RENDERED: APRIL 26, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000833-MR

TONYA FORD APPELLANT

v.

APPEAL FROM TAYLOR CIRCUIT COURT
HONORABLE SAMUEL TODD SPALDING, JUDGE
ACTION NO. 10-CR-00162

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, KRAMER AND L. THOMPSON, JUDGES.

THOMPSON, L., JUDGE: Tonya Ford ("Appellant") appeals from an order of the Taylor Circuit Court denying her Kentucky Rules of Criminal Procedure (RCr) 11.42 motion alleging ineffective assistance of counsel and prosecutorial misconduct. For the reasons addressed below, we find no manifest injustice and AFFIRM the order on appeal.

Facts and Procedural History

On August 24, 2012, a jury convicted Appellant of murdering her husband, David Ford, and she was sentenced to twenty years in prison. Evidence was adduced at trial that Appellant shot her husband, who had numerous affairs during the marriage, in the back of his head after he told Appellant that he wanted a divorce and that he was moving in with his latest paramour. Appellant confessed to her mother that she committed the murder. Evidence was offered that Appellant's fingerprints were on a threatening note discovered near the body, and cell phone records showed that she was in the vicinity of the murder at the time it occurred. Witnesses testified that Appellant said she would kill David if she discovered that he was cheating on her again.

At trial, the Commonwealth called Jerome McNear, an AT&T analyst, who produced a propagation map of Taylor County showing where various cell towers were located and the areas to which they provide coverage. His testimony placed Appellant in the general vicinity of the murder scene at the time the murder was committed. His testimony contradicted Appellant's earlier claim that she was fifteen minutes away from the murder scene getting coffee at a Sonic fast food restaurant.

Similarly, Kentucky State Police Detective Israel Slinker engaged the services of Russ McIntyre to create a map identifying where and when calls were

made from Appellant's cellphone. McIntyre was a Kentucky National Guard analyst assigned to Kentucky State Police drug enforcement. At trial, and based on McIntyre's information, Detective Slinker offered his opinion that Appellant was in the vicinity of the murder scene at the critical time.

Appellant's conviction was affirmed by the Kentucky Supreme Court.[1] In June 2015, she filed an RCr 11.42 motion seeking to vacate her conviction based on ineffective assistance of counsel and prosecutorial misconduct. The Taylor Circuit Court conducted a two-day hearing. It rendered a comprehensive order denying her motion for RCr 11.42 relief and her motion to set aside her conviction based on her claim that her due process rights were violated and because the Commonwealth failed to produce certain evidence. This appeal followed.

On June 14, 2017, Ford's appointed counsel tendered a motion to increase the maximum page limit of her appellate brief from 25 to 40 pages. That motion was granted by way of an order entered on July 12, 2017. Thereafter, counsel filed a renewed motion seeking leave to file an appellate brief in excess of forty pages. That motion was denied on January 22, 2018. Counsel's brief was returned to her as noncompliant with the 40-page limitation, and she was ordered to file a compliant brief within 30 days. In response, Appellant's counsel filed her

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[1] *Ford v. Commonwealth*, 2012-SC-000624-MR, 2014 WL 1118198 (Ky. March 20, 2014).

brief on February 21, 2018. The Commonwealth then filed its brief, and Appellant's reply brief was filed.[2]

Law and Analysis

We began our analysis by noting that Appellant's brief is not in conformity with Kentucky Rules of Civil Procedure ("CR") 76.12(4)(a)(ii). This rule requires the appellate brief to utilize 12-point font, with a 1.5-inch margin on the left side and 1-inch margins on all other edges. Appellant's brief appears to employ a font smaller than that required by the rule, with more lines per page than can be achieved with 12-point font, and margins which are smaller than 1.5 inches on the left and 1 inch on all other edges. The result is that counsel has compressed more than 40 pages of material within the 40-page limit in nonconformity with the Civil Rules and with the Court's prior orders.

Appellant's noncompliance with CR 76.12(4)(a)(ii) appears to be intentional. It came about in the context of this Court's denial of her renewed motion to exceed the 40-page limit, and her first brief having been returned to her as noncompliant. We may reasonably conclude, then, that counsel intentionally sought to circumvent the Civil Rules and the orders of this Court, by purposeful

[2] Appellant's original counsel withdrew, and two new counsels were substituted. The new counsels filed Appellant's responsive brief and are prosecuting the instant appeal.

noncompliance. Accordingly, we are compelled to address counsel's noncompliance.

"Our options when an appellate advocate fails to abide by the rules are: (1) to ignore the deficiency and proceed with the review; (2) to strike the brief or its offending portions, CR 76.12(8)(a); or (3) to review the issues raised in the brief for manifest injustice only, *Elwell v. Stone*, 799 S.W.2d 46, 47 (Ky. App. 1990)." *Hallis v. Hallis*, 328 S.W.3d 694, 696 (Ky. App. 2010).

