RENDERED: DECEMBER 21, 2018; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000506-MR

CHRISTOPHER KOTERAS — APPELLANT

v.

APPEAL FROM JESSAMINE CIRCUIT COURT
HONORABLE C. HUNTER DAUGHERTY, JUDGE
ACTION NO. 11-CR-00087

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

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

NICKELL, JUDGE: Christopher Koteras appeals from an order entered by the Jessamine Circuit Court denying his motion for RCr[1] 11.42 relief alleging counsel—both at trial and on direct appeal—was ineffective and prejudiced his

[1] Kentucky Rules of Criminal Procedure.

case. In denying the motion, the trial court attributed trial counsel's actions to reasonable trial strategy and found, if raised by appellate counsel on direct appeal, two additional arguments would not require reversal. This appeal challenges trial counsel's representation. After reviewing the record, briefs and law, we affirm.

FACTS AND PROCEDURAL BACKGROUND

We quote the Supreme Court's rendition of the facts from the direct appeal.[2]

> Jennifer Koteras found a note written by her eldest daughter, [A.K.],[3] then eleven years old, informing her that [Christopher] had touched [her] "private spots." The note stated that the touching started several years earlier when [A.K.] was age seven and asked Jennifer to inform [A.K.]'s counselor, Ms. Janet. Jennifer reported the alleged abuse to authorities. [Christopher's] indictment and prosecution followed.
>
> Leading up to Jennifer's discovery of the note, [Christopher's] relationship with both Jennifer and their children had been confrontational. Diagnosed as bipolar, [Christopher] was subject to severe mood swings and bouts of anger. Eventually, the Koterases' tumultuous relationship became strained to the point that the couple separated; and Jennifer sought and received an Emergency Order of Protection (EPO) against [Christopher]. Soon thereafter, the couple divorced.
>
> [Christopher] got an apartment in Lexington, and the children made weekend visits there. The apartment had two bedrooms—one with a queen-sized bed and the other

[2] *Koteras v. Commonwealth*, 2012-SC-000649-MR, 2014 WL 5410233, at *1-2 (Ky. Oct. 23, 2014) (footnotes omitted).

[3] The victim, born July 9, 2000, is identified by initials only to conceal her identity.

with a twin-sized bed. [A.K.] testified that on a particular visit in Lexington, her sister wanted to sleep alone in the twin bed rather than the sisters sleeping together in the queen-sized bed as was customary. So [A.K.] slept with [Christopher] in the queen-sized bed. Similar to the encounters alleged in the indictment, [A.K.] testified she woke up to Christopher touching her inappropriately. The impact of this occurrence was clear and immediate. On [A.K.]'s next scheduled visit to [Christopher's] apartment, she refused to get out of Jennifer's car. [Christopher] grabbed [A.K.] by the wrist and attempted to pull her from the vehicle. As a result, [A.K.] suffered a sprained wrist.

The wrist incident prompted a suspension and modification of [Christopher]'s exercise of his visitation rights with his daughters. Initially following the incident, [his] visits were supervised at a counselor's office. This eventually transitioned to visitation only in public places. But at no point following this incident did [A.K.] visit with [Christopher].

[A.K.] testified that when she overheard her mother considering permitting [A.K.]'s younger sister to resume weekend overnight visits with [Christopher], she was impelled to report the abuse to her. By this time, [A.K.]'s younger sister was reaching the age when [A.K.] was first subjected to abuse by [Christopher], so [A.K.] said she feared [Christopher] would start abusing the sister, as well.

[Christopher] was indicted by the Jessamine County Grand Jury on twenty-four counts of first-degree sexual abuse, but the Commonwealth later amended the indictment to proceed on only eight counts. The remaining sixteen counts were later dismissed. Each count was differentiated by specific facts relative to the particular occurrence. The eight occurrences presented at trial follow the general pattern of [A.K.] waking to

> find [Christopher] sitting on the edge of her bed with his hand underneath her panties and fondling her genitals.
>
> The jury convicted [Christopher] of all eight counts and recommended a sentence of five years' imprisonment on each count, to run consecutively, for a total of forty years' imprisonment. But because of the consecutive-sentence cap outlined in Kentucky Revised Statutes (KRS) 532.110(c) and 532.080(6)(b), at final sentencing, the trial court sentenced [Christopher] to twenty years' imprisonment. In addition, [he] was sentenced to a five-year period of conditional discharge upon release from incarceration or parole and to lifetime sex-offender registration. This appeal followed.

