RENDERED: AUGUST 26, 2016; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000157-MR

LAWRENCE STINNETT — APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE, JOHN R. GRISE, JUDGE
ACTION NO. 06-CR-00288-002

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: D. LAMBERT, STUMBO AND THOMPSON, JUDGES.

STUMBO, JUDGE: Lawrence Stinnett was convicted of murder and kidnapping and sentenced to life without the possibility of parole. He appeals from the Warren Circuit Court order denying his motion for Kentucky Rules of Criminal Procedure (RCr) 11.42 relief. After careful review, we affirm.

FACTS AND PROCEDURAL HISTORY

On February 3, 2006, while in Oklahoma City, Oklahoma, on a business trip, Stinnett phoned his girlfriend Christina Renshaw. At the conclusion of the telephone conversation, the connection remained open for about three hours, during which time Stinnett heard what sounded to him like his girlfriend having sexual intercourse with several men. Upset about this, Stinnett and his associate, Alanda Lewis, immediately drove to Bowling Green to confront Renshaw. Upon arrival, Stinnett and Lewis entered Renshaw's apartment and waited for her to return from work. When Renshaw entered her apartment Stinnett and Lewis ambushed her, bound her, beat her, forced used cat litter into her mouth, strangled her with a ligature, and eventually killed her. The cause of death was later determined to be subarachnoid hemorrhage due to multiple blunt force injuries.

Stinnett was indicted for murder, kidnapping, and being a first-degree persistent felony offender. Due to the aggravating circumstances, the Commonwealth sought the death penalty. Stinnett was arraigned on March 30, 2006, at which time Department of Public Advocacy (DPA) attorney, Betty Niemi, was appointed as counsel. In a letter to the trial judge, Judge Grice, Stinnett requested that Niemi be replaced as counsel due to personal differences. On September 29, 2006, Niemi was substituted as counsel by DPA attorneys Vincent Yustas and Jonathan Hieneman. In January 2007, Stinnett began writing a series of letters to Judge Grice requesting that Yustas and Hieneman be removed as counsel. In those letters, Stinnett complained about, among other things, a lack of

communication between him and trial counsel and a difference of opinion regarding trial strategy. He also claimed that Yustas and Hieneman were colluding with the prosecutor and his co-defendant's attorney. Ultimately, Stinnett requested to represent himself *pro se*, and the trial court granted the motion. Yustas and Hieneman were retained as hybrid counsel with the limited duties of conducting individual *voir dire*, preparing and arguing jury instructions, and conducting the direct examination of Stinnett should he choose to testify. Counsel was further required to advise Stinnett on objections and the rules of evidence and also to assist Stinnett with court exhibits and the service of subpoenas.

At trial, Stinnett admitted to the crimes, but claimed that he committed them while acting under extreme emotional disturbance (EED). On March 4, 2010, a jury returned a verdict of guilty for murder and kidnapping and recommended a sentence of life without the benefit of parole. The trial court sentenced Stinnett accordingly. Stinnett's conviction and sentence were affirmed by the Supreme Court of Kentucky on November 23, 2011. *Stinnett v. Commonwealth*, 364 S.W.3d 70 (Ky. 2011).

Thereafter, Stinnett filed an RCr 11.42 motion to vacate his judgment due to ineffective assistance of counsel. Specifically, Stinnett claimed that his hybrid counsel failed in the following regards: jury selection, jury instructions, to facilitate requests to test evidence, to file a petition for writ of mandamus, to secure the appearance of witnesses, and to seek introduction of evidentiary materials. He further alleged that hybrid counsel undermined his trial strategy and exceeded the

approved scope of legal representation. Lastly, Stinnett argued that he had ineffective assistance of appellate counsel when appellate counsel failed to appeal the refusal of the court to strike a potential juror for cause. Without a hearing, the trial court, on December 24, 2014, denied Stinnett's motion. This appeal followed.

