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ACTION.

Supreme Court of Kentucky

2011-SC-000541-MR
AND
2011-SC-000585-MR

JOHN MILLS

APPELLANT/CROSS-APPELLEE

V.

ON APPEAL FROM KNOX CIRCUIT COURT
HONORABLE RODERICK MESSER, JUDGE
NO. 95-CR-00098

COMMONWEALTH OF KENTUCKY

APPELLEE/CROSS-APPELLANT

MEMORANDUM OPINION OF THE COURT

AFFIRMING

John Mills appeals from an order of the Knox Circuit Court denying his Kentucky Rule of Criminal Procedure (RCr) 11.42 motion to vacate his capital murder conviction. The Commonwealth cross-appealed the portion of the court's order vacating Mills's death sentence and granting him a new penalty phase. After careful review, we affirm the order of the Knox Circuit Court and remand for further proceedings.

FACTS

On August 30, 1995, seventy-seven year old A.L. Phipps was brutally attacked in his Knox County home. Phipps was stabbed multiple times and beaten with a blunt object before succumbing to his injuries just as police and emergency medical technicians arrived at the scene. As law enforcement worked to secure the area, Kentucky State Police Trooper Clyde Wells observed

a trail of blood leading away from Phipps's residence and down a small walking path. Trooper Wells and a sheriff's deputy followed the blood trail to a rental home located on Phipps's expansive property. At the time of Phipps's death, the home was rented to John Mills and his wife, Sharon. Trooper Wells spotted Mills inside the darkened home. Upon the officers' entry of the residence, Mills immediately surrendered. He was handcuffed and advised of his *Miranda* rights,¹ which he indicated that he understood. He smelled of alcohol and his clothing was covered in blood. Kentucky State Police Detective Ancil Hall arrived on the scene at approximately 9:00 p.m. and proceeded to take a video-recorded statement from Mills. Mills claimed that he went to Phipps's home that evening to pay his rent when a fight between the two ensued. Mills admitted to killing Phipps during the altercation and surrendered a bloody pocket knife to the officers during the course of his interview. Personal items belonging to the victim, including a change purse and a bottle of prescription medication, were found in Mills's residence.

A Knox County Grand Jury indicted Mills on one count of murder, burglary in the first degree, robbery in the first degree, and being a persistent felony offender ("PFO") in the second degree. At trial, the Commonwealth presented evidence that Mills burglarized Phipps's residence, robbed him, and then stabbed him and struck him with a blunt object. Sam Shepherd, who shared a cell with Mills at the Laurel County jail, testified that Mills had spoken of the murder several times. According to Shepherd, Mills argued with

¹ *Miranda v. Arizona*, 384 U.S. 436 (1966).

his wife on the day of the murder before going into town to buy some marijuana. Mills, who had been drinking all day, returned home and went to Phipps's residence to "rob the old man." While there, he asked Phipps if he could use his car. When Phipps refused, the two men began to fight, first in the home and then in the front yard. Mills told Shepherd that he stabbed Phipps with two different knives and beat him with "maybe a poker stick or something." After the attack, according to Shepherd's testimony, Mills searched Phipps's home for money and pills, hiding one of the two knives used in the attack before returning home. Portions of Mills's taped confession were also played for the jury, including parts where Mills stated, "I killed him. I did it. I killed that [inaudible]. I did it willfully."

The jury found Mills guilty of murder, first-degree burglary, first-degree robbery, and PFO in the second degree, and recommended a sentence of death, which the trial court imposed. The conviction was affirmed by this Court on direct appeal in *Mills v. Commonwealth*, 996 S.W.2d 473 (Ky. 1999).

In 2000, Mills commenced post-conviction proceedings by filing a RCr 11.42 motion alleging that his trial counsel, Timothy Despotes, provided ineffective assistance during both the guilt and penalty phases of his capital trial. The trial court denied that motion without an evidentiary hearing and also denied Mills's subsequent Civil Rule ("CR") 59.05 motion. On appeal, this Court remanded Mills's case for an evidentiary hearing on the following specific claims: (1) that his trial counsel had failed to adequately present an alleged alternative perpetrator theory, (2) that counsel failed to ask for exculpatory

material pursuant to *Brady v. Maryland*,² and (3) that the Commonwealth engaged in prosecutorial misconduct in failing to turn over potentially exculpatory evidence. *Mills v. Commonwealth*, 170 S.W.3d 310, 338 (Ky. 2005) *overruled in part by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009). This Court specifically denoted various factual allegations that pertained to the foregoing legal issues and that merited an evidentiary hearing on remand:

(1) that the victim's relatives engaged in drug dealing and other criminal activity on his property; (2) that the victim's girlfriend had threatened to kill him and was looking for someone to commit murder on her behalf; (3) that someone broke into the victim's house after his death and tampered with his belongings; (4) that Appellant's house, which was owned by the victim and which contained property, including illegal drugs, belonging to the victim's children, was burned down only one week after his arrest; (5) that there was evidence, in the form of empty bank bags and money wrappers, that a large amount of money had been stolen from the victim; (6) that weapons other than Appellant's pocket knife had been used to kill the victim; (7) that a drug report existed that showed that Appellant had benzodiazepine in his blood; (8) that fingerprint results from the victim's home were inconclusive; (9) that the victim was in dire need of a large amount of money to pay his taxes; (10) that the victim's family members had threatened to kill him and his girlfriend; and (11) that a bloody note was found on the victim's dining room table and that the note had the address of a woman named Anna Matthews, who Appellant claims has a long criminal history, who was allegedly at the victim's house the day he was murdered, and who left the state shortly after the crime.

170 S.W.3d at 338-39 (Ky. 2005). In addition to the issues related to the guilt phase of the trial, this Court also held that Mills was entitled to an evidentiary hearing concerning the claim that his counsel was “deficient in failing to present compelling mitigation evidence in the penalty phase.” *Id.* at 340.

² *Brady v. Maryland*, 373 U.S. 83 (1963).

An evidentiary hearing was held over the course of seven dates from September 2007 to November 2008. After taking five and one-half hours of testimony, the trial court denied Mills's RCr 11.42 motion as to the guilt phase of his trial, but granted Mills's motion regarding the sentencing phase on the grounds that his trial counsel failed to provide adequate mitigating evidence, rendering his assistance ineffective. Both Mills and the Commonwealth have appealed the Knox Circuit Court's ruling.

ANALYSIS

I. Standards of Review.

A. Ineffective Assistance of Counsel Claims Reviewed Under *Strickland v. Washington*.

The majority of Mills's arguments concern his attorney's alleged ineffective assistance at trial. We evaluate ineffective assistance of counsel claims under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), adopted by this Court in *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985). Under the *Strickland* framework, an appellant must first show that counsel's performance was deficient. *Strickland*, 466 U.S. at 687. A "deficient performance" contains errors "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* Second, the appellant must show that counsel's deficient performance prejudiced his defense at trial. *Id.* "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.* An appellant must satisfy both elements of the *Strickland* test in order to merit relief. *Id.*

When faced with an ineffective assistance of counsel claim in an RCr 11.42 appeal, a reviewing court first presumes that counsel’s performance was reasonable. *Commonwealth v. Bussell*, 226 S.W.3d 96, 103 (Ky. 2007) (*quoting Haight v. Commonwealth*, 41 S.W.3d 436, 442 (Ky. 2001) *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009)). We must analyze counsel’s overall performance and the totality of circumstances therein in order to determine if the challenged conduct can overcome the strong presumption that counsel’s performance was reasonable. *Haight*, 41 S.W.3d at 441-42. In addition, the trial court’s factual findings and determinations of witness credibility are granted deference by the reviewing court. *Id.*

B. Prosecutorial Misconduct Claims Are Reviewed Under *Brady v. Maryland*.

In addition to his ineffective assistance of counsel allegations, Mills claims there was prosecutorial misconduct relating to the withholding of exculpatory evidence. As declared by the Supreme Court in *Brady v. Maryland*, the government’s suppression of material evidence, in either guilt or punishment proceedings, violates a defendant’s right to due process. 373 U.S. 83, 87 (1963). Evidence is considered “material” only if there is a “reasonable probability that had the evidence been disclosed to the defense, the result of the trial would have been different.” *Benjamin v. Commonwealth*, 266 S.W.3d 775, 780 (Ky. 2008) (*citing United States v. Bagley*, 473 U.S. 667 (1985)). For

the purposes of analyzing a purported *Brady* violation, a reasonable probability is a “probability sufficient to undermine the confidence in the outcome” of the trial. *Bowling v. Commonwealth*, 80 S.W.3d 405, 410 (Ky. 2002) (internal citations omitted). Material evidence may be exculpatory in nature, or valuable to the defendant for the purposes of impeachment. *James v. Commonwealth*, 360 S.W.3d 189, 197 (Ky. 2012). Notably, the duty to disclose exculpatory evidence exists even though there is no request by the accused. *United States v. Agurs*, 427 U.S. 97, 107 (1976). Furthermore, the *Brady* rule applies only to the post-trial discovery of information known to the prosecution, but unknown to the defendant. *Id.* at 103.

We apply the de novo standard when reviewing counsel’s performance under *Strickland*, *Brown v. Commonwealth*, 253 S.W.3d 490, 500 (Ky. 2008), as well as in determining whether alleged evidence or materials implicate the *Brady* rule. *Bussell*, 226 S.W.3d at 100. With those standards to guide our analysis, we turn first to the numerous guilt phase allegations.