ADHERENCE TO RULES OF APPELLATE PROCEDURE

Christopher's brief is rife with errors, the most flagrant being inclusion of a detailed summary of two family court cases[4] which are not part of the record on appeal. Post-conviction appellate counsel sought to have those files certified as part of the appellate record, but the trial court denied supplementation as "unnecessary, and a waste of time[.]" Attempts to supplement the record and factual misstatements culminated in the Commonwealth moving to strike Christopher's brief. That motion was passed to this merits panel for resolution. We grant the motion to strike in part in a separate order entered this date.

[4] Divorce proceeding and EPO proceedings.

Additionally, in violation of CR[5] 76.12(4)(c)(v), three of the nine numbered issues in Christopher's brief do not cite where the claims were argued to the trial court. We emphasize preservation for good reason. For this Court to have authority to review a claim, the trial court must have had an opportunity to correct its alleged error. *Harrison v. Leach*, 323 S.W.3d 702, 708-09 (Ky. 2010). We have no duty to search the record for proof a party's argument was presented to the trial court. *See Milby v. Mears*, 580 S.W.2d 724, 727 (Ky. App. 1979). However, we lack authority to review unpreserved issues unless palpable error review is requested. RCr 10.26. In this appeal, palpable error review was not requested for any claim. All nine numbered claims were addressed by the trial court, convincing us they were preserved. We, therefore, address all nine claims.

In an unnumbered claim, Christopher's brief argues trial counsel pursued a defense to which he never agreed and without his consent conceded guilt of physical abuse—a crime with which he was neither charged nor convicted. "[A] party may not raise an issue for the first time on appeal[.]" *Taylor v. Kentucky Unemployment Ins. Comm'n*, 382 S.W.3d 826, 835 (Ky. 2012) (citations omitted). The claim was raised in neither the *pro se* RCr 11.42 motion, nor counsel's supplement thereto. Thus, it is not properly before us and will not be addressed.

[5] Kentucky Rules of Civil Procedure.

Finally, the last page of the appendix to Christopher's brief is a single sheet of handwritten notes attributed to Hon. Susanne McCullough who served as trial counsel with Hon. Kieran Comer. CR 76.12(4)(c)(vii) directs, "[t]he index shall set forth where the documents may be found in the record." Failure to specify the page number on which the sheet is found in the record violates the rule.

Despite the foregoing errors in the brief for appellant, and the Commonwealth's motion to strike, we will allow the appeal to go forward because these flaws are attributable to counsel, not to the client. All counsel are warned to adhere to the rules of appellate practice and procedure.

STANDARD OF REVIEW

Denial of RCr 11.42 relief is reviewed for abuse of discretion. *Phon v. Commonwealth*, 545 S.W.3d 284, 290 (Ky. 2018) (citing *Teague v. Commonwealth*, 428 S.W.3d 630, 633 (Ky. App. 2014)). The test is "whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (citations omitted). Legal issues are reviewed *de novo*. *Phon*, 545 S.W.3d at 290.

To establish ineffective assistance of counsel, a movant must satisfy a two-pronged test showing counsel's performance was deficient and the deficiency caused actual prejudice resulting in a fundamentally unfair proceeding with an unreliable result. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80

L.Ed.2d 674 (1984); *accord Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985).

As established in *Bowling v. Commonwealth*, 80 S.W.3d 405, 411-12 (Ky. 2002):

> [t]he *Strickland* standard sets forth a two-prong test for ineffective assistance of counsel:
>
> > First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.
>
> *Strickland*. . . . To show prejudice, the
>
> > defendant must show 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 the probability sufficient to undermine the confidence in the outcome.
>
> *Id.* [466 U.S.] 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 695.

For relief to be granted, both *Strickland* prongs must be satisfied. "Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable." *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064.

Movant must overcome the strong presumption counsel's assistance was constitutionally sufficient or "might be considered sound trial strategy." *Id.*, 466 U.S. at 689, 104 S.Ct. at 2065. "[S]trategic choices made after a thorough

investigation of law and facts relevant to plausible options are virtually unchallengeable[.]" *Id.*, 466 U.S. at 690, 104 S.Ct. at 2066. Courts must be highly deferential in reviewing trial counsel's performance and avoid second-guessing those actions in hindsight. *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); *Harper v. Commonwealth*, 978 S.W.2d 311, 315 (Ky. 1998). "Surmounting *Strickland*'s high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371, 130 S.Ct. 1473, 1485, 176 L.Ed.2d 284 (2010).