STANDARD OF REVIEW

When a movant has raised an allegation of ineffective assistance of counsel, the trial court need not always conduct an evidentiary hearing. "Even in a capital case, an RCr 11.42 movant is not automatically entitled to an evidentiary hearing." *Stanford v. Commonwealth,* 854 S.W.2d 742, 743 (Ky. 1993). A circuit court need only conduct an evidentiary hearing if (1) the movant shows the alleged error(s) is such that the movant would be entitled to relief under RCr 11.42, and (2) 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); *Hodge v. Commonwealth,* 68 S.W.3d 338, 342 (Ky. 2001); RCr 11.42(5).

ANALYSIS

I. Trial Counsel Did Not Exceed the Scope of Standby Counsel.

On appeal, Stinnett argues that his trial counsel exceeded the scope of standby counsel thereby violating his Sixth Amendment right to represent himself. Specifically, Stinnett alleged that counsel: failed to facilitate his requests for independent examination and testing; failed to file a writ in the appellate court;

failed to subpoena a witness, Jackie Thompson; told the court that a printout from a website that Stinnett sought to admit would not qualify as a learned treatise; audibly fed questions to Stinnett during what was supposed to be Stinnett's questioning of witnesses; and told the jury that Stinnett wholeheartedly believed the conspiracy theories that Stinnett had just argued in his closing. The trial court found that counsel did not exceed the scope of their duties. We agree.

The Sixth Amendment of the United States Constitution and Section 11 of the Kentucky Constitution guarantee a criminal defendant the right to counsel, as well as the right to reject counsel and represent himself during criminal proceedings. *Allen v. Commonwealth*, 410 S.W.3d 125, 133 (Ky. 2013).

> A defendant's right to self-representation plainly encompasses certain specific rights to have his voice heard. The *pro se* defendant must be allowed to control the organization and content of his own defense, to make motions, to argue points of law, to participate in voir dire, to question witnesses, and to address the court and the jury at appropriate points in the trial.

McKaskle v. Wiggins, 465 U.S. 168, 174, 104 S.Ct. 944, 949, 79 L.Ed.2d 122 (1984).

A trial court may, however, over the objection of the defendant, appoint standby counsel. *Allen*, 410 S.W.3d at 134. The purpose of standby counsel is to ensure respect for and compliance with courtroom procedures and protocol by a *pro se* defendant. *McKaskle*, 465 U.S at 183, 104 S.Ct. at 953-54. If standby counsel is appointed over a defendant's objections, the defendant may define standby counsel's participation at trial. *Allen*, 410 S.W.3d at 134.

While there is "no absolute bar on standby counsel's unsolicited participation," *McKaskle*, 465 U.S. at 176, 104 S.Ct. at 950, it is possible for standby counsel to undermine the objectives underlying a defendant's right to proceed *pro se* through "unsolicited and excessively intrusive participation." *Allen*, 410 S.W.3d at 135 (quoting *McKaskle*, 465 U.S. at 177, 104 S.Ct. at 950). Recognizing this, the United States Supreme Court set limits on the unsolicited participation by standby counsel. First, counsel's participation must not diminish a defendant's actual control over the case. *McKaskle*, 465 U.S. at 178, 104 S.Ct. at 951. The right to self-representation is eroded when unsolicited participation by the standby counsel, objected to by the defendant, "effectively allows counsel to make or substantially interfere with any significant tactical decisions[.]" *Id.* Second, counsel's unsolicited participation must not destroy the jury's perception that the defendant is presenting a *pro se* defense. *Id.* "From the defendant's own point of view, the right to appear *pro se* can lose much of its importance if only the lawyers in the courtroom know that the right is being exercised." *Id*. at 179, 104 S.Ct. at 951. However, "the appearance of a *pro se* defendant's self-representation will not be unacceptably undermined by counsel's participation outside the presence of the jury." *Id.*

a. Failure to facilitate request for independent testing.