II. Guilt Phase Ineffective Assistance of Counsel Claims.

Before we analyze the specific alleged *Brady* violations and ineffective assistance of counsel claims raised by Mills, we must first address Mills’s general assertion that Despotes failed to prepare sufficiently for his capital trial. In arguing that Despotes’s 150 hours of work on the case was “demonstrably and grossly insufficient,” Mills cites comments to the 2003 American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases which provide that the hours per

representation in capital cases nationwide from 1990 – 1997 averaged 1,889. 2003 ABA Guidelines, comment 6.1. Mills also points to Despotes’s decision to not obtain co-counsel or an investigator or a mitigation expert as indicative of deficient performance. While such facts concerning Despotes’s preparation for the trial may be considered in the totality of the circumstances, *Haight*, 41 S.W.3d at 441-42, the *Strickland* holding explicitly rejects the notion that failure to meet such guidelines is de facto proof of ineffective assistance of counsel.³

Kentucky courts are guided by the standards set forth in *Strickland* and *Gall* in addressing instances of alleged ineffective assistance of counsel. See *Roe v. Flores-Ortega*, 528 U.S. 470, 479 (2000) (holding that “while [s]tates are free to impose whatever specific rules they see fit to ensure that criminal defendants are well represented, we have held that the Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices.”). Therefore, Despotes’s general pretrial preparation will be considered as one facet of his overall performance, but it is not dispositive of the entire issue.

³ “In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel’s assistance was reasonable considering all the circumstances. Prevailing norms of practice as reflected in American Bar Association standards and the like, *e.g.*, ABA Standards for Criminal Justice 4–1.1 to 4–8.6 (2d ed. 1980) (“The Defense Function”), are guides to determining what is reasonable, but they are only guides. No particular set of detailed rules for counsel’s conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions.” *Strickland*, 466 U.S. at 688-89.

In support of his ineffective assistance argument, Mills submits various instances concerning Despotes's performance at trial. These specific instances relate to one of three general categories of error argued by Mills on appeal: 1) counsel's alleged failure to investigate or otherwise advance an "alternative perpetrator" defense theory; 2) counsel's alleged failure to interview critical witnesses; and 3) counsel's alleged failure to investigate or to present potentially exculpatory forensic or physical evidence. Some of these arguments relate to or encompass Mills's asserted *Brady* claims, and most concern the overarching argument that an alternative perpetrator committed the offense.

A. Alternative Perpetrator Evidence.

According to Mills, there were many individuals close to Phipps who had both motive and opportunity to commit the murder, including Phipps's girlfriend, Susie Brown, his daughter's boyfriend, Doug Bright, and several of Phipps's eleven children. During closing argument, Despotes made several references to the possibility that an unknown suspect killed Phipps and assaulted Mills. Despite this apparent attempt to advance an alternative perpetrator theory, Mills argues that Despotes rendered ineffective assistance when he failed to reasonably investigate or advance evidence that an alternative suspect or suspects murdered Phipps.

1. There Was No *Brady* Violation or *Strickland* Error Related to an Audio Recording Allegedly Made at the Time of Mills's Arrest.

Many of the arguments concerning the existence of an alternative perpetrator presented by Mills at the evidentiary hearing are based on a report authored by Eddie Mott, a private investigator hired by the Phipps family to

“prove or disprove” Mills’s involvement in the murder. Mott provided copies of his report to the investigating police officers, and later to Despotes. Mills now argues that Despotes’s failure to follow up on leads presented in the Mott report deprived him of a fair trial. In addition, Mills asserts that the Commonwealth engaged in misconduct when it withheld exculpatory *Brady* material described in Mott’s report.

One factual allegation contained in the Mott report was the purported existence of an audiotape made at the time of Mills’s arrest. In the 2005 *Mills* opinion, this Court noted that perhaps the “most troubling bit of evidence” advanced by Mills in his RCr 11.42 motion involved the existence of an audiotape containing a recorded statement by Mills alleging that someone else went with him to Phipps’s house on the night of the murder. 170 S.W.3d at 339. In his report, Mott stated the following: “After the arrest of John Mills a tape recording was made while Mills was being attended to by paramedics. I noticed Mills make a [sic] interesting statement. Mills is asked, did you bring anything from over there (A.L. house). Mills states, ‘I didn’t go over there by myself.’” At the evidentiary hearing, Mott testified to hearing the taped statement in question. He said he received the audiotape from Phipps’s son-in-law, Leon Barton, but he did not explain how Barton came into possession of the tape. Mott claimed that he gave the tape to lead investigator, Detective Gary Partin, and received a receipt. Mott could not produce said receipt. To that end, Detective Partin denied ever receiving the tape, and no one else testified to the tape’s existence.

The trial court found that the tape, the very existence of which was questionable, likely did not contain any exculpatory evidence. The videotape of Mills taken by police at the same time of the purported audiotape contains an exchange wherein Detective Ancil Hall asks Mills, "Was anybody with you when you went over there John?" Clearly depicted on the videotape is Mills's response: "No, sir." Detective Hall repeats his question: "Nobody at all?" Mills answers, "None."

There is no evidence beyond Mott's own attestation in his report and at the hearing that the audiotape existed, or that it contained exculpatory evidence. Notably, Mott admitted that he never watched Mills's videotaped statement to see if the audio content on that tape was the same. As presented by the Commonwealth in its brief, there is an exchange on the videotape that appears to reflect the conversation that Mills now focuses on:

Detective Hall: "But you didn't bring nothing over here with you from over there?"

Mills: "No. I didn't go over there like I as...(INAUDIBLE)... I went over there to pay my (expletive) rent, and that's the truth Ancil...(INAUDIBLE)."

Detective Hall: "You got your money with you?"

Mills: "I paid the guy! He didn't give me no receipt. I bet you if you go over and look on that guy--"

Detective Hall: "How much did you pay him?"

Mills: "A hundred and fifty dollars."

The context of the conversation seems to indicate that Mills and Detective Hall were discussing the reason for his presence at Phipps's home,

and not whether he was alone or not. Although difficult to decipher, Mills's utterances on the videotape do not correspond syllabically with the purported "I didn't go over there by myself," but with a longer phrase. Nevertheless, we need not rely on any speculative interpretation to make a determination as to Mills's claims. The record clearly reflects that when Detective Hall asked Mills directly if he went to the Phipps residence with anyone else, Mills twice replied, without hesitation, that he went there alone. Therefore, any deficiencies in counsel's performance relating to the investigation of an audiotape did not deprive Mills of a fair trial because the audiotape, if it in fact existed, likely did not contain exculpatory evidence. *Strickland*, 466 U.S. at 687.

Mills's *Brady* claim also fails. Even assuming that the audiotape existed, the alleged exculpatory "I didn't go there by myself" statement was contradicted by the videotaped conversation where Mills unequivocally asserts not once, but *twice*, that no one accompanied him to the scene. Also, in the same video Mills confesses to the murder, describing the crime in detail. In light of the videotaped confession and other evidence tending to show Mills's guilt, we cannot agree that there is a reasonable probability that the alleged audiotape would have affected the outcome of the trial. No *Brady* violation occurred.

2. There Was No *Brady* Violation or *Strickland* Error Related to the Unproven Allegation That a Large Sum of Money Was Missing From Phipps's Home.

In the prior opinion, this Court expressed concern about evidence "in the form of empty bank bags and money wrappers," that perhaps indicated "that a large amount of money had been stolen from the victim." 170 S.W.3d at 339.

Mills now contends that Despotes's failure to present evidence that a large sum of money was missing from the Phipps residence after the murder constituted ineffective assistance of counsel. He further contends that the Commonwealth failed to turn over these items in violation of *Brady*.

Turning first to the *Brady* allegation, at the evidentiary hearing Mills argued that the prosecutor committed misconduct by withholding an empty bank bag and money wrappers recovered from the crime scene. Detective Partin testified that private investigator Mott brought him an empty bank bag found at the Phipps home and that he logged the bag into evidence. Although Detective Partin had been aware of the bank bag's presence at the scene during his initial investigation, he did not think that it was important. According to Detective Partin, a member of the Phipps family had told him that the victim kept cash in a bank bag hanging from a nail behind his bed. Arthur C. Phipps, the victim's eldest son, testified that although there were some money wrappers lying on the floor of his father's home, no money was missing from the residence. Truleen Barton, daughter of the victim, also testified that no money was missing from the home. Anna Matthews, who visited Phipps on the day of the murder, testified that she saw a zipped bank bag from the American Fidelity Bank in the home. While the bag appeared full to Matthews, she did not see any cash inside of the bag or elsewhere in the residence. The trial court concluded that the foregoing evidence did not support the allegation that a large amount of money was missing from the Phipps home after the murder, and therefore there was no reasonable probability that the outcome of the trial

would have been different had the money wrappers and bank bags been disclosed to the defense by the Commonwealth.

In fact, the weight of the evidence suggests that there was *not* a large amount of money taken from the home on the night of the murder. There were no witnesses to attest to the presence of a large amount of money at the home, and, according to Arthur C. Phipps, the presence of money wrappers in his father's home was not indicative of stolen money. Furthermore, the evidence does not directly support the alternative perpetrator theory. This Court has held that evidence simply tending to show that someone else committed the offense is not automatically admissible. *Beaty v. Commonwealth*, 125 S.W.3d 196, 207 (Ky. 2003) (citing *Commonwealth v. Maddox*, 955 S.W.2d 718 (Ky. 1997)). For example, alleged alternative perpetrator (“aaltperp”) evidence concerning an actor’s motive alone is “insufficient to guarantee admissibility,” as is “simply showing that the ‘aaltperp’ was at the scene of the crime[.]” *Id.* (internal citations omitted). Rather, a connection between the “aaltperp” and the crime is required in order to admit the “aaltperp” evidence. *Id.* As noted by the trial court in its order, the absence of a large sum of money “may be assigned to [Mills] as readily as any alternative suspect.” In sum, any failure on the part of the Commonwealth to disclose the money wrappers and bank bag did not deprive Mills of a fair trial. *Bagley*, 473 U.S. at 682.

