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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000951-MR

RONALD L. CORMAN — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 13-CR-00146

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, JOHNSON AND J. LAMBERT, JUDGES.

LAMBERT, J., JUDGE: Ronald L. Corman appeals from an order of the Kenton Circuit Court that denied his Motion to Vacate, Correct Sentence or Set Aside Sentence filed pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. For the reasons set forth below, we affirm.

On February 13, 2013, while Corman was at a local bar, he received several text messages from his wife, Violett, involving problems with their marriage. After consuming a "few beers," Corman returned home and they began arguing. During the argument, Corman obtained a handgun and fired four shots striking her in the abdomen, neck, shoulder, and hand. Corman's step-daughter, Danielle, who was also in the house at the time, locked her bedroom door upon hearing the gunfire. Corman went to Danielle's room and fired two shots through the door into her room. Danielle eventually opened the door and Corman argued with her, even pointing the handgun at her head at one point. Violett called the police and exited the house with Danielle. When the police arrived, Corman remained in the house refusing to leave for a period of several hours until he was arrested after being shot by the police. Violett was taken to the hospital and underwent surgery to treat her wounds.

On February 28, 2014, Corman was indicted on two counts of attempted murder (Kentucky Revised Statute (KRS) 507.020 and 506.010), one count of assault in the first degree (KRS 508.010), and two counts of wanton endangerment in the first degree (KRS 508.060). On March 10, 2014, Corman entered an unconditional "open" guilty plea to all of the charges without a recommendation by the Commonwealth. On May 1, 2014, the circuit court entered a judgment sentencing Corman to twenty (20) years on the first count of attempted murder; fifteen (15) years on the second count of attempted murder to run consecutively to the first count of attempted murder and the two counts of wanton

endangerment; twenty (20) years on the count of assault in the first degree to run concurrently with the first count of attempted murder; and five (5) years on each of the two counts of wanton endangerment in the first degree to run consecutively to the first three counts, for a total sentence of forty-five years in prison.[1]

On July 1, 2015, Corman filed an RCr 11.42 motion to vacate his sentence based on ineffective assistance of counsel. On January 27, 2016, the circuit court entered an order denying the motion. This appeal followed.

The standard of review for ineffective assistance of counsel involves a two-prong test requiring the defendant to show: (1) deficient performance by counsel and (2) resulting prejudice to the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984), *accord Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985). With respect to a guilty plea, the standard requires the defendant to establish: (1) that counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance; and (2) that the deficient performance so seriously affected the outcome of the plea process that, but for the errors of counsel, there is a reasonable probability that the defendant would not have pled guilty, but would have insisted on going to trial. *Bronk v. Commonwealth*, 58 S.W.3d 482, 486-87 (Ky. 2001). *See also Hill v. Lockhart*, 474 U.S. 52, 59, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985). "There is 'a strong presumption that counsel's conduct falls within a wide range of reasonable professional assistance.'" *Commonwealth v.*

[1] The maximum sentence that Corman could have received for the multiple offenses was seventy (70) years. KRS 532.110.

Bussell, 226 S.W.3d 96, 103 (Ky. 2007) (citing *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 must analyze counsel's overall performance and the totality of circumstances therein in order to determine if the challenged conduct can overcome the strong presumption that counsel's performance was reasonable. *Haight*, 41 S.W.3d at 441-42; *Commonwealth v. Pridham*, 394 S.W.3d 867, 875 (Ky. 2012); *Embry v. Commonwealth*, 476 S.W.3d 264, 268 (Ky. App. 2015). "A defendant is not guaranteed errorless counsel, or counsel adjudged ineffective by hindsight, but counsel reasonably likely to render . . . reasonably effective assistance." *McQueen v. Commonwealth*, 949 S.W.2d 70, 71 (Ky. 1997). An appellate court reviews counsel's performance and any alleged deficiency *de novo*, *Brown v. Commonwealth*, 253 S.W.3d 490, 500 (Ky. 2008), and defers to any findings of fact made by the trial court. *Logan v. Commonwealth*, 446 S.W.3d 655, 658-59 (Ky. App. 2014).