"When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Strickland*, 466 U.S. at 695, 104 S.Ct. at 2068-69. In answering this question, we consider the totality of the evidence and defer to the trial court's evaluation of witness credibility unless clearly erroneous. CR 52.01; *Johnson v. Commonwealth*, 412 S.W.3d 157, 166 (Ky. 2013).

LEGAL ANALYSIS

In its order denying RCr 11.42 relief, the trial court combined three alleged errors emanating from a letter from Dr. Eric V. Drogin, a clinical and forensic psychologist retained by the defense as a trial consultant. Dr. Drogin recommended defense counsel secure testimony about the adverse impact of leading questions during interviews with children; have A.K. undergo a forensic

psychological evaluation; and emphasize A.K. was found to be in good mental health during the time she claimed her father was sexually abusing her. The trial court deemed counsel's rejection of all three ideas to be reasonable trial strategy.

First, Christopher alleges trial counsel should have offered testimony about the impact of leading questions on children. After conducting a paper review of A.K.'s records and psychotherapy notes, Dr. Lee Epstein's evaluation,[6] and A.K.'s Child Advocacy Center ("CAC") interview, Dr. Drogin wrote to trial counsel:

> [i]t appears that the child was presented for a [CAC] interview on 13 April 2011 by her mother, and that the child and mother had discussed the interview in advance. Counsel will doubtless be moved to characterize many of the questions asked of the child during that interview as leading, and will want to ensure that one component of the aforementioned forensic evaluation will be to review the DVD of that interview prior to engaging in a follow-up inquiry with the child.

During the evidentiary hearing, Dr. Drogin was asked about the CAC interview. He stated his only concern was leading questions posed to A.K. which he admitted "commonly exist in [child sexual abuse] cases—not always—and not rarely." He further admitted he did not know what Jennifer may have suggested to A.K. en

[6] In July 2009, A.K. experienced four days of seizures. A.K. was referred to Dr. Epstein who conducted a comprehensive psychoeducational evaluation for the limited purpose of determining whether she was faking the seizures to gain attention. He concluded she showed no sign of neurocognitive impairment; exhibited "no chronic, lingering condition" impairing her mental health; and, was well-adjusted, sweet and kind. Dr. Epstein did not testify at trial.

route to the interview, nor what anyone else may have suggested to the child. He also could not say A.K.'s memory had in fact been tainted.

Based on the foregoing, Christopher argues the trial court clearly erred in finding:

> as to any suggestive interview techniques, Dr. Drogin testified at the RCr 11.42 hearing that although there were some leading questions, the interview overall was fairly standard and not unduly suggestive, and that given the trial strategy, the decision of whether to challenge the interview techniques should be left to the discretion of the trial counsel.

Our review of the evidentiary hearing shows the following. On cross-examination, the prosecutor confirmed with Dr. Drogin, he testified leading questions are "fairly common in these sort of cases," to which Dr. Drogin responded, "they are fairly common." Moments later, the prosecutor asked Dr. Drogin whether he had suggested counsel request a taint hearing, to which the witness replied, "He's an attorney. He doesn't need a psychologist to tell him what sort of hearings he should ask for. My advice to him was on what sort of mental health experts he might need to support his job." When the court asked Dr. Drogin how an attack on the use of leading questions could have benefitted the defense, he stated, "Your Honor, I don't know that I'm qualified to answer that question." Substantial proof demonstrates the trial court accurately summarized Dr. Drogin's testimony.

Second, Dr. Drogin recommended defense counsel secure a qualified person to do two tasks: perform a forensic psychological evaluation of A.K. and review the CAC interview for leading questions and Jennifer's possible manipulation of her daughter. Christopher argues failing to hire a forensic expert to help the defense was ineffective assistance of counsel.

