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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001501-MR

MICHAEL HANDLE

APPELLANT

v. APPEAL FROM BRECKINRIDGE CIRCUIT COURT
HONORABLE BRUCE T. BUTLER, JUDGE
ACTION NO. 11-CR-00060

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING

** ** * * * * *

BEFORE: CLAYTON, CHIEF JUDGE; K. THOMPSON AND L. THOMPSON,
JUDGES.

THOMPSON, L., JUDGE: Michael Handle appeals from an order of the
Breckinridge Circuit Court which denied his Kentucky Rules of Criminal
Procedure (RCr) 11.42 motion alleging ineffective assistance of counsel.

Appellant raises multiple allegations of ineffective assistance of counsel. We

believe that Appellant received the effective assistance of counsel during the guilt phase of trial, but that his counsel was ineffective during the sentencing phase; therefore, we reverse and remand Appellant's sentence and order a new sentencing hearing.

FACTS AND PROCEDURAL HISTORY

On May 22, 2012, Appellant was convicted of second-degree assault¹ and kidnapping.² He was sentenced to a thirty-year term of imprisonment. This conviction was a result of him having tied up his girlfriend and shooting her with a paintball gun.³ This conviction was affirmed by the Kentucky Supreme Court in *Handle v. Commonwealth*, No. 2012-SC-000374-MR, 2013 WL 6729962 (Ky. Dec. 19, 2013). On August 26, 2016, Appellant filed the underlying motion alleging ineffective assistance of counsel. An evidentiary hearing was held on February 9, 2018. The trial court ultimately denied Appellant's motion and this appeal followed. Additional facts will be discussed as they become relevant to our analysis.

¹ Kentucky Revised Statutes (KRS) 508.020.

² KRS 509.040.

³ Appellant confessed to shooting his girlfriend with the paintball gun but continues to deny that he tied her up or restrained her in any fashion.

ANALYSIS

On appeal, Appellant raises multiple arguments in which he alleges ineffective assistance of counsel. To prevail on a claim of ineffective assistance of counsel, Appellant must show two things:

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. 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, 80 L.Ed.2d 674 (1984). "[T]he proper standard for attorney performance is that of reasonably effective assistance." *Id.*

An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.

Id. at 691-92 (citation omitted). "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693. "The defendant must show that 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 a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. 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. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.

Id. at 689 (citations omitted). "Appellant is not guaranteed errorless counsel or counsel that can be judged ineffective only by hindsight, but rather counsel rendering reasonably effective assistance at the time of trial." *Parrish v. Commonwealth*, 272 S.W.3d 161, 168 (Ky. 2008) (citations omitted).

At the trial court level, "[t]he burden is upon the accused to establish convincingly that he was deprived of some substantial right which would justify the extraordinary relief afforded by . . . RCr 11.42." On

appeal, the reviewing court looks *de novo* at counsel's performance and any potential deficiency caused by counsel's performance.

And even though, both parts of the *Strickland* test for ineffective assistance of counsel involve mixed questions of law and fact, the reviewing court must defer to the determination of facts and credibility made by the trial court. Ultimately however, if the findings of the trial judge are clearly erroneous, the reviewing court may set aside those fact determinations. CR^[4] 52.01 (“[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witness.”) The test for a clearly erroneous determination is whether that determination is supported by substantial evidence. This does not mean the finding must include undisputed evidence, but both parties must present adequate evidence to support their position.

Brown v. Commonwealth, 253 S.W.3d 490, 500 (Ky. 2008) (citations omitted).

With the above standard in mind, we will now move on to Appellant's arguments. Appellant's first argument on appeal is that his trial counsel was ineffective for failing to file a suppression motion regarding the illegal search of his home. When authorities arrived at Appellant's home to arrest him, Appellant was outside.⁵ A police officer placed Appellant under arrest and searched his house, finding the paintball gun. The police did not have a search warrant. Appellant argues that he did not give consent to search the house and there was no

⁴ Kentucky Rules of Civil Procedure.

⁵ The victim in this case had already freed herself and left the premises by the time Appellant was arrested.

paperwork regarding a voluntary consent to search the home. The arresting officer, who also performed the search, testified that he could not remember if he was given consent to search, but that if he did, there would be a notation in his report. There was no such notation. Appellant's trial counsel testified that Appellant told her he had given consent to search the residence.

In denying this claim of ineffective assistance of counsel, the trial court held that even if a suppression motion could have been filed and the paintball gun and ammo had been suppressed, the result of the trial would not have been different. The court found that the primary evidence regarding the victim's injuries came from her testimony and the photographs taken of those injuries. We agree with the trial court's analysis. Even if it was error not to pursue a suppression motion, Appellant cannot meet the high prejudicial standard set forth in *Strickland*. The victim's testimony and the photographs of her injuries were more than enough to prove that she received injuries from the paintball gun.

