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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001928-MR

DENNIS LEE CALLOWAY — APPELLANT

v.

APPEAL FROM LOGAN CIRCUIT COURT
HONORABLE TYLER L. GILL, JUDGE
ACTION NO. 12-CR-00177

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT, MAZE, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Dennis Lee Calloway appeals *pro se* from the Logan Circuit Court's April 15, 2016, order denying his motion to vacate sentence pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. We affirm.

I. BACKGROUND

Calloway was arrested and charged with several felony offenses relating to a late-night home invasion at Bennie Bryant's residence in Logan

County, Kentucky. On September 11, 2012, two men broke into Bryant's home, duct-taped his wrists, beat him with a baseball bat, and searched his home for money and drugs. As the men ransacked his home, Bryant managed to free his wrists from the duct tape. He then obtained a garden hoe and used it as an improvised weapon to chase his assailants from the area. Bryant recognized one of his two assailants as someone he knew as "Dennis Lee." In addition, one of Bryant's neighbors, Susan Smith, witnessed Calloway fleeing the scene and telephoned 911. She identified the fleeing individual as Calloway in a photographic array provided by law enforcement that same evening. The Logan County Sheriff's Department apprehended Calloway shortly thereafter.

Following his trial in 2013, the jury found Calloway guilty of first-degree robbery,[1] complicity to first-degree unlawful imprisonment,[2] first-degree burglary,[3] third-degree criminal mischief,[4] and third-degree terroristic threatening.[5] The trial court entered final judgment on March 28, 2013, sentencing Calloway to

[1] Kentucky Revised Statutes (KRS) 515.020, a Class B felony.

[2] KRS 509.020, a Class D felony and KRS 502.020.

[3] KRS 511.020, a Class B felony.

[4] KRS 512.040, a Class B misdemeanor. Although the trial court's final judgment states Calloway was found guilty of first-degree criminal mischief, a Class D felony, this appears to be a clerical error. The jury verdict (R. at 133) and recommended sentence of ninety days (R. at 141) are actually for third-degree criminal mischief, and the trial court correctly sentenced Calloway to ninety days on this charge.

[5] KRS 508.080, a Class A misdemeanor.

a concurrent term of ten years' imprisonment in accordance with the jury's recommendation. Another panel of this Court upheld Calloway's conviction on direct appeal in an unpublished opinion rendered October 24, 2014.[6] The Kentucky Supreme Court denied discretionary review by order entered September 16, 2015. Calloway subsequently filed a *pro se* motion to vacate sentence under RCr 11.42, which was denied by the circuit court on April 15, 2016. This appeal followed.[7]

II. ANALYSIS

As a preliminary matter, we note the record is not complete in this case. Although the jury trial stretched over multiple days, the video recording of the trial contains only a single day's testimony. The omissions in the record hinder our ability to fully consider the merits of Calloway's appeal. It is the appellant's obligation to ensure the appellate court receives a complete record—including all relevant video recordings. *Gambrel v. Gambrel*, 501 S.W.3d 900, 902 (Ky. App. 2016). The appellant's obligation to ensure a complete record remains even when the appellant is incarcerated and acting *pro se*. *See Graves v. Commonwealth*, 283 S.W.3d 252, 255-56 (Ky. App. 2009). "If evidence is missing from the record, we

[6] *Calloway v. Commonwealth*, 2013-CA-000714-MR, 2014 WL 5421256 (Ky. App. Oct. 24, 2014).

[7] Due to a purported circuit clerk error in processing this appeal, this Court granted Dennis Lee Calloway a belated appeal by order entered December 14, 2017.

must assume that the trial court's decision is supported by the record." *King v. Commonwealth*, 384 S.W.3d 193, 194-95 (Ky. App. 2012) (citing *Smith v. Smith*, 235 S.W.3d 1, 5 (Ky. App. 2006); *see also Commonwealth v. Thompson*, 697 S.W.2d 143, 145 (Ky. 1985)). We shall proceed with our review to the best of our ability, but we must nevertheless assume any missing items from the record support the trial court's decision. *King*, 384 S.W.3d at 194; *Graves*, 283 S.W.3d at 256.

