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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001170-MR

JOHN C. KNIPP — APPELLANT

v.

APPEAL FROM CARTER CIRCUIT COURT
HONORABLE REBECCA K. PHILLIPS, JUDGE
ACTION NO. 01-CR-00023

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; ACREE AND JOHNSON, JUDGES.

ACREE, JUDGE: Appellant, John C. Knipp, appeals from an order of the Carter Circuit Court denying his motion for post-conviction relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42 on grounds that he received ineffective assistance of counsel at trial. We affirm.

I. FACTUAL BACKGROUND

The pertinent facts were summarized on direct appeal by the Kentucky Supreme Court as follows:

> On the night of February 25, 2001, Appellant was drinking alcoholic beverages with the victim Darrell Dunn and Ronnie Sammons at the residence of Connie Sammons, who was not present. Eventually Darrell Dunn fell asleep. Appellant and Ronnie Sammons went next door to Ronnie Sammons' residence and continued to drink. Appellant later left for a period of time but then returned to Ronnie Sammons' residence. At some point, Sammons asked Appellant to leave. Appellant eventually left, and Sammons went to sleep. Sammons awoke due to an explosion. When Sammons exited his residence, he saw Connie Sammons' residence on fire with Appellant standing in front of it. Sammons accused Appellant of starting the fire, but Appellant denied it and fled the scene.
>
> Appellant arrived on foot at the residence of Joyce Marshall, asking to use the telephone to call someone to come for him. He had no shirt, his hands were black and bleeding, there was blood on his pants, and he smelled of kerosene. He told Ms. Marshall that the fire at Connie Sammons' residence was caused by a kerosene heater that had been knocked over on the porch. State Troopers Paul Tanner and Shawn Podunovac arrived at the Marshall residence after receiving a call that Appellant was there and refused to leave. Appellant told Trooper Podunovac that he had not been at Connie Sammons' residence that night, but that the smoke smudges on his hands and his singed hair had been caused when a kerosene heater blew up in his face. Appellant was arrested. Detective Paul Cales spoke with Appellant at the jail after his arrest. Appellant told Detective Cales that his singed hair was the result of burning brush with kerosene earlier that day.

> The Medical Examiner and the Coroner both testified that a corpse recovered from the fire was that of Darrell Dunn and that Dunn had died of smoke and soot inhalation caused by the fire. Kenny Johnson, a deputy fire marshal who investigated the fire the same day that it occurred, testified that the fire had been set on the front porch with an accelerant, such as kerosene. Larry Dehus, a paid expert, examined the scene of the crime on September 12, 2001, and testified that the fire was caused by faulty electrical wiring and started in the east kitchen wall.

Knipp v. Commonwealth, 2003-SC-0039-MR, 2005 WL 387276, at *1 (Ky. Feb. 17, 2005).

Knipp was indicted for murder, first-degree arson, first-degree burglary, and theft by unlawful taking under $300. Following a trial in November 2002, Knipp was convicted of first-degree arson, second-degree manslaughter, second-degree burglary, and theft. He was sentenced to a total of sixty years' imprisonment. On direct appeal, Knipp's conviction and sentence for second-degree burglary were reversed and his sentence was amended to a total of fifty years' imprisonment. *Knipp*, 2005 WL 387276, at *4-5.

On December 16, 2005, Knipp filed a *pro se* RCr 11.42 motion raising numerous allegations of ineffective assistance of trial counsel. The circuit court appointed counsel who supplemented Knipp's motion in March 2013. Evidentiary hearings were held in September 2013 and November 2013. By order

dated April 25, 2015, the circuit court overruled Knipp's motion. This appeal followed. Additional fact will be discussed as necessary.

II. STANDARDS GOVERNING OUR REVIEW

Every defendant is entitled to reasonably effective – but not necessarily errorless – counsel. *Fegley v. Commonwealth*, 337 S.W.3d 657, 659 (Ky. App. 2011). To succeed on a claim of ineffective assistance of counsel, the movant must satisfy the two-prong test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

"First, the defendant must show that counsel's performance was deficient." *Id.* at 687, 104 S. Ct. at 2064. To establish deficient performance, the movant must demonstrate that counsel's representation "fell below an objective standard of reasonableness" such that "counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment[.]" *Commonwealth v. Tamme*, 83 S.W.3d 465, 469 (Ky. 2002).

"Second, the defendant must show that the deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064. To establish prejudice, the movant must demonstrate "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S. Ct. at 2068.