Appellant's next argument is that trial counsel was ineffective in her handling of plea negotiations. Appellant and trial counsel did not have a good attorney-client relationship. Trial counsel alleged that Appellant threatened her; therefore, she brought in co-counsel who would speak with Appellant on her behalf. Co-counsel is the attorney who spoke with Appellant about a plea offer. The Commonwealth offered Appellant an eight-year sentence, probated for five

years. One of the terms of the agreement was that Appellant would have to sign over ownership of his truck to the victim. Appellant did not want to relinquish his truck and expressed this to co-counsel. Co-counsel contacted trial counsel to see if the truck could be excluded from the plea deal. Trial counsel contacted the Commonwealth Attorney and explained Appellant's request, but the truck was a required part of the deal. Appellant eventually accepted the deal and signed the paperwork.

A few days later, which was the day of trial and the day Appellant believed his plea agreement would be entered before the court, Appellant discovered that the Commonwealth had revoked the plea agreement. The Commonwealth believed that Appellant did not want to give up the truck and that trial counsel's discussion with the Commonwealth Attorney was a counteroffer. Trial counsel filed a motion to enforce the agreement, but that motion was denied. The trial court accepted the Commonwealth's argument that Appellant made a counteroffer by requesting to keep his truck. The Kentucky Supreme Court affirmed this issue.

Appellant now argues that his counsel was ineffective for failing to adequately communicate with him regarding the plea offer negotiation. He claims that had trial counsel spoken to him directly, as opposed to using co-counsel, she would have understood that Appellant was asking a general question about the

truck and was not putting forth a counteroffer. He also claims that had trial counsel personally spoken to him, she would have discovered that he had accepted the plea agreement before it was revoked.⁶ He alleges this would have allowed trial counsel to argue before the trial court that the revocation was not communicated to him before he accepted the deal, an argument which was not made.

The trial court held that trial counsel's performance was not deficient as to this issue. We agree. Trial counsel claimed that Appellant threatened her and that is why she used co-counsel as a go-between to communicate with him.

Although Appellant claims he never threatened her, he did admit that he was hard to get along with and he refused to meet with her on occasion. The trial court and the Kentucky Supreme Court held that Appellant made a counteroffer, which allowed the Commonwealth to revoke the plea agreement altogether. At the RCr 11.42 hearing, both trial counsel and co-counsel testified that Appellant was adamant about not wanting to lose his vehicle. This was communicated to the

⁶ The record is unclear when the Commonwealth revoked its offer. Trial counsel testified that after Appellant accepted the offer, he changed his mind on the day of trial and refused to give up the truck and that it was at this time the Commonwealth revoked the offer. The trial court utilized this testimony to deny Appellant's motion as to this issue. However, the motion to enforce the plea agreement indicated that the offer was revoked the same day Appellant signed the agreement. In addition, when trial counsel presented the motion to enforce the agreement before the trial court, the conversation between trial counsel and the prosecution suggests the deal was revoked the same day Appellant signed it.

prosecution and was considered a counteroffer. Based on the record before us, we cannot definitively say that trial counsel miscommunicated with the prosecution.

Alternatively, if no counteroffer was actually made, and this was simply a miscommunication, it was brought on by Appellant's behavior and reluctance to communicate with trial counsel. Had Appellant not been a combative client, trial counsel may have been able to communicate with him directly about this plea agreement and any concerns he may have had. Trial counsel's performance as it pertains to the plea negotiation was not deficient.

Appellant next argues that his trial counsel was ineffective when she failed to investigate, impeach, and effectively cross-examine the victim, Tia Hager. Appellant argues that Ms. Hager's credibility was the linchpin of the Commonwealth's case and that counsel failed to investigate her or impeach her credibility. "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland*, 466 U.S. at 691. "A reasonable investigation is not an investigation that the best criminal defense lawyer in the world, blessed not only with unlimited time and resources, but also with the benefit of hindsight, would conduct. The investigation must be reasonable under all the

circumstances.” *Haight v. Commonwealth*, 41 S.W.3d 436, 446 (Ky. 2001), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009) (citations omitted). In addition, an attorney’s questioning of a witness is a trial strategy which courts are reluctant to second guess. *Hodge v. Commonwealth*, 116 S.W.3d 463, 473 (Ky. 2003), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009).

