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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2012-CA-002181-MR

NORMAN GRAHAM

APPELLANT

v. APPEAL FROM TODD CIRCUIT COURT
HONORABLE DAVID H. JERNIGAN, JUDGE
ACTION NO. 07-CR-00001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: ACREE, CHIEF JUDGE; JONES AND NICKELL, JUDGES.

JONES, JUDGE: Appellant, Norman Graham, appeals from the Todd Circuit Court's decision to deny his motion to alter, amend, or vacate pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. For the reasons that follow, we affirm.

I. BACKGROUND

In the early morning hours of June 30, 1980, Graham's girlfriend, Kay Williams, was raped and stabbed to death in a trailer she and Graham shared. Graham was charged with the murder in 1981, and the resulting trial ended with a hung jury. Lacking physical evidence, the Commonwealth dismissed the indictment without prejudice.

The case remained largely dormant until 2008 when new DNA technology enabled the Commonwealth to test some of the evidence collected at the time of Williams's murder. After the evidence was tested, Graham was again arrested, charged, and indicted with Williams's rape and murder. Following a jury trial, Graham was found guilty. The trial court sentenced Graham to forty years of imprisonment on each count, to run concurrently, for a total sentence of forty years. Graham appealed his conviction to the Kentucky Supreme Court which affirmed by opinion rendered August 26, 2010, and modified on September 19, 2010. *Graham v. Commonwealth*, 319 S.W.3d 331 (Ky. 2010).

On November 16, 2011, Graham filed a motion pursuant to RCr 11.42 claiming ineffective assistance of trial counsel. On August 13, 2012, the trial court overruled Graham's RCr 11.42 motion without conducting an evidentiary hearing. Graham then filed a timely motion to reconsider pursuant to Kentucky Rules of Civil Procedure (CR) 59.05. The trial court affirmed the motion to the extent it

corrected a factual misstatement, but denied it on all other issues. This appeal followed.

II. STANDARD OF REVIEW

This Court reviews a trial court's denial of RCr 11.42 relief under an abuse of discretion standard. *Bowling v. Commonwealth*, 981 S.W.2d 545, 548 (Ky. 1998). An abuse of discretion has occurred when the trial court's decision is arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky.1999) (citation omitted). A trial court's findings of fact are conclusive if they are supported by substantial evidence. RCr 9.78.

III. ANALYSIS

Graham's motion before the trial court raised several issues of alleged ineffective assistance of counsel: 1) trial counsel's alleged failure to call two exculpatory witnesses at Graham's trial; 2) trial counsel's failure to investigate and present evidence of alternative suspects; 3) trial counsel's failure to retain an expert to evaluate and challenge the evidence regarding dew on Graham's vehicle the morning after the murder; and 4) trial counsel's failure to properly prepare for the DNA evidence presented at trial, including his failure to secure an expert to conduct independent DNA testing.

Graham's sole argument before us is that the trial court erred in resolving these claims against him without first conducting an evidentiary hearing. To properly evaluate Graham's claims, it is necessary for us to briefly review both

the ineffective assistance of counsel standards and the standards used to determine whether an evidentiary hearing is necessary.

To establish an ineffective assistance of counsel claim under RCr 11.42, a movant must satisfy a two-prong test showing both that counsel's performance was deficient, and that the deficiency caused actual prejudice resulting in a proceeding that was fundamentally unfair, and, as a result, was unreliable. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). As established in *Bowling v. Commonwealth*, 80 S.W.3d 405 (Ky. 2002):

The Strickland standard sets forth a two-prong test for ineffective assistance of counsel: 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 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, 2064, 80 L.Ed.2d 674, 693 (1984). To show prejudice, the defendant must show 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 the probability sufficient to undermine the confidence in the outcome. *Id.* at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 695.

Id. at 411–12. Additionally, we note that the burden is on the movant to overcome a strong presumption that counsel's assistance was constitutionally sufficient or

that under the circumstances, counsel's action “might have been considered sound trial strategy.” *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065.

When the record fails either to prove or to refute a material issue of fact, a hearing is required. “The trial judge may not simply disbelieve factual allegations in the absence of evidence in the record refuting them.” *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001). “The hearing ensures a defendant the protections of due process in securing his right to effective assistance of trial counsel. To that end, he is permitted to call witnesses and present evidence in support of his motion, to cross-examine the witnesses for the Commonwealth, and to be represented by counsel.” *Knuckles v. Commonwealth*, 421 S.W.3d 399, 401 (Ky. App. 2014).