As for Mills’s related *Strickland* claim, we agree that Despotes’s decision to not present evidence that a large sum of money was missing from the crime scene fell within the bounds of reasonable professional conduct. *Bussell*, 226

S.W.3d at 103. The connection between the money wrappers and empty bank bag found at the scene and the theory that a large sum of money was missing was refuted by the testimony provided by Phipps's own children. Truleen Barton's testimony carried significant weight in this regard, as she had served as the informal custodian of her father's financial affairs. Despotes's failure to pursue this speculative theory, one that, as previously discussed, does not directly implicate any *particular* alternative suspect,⁴ cannot be considered ineffective assistance of counsel that exposed Mills to substantial prejudice.

3. There Was No *Strickland* Error Related to the Unproven Allegation That Phipps Was in Need of Money.

Mills contends that Despotes's failure to investigate the evidence presented in the Mott report regarding the allegation that the victim was in need of a large amount of money constituted ineffective assistance of counsel. *See also Mills*, 170 S.W.3d at 338-39 (remanding for an evidentiary hearing on factual allegations including whether "the victim was in dire need of a large amount of money to pay his taxes."). Mott reported that approximately a week and a half before the murder, Phipps told his son, Roamon Phipps, that he was in need of money in order to pay his taxes. However, Truleen Barton, who handled her father's finances and managed his checkbook, testified that her father did not owe taxes at or around the time of his death, nor did he ever ask her for money. Arthur C. Phipps also testified that his father never revealed to

⁴ Despotes implies the fact that Anna Matthews saw the bank bags implicates her in the purported disappearance of a large amount of money from the Phipps home. Matthews's alleged involvement in the crime is discussed later in this opinion.

him that he needed money, nor had he received that information from his brother Roamon.⁵ The record is devoid of any tax bills or notices which would substantiate that Phipps had a significant tax liability. The trial court noted that on remand Mills admitted his claim regarding Phipps's need for cash to pay taxes was "false."

To continue advancing the "large amounts of missing cash" theory, Mills argued that Phipps needed money because he was being blackmailed by Sandy Campbell, a family friend, and Karen Phipps, the victim's former daughter-in-law. Details of the blackmail theory emerged from the hearing testimony of Dianna Queen, a policy analyst and director of investigations with the Department of Public Advocacy's nonprofit Kentucky Innocence Project. Queen was assigned to investigate the Mills case in 2000. Queen testified that Donna Phipps had told her during an interview that Karen Phipps and Sandy Campbell attempted to blackmail the victim with a recorded phone conversation wherein the victim talked "dirty" to them. However, at the RCr 11.42 hearing Donna Phipps denied ever telling Queen that the victim was being blackmailed by Sandy Campbell and his daughter-in-law. Also, Karen Phipps explicitly denied any blackmail/extortion scheme and testified she never tried to get money from the victim. Sandy Campbell was not asked about the alleged blackmail scheme. Sandy testified that Queen attempted to influence her testimony by telling her what to say and offering her own testimony when Campbell could not recall certain information about the night

⁵ Roamon Phipps died before the commencement of the RCr 11.42 hearing.

of the murder. The trial court, understandably, found the “late claim of blackmail . . . not credible.”

Neither the tax argument nor the blackmail theory is based on any substantiated facts. The claim that Phipps needed money to pay taxes was directly refuted by Barton and Arthur C. Phipps, and there is no record of taxes due from the victim. Moreover, Donna Phipps’s, Karen Phipps’s and Sandy Campbell’s testimonies seriously belie the reliability of Queen’s blackmail theory. A reviewing court remains highly deferential in scrutinizing an attorney’s performance under the *Strickland* standard. *Harper v. Commonwealth*, 978 S.W.2d 311, 315 (Ky. 1998). As such, we find no deficiency in counsel’s failure to pursue such manifestly speculative evidence. Mills’s *Strickland* argument on this point fails.

4. Counsel’s Interview With Eddie Mott Did Not Constitute Deficient Performance.

Next, Mills asserts that Despotes was deficient in “only briefly” interviewing private investigator Mott. Despotes subpoenaed and interviewed Mott at the Knox County courthouse. During that interview, Mott explained to Despotes that he did not think that the evidence contained in his report would be helpful in Mills’s defense. Mills offers no evidence concerning the length or breadth of the interview between Despotes and Mott. Having reviewed the report and interviewed its author, Despotes was entitled to exercise his professional judgment concerning how to proceed with the information contained therein. Given the weight of the evidence from the police investigation, including Mills’s confession, we agree that any deficiency related

to the so-called “brevity” of the interview with Mott did not prejudice Mills and did not constitute ineffective assistance of counsel.

5. There Was No *Brady* Violation or *Strickland* Error Related to Evidence of the Break-In at the Victim’s Home.

In 2005, this Court remanded for an RCr 11.42 hearing the factual allegation “that someone broke into the victim's house after his death and tampered with his belongings.” *Mills*, 170 S.W.3d at 338-39. Two months after the murder, the victim’s daughter Truleen Barton revealed to private investigator Mott that someone had broken into her father’s house shortly after his murder. Mott surveyed the home and reported that the victim’s son, Arthur C. Phipps, said a gray lock-box was missing. According to the son, the box, which had been kept under Phipps’s bed, was the only item missing from the residence. Mott observed a gray box when he visited the scene but reported that Arthur C. Phipps said there was a second, “similar” box missing. At the evidentiary hearing, Arthur C. Phipps testified that his father’s home was, in fact, broken into in the days following the murder. Barton testified that she reported the break-in to the police, but that no items were missing from the home. In fact, no testimony was offered at the RCr 11.42 hearing to show that any items were taken from the home. No suspect in the break-in was ever identified.

Mills now contends that the break-in and allegedly missing gray box suggest that someone other than Mills was involved in the murder, claiming that “[w]hoever broke into Mr. Phipps’s house after his death was clearly only interested in the contents of that box.” He argues that Despotes’s performance

was deficient in failing to request a copy of the police report from the Commonwealth, and that the Commonwealth's failure to disclose the police report from the break-in violated *Brady*.

There are several problems with Mills's gray box theory. First, Mills has failed to offer any credible evidence that any items were stolen from the victim's home. He has also failed to establish the contents of the gray box, how it relates to an alternate perpetrator and who that perpetrator might be. Moreover, there was no evidence produced to suggest that the prosecutor was aware of the contents of the gray box, let alone that the Commonwealth failed to disclose this evidence or that it was even in possession of a police report in the first place. Given its unsubstantiated basis, we cannot fault trial counsel for electing not to request this kind of evidence from the Commonwealth. We agree with the trial court's conclusion that there was no ineffective assistance of counsel or *Brady* violation on this issue.

6. There Was No *Brady* Violation or *Strickland* Error Related to the Evidence of a Fire at the Rental House on the Victim's Property.

In its 2005 opinion, this Court also highlighted Mills's allegation that "[Mills's] house, which was owned by the victim and which contained property, including illegal drugs, belonging to the victim's children, was burned down only one week after his arrest," remanding that allegation for an evidentiary hearing. *Mills*, 170 S.W.3d at 338-39. Relying on statements from Mott's investigative report, Mills contends that "someone was clearly entering [Mills's] property after the night of the crime and apparently stashing items taken from

Mr. Phipps's house." The subsequent fire, according to Mills, suggests that an alternative perpetrator destroyed significant evidence of his or her involvement in the murder. Mills asserts Despotes rendered ineffective assistance of counsel by failing to request *Brady* material related to the investigation of the fire. He further charges the prosecutor with misconduct by failing to provide trial counsel with the information about the investigation of the fire.

At the evidentiary hearing, Mills withdrew his claim that the rental house had burned down within one week of his arrest. A "run sheet" from the Barbourville Fire Department showed that the house in fact burned down in January 1996, approximately *five months* after the murder. The remainder of Mills's claim fails to merit relief. There is simply no evidence whatsoever to show that there were any items in the rental house connected with the murder, and any evidence of arson is purely hypothetical as the fire department's report does not identify the cause of the fire. Furthermore, Mills fails to relate the fire to any particular suspect.⁶ We disagree that Mills suffered prejudice as a result of Despotes's failure to investigate this particular factual allegation. We similarly cannot conclude that the prosecutor withheld valuable evidence relating to the fire, as the Barbourville Fire Department run sheet does not contain any exculpatory evidence.

B. Counsel Was Not Ineffective in Failing to Interview "Critical" Witnesses.

⁶ The allegations against Phipps's children, which may be considered tangential to this argument, are discussed *infra*.

A second general category of ineffective assistance of counsel asserted by Mills is the contention that Despotes's failure to interview certain individuals substantially prejudiced his defense. Mills claims that Despotes was deficient in his failure to interview several potential witnesses including Susie Brown, Cindy Adkins, Anna Matthews, and multiple members of the Phipps family. Related to this general allegation of deficient performance are various factual allegations, many of which were specifically remanded for an evidentiary hearing pursuant to the 2005 *Mills* opinion.