Here, the trial court found that trial counsel adequately investigated Ms. Hager and that trial counsel’s questioning of Ms. Hager was not deficient. We agree. Trial counsel and her investigator, Jean Smallwood, spoke with Ms. Hager about the events in question. Ms. Smallwood then wrote a report about their discussion. Additionally, trial counsel cross-examined Ms. Hager for approximately seventeen minutes. Trial counsel questioned Ms. Hager about inconsistent statements she made to the police and asked questions which implied Ms. Hager tried to take all the contents of the house she shared with Appellant once he was arrested.⁷ Trial counsel also called a rebuttal witness, her investigator. During Ms. Hager’s cross-examination, she testified that trial counsel and Ms. Smallwood harassed her during the interview and that Ms. Hager’s aunt, who was also present, asked them to leave. Ms. Smallwood testified that there was no harassment, that the interview was cordial, and that no one asked them to leave.

⁷ One defense theory was that Ms. Hager lied about the severity of her injuries in order to get Appellant arrested so she could take all of his belongings.

The trial court did not err in finding trial counsel's investigation and cross-examination were adequate.

Appellant's next argument is that his trial counsel was ineffective for failing to object to Trooper Brad Riley's testimony regarding the victim's injuries. Trooper Riley was the arresting officer in this case. During his testimony Trooper Riley discussed Ms. Hager's injuries. As Trooper Riley was testifying, the Commonwealth used photographs of these injuries to help illustrate his testimony.⁸ Trooper Riley pointed out round bruises, flat bruises, and red marks on Ms. Hager's wrists, which he described as ligature marks. Appellant argues this testimony is beyond Trooper Riley's expertise and that counsel should have objected. In other words, Appellant believes a medical expert should have been the one to describe Ms. Hager's injuries.

The trial court held that Trooper Riley's testimony was proper because it was used to authenticate the pictures and describe his observations of Ms. Hager's injuries. We agree with the trial court. Trooper Riley was the one to take the pictures of the injuries and his testimony was a description of what he saw. Trooper Riley did not testify as to what he believed caused the bruises on Ms. Hager, he only described the shape and location of the bruises. In fact, defense counsel questioned Trooper Riley about whether he had training on bruise

⁸ Trooper Riley was the person who took the photographs.

identification and he replied that he had no training. Defense counsel also elicited testimony from Trooper Riley that his ability to identify bruises would be similar to that of defense counsel. In other words, Trooper Riley was testifying as a layman. Trooper Riley also testified that he would defer to medical professionals in the examination of Ms. Hager's bruises. Trooper Riley did not testify as an expert in bruise identification; he merely described what he saw as a layman. Trial counsel had no reason to object to Trooper Riley's testimony; therefore, there was no deficient performance.

Appellant's next argument is that trial counsel was ineffective when she failed to object to improper penalty phase evidence. During the penalty phase, the Commonwealth provided evidence of Appellant's prior convictions. Some of the documentation identified the victims of his prior crimes. The prosecutor also verbally identified a victim during questioning of a witness. When questioning Marty Jenkins, a friend of Appellant, the prosecution indicated that Appellant was convicted of a crime against his own mother. In addition, exhibits entered by the Commonwealth identified charges that had been set aside due to plea agreements or merged into other charges. Finally, the Commonwealth stated during closing argument that Appellant would "likely" only serve six years before being paroled.

KRS 532.055(2)(a) allows the Commonwealth to introduce evidence relevant to sentencing including minimum parole eligibility, prior convictions, and

the nature of the prior convictions. “[T]he Commonwealth cannot introduce evidence of charges that have been dismissed or set aside.” *Cook v. Commonwealth*, 129 S.W.3d 351, 365 (Ky. 2004). When describing the nature of prior convictions, that evidence should be

limited to conveying to the jury the elements of the crimes previously committed . . . either by a reading of the instruction of such crime from an acceptable form book or directly from the Kentucky Revised Statute itself. . . . The description of the elements of the prior offense may need to be customized to fit the particulars of the crime, i.e., the burglary was of a building as opposed to a dwelling. The trial court should avoid identifiers, such as naming of victims, which might trigger memories of jurors who may—especially in rural areas—have prior knowledge about the crimes.

Mullikan v. Commonwealth, 341 S.W.3d 99, 109 (Ky. 2011). Here, the Commonwealth clearly erred in introducing evidence of crimes Appellant was not convicted of and in identifying the victims of some of the crimes. Additionally, it is improper for a prosecutor to tell a jury that a defendant will get out on parole after so many years because a defendant is not guaranteed parole. *Ruppee v. Commonwealth*, 754 S.W.2d 852, 853 (Ky. 1988); *Evans v. Commonwealth*, 544 S.W.3d 166, 170 (Ky. App. 2018).