With respect to Stinnett's argument that his counsel refused to facilitate his request for independent testing and failed to intervene to prevent Renshaw's body from being cremated, the trial court found that Stinnett's request occurred prior to

the authorization by the court of the standby counsel representation system. We agree.

In his motion to the trial court, Stinnett directed the court's attention to the numerous instances in the record in which he filed *pro se* motions to perform additional testing of the evidence. Each of these instances occurred before counsel was appointed as standby counsel with limited duties; therefore, counsel could not have "exceeded the scope of his hybrid representation" where he was not standby counsel at the time of Stinnett's requests.

b. Failure to file *pro se* writ of mandamus.

Stinnett also argues that trial counsel exceeded its scope of representation by failing to facilitate the filing of Stinnett's *pro se* writ to the Supreme Court of Kentucky. Prior to trial, Stinnett's *pro se* motion to apply the kidnapping exemption was presented to the court and denied. Stinnett then allegedly drafted a *pro se* writ requesting the Court compel the trial court to apply the kidnapping exemption and gave the writ to Yustas to file.[1] Stinnett alleges that Yustas said he filed the writ, but did not. He states that "in fact, [Stinnett's] writ remained in defense counsel's file and it wasn't until commencement of this post-conviction action that [Stinnett] discovered what happened to the writ." Stinnett reasons that the failure to facilitate the filing of the petition amounted to subversion

[1] There is no evidence of this alleged writ in the record.

by counsel of Stinnett's trial strategy, which resulted in a denial of Stinnett's right to represent himself. We disagree.

As noted in *McKaskle*, *supra*, interference with a defendant's right to self-representation occurs due to standby counsel's *unsolicited involvement*. The defendant may consent to expansion of counsel's role at any time during the course of representation. *McKaskle*, 465 U.S. at 182-83, 104 S.Ct. at 953-54. Here, Stinnett solicited trial counsel's assistance in filing the writ, which expanded trial counsel's scope of representation. Stinnett allegedly gave his standby counsel the writ to file and counsel failed to file it. Thus, Stinnett's claim is one of ineffective assistance as it pertains to counsel's failure to effectively assist in his role as standby or hybrid counsel.

Applying the *Strickland, infra,* standard of ineffective assistance, any claim that hybrid counsel was ineffective for failure to file the writ of mandamus fails. In his direct appeal from his conviction, Stinnett argued to the Supreme Court of Kentucky that the kidnapping exception applies in his case. *Stinnett*, 364 S.W.3d at 75. The Court held that it did not and that Stinnett had been appropriately charged with and convicted of kidnapping; therefore, Stinnett was not prejudiced by trial counsel's failure to facilitate the filing of Stinnett's writ because the writ would not have issued.

c. Failure to subpoena Jackie Thompson.

Stinnett argues that his counsel undermined his strategic decisions by failing to subpoena Jackie Thompson. He claims that Thompson would have testified that

Stinnett accused her of being unfaithful and would have demonstrated that Stinnett was erratic and irrational when faced with infidelity. On February 17, 2010, Stinnett addressed the court regarding standby counsel's failure to locate Thompson. Standby counsel advised the court that he had located Thompson, but that she indicated that she was unwilling to travel to Kentucky to testify and she had stated that her testimony would not be favorable to Stinnett. The court concluded that Thompson was not a material witness and the trial would proceed without her. We believe that it is clear from the record that it was not the actions of counsel—who undoubtedly attempted to secure the witness—but the actions of the trial court that impacted Stinnett's trial strategy.

d. Informed the court that a document was not a learned treatise.

Stinnett argues that standby counsel interfered with his right to self-representation when it advised the court, outside the presence of the jury, that a document Stinnett sought to introduce would not qualify as a learned treatise. The document Stinnett attempted to introduce was from a medical website. It explained other causes of subarachnoid hemorrhage beyond blunt force trauma. The trial court ruled that the document could not be introduced without proper authentication and that the document did not qualify as a learned treatise. After the trial court made its ruling, trial counsel advised the court that he would not attempt to introduce the document as a learned treatise because it would not qualify.