We note that the record on appeal does not contain any of the hearings held by the circuit court, such as the guilty plea and sentencing hearings. "It is Appellant's duty to designate the contents of the record on appeal. *Commonwealth v. Thompson*, 697 S.W.2d 143, 144 (Ky. 1985). 'It has long been held that, when the complete record is not before the appellate court, that court must assume that the omitted record supports the decision of the trial court. *Id*. at 145.'" *McDaniel v. Commonwealth*, 341 S.W.3d 89, 96 (Ky. 2011).

Corman argues that trial counsel was ineffective for failure to perform an adequate investigation and fully inform him of the available defenses in order for him to enter a knowing and intelligent guilty plea. Corman contends that he would not have pled guilty and would have insisted on going to trial based on the potential defense of extreme emotional distress (EED). "Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Halvorsen v. Commonwealth*, 258 S.W.3d 1, 3 (Ky. 2007) (quoting *Strickland v. Washington*, 466 U.S. at 690, 104 S.Ct. at 2066). "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland*, 466 U.S. at 691, 104 S. Ct. at 2066. Where the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, whether the error caused the defendant to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea, which in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial. *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); *Commonwealth v. Tigue*, 459 S.W.3d 372, 392 (Ky. 2015). For claims that counsel failed to advise the defendant about potential defenses, "the resolution of the 'prejudice' inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial." *Id*. *See also Commonwealth v. Elza*, 284 S.W.3d 118, 122 (Ky. 2009). In other words, "'to

obtain relief [on an ineffective assistance claim] a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances.'" *Stiger v. Commonwealth*, 381 S.W.3d 230, 237 (Ky. 2012) (quoting *Padilla v. Kentucky*, 559 U.S. 356, 372, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010)).

To establish EED, a defendant must show 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, 468-69 (Ky. 1986). "[T]he event which triggers the explosion of violence on the part of the criminal defendant must be sudden and uninterrupted." *Foster v. Commonwealth*, 827 S.W.2d 670, 678 (Ky. 1991). The triggering event for extreme emotional disturbance may "fester in the mind" before surfacing to exact its damage. *Benjamin v. Commonwealth*, 266 S.W.3d 775, 783 (Ky. 2008). However, there exists a "subsidiary inquiry" as to whether there was an intervening "cooling off" period between the provocation and the criminal act sufficient enough to preclude a conclusion that the provocation was adequate. *Id*.

Corman asserts that the text messages that he received while at the bar so enraged him that they served as the triggering event for his extreme emotional disturbance. Corman acknowledges, however, that both he and defense counsel were fully aware of the possibility of an extreme emotional distress defense prior to entry of the plea. During the guilty plea hearing, Corman indicated that he had

fully discussed all his defenses with counsel, including any mental health issues, and he fully understood his charges and his defenses. "Solemn declarations in open court carry a strong presumption of verity." *Centers v. Commonwealth*, 799 S.W.2d 51, 54 (Ky. App. 1990) (citing *Blackledge v. Allison*, 431 U.S. 63, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977)).

The circuit court stated that while there was evidence of stress, there was not sufficient evidence to support a jury instruction on an extreme emotional disturbance defense. First, evidence of "hurt" or "anger" is insufficient to prove extreme emotional disturbance. *Talbott v. Commonwealth*, 968 S.W.2d 76, 85 (Ky. 1998). Second, there was a significant "cooling-off" period from the time Corman received the text messages from his wife and the act of deliberately obtaining the handgun and shooting her. Also, the text messages and argument with his wife would provide no legitimate justification for shooting at his step-daughter. There is not a significant likelihood that an extreme emotional disturbance defense would have been successful had Corman eschewed entry of a guilty plea in favor of going to trial. Given the statements of Corman and his attorney at the guilty plea hearing and the evidence, Corman has not shown ineffective assistance of counsel based on an alleged extreme emotion disturbance defense.