> It is a dangerous precedent to permit appellate advocates to ignore procedural rules. Procedural rules "do not exist for the mere sake of form and style. They are lights and buoys to mark the channels of safe passage and assure an expeditious voyage to the right destination. Their importance simply cannot be disdained or denigrated." *Louisville and Jefferson County Metropolitan Sewer Dist. v. Bischoff*, 248 S.W.3d 533, 536 (Ky. 2007) (quoting *Brown v. Commonwealth*, 551 S.W.2d 557, 559 (Ky. 1977)). Enforcement of procedural rules is a judicial responsibility of the highest order because without such rules "[s]ubstantive rights, even of constitutional magnitude, . . . would smother in chaos and could not survive." *Id.*

Id.

We would be inclined to ignore an otherwise harmless formatting error, or to render an order to bring about compliance. Given the procedural history of this matter, however, we will not merely ignore the deficiency and proceed with the review. Our options, then, are to strike the brief in whole or in part, or to review the issues raised in the brief for manifest injustice only. Given

the gravity of the underlying offense and the issues raised in Appellant's nonconforming brief, we are compelled to examine the matter for manifest injustice only.

"To discover manifest injustice, a reviewing court must plumb the depths of the proceeding . . . to determine whether the defect in the proceeding was shocking or jurisprudentially intolerable." *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006). Accordingly, we will "plumb the depths" of Appellant's proceeding to uncover shocking or jurisprudentially intolerable defects, if any. In so doing, we must be cognizant that Appellant has previously prosecuted a direct appeal before the Kentucky Supreme Court where numerous claims of error were adjudicated.

While keeping in mind we are only reviewing for manifest injustice, we will set forth the usual standards of review for the issues raised by the Appellant. We must utilize these standards of review in the overall context of our manifest injustice analysis.

In order to prove ineffective assistance of counsel, a party must show: 1) that counsel's representation was deficient in that it fell below an objective standard of reasonableness, measured against prevailing professional norms; and 2) that he was prejudiced by counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). We

review the trial court's denial of an RCr 11.42 motion for an abuse of discretion. *Teague v. Commonwealth*, 428 S.W.3d 630, 633 (Ky. App. 2014).

We review *de novo* whether the conduct of the Commonwealth pertaining to the evidentiary issue constitutes a *Brady*[3] violation. *Commonwealth v. Parrish*, 471 S.W.3d 694, 697 (Ky. 2015) (citing *Commonwealth v. Bussell*, 226 S.W.3d 96, 100 (Ky. 2007)). *Brady* holds in relevant part that the prosecution's suppression of evidence at trial constitutes a Due Process violation if the evidence is material to either guilt or sentencing.

Appellant first argues that her trial counsel made a critical error in failing to obtain an expert to rebut the Commonwealth's claim that Appellant's cellphone records placed her in the area of the murder at the time it occurred. She asserts that Detective Slinker improperly testified to expert matters without demonstrating qualification as an expert, and that Slinker used maps produced by McIntyre that were not disclosed to defense counsel. As the Commonwealth properly notes, this argument is an amalgam of ineffective assistance of counsel and *Brady* violations.

In examining the ineffective assistance argument, the trial court found that Appellant's counsel did not retain a cell tower expert primarily because of financial considerations. It determined that this failure was deficient performance

[3] *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

thus satisfying the first prong of the *Strickland* test. It also concluded, however, that this failure did not affect the outcome of the proceedings, and thus did not satisfy the second prong of the *Strickland* test.

We agree with the trial court's reasoning on this issue. After trial, Appellant gave a new story attempting to demonstrate that while she was in the vicinity of the murder scene at the time of the murder, she was looking at a rental house near West Saloma Road which is located near the murder scene. The trial court characterized this claim, which was raised for the first time after her conviction, as "unfounded and unbelievable," and a "complete fabrication" to provide a plausible explanation for being near the murder scene. Thus, counsel's failure to produce an expert cell tower witness did not affect the outcome of the proceedings, as Appellant admitted to being in the vicinity of the murder at the time it occurred. Further, such expert testimony would not have overcome the strong circumstantial evidence, including Appellant's admission to her mother that she killed David. As there was no prejudice, we find no manifest injustice. *Martin*, *supra*.

In her related argument, Appellant argues that a *Brady* violation occurred when the Commonwealth failed to disclose that Russ McIntyre created cell tower coverage maps that were later relied on by Detective Slinker when Slinker testified at trial. Appellant maintains that if the Commonwealth had

disclosed McIntyre's identity as the author of Slinker's maps and opinion, reasonable counsel would have objected and had those opinions excluded at trial. She asserts that this failure to disclose constitutes a *Brady* violation, because there is a reasonable probability that the outcome of the trial would have been different but for Detective Slinker's testimony.