Dr. Drogin suggested A.K. undergo a forensic evaluation because none had been performed and two prior evaluations had yielded inconsistent opinions about the child's mental state. Dr. Epstein had found A.K. was in good mental health in July 2009—while the still-undisclosed sexual abuse was occurring—and Janet Vessels[7]—the family's licensed professional clinical counselor—had diagnosed A.K. with post-traumatic stress disorder ("PTSD") prior to March 2012—after the sexual abuse had been revealed. Based on the limited information he reviewed, Dr. Drogin suggested a forensic evaluation *might* confirm whether A.K. had been sexually abused; help trial counsel understand whether and to what degree A.K.'s testimony was tainted, if at all; and, better prepare counsel to cross-examine A.K. Dr. Drogin further stated Dr. Epstein's evaluation—performed to understand the child's development in the wake of

[7] Vessels is neither a psychologist nor psychiatrist. She began working with the family on June 21, 2010, helping A.K. adjust to the divorce and her father spraining her wrist trying to forcibly remove her from Jennifer's car prior to a scheduled visitation. Vessels did not testify at trial.

seizures—was insufficient for developing a trial strategy. He believed counsel needed someone to help "sort it out." Dr. Drogin also explained a forensic psychological evaluation would demonstrate whether two experts reached the same conclusion.

Christopher was represented by two experienced criminal defense attorneys at trial. Both testified at the evidentiary hearing. Both recalled Dr. Drogin, who is also an attorney, suggesting A.K. be psychologically evaluated for trial purposes, but rejected the idea in light of the facts and chosen trial strategy. The defense theory was to admit A.K. was scared of her father because of his verbal outbursts, being bipolar, and spraining the child's wrist. A.K.'s fear of her father was offered to explain her supposed fabrication of sexual abuse allegations to avoid spending time with him. It was believed jurors would see Jennifer as seeking to limit Christopher's time with the children due to the hotly contested custody battle in a bid to personally receive favorable treatment in the divorce. Trial counsel realized the jury's verdict would rest entirely on whether jurors believed Christopher or A.K.

Arguing Vessels was unqualified to diagnose A.K. as suffering from PTSD, counsel convinced the trial court to totally exclude Vessels as a witness. During the evidentiary hearing, Comer acknowledged the trial court's ruling may have been overly generous because Vessels was probably qualified to be a

therapist and make notes. Thus, jurors never heard the PTSD diagnosis. Jurors also did not hear Vessels' observations of the child during months of counseling. Comer did not want to dilute that ruling with a new evaluation that might echo the PTSD diagnosis and open the door to damaging testimony from Vessels.

Comer also stated he believed challenging the CAC interview would have done more harm than good. While Dr. Drogin testified leading questions were asked of A.K., he readily acknowledged such questions are common when interviewing children. Christopher attempts to link unspecified leading questions in the CAC interview to Jennifer's alleged manipulation of A.K., but he failed to establish any correlation. Jennifer's alleged manipulation was an unsubstantiated defense theory—rank speculation that developed into nothing more.

Comer described structuring the defense as, "trying to step through a minefield." From his perspective, securing a forensic evaluation would have been more damaging than beneficial. Even Dr. Drogin admitted he was unqualified to say how such an evaluation would have helped the defense. We do not have access to the CAC interview and no particular question has been challenged. Thus, no basis exists from which we could declare counsel should have offered expert testimony about the effect of leading questions on children alleging sexual abuse.

From the totality of the evidence, the trial court concluded a forensic psychological evaluation would not have aided the defense and could have created

insurmountable problems. Based on counsel's view of the evidence and the available defenses, we conclude the decision against securing a forensic evaluation and challenging the CAC interview due to leading questions was sound trial strategy and not ineffective assistance of counsel.

The third claim is counsel did not tell jurors Dr. Epstein found A.K. to be in good mental health in 2009—testimony Christopher claims would have exculpated him. Dr. Epstein evaluated A.K. for the limited purpose of finding the cause of the child's seizures. At that time, sexual abuse would have been occurring but had not been disclosed. Even Dr. Drogin acknowledged Dr. Epstein—given his limited purpose—may have lacked all facts relevant to evaluating A.K., thereby diminishing the value of his findings. He further acknowledged the helpfulness of Dr. Epstein's report would have depended entirely on the trial strategy pursued by counsel.

Had Dr. Epstein testified, the Commonwealth would likely have questioned him using details gleaned from Vessels' report. Instead, as trial evolved, A.K. testified Dr. Epstein evaluated her for seizures but she did not reveal the sexual abuse to him—a fact McCullough repeated in summation. Thus, the defense received the benefit of Dr. Epstein's evaluation without subjecting him to cross-examination. Like the trial court, we discern no ineffectiveness assistance of counsel.

