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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000943-MR

CHRISTIAN OMAR WALKER APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BRIAN C. EDWARDS, JUDGE
ACTION NO. 04-CR-003572-002

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JONES, NICKELL AND TAYLOR, JUDGES.

NICKELL, JUDGE: On June 5, 2007, Christian Walker was convicted of complicity to murder, complicity to robbery in the first degree, complicity to assault in the second degree, and complicity to tampering with physical evidence. He was sentenced to fifty years' imprisonment. Walker now appeals the denial of

his RCr[1] 11.42 motion to vacate, set aside, or correct his sentence, alleging ineffective assistance of counsel, entered by the Jefferson Circuit Court on January 2, 2017. Applying the two-pronged performance and prejudice standard established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the trial court denied the motion, finding the jury's verdict was reliable. Following a careful review, we affirm.

Direct appeal of this case was affirmed by the Supreme Court of Kentucky in *Walker v. Commonwealth*, 288 S.W.3d 729 (Ky. 2009). We adopt the facts detailed therein and incorporate the same herein by reference. As such, only facts pertinent to this appeal will be specifically addressed by this Court.[2] By way of summary, on December 8, 2004, Walker and his co-defendant Tywan Beaumont attempted an armed robbery of Phillip Thomas at his home. During the altercation, both Jutta Whitlow and Shirley Thomas were shot; Shirley was killed.

Trial was originally set for October 19, 2006, but was continued before the jury was empaneled when Beaumont refused to testify against Walker.

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[1] Kentucky Rules of Criminal Procedure.

[2] We note Volumes I and II of the trial court's record, consisting of 301 pages, are absent from our review on appeal. Neither the Court of Appeal's Clerk's office nor the Jefferson Circuit Court Clerk's office could locate these pages of record. However, because no citations are made to the missing portion of the record and our review of such is unnecessary in our determination of whether denial of Walker's RCr 11.42 motion was appropriate, we have elected to proceed without reconstruction of those volumes of record which would needlessly delay rendition of our Opinion.

Trial commenced on May 21, 2007, and both defendants were convicted and sentenced to fifty years' imprisonment. Walker appealed, and his conviction became final on July 16, 2009. Walker filed an RCr 11.42 motion and an evidentiary hearing was held April 23, 2015. The motion was denied, and this appeal followed.

As an initial matter, in contravention of CR[3] 76.12(4)(c)(v), Walker does not state how he preserved any of his arguments in the trial court.

> CR 76.12(4)(c)[(v)] in providing that an appellate brief's contents must contain at the beginning of each argument a reference to the record showing whether the issue was preserved for review and in what manner emphasizes the importance of the firmly established rule that the trial court should first be given the opportunity to rule on questions before they are available for appellate review. It is only to avert a manifest injustice that this court will entertain an argument not presented to the trial court. (citations omitted).

Elwell v. Stone, 799 S.W.2d 46, 48 (Ky. App. 1990) (quoting *Massie v. Persson*, 729 S.W.2d 448, 452 (Ky. App. 1987)). We require a statement of preservation

> so that we, the reviewing Court, can be confident the issue was properly presented to the trial court and therefore, is appropriate for our consideration. It also has a bearing on whether we employ the recognized standard of review, or in the case of an unpreserved error, whether palpable error review is being requested and may be granted.

[3] Kentucky Rules of Civil Procedure.

Oakley v. Oakley, 391 S.W.3d 377, 380 (Ky. App. 2012).

Further, in contravention of CR 76.12(4)(c)(iv) and (v), which require ample references to the trial court record supporting each argument, Walker's initial brief contains no such references in support of two of his four arguments and his reply brief only cites to the record in three of his four arguments, leaving one of his arguments without any citation to the record. This simply does not constitute ample citation to the record.

Failing to comply with the civil rules is an unnecessary risk the appellate advocate should not chance. Compliance with CR 76.12 is mandatory. *See Hallis v. Hallis*, 328 S.W.3d 694, 696 (Ky. App. 2010). Although noncompliance with CR 76.12 is not automatically fatal, we would be well within our discretion to strike his brief or dismiss the appeal for Walker's failure to comply. *Elwell*, 799 S.W.2d at 48. In fact, the Commonwealth has urged this Court to take such action as a result of Walker's noncompliance. While we have chosen not to impose such a harsh sanction, we caution counsel such latitude may not be extended in the future.

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

> The *Strickland* standard sets forth a two-prong test for ineffective assistance of counsel:

> [f]irst, 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.

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 Walker's trial counsel's performance was adequate because

Walker 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) (quoting *Harrington v Ritcher*, 562 U.S. 86, 100, 131 S.Ct. 770, 791, 178 L.Ed.2d 624 (2011), citing *Strickland*, 466 U.S. at 693, 104 S.Ct. at 2067).

> 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.*

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[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.

> *Commonwealth*, 978 S.W.2d 311 ([Ky.] 1998). As noted by *Waters v. Thomas*, 46 F.3d 1506 (11th Cir. 1995) (*en banc*): "The mere fact that other witnesses might have 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) (citation omitted).

Walker raises four allegations of error in seeking reversal—all based on claims his trial counsel was ineffective. First, he contends trial counsel was ineffective in failing to investigate and call as a witness Kevin Faye who claims he overheard Beaumont admit he shot both victims. Second, Walker alleges trial counsel was ineffective by conceding Walker's guilt to robbery, without Walker's prior notice or permission. Third, Walker alleges trial counsel was ineffective by failing to object during the co-defendant's closing argument when he "misled the jury" by saying the 9mm gun Walker claimed Beaumont had given him was a figment of his imagination. Fourth, Walker contends trial counsel was ineffective in failing to interview or present mitigating evidence from Carol Brooks.