Calloway presents six principal issues, along with related sub-issues, on appeal from the denial of his RCr 11.42 motion. For his first principal issue, Calloway argues his trial counsel rendered ineffective assistance by failing to object to improper character evidence and hearsay during a witness's testimony. Second, Calloway argues trial counsel was ineffective in failing to object to an in-court identification of him by a witness during a suppression hearing. Third, Calloway argues trial counsel was ineffective in failing to suppress unduly suggestive identification procedures. Fourth, Calloway argues trial counsel was ineffective for its failure to request separation of witnesses under Kentucky Rules of Evidence (KRE) 615 for the suppression hearing. Fifth, Calloway argues trial counsel was ineffective for failing to object to an article of clothing on the prosecutor's table, which he alleges was visible to the jury but never admitted into evidence. Sixth, and finally, Calloway argues trial counsel was ineffective for its

failure to object to the trial court's admonition to the jury regarding how to use DNA evidence in this case, which he contends was insufficient and prejudicial to his case. We consider each issue in turn.

A. Standard of review

A successful petition for relief under RCr 11.42 for ineffective assistance of counsel must survive the twin prongs of "performance" and "prejudice" provided in *Strickland v. Washington*, 466 U.S. 668 (1984); *accord Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985). The "performance" prong of *Strickland* requires as follows:

> Appellant must show that counsel's performance was deficient. This is done by showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment, or that counsel's representation fell below an objective standard of reasonableness.

Parrish v. Commonwealth, 272 S.W.3d 161, 168 (Ky. 2008) (citations and internal quotation marks omitted). The "prejudice" prong requires a showing that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Commonwealth v. McGorman*, 489 S.W.3d 731, 736 (Ky. 2016) (quoting *Strickland*, 466 U.S. at 687). "The critical issue is not whether counsel made errors but whether counsel was so thoroughly ineffective that defeat was snatched from the hands of probable victory." *Haight v. Commonwealth*, 41

S.W.3d 436, 441 (Ky. 2001) (citation omitted), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009).

Both *Strickland* prongs must be met before relief pursuant to RCr 11.42 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. This is a very difficult standard to meet. "Surmounting *Strickland*'s high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010). We review counsel's performance under *Strickland de novo*. *McGorman*, 489 S.W.3d at 736.

B. Bernice Wells' testimony

For his first issue, Calloway contends his trial counsel rendered ineffective assistance by failing to object to improper character evidence and hearsay during Bernice Wells' testimony at trial. As depicted by Calloway, Wells' testimony contained the following:

> Prosecutor: Okay and what came out of that phone conversation again?
>
> Wells: He just kept saying, "man you the only one grimy enough, and hard enough to do something like that," and he kept telling him, "man don't put that on me," said "I been here in Bowling Green."
>
> Prosecutor: That was this Chubb's [sic] fellow saying that to Mr. Calloway?

> Wells: Telling him that he knew he was the only one hard enough to do something like that.
>
> Prosecutor: That Dennis Lee was the only one hard enough to do something like that?
>
> Wells: Yes, and he told him, "man do not put that on me because I have not been in Russellville since I left, I did not do that. And y'all need to stop telling people that because Thomas and him . . ."
>
> Judge: Can we direct this in another direction? Do you have another question?
>
> Prosecutor: She was still answering my last question.
>
> Judge: Well, could you step up for just a minute then?
>
> All parties approach the bench.

Calloway's Brief at 4.

At this point, as described by the parties, the trial court expressed its concern about the direction of Wells' testimony and the potential for palpable error, regardless of the apparent failure of the defense to raise an objection. Calloway's trial counsel then stated, in pertinent part, as follows:

> Trial Counsel: From my perspective, **I don't mind it coming in** because she's a witness that he got this phone call and the first thing he says is ["]man I didn't do it, man I was in Bowling Green[,"] and **she confirms he was in Bowling Green**. . . .

Calloway's Brief at 5 (emphasis added). After further discussion, the trial court expressed its concern about the potential sullying of Calloway's character and instructed the parties to move on from this line of testimony.