1. Susie Brown as an Alternative Perpetrator.

This Court previously held that Mills was entitled to an evidentiary hearing on the claim that Despotes was deficient in failing to investigate the allegation that Phipps's girlfriend, Susie Brown, had threatened to kill him and was looking for someone to commit the murder on her behalf. *Mills*, 170 S.W.3d at 338-39. The Mott report alleged that Brown exerted a considerable amount of influence over Phipps, convincing him to buy expensive cars and take many overnight trips. According to Mott, Phipps's children were at odds with Brown and warned their father against continuing a relationship with the much-younger woman. Sandy Campbell told Mott that Brown had called her two days before Phipps's death and stated that she was "going to bump A.L. off" or "find someone [who Brown] could trust to kill him." Campbell reported that she recorded the conversation, but later destroyed the tape for fear of prosecution. Mott alleged that Doug Bright and Karen Phipps were present when the tape was made. However, Karen Phipps stated that she was asleep

and did not hear any conversation between Brown and Campbell, while Doug denied the existence of the conversation and tape entirely. Also contained in Mott's report was the claim that Cindy Adkins, a family friend, and Sharon Mills, Mills's wife, saw a yellow vehicle that looked similar to Brown's vehicle at Phipps's home on the day of the murder.

Mills argues that Despotes's failure to interview Brown, Campbell, or Adkins constituted ineffective assistance of counsel. According to Mills, such information was critical to building an alleged alternative perpetrator theory of defense. As will become evident, Mills has offered several potential "aaltperp" theories in his brief to the Court.

Susie Brown's presence at the crime scene at the time of the murder was never directly established. While Sharon Mills, Mills's wife, claimed to have seen a vehicle similar to Brown's on the day of the murder, she could not remember the time.⁷ Sharon Mills testified that she often saw Brown at the Phipps residence. Neither Sharon Mills, who testified at both the trial and the evidentiary hearing, nor Adkins,⁸ who provided a written statement to police, actually saw Brown at the residence on August 30. A police officer who interviewed Brown immediately after Phipps's body was found testified that he and his partner concluded that Brown was not present at the crime scene at the time of the attack because her car engine was completely cool, thereby

⁷ This RCr 11.42 hearing account in 2007, is different than the testimony elicited at the 1996 trial, where Sharon Mills stated that she could not recall seeing the vehicle at the Phipps home that day, admitting that she was not paying close attention to the house.

⁸ Cindy Adkins died before the commencement of the RCr 11.42 hearing.

suggesting that she had not driven anywhere during the time-frame of the attack or immediately after. Evidence regarding Brown's purported threat against Phipps is even more tenuous given that Doug Bright and Sandy Campbell testified that they had no knowledge of the conversation ever taking place. Standing alone, we are not convinced that the foregoing evidence could withstand the "aaltperp" evidence admissibility requirements set forth by this Court. *See Beaty*, 125 S.W.3d at 207; *Harris v. Commonwealth*, 134 S.W.3d 603 (2004).

In sum, Mills has not presented any evidence of substance to support the existence of the audiotape containing Brown's alleged threat to kill Phipps or hire someone to kill him, nor has he offered witness testimony positively placing Brown at the scene at the time of the murder. Despotes's election to not interview Brown, Campbell, or Adkins concerning the dubious accusations contained in the Mott report does not rise to the level of ineffective assistance nor does it undermine our confidence in the outcome of Mills's trial.

2. Anna Matthews as an Alternative Perpetrator.

On the Saturday prior to Phipps's death, Anna Matthews, accompanied by her husband Richard, traveled to Phipps's home to inquire about renting a trailer on the property. Though Phipps declined to rent the trailer to Matthews at that time, Anna Matthews returned to the home on the day of the murder ostensibly to get him to reconsider. While there, she noticed a green bank bag, zipped closed, that appeared to be full. A note found at the crime scene read, "Matthews wants to rent trailer site." Matthews apparently returned to the

Phipps home the day after the murder, unaware of what had occurred. The Matthews family moved to Cincinnati shortly after the murder but Anna Matthews returned to testify at the RCr 11.42 hearing.

Mills argues that the Matthews had both motive and opportunity to commit the murder, and Despot's failure to interview Anna Matthews constituted ineffective assistance of counsel. This Court remanded for an evidentiary hearing on the factual allegation that a bloody note with Anna Matthews's address was found on Phipps's dining room table. *See Mills*, 170 S.W.3d at 339. Phipps's daughter, Melinda Sutherland, testified at the trial and again at the evidentiary hearing that she saw a woman matching Anna Matthews's description at her father's home on the day of the murder. Leon Barton, Phipps's son-in-law, told police that Terry Sutherland, Melinda's husband, also saw Anna Matthews at the scene on the day of the crime.

At the RCr 11.42 hearing, Anna Matthews testified that she went to Phipps's house to discuss renting the trailer site on his property. The two talked in the dining room while her son and husband waited in the car. Matthews said that Phipps agreed to rent her the site and wrote down her name and number. She saw a green bank bag at the home, but it was closed and she could not identify its contents. She denied any involvement in Phipps's murder. Detective Partin, who took Anna Matthews's statement after the crime, testified that she stated she went to the home around 5:00 p.m. on the evening that Phipps was murdered.

Mills argues that Despotes was deficient in failing to interview Anna Matthews and witnesses who had information that allegedly connected Matthews to the murder. We disagree. Mills failed to produce evidence directly connecting Matthews to the murder, and her mere presence at the home hours before the murder is not inherently suspicious. *Beaty*, 125 S.W.3d at 207. The fact that Matthews saw a closed bank bag does not suggest that she possessed a motive to kill Phipps. Moreover, the note found at the crime scene appears to memorialize an innocuous conversation between the victim and Matthews and nothing more.⁹ Despotes did not render ineffective assistance by failing to interview Matthews, Barton, and Sutherland, or by failing to present evidence concerning Matthews's presence at the home earlier that day.

3. Allegations Concerning the Phipps Children.

Mills asserts that Despotes's failure to investigate "relevant [Phipps] family members" concerning the allegation that some of Phipps's children had voiced threats against their father amounted to ineffective assistance of counsel. This Court remanded for an evidentiary hearing regarding the allegation "that the victim's relatives engaged in drug dealing and other criminal activity on his property[.]" *Mills*, 170 S.W.3d at 338-39. We now conclude that neither of these arguments merits relief.

At the hearing, Mills introduced evidence through the testimony of Kentucky State Police Trooper John Reynolds that Phipps's son and grandson

⁹ At the hearing, the note was entered into evidence. Rather than containing Matthews's address as stated in this Court's 2005 *Mills* opinion, it simply read: "Matthews wants to rent trailer site."

had been arrested for trafficking in marijuana from the home that Mills later rented and resided in. Trooper Reynolds could not recall any additional criminal investigations or charges against Phipps's son and grandson since their 1992 arrest. Donna Phipps testified that John Phipps, the victim's son, was in jail at the time of their father's murder, a fact that was never disputed.

Mills now argues that Despotes's failure to investigate whether John Phipps had a criminal record was evidence of his deficient performance. However, Mills has failed to provide a logical nexus between John Phipps's arrest and the commission of the crime beyond asserting that such evidence "would have been critical to his defense theory." The general implication that drug activity corresponds with the commission of violent crimes is not enough to connect John Phipps's 1992 arrest on the Phipps's property with the murder three years later, especially when it was uncontroverted that John Phipps had been incarcerated for several weeks. *See Harris v. Commonwealth*, 134 S.W.3d 603 (Ky. 2004). Given the lack of demonstrable facts linking the 1992 drug arrest and the 1995 murder, Despotes's decision not to investigate John Phipps's criminal activity was a reasonable one under the circumstances. We certainly cannot say this deprived Mills of a fair trial. Therefore, Mills has failed to prove either element of *Strickland* in regards to John Phipps's past criminal history.

As for the purported threats made by the Phipps children, there is no evidence whatsoever placing *any* of the eleven Phipps children at the scene of the crime on the night of the murder with the sole exception of Melinda

Sutherland who, along with her husband and three children, visited her father in the early evening. Mills has not suggested that Melinda, with three children in tow, was the perpetrator. Aside from the claim that “some” of the Phipps children were upset with their father about his estate, Mills has failed to present any evidence of motive or opportunity linking the children to the crime. As such, this vague claim also fails.

C. Claims of Ineffective Assistance of Counsel and Prosecutorial Misconduct Concerning Potentially Exculpatory Forensic and Physical Evidence Do Not Merit Relief.

In addition to the claims of ineffective assistance associated with the investigation of potential alternative perpetrators and other witnesses, Mills further contends that Despotes was deficient in his failure to investigate what he calls “the abundance of potentially exculpatory physical and forensic evidence.” All of this evidence, with the exception of evidence of Mills’s medical records, relates to Mills’s various alternative perpetrator theories and also underpins many of the *Brady* claims of prosecutorial misconduct.

1. There Was No *Brady* Violation or *Strickland* Error Related to the Kitchen Knives and Hoe Handle Found at the Scene.

Mill asserts that Despotes rendered ineffective assistance by failing to use evidence concerning the murder weapons to develop and advance an alternative perpetrator theory. He also argues that the prosecutor engaged in prosecutorial misconduct by failing to send the suspected murder weapon, a pocket knife found on Mills’s person at the time of his arrest, to the medical examiner for testing. Finally, Mills contends that the prosecutor failed to

disclose the underlying notes from Phipps's autopsy, as well as possible alternative murder weapons, in violation of *Brady*.