However, not every claim of ineffective assistance merits an evidentiary hearing. *Stanford v. Commonwealth*, 854 S.W.2d 742, 743 (Ky. 1993). The law on this issue is clear: the circuit court need only conduct an evidentiary hearing if (i) the movant establishes that the error, if true, entitles him or her to relief under RCr 11.42; and (ii) the motion raises an issue of fact that “cannot be determined on the face of the record.” *Parrish v. Commonwealth*, 272 S.W.3d 161, 166 (Ky. 2008). “An evidentiary hearing is not required when the record refutes the claim of error or when the allegations, even if true, would not be sufficient to invalidate the conviction.” *Cawl v. Commonwealth*, 423 S.W.3d 214, 218 (Ky. 2014).

A. Exculpatory Witnesses

As part of his RCr 11.42 motion, Graham provided affidavits from two individuals, Sandra Burnette and Rita Kelly, regarding what they would have testified to had Graham's trial counsel called them to testify for the defense. Graham maintains that both women would have provided testimony to support Graham's innocence and place reasonable doubt in the jurors' minds as to Graham's guilt.

Sandra Burnette is Graham's ex-wife. In her affidavit, Burnette averred that had she been called to testify at Graham's trial she would have told the jurors that she was with Graham during the time the Commonwealth alleges the murder occurred. Specifically, Burnette says that she would have testified that she was with Graham at the Red Carpet Inn parking lot in Clarksville, Tennessee, until well after 3:00 a.m. on the morning in question.

However, the record refutes Burnette.¹ Immediately after the murder, Burnette told investigators that she could not recall when she left Graham. In fact, as part of a written police statement, Burnette crossed out 2:30 a.m. and wrote that she left Graham at an "unknown time." Additionally, given that the Commonwealth could have impeached Burnette's credibility with her prior inconsistent statement, we believe any decision by counsel not to call her was sound trial strategy. Certainly, we cannot conclude that counsel was so thoroughly

¹Immediately after Graham was found guilty, he filed a motion for a new trial, also arguing that his attorney should have presented Burnette's testimony. The trial court held a hearing and Burnette testified at the hearing. The trial court then rejected the evidence as being contradictory to her prior statements to police that she did not recall what time she parted company with Graham.

ineffective in failing to call Burnette that "defeat was snatched from the hands of probable victory." *Foley v. Commonwealth*, 17 S.W.3d 878, 884 (Ky. 2000).

With respect to Kelly, we fail to see how her testimony would have assisted Graham. The Commonwealth's theory at trial was that Williams was murdered sometime in the very early hours of the morning, likely before 3:00 a.m. Graham's defense was that he did not arrive home until 4:30 a.m., *after* Williams was already dead. Kelly states that, if called, she would have testified that she heard screams coming from next door sometime between 1:00 a.m. and 3:00 a.m., but did not look out the window.

Kelly's timeframe is consistent with the time of death argued by the Commonwealth. And, because Kelly did not look out the window, her testimony would not have indicated whether Graham's car was in the driveway at the time she heard the screams. In short, Kelly's testimony would have corroborated the Commonwealth's alleged time of death, but added nothing to assist Graham in establishing his innocence.

Graham claims that Kelly would also have testified that she saw four men leaving Williams's trailer sometime around dusk. Had Kelly seen the men return to Williams's trailer, heard the men fighting with Williams, or had a basis upon which to conclude the men wished to do Williams some harm, we would agree with Graham that the testimony might have been relevant and probative. However, there was absolutely no medical evidence to support a conclusion that Williams was killed at dusk. To the contrary, it was essentially agreed by both the

defense and the Commonwealth that Williams was killed sometime around 3:00 a.m. Testimony that several men left Williams's trailer, hours before she was killed, would not have assisted in Graham's defense. Accordingly, we agree with the trial court that even had counsel proffered Kelly's testimony regarding the men, there was no "likelihood of a different result [that is] substantial, not just conceivable." *Harrington v. Richter*, 131 S.Ct. 770, 792 (2011) (citing *Strickland*, 466 U.S. at 693, 104 S.Ct. at 2052). A hearing was unnecessary in this determination.

B. Alternative Suspects

Graham next alleges that the trial court erred when it denied his RCr 11.42 motion for his counsel's failure to investigate and present evidence of alternative suspects, without an evidentiary hearing. The trial court found that based upon evidence contained in the record, the claim of ineffective assistance with regards to this issue failed to demonstrate that the actions of counsel were deficient or prejudicial. We agree. Each alternative suspect is discussed below.

