial." *Jackson v. Commonwealth*, 717 S.W.2d 511, 513 (Ky. App. 1986) (citation omitted).

Like the palpable error standard, *Strickland* requires that there be a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. The Court in *Moss* did not believe this line of questioning was palpable error. Likewise, we do not believe defense counsel's failure to object was so egregious as to undermine the result of the trial.

The next alleged instance of prosecutorial misconduct occurred during the Commonwealth's closing argument and its characterization of Mr. Smalls' testimony. The Commonwealth Attorney stated:

> [Smalls is] a little punk on a crack leash. I could walk into Sheppard Square right now with a bag of crack and I could have ten people in here saying whatever you want them to say. They'd come in here and tell you it's Sunday and that's exactly what he is. That's his dealer. That's his armed dealer. That's his street tough dealer. That's his hood thug dealer. And he depends on him for the crack and he doesn't want to cross him, so he's going to get his ass up here in the chair and say whatever he wants him to say.

The testimony at trial revealed that Appellant had sold crack cocaine to Mr. Smalls on multiple occasions. Appellant argues that the Commonwealth was implying that Appellant bought Mr. Smalls' testimony with drugs and that defense counsel should have objected. We find that there was no error on the part of trial counsel in failing to object because this statement was a reasonable inference from the evidence presented at trial and does not support Appellant's argument that the Commonwealth was inferring that Mr. Smalls' testimony was bought.

> Counsel has wide latitude during closing arguments. The longstanding rule is that counsel may comment on the evidence and make all legitimate inferences that can be reasonably drawn therefrom. This Court recently explained the appropriate standard of review for prosecutorial misconduct during closing arguments, stating that reversal is required "only if the misconduct is 'flagrant' or if each of the following are satisfied: (1) proof of defendant's guilt is not overwhelming; (2) defense counsel objected; and (3) the trial court failed to cure the error with sufficient admonishment." Additionally, this Court "must always consider these closing arguments 'as a whole.' "

Padgett v. Commonwealth, 312 S.W.3d 336, 350 (Ky. 2010) (citations omitted).

This issue was discussed during Appellant's direct appeal and we find that discussion helpful.

> Unquestionably, the prosecution's closing argument sought to characterize (and thereby attack) Small's motive to testify.[FN7] Yet, Appellant does not contest that evidence had been introduced showing that Appellant had, on prior occasions, supplied Small with controlled substances. Accordingly, "enough evidence was introduced to make the prosecutor's inference reasonable."
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> > FN7. According to Appellant, the closing conveyed that, because Appellant was a drug dealer, he would stoop to anything, including inducing a witness to testify for him, in order to be acquitted of a crime. As a result, Appellant asserts that the closing amounts to an introduction of evidence and his argument focuses on probativeness and prejudicial value. In reviewing the closing, we view the prosecutor's statement as a general assault on Small's motive, premised upon evidence admitted; we cannot say that the prosecutor introduced evidence of a definitive transaction between Appellant and Small to "buy" testimony. Accordingly, Appellant's claim of error encompasses an entirely different review than a claim of evidentiary error.
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> Because the prosecutor's inference was reasonable, and in light of the wide latitude afforded parties during closing, we find no error.

Gatewood v. Commonwealth, 2011 WL 2112566, 8 (Ky. 2011) (citation omitted). We agree with the Kentucky Supreme Court that the Commonwealth Attorney's statement was reasonable based on the evidence presented at trial; therefore, Appellant's trial counsel did not err when he failed to object.

Appellant's last alleged instance of prosecutorial misconduct occurred during the penalty phase of trial when the Commonwealth Attorney argued for a stiffer penalty based upon what Appellant might do in the future, i.e., his future dangerousness. Appellant claims his trial counsel was ineffective for failing to object to this request of a harsher penalty.

We find trial counsel was not ineffective in relation to this issue for two reasons. First, Appellant's sentence range for murder was 20 to 50 years. The jury gave him 30 years. The jury did not give Appellant the maximum sentence; therefore, prejudice is hard to prove. Second, the Commonwealth Attorney's statement was not prosecutorial misconduct; therefore, Appellant's counsel had no duty to object. "The United States Supreme Court 'has approved the jury's consideration of future dangerousness during the penalty phase of a capital trial, recognizing that a defendant's future dangerousness bears on all sentencing determinations made in our criminal justice system.' *Simmons v. South Carolina,* 512 U.S. 154, 162, 114 S.Ct. 2187, 2193, 129 L.Ed.2d 133 (1994)." *Hodge v. Commonwealth*, 17 S.W.3d 824, 853 (Ky. 2000); *see also Woodall v. Commonwealth*, 63 S.W.3d 104, 125 (Ky. 2001).[1]

Appellant's final argument on appeal is that he was prejudiced by the cumulative effect of his trial counsel's deficiencies. We find this argument without merit. "In view of the fact that the individual allegations of ineffective assistance

[1] Although the case at hand was not a capital case, we believe future dangerousness is relevant to the penalty phase and have previously stated such in *Alexander v. Commonwealth*, 2009 WL 2834957 (Ky. App. 2009).

of counsel are unconvincing, they can have no cumulative effect. *McQueen v. Commonwealth*, 721 S.W.2d 694 (Ky. 1986)[.]" *Sanborn v. Commonwealth*, 975 S.W.2d 905, 913 (Ky. 1998) (overruled on other grounds by *Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009)).

For the foregoing reasons, we affirm the judgment of the Jefferson Circuit Court.

ALL CONCUR.

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