RENDERED: NOVEMBER 8, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001132-MR

MICAH HOLLAND — APPELLANT

v.

APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE JOHN L. ATKINS, JUDGE
ACTION NO. 12-CR-00461

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; JONES AND LAMBERT, JUDGES.

CLAYTON, CHIEF JUDGE: Micah Holland was convicted in Christian Circuit Court of wanton murder and sentenced to twenty years' imprisonment. His conviction was affirmed on direct appeal. *Holland v. Commonwealth*, 466 S.W.3d 493 (Ky. 2015). He thereafter filed a motion to vacate his conviction pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42, arguing that his trial and

appellate counsel were ineffective. Following an evidentiary hearing, the Christian Circuit Court entered an order denying the motion and this appeal followed.

The underlying facts of the case are set forth in the opinion of the Kentucky Supreme Court:

> Appellant and [Joey] Weatherwax [the victim] grew up together amidst a large, extended family in the Christian County area. The record discloses that both Appellant and Weatherwax suffered from mental and emotional issues for which they were prescribed medications, and that both experienced difficulties with alcohol and illegal drug use. More significantly, Appellant's wife, Christina, had previously been married to Weatherwax, and this led to ongoing animosity between the two.
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> Various events foreshadowed the present trouble, including an altercation in Clarksville, Tennessee, between Appellant and other family members, which led Appellant to believe that his family members were "all against him." On a different occasion, Appellant complained that Weatherwax and other family members had loosened the lug nuts on the wheels of his car and cut his brake or power steering lines. On yet another occasion, Weatherwax allegedly asked his grandmother for money to buy ammunition so that he could shoot Appellant.
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> During the late-night hours of September 8, 2012, and the early morning hours of September 9, 2012, another cousin, Kyle Cherry, hosted a gathering at his residence that was attended by several family members, including Weatherwax. In the hours preceding this event, Appellant and Weatherwax engaged in several acrimonious telephone conversations during which each made threats against the other. In the last of these conversations, Appellant indicated that he was on his way to confront Weatherwax. Weatherwax encouraged

> Appellant to do so, and then armed himself with a two-by-four board to await Appellant's arrival.
>
> As Appellant arrived, Weatherwax ran toward his vehicle armed with the two-by-four. Appellant fired a shot from his open car window; the bullet struck Weatherwax, who collapsed on the road with the board at his feet. As he fled from the scene, Appellant ran over Weatherwax. The official cause of death was listed as a gunshot wound to the chest.
>
> Appellant was charged with murder. At trial, he declined to testify and called no witnesses. His defense, based upon principles of self-protection, was presented through cross-examination of the Commonwealth's witnesses and trial counsel's arguments to the jury. The trial court instructed the jury that it could find Appellant guilty of murder if it believed he acted either wantonly or intentionally in causing Weatherwax's death. The jury found Appellant guilty of wanton murder.

Id. at 497.

Holland claims his trial counsel was ineffective for failing to object to Holland's not being present during portions of *voir dire* and for failing to strike a juror who was a friend of the victim's ex-wife. He further claims that his appellate counsel was ineffective for failing to raise these arguments in his direct appeal. Finally, he argues his trial counsel was ineffective for failing to investigate and present a viable defense.

To succeed on a claim of ineffective assistance of counsel, a movant must fulfill two requirements: "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 the defendant by the Sixth Amendment." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). "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." *Id*.

When the trial court holds an evidentiary hearing, as it did in this case, the reviewing court "must defer to the determinations of fact and witness credibility made by the trial judge." *Commonwealth v. Robertson*, 431 S.W.3d 430, 435 (Ky. App. 2013). If the trial judge's findings are clearly erroneous, however, the reviewing court may set them aside. *Brown v. Commonwealth*, 253 S.W.3d 490, 500 (Ky. 2008); Kentucky Rules of Civil Procedure (CR) 52.01. "On appeal, the reviewing court looks *de novo* at counsel's performance and any potential deficiency caused by counsel's performance." *Id*. (citations omitted).