We agree with the trial court that counsel did not impede Stinnett's trial strategy when he properly informed Stinnett and the court of the mandatory rules

of evidence. In the trial court's order granting Stinnett the right to represent himself, one of standby counsel's explicit duties was to advise Stinnett on the rules of evidence. That is exactly what counsel did here. Moreover, we do not believe that Stinnett's trial strategy was undermined simply because trial counsel informed the court that the document did not qualify as a learned treatise. Trial strategy cannot be based on inadmissible evidence. Counsel's remark to the court did not prevent the document from being presented to the jury—the rules of evidence did.

e. Audibly supplied Stinnett questions.

Stinnett argues that his trial strategy was undermined when counsel persisted in supplying questions to Stinnett in a "stage whisper" tone. After review of the record, we agree with the trial court that Stinnett readily accepted counsel's assistance throughout trial. "[A] *pro se* defendant's solicitation of or acquiescence in certain types of participation by counsel substantially undermines later protestations that counsel interfered unacceptably." *McKaskle*, 465 U.S. at 182, 104 S.Ct. at 953. Here, Stinnett implicitly consented to standby counsel's interference. At no point did he object to counsel supplying him questions and he regularly consulted with counsel while questioning witnesses.

f. Closing Arguments.

Stinnett argues that his trial strategy was subverted when standby counsel covered topics in his closing argument that Stinnett did not cover in his *pro se* closing argument. Stinnett's argument fails because he consented to standby counsel's representation during closing argument in order to address issues not

addressed by Stinnett in his *pro se* closing. Thus, Stinnett's right to self-representation was not violated.

g. Cumulative effects.

Finally, Stinnett argues that the cumulative effect of counsels' errors demonstrate that counsel exceeded the scope of his representation. In reviewing the trial record we observed that among other things, Stinnett questioned witnesses, made objections, filed motions, participated in *voir dire*, participated in sidebars, and gave opening and closing arguments. We conclude that Stinnett had considerable control of every aspect of his defense and that there was no risk that the jury did not perceive that Stinnett represented himself. Further, a hearing was unnecessary as Stinnett's claim that his trial counsel violated his right to self-representation was easily resolved by examining the record.

II. Ineffective Assistance of Standby Counsel.

Stinnett next argues that within the scope of authorized representation, he was denied effective assistance of counsel. In Kentucky, a defendant has a right to make a limited waiver of counsel and then specify the specific services he wishes counsel to perform (within the scope of counsel services). *Major v. Commonwealth*, 275 S.W.3d 706, 718 (Ky. 2009). "[T]rial counsel is obligated to provide reasonably effective representation as to those duties specifically and unequivocally assigned to him or her." *Wagner v. Commonwealth*, 483 S.W.3d 381, 383-84 (Ky. App. 2016). Denying the right to challenge counsel's

representation "would grant hybrid counsel complete autonomy to disregard any duty whatsoever to defendants." *Id*. at 384.

To prove ineffective assistance of counsel, Stinnett must show, (1) that counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance; and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

a. Failure to subpoena witnesses.

Stinnett argues that he received ineffective assistance when counsel failed to subpoena Dr. Pam Auble, Jackie Thompson, Wanda Jernigan, Reginald Craig, and Jill Hornback Melrose to testify. We disagree.

The record indicates that all of the proposed witnesses that Stinnett claims trial counsel failed to subpoena lived in Oklahoma. In *Bowling v. Commonwealth,* 80 S.W.3d 405 (Ky. 2002), the court held that the failure to compel attendance of an out-of-state witness at a criminal trial is not ineffective assistance of counsel unless the movant demonstrates that the absent witness's testimony was material and that the witness's attendance could have been secured under KRS 421.250(1). "KRS 421.250 requires that a motion be made with the trial court, in which a proceeding is pending, to certify that a witness is material and necessary to the proceeding. The party wishing to subpoena the witness has the burden of showing materiality." *Id*. at 418. With respect to each of his proposed witnesses, Stinnett's

claim fails because the record refutes any notion that the witnesses' testimony was material.

