RENDERED: DECEMBER 7, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001410-MR

ANA HERRERA — APPELLANT

v.

APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE FRED A. STINE, V, JUDGE
CASE NO. 14-CR-01098

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; KRAMER AND NICKELL, JUDGES.

NICKELL, JUDGE: Ana Herrera appeals from the judgment and sentence of five years' imprisonment entered by the Campbell Circuit Court following her conviction of assault in the second degree[1] at a two-day jury trial. Shortly after the trial, but prior to sentencing, with newly retained counsel, Herrera timely moved for a judgment of acquittal or new trial pursuant to RCr[2] 10.02 and 10.06, alleging

[1] Kentucky Revised Statutes (KRS) 508.020, a Class C felony.

[2] Kentucky Rules of Criminal Procedure.

ineffective assistance of trial counsel. Applying the two-pronged performance and prejudice standard established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.674 (1984), the trial court denied the motion, finding the jury's verdict was reliable because the totality of the evidence compelled a verdict of guilt regardless of trial counsel's deficient assistance. We affirm.

In the early morning hours of November 5, 2014, Michael Schroder was stabbed outside a strip club in Newport, Kentucky, and called 911 for help. He identified his assailant as a larger Hispanic woman with short hair. Officers responding to the 911 call located an inebriated Herrera walking a short distance away. She was read her *Miranda*[3] warnings, placed in the back seat of a patrol car, and driven to where Schroder was being treated by emergency responders. Schroder positively identified Herrera as his attacker. An exhaustive search of the area of the attack failed to locate the weapon. Following a lengthy interview with detectives, Herrera was arrested and charged with assault. Subsequent scientific testing revealed blood found on Herrera's shirt matched Schroder's DNA.

Following conviction in October 2015, in a combined RCr 10.02 and 10.06 motion, Herrera claimed trial counsel had failed to: properly investigate witness statements and allegations; inform himself regarding the Commonwealth's scientific DNA evidence; move to suppress the show-up identification; conduct

[3] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

competent cross-examination; object to inadmissible testimony and evidence; and adequately consult with her regarding evidence, testimony, and trial strategy.

The Commonwealth opposed Herrera's motion, arguing "because the basis of the Defendant's motion is ineffective assistance of counsel, the defendant's motion should be made pursuant to RCr 11.42," and refuting her claim trial counsel had performed deficiently or prejudiced her defense. After hearing arguments, the trial court rejected the Commonwealth's procedural challenge and ruled the motion for relief could proceed. An evidentiary hearing was held with testimony offered by Herrera, her longtime partner, and her trial counsel.

Herrera testified to the paucity of trial counsel's communications and legal advice. She stated her contact with him was primarily limited to two short letters and brief conversations immediately before and after five court appearances. She claimed she attempted telephone contact numerous times, but counsel was always unavailable or unresponsive. About one week prior to trial, she spoke briefly with counsel by telephone and during a one-hour office conference. Counsel indicated the Commonwealth had no evidence, Schroder's injury was merely a superficial cut, Schroder's blood transferred to Herrera's clothes via contact with a police officer, and the charge would likely be dismissed. Though trial counsel gave Herrera a copy of the police report, she testified he never shared or discussed with her the videotaped statement she gave to police, Schroder's

recorded statements or photographs of his injuries, her partner's statement, a telephonic interview with the bartender from the bar where she had been drinking earlier on the night of the attack, the statement from a cab driver who had transported her a short distance moments prior to the attack, or a surveillance video the prosecutor sought to question her about during trial. Herrera complained trial counsel failed to provide legal guidance or advice, and simply told her to be honest when she asked to discuss and practice potential courtroom testimony. Among other matters, if any meaningful opportunity had been provided to discuss trial strategy, Herrera maintained she would have asked trial counsel to ask the cab driver if he ever saw her carrying a knife and whether her clothing was sufficient to conceal a knife. Herrera also testified trial counsel never discussed with her—and apparently never considered—filing a motion to suppress any reference to the show-up identification. However, on cross-examination Herrera was unable to explain how the trial might have turned out differently had she been provided the opportunity to view and discuss these items with trial counsel.