As previously discussed, the record is incomplete and does not contain significant portions of the trial, including Wells' testimony. However, even assuming Calloway's recitation of her testimony is factually accurate, he cannot succeed on this claim. To show ineffective assistance of counsel, "the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Parrish*, 272 S.W.3d at 168 (quoting *Strickland*, 466 U.S. at 689) (internal quotation marks omitted). "It is not the function of this Court to usurp or second guess counsel's trial strategy." *Commonwealth v. York*, 215 S.W.3d 44, 48 (Ky. 2007) (citation omitted). Calloway's trial counsel gave an appropriately strategic reason for his failure to object during the bench conference. Wells' testimony indicated Calloway was in Bowling Green and not in Logan County at the time of the home invasion, and trial counsel reasonably believed this testimony supported Calloway's mistaken-identity defense. Because we will not second guess trial strategy, Calloway's trial counsel cannot be deemed ineffective on this issue.

C. Susan Smith's in-court identification

For his second issue, which is closely related to his third issue, discussed *infra*, Calloway asserts his defense counsel provided ineffective assistance by failing to attack Susan Smith's in-court identification of him during a pretrial suppression hearing. The essence of Calloway's second issue appears to be that Smith and Bryant "had abundance of time to confer with one another" before officers arrived on the night of the incident. Calloway then posits that Smith's pretrial identification tainted her in-court identification of him during the suppression hearing.

Calloway's argument lacks merit because it is entirely speculative. There is nothing in the record to support Calloway's claim that Smith and Bryant colluded on her identification of him as the perpetrator in this case—Calloway only argues what *might* have happened. Speculative claims, *i.e.*, "claim[s] that certain facts *might* be true . . . cannot be the basis for RCr 11.42 relief." *Mills v. Commonwealth*, 170 S.W.3d 310, 328 (Ky. 2005), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009).

D. Unduly suggestive identification procedures

For his third issue, Calloway makes a number of related claims attacking the pretrial and in-court identification procedures as unduly suggestive. He contends trial counsel was ineffective for failing to attack these procedures

adequately, and he also contends appellate counsel was ineffective for failing to raise this issue on appeal. Calloway's argument is difficult to understand, but he appears to assert the following: (1) trial counsel should have won the suppression motion on the undue suggestiveness of the pretrial identification procedure; (2) trial counsel should have objected to Smith and Bryant being present during the suppression hearing; (3) trial counsel should have objected to Smith's and Bryant's in-court identifications of him during the suppression hearing because he was the only one wearing an orange jumpsuit; (4) appellate counsel should have presented the identification issue on direct appeal; and (5) the trial court did not issue findings of fact on Calloway's trial counsel issues, but only the failure of appellate counsel to present the issue on appeal.

Calloway's first claim on this issue asserts trial counsel should have succeeded in the suppression of what he believes was an unduly suggestive identification procedure. However, as the trial court states in its denial of Calloway's RCr 11.42 motion, trial counsel *did* argue extensively in attempting to suppress Smith's identification. Counsel attacked the photographic array as unduly suggestive, asserting the other individuals in the array appeared distinctly different from Calloway. Counsel also attempted to discredit Smith's identification of Calloway, pointing out how Smith's initial telephone call to 911 mistakenly identified Calloway's unknown partner in the home invasion as another black

male; Smith later revised her description and asserted the second man had light skin. Nonetheless, despite trial counsel's vigorous cross-examination in the suppression hearing, Smith remained positive in her identification of Calloway as one of the assailants.

The trial court found the procedure used to identify Calloway was not unduly suggestive, and further found trial counsel had done "everything possible" to suppress the identification. We agree with both conclusions. The photographic array consisted of six black-and-white photographs of black men, most of whom had very short or no hair. "Minor differences in photos are not sufficient to establish that a photo lineup was unduly or impermissibly suggestive." *Crutcher v. Commonwealth*, 500 S.W.3d 811, 816 (Ky. 2016). On the basis of the photographic array alone, it is not reasonably likely that Calloway's suppression issue would have succeeded on direct appeal.

Furthermore, the mere fact that trial counsel's efforts proved unsuccessful at suppressing the identification does not indicate ineffective assistance. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. And, "the test for effectiveness is not whether counsel could have done more, but rather whether

counsel's errors undermined the reliability of the trial." *Baze v. Commonwealth*, 23 S.W.3d 619, 625 (Ky. 2000) (citations omitted), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009). We discern no ineffective assistance by trial counsel on this claim.