1. Dr. Pam Auble

The record indicates that on the first day of trial, Yustas tendered a motion to compel the attendance of Dr. Auble. In seeking the subpoena, Yustas misrepresented to the court that the Commonwealth's first witness, Dr. Greg Perry of the Kentucky Correctional Psychiatric Center (KCPC)—who had examined Stinnett to determine if he was criminally responsible for the crimes and to determine if he was competent to stand trial—had relied on Dr. Auble's evaluation of Stinnett in preparing his report. The trial court held a hearing and determined that Dr. Auble was not a necessary or indispensable witness. Stinnett claims that counsel's misrepresentation and failure to secure Dr. Auble as a witness amounted to ineffective assistance of counsel. We disagree.

Despite Stinnett's present claim to the contrary, the Supreme Court of Kentucky, on direct appeal, held that regardless of the trial court's reliance on erroneous information, it reached the correct conclusion. *Stinnett*, 364 S.W.3d at 85. The Court found that Dr. Auble's testimony would not have aided Stinnett's EED defense, and therefore, Stinnett failed to show that Dr. Auble's testimony was material and necessary to the proceeding. The Supreme Court's decision is the law of the case. Dr. Auble's testimony was not material, and therefore her attendance could not have been secured absent the misrepresentation by standby counsel.

Accordingly, Stinnett was not prejudiced as a result of trial counsel's misrepresentation.

2. Jackie Thompson

Stinnett claims that Thompson would have testified that she and Stinnett had a tumultuous relationship due to Stinnett's paranoia and concerns that she was unfaithful to him. Further, she would have testified that there were times that Stinnett would call the police to her home to report "men in the attic," and would stab the couch cushions because he believed she hid other men there.

As noted earlier, during trial, Stinnett complained about standby counsel's inability to secure Thompson's presence. Standby counsel informed the court that he had attempted to secure Thompson's presence, but Thompson indicated that she would not testify and that if she were forced to testify it would not be favorable to Stinnett. The trial court determined during trial that Thompson was not a necessary witness and that the trial would proceed without her. We agree with the trial court.

The substance of Thompson's testimony came out during Dr. Perri's testimony wherein he discussed Thompson's interview. Thus, the testimony Stinnett wished to elicit from Thompson would have been merely cumulative. Counsel cannot be ineffective for failing to present cumulative evidence. *Sanders v. Commonwealth*, 89 S.W.3d 380, 391 (Ky. 2002) (*overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009)). The record refutes

Stinnett's claim that Thompson's testimony was essential and that her attendance could have been secured under KRS 421.250(1).

3. Wanda Jernigan

Stinnett claims that Jernigan would have testified that Stinnett sounded "different" on the phone when she spoke with him during his trip from Oklahoma to Bowling Green. Presumably, Jernigan's testimony would have implied that Stinnett was enraged, which would have supported his claim of extreme emotional distress. The Commonwealth argues that Jernigan's testimony was not material because the jury heard Stinnett's tone of voice when the Commonwealth played for the jury angry voice messages Stinnett left on the victim's telephone during his drive from Oklahoma to Bowling Green. We agree.

EED is "a temporary state of mind so enraged, inflamed, or disturbed as to overcome one's judgment and to cause one to act uncontrollably from the impelling force of the extreme emotional disturbance rather than from evil or malicious purposes." *McClellan v. Commonwealth*, 715 S.W.2d 464, 468 (Ky. 1986). The voice messages Stinnett left on the victim's phone clearly conveyed to the jury that Stinnett was enraged in the moments leading up to the crime. Any testimony from Jernigan that Stinnett sounded "different" that day would have been cumulative and much less probative of Stinnett's state of mind leading up to the murder. That Jernigan was a necessary witness is refuted by the record; therefore, counsel could not have been ineffective for failing to subpoena her.