As noted above, a *Brady* violation occurs when material evidence is withheld by the prosecution. Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyle v. Whitley*, 514 U.S. 419, 433-34, 115 S.Ct. 1555, 1565, 131 L.Ed.2d 490 (1995) (quoting *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985)). The question for our consideration, then, is whether Appellant has demonstrated that the disclosure of McIntyre would have resulted in a different verdict. We must answer that question in the negative. It is uncontroverted that McIntyre did not testify at trial, but rather offered his opinion to Detective Slinker during the investigative phase. Further, the trial court made a factual finding that "the testimony of [AT&T specialist] Jerome McNear was also generally consistent with the preliminary work of Russ McIntyre." The import of this finding is that the opinions given by McIntyre to Detective Slinker during the investigation are substantially the same as the opinion of expert witness McNear at trial. Ultimately,

we conclude that Appellant has not produced any basis for finding that a reasonable probability exists that but for the nondisclosure of McIntyre, the outcome of the proceeding would have been different. The cell phone issue was but one element of the Commonwealth's case against Appellant, which included her threat to kill David, fingerprint evidence and admission of guilt to her mother. In sum, the prejudice element of the *Brady* analysis cannot be shown, and we find no manifest injustice.

Appellant next argues that her trial counsel was ineffective when he failed to conduct a basic investigation of her alibi witnesses and present their testimony at trial. She maintains that her trial counsel's errors were compounded by the Commonwealth's failure to disclose an exculpatory statement of an alibi witness and Slinker's false testimony regarding that undisclosed statement. As Appellant's defense at trial centered on her claim that she was not present at the murder scene when the crime was committed, she asserts that her trial counsel had a duty to produce witnesses who were employed at a Sonic restaurant where Appellant claimed to be at the time of the murder. Specifically, Appellant maintains that her trial counsel could not recall whether he interviewed Sonic employees Natasha Gribbons and Jason Yocum who may have been able to testify that Appellant was at the Sonic restaurant shortly after 11:00 a.m. on the morning of the murder. The substance of Appellant's argument on this issue is that there is

a reasonable probability that absent her trial counsel's failure to investigate Sonic employees Gribbons and Yocum, the result of her trial would have been different. Pursuant to *Strickland*, Appellant argues that she is entitled to have her conviction vacated.

Trial counsel has full authority to manage the conduct of the trial. *Commonwealth v. Tigue*, 459 S.W.3d 372, 385 (Ky. 2015) (citing *Taylor v. Illinois,* 484 U.S. 400, 418, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988)). Defense counsel's reasonable investigation must not mimic the investigation of the best criminal defense lawyer in the world, blessed with unlimited time and resources, but rather must provide an investigation which is reasonable under the circumstances. *Foley v. Commonwealth*, 17 S.W.3d 878, 885 (Ky. 2000), *overruled on other grounds by Stopher v. Conliffe*, 170 S.W.3d 307 (Ky. 2005). A defendant is not guaranteed errorless counsel, or counsel judged ineffective by hindsight, but counsel who renders reasonably effective assistance. *McQueen v. Commonwealth*, 949 S.W.2d 70, 71 (Ky. 1997).

In the matter before us, Appellant's defense counsel presented two alibi witnesses in an attempt to bolster her version of the timeline. Even if her trial counsel called Gribbons and Yocum to the witness stand, their testimony would have been cumulative rather than unique. And further, the other evidence against Appellant was compelling. When reviewing the record in its totality, we cannot

conclude that her trial counsel's assistance was ineffective on this issue, nor that the failure to call Gribbons and Yocum affected the outcome of the proceedings. *Strickland*, *supra.* And while the trial court determined that the recorded interview of Gribbons was inadvertently not provided to Tonya, there again is no reasonable probability that it affected the outcome of the proceedings. As such, the trial court properly found no *Brady* violation. We find no shocking or jurisprudentially intolerable defect in the proceedings. *Martin*, 207 S.W.3d at 4.

Appellant goes on to argue that her trial counsel was ineffective for failing to object to Slinker's testimony about the handwriting found on a threatening note, and failing to investigate the note. Additionally, she asserts a *Brady* violation concerning another letter found in the victim's truck.

A threatening note was found near David's body. Neither the Commonwealth nor defense counsel conducted a handwriting analysis, and Detective Slinker did not testify as to any such analysis, nor did he offer an opinion regarding who wrote the note. Rather, Slinker testified as to his opinion that the handwriting on the note looked disguised. At the RCr 11.42 hearing, the trial court ruled that her trial counsel's failure to object to Detective Slinker's testimony did not prejudice the proceedings against Appellant.