Holland argues that his trial counsel was ineffective for not ensuring he was present during parts of the *voir dire* conducted in the trial court's chambers, and for failing to strike juror Holly Gilkey, one of the jurors who was questioned in chambers. Holland makes no references to the video record to indicate when in the proceedings this portion of the *voir dire* occurred, in contravention of CR 76.12(4)(c)(iv) and (v), which require ample references to the record supporting

each argument. Although "[i]t is not the job of the appellate courts to scour the record in support of an appellant or cross-appellant's argument[,]" *Dennis v. Fulkerson*, 343 S.W.3d 633, 637 (Ky. App. 2011), we have located and reviewed the pertinent part of the recording.

During the *voir dire*, several members of the venire, including Holly Gilkey, were taken into the judge's chambers for further individual questioning after they indicated they knew some of the parties in the case. The attorneys were present, but not Holland. Gilkey informed them that she knew Andrea Reynolds, Joey Weatherwax's former wife and the mother of his son. The judge asked her whether this would affect her ability to be fair and impartial. She replied, "I wouldn't think so." The judge then explained that the real key was whether she could base her decision in the case solely on the evidence presented at trial or if her relationship with Andrea Reynolds would affect her ability to do so. Gilkey stated she thought she could base her decision solely on the evidence.

Fletcher Long, Holland's trial counsel, then asked her if she would characterize her relationship with Reynolds as a friendship. She replied in the affirmative and also stated that Reynolds was best friends with her sister. Long inquired whether she knew anything about the personal relationship between Weatherwax and Reynolds and whether their split was friendly or unfriendly. She replied she was told Weatherwax "got into drugs and stuff." Long asked whether

she was told this by Reynolds, and she replied no, by her sister. He asked whether her knowledge regarding Weatherwax's involvement in drugs would make her incline one way or the other in the case and she replied no. When she was asked if she would feel awkward encountering Reynolds after the verdict, she replied that she already felt awkward because their kids played together and they often talked together for a long time. She further stated that the verdict would not alter that and replied yes when she was asked whether she could give a commitment that it would not.

Upon questioning by the Commonwealth attorney, she stated that she did not know Holland. When she was asked whether her knowledge of Weatherwax's involvement in drugs would affect her impartiality, she replied no, because she had heard the same thing about the other, presumably referring to Holland.

At the evidentiary hearing on his RCr 11.42 motion, Holland testified that he was never asked to accompany his attorney to chambers during the *voir dire* process, so he was not present at the questioning of Holly Gilkey. He testified that he did not know her prior to trial and had never seen her before. Following the conclusion of his direct appeal, however, he learned of her friendship with Reynolds. He claimed he also learned Reynolds had written letters to the judge during Holland's bond hearing explaining she did not want his bond reduced

because she was worried about her safety if he was released. Holland testified that if he had been aware of the statements Gilkey made in *voir dire* and her friendship with Andrea Reynolds, he would have moved to strike her. He testified that his attorney never informed him of Gilkey's statements when they were reviewing the strikes together.

Long testified that he never brings clients into chambers during *voir dire* and was unaware of any rule that would permit it. He had no independent recollection of Holly Gilkey. He testified that he could not fathom not striking her based on her relationship with the victim's ex-wife, but also stated Gilkey could have known the victim to be provocative and an aggressor or she could have liked him. He described further questioning of Gilkey about her feelings towards the victim as a double-edged sword, because if she had responded that she knew Weatherwax was violent, he would have just lost a helpful juror.

A defendant has the constitutional right to be present at jury selection as it constitutes a critical stage of the criminal proceeding. *Truss v. Commonwealth*, 560 S.W.3d 865, 869-70 (Ky. 2018), *reh'g denied* (Dec. 13, 2018). Insofar as Holland's trial counsel was not aware that Holland had the right to attend the *voir dire* session in chambers, his performance was deficient for purposes of the first prong of *Strickland*.

Holland does not, however, succeed in satisfying the second prong of the *Strickland* test, which requires a showing of prejudice stemming from the deficient performance. "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." *Foley v. Commonwealth*, 17 S.W.3d 878, 884 (Ky. 2000), *as modified on denial of reh'g* (June 15, 2000), *overruled on other grounds by Stopher v. Conliffe*, 170 S.W.3d 307 (Ky. 2005) (citing *United States v. Morrow*, 977 F.2d 222, 229 (6th Cir. 1992)). Holland's claim he would have told his attorney he wanted Gilkey stricken had he been present at the session in chambers is speculative at best. Holland admits he did not know Gilkey and did not recognize her. As to the letter from Reynolds asking the trial court not to reduce Holland's bond, Holland testified he did not learn of its existence until after the conclusion of his direct appeal.