4. Reginald Craig

Stinnett asserts that Craig would have testified that he knew of the victim's infidelity, but was afraid to relay the information to Stinnett. We agree with the trial court that Craig's proposed testimony had no bearing on Stinnett's state of mind. Establishing as fact the victim was unfaithful in the past was unnecessary to substantiate Stinnett's claim of EED. Stinnett's culpability depended on what he genuinely believed to be true—that the victim was engaged in multiple adulterous affairs on the night before the murder. It did not depend on whether the victim had past adulterous affairs. Craig's testimony was not material and was likely intended only to impugn the victim's character. The record refutes any notion that Craig was a material witness and as such, counsel cannot be ineffective for failing to subpoena him.

5. Jill Melrose

Stinnett claims that Melrose is a licensed professional counselor and would have testified that she treated Stinnett on one or two occasions at the Talifero Mental Health Center in Lawton, Oklahoma. He states that Melrose would have testified that she helped Stinnett deal with fears regarding mental disturbances and that he willingly sought out treatment. We are not convinced that Melrose's testimony would have aided Stinnett's EED defense.

First, Melrose had no personal knowledge as to Stinnett's state of mind during the crimes, and therefore her testimony was not competent to assist the jury regarding a fact that was of consequence. Second, the substance of Melrose's testimony was introduced though the testimony of Dr. Perri who used Melrose's

statement in making his evaluation. Dr. Perri, in his testimony, outlined some of Stinnett's mental health history and any testimony given by Melrose regarding Stinnett's mental health history would have been cumulative. Again, the record refutes any claim that Melrose was a material witness.

b. Failure to introduce Dr. Perri's report.

Stinnett next claims that his standby counsel, who conducted the examination of Dr. Perri at trial, was ineffective for failing to introduce Dr. Perri's report. He contends that Dr. Perri's testimony was lengthy and complicated and admitting the report would have helped the jury understand the testimony. He supposes that because the jury asked for a copy of the report, it indicates that the jurors did not understand Dr. Perri's testimony.

We agree with the trial court that Stinnett has failed to prove prejudice on this issue. First, the jury was well aware of the contents of Dr. Perri's report because Dr. Perri testified to its contents at trial. Stinnett does not identify any of the report's contents not contained in Dr. Perri's testimony that he wished to have before the jury, nor does he contend that Dr. Perri's testimony was inconsistent with his report. Second, Stinnett's assertion that the jury did not understand Dr. Perri's testimony because they asked for a copy of the report assumes too much. The jury asking for a copy of Dr. Perri's report does not necessarily mean that the jurors did not understand his testimony. The jury may have just wanted to refresh its memory regarding Dr. Perri's testimony. Stinnett must establish actual

prejudice, not merely the possibility that the evidence might have helped his case. *Strickland,* 466 U.S. at 693, 104 S.Ct. at 2067-68.

c. Failure to visit and communicate.

Stinnett next claims that trial counsel failed to visit and communicate with him prior to trial. He contends that had counsel met with him more, he would have allowed them to continue to represent him. Not only is Stinnett's claim conclusory, it is also directly refuted by evidence in the record. The record indicates that Stinnett admitted to having at least five face-to-face meetings with his first attorney. It reveals at least eight meetings with Yustas and two meetings with Hieneman. The record further indicates at least six meetings with Department of Public Advocacy investigators. During these meetings counsel provided Stinnett with discovery, played audio recordings for Stinnett, and discussed trial strategy. Additionally, there were twenty-four pretrial hearings involving Stinnett and his attorneys, and Stinnett acknowledged receiving correspondence from his attorneys and the defense team and speaking with his attorneys on multiple occasions over the phone.

There is no fixed number of face-to-face visits an attorney must conduct for his performance to be deemed constitutionally efficient. Stinnett has not alleged that his attorney never discussed his case with him and does not demonstrate how more face-to-face visits would have changed the outcome. On this issue, we agree that Stinnett has failed to meet his burden of showing that trial counsel's performance was deficient and that the deficient performance changed the outcome

of the proceeding. *See Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. The record was sufficient to make this determination.