The trial court did not address these issues other than to say they had been addressed by the Kentucky Supreme Court in the direct appeal. The Court held that the admission of the charges which were dismissed by plea agreements

was error, but that it was harmless error. The Court stated that “[g]iven the weight of the eight prior convictions, and the fact that the jury returned with the maximum sentence so quickly, we come to the conclusion that the presentation of the merged misdemeanor charges did not substantially sway the decision of the jury.” *Handle*, 2013 WL 6729962, at *8. As to the naming of the victims, the Court reviewed that issue for palpable error. The Court held that there was no palpable error or manifest injustice because the victims identified “were not from the area in which the case was being tried and were not in any way similar or related to the victims of the present crime[.]” *Id.* at *10. Finally, the Court’s opinion mentions in the introductory paragraph that Appellant appealed the Commonwealth’s speculative statements regarding parole eligibility, but the Court did not actually address it.

In the case at hand, we believe that trial counsel should have objected to the admission of evidence of prior crimes of which Appellant was not convicted and to the admission of information regarding victims. These were obvious mistakes on the part of the Commonwealth and courts of this Commonwealth routinely reverse sentences due to this improper evidence. *See Cook, supra*; *Robinson v. Commonwealth*, 926 S.W.2d 853, 854 (Ky. 1996); *Scrivener v. Commonwealth*, 539 S.W.2d 291, 293 (Ky. 1976); and *Mullikan, supra*. As to the alleged improper parole eligibility statements made by the prosecutor, defense counsel should have objected to the statement. As previously mentioned, stating

that a defendant will get out on parole after serving a set amount of time is improper because it is not guaranteed a defendant will receive parole. *Ruppee, supra; Evans, supra*. In this instance, however, the prosecutor tried to mitigate his statement by further stating that he was not sure that Appellant would get released on parole after serving only six years. The prosecutor then referred the jury back to the testimony of the probation and parole officer who testified as to the same thing.

Having found that trial counsel's performance during the penalty phase was deficient, we must now determine if it prejudiced Appellant to such an extent that he was denied a fair trial. While it is possible that these errors might not individually meet the high threshold of the prejudice prong of the ineffective assistance of counsel standard, we believe that they do cumulatively. "Cumulative error is the doctrine under which multiple errors, although harmless individually, may be deemed reversible if their cumulative effect is to render the trial fundamentally unfair. We have found cumulative error only where the individual errors were themselves substantial, bordering, at least, on the prejudicial." *Mason v. Commonwealth*, 559 S.W.3d 337, 344-45 (Ky. 2018) (footnotes, citations, and internal quotation marks omitted).

Here, the Commonwealth provided evidence of two criminal charges that Appellant was never convicted of. As former Justice Mary Noble stated in her concurring in part and dissenting in part opinion in *Handle, supra*:

In my experience, the more crimes attached to a defendant's name, the more punitive the sentence is. An error is not harmless when the error had a "substantial influence" on the jury or if the court is "left in grave doubt" about the influence. *Winstead v. Commonwealth*, 283 S.W.3d 678, 689 (Ky. 2009). *Handle* was tagged with two additional crimes. That simply cannot fail to influence the thinking of the average juror, and at the very least we should be left in grave doubt that the added crimes had no effect on the jury's consideration.

Handle, 2013 WL 6729962, at *11 (Noble, J., concurring in part and dissenting in part).

Additionally, the Commonwealth gave the jury information about some of the victims of Appellant's previous crimes. One such victim was Appellant's own mother. Informing the jury that Appellant committed a crime against his own mother is, in our opinion, highly prejudicial. Finally, the prosecution suggested the jury should give Appellant the highest possible sentence because he would be released on parole after six years. Although the prosecution later clarified that he was not sure if this would actually happen, that bell cannot be unrung, especially since no objection was made and no admonition was given.

Here, Appellant was given the maximum sentence. It is likely that the jury gave Appellant the maximum sentence at least in part because of the improper information they received from the Commonwealth. Because of the cumulative and prejudicial errors on behalf of the Commonwealth, and defense counsel's failure to object, we conclude that trial counsel was ineffective during the penalty phase.⁹

Appellant's next argument on appeal is that his trial counsel was ineffective for failing to investigate witnesses. Appellant claims Jerry Wolfe, Kay Wolfe, David Phelps, and Kenny Scott should have been called to testify at trial. Appellant argues that these witnesses could have discredited Ms. Hager and help prove the defense's theory that Ms. Hager wanted Appellant in jail so that she could steal all of his possessions. All of these people testified at the RCr 11.42 evidentiary hearing. They all stated that they would have been willing to testify.