Herrera's longtime partner, Dione Brown, testified the two were living together at the time of the incident and she attended the conference at which trial counsel advised Herrera prosecutors had no evidence. Brown confirmed trial counsel failed to provide Herrera any recorded statements or videos and neglected to discuss how their content might be addressed at trial. Brown told trial counsel

she was willing to testify at trial but was told her testimony was unnecessary. Had she testified, Brown would have affirmed it was not Herrera's practice to carry weapons, Herrera had not exhibited violent behavior in the past, and all kitchen knives were accounted for in their home.

Trial counsel admitted spending a total of about two hours preparing for Herrera's trial. In addition, he attended court appearances, had telephone conversations, conferenced with Herrera, reviewed the Commonwealth's exhibits and offer on a plea of guilty, and reviewed Schroder's hospital records. Trial counsel had received recorded interviews of Schroder, the bartender, the cab driver, and Brown, but admitted he never reviewed them, explaining he had seen the police report and knew what each witness had said. Consequently, he admitted never discussing the substance of these items with Herrera. Further, he admittedly did not: discuss or file a motion to suppress Schroder's show-up identification of Herrera; cross-examine Schroder regarding his inability to describe Herrera's clothing or explain a search by his friends for Herrera's photograph on the internet subsequent to the attack; play any portion of Schroder's hospital or telephone interviews; object to testimony offered by the cab driver about the bartender's statements to him; and obtain an independent expert to assist with understanding DNA test results and proper cross-examination. Knowing none of the men who had been with Schroder when the attack occurred had been located and would not

appear at trial and no knife had been found on Herrera or in the vicinity, trial counsel testified his theory of defense was the assault had been perpetrated by one of the men with whom Schroder had been drinking. Though Herrera had argued with these three men, trial counsel would assert Herrera attacked neither the men nor Schroder. He stated there had been no surprises at trial and his actions before and during trial were appropriate under the circumstances.

On May 31, 2017—nearly twenty months after the jury had convicted Herrera—the trial court entered an order denying her motion for new trial, finding trial counsel's performance was defective but had not prejudiced the trial's outcome. On August 2, 2017, the trial court entered its judgment sentencing Herrera to five years' imprisonment consistent with the jury's recommendation. This appeal followed.

Herrera alleged ineffective assistance of trial counsel in her new trial motion. RCr 10.02(1) authorizes a trial court to "grant a new trial for any cause which prevented the defendant from having a fair trial, or if required in the interest of justice." Granting a new trial is discretionary and, absent a showing this discretion was abused, reversal is unwarranted. *Rowe v. Commonwealth*, 355 S.W.3d 480, 485 (Ky. App. 2011). "The test for abuse of discretion 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). Appellate courts engage in a deferential review of the record, findings of fact, and rulings, to determine whether the trial court's decision "falls within a range of permissible decisions." *Miller v. Eldridge*, 146 S.W.3d 909, 915, 917 (Ky. 2004) (citations omitted). We walk a fine line between engaging "in a meaningful review without resorting to retrying the issue." *Id.*

As a threshold matter, we agree with the trial court's initial determination RCr 10.02(1) neither limits nor prohibits the cause or claim for relief underpinning a new trial motion. "One procedural rule or statute does not supersede another merely by providing an alternative means for obtaining the same type of [relief]." *James v. James*, 313 S.W.3d 17, 27 (Ky. 2010) (citation omitted). Trial courts may consider motions to vacate a judgment pursuant to RCr 10.02 or RCr 11.42 even while a direct appeal is pending when new issues are raised which could not have been the subject of a direct appeal. *Wilson v. Commonwealth*, 761 S.W.2d 182, 184 (Ky. App. 1988).

As explained by the Supreme Court of Kentucky in *Humphrey v. Commonwealth*, 962 S.W.2d 870 (Ky. 1998), because

> it is unethical for counsel to assert his or her own ineffectiveness for a variety of reasons . . . and due to the brief time allowed for making post trial motions, claims of ineffective assistance of counsel are best suited to collateral attack proceedings, after the direct appeal is over, and in the trial court where a proper record can be made. This is not to say, however, that a claim of ineffective assistance of counsel is precluded from

> review on direct appeal, provided there is a trial record, or an evidentiary hearing is held on motion for a new trial, and the trial court rules on the issue.

Id. at 872-73 (citations omitted). Herrera's appeal of the trial court's denial of her RCr 10.02 motion falls squarely within the latter situation cited in *Humphrey*.