First, Walker contends trial counsel's failure to properly investigate prevented witness Kevin Faye from being called to testify at trial. Walker asserts Faye's testimony constituted exculpatory evidence establishing Faye heard

Beaumont admit to shooting both victims. Walker further contends trial counsel's failure to present evidence to the jury from this allegedly favorable witness deprived him of effective assistance of counsel and requires a new trial.

According to Walker, had the jury heard Faye's testimony there is a reasonable probability the outcome of trial would have been different because it provided a key admission Beaumont, not Walker, shot both victims and corroborated Walker's testimony. The trial court found Walker's assertions Faye would have testified to certain facts were "unsupported by actual evidence." After carefully reviewing the record, we agree.

Faye testified at Walker's RCr 11.42 evidentiary hearing on April 23, 2015.[5] His testimony was vague and did not support Walker's current claims. Faye admitted he knew neither Walker nor Beaumont prior to the incident. Faye then testified he overheard Beaumont talking to someone in a store. On direct questioning, Faye stated he overheard the conversation the day after the shooting. On cross-examination, mere minutes later, Faye said the conversation was two or three days after the shooting. Faye testified:

> I overheard [Beaumont] talking to somebody else, then I butted in, and he kinda like told me it was him that said, you know. He really didn't go into any implications, but

[5] At the evidentiary hearing, Walker's trial counsel testified he gave the names provided to him by Walker to his investigator to attempt to contact and interview.

> I kinda knew he did it. Just the way he was talking and acting.

Contrary to Walker's assertions, this testimony was not proof of a solid confession from Beaumont that he shot both Whitlow and Shirley.

The trial court noted "most importantly" that Walker was convicted on complicity to murder; thus, the Commonwealth did not have to prove Walker was the shooter, instead, the jury only had to find Walker aided and abetted Beaumont in the murder. Therefore, an additional witness testifying Beaumont was the shooter would not refute the Commonwealth's evidence Walker was complicit in the murder.

Although Walker believes the verdict could have been different had counsel performed better or differently, his assertions are speculative. He fails to establish a substantial likelihood the jury would have returned a different verdict absent counsel's failure to conduct further investigation or call Faye as a witness. There was no prejudicial effect on his trial. As such, Walker has failed to demonstrate the trial's outcome would have been any different had the jury heard Faye's testimony.

Walker's second argument consists solely of a recitation of theories of law with little or no application to the facts of the case now before us. Walker states, "trial counsel indicated to the jury that Christian Walker was guilty of robbery, without the consent of Mr. Walker and without first discussing this

admission with him." However, Walker fails to cite to any portion of the record where this "indication" was made. We will not search the record to construct Walker's argument for him, nor will we go on a fishing expedition to find support for his underdeveloped arguments. "Even when briefs have been filed, a reviewing court will generally confine itself to errors pointed out in the briefs and will not search the record for errors." *Milby v. Mears*, 580 S.W.2d 724, 727 (Ky. App. 1979) (citing *Ballard v. King*, 373 S.W.2d 591, 593 (Ky. 1963)). Walker'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 a summary dismissal of the motion." *Id*. Walker's unsupported assertion of prejudice warrants no further discussion. *Jackson*, 20 S.W.3d at 908.

Walker's third argument—again—consists of unsupported legal theories with little or no application to the facts of the instant case. Walker alleges trial counsel was ineffective for failing to object when Beaumont's counsel argued Walker's claim he was holding a 9mm semi-automatic handgun was a "figment of Christian's imagination" during his closing argument.

As the trial court noted, "[a]ttorneys are allowed great latitude in their closing arguments. They may draw reasonable inferences from the evidence and propound their explanations of the evidence and why the evidence supports their

respective theories of the case." *Garrett v.* Commonwealth, 48 S.W.3d 6, 16 (Ky. 2001). The trial court also noted it is not always in the best interest of a client to make an objection, and the court must presume counsel had strategic reasons for choosing not to object. Walker's trial counsel testified he chose not to object because he did not want to draw additional attention to the statement. The trial court found the result of the trial would not have been different had the objection been made stating, "[w]hether or not [Walker] actually had a 9[mm] prior to the crime, does not automatically correlate to whether he subsequently could have used a revolver to commit the crime."

Walker has presented nothing more than unsupported speculation in his argument on this issue. Once again, we decline to search the record to construct Walker's argument for him or find support for his undeveloped arguments. *Dennis*, 343 S.W.3d at 637.

Walker's fourth argument—that trial counsel failed to present "crucial" mitigating evidence from Carol Brooks—is not borne out by the record. Walker's trial attorney testified he called eight mitigating witnesses on Walker's behalf, which produced nearly a full day's worth of testimony. Trial counsel further testified his trial strategy was to demonstrate Walker had no positive authority figures to influence his life. Brooks' proffered testimony was squarely counter to this strategy. Walker admits Brooks' proffered testimony "would have

humanized [him], presented his positive attributes, showed the jury that he can be a positive influence even on children, and . . . he responded well to positive discipline." Under *Strickland*, "the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" 466 U.S. at 689, 104 S.Ct. at 2065. Walker has failed to overcome the presumption.

For the forgoing reasons, the order of the Jefferson Circuit Court is AFFIRMED.

ALL CONCUR.

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