Trial strategy greatly influenced counsel's decisions on the first three issues. Christopher has not overcome the strong presumption counsel's decisions were "sound trial strategy." *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065. Moreover, Dr. Drogin spoke in terms of had counsel taken his proposed steps, things "could have," "might have," and "may have" happened. Those words represent mere *possibilities*.

> [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.

Strickland, 466 U.S. at 694, 104 S.Ct. at 2068 (emphasis added). There being no reason to conclude counsel's decisions were not sound strategy, or the trial verdict would have been any different, Christopher failed to sustain his burden on the first three claims.

The fourth allegation is trial counsel failed to seek an admonition and allowed the victim advocate to stand behind the jury box as A.K. testified, using hand signals to remind her to speak loudly. Christopher suggests the signals were unnecessary because the child's volume never wavered and the advocate's real purpose was to provide A.K. encouragement, approval and comfort as criticized in *Sharp v. Commonwealth*, 849 S.W.2d 542, 547 (Ky. 1993). *Sharp* is factually distinct. There, the family friend of a child victim of rape and sodomy took it upon

herself to become a trial participant by gesturing and signaling to the victim as the child testified. The bystander also shared the substance of testimony with witnesses waiting to testify outside the courtroom.

Here, one could just as easily conclude A.K.'s voice did not waver because she followed the advocate's gestures and spoke loudly throughout her testimony. But more importantly, KRS 421.575, titled "Role of victim advocates in court proceedings," specifically allows the advocate to be in the courtroom to support and confer with the victim.

> In all court proceedings, a victim advocate, upon the request of the victim, shall be allowed to accompany the victim during the proceeding to provide moral and emotional support. The victim advocate shall be allowed to confer orally and in writing with the victim in a reasonable manner. However, the victim advocate shall not provide legal advice or legal counsel to the crime victim in violation of KRS 421.570 and 524.130.

KRS 421.575. Testifying at the evidentiary hearing, the advocate stated she sat with A.K. and Jennifer before the child took the witness stand, provided a familiar face to the child, and stood near the front row of the gallery while A.K. testified. She said she signaled to A.K. to keep her voice up,[8] as the prosecutor had directed her to do, but mouthed nothing. There is no proof the advocate told A.K. how to answer any question. There is also no indication the jury knew of her presence

[8] The advocate testified she used a thumbs-up signal and cupped her hand behind her ear.

because she positioned herself *behind* the jury box. A victim advocate is distinct from a bystander.

Christopher claims the trial court erroneously found the advocate gestured solely as volume control. We disagree. During the evidentiary hearing, the trial court took judicial notice of the courtroom cameras not revealing juror faces, and further stated, at the time of trial, no camera was focused on the spot where the advocate stood. Moreover, courtroom cameras respond to sound. There was no indication the advocate audibly spoke to A.K. during the testimony. Thus, there is no video record of the advocate during trial to support Christopher's claim.

Christopher alleges counsel should have taken action as soon as he alerted them to the advocate's actions. McCullough testified she was focused on A.K.'s testimony because she was preparing to cross-examine the child. She further testified she did not see the advocate and learned of her only from her client. Christopher claims he also told Comer, but he too was focused on A.K.'s testimony. Christopher claims the advocate gestured "thumbs up," made movements up and down, and nodded her head.

When direct examination of A.K. ended, McCullough approached the bench, asking the court to direct the advocate to be seated. McCullough told the judge the defense would prefer the advocate be excluded from the courtroom, but would be satisfied if she took a seat. The trial court had the prosecutor direct the

advocate to be seated. In light of KRS 421.575, there was no error by counsel. Nor did the trial court err; he properly exercised his discretion to accommodate the victim and maintain courtroom decorum. *Sharp*, 849 S.W.2d at 547 (citing *Jones v. Commonwealth*, 623 S.W.2d 226 (Ky. 1981)).

The fifth claim is counsel failed to receive sufficient and timely notice of the eight charges being tried—three of which Christopher maintains were based on incidents not mentioned in the CAC interview.[9] He also claims receiving delineation of the charges just nine days ahead of trial prejudiced his defense. Timing of the delineation of charges and its alleged insufficiency was known at the time of direct appeal. This claim was alleged for the first time in the *pro se* RCr 11.42 motion; it should have been raised on direct appeal. *Owens v. Commonwealth*, 512 S.W.3d 1, 13-14 (Ky. App. 2017).