Whether raised under RCr 10.02 or RCr 11.42, the standard for establishing ineffectiveness of counsel is the same. As established in *Bowling v. Commonwealth,* 80 S.W.3d 405 (Ky. 2002):

> The *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 v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984). 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.* at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 695.

Bowling, at 411-12. Both *Strickland* prongs must be met before relief may be granted. "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. In the instant

case, we need not determine whether Herrera's trial counsel's performance was adequate because she fails to demonstrate prejudice resulting from counsel's allegedly deficient performance.[4]

To establish prejudice, a movant must show a reasonable probability exists that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*., 466 U.S. at 694, 104 S.Ct at 2068. In short, one must demonstrate "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id*., 466 U.S. at 687, 104 S.Ct. at 2064. Fairness is measured in terms of reliability. "The likelihood of a different result must be substantial, not just conceivable." *Commonwealth v. Pridham*, 394 S.W.3d 867, 876 (Ky. 2012) (citing *Strickland*, 466 U.S. at 693, 104 S.Ct. 2052)).

> Mere speculation as to how other counsel might have performed either better or differently without any indication of what favorable facts would have resulted is not sufficient. Conjecture that a different strategy might have proved beneficial is also not sufficient. *Baze* [*v. Commonwealth*, 23 S.W.3d 619 (Ky. 2000)]; *Harper v. Commonwealth*, 978 S.W.2d 311 (1998). As noted by *Waters v. Thomas*, 46 F.3d 1506 (11th Cir.1995) (*en banc*): "The mere fact that other witnesses might have

[4] "Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Strickland*, 466 U.S. at 697, 104 S.Ct. at 2069.

> been available or that other testimony might have been elicited from those who testified is not a sufficient ground to prove ineffectiveness of counsel."

Hodge v. Commonwealth, 116 S.W.3d 463, 470 (Ky. 2003), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009). "No conclusion of prejudice . . . can be supported by mere speculation." *Jackson v. Commonwealth*, 20 S.W.3d 906, 908 (Ky. 2000) (citations omitted).

First, Herrera contends trial counsel's failure to properly investigate her case by reviewing all of the discovery materials and the failure to include her in evaluating the evidence resulted in multiple "missed opportunities" to place evidence before the jury supporting the defense theory of the case. Herrera asserts these missed opportunities "cast a doubt on the reliability of the outcome" of her trial. She argues had trial counsel been adequately prepared, he could have produced exculpatory evidence at trial, including: Brown's belief Herrera does not carry a knife and no knives were missing from their home; inconsistencies disclosed in various statements Schroder made about his recollection of the incident, especially the location of all persons involved; and, the cab driver not observing Herrera carrying a knife and doubting she could have easily concealed one given the clothes she was wearing. In addition, Herrera argues her own testimony would have been more credible had trial counsel conferred with her regarding her prior statements and the Commonwealth's evidence.

In the order entered on May 31, 2017, the trial court noted trial counsel had substantially confirmed Herrera's allegations. After chronicling trial counsel's numerous alleged deficiencies, the trial court concluded counsel's performance was deficient under the *Strickland* standard. However, regardless of trial counsel's deficiencies, and based on the totality of the evidence presented against Herrera, the trial court concluded it could not say "the results of the trial were rendered unreliable," and:

> [a]t least two key findings compel such a determination. The first is that regardless of how one may view counsel's errors, the testimony of both the Defendant and the victim place five persons at the scene of the assault: the three Latinos referenced by Mr. [Schroder] and Ms. Herrera in their trial testimony, the victim, Michael [Schroder], and the Defendant, Ana Herrera. Thus, the assailant could have only been the Defendant or one of the three [Latino] gentlemen with whom [Schroder] had been drinking that evening. At one point, the defendant attempted to point the finger at two men she claimed emerged from a bar across the scene from the accident. However, none of the trial witnesses, including the Defendant, testified that either of those two unidentified men ever crossed the street and engaged in any way with the victim. A second key point is that DNA analysis matched the blood found on the [sic] Herrera's shirt with that of the victim, Michael Schroder. Not only was this independent evidence placing the Defendant at the scene of the crime, it also leads directly to the reasonable conclusion that the Defendant had close personal contact with the victim on the evening in question. Further, the blood on her shirt could not have resulted from transfer from the surfaces of another vehicle as [Schroder] testified he got in his truck directly from the incident and drove directly to the hospital.

