RENDERED: DECEMBER 11, 2015; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000845-MR

OSCAR UMAR GONZALEZ APPELLANT

v.

APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE JOSEPH W. CASTLEN III, JUDGE
ACTION NO. 11-CR-00289

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JONES, STUMBO, AND VANMETER, JUDGES.

VANMETER, JUDGE: Oscar Umar Gonzalez appeals an order entered by the Daviess Circuit Court denying his motion for relief for ineffective assistance of counsel pursuant to RCr[1] 11.42. For the following reasons, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND.

[1] Kentucky Rules of Criminal Procedure.

Gonzalez was convicted by a jury of five counts of first-degree sexual abuse (victim under twelve years of age), three counts of incest with a minor, and eight counts of first-degree degree sodomy (victim under twelve years of age). The victims were Gonzalez's step-daughter and two biological daughters, who were subjected to systemic and extensive sexual abuse. This case arose when one of Gonzalez's daughters reported the abuse to her school after a class on sexual abuse. When the other biological daughter and stepdaughter corroborated the abuse, the children were placed in protective custody at school and later transported to the Owensboro Police Department to continue the investigation. Once Gonzalez arrived at the police department, he was arrested for the alleged abuse.

The jury recommended a sentence of 320 years, which was reduced to a maximum of seventy years pursuant to KRS[2] 532.110 in the final judgment entered April 11, 2012. On direct appeal, the Supreme Court of Kentucky affirmed Gonzalez's conviction. *See Gonzalez v. Commonwealth*, No. 2012-SC-000258-MR, 2013 WL 4632714 (Ky., Aug. 29, 2013). Gonzalez then filed an RCr 11.42 motion for relief. Gonzalez has also filed more than twenty-five additional *pro se* motions, which include in part: motions to recuse the trial judge, Commonwealth Attorney, and the entire prosecutor's office; motions to proceed *in forma pauperis*; a motion for all trial records and grand jury transcripts; various motions for exculpatory materials related to the selection of his jury and all documents and

[2] Kentucky Revised Statutes.

records related to the Commonwealth's case; and motions for evidentiary hearings and appointments of counsel to defend against the denial of these motions. All motions, except his motion to proceed *in forma pauperis*, were denied. Now, Gonzalez timely appeals the denial of his RCr 11.42 motion.

II. STANDARD OF REVIEW.

We review 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 was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Commonwealth v. English,* 993 S.W.2d 941, 945 (Ky. 1999).

To succeed on a claim of ineffective assistance of counsel, a defendant must meet two requirements:

> 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 v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). The trial court must therefore determine whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the

proceeding would have been different." *Id.* at 694, S.Ct. at 2068. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

Gonzalez raises three primary grounds for his appeal of the denial of his RCr 11.42 motion. First, he argues that the Department of Public Advocacy is overworked and his defense attorney refused to hire a private investigator to evaluate his defenses. Second, he argues that his daughters' testimony should have been suppressed as illegally obtained under the Fourth Amendment, and his attorney failed to move to suppress the testimony. Finally, Gonzalez argues that the jury foreman had a preexisting relationship with the prosecuting attorney, which was withheld from him during *voir dire*, and may have constituted a challenge for cause, thus denying him a peremptory challenge.

III. ANALYSIS.

A. Failure to Dispatch an Investigator.

First, Gonzalez argues that his counsel was ineffective in her assistance because she deprived him of access to her investigators due to case overload. He claims that the Department of Public Advocacy has "case overload," which prevented the Office from doing its job "effectively." Additionally, he argues "his attorney's refusal to have her investigators pursue any of the pertinent factors that would have enabled a meaningful scrutiny of the 'procedures' employed by various officials party to events that day, . . . constituted gross ineffective assistance and severely prejudiced [his] ability to mount a meaningful defense." If he had been able to have an investigator involved in his case,

Gonzalez argues that his attorney "would have been better prepared for the defense for trial" and "the outcome would have been a true outcome." He asks for remand and that an evidentiary hearing be granted to review this matter.[3]

We disagree. Gonzalez again "fails to state with any specificity how a private investigator would change the outcome of his conviction." Gonzalez does not specify how, but for his counsel being "overworked" or the failure of his counsel to hire or dispatch an investigator, the outcome of his case would have been different. Gonzalez has not presented any evidence about what the investigator would have discovered, or how that would combat such ample evidence and testimony presented at trial confirming the sexual abuse of his daughters. "The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible." *Commonwealth v. Elza*, 284 S.W.3d 118, 122 (Ky. 2009) (*quoting Blackledge v. Allison,* 431 U.S. 63, 74, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977)).

