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NOT TO BE PUBLISHED

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2016-CA-001898-MR

KENT R. MASON

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT  
HONORABLE TIMOTHY KALTENBACH, JUDGE  
ACTION NO. 09-CR-00538

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: ACREE, DIXON AND D. LAMBERT, JUDGES.

ACREE, JUDGE: Kent Mason appeals from the McCracken Circuit Court's November 14, 2016 order, issued following an evidentiary hearing, denying his motion for post-conviction relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. We affirm.

## I. FACTS AND PROCEDURE

In April 2010, a jury found Mason guilty of first-degree burglary and first-degree assault for breaking into his ex-girlfriend's townhouse and brutally assaulting her, and being a first-degree persistent felony offender. Mason and the victim had a tumultuous relationship for most of 2008 and 2009. The victim lived in a townhouse in Paducah, Kentucky. She was the sole tenant and only her name was on the lease. Mason often stayed the night and kept personal items there, including clothing. He used the victim's address to obtain a state-issued identification card, for employment purposes, and on a credit union application. Mason did not, however, have a key to the townhouse and was not permitted to stay there when the victim was not home.

In late November 2009, Mason and the victim mutually agreed to end their relationship. The victim notified Mason he was no longer allowed to stay at her townhouse; she removed his personal belongings by taking them to his sister's residence. On the evening of November 18, 2009, Mason had been drinking and repeatedly called the victim. According to the victim, during one of the phone calls, Mason told her, "If you play games, you get hurt." The victim locked her doors and went to bed.

The victim later awoke to the sound of glass breaking. She found Mason in her townhouse. Mason attacked, choked, and brutally beat the victim. He accused her of cheating on him and called her insulting names. Mason eventually passed out, and the victim called the police. When officers arrived, they

found that the townhouse's back screen door and back door glass had been broken. The officers woke Mason and placed him under arrest.

The officers testified at trial that while Mason smelled of alcohol, he did not appear to be overly intoxicated. He was not slurring his speech and walked unassisted down the stairs. The officers transported Mason to the police station to be interviewed. During the interview, Mason could recall specific facts about the incident, including breaking into the townhouse and being aware that the victim had taken his clothes to his sister's house.

Mason's trial strategy was to concede the misdemeanor assault charge, but prove that he lived at the victim's townhouse at the time of the incident to combat the more serious burglary charge. He did not testify at trial. He did not request a jury instruction on voluntary intoxication.

The jury ultimately found him guilty of the charged crimes, and the circuit court sentenced him to a total of thirty years' imprisonment. Mason appealed to the Kentucky Supreme Court as a matter of right. He argued, among other things, that the circuit court erred in failing to *sua sponte* instruct the jury on voluntary intoxication. The Court disagreed with Mason and affirmed, noting while the unpreserved issue did not rise to the level of palpable error mandating reversal, Mason "would have been entitled to an instruction on voluntary intoxication had he requested it." *Mason v. Commonwealth*, 2010-SC-000412-MR, 2011 WL 5880945, at \*3 (Ky. Nov. 23, 2011).

Mason then sought to have his convictions and sentence vacated pursuant to RCr 11.42 on grounds that he received ineffective assistance of trial counsel. He argued his trial counsel was ineffective for failing to request an instruction on voluntary intoxication and for failing to introduce the laws of tenancy to the jury. The circuit court denied his motion. It reasoned that because the issues had been addressed on direct appeal, they could not be addressed in a subsequent RCr 11.42 motion.

We reversed the circuit court's decision, finding that Mason's RCr 11.42 claim of attorney error related to the unrequested voluntary intoxication instruction differed materially from his claim of court error raised on direct appeal regarding the same issue. *Mason v. Commonwealth*, 2013-CA-000794-MR, 2015 WL 5768678, at \*1 (Ky. App. Oct. 2, 2015). We directed the circuit court to conduct an evidentiary hearing, if warranted, and to fully consider counsel's failure to request an instruction on voluntary intoxication.

The circuit court conducted an evidentiary hearing on July 26, 2016. Mason's trial counsel was the sole witness.

Trial counsel, a seasoned defense attorney with ample trial experience, considered "very little" a voluntary intoxication defense or instruction. He testified that his trial strategy was to concede the assault charge and contest the burglary charge. His focus, then, was on trying to prove that Mason lived in the home, because "you can't break into your own home," and not on Mason's degree of intoxication. Counsel testified the evidence established Mason was drinking.

To emphasize that fact would, in counsel's opinion, serve only to inflame the jury with little chance of succeeding on the voluntary intoxication defense. He explained: "Well, I believed that if I got up in front of the jury and said, 'Mr. Mason didn't know what he was doing because he drank so much,' I didn't think that would be effective considering the defense we were trying to put on."