This Court remanded for an evidentiary hearing the factual allegation "that weapons other than the victim's pocket knife had been used to kill the victim." *Mills*, 170 S.W.3d at 339. Items including kitchen knives and a hoe handle found at the residence were later turned over to the police by members of the Phipps family and private investigator Mott. Despotes did not submit the recovered knives for independent forensics testing, nor did he pursue a wounds-weapon analysis.

At trial, medical examiner Dr. Carolyn Coyne testified about Phipps's autopsy results. Notably, Dr. Coyne testified that a wound to the victim's sternum was likely not caused by a pocket knife. At the evidentiary hearing, Mills called forensic pathologist Dr. Jonathan Arden to testify about Dr. Coyne's conclusions. Dr. Arden, who did not review Dr. Coyne's trial testimony but instead relied on a summary of that testimony prepared by Mills's post-conviction counsel, testified that, in his opinion, two of the twenty-nine stab wounds (the belly and the sternum wound) inflicted upon the victim were not caused by a pocket knife. On cross-examination, Dr. Arden clarified that the wound to the belly could have been caused by a pocket knife with sufficient compression, but that it was "highly unlikely" that the wound to the sternum was caused by a pocket knife. All other wounds, according to Dr. Arden, could have been inflicted by a pocket knife.

Evidence presented at trial and at the evidentiary hearing supports the theory that the murderer used more than one weapon to kill Phipps. However, Mills has failed to produce evidence that more than one perpetrator, or a perpetrator other than Mills, committed the crime. There is no physical or testimonial evidence to suggest that the beating and the stabbing took place simultaneously, or that Mills was incapable of carrying out the attack with multiple weapons by himself. To the contrary, the testimony of Mills's cellmate, Sam Shepherd, revealed that Mills himself admitted to stabbing Phipps with two different knives - a pocket knife and another knife that he hid after the attack - and to beating Phipps with a blunt object described as a "poker or a stick[.]"

Mills was found after the murder with a weapon capable of inflicting the vast majority of the victim's stab wounds. He later admitted that he used two knives and that he beat the victim with a blunt object, despite Phipps's vigorous attempt to defend himself. The discovery of the hoe handle, along with other knives in Phipps's residence, simply does not suggest that a perpetrator other than Mills committed the crime. Moreover, Dr. Coyne was clearly capable of deducing that a pocket knife could have inflicted all but one of the victim's wounds without further examination of the pocket knife found on Mills's person. Overall, Dr. Arden and Dr. Coyne's testimonies concerning Phipps's wounds were consistent, and further testing of the pocket knife, either by Dr. Coyne or an independent wounds-weapon expert, would not have substantially affected the outcome of the trial. *Benjamin*, 266 S.W.3d at 780.

There simply was no ineffective assistance of counsel concerning Despotes's decision to not develop a defense theory based on the discovery of multiple weapons or his failure to seek wounds-weapons analysis.

Furthermore, we find no *Brady* violation or prosecutorial misconduct regarding these other weapons or Dr. Coyne's autopsy notes, the significance of which Mills has failed to establish. As noted, the conclusion that at least one, and perhaps more, of the victim's wounds were not caused by a pocket knife in no way excludes Mills as the perpetrator or suggests another perpetrator. In light of the evidence implicating Mills in the crime, disclosure of Dr. Coyne's notes would also not have changed the outcome of the trial. In the same vein, we do not believe that disclosure of the hoe handle and other recovered knives would have proven exculpatory or valuable to his defense, as Mills has failed to link those weapons to an alternative perpetrator, and his presence at the scene of the crime was established through other evidence. *Gall*, 702 S.W.2d 37 at 42. Finally, those "other" weapons are totally consistent with Sam Shepherd's testimony regarding Mills's account of the murder.

2. There Was No *Brady* Violation or *Strickland* Error Related to the Notes Supporting the DNA Report.

Despotes made two requests to prosecutors seeking DNA test results from blood and hair/fiber samples, and also sought a continuance from the trial court on the grounds that he had yet to receive those results. In addition, Despotes filed a Motion to Preserve and Produce the physical samples, raw data, notes, slides, and photos of slides regarding the serological and hair/fiber evidence. However, when the motion came before the court, Despotes only

asked that the Commonwealth's experts bring their notes with them so that he could look at the notes prior to cross-examination; he did not otherwise pursue the Motion to Preserve and Produce the underlying notes.

Mills now claims that Desportes rendered ineffective assistance of counsel in failing to obtain notes relating to the DNA test that would have purportedly supported his alternative perpetrator theory, and by failing to seek expert assistance in analyzing the DNA report. He also alleges that the Commonwealth withheld the underlying notes and raw data from the DNA report in violation of *Brady*. According to Mills, the DNA used to generate the two-page DNA report revealed the absence of a Y-chromosome from the blood taken from Mills's pocket knife, suggesting the presence of blood from an "unknown contributor."

The missing Y-chromosome is significant in that it could suggest that a female contributor's blood was found on the pocket knife and at the crime scene. However, while the absence of a Y-chromosome in recovered DNA would certainly appear compelling, testimony provided at the evidentiary hearing painted a much different picture of the DNA report and the evidence. Lucy Davis-Houck, who performed the DNA testing and whose notes are the subject of this argument, testified that the insufficient quantity and quality of the DNA material presented for analysis rendered it impossible for her to indicate the presence, or absence, of a Y-chromosome on her report. According to Davis-Houck's testimony, if the Y-chromosome was missing (and she could not say it was) it would most likely be due to the low quantity, degraded sample, and not

the presence of a female contributor. A second expert, Ed Taylor, Jr., testified that his independent testing of the blood found on the pocket knife established that it was human blood, but that the results of the DNA test were “inconclusive.” Lucy Schile, Mills’s DNA expert, testified that in spite of Davis-Houck’s testimony, her notes underlying the report showed that a female was present at the scene of the crime. However, as the trial court aptly noted, Schile did not offer a reason why Davis-Houck’s explanation of her own notes was unacceptable.

We agree that conclusive evidence revealing the presence of female DNA at the scene of the crime could have had some effect on the trial. However, the substance of Davis-Houck’s notes simply indicates that the quantity of DNA present was not sufficient to allow Davis-Houck to make a conclusion as to the source of the DNA, or the presence or absence of a Y-chromosome. This evidence neither implicates nor exculpates Mills. Without more, it would be difficult to deduce prejudice but considering the weight of the evidence against Mills, including his confession shortly after the murder, it would be virtually impossible to conclude that the absence of this evidence prejudiced Mills. This Court has held that an attorney’s failure to consult with independent “identification” experts is not prejudicial when a defendant’s involvement in a crime has been clearly established by other evidence. *See Gall*, 702 S.W.2d at 42. We cannot say that any deficiencies in Despotes’s failure to pursue this DNA claim prejudiced Mills. Mills’s *Strickland* claim concerning the DNA evidence fails.

Mills's related *Brady* claim similarly fails to merit relief. As discussed, the underlying DNA notes were not exculpatory in nature as they tended to only show that the sample was degraded and inconclusive. See *James*, 360 S.W.3d at 197. Moreover, Schile's testimony that Davis-Houck's notes indicated that female DNA was found at the crime scene was contradicted by Schile's own cross-examination testimony that Davis-Houck's testimony was an acceptable explanation of the notes and findings. In sum, no *Brady* violation occurred because disclosure of Davis-Houck's notes would not have changed the outcome of the trial. *Benjamin*, 266 S.W.3d at 780.

3. There Was No *Brady* Violation or *Strickland* Error Related to the Fingerprint Evidence.

Mills challenges Despotes's failure to seek an independent analysis of fingerprints taken from the crime scene. He further charges the Commonwealth with violating *Brady* by failing to disclose a fingerprint report prepared by the Kentucky State Police crime lab. The KSP report was sent to the state police post to aid in the investigation, but for reasons unknown the report was never provided to Detective Partin or to the Commonwealth Attorney's office. As a consequence, Despotes never received a copy of the report. In its order addressing Mills's ineffective assistance of counsel claim regarding the fingerprint report, the trial court concluded that a discovery violation occurred when the report was never handed over to Despotes. Despite the discovery violation, the trial court found that no *Brady* or *Strickland* violation occurred. We agree with the trial court's conclusions.

At the evidentiary hearing, Stan Slonina testified that he conducted the fingerprint analysis for the Kentucky State Police. Slonina concluded that of the seven prints taken from the crime scene, only two prints were “of value” for comparison, one of which was a palm print. Detective Partin testified that the results of the fingerprint analysis were “inconclusive.”¹⁰ Mills called forensic expert Jason Pressly to testify about the prints. Pressly agreed that only two of the seven prints were of value. In comparing the two “of value” prints to prints submitted by Mills, Pressly testified that one of the prints was incapable of comparison due to the quality of the rolling of the prints. The other “of value” print, a palm print lifted from a door at the crime scene, did not belong to Mills.