Although Long was unable to recall his *voir dire* examination of Gilkey, his testimony provided a reasonable strategic explanation for not questioning her directly about her feelings towards Holland as she may well have been hostile to Weatherwax and consequently a good juror for the defense. The record of the proceedings in chambers shows that Long and the trial judge delved into Gilkey's relationship with Andrea Reynolds at some length. Gilkey stated that she did not know Holland and did not have a favorable impression of Weatherwax.

Gilkey was adamant that the verdict in the case would not make her relationship with Reynolds more awkward and gave a commitment she could be objective and impartial. In light of the evidence, Holland has simply failed to show either that his exclusion from the *voir dire* or his counsel's decision not to use a peremptory strike to remove Holly Gilkey from the jury prejudiced his case to the extent necessary to obtain RCr 11.42 relief.

In a related argument, Holland contends his appellate counsel was ineffective for not arguing as grounds for reversal the denial of his right to be present during jury selection. "A movant will only be successful on IAAC [ineffective assistance of appellate counsel] claims for 'ignored issues' which 'counsel must have omitted completely' from the direct appeal." *Jackson v. Commonwealth*, 567 S.W.3d 615, 619 (Ky. App. 2019) (quoting *Hollon v. Commonwealth*, 334 S.W.3d 431, 437 (Ky. 2010)). "[O]nly when ignored issues are clearly stronger than those presented, will the presumption of effective assistance be overcome." *Hollon*, at 436-37 (citation and internal quotation marks omitted). "Finally, the defendant must also establish that he or she was prejudiced by the deficient performance, which . . . requires a showing that absent counsel's deficient performance there is a reasonable probability that the appeal would have succeeded." *Id.* at 437 (citation omitted). We review the denial of claims of IAAC for an abuse of discretion. *Jackson*, 567 S.W.3d at 619-20.

Because the error relating to his exclusion from *voir dir*e was unpreserved, Holland's appellate counsel would have had to seek palpable error review under RCr 10.26, which provides "an unpreserved error may be reviewed and appropriate relief granted providing the court determines that manifest injustice has resulted from the error." *West v. Commonwealth*, 780 S.W.2d 600, 602 (Ky. 1989). "[W]hat a palpable error analysis boils down to is whether the reviewing court believes there is a substantial possibility that the result in the case would have been different without the error." *King v. Commonwealth*, 465 S.W.3d 38, 42 (Ky. App. 2015) (citation and internal quotation marks omitted). "A palpable error is clear and plain, affects the substantial rights of a party, and is more likely than other ordinary errors to affect the outcome of the case. . . . Even so, the defendant is not entitled to relief unless it can be determined that manifest injustice, i.e., a repugnant and intolerable outcome, resulted from that error." *McCleery v. Commonwealth*, 410 S.W.3d 597, 605-06 (Ky. 2013) (citing *Miller v. Commonwealth*, 283 S.W.3d 690, 695 (Ky. 2009)).

Holland is unable to show how appellate counsel could have succeeded in showing manifest injustice stemming from his absence from portions of the *voir dire*. Even a constitutional error may be waived if trial counsel fails to object. "[N]othing contained in RCr 10.26 precludes the waiver of palpable error or even waiver of a constitutional right." *West*, 780 S.W.2d at 602. "Substantive

rights, even of constitutional magnitude, do not transcend procedural rules, because without such rules those rights would smother in chaos and could not survive. There is a simple and easy procedural avenue for the enforcement and protection of every right and principle of substantive law at an appropriate time and point during the course of any litigation, civil or criminal." *Id*. (quoting *Brown v. Commonwealth*, 551 S.W.2d 557, 559 (Ky. 1977)).

Holland nonetheless contends that this argument regarding his exclusion from portions of the *voir dire* would have had a greater likelihood of success than his appellate counsel's argument that the trial court erred in failing to allow an instruction on first-degree manslaughter based upon the theory the jury could have reasonably believed Holland acted under the compelling influence of an extreme emotional disturbance (EED). He claims that the latter argument was weak as evidenced by the Kentucky Supreme Court's decision not to reverse on this issue because there was no evidence of a specific triggering event and/or any direct testimony by Holland regarding his state of mind. *Holland*, 466 S.W.3d at 504-05.