Trial counsel also explained that Mason elected not to testify and, without his testimony explaining he did not know what he was doing due to his level of intoxication, trial counsel believed a voluntary intoxication instruction would not be successful or support Mason's defense. Again, while the evidence established Mason had been drinking, trial counsel could not recall evidence in the record indicating Mason told investigators that he did not know or remember what he was doing on the night in question. "If he had, maybe that would have changed my mind," trial counsel stated. In trial counsel's professional opinion, there was simply insufficient evidence, absent Mason's testimony, to prove that Mason met the voluntary intoxication standard.

The circuit court found trial counsel's testimony persuasive and credible, and his trial strategy reasonable. It concluded trial counsel's decision not to pursue a strategy of voluntary intoxication fell within the wide range of professionally competent assistance. The circuit court again denied Mason's RCr 11.42 motion, and Mason again appealed.

## **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. Tamm*, 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.*

Appellate review of counsel’s performance under *Strickland* is *de novo*. *Commonwealth v. McGorman*, 489 S.W.3d 731, 736 (Ky. 2016).

### III. ANALYSIS

Mason argues he was denied effective assistance of counsel when trial counsel failed to request a jury instruction on voluntary intoxication. He claims the evidence unquestionably established he was heavily intoxicated at the time of the offense and, if properly instructed, the jury could have found his intoxication negated the intent element of the burglary charge resulting in a lesser sentence.

The circuit court found, and we agree, that trial counsel’s performance was not deficient. “Judicial scrutiny of counsel’s performance must be highly deferential[,]” and “a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance[.]” *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065. Moreover, we must resist “the distorting effects of hindsight” by “evaluat[ing] the conduct from counsel’s perspective at the time.” *Id.* “It is all too tempting for a defendant to second-guess counsel’s assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel’s defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.” *Id.*

Here, trial counsel’s decision not to request a voluntary intoxication instruction was the result of reasonable professional judgment. Trial counsel

thought that attempting to use alcohol to justify Mason's decision to break into and brutally assault the victim would do nothing more than inflame the jury. He was also not convinced the defense would prove successful. "A voluntary intoxication instruction is justified only when there is evidence that the defendant 'was so drunk that he did not know what he was doing,' or when the intoxication 'negatives the existence of an element of the offense.'" *Rogers v. Commonwealth*, 86 S.W.3d 29, 44 (Ky. 2002) (footnotes omitted). "Evidence of 'mere drunkenness' will not suffice." *King v. Commonwealth*, 513 S.W.3d 919, 923 (Ky. 2017) (citation omitted).

There is no question Mason was drunk on the night in question. His degree of drunkenness, however, was unclear. He was so intoxicated he passed out on the victim. But he was also able to accurately recall events when interviewed by police, to walk unassisted down stairs, and to speak intelligibly without slurring his words. Because Mason chose not to testify, he could not express to the jury that he was so intoxicated he did not know what he was doing. Trial counsel testified he took all these facts into consideration when deciding not to pursue a voluntary intoxication instruction. He thought the defense weak and easily assailable. Absent Mason's testimony, trial counsel stated he had little chance to persuade the jury that Mason was so drunk that intent was negated or that Mason had abandoned his faculties. Trial counsel chose to combat the burglary charge by focusing, instead, on proving Mason lived at the victim's townhouse.

Mason leans heavily on the Supreme Court's statement in his direct appeal that, if requested, he would have been entitled to a voluntary intoxication instruction. *Mason*, 2011 WL 5880945, at \*3. This statement in the Supreme Court's unattributed and unpublished memorandum opinion could well be considered dicta in that it was unnecessary to the determination whether the trial court should have instructed the jury *sua sponte*. Nevertheless, the issue in this RCr 11.42 matter is not whether the evidence supported such an instruction. The focus is on whether it was reasonable for trial counsel, taking into consideration all the facts as he knew them before trial, to forego the instruction in lieu of another reasonable defense strategy.

There is rarely one perfect, unassailable way to try a criminal case. Counsel is often faced with various viable strategic options, and he or she must exercise reasonable professional judgment in discerning which options or strategies to pursue. Trial counsel in this case explained his rationale and decision-making process. The circuit court found his explanation reasonable and credible. It is not for us to second-guess trial counsel's decision here.

#### **IV. CONCLUSION**

We affirm the McCracken Circuit Court's November 14, 2016 order denying Mason's RCr 11.42 motion seeking relief due to alleged ineffective assistance of counsel.

ALL CONCUR.

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