Much like the DNA data discussed *supra*, the fingerprints collected at the scene neither inculpate nor exculpate Mills. Notably, Pressly did not have any other prints to compare, and therefore could not exclude the victim as having made the palm print. Additionally, Mills has offered no evidence linking any specific alternative suspect to the palm print. *See Harris*, 134 S.W.3d 603. Furthermore, and perhaps most significantly, there was no proof as to *when* the palm print was made. The evidence, therefore, simply indicates that someone other than Mills, perhaps the victim himself, left a palm print at the

¹⁰ Mills asserts that the prosecutor engaged in misconduct by failing to correct Detective Partin’s testimony concerning the value of the fingerprints. According to Mills, Detective Partin’s testimony that the prints were “of no value” and “couldn’t be matched” was untrue. Mills relies on the United States Supreme Court’s decision in *Napue v. Illinois*, 360 U.S. 264 (1959), for the premise that the government’s failure to correct a witness’s false testimony may be grounds for reversal. However, Mills has neither addressed the alleged false testimony, nor has he advanced a counter-argument refuting Detective Partin’s statement. Having no basis for analyzing this particular claim of prosecutorial misconduct, we decline to further address the argument. Mills’s additional claims of error under *Napue* are discussed *infra*.

victim's home *at some point in time*. As Mills's own confession placed him at the scene at the time of the murder, we agree that further analysis of the palm print would not have had a substantial effect on the outcome of the trial, nor would it render the outcome unreliable. *Benjamin*, 266 S.W.3d at 780; *Strickland*, 466 U.S. at 687. As such, the *Brady* and *Strickland* claims premised on the palm print and "inconclusive" fingerprint fail.

4. There Was No *Brady* Violation Related to the Items Photographed at the Crime Scene.

Mills argues that police failed to collect potentially exculpatory evidence from the crime scene. These items, including a broken hammer, a prybar, a bloody glove, an empty bank bag, and a coin purse, were depicted in crime scene photographs. We now conclude that the government's failure to collect and catalog these pieces of evidence does not rise to the level of a *Brady* violation.¹¹ First, it is unclear whether the prosecution was aware of the existence of the photographs depicting the uncollected items before the RCr 11.42 hearing. Furthermore, we are unconvinced that collection of these items would have changed the outcome of the trial. Mills has offered no evidence to connect any of the items to any particular alternative suspect, nor has he

¹¹ Though not raised, we are similarly unconvinced that Mills would have been entitled to a missing evidence instruction concerning these items, as bad faith on the part of the police has not been alleged. Indeed, the failure to collect these items cannot be proven intentional. See *Estep v. Commonwealth*, 64 S.W.3d 805, 810 (Ky. 2002) ("[M]issing evidence amounts to a Due Process violation only if the evidence was intentionally destroyed by the Commonwealth or destroyed inadvertently outside normal practices.") (internal citations omitted).

demonstrated the materiality of those items. The Supreme Court has held that “[t]he mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish materiality in the constitutional sense.” *Agurs*, 427 U.S. at 109-10. Accordingly, we find no *Brady* violation.

5. There Was No *Brady* Violation or *Strickland* Error Related to the Alleged Audiotaped Interview With Sandy Campbell.

Mills claims that the prosecutor violated *Brady* by failing to disclose an audio taped interview with Sandy Campbell conducted by Detective Partin. Campbell testified at the evidentiary hearing that Detective Partin interviewed her in her home concerning a recorded phone conversation that Doug Bright, Donna Phipps’s boyfriend at the time of the murder, had with the victim’s girlfriend, Susie Brown.¹² Mills contends that the taped interview corroborates Campbell’s testimony concerning Susie Brown’s purported threats, and therefore the Commonwealth was required to disclose that evidence. While Campbell testified that the interview was audio taped, Detective Partin denied taping any of his investigative interviews with the exception of the interview of Mills’s cellmate, Sam Shepherd. Campbell’s written statement was taken by Detective Partin and disclosed to Mills’s defense attorney prior to the commencement of his trial.

¹² In the alleged phone conversation, Susie Brown threatened to “knock off” the victim or to find someone who would do it for her. The trial court noted that both Doug Bright and Susie Brown denied ever having the conversation, and if a tape of the phone conversation ever existed it was no longer available.

Aside from Campbell's testimony that Detective Partin recorded their interview, Mills has offered no evidence to show that such a recording exists. It is axiomatic that the government cannot suppress evidence it does not have. Without proof beyond mere speculation that this evidence exists, we cannot conclude that a *Brady* violation has occurred. See *Agurs*, 427 U.S. at 109-10.

6. There Was No *Brady* Violation or *Strickland* Error Related to Mills's Medical Records.

Mills argues that Despotes's "incompetent review" of his medical records, as well as the failure to enter the University of Kentucky medical records into evidence, constituted ineffective assistance of counsel. Related to this claim is Mills's contention that the prosecutor engaged in prosecutorial misconduct when he "promoted a false picture of the evidence with respect to whether [Mills] tested positive for benzodiazepines."

At trial, the emergency room doctor who treated Mills testified that he had been told that Mills "apparently took a large amount of Xanax, Percocet, and alcohol." However, a drug screen conducted at Knox County Hospital sometime after Mills's admittance returned a negative result for Xanax and Percocet. A toxicology report from the University of Kentucky, the hospital where Mills was transferred, indicated a positive test result for benzodiazepine, a drug found in Xanax and Valium. Despotes did not enter the University of Kentucky report into evidence.

This Court addressed the University of Kentucky report in its 2005 opinion, holding that in light of the evidence of Mills's intoxication, there was no ineffective assistance of counsel as Mills "failed to show a reasonable

likelihood that introduction of the report would have changed the outcome of the proceeding.” *Mills*, 170 S.W.3d at 331. The trial court declined to address the question of Despotēs’s ineffective assistance on this point, finding that this Court had already decided the issue. *Mills* has raised the question again on this appeal, and the Commonwealth asserts that the law of the case doctrine dictates that this Court’s previous ruling cannot be disturbed. In cases with multiple appeals, the law of the case doctrine generally forbids the practice of reopening formerly decided issues in the interest of finality and judicial economy. *Brown v. Commonwealth*, 313 S.W.3d 577, 610 (Ky. 2010). Having previously addressed the merits of the ineffective assistance of counsel claim relating to the introduction of the University medical report in our 2005 opinion, we now decline to revisit the issue.¹³

Bootstrapped to this particular ineffective assistance argument is *Mills*’s claim that the prosecutor engaged in misconduct by eliciting or failing to correct false testimony concerning the medical report at trial. The Supreme Court has long held that deliberate deception through the presentation of false evidence violates a criminal defendant’s right to the due process of law. See *Giglio v. United States*, 405 U.S. 150, 153 (1972). In *Napue v. Illinois*, the

¹³ *Mills* argues that our *Leonard v. Commonwealth* decision overrides the law of the case doctrine and allows this Court to reopen the issue concerning his medical records. While *Mills*’s *Leonard* argument is discussed *infra*, we note that the law of the case doctrine concerns the *merits* of a previously decided issue. See *Buckley v. Wilson*, 177 S.W.3d 778 (Ky. 2005); *Inman v. Inman*, 648 S.W.2d 847 (Ky. 1982). Our *Leonard* ruling, on the other hand, involves the application of a new procedural rule. See *Leonard v. Commonwealth*, 279 S.W.3d at 151. The principle in *Leonard*, therefore, does not directly implicate nor does it abrogate the law of the case precedent.

Supreme Court announced that a defendant will be entitled to a new trial in instances where “false testimony used by the State in securing the conviction . . . may have had an effect on the outcome of the trial.” 360 U.S. at 272.

In *Commonwealth v. Spaulding*, this Court held that in order to establish prosecutorial misconduct by eliciting false testimony, the defendant must show “(1) the statement was actually false; (2) the statement was material; and (3) the prosecution knew it was false.” 991 S.W.2d 651, 654 (Ky. 1999) (*quoting United States v. Lochmondy*, 890 F.2d 817, 822 (6th Cir.1989)). Mills argues that the prosecutor engaged in misconduct by failing to correct the testimony of the emergency room physician called by Mills that the drug screen was negative for benzodiazepine, and by further eliciting that testimony on cross-examination.

This claim is without merit. First, the ER doctor’s statements on direct and in response to the prosecutor’s questions – i.e. that the Knox County hospital drug screen failed to reveal benzodiazepines in Mills’s urine – cannot be fairly characterized as a perjured statement. The ER doctor did not conduct the drug screen himself; he simply interpreted the results, which were negative. The Knox County Hospital test may have been flawed in a way that the witness was unaware, though there is no evidence of a degraded test beyond the existence of a second, contradictory drug screen. Second, Mills has failed to establish the materiality of the ER doctor’s statement. Just as this Court concluded in 2005 that there was no reasonable likelihood that introduction of

the actual report would have affected the trial outcome, there is no basis for concluding that “correction” of this defense witness’s testimony would have had any affect. Mills told police officers that he had taken Xanax, Valium, and Percocet on the evening of the murder, and several witnesses at trial testified that Mills was intoxicated at and around the time of his arrest. The arrest videotape also shows a clearly intoxicated Mills. Introducing the University of Kentucky report through the ER physician, therefore, would have simply presented cumulative information, the value of which is questionable given the other evidence showing Mills’s intoxication. Mills, having failed to prove the elements set forth in *Spaulding*, has no viable prosecutorial misconduct claim on this issue.

D. The Cumulative Effect of Alleged *Strickland* Errors and *Brady* Violations Does Not Merit Relief.

Mills argues that he suffered prejudice as a result of the cumulative effect of the various *Strickland* and *Brady* violations during the guilt phase of his trial. He urges this Court to abandon a “piecemeal” analysis of each alleged instance of deficient performance and prosecutorial misconduct and instead consider the effect of the errors as a whole on the reliability of the guilty verdict. Having reviewed the extensive record and having considered the alleged cumulative effect, we find that Mills received a fair trial.