B. Failure to Move to Suppress Daughters' Testimony.

Second, Gonzalez argues his counsel was ineffective by failing to move to suppress the testimony of his daughters, the victims in this case. He contends that when his children were removed from school following the abuse

[3] In the Order Denying Hearing and Denying Appointment of Counsel on Gonzalez's 1/23/14 Motion to Vacate, the trial court ruled on a nearly identical motion for an evidentiary hearing on this matter. This hearing was denied: "The motion does not appear to require an evidentiary hearing. The court will reconsider this order, *sua sponte*, if during the course of further review it is determined that a hearing would be helpful."

allegations, and transported to the Owensboro Police Department, this constituted an illegal search and seizure under the Fourth Amendment as well as a violation of KRS 620.040.

KRS 620.040(5), in relevant part, states:

> (a) If, after receiving the report, the law enforcement officer, the cabinet, or its designated representative cannot gain admission to the location of the child, a search warrant shall be requested from, and may be issued by, the judge to the appropriate law enforcement official upon probable cause that the child is dependent, neglected, or abused. If, pursuant to a search under a warrant, a child is discovered and appears to be in imminent danger, the child may be removed by the law enforcement officer.
> …
> (c) Any appropriate law enforcement officer may take a child into protective custody and may hold that child in protective custody without the consent of the parent or other person exercising custodial control or supervision if there exist reasonable grounds for the officer to believe that the child is in danger of imminent death or serious physical injury, **is being sexually abused**, or is a victim of human trafficking and that the parents or **other person exercising custodial control or supervision are unable or unwilling to protect the child**. The officer or the person to whom the officer entrusts the child shall, within twelve (12) hours of taking the child into protective custody, request the court to issue an emergency custody order.

(emphasis added). Pursuant to KRS 620.030(1), any teacher or school personnel who "knows or has reasonable cause to believe that a child is . . . abused shall immediately cause an oral or written report to be made to a local law enforcement agency or the Department of Kentucky State Police. . . . Nothing in this section shall relieve individuals of their obligations to report."

Gonzalez argues that the school official and law enforcement officers who took his daughters into protective custody did not make the appropriate showing that they were in "imminent danger" or that he and his wife "were unwilling or unable to protect" the girls as required by KRS 620.040. He argues that without a showing of "exigent circumstance," the parents of the children must be notified, or the seizure is unconstitutional. He contends while the children were at school, any exigent circumstance or emergency had abated, and ample time existed to investigate these claims of abuse without taking protective custody of the children, and depriving him of notice and the children of their due process. Additionally, Gonzalez argues that the girls' Fourth Amendment rights against unreasonable search and seizure were violated when they were transported to the Owensboro Police Department.

We disagree. First, to address the Constitutional claim, Gonzalez cannot claim a violation of the Fourth Amendment for another person as he attempts to do here.

> Central to our analysis was the idea that in determining whether a defendant is able to show the violation of his (and not someone else's) Fourth Amendment rights, the "definition of those rights is more properly placed within the purview of substantive Fourth Amendment law than within that of standing." Thus, we held that in order to claim the protection of the Fourth Amendment, a defendant must demonstrate that **he personally** has an expectation of privacy[.]