The primary focus of this issue is trial counsel did not seek a bill of particulars ("BOP"), a fact Comer confirmed during the evidentiary hearing, testifying he did not request one because he had discussed the charges with the Commonwealth during an in-chambers meeting at which the prosecutor agreed to send information to the defense distinguishing the charges. Comer further testified he had all the information he needed to go to trial because the Commonwealth had

[9] Comer could neither confirm nor deny inclusion of particular charges in the CAC interview. He had not reviewed the file prior to the evidentiary hearing and did not recall content of the interview.

provided a letter differentiating the eight charges being tried. The trial court referenced the letter—dated July 16, 2012—in its order denying the RCr 11.42 motion. Post-conviction counsel stated the letter was attached to the motion to vacate. Despite multiple references to the letter, it is not in the appellate record. "It is the appellant's duty to present a complete record on appeal." *Steel Techs., Inc. v. Congleton*, 234 S.W.3d 920, 926 (Ky. 2007), *abrogated on other grounds by Osborne v. Keeney*, 399 S.W.3d 1 (Ky. 2012). "[W]hen the complete record is not before the appellate court, that court must assume that the omitted record supports the decision of the trial court." *Commonwealth v. Thompson*, 697 S.W.2d 143, 145 (Ky. 1985). Thus, we assume the letter adequately explained the charges to the defense and was provided sufficiently ahead of trial to be beneficial.

All charges of which Christopher was convicted were included in the Commonwealth's letter—there has been no showing and no allegation to the contrary. Christopher admitted trial counsel discussed notice of the charges with him. There has been no allegation of surprise and no showing of new information coming to light since conviction. Nor has it been shown Christopher would have been acquitted with more information or more notice. From inception, Christopher denied sexually abusing A.K. His stance never changed.

Furthermore, on the court docket for June 7, 2012, the trial court handwrote, "Commonwealth to provide Bill of Particulars on remaining 8 counts."

There was no need for counsel to demand something the trial court had already directed the Commonwealth to do. "It is not ineffective assistance of counsel to fail to perform a futile act." *Bowling*, 80 S.W.3d at 415.

At the conclusion of an in-chambers hearing—moments before trial commenced—the trial court asked counsel and Christopher, "[a]nything else to put on the record as far as investigation of the case or witnesses?" Christopher, who had just explained his reason for rejecting the Commonwealth's offer on a plea of guilty, said nothing about not understanding the charges against him, being rushed to trial, or any other alleged failure of, or dissatisfaction with, his legal team. The Commonwealth provided all it had via open file discovery, it just had very little to give. There was no physical evidence, the only witnesses were A.K. and Christopher, and few statements were made during the police investigation. The trial court accurately noted jurors would believe or reject the allegations "based on the credibility of the victim, the victim's mother, and [Christopher]." While Christopher alleges counsel needed more time to understand the charges, counsel negated that claim. There has been no showing of prejudice.

Christopher argues—as an aside and not as a numbered claim—failure to seek a BOP should have been raised on direct appeal by appellate counsel pursuant to a request for palpable error review. He further complains the trial court did not rule on the issue even though he raised it in his *pro se* motion as an

allegation of appellate counsel's ineffectiveness. This claim is not properly before us. Christopher did not give the trial court an opportunity to correct any oversight by seeking reconsideration of the motion to vacate or moving for specific findings per CR 52.01 and CR 54.02(2).

The sixth claim is trial counsel should have objected to the Commonwealth's cross-examination of Christopher. This issue derives from his interview with Det. Kim Hamilton a few days after A.K.'s disclosure, wherein he called the child a liar, said she would lie and was lying, said she made up the charges because he had done nothing to her, said Jennifer bad-mouthed him to the girls "a lot," said Jennifer and Vessels programmed A.K. to fear him, and claimed Jennifer had programmed A.K. to accuse him of sexually abusing her.