Roy Wayne Dean

Regarding Roy Dean, the trial court found:

As for Roy Wayne Dean, there is no fact or evidence to indicate he murdered Kay Williams. The fact that Mr. Dean was subsequently convicted of murdering two women does not indicate his guilt in this case. There has not been shown similarities in the crimes to suggest he also killed Ms. Williams. Dean murdered his victims by gun shots to the head, while Ms. Williams was stabbed with a knife. Furthermore, the jury was told that although

Dean was a neighbor of Ms. Williams, he had been investigated by the police, and had been excluded (by scientific testing) as the source of the DNA.

We disagree with the trial court's conclusion that there is no basis in fact to indicate Dean as a suspect. Dean is a suspected serial killer who lived in the same trailer park at the time of the victim's murder. There were numerous similarities between the murders, which the detective in the case noted in his Uniform Offense Report. These similarities include: overkill, rape, bound wrists, similar positions, and nudity of the victims. The only dissimilarity was the weapon used to murder the victims. Graham's contention that Roy Dean should have been offered as an alternate suspect is clearly not "without a minimum factual basis."

Nevertheless, the trial court properly disposed of the ineffective assistance claim with regard to Roy Dean based on the prejudice prong of the *Strickland* test by finding that Graham was not prejudiced by the failure of trial counsel to introduce Dean as an alternate suspect. Roy Dean was excluded through the Commonwealth's testing, as well as through Graham's independent testing, as a source of DNA found on any of the evidence. Graham was the only source of seminal DNA found on the victim. In order to meet *Strickland* prejudice, the "likelihood of a different result [must be] substantial, not just conceivable." *Harrington*, 131 S. Ct at 792. Even if trial counsel's failure to present Roy Wayne Dean as an alternative suspect was deficient, given that none of Dean's DNA was ever linked to the crime scene, we cannot say that it was prejudicial. Thus, we do not believe that the trial court abused its discretion when it determined that any

failure to present Roy Wayne Dean as an alternative suspect was not prejudicial to Graham's defense.

Joey Weatherford

Joey Weatherford also lived in the same trailer park as Williams and Graham. He was presented as an alternative suspect at Graham's trial and Graham's counsel introduced evidence that Weatherford had a 1957 rape conviction. Graham contends that his counsel was defective for not also introducing Weatherford's prior assault conviction because that assault involved a knife and the victim in this case was found stabbed.

Generally, "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." *Newcomb v. Commonwealth*, 410 S.W.3d 63, 73 (Ky. 2013) (citing Kentucky Rules of Evidence 404(b)). An exception exists for "modus operandi." *Id.* "The modus operandi exception requires the facts surrounding the prior misconduct [] be so strikingly similar to the charged offense as to create a reasonable probability that (1) the acts were committed by the same person, and/or (2) the acts were accompanied by the same mens rea." *Id.* (quoting *Clark v. Commonwealth*, 223 S.W.3d 90, 96 (Ky. 2007)).

Weatherford's prior assault charge involved him stabbing a man in the side during the course of a domestic altercation between the man and Weatherford's daughter. There is no proof that the prior dispute involved any type

of sexual assault or was in any way similar to the manner in which Williams was killed, apart from the fact that a knife was involved in both instances. A common, ordinary weapon is insufficient to establish a "signature crime." We do not believe that the prior assault conviction was admissible for the purpose of establishing that Weatherford likely killed Williams. For this reason, we agree with the trial court that Graham's counsel was not ineffective for failing to discover and/or seeking to introduce it.

Linda Chapman

Lastly, Graham asserts that his counsel was ineffective for failing to present testimony from a witness stating that she saw a boot with missing laces in the back of Linda Chapman's vehicle, the implication being that the laces from this boot were the ones used to bind Williams's wrists.

The record reveals that trial counsel presented evidence that Linda Chapman and the victim had a confrontation a few days before the murder. Counsel also presented evidence that laces, similar to the ones used to bind the victim, were missing from military boots found in Chapman's closet. The jury heard this evidence and ultimately rejected Chapman as a viable alternative suspect. Additionally, Williams was vaginally raped prior to her murder. Semen was found inside Williams's vagina. None of the DNA from the crime (even the DNA on the bootlaces) matched Chapman.

We agree with the trial court that further evidence of a missing shoelace in Chapman's possession would have been cumulative and not likely to change the outcome of the proceeding. The trial court properly found, without holding an evidentiary hearing, that the claim of ineffective assistance of counsel regarding the boot in Linda Chapman's car did not satisfy either prong of the *Strickland* test.