III. Ineffective Assistance of Appellate Counsel.

Stinnett's final argument is that he received ineffective assistance of appellate counsel (IAAC) on direct appeal when his appellate attorney "failed to raise on direct appeal the trial court's denial of his motion to strike a potential juror for cause."

Criminal defendants are entitled to the effective assistance of counsel during their first appeal as of right. *Hollon v. Commonwealth,* 334 S.W.3d 431, 434 (Ky. 2010). To succeed on an IAAC claim premised upon appellate counsel's alleged failure to raise a particular issue on direct appeal, the defendant must establish that "counsel's performance was deficient, overcoming a strong presumption that appellate counsel's choice of issues to present to the appellate court was a reasonable exercise of appellate strategy." *Id*. at 436. To overcome the presumption of effective assistance, the defendant must show that the omitted issue was clearly stronger that those presented. *Id*. IAAC further requires a showing of prejudice. In order to establish prejudice, Stinnett must show that "absent counsel's deficient performance there is a reasonable probability that the appeal would have succeeded." *Commonwealth* v. *Pollini,* 437 S.W.3d 144, 149 (Ky. 2014) (internal citation and quotation marks omitted). On appeal, IAAC claims are reviewed *de novo*. *Id*.

We believe that Stinnett has failed to show that the omitted issue was stronger than those presented and has failed to show that absent the omission his appeal would have succeeded. It is well-established in Kentucky that "a determination as to whether to exclude a juror for cause lies within the sound discretion of the trial court, and unless the action of the trial court is an abuse of discretion or is clearly erroneous, an appellate court will not reverse the trial court's determination." *Ordway v. Commonwealth*, 391 S.W.3d 762, 781 (Ky. 2013) (internal citation and quotation marks omitted). The trial court's determination should be "based on the totality of the circumstances, [and] not on a response to any one question." *Id*. (internal citation and quotation marks omitted). The "test for whether . . . a juror should be stricken for cause is whether the prospective juror can conform his views to the requirements of the law and render a fair and impartial verdict." *Id.* (internal citation, quotation marks, and footnote omitted).

Here, Stinnett's umbrage lies with one of the potential juror's responses to a question posed by defense counsel. When asked by counsel about his thoughts on the death penalty, the potential juror answered, "If he's guilty, he's guilty. If he's not, he's not." Stinnett argues that the juror's answer exhibited an unwillingness to consider possible mitigating evidence when considering possible punishments and was indicative of the juror's bias toward the death penalty. After reviewing the record, we disagree. Both the trial court and the Commonwealth asked the juror several times during the *voir dire* process whether he could consider mitigating evidence when determining an appropriate punishment, and each time he answered

affirmatively. When defense counsel questioned the juror whether mitigating evidence about background and childhood should be given any weight when deciding if a convicted defendant should be sentenced to execution, the juror again replied in the affirmative.

In denying Stinnett's motion to strike the juror for cause the trial court surmised that the juror might be somewhat skeptical about possible mitigating evidence, but he affirmatively indicated several times that he would consider mitigating evidence. The court properly considered the totality of the circumstances and not just his response to one question. We do not think that the trial court abused its discretion under the circumstances presented here; therefore, Stinnett cannot establish deficient performance or prejudice because this ignored issue is not clearly stronger than the issues that were presented on direct appeal and absent its omission his appeal was not likely to succeed. *Hollon,* 334 S.W.3d at 436–37.

CONCLUSION

Having determined that all of Stinnett's claims were easily refuted using the record, we believe that the trial court was correct when it overruled Stinnett's RCr 11.42 motion without conducting an evidentiary hearing. For the foregoing reasons, the order of the Warren County Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Euva D. Blandford
Assistant Public Advocate
Department of Public Advocacy
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear
Attorney General of Kentucky

Bryan D. Morrow
Assistant Attorney General
Frankfort, Kentucky