We find no error in this conclusion. There is no basis for concluding that her trial counsel's representation of Appellant was ineffective based on his

decision not to conduct an expert analysis of the note. *Arguendo*, even if her trial counsel's decision did constitute ineffective assistance, it did not affect the outcome of the proceedings. *McQueen*, *supra*. Further, the trial court correctly determined that there was no *Brady* violation regarding another note found in David's truck. While this note was not turned over to Appellant's counsel, she has failed to demonstrate that the note – which the Commonwealth characterizes as not exculpatory – would have had any effect on the jury's decision to return a guilty verdict. We find no shocking or jurisprudentially intolerable defect in the proceedings as to this issue.

Appellant next argues that her trial counsel was ineffective for failing to object to the inclusion of complicity language in the murder instruction, when no evidence of complicity was presented at trial. This matter was addressed on direct appeal to the Kentucky Supreme Court, whereupon that Court determined that while the inclusion of complicity in the instructions was erroneous, it did not constitute palpable error and did not affect the judgment. As the Kentucky Supreme Court's disposition of this issue has become the law of the case, *Union Light, Heat & Power Co. v. Blackwell's Adm'r*, 291 S.W.2d 539, 542 (Ky. 1956), we find no error. Having determined that this language did not affect the judgment, it follows that it does not run afoul of *Strickland*. Again, we find no defect in the proceedings.

Appellant's next argument is that her trial counsel was ineffective in failing to object to statements made by the Commonwealth as part of its closing argument. During direct examination at trial, Detective Slinker was asked if he thought it "would be normal" for an innocent spouse to make a 911 call from just outside the residence in the edge of the yard. In answering, Slinker equivocated by saying it depended on whether a third-party gunman was in the residence, and whether anyone was checking for signs of life from the victim. At closing argument, the Commonwealth relied in part on this testimony by mentioning that "most reasonable people would think" that an innocent spouse who discovered the body would run to a neighbor's house in case a gunman was in the residence. Appellant now argues that her trial counsel was ineffective in failing to object to this and related statements.

In examining this argument at the RCr 11.42 hearing, the trial court concluded that her trial counsel should have objected to the Commonwealth's statements as to what reasonable people might do when discovering a murdered spouse. It went on, however, to find that the statements at issue had no bearing on the outcome of the trial. This conclusion is supported by the record and the law, and we find no manifest injustice arising therefrom.

Appellant also argues that her trial counsel was ineffective for failing to interview Carl Lusk, and that a *Brady* violation occurred when a recorded

interview of Lusk was not given to her. Lusk was a Taylor County emergency rescue chaplain who accompanied Appellant to the bathroom at a neighbor's house, and an issue arose to as whether Appellant washed her hands in the bathroom after expressly being told not to do so in order to preserve any gunshot residue.

Appellant's hands were never tested for gunshot residue, and as such, no gunshot residue results were offered into evidence. Accordingly, Lusk's testimony, if any, regarding whether he heard or did not hear Appellant washing her hands in the bathroom is largely irrelevant. This is especially true in the context of all of the evidence of guilt presented against Appellant. As Lusk's testimony, if any, would not have affected the jury's verdict, there is no basis for finding ineffective assistance of counsel nor a *Brady* violation. For the same reason, we find no manifest injustice as to Appellant's penultimate argument that her trial counsel was ineffective for failing to explore the possibility of an alternative perpetrator.

Appellant's final argument is that the foregoing claims of error constitute cumulative error sufficient to reverse the judgment on appeal. Citing *Funk v. Commonwealth*, 842 S.W.2d 476, 483 (Ky. 1992), Appellant maintains that even if each of the errors presented do not individually constitute grounds to

vacate her conviction, the cumulative effect of them rendered her trial fundamentally unfair and constituted a violation of Due Process.

We are not persuaded that the purported individual errors are sufficient to constitute cumulative error justifying a reversal of her conviction. As noted by the Kentucky Supreme Court in *Brown v. Commonwealth*, 313 S.W.3d 577, 631 (Ky. 2010), "we have declined to hold that the absence of prejudice plus the absence of prejudice somehow adds up to prejudice." We find no cumulative error, and thus no shocking or jurisprudentially intolerable defect in the proceedings. *Martin*, *supra*.

Conclusion

Appellate counsel's apparent intentional failure to comply with CR 76.12(4)(a)(ii) compelled this Court to review the issues raised in the brief for manifest injustice only. *Hallis*, 328 S.W.3d at 696. Having found no shocking or jurisprudentially intolerable defect in the proceedings, *Martin*, *supra*, we find no manifest injustice. Accordingly, we AFFIRM the order of the Taylor Circuit Court denying Appellant's motion for RCr 11.42 relief.

ACREE, JUDGE, CONCURS.

KRAMER, JUDGE, CONCURS IN RESULT ONLY.

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