The brief alleges the prosecutor spent twenty minutes forcing Christopher to portray A.K. as a liar in violation of *Moss v. Commonwealth*, 949 S.W.2d 579, 583 (Ky. 1997). We disagree. From the start, Christopher's position was A.K. was a liar. That was his position when interviewed by Det. Hamilton in 2010 and it was still his position at trial in 2012. The prosecutor never asked Christopher whether A.K. was lying *when she testified*—that would have run afoul of *Moss*. Instead, the prosecutor focused solely on Christopher's prior police interview wherein he voluntarily chose to portray A.K. as a liar. The prosecutor properly highlighted differences in A.K.'s allegations her father sexually abused

her and Christopher's position he did nothing to his oldest daughter and she was lying at the behest of her mother and the family's counselor. There was no *Moss* violation and therefore, no basis for an objection by trial counsel. *St. Clair v. Commonwealth*, 451 S.W.3d 597, 638 (Ky. 2014). In *Newman v. Commonwealth*, 366 S.W.3d 435, 442 (Ky. 2012), "mere verbalization of the defense theory by the prosecutor" did not require reversal where no objection was voiced.

The seventh claim is trial counsel should have objected to the Commonwealth's improper bolstering of A.K.'s testimony during summation. "Bolstering" occurs when a person speaks directly of the "character for truthfulness" of a witness. *Harp v. Commonwealth*, 266 S.W.3d 813, 824 (Ky. 2008). Here, the prosecutor never referenced particular testimony from A.K., nor commented on her truthfulness. The argument Christopher finds so offensive was as follows:

> [t]his defendant, in a most heinous way, has violated that relationship repeatedly over a couple of years length of time, and the result of that is a child who is timid and beaten down and has low self-esteem and is scared to death, and yet, in an act of pure courage had to come in here to open court and tell it to fourteen strangers right in the presence of the person she is the most afraid of, the very person who has been doing this to her in the dark of night for years. . . . He used fear as a tool of manipulation to keep her quiet, and it worked, he was successful for a long time at keeping her quiet while he was doing these things. . . . It's a giant step for a child to have to make this disclosure knowing that it's going to tear that relationship apart forever.

. . .

> She came in despite the threats, despite the years of enduring the sexual abuse and the verbal abuse and the physical abuse, she came in here, ya know, the number one fear in the country is public speaking? And she had to come here, in front of him, the abuser, and tell a room full of strangers what was going on, well of course she was scared, but she did it, she told you with as much detail as she could about what happened.

Prosecutorial misconduct occurs when a prosecutor improperly or illegally attempts to "persuade the jury to wrongly convict a defendant or assess an unjustified punishment." *Hall v. Commonwealth*, 551 S.W.3d 7, 16-17 (Ky. 2018). It includes improper comments made during summation. *Id.* at 17. But "[c]losing arguments are not evidence, and prosecutors are given 'wide latitude' during closing arguments." *Id.* "[R]eversal is warranted only if the misconduct is 'flagrant', or if each of the following three conditions is satisfied: (1) proof of defendant's guilt is not overwhelming; (2) defense counsel objected; and (3) the trial court failed to cure the error with a sufficient admonishment to the jury." *Id.* (footnotes omitted). Because no objection was lodged in this case, relief would be available only on a finding of flagrant misconduct.

Rather than arguing A.K. was truthful or believable, the prosecutor focused on A.K.'s state of mind—fearing her father after years of threats and manipulation and then revealing intimate details to a jury of strangers. A

"prosecutor may comment on tactics, may comment on evidence, and may comment as to the falsity of the defense position." *Dickerson v. Commonwealth*, 485 S.W.3d 310, 332 (Ky. 2016) (quoting *Slaughter v. Commonwealth*, 744 S.W.2d 407, 412 (Ky. 1987)). Here, the Commonwealth's summation was immediately preceded by a thirty-minute closing in which the defense attacked A.K., arguing she waited three years to disclose abuse despite numerous opportunities to tell; she "rehearsed" her testimony with the prosecutor and the victim advocate; and, rather than looking at the jury when she testified, A.K. looked only at the victim advocate. Trial counsel specifically told the jury, "you're gonna have to judge the credibility of [A.K. and Christopher]." In light of the foregoing, the Commonwealth's remarks were fair and an invited response to the defense closing. *Clayton v. Commonwealth*, 786 S.W.2d 866, 868 (Ky. 1990). No defense objection was necessary as there was no error.

The eighth issue is trial counsel should have called two character witnesses, Julie Evans—Christopher's therapist for more than five years; and Eugene LaPierre—a coworker at Bluegrass Airport. During the evidentiary hearing, both Evans and LaPierre said they knew Christopher had been charged and would have testified at trial but no one contacted them. Neither testified about Christopher's family life.