When, as here, the circuit court conducts an evidentiary hearing in an RCr 11.42 proceeding, we must defer to the circuit court's determinations of fact and witness credibility. *Haight v. Commonwealth*, 41 S.W.3d 436, 442 (Ky. 2001), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009). We review the circuit court's factual findings for clear error. *Johnson v. Commonwealth*, 412 S.W.3d 157, 166 (Ky. 2013). If the circuit court's findings are supported by substantial evidence, then they are not clearly erroneous. *Id.*

III. ANALYSIS

On appeal, Knipp has abandoned all but two of his ineffective-assistance claims. First, he asserts that his trial counsel was ineffective for failing to move to strike a juror who allegedly had a romantic relationship with his brother. And second, Knipp asserts that his trial counsel was ineffective for failing to request an instruction on arson in the third degree as a lesser-included offense. Knipp also argues cumulative error.

A. Allegedly Biased Juror

Knipp first claims that his trial counsel provided ineffective assistance when they failed to move the circuit court to strike for cause a juror, "Juror Allen," who allegedly had briefly entertained a romantic relationship with Knipp's brother. In support, Knipp provided an affidavit from his brother, in which the brother claimed: (1) that he had dated Allen approximately six months prior to the date

Knipp was arrested; (2) that he had dated Allen for approximately two months; (3) that at the time he and Allen were dating, Knipp and Allen lived within a short distance of one another; and (4) that during the time he dated Allen, Allen had stated that Knipp was a "hard egg" and that "his drinking was going to lead him into getting in trouble."

According to the trial transcripts,[1] during general voir dire, the Commonwealth's attorney asked the group of prospective jurors if any of them knew Knipp personally. Presumably some of the potential jurors raised their hands because immediately thereafter, the Commonwealth's attorney stated, "there are quite a few." Nonetheless, no follow-up questions were asked by either the Commonwealth's attorney or trial counsel regarding the potential jurors' personal knowledge of Knipp.

During Allen's individual voir dire, she was asked whether she could consider the range of penalties and whether she had been exposed to any of the pre-trial publicity the case garnered. She was never asked any follow-up questions regarding any relationships or familiarity with the parties or the witnesses. Trial Counsel did, however, ask Allen if she had any opinion about the case or about Knipp's guilt or innocence, to which she stated, "No, I don't have any."

[1]A video record was not made.

At the evidentiary hearing one of Knipp's two attorneys, Hugh Convery, who was retired at the time of the evidentiary hearing, testified that he could not recall many of the details of his representation, including whether Knipp told him of Allen and her alleged relationship to his brother. The other half of Knipp's representation, Stuart Read, testified that Knipp notified him that his brother may have had a relationship with Allen, but that he provided very little information regarding the nature of that relationship. Read testified that nothing Knipp said on the subject raised any concerns of bias, prejudice, or impropriety for the defense team.

Knipp testified that he informed both of his attorneys that his half-brother had dated Allen. He stated that at one point he lived with Allen's sister, Jamie Piper. He alleged that Allen did not like him because he had stolen something from Piper. He acknowledged that Allen never showed any ill will or dislike toward him, and that he and Allen never had a social relationship.

After reviewing the facts in the record, we find it unnecessary to examine whether trial counsel's failure to challenge Allen or ask her follow-up questions constitutes deficient performance because, assuming deficient performance occurred, Knipp has made an insufficient showing of prejudice to support his claim of ineffective assistance of counsel. *See Commonwealth v. Searight*, 423 S.W.3d 226 (Ky. 2014) (holding that the circuit court properly

denied the appellant's claim solely on prejudice grounds). Knipp failed to make a sufficient showing that a challenge for cause would have succeeded, or that Allen was actually biased. Therefore, on prejudice grounds, Knipp's claim fails.

The established test for determining whether a juror should be stricken for cause is "whether, after having heard all of the evidence, the prospective juror can conform his views to the requirements of the law and render a fair and impartial verdict." *Mabe v. Commonwealth*, 884 S.W.2d 668, 671 (Ky. 1994). The Supreme Court of Kentucky has long recognized that "a determination as to whether to exclude a juror for cause lies within the sound discretion of the trial court[.]" *Fugett v. Commonwealth*, 250 S.W.3d 604, 613 (Ky. 2008) (quoting *Pendleton v. Commonwealth*, 83 S.W.3d 522, 527 (Ky. 2002)). That determination, however, "is based on the totality of the circumstances, [and] not on a response to any one question." *Id.*

"Bias is implied from any close relationship, familial, financial or situational, with any party, counsel, victim, or witness, which, though not so close as to cause automatic disqualification, nevertheless transgresses the concept of a fair and impartial jury." *Sholler v. Commonwealth*, 969 S.W.2d 706, 709 (Ky. 1998) (citations omitted). "Once that close relationship is established, without regard to protestations of lack of bias, the court should sustain a challenge for cause and excuse the juror." *Ward v. Commonwealth*, 695 S.W.2d 404, 407 (Ky.

1985). The definition of close relationship "does not encompass a mere social acquaintanceship in the absence of other indicia of a relationship so close as to indicate the probability of partiality." *Sholler*, 969 S.W.2d at 709.