But the allegation of error regarding the failure to instruct on EED was preserved by his counsel's request for such an instruction, and hence the claim of instructional error was reviewed *de novo* rather than for palpable error. *See Mendez v. University of Kentucky Bd. of Trustees*, 357 S.W.3d 534, 538 (Ky. App.

2011) ("Because alleged errors regarding jury instructions are considered questions of law, we examine them under a de novo standard of review."). Although the Kentucky Supreme Court ultimately concluded, after a lengthy analysis, that the evidence of "bad blood" between Holland and Weatherwax did not rise to the level of warranting an EED instruction, it is difficult to see how the unpreserved argument regarding Holland's exclusion from portions of the *voir dire* would have fared any better or was clearly stronger.

Third and finally, Holland argues that his trial counsel failed to investigate and present a viable defense. Long testified he proceeded on a "stand your ground" theory, arguing that Holland had no duty to retreat when Weatherwax approached him with the board. Holland argues that "stand your ground" was inapplicable to the facts of the case and his attorney should instead have argued self-defense under Kentucky Revised Statutes (KRS) 503.010.

The record shows that Holland's trial counsel specifically requested a self-defense instruction, a "no duty to retreat" instruction, and an imperfect self-defense instruction. The jury was given a self-defense instruction containing the requested "no duty to retreat" instruction as well as lesser-included homicide instructions incorporating imperfect self-defense. On direct appeal, Holland argued that the instructions were structured in such a way that "the jury was unable to give fair consideration to the concept of imperfect self-defense that might have

mitigated the killing of Weatherwax from wanton murder to second-degree manslaughter or reckless homicide." *Holland*, 466 S.W.3d at 502. The Kentucky Supreme Court disagreed, explaining as follows:

> The theory of imperfect self-defense that would justify an instruction on the lesser crime of second-degree manslaughter is based upon the factual premise that the accused had the *actual subjective belief* that deadly force was necessary to protect himself from the victim. Once the jury concludes that the defendant *did not* have that actual belief, there is no longer the possibility of a lesser offense based upon imperfect self-defense.

Id. The Supreme Court concluded that the instructions given in the case "provided the jury with an accurate roadmap to navigate the legal intricacy involved[,]" by requiring the jury to find first whether Holland had an actual belief that his use of deadly force against Weatherwax was necessary. *Id*. at 503. Once the jury determined that Holland did not have "an actual belief in the necessity of acting in self-protection, the lesser offenses of second-degree manslaughter and reckless homicide were no longer viable options." *Id*.

Holland nonetheless argues that there was additional evidence to support the given self-defense instructions which his trial counsel failed to present. Holland points to Weatherwax's history of threatening behavior toward Holland and his wife Christine, and Christine's testimony that she complained to the county attorney about Weatherwax's behavior. Holland claims that a friend, Michael Burges, would have testified that he stayed with the Hollands to help protect

Christine due to Weatherwax's prior threats. But the primary piece of evidence which Holland contends would have justified his use of deadly force was his conviction that Weatherwax was reaching for a gun immediately before he shot him. Holland testified at the evidentiary hearing that Weatherwax was behaving erratically when he arrived to confront him, that he was banging a board on the ground and yelling, and finally reached for what Holland believed was a gun.

But an arrest warrant and affidavit for a search warrant in the record indicate Holland changed his story about Weatherwax having a gun. Holland's father, Steven, approached law enforcement regarding two telephone conversations Holland had initiated with him. In the first conversation, Holland admitted shooting Joey Weatherwax but stated Joey had a weapon. In the second such phone conversation, Holland recanted the portion regarding Joey's possession of a weapon.

At the RCr 11.42 hearing, trial counsel was not questioned about Holland's belief that Weatherwax had a gun. In any event, had trial counsel chosen to have Holland testify about his belief that Weatherwax had a gun, which would have been the only means of introducing this evidence, he would have risked his client's impeachment by the Commonwealth on the basis of his inconsistent accounts to his father of what occurred. Holland's counsel was not ineffective for not pursuing this defense strategy.

The Christian Circuit Court order denying RCr 11.42 relief is affirmed.

ALL CONCUR.

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