> Other key bits of information are almost as compelling. For example, Michael [Schroder's] initial description of the woman who approached him in the parking lot where the assault occurred and who started arguing with him and his companions was that of a larger Hispanic woman with short hair. This description fit Ms. Herrera. Schroder later identified the Defendant as his assailant. In fact, the only person Schroder claimed argued with him and followed or touched him as he was attempting to walk to his truck was this "larger Hispanic woman with short hair." He also testified that she argued with his companions as well. Given that Schroder testified that he did not know his three companions or Ms. Herrera prior to the incident, it begs the question why he would point the finger at Ms. Herrera, a woman, if one of the Latinos, all men, had been his assailant. At trial, Defendant had put herself in a tenuous position, because when interviewed by the police prior to trial, she claimed to be unable to recall anything of what Schroder may have said to her or any possible confrontation they had with each other. In fact, she claimed not to have remembered Michael Schroder at all. Finally, Defendant's own testimony and that of the cab driver with whom she initially left Huddles Café, Michael Duve, established that she rode in Duve's cab approximately two blocks from Huddles' parking lot when she got out of the car and walked back to the parking lot. Regardless of any established errors or omissions of trial counsel, the evidence was such that it virtually compelled a finding of guilty by the jury.

We agree with the trial court's assessment of the evidence and determination the outcome of the trial was not impacted by trial counsel's actions. Although Herrera believes the result of the trial could have been different had counsel performed better or differently, her assertions are based primarily on speculation. She fails to

establish a substantial likelihood the jury would have returned a different verdict absent counsel's failure to adequately prepare for trial. There was no prejudicial effect on her trial.

Next, Herrera argues "[t]he repeated testimony about [the] inherently suggestive [show-up] identification during trial prejudiced her and should have been suppressed but for her trial counsel's failure to seek suppression." However, in a footnote to its May 31, 2017, Order, the trial court indicated it could not address Herrera's argument because her claim of prejudice "was not presented with sufficient facts from which any deductions could have been made or conclusions drawn about Counsel's failure to file a motion to suppress Defendant's out of court identification." We agree. Herrera's argument is conclusory, speculative, and without factual basis. Claims for ineffective assistance of counsel must be stated with specificity and grounded in fact. RCr 11.42(2). Failure to do so "shall warrant summary dismissal of the motion." *Id*. Herrera's unsupported assertion of prejudice warrants no further discussion. *Jackson*, 20 S.W.3d at 908.

Herrera next argues trial counsel's lack of scientific knowledge regarding DNA evidence and his failure to hire an expert to guide him in evaluating and cross-examining laboratory findings and testimony of the DNA expert for the Commonwealth prejudiced her defense. Trial counsel admittedly lacked sufficient scientific knowledge regarding DNA and took no steps to inform

himself, but Herrera's argument fails to specifically indicate how the expert's laboratory findings or testimony could have been impeached had trial counsel hired an expert. Again, Herrera's argument is based on pure conjecture, supposition, and speculation and requires no further discussion.

Finally, Herrera contends her defense was prejudiced by trial counsel's failure to object to hearsay testimony from the cab driver which "seemed to corroborate" Schroder's factual description of events. Even if jurors should not have learned the bartender told the cab driver Herrera mentioned "getting into an argument and stabbing a guy," trial counsel's failure to object was harmless considering other compelling evidence. In her police interview and in her testimony, Herrera admitted she had consumed a significant amount of alcohol, had no recollection of having ridden in a cab though she could not deny doing so, and had been involved in a "pushing and shoving" argument with three Latino men. Further, the jury could not have been misled by the cab driver's statement because the bartender, herself, testified she had not seen Herrera stab anyone. Finally, we cannot overlook the possibility trial counsel strategically opted to forego any objection to avoid calling undue attention to the statement. Under *Strickland*, "the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id*., 466 U.S. at 689, 104 S.Ct at 2065.

Based on the meticulous and factually-supported analysis by the trial court in its May 31, 2017, order, we cannot say its denial of Herrera's RCr 10.02 motion was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. Thus, we hold the trial court did not abuse its discretion.

For the foregoing reasons, the judgment of the Campbell Circuit Court is AFFIRMED.

ALL CONCUR.

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