Here, Knipp did not establish a sufficiently close relationship as necessary to establish implied bias. The affidavit Knipp's brother submitted to the circuit court only stated that the relationship between him and Allen was very brief and that Knipp lived within a short distance of Allen. It said nothing as to the extent and nature of the relationship between Allen and Knipp. Knipp could have compelled Allen's attendance at the evidentiary hearing so that she herself could have testified to the extent and nature of her relationship with Knipp; he failed to do so. In any event, Knipp himself testified that he had no social relationship with Allen. Although our Supreme Court has expressed uncertainty about what constitutes a close relationship requiring a juror to be dismissed, *see id*., we are confident that the brief and attenuated relationship between Knipp and Allen was not nearly so consequential as to meet the foregoing requirements for granting the relief Knipp seeks.

Furthermore, Knipp failed to establish that Allen was actually biased. Knipp testified that Allen told him she did not want him drinking in her apartment, but otherwise expressed no ill will or dislike toward Knipp. Knipp's brother's affidavit stated that Allen had once called Knipp a "hard egg" whose drinking was

going to get him into trouble one day. This proof hardly indicates that Allen was biased against Knipp and thus incapable of rendering a fair and impartial verdict. On the contrary, Allen informed the circuit court during voir dire that she had no opinion regarding Knipp's innocence or guilt. Knipp has failed to convince this Court that Allen could have been properly dismissed for cause, or that he was denied a fair trial on the basis of Allen's inclusion on the jury. Accordingly, we conclude the circuit court properly denied Knipp's claim regarding this issue because Knipp failed to sufficiently establish any prejudice resulting from his attorneys' failure to move to strike Allen from the jury pool.

B. Lesser-included Instruction

Knipp contends that circuit courts are required to include third-degree arson as a lesser-included offense of first-degree arson when voluntary intoxication is an issue in the case. Therefore, Knipp argues, trial counsel acted outside the bounds of reasonable professional norms when they failed to request an instruction on third-degree arson. We disagree.

Knipp correctly points out that a "defendant has a right to have every issue of fact raised by the evidence and material to his defense submitted to the jury on proper instructions." *Hayes v. Commonwealth*, 870 S.W.2d 786, 788 (Ky. 1993). However, that right does not entitle a defendant to instructions on theories with no evidentiary foundation. *Neal v. Commonwealth*, 95 S.W.3d 843, 850 (Ky.

2003). "An instruction on a lesser included offense is required only if, considering the totality of the evidence, the jury might have a reasonable doubt as to the defendant's guilt of the greater offense, and yet believe beyond a reasonable doubt that he is guilty of the lesser offense." *Id.*

Kentucky Revised Statute (KRS) 513.020, the first-degree arson statute, provides:

> (1) A person is guilty of arson in the first degree when, with intent to destroy or damage a building, he starts a fire or causes an explosion, and;
>
> > (a) The building is inhabited or occupied or the person has reason to believe the building may be inhabited or occupied; or
> >
> > (b) Any other person sustains serious physical injury as a result of the fire or explosion or the firefighting as a result thereof.

In contrast, "[a] person is guilty of arson in the third degree if he wantonly causes destruction or damage to a building of his own or of another by intentionally starting a fire or causing an explosion." KRS 513.040(1). Knipp argues that a jury could have believed that due to his intoxication he intended to start the fire, but did not intend to damage or destroy the building. However, after a review of the record, it becomes clear that Knipp's theory has no evidentiary foundation.

"When a defendant denies any involvement in the crime alleged, and the evidence presented does not otherwise suggest reasonable doubt regarding the

degree of an offense, trial courts need not instruct regarding lesser included offenses." *Lawson v. Commonwealth*, 53 S.W.3d 534, 548 (Ky. 2001). Here, in his multiple statements to the police, Knipp denied being at Connie Sammons's house and claimed that his hair was singed as a result of burning brush with kerosene. His defense at trial was that the fire was not set intentionally by him or anyone else, but was the result of faulty electrical wiring. While Knipp did present evidence that he was intoxicated, nowhere during trial did his defense state, imply, or allude to the fact that Knipp intentionally started the fire for some purpose other than burning the home.

The evidence in this case supports only two theories: that Knipp intentionally set the fire to destroy the home or that he did not set the fire at all. Neither of these theories align with the elements of third-degree arson. Because Knipp was not entitled to a lesser-included instruction of third-degree arson, his attorneys were not ineffective for failing to request such an instruction.

C. Cumulative Error

Finally, Knipp argues that the cumulative effect of the errors he argued above deprived him of a fair trial. Because we have found no error in any of the arguments Knipp has presented, we likewise hold that there is no cumulative error. *See Woodall v. Commonwealth*, 63 S.W.3d 104, 134 (Ky. 2001).

IV. CONCLUSION

Based on the foregoing, the April 25, 2015 order of the Carter Circuit Court denying Knipp's RCr 11.42 motion is affirmed.

ALL CONCUR.

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