None of Mills’s guilt phase ineffective assistance of counsel claims merits relief under *Strickland*. Many instances of deficient performance as alleged by Mills have failed to overcome the presumption that Despotes was exercising his professional discretion within the “wide range of reasonable professional

assistance.” *Bussell*, 226 S.W.3d at 103. It is well established that conjecture, unsupported allegations, and mere speculation cannot serve as a basis for relief under *Strickland*. See *Hodge v. Commonwealth*, 116 S.W.3d 463, (Ky. 2003) (*overruled on other grounds by Leonard*, 279 S.W.3d 151); *Baze v. Commonwealth*, 23 S.W.3d 619 (Ky. 2000); *Harper*, 978 S.W.2d at 311. This case is factually voluminous, and this Court has considered the extensive record in an endeavor to pursue each of Mills’s proffered theories to its logical end. In the end, the arguments presented by Mills concerning alternative suspects can best be described as a bundle of “loose-ends.” In order to connect any of these “loose-ends” to A.L. Phipps’s murder, and therefore attribute deficient performance to Despotes, Mills asks this Court to incorporate factually unsupported theories into our *Strickland* analysis. For example, Susie Brown’s involvement in the murder *may* have been substantiated if her DNA was found at the scene, *and* if there was admissible evidence of her alleged threat. See *Beaty*, 125 S.W.3d at 207. However, both claims remain absolutely unsubstantiated. In order to reconcile Mills’s speculative theories, this Court would need to incorporate rampant speculation into our analysis of the evidence of record, a leap we are unwilling to make.

Furthermore, both prongs of *Strickland* – deficient performance and resulting prejudice – must be shown to merit relief. 466 U.S. at 687. In addition to the testimony of Sam Shepherd recounting Mills’s detailed admissions regarding the murder, as well as the physical evidence connecting Mills to the crime, the jury saw and heard Mills’s videotaped confession

wherein he clearly utters the words, “I killed him. I did it. I did it willfully.” We cannot conclude that counsel’s performance deprived Mills of a fair trial, especially in light of the overwhelming evidence supporting his guilt.

We likewise agree that none of the alleged failures on the part of the Commonwealth to disclose evidence to Mills rises to the level of a *Brady* violation. In some instances, Mills cannot prove that the evidence existed in the first place, or that the Commonwealth possessed said evidence and knowingly suppressed it (*e.g.* the audiotape from Mills’s arrest that no one but Mott ever claimed existed; a recorded phone conversation between Doug Bright and Susie Brown, which they both denied ever occurred; and an alleged recorded interview with Sandy Campbell which Detective Partin denied ever existed and which would have been contrary to Partin’s practice of not recording such interviews). In other instances, the evidence sought by Mills did not qualify as *Brady* material because it was not exculpatory or otherwise valuable to his defense (*e.g.* Dr. Coyne’s autopsy notes and Davis-Houck’s notes regarding DNA testing). Most importantly, there simply is no reasonable probability that the outcome of the trial would have been different had any or all of this “evidence” been disclosed to Mills’s defense team.

E. The Procedural Rule Announced in *Leonard v. Commonwealth* Does Not Permit Mills to Reopen Previously Decided Claims.

Mills asserts that the trial court erred by failing to give full and proper attention to the merits of various claims previously addressed in the 2005 *Mills* decision. 150 S.W.3d at 310. Relying on *Leonard*, 279 S.W.3d at 151, Mills

urges this Court to remand the case to the trial court for the purpose of re-litigating eight specific issues¹⁴ that the trial court declined to address in its order.

In *Leonard*, the appellant appealed from the denial of his motion under Civil Rule (“CR”) 60.02 to be relieved of an order denying his RCr 11.42 motion which had held that several collateral issues were procedurally barred having been addressed on direct appeal. 279 S.W.3d at 154. The appellant in *Leonard* asked this Court to allow him to reopen his RCr 11.42 claims and apply the *Martin v. Commonwealth* decision, which held that issues unsuccessfully appealed under the palpable error rule can still give rise to a separate ineffective assistance of counsel claim. 207 S.W.3d 1 (Ky. 2006). In addressing the retroactive application of a new collateral attack rule, we concluded that “appellate resolution of an alleged direct error cannot serve as a procedural bar to a related claim of ineffective assistance of counsel,” thus creating a new rule concerning RCr 11.42 motions. 279 S.W.3d at 158.

¹⁴ The trial court held that Mills was precluded from litigating the following claims in his RCr 11.42 motion on the basis that these ineffective assistance claims were premised on legal claims previously disposed of on direct appeal: 1) trial counsel’s failure to obtain expert assistance for the purpose of evaluating and challenging Mills’s competency to stand trial; 2) trial counsel’s failure to obtain expert assistance for the purpose of challenging the voluntariness of Mills’s statements to police; 3) trial counsel’s failure to obtain expert assistance for the purpose of demonstrating that Mills’s statement to police was not reliable; 4) trial counsel’s failure to obtain expert assistance for the purpose of demonstrating Mills’s waiver of *Miranda* rights was not knowing, intelligent, and voluntary; 5) trial counsel’s failure to obtain expert assistance for the purpose of challenging the voluntariness of Mills’s consent to the search of his residence; 6) trial counsel’s failure to obtain expert assistance for the purpose of demonstrating Mills’s ineligibility for the death penalty due to mental retardation; 7) trial counsel’s failure to more ably seek suppression of Mills’s videotaped statements to police; and 8) trial counsel’s failure to request redaction of Mills’s statements to police.

As a corollary to the new procedural rule, *Leonard* also held that this rule “would generally not be retroactively applicable to any other case where the order denying the RCr 11.42 motion was final (that is, having been appealed and affirmed).” *Id.* at 160. As such, “[t]he cutoff for retroactivity of a new collateral attack rule is thus when the order resolving a collateral attack becomes final, and any such new rule announced after the finality of such a collateral attack order is not retroactively applicable.” *Id.*¹⁵ Ultimately, this Court reaffirmed the *Martin* rule in our *Leonard* decision, but held that the *Martin* rule could not be retroactively applied to reopen the RCr 11.42 proceedings in *Leonard* because the order denying the RCr 11.42 motion was appealed and affirmed almost seven years before the announcement of the new *Martin* rule. *Leonard*, 279 S.W.3d at 160.

Turning to the present case, the determinative factor concerning the retroactive application of the *Leonard* rule to Mills’s RCr 11.42 motion is the finality of the “order resolving [the] collateral attack.” In 2001, the trial court dismissed Mills’s RCr 11.42 motion without an evidentiary hearing. Mills appealed to this Court, which affirmed in part, reversed in part, and remanded. *Mills*, 170 S.W.3d 310. In our 2005 opinion, this Court affirmed the trial court’s order dismissing “several [of Mills’s claims] on the grounds that the issues had already been addressed on the direct appeal.” *Id.* at 328. We

¹⁵ See also *Teague v. Lane*, 489 U.S. 288 (1989) (“[U]nless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced.”).

ultimately reversed and remanded that portion of the trial court's order denying the RCr 11.42 motion as to Mills's claims of ineffective assistance and prosecutorial misconduct "relating to the possibility that another person killed the victim and the possibility that exculpatory evidence was not turned over to the defense." *Mills*, 170 S.W.3d at 342-43. To that end, the opinion explicitly directs that on remand "[Mills] will be allowed to prove his claims not disposed of in this opinion and nothing more." *Id.* at 340. The United States Supreme Court denied *certiorari* in 2006. *Mills v. Kentucky*, 547 U.S. 1005 (2006). Those claims remanded by this Court in 2005 are addressed herein.

The trial court's original order denying portions of Mills's RCr 11.42 motion was final to the extent that it was affirmed by this Court in 2005. This Court routinely renders opinions affirming in part and reversing in part a lower court's decision. Despite Mills's argument to the contrary, the portion of the 2005 *Mills* decision reversing and remanding certain parts of the trial court's 2001 RCr 11.42 order does not leave the remainder of this Court's decision affirming other parts of the order "non-final." *Cf. Hallum v. Commonwealth*, 347 S.W.3d 55, 57 (Ky. 2011) (holding that *Leonard*'s rule of retroactive application applied in a case where a new rule of criminal procedure was announced while the appellant's case was still pending before the Court). Therefore, Mills is not entitled to application of the *Leonard* rule because the order denying RCr 11.42 relief as to the aforementioned claims, having been appealed and affirmed by this Court, was final nearly four years before the *Leonard* rule was announced in 2009.

III. Evidentiary Rulings Regarding Guilt Phase Claims.

Mills also challenges multiple evidentiary rulings made by the trial court in the context of the RCr 11.42 hearing. Mills's arguments concern the denial of additional funding for expert witnesses and the exclusion or limitation of evidence. We review a trial court's evidentiary rulings for an abuse of discretion. *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575 (Ky. 2000). We will address each argument to the extent that it has not been previously discussed in this opinion.

A. Trial Court Properly Denied Funds For Footwear Impressions Expert.

First, Mills argues that the trial court abused its discretion in denying funds for an expert in forensic footwear impressions. Post-conviction counsel sent crime scene photographs to Edward E. Hueske, a forensic footwear impression expert, along with photographs of the boots worn by Mills at the time of his arrest. Hueske summarized his initial findings in an affidavit, which stated that based on his review of the photographs, there were footwear impressions at the crime scene that were not consistent with the boots worn by Mills. Mills submitted Hueske's affidavit to the trial court to support a request for funding for expert witnesses. The trial court denied the motion. In 2008, Mills sought a writ of mandamus compelling the trial court grant his request for expert funds. *Mills v. Messer*, 268 S.W.3d 366 (Ky. 2008). This Court granted the writ and remanded the matter to the trial court for a determination "as to whether [Mills's] proposed expert witnesses are necessary for a full-presentation" of his claims on remand. *Id.* at 368.