Second, Calloway asserts trial counsel should have objected to Smith and Bryant being present in the courtroom during the suppression hearing. This claim is refuted by the record. Bryant was not present during the suppression hearing at all, and Smith was excluded from the courtroom during relevant portions of the investigating detective's testimony.

Third, Calloway argues trial counsel should have objected to Smith's and Bryant's in-court identifications of him during the suppression hearing because he was the only one wearing an orange jumpsuit. Again, Bryant was not present during the hearing, and so this portion of his argument is refuted by the record. Smith was present during the hearing, and she made an in-court identification of Calloway; however, she had previously identified Calloway through a photographic array. "An in-court identification violates due process if the pretrial identification procedures were so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Oakes v. Commonwealth*, 320 S.W.3d 50, 56 (Ky. 2010) (citations and internal quotation marks omitted). As

previously discussed, the photographic array was not unduly suggestive. Smith's subsequent in-court identification was not improper.

Fourth, Calloway argues his appellate counsel was ineffective for failing to present his identification issue on direct appeal. To show ineffective assistance of appellate counsel, the defendant must show "the issue appellate counsel failed to brief was 'clearly stronger' than the issues that it did brief on appeal." *Commonwealth v. Pollini*, 437 S.W.3d 144, 149 (Ky. 2014) (quoting *Hollon v. Commonwealth*, 334 S.W.3d 431, 436 (Ky. 2010)). The trial court found Calloway alleged no facts to overcome the presumption appellate counsel acted reasonably, and the identification issue was not likely to succeed on appeal due to being thoroughly litigated at the trial level. Ineffective assistance of appellate counsel "requires a showing that absent counsel's deficient performance there is a reasonable probability that the appeal would have succeeded." *Hollon*, 334 S.W.3d at 437. Calloway's identification argument is not clearly stronger than the other issues presented by his appellate counsel, and we agree with the trial court's determination that it was not likely to succeed on appeal. Therefore, appellate counsel was not ineffective in failing to present this issue.

Finally, for his fifth claim on this issue, Calloway asserts the trial court failed to issue findings of fact relating to his trial counsel issues and only addressed his ineffective assistance of appellate counsel claim. Calloway argues

he "specifically requested findings" concerning all of his issues. However, he does not indicate where he gave the trial court an opportunity to correct this oversight by means of a motion for specific findings pursuant to Kentucky Rules of Civil Procedure 52.04: "A final judgment shall not be reversed or remanded because of the failure of the trial court to make a finding of fact on an issue essential to the judgment unless such failure is brought to the attention of the trial court[.]" We decline to reverse the trial court on this basis.

Although Calloway asserts a litany of complaints in his third issue on appeal, none are meritorious. Accordingly, we discern no error in the trial court's denial of relief on these associated claims.

E. Separation of witnesses during the suppression hearing

For his fourth principal issue on appeal, Calloway argues trial counsel was ineffective for failing to request separation of witnesses pursuant to KRE 615 at the suppression hearing. However, as previously noted, Bryant did not appear at the suppression hearing; the only two individuals to testify were Susan Smith and the investigating detective; and the trial court, at its discretion, excluded Smith from the courtroom during the relevant portions of the detective's testimony. Consequently, Calloway's arguments relying on Bryant's presence at the suppression hearing are refuted by the record.

Additionally, KRE 615 "does not authorize exclusion of . . . [a]n officer or employee of a party which is not a natural person designated as its representative by its attorney[.]" KRE 615(2). Our courts have consistently held this exception codifies the longstanding tradition of allowing the lead detective to remain in the courtroom with the prosecutor. *See Dillingham v. Commonwealth*, 995 S.W.2d 377, 381 (Ky. 1999); *see also Willis v. Commonwealth*, 304 S.W.3d 707, 712 (Ky. App. 2009) (quoting *Brewster v. Commonwealth*, 568 S.W.2d 232, 236 (Ky. 1978): "[The police exception to the exclusion-of-witnesses rule] . . . is so well established that there is no need for a citation of authority and . . . has been the law of this Commonwealth for so long that the mind of man runneth not to the contrary[.]"). As a result, the trial court did not err in allowing the detective to remain in the courtroom, and trial counsel did not give deficient performance in failing to ask for his exclusion. Calloway cannot demonstrate ineffective assistance of counsel on this issue.