"Decisions relating to witness selection are normally left to counsel's judgment, and this judgment will not be second-guessed by hindsight." *Fretwell v. Norris*, 133 F.3d 621, 627 (8th Cir. 1998) (quotation marks and citation omitted). Comer testified he recalled neither being given the names of Evans or LaPierre, nor being asked to contact them. He did recall Carolyn Flynn. After the sexual abuse was disclosed, she became Christopher's girlfriend. She testified for the defense at trial, but she did not know Christopher during the relevant time.

The trial court stated, and we tend to agree, any value of a character witness is severely diminished—if not lost—once the prosecutor asks if his/her positive opinion of the defendant would be the same with knowledge of specific facts. Here, those facts would have included A.K. cowering in Vessels' office when her father came near her and Christopher spraining A.K.'s wrist while trying to forcibly remove her from a car. As noted by the trial court, cross-examination would have reiterated damaging aspects of the case and diluted any value the defense would have hoped to achieve by calling Evans and LaPierre. Christopher's own testimony confirmed he was employed, married fifteen years until the divorce, and a father.

Importantly, in his *pro se* RCr 11.42 motion, Christopher claims counsel was given "names of [his] coworkers and supervisors." However, not until

the evidentiary hearing did he mention Evans and LaPierre by name. RCr 11.42 (2) directs a motion for relief

> shall state specifically the grounds on which the sentence is being challenged and the facts on which the movant relies in support of such grounds. Failure to comply with this section shall warrant a summary dismissal of the motion.

Christopher did not claim with specificity he asked counsel to contact Evans and LaPierre and offer them as character witnesses. Similarly, in post-conviction counsel's supplemental pleading, Evans, LaPierre and others are mentioned, but counsel avoids saying Christopher identified any particular character witness to counsel *prior* to trial. The lack of specificity dooms the claim.

The ninth and final claim is trial counsel failed to impeach Jennifer with details gleaned from family court records. Comer testified he reviewed the family court file, but did not recall watching videos in the divorce case. Christopher attempts to rely on material from the family court records which are not part of our record. We are not authorized to—and will not—consider such material. *Lucas v. Lucas*, 720 S.W.2d 352, 353 (Ky. App. 1986).

The defense theorized Jennifer manipulated A.K. to fabricate the sexual abuse charges, perhaps going so far as to write the note disclosing the improper touching. Trial counsel secured a handwriting expert to examine the note; the expert concluded it was written by A.K. While Jennifer's manipulation

of A.K. was a good theory, it went no further than being an unsupported hypothesis. Christopher has not shown otherwise.

In cross-examining Jennifer at trial, Comer established numerous points. The divorce was "highly contested," taking about fifteen months to resolve. Jennifer received an EPO against Koteras with a no contact provision before filing for dissolution. After the EPO was issued, Christopher had visitation with the girls every other weekend, then every weekend, then supervised visits and finally public visits. Christopher sought extended visitation with the girls. At one point the family court ordered a second opinion of the girls' mental health, but nothing came to fruition despite attempts to contact two experts. The family court order was ultimately suspended in light of the criminal trial. Jennifer was okay with Christopher taking the girls with him to Florida during spring break. After reading A.K.'s note, Jennifer waited two days before reporting it to police, saying she did not know how to handle an allegation of child sexual abuse even though she ran a daycare center in her home and had received basic training on running such a business. Defense counsel also suggested Jennifer had a selective memory. Contrary to Christopher's motion, defense counsel effectively cross-examined Jennifer.

In conclusion, Christopher has failed to satisfy *Strickland*. He has shown neither attorney error nor prejudice resulting therefrom. Both showings are

necessary for a court to grant relief. Christopher was not entitled to perfect counsel, only "reasonably effective" counsel. *Strickland*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (citing *Trapnell v. United States*, 725 F.2d 149, 151-52 (2d Cir. 1983)). That he received.

We simply cannot say, in light of the totality of the evidence, there is a reasonable probability that had counsel performed at trial as Christopher now claims they should have, jurors would have reasonably doubted his guilt and acquitted him. For that reason, the order of the Jessamine Circuit Court is AFFIRMED.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Euva D. Blandford
Assistant Public Advocate
LaGrange, Kentucky

Brandon Neil Jewell
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear
Attorney General of Kentucky

James C. Shackelford
Assistant Attorney General
Frankfort, Kentucky