“[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly

⁹ The Kentucky Supreme Court in Appellant's direct appeal held that the jury being informed of two crimes Appellant was not convicted of was harmless error. The Court also held that the issue of the naming of Appellant's prior victims, which had not been preserved, did not amount to palpable error. The Court did not rule on the issue of the statement given by the prosecution that Appellant would only have to serve six years before he would be paroled. The Court also did not do any cumulative error analysis. We believe that our opinion does not contradict the opinion of our Supreme Court because that Court did not analyze the parole issue or cumulative error.

assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland*, 466 U.S. at 691. "A reasonable investigation is not an investigation that the best criminal defense lawyer in the world, blessed not only with unlimited time and resources, but also with the benefit of hindsight, would conduct. The investigation must be reasonable under all the circumstances." *Haight*, 41 S.W.3d at 446 (citations omitted). The court in this case held that trial counsel was not ineffective in her investigation. The court found the following: that trial counsel contacted everyone in Appellant's contact list; that trial counsel contacted Mr. Phelps, but that he did not have any relevant information; that trial counsel contacted Mr. Scott, but that he stated he did not want to get involved in the case and had no relevant knowledge; that Mr. Wolfe did testify at trial; and that all of the witnesses, except Mr. Phelps, remembered being contacted by trial counsel and speaking with her.

We agree with the trial court's conclusion. Trial counsel contacted each of the proposed witnesses and spoke to them about the case. "[T]rial counsel's choice of whether to call witnesses is generally accorded a presumption of deliberate trial strategy and cannot be subject to second-guessing in a claim of ineffective assistance of counsel." *Saylor v. Commonwealth*, 357 S.W.3d 567, 571 (Ky. App. 2012) (citation omitted). The court's findings are supported by the testimony of the witnesses at the hearing and we find no error.

Appellant next claims that counsel was ineffective for failing to strike a potential juror. During *voir dire*, the trial judge in this case disclosed to the defense and the Commonwealth that a potential juror, Joe Bolin, was the brother of the judge's secretary. Juror Bolin was brought to the bench and asked if his relationship with his sister would affect his ability to be fair. Juror Bolin stated, "It shouldn't, but I couldn't say, you know, positive." Defense counsel did not move to strike the juror and Juror Bolin served on the jury. Appellant claims his trial counsel should have moved to strike this juror.

The trial court in this case found the juror had no bias and that trial counsel indicated she purposefully chose to keep the juror. The court concluded that trial counsel's performance was not deficient. We agree. According to her testimony at the RCr 11.42 hearing, trial counsel made the strategic decision to keep this juror. As this was a strategic decision and the juror did not express that he was biased toward the defense or Commonwealth, we find no error.

Appellant next argues that his trial counsel was ineffective for failing to prepare him to testify and for coercing him into not testifying. Appellant claims that counsel failed to discuss with him in advance whether or not he should testify. He claims that the first time he was presented with the option to testify was during trial when trial counsel leaned over to him and asked if he wanted to testify. He responded in the affirmative, but trial counsel is alleged to have told him that it

would allow the Commonwealth to introduce negative evidence and that she would counsel him not to testify. He argues that because this was a last-minute decision, he was coerced into not testifying.

As to this issue, the trial court held that the evidence presented at the hearing indicated that trial counsel and co-counsel explained to Appellant the potential issues that could arise should he testify and that they did not coerce him into not testifying. The court found trial counsel was not ineffective as to this issue. We agree. Co-counsel testified that he believed he spoke to Appellant pretrial about what could happen if he testified at trial. Trial counsel testified that she met with Appellant at the jail pretrial in an attempt to prepare him for trial. She requested that a member of the jail staff accompany her for her protection because Appellant made threats against her. Appellant refused to meet with trial counsel because she was not alone.¹⁰ Evidence presented at the hearing indicated that co-counsel spoke with Appellant about testifying and trial counsel attempted to prepare him for trial. Presumably trial counsel's pretrial preparation would have included a discussion about testifying. We find defense counsel's performance was not deficient in this respect and the trial court's conclusion as to this issue was not in error.

¹⁰ Appellant testified that he refused to speak with trial counsel on this occasion because she was not alone and he was worried about his attorney-client privilege.

Appellant's final argument on appeal is that his counsel was ineffective for failing to present mitigation evidence during the penalty phase. We have previously stated that Appellant is entitled to a new penalty phase; therefore, this issue is moot.

CONCLUSION

Based on the foregoing, we find that Appellant received effective assistance of counsel during the guilt phase of trial, but that counsel was ineffective during the penalty phase. We reverse and remand for a new penalty phase only.

ALL CONCUR.

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