F. Article of clothing visible to the jury on the prosecutor's table

In his fifth principal issue on appeal, Calloway argues trial counsel provided ineffective assistance by failing to object to the presence of a black, hooded sweatshirt (colloquially known as a "hoody"), which he contends was "propped up" on the prosecutor's table in full view of the jury. In addition,

because this item was not admitted into evidence, Calloway alleges prosecutorial misconduct in allowing the sweatshirt to be so displayed.

In its denial of the RCr 11.42 motion, the trial court explicitly rejected Calloway's version of the facts on this issue:

> It is clear from the record that this hoody was never introduced as evidence, that the Commonwealth never attempted to introduce this hoody as evidence, and that the Commonwealth never removed this hoody from its storage bag or showed it to the jury; there was simply nothing for defense counsel to object to. Moreover, Mr. **Calloway has alleged no facts whatsoever** to support his allegation that the jury assumed this evidence belonged to him, or that their verdict was based on such an assumption. Thus, the argument that defense counsel's performance was somehow deficient is entirely without merit.

April 15, 2016, order denying RCr 11.42 motion at 6 (emphasis added). Calloway cites no portion of the record in support of this argument. RCr 11.42 requires the movant to "state specifically the grounds on which the sentence is being challenged and the facts on which the movant relies in support of such grounds." *Roach v. Commonwealth*, 384 S.W.3d 131, 140 (Ky. 2012) (quoting RCr 11.42(2)). Failure to do so "warrant[s] a summary dismissal of the motion." *Id*. Here, the trial court correctly found Calloway's allegations were not supported by the facts, and the issue needed no further consideration.

As a related argument, Calloway asserts the presence of the hooded sweatshirt amounted to prosecutorial misconduct. The trial court summarily

rejected this as a "specious" argument. We agree with the trial court. "We reverse for prosecutorial misconduct only if the misconduct is 'flagrant' *or* . . . [p]roof of defendant's guilt is not overwhelming; [d]efense counsel objected; and [t]he trial court failed to cure the error with a sufficient admonishment to the jury." *Caudill v. Commonwealth*, 374 S.W.3d 301, 312 (Ky. 2012) (citations omitted). Because defense counsel did not object, we are required to consider if the conduct was "flagrant." At minimum, the record would have to indicate the Commonwealth acted in bad faith regarding this issue. We agree with the trial court that nothing in the record supports this allegation. And, Calloway himself fails to identify any facts in the record to support his argument. "[A]n unobjected-to prosecutorial error will be deemed reversible only if it was 'flagrant' or 'palpable.'" *Hale v. Commonwealth*, 396 S.W.3d 841, 850 (Ky. 2013) (citations omitted). We discern no error in the trial court's ruling.

G. Failure to object to trial court's admonition

Finally, for his sixth principal issue on appeal, Calloway contends trial counsel was ineffective for failing to object to the trial court's admonition to the jury regarding DNA evidence. At trial, the Commonwealth presented testimony from Sally Edwards, a forensic biologist employed by the Kentucky State Police. She testified that the mixture of DNA evidence found on a bandana recovered from the crime scene did not definitively inculpate Calloway, but he could not be

excluded as a potential contributor. After conferring with Edwards and counsel, the trial court elected to give an admonition, stating the jury could only use the evidence to say it is "possible" the DNA on the bandana belonged to Calloway.

Calloway now asserts the admonition was prejudicial and trial counsel was ineffective in failing to object to the admonition. We disagree. Calloway previously asserted the admonition issue on direct appeal, and this Court held the admonition was curative: "The trial court's admonition to the jury adequately overcame any danger of undue prejudice associated with the evidence." *Calloway v. Commonwealth*, 2013-CA-000714-MR, 2014 WL 5421256, at *8 (Ky. App. Oct. 24, 2014). Because the admonition helped "avoid undue prejudice and confusion," *id.*, Calloway cannot demonstrate the necessary prejudice for him to succeed under the second prong of *Strickland*, and trial counsel cannot be deemed ineffective for failing to object. "A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed." *Strickland*, 466 U.S. at 670.

III. CONCLUSION

For the foregoing reasons, we affirm the Logan Circuit Court's order denying the RCr 11.42 motion, entered April 15, 2016.

ALL CONCUR.

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