Minnesota v. Carter, 525 U.S. 83, 88, 119 S. Ct. 469, 472, 142 L. Ed. 2d 373 (1998) (emphasis added) (internal citations omitted); *see also McCloud v.*

Commonwealth, 286 S.W.3d 780, 790 n. 4 (Ky. 2009). Gonzalez also confuses custodial interrogation for the purpose of charging an individual with a crime with interviewing the victim of a crime in order to investigate the case. Gonzalez's daughters were the victims of sexual abuse, perpetrated by him; they were not interrogated with the purpose of charging a criminal act. Gonzalez's Fourth Amendment rights are not at issue in this case, and therefore, his counsel was not ineffective for not raising this non-issue.[4]

Furthermore, Gonzalez's daughters were properly taken into protective custody pursuant to KRS 620.040. The school had a statutory duty to follow procedure and report any allegations of abuse. Based on the children's statements, the school officials and law enforcement officers had reasonable grounds to believe the children were being sexually abused, which is sufficient to take the children into protective custody. The statute does not require a showing of exigent circumstances in addition to sexual abuse. Furthermore, the girls were taken into custody without the consent of the parent because that parent, Gonzalez, was the alleged abuser. To bolster the justification for protective custody, as evidenced by the extent of the sexual abuse perpetrated on these girls, their mother had either not been able or willing to stop that abuse. Thus, the statutory requirements for protective custody without prior parental notification were met, and the trial court properly denied RCr 11.42 relief for this claim.

[4] Additionally, the record shows Gonzalez's counsel did file an appropriate motion to evaluate the child witness for competency to testify, and the minor was deemed competent. His counsel took the proper steps to ensure that the minor's testimony was admissible before she testified, and did not fail as effective counsel by not moving to suppress this testimony.

C. *Voir Dire* and Peremptory Challenges.

Lastly, Gonzalez makes a two-fold argument that his counsel was ineffective during *voir dire*. First, Gonzalez argues Kentucky courts have long recognized an irrebuttable presumption of bias where some relationship exists between a juror and the prosecuting attorney, and that since the jury foreman and the Commonwealth Attorney had a prior relationship, Gonzalez's attorney should have moved to strike the juror for cause. Second, Gonzalez argues that peremptory challenges are essential to a fair trial, and he was essentially denied the use of a peremptory challenge when his attorney did not inform him of this prior relationship when disclosed during a bench conference during *voir dire*.

In order to sustain a challenge for cause for a potential juror and excuse the juror, a "close relationship" must be established. *Marsch v. Commonwealth*, 743 S.W.2d 830, 833 (Ky. 1987); *Ward v. Commonwealth*, 695 S.W.2d 404, 407 (Ky. 1985).

> This Court has held that a trial court has considerable discretion to determine whether a juror should be stricken for cause. Specifically, "unless clearly erroneous, the exercise of such discretion is a judicial prerogative and is not subject to review by an appellate court."
>
> The standard for review of whether a juror should be stricken was enunciated in *Ward v. Commonwealth,* Ky., 695 S.W.2d 404 (1985). We adopted the law . . . that:
>
> "[I]rrespective of the answer given on voir dire, the Court should presume the likelihood of prejudice on the part of a prospective juror because the potential juror has such a close relationship, be it familial, financial or situational, with parties, counsel, victims or witnesses."

Campbell v. Commonwealth, 788 S.W.2d 260, 262 (Ky. 1990) (internal citations omitted). The Supreme Court of Kentucky has held relationships that are distant, casual, or based on proximity alone are not sufficient to disqualify a juror.[5] Further, when a trial court extensively questions a juror about the "precise nature of [the juror's] relationship" with either the victim or attorney, and the relationship is determined to be "remote," and if that juror indicates that he or she is able to serve on the jury in an unbiased manner, then such a relationship is "simply insufficient to warrant [his or] her removal." *Wood*, 178 S.W.3d at 516.

The prior "relationship" between the Commonwealth Attorney and juror is "that [juror's] son played Little League Baseball with the prosecuting attorney over thirty years ago." Gonzalez argues that the Commonwealth attorney overly personalized this juror by asking "Are you Scott's dad?" and thus a close enough relationship existed to presuppose bias. The court noted that further questioning of both the juror and the Commonwealth Attorney "at the bench, provided no evidence of a close relationship between the two, or even a suggestion of such . . . . There was no further extent to the relationship." In this appeal, Gonzalez has still not shown that a close relationship existed between the Commonwealth Attorney and the juror beyond the former connection of Little