Corman also alleges that counsel failed to investigate and fully advise him of the potential defense of intoxication, and contends that he would not have pled guilty, but would have insisted on going to trial based on this defense. A

voluntary intoxication defense is available where a jury could reasonably conclude that the defendant was so intoxicated that he could not have formed the requisite *mens rea* for the offense. *Fredline v. Commonwealth*, 241 S.W.3d 793, 797 (Ky.2007); KRS 501.080. However, this defense presents a high bar, because "there must be evidence not only that the defendant was drunk, but that [he] was so drunk that [he] did not know what [he] was doing." *Springer v. Commonwealth*, 998 S.W.2d 439, 451-52 (Ky. 1999). Thus, evidence of "mere drunkenness" is not sufficient to raise the defense of intoxication. *King v. Commonwealth*, 513 S.W.3d 919, 923 (Ky. 2017).

In support of this claim, Corman suggests that the combination of alcohol and anxiety and depression medications that he was taking at the time of the incident caused him to become intoxicated. He further contends that the extreme violence he exhibited was uncharacteristic of his normal behavior.[2] The circuit court stated that there was not sufficient evidence of such extreme intoxication to support a jury instruction on the defense, and the choice not to risk reliance upon the possibility of such a defense was well within the range of intelligent choices among the alternative courses of action open to the defendant. The record indicates that defense counsel raised this issue prior to entry of the guilty plea and an expert provided an opinion based on hospital toxicology records that while Corman had an elevated level of alcohol, it was not significant enough

[2] We note that Corman's claims of extreme emotional distress and intoxication are inherently contradictory. An extreme emotional distress defense is based on excusing an intended criminal act because of uncontrollable emotion; whereas, an intoxication defense requires a level of intoxication so high that it negates intent.

to negate his level of intent. Corman does not provide any specific evidence as to the effect of the combination of these drugs and alcohol to support his allegations, and he stated in his brief that he only consumed a "few beers" prior to the incident. Corman has failed to present sufficient evidence to rebut the presumption that defense counsel's actions were deficient or that the defense of voluntary intoxication would have been successful at trial.

Corman also asserts ineffective assistance of counsel based on an alleged violation of double jeopardy involving his conviction for both attempted murder and assault in the first degree as to his wife. Relying on *Spicer v. Commonwealth*, 442 S.W.3d 26 (Ky. 2014), Corman argues that his conviction for the two offenses violated the proscription against conviction of more than one offense stemming from single course of conduct. *See also* KRS 505.020; *Kiper v. Commonwealth*, 399 S.W.3d 736 (Ky. 2012). The circuit court stated that "the description of the events presented to the court support the charges as indicted . . . ." Unfortunately, because the video recording of the guilty plea hearing is not included in the record on appeal, we must assume that it would support the circuit court. In addition, Corman's total sentence was not impacted by the convictions for both of the two offenses because the sentence for assault in the first degree ran concurrently with the sentence for attempted murder. Consequently, even if a possible conviction for assault in the first degree were removed,[3] Corman was still facing a possible maximum sentence of seventy years, so he was not prejudiced in

[3] The remedy for a double jeopardy violation is to vacate the conviction for the lesser offense. *See Kiper*, 399 S.W.3d at 746; *Brown v. Commonwealth*, 297 S.W.3d 557, 562-63 (Ky. 2009).

that it would not have been reasonable to reject the guilty plea in favor of going to trial given the strong evidence on the other charges.

As a result, Corman has failed to show that his guilty plea was not entered voluntarily and intelligently or that it was a result of ineffective assistance of counsel. We conclude that the circuit court did not err in denying the RCr 11.42 motion.

For the foregoing reasons, we affirm the order of the Kenton Circuit Court.

ALL CONCUR.

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