

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2015-CA-000277-MR

JOHN W. SKAGGS

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT  
v. HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE  
ACTION NO. 08-CR-000550

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: DIXON, J. LAMBERT, AND NICKELL, JUDGES.

DIXON, JUDGE: John W. Skaggs appeals an order of the Jefferson Circuit Court denying his RCr 11.42 motion to set aside his conviction due to ineffective assistance of counsel. Finding no error, we affirm.

In February 2008, Skaggs was indicted for third-degree burglary, theft by unlawful taking over \$300, third-degree criminal mischief, and first-degree persistent felony offender. The Commonwealth alleged Skaggs stole \$6000 from

the office of the apartment building where he was a tenant. Evidence found at the scene included a broken window with blood on the glass. Surveillance video showed Skaggs running away from the area of the broken office window. Forensic evidence established that Skaggs's DNA matched the DNA found on the broken glass. A jury found Skaggs guilty of third-degree burglary, third-degree criminal mischief, and first-degree PFO. Skaggs was subsequently sentenced to twenty-years' imprisonment. On direct appeal, the Kentucky Supreme Court affirmed Skaggs's conviction in an unpublished opinion. *Skaggs v. Commonwealth*, 2010-SC-000723-MR (Sept. 22, 2011).

In April 2013, Skaggs filed a motion to vacate his conviction due to ineffective assistance of counsel. Counsel was appointed to represent Skaggs, and the trial court held an evidentiary hearing. The court heard testimony from Skaggs, Joshua Payne (Skaggs's stepson), Laura Skaggs (Skaggs's wife), and Hon. Casey Kimball (trial counsel). The court rendered an order denying RCr 11.42 relief, and this appeal followed.

We evaluate claims of ineffective assistance of counsel pursuant to the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To establish ineffective assistance, a movant must show that counsel made serious errors amounting to deficient performance and that those alleged errors prejudiced the defense. *Id.* at 687. The standard for reviewing counsel's performance is whether the alleged conduct fell outside the range of objectively reasonable behavior under prevailing professional norms. *Id.* at 688.

To establish actual prejudice, a movant “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.

We are mindful that “[a] defendant is not guaranteed errorless counsel, or counsel adjudged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance.” *McQueen v. Commonwealth*, 949 S.W.2d 70, 71 (Ky. 1997). There is a strong presumption that counsel performed competently; consequently, it is the movant’s burden to establish that the alleged error was not reasonable trial strategy. *Kimmelman v. Morrison*, 477 U.S. 365, 381, 106 S. Ct. 2574, 2586, 91 L. Ed. 2d 305 (1986).

Skaggs argues on appeal, as he did below, that Kimball rendered ineffective assistance by failing to pursue an intoxication defense and failing to investigate witnesses that could testify as to his level of intoxication. Skaggs asserts he took prescription medicine and consumed alcohol on the night in question, which rendered him unable to form the necessary criminal intent to commit burglary.

In its order denying RCr 11.42 relief, the trial court stated, in relevant part:

Defendant’s trial counsel, Hon. Casey Kimball, testified that she investigated every issue Defendant raised with her; that she spent quite a bit of time with Defendant and that he was one of the most ‘involved clients I’ve ever had’; that they discussed an intoxication

defense and the reality that employing same would require Defendant to testify; that Defendant was on parole and his testimony that he used alcohol or drugs could get him revoked; that Defendant never mentioned using pills that day; that Defendant made the decision not to testify; that Defendant also made the decision not to call his wife to the witness stand; that Defendant's wife made a 'horrible' witness as she was incoherent and intoxicated on the day of trial and she would have damaged any chance Defendant had with the jury.

Defendant's stepson, Joshua Payne testified that Defendant drinks every day, usually a six-pack up to a case of beer but never saw him take pills. When drunk, Defendant gets 'ugly.'

Defendant's wife, Laura Skaggs testified that Defendant was intoxicated on the night at issue; that he gets drunk every day and was 'trying to get into the washing machine' that night. She also stated that Attorney Kimball requested that she come to the trial.

Defendant testified that he took 'lots of medicine' that day and drank over a case of beer; that Kimball only spoke to him for 12 minutes; that on the date at issue he was upset with his landlord, was intoxicated, couldn't control himself and blacked out; that he gave Kimball family background information; that he would have testified that he has no memory of the events that night; that testing of the broken glass would have helped him.

The claim of Defendant that counsel should have raised an intoxication defense would have required proof that Defendant was drunk and was so drunk he had no idea what he was doing. *Springer v. Commonwealth*, 998 S.W.2d 439 (Ky. 1999). Defendant would have to testify in order to produce that evidence for the jury. It is clear from the hearing that Defendant made the decision not to testify and his decision was reasonable in light of the circumstances and risks. Likewise, the decision not to call Defendant's wife to testify was reasonable in light of the fact that she was intoxicated, incoherent, and dressed inappropriately.

After reviewing the record, we agree with the trial court's conclusion that Skaggs failed to establish that he received ineffective assistance of counsel. We reiterate that "[a] defendant is not guaranteed errorless counsel, or counsel adjudged ineffective by hindsight . . . ." *McQueen*, 949 S.W.2d at 71. Although Skaggs is now dissatisfied with Kimball's performance, the record clearly reflects that counsel acted reasonably under the circumstances. Kimball testified Skaggs was extremely involved in his defense, noting he filed numerous pretrial *pro se* motions. Kimball stated she spoke with Skaggs on multiple occasions and that they specifically discussed the potential intoxication defense. Kimball asserted Skaggs agreed with the strategy to abandon the intoxication defense because he was unwilling to testify at trial. In this case, Kimball's representation simply did not fall below the standard of reasonable professional assistance. The trial court properly denied Skaggs's RCr 11.42 motion.

Finally, Skaggs contends that the totality of counsel's deficiencies resulted in cumulative error. We disagree. This Court has previously stated, "In order for individual allegations of ineffective assistance of counsel to have a cumulative effect, the individual allegations must have merit." *Johnson v. Commonwealth*, 180 S.W.3d 494, 503 (Ky. App. 2005). Because Skaggs's individual allegations of deficient performance are meritless, there is no cumulative error.

For the reasons stated herein, the order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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