[5] *See e.g. Wood v. Commonwealth*, 178 S.W.3d 500, 516 (Ky. 2005) (finding no error in not striking a juror who attended junior high school with the victim, but did not maintain a relationship afterwards); *Sanders v. Commonwealth*, 801 S.W.2d 665, 670-71 (Ky. 1990) (finding no error in not striking a juror who had a casual business associate relationship with the victim, and the juror stated he "liked" the victim); *Derossett v. Commonwealth*, 867 S.W.2d 195, 197 (Ky. 1993) (citing *Campbell v. Commonwealth,* 788 S.W.2d 260 (Ky. 1990)) (holding that "[a]cquaintance with a victim's family or residing in the same general neighborhood is not a relationship sufficient to always disqualify a prospective juror.").

League Baseball. Therefore, since this juror did not have the requisite relationship to be removed, defense counsel had no reason to strike for cause.

Gonzalez further contends that his attorney should have informed him of the "relationship" between the Commonwealth Attorney and juror, and her failure to do so deprived him of a peremptory challenge and constituted ineffective assistance of counsel. Gonzalez did not raise this issue of the use of peremptory challenges in his initial RCr 11.42 motion. The Court of Appeals cannot rule on any matter not ruled upon by the trial court. *See* CR 76.12. The "reviewing court will not consider any argument on appeal that has not been preserved in the trial court." *Am. Founders Bank, Inc. v. Moden Invs., LLC*, 432 S.W.3d 715, 721 (Ky. App. 2014) (internal citation omitted). Therefore, we cannot review the argument that Gonzalez was denied the right to use a peremptory challenge.[6]

If, in the alternative, we review Gonzalez's argument in the context that his attorney was ineffective for not relaying the contents of the bench conference, we agree with the trial court that he has not established a claim of ineffective assistance of counsel. "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688, 104 S. Ct. at 2065.

> Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant

[6] We note that the record shows Gonzalez's attorney used all of the allowed peremptory challenges during *voir dire*, and Gonzalez has not shown which juror he would have kept on the jury in the place of the juror at issue in this appeal.

> making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.

Id., at 690, 104 S. Ct. at 2066. Gonzalez has not provided any evidence or citing authority that "prevailing professional norms" dictate that a defense attorney share the details of every bench conference during *voir dire* with her client, especially when that bench conference revealed that the juror did not have the close relationship required to be stricken for cause. Therefore, Gonzalez has not established that his counsel's actions were outside the range of competent assistance nor has he established how this nondisclosure undermined the veracity of his guilty verdict.

IV. ADDITIONAL ARGUMENTS AND CONCLUSION.

Lastly, Gonzalez raises six additional arguments under the heading "Issues Not Presented on Appeals That Were Presented to Trial Court on RCr 11.42." These issues are not presented in a manner that comports with the requirements of an appellate brief pursuant to CR[7] 76.12(4)(c)(v), which requires an appellant's brief to contain "[a]n 'ARGUMENT' conforming to the Statement of Points and Authorities, with ample supportive references to the record and citations of authority pertinent to each issue of law[.]" Gonzalez's bulleted list of additional arguments does not contain any citations or supportive references,

[7] Kentucky Rules of Civil Procedure.

except for alleging a violation of Federal and Kentucky Rules of Evidence.[8] "Appellants who desire review by this Court must ensure their briefs comply with our Rules of Civil Procedure." *Harris v. Commonwealth*, 384 S.W.3d 117, 130-31 (Ky. 2012). This Court does not have the function nor responsibility to determine, research, and refine arguments for an appellant. *Id.* Therefore, these arguments will not be addressed.

For the foregoing reasons, the order of the Daviess Circuit Court is affirmed.

ALL CONCUR

BRIEFS FOR APPELLANT:

Oscar Umar Gonzalez, Pro se
West Liberty, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Christian K. R. Miller
Frankfort, Kentucky

[8] The trial court analyzed the issue of expert witness testimony of Dr. Crick. As Dr. Crick certainly qualifies as an expert under *Daubert* and examined both minor children, he is qualified to offer his opinion. Gonzalez does not provide sufficient legal support to raise this issue for review on appeal.