C. Dew Expert

Graham's next claim of error is that the trial court erroneously denied, without holding an evidentiary hearing, his claim that his counsel was ineffective for failing to retain an expert to evaluate and challenge the evidence regarding dew on his vehicle. At trial, the jury heard testimony from several witnesses describing Graham's vehicle having dew on the hood. Graham claims that his counsel should have hired an expert to familiarize the jury with the science of dew accumulation since, based on the first trial, counsel knew that this would be a focal point of the Commonwealth's case.

The allegation of ineffective assistance for failure to hire an expert on dew formation did not prejudice Graham because, "even if true, [it] would not be sufficient to invalidate the conviction." *Wilson*, 971 S.W. 2d at 904. In his brief to this Court, Graham introduced an analytical report from an expert on dew formation concluding that the hood of a car will remain too warm for at least two or more hours after being driven for dew to form. Graham claims that shortly after

he returned home to discover his girlfriend's dead body he called the police. However, each of Commonwealth's witnesses report seeing dew on the hood of Graham's car less than two hours after Graham claims to have arrived at the scene of the crime, indicating he had been there longer than he claims. The evidence from the dew expert that Graham is advocating would have strengthened the Commonwealth's case against him and refuted his defense that he did not leave the parking lot of the Red Carpet Inn until 4:20 a.m., after Williams was killed. Accordingly, the lack of a dew expert cannot be said to have prejudiced Graham.

D. DNA

Finally, Graham contends that the trial court erred when it failed to grant him an evidentiary hearing regarding trial counsel's failure to adequately prepare for and challenge DNA evidence presented at trial. Graham asserts that his trial counsel did not perform at a professionally acceptable standard by neglecting to alert the jury to the fact that a second source of semen was found on the victim and also by failing to retain an independent DNA expert to independently test the evidence and assist with reviewing and rebutting the Commonwealth's evidence. Graham insists that he is entitled to an evidentiary hearing because the record is devoid of trial counsel's reasoning behind his actions. We disagree.

We have painstakingly reviewed the DNA testing results in this case. Having done so, we disagree with Graham that the record establishes that semen from two different contributors was found inside Williams. Rather, the DNA evidence established that two different semen deposits from the same contributor

were found inside of Williams. One deposit was determined to be "higher intensity" than the other indicating that it was left in Williams closer in time to her murder than the other deposit. However, both deposits were found to be from the same contributor and were consistent with Graham's DNA profile. Subsequently, Graham's own experts, through the Innocence Project, had the evidence in question retested and the results showed that there were no other contributors of DNA from the semen found on the victim.

Based on the evidence of record, it is clear that Graham cannot prevail on this issue. All the evidence indicates that while there were two semen deposits found inside the victim, both deposits came from the same individual. Nothing in the record even points to there being a remote possibility that additional testing would have revealed a second contributor of the semen. Thus, the trial court properly rejected this claim without an evidentiary hearing.

In his second argument regarding DNA testing, Graham asserts that by failing to obtain an independent expert to evaluate the Commonwealth's DNA testing and determine if independent testing of the DNA evidence was needed, his trial counsel's performance fell below professional standards of reasonableness. Graham argues that, had his counsel retained an independent expert, the expert would have made counsel aware of DNA touch testing, and also made him aware of the pieces of evidence that should have been tested using this new method. He further contends that this testing would have provided results exculpatory in nature.

In support of his argument, Graham submits independent testing that shows that he (Graham) is excluded as a source of DNA found on some of the DNA swabs taken from the bootlaces used to bind the victim's wrists and on portions of the jumpsuit the victim was wearing at the time of her murder. On other swabs taken from the bootlaces and jumpsuit, the results from the testing were either inconclusive or could not exclude Graham as a source.

While the decision not to hire an independent expert may have been deficient, we do not feel that Graham was prejudiced by this omission. Graham is the sole contributor of the semen sample and vaginal smear, most of the touch testing on the bootlaces and jumpsuit was inconclusive, some of it was inculpatory (unable to exclude Graham), and some of it was exculpatory in that Graham's DNA was not found on the sections of the bootlaces tested. Given the mixed results, we do not believe this evidence is sufficiently indicative of Graham's innocence that we can say with certainty that the jury would not have convicted him had they been privy to it. Thus, we agree with the trial court that counsel's failure to secure its own DNA expert did not prejudice Graham.

IV. CONCLUSION

For the reasons stated above, we affirm the Todd Circuit Court.

ALL CONCUR.

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