The trial court denied funds for a “shoe print expert” on the grounds that the 2005 *Mills* opinion did not specifically remand “shoe print” evidence for an evidentiary hearing. Moreover, the writ fails to denote a forensic footwear expert as being sought by Mills in the first place. Rather, this Court recounted that Mills’s motion for a writ sought state funds to retain “a forensic expert specializing in fingerprint evidence; a forensic expert specializing in crime scene reconstruction; a forensic pathologist; an expert attorney witness; a psychologist; and a social worker.” 268 S.W.3d at 367. We cannot say that the trial court abused its discretion in denying funds for a forensic footwear expert when the writ compelling a hearing to consider the reasonableness of Mills’s request did not contemplate a forensic footwear expert.¹⁶

B. Trial Court Did Not Abuse its Discretion in Excluding at the RCr 11.42 Hearing Evidence of Drilling Permits.

Mills also challenges the trial court’s exclusion of evidence, at the RCr 11.42 hearing, that Phipps applied for and had been granted oil drilling permits in August of 1995. He claims, rather confusingly, that this evidence supports his assertion that Phipps was in “dire need” of money before his death, a theory that underpins his contention that Phipps may have been in the throes of some kind of extortion attempt, and that someone other than Mills murdered him in order to rob him of a large amount of money. Much of the substance of this convoluted argument has been discussed previously in this opinion. In sum,

¹⁶ Mills’s own rendition of relevant facts establishes that Terry Sutherland, the victim’s son-in-law, walked through the house that night, noting blood everywhere and the victim’s pants lying on the kitchen floor, before returning outside where he found the victim in the front yard.

Mills has offered no proof that Phipps was in “dire need” of money. In fact, two of Phipps’s children who were aware of his finances testified that such claim was untrue. Furthermore, the drilling permits alone, or in conjunction with other admissible evidence, do not establish that Phipps was in need of, or had in his possession, large amounts of cash. The trial court’s exclusion of this evidence at the RCr 11.42 hearing (evidence presented as probative of the “in dire need of money” argument) was neither arbitrary nor unreasonable, and accordingly, we find no abuse of discretion.

C. Trial Court Did Not Abuse its Discretion in Excluding Affidavit Testimony of Danny Bartolo.

Next, Mills argues that the trial court abused its discretion in excluding from the RCr 11.42 hearing an affidavit that would have undermined the Commonwealth’s claim that he stole a change purse from Phipps. As previously noted, a change purse was among the items found in Mills’s home after the murder. To explain how the change purse came into his possession, Mills offered Danny Bartolo’s affidavit stating that he had hired Mills to clean his shed. On the day of Phipps’s murder, Bartolo claimed that Mills was cleaning out the shed when he found three change purses. Bartolo allowed Mills to keep one of the change purses, which Mills placed in his pocket. Bartolo died before the commencement of the RCr 11.42 hearing, and the trial court denied Mills’s request to enter the Bartolo affidavit into evidence.

Mills has failed to articulate a legal argument for admission of the Bartolo affidavit, which was clearly testimonial in nature. Furthermore, Bartolo’s affidavit does not seriously undermine the allegation that Mills took a

change purse from Phipps's residence. Truleen Barton, the victim's daughter, and Terry Sutherland, the victim's son-in-law, both identified the change purse found at Mills's home as belonging to the victim. Therefore, we find no abuse of discretion in the trial court's exclusion of the affidavit.

D. Trial Court Did Not Abuse its Discretion in Excluding Pharmacy Records.

Mills asserts that he was improperly prevented from presenting evidence at the RCr 11.42 hearing in the form of pharmacy records which showed that Phipps had refilled a prescription for Percocet on August 16, 1995. According to Mills, the introduction of the pharmacy record would have called into question the validity of the Commonwealth's allegation that Mills had stolen a bottle of Percocet from Phipps because the bottle of Percocet found at Mills's residence had a prescription date of July 21, 1995. Clearly, the decision to exclude pharmacy records was not arbitrary. The discrepancy in dates between the last refill and the bottle found at Mills's home does not undermine the allegation that Mills robbed Phipps whatsoever, as the bottle of pills found under Mills's bed bore Phipps's name. There was no abuse of discretion.

E. Trial Court Did Not Abuse its Discretion in Limiting Expert Testimony.

Next, Mills challenges the trial court's limitation of the defense's fingerprint expert Jason Pressly's testimony. Pressly's testimony that items not collected by the investigating officers could have been subjected to fingerprint analysis was excluded by the trial court during the RCr 11.42 hearing. Pressly testified by avowal that a glove and bank bags could have been processed for

prints. We agree with the Commonwealth's assessment that the general notion that any number of items at a particular crime scene could be analyzed for fingerprints is true of *any* crime scene. As for the glove and the bank bags, Mills has failed to establish the importance of these items in the context of his alternative perpetrator theory. Questions concerning the scope of evidence to be admitted fall squarely within the discretion of the trial court. *Keene v. Commonwealth*, 516 S.W.2d 852, 855 (Ky. 1974). Without evidence connecting an alternative perpetrator to these items and the crime, Pressly's testimony concerning these additional items at the crime scene is of questionable relevance. *See Schulz v. Celotex*, 942 F.2d 204 (3rd Cir. 1991) (noting that speculative expert testimony is often excluded); *see also Combs v. Stortz*, 276 S.W.3d 282 (Ky. App. 2009). The trial court properly exercised its discretion in limiting Pressly's testimony.

F. Trial Court Did Not Abuse its Discretion in Excluding Witness Testimony.

Mills also claims that the trial court abused its discretion when it limited testimony that established a connection between an alternative suspect and the murder. On avowal, Donna Hibbert testified that she was working at a gas station on the night of the murder when she encountered Doug Bright and Donna Phipps, the victim's daughter. Hibbert observed that the couple "didn't act right" and had difficulty speaking. She further testified that she had to help them count coins in order to pay for their purchase. Hibbert thought the

couple was using drugs. The trial court excluded Hibbert's testimony that Doug Bright and Donna Phipps "didn't act right" and appeared to be on drugs.

According to Mills, Hibbert's testimony, if admitted, could have helped establish a motive for Doug Bright to become involved in Susie Brown's alleged scheme to have someone murder Phipps, *i.e.*, his drug use would have suggested a need for cash which in turn would have made him receptive to Susie Brown's alleged plan to find someone to kill A.L. Phipps. Again, there is no evidence connecting Doug Bright to the murder apart from speculation and unsupported theories regarding possible drug use resulting in possible money issues making him amenable to a possible murder scheme by Susie Brown. We have previously held that a trial court does not abuse its discretion in limiting a witness's testimony where defense counsel has failed to establish a sufficient connection between the excluded testimony and the facts in evidence. *Davenport v. Commonwealth*, 177 S.W.3d 763 (Ky. 2005). Therefore, we find no abuse of discretion, as the trial court's decision to exclude Hibbert's testimony was imminently reasonable and supported by sound legal principles.

G. Trial Court Did Not Abuse its Discretion in Limiting Testimony Regarding the Effects of Drugs.

Mills argues that the trial court improperly limited the testimony of expert witness Dr. Frank Deland concerning the effects of benzodiazepine on Mills on the night of the murder. This particular challenge to an evidentiary ruling is simply an extension of Mills's claim that the trial court abused its discretion in limiting his ability to challenge the voluntariness of his statement to police. As discussed, that claim was previously ruled on by this Court in the

2005 *Mills* opinion, and we decline to reopen the issue here. However, we note that evidence of Mills's intoxication was well established for the jury. For example, in Mills's videotaped confession, he admitted to ingesting alcohol, Xanax, Valium, and Percocet on August 30, 1995. Also, several witnesses testified to his apparent intoxication, including his treating ER physician at the Knox County Hospital, who reported that Mills's blood alcohol level was .18.

IV. Ineffective Assistance of Counsel During the Penalty Phase Merits Relief.

In the 2005 Opinion remanding part of Mills's case for an evidentiary hearing, this Court directed the trial court to consider whether the apparent failure on the part of trial counsel to present mitigation evidence constituted "trial strategy, or an abdication of advocacy." *Mills*, 170 S.W.3d at 341 (internal quotations omitted). During the penalty phase of Mills's 1996 trial, Despotes called Debbie Shields, Mills's sister, to testify. Despotes, who waived his opening statement, prepared for Shields's examination on the final day of jury deliberations during the guilt phase of the trial. This was the only mitigation evidence that Despotes prepared or presented and it was extremely limited. Shields explained that Mills was one of ten children. Eleven years prior, Mills's father had drowned. She testified that Mills dropped out of high school in the ninth grade after he accidentally shot himself in the leg. Mills, who had stepchildren but no biological children of his own, had been twice married and had a problem with alcohol. Although other members of the Mills family were present and available, Shields was the sole witness called by Despotes to

offer testimony during the penalty phase of the trial. Shields's testimony lasted less than three minutes.

At the evidentiary hearing, over sixteen witnesses gave testimony concerning mitigation of punishment. The trial court found the testimony of clinical psychologist Steve Simon particularly compelling. Simon, employed by the Kentucky Correctional Psychiatric Center ("KCPC"), evaluated Mills in January of 1999. At the hearing, Simon testified that Mills scored a 76 on an IQ test, and somewhat better on a second evaluative test. Concerning the drowning death of Mills's father, Simon explained that Mills continued to express sadness and guilt at the time of Phipps's murder. He also testified that Mills had been wounded by an accidental gunshot wound to the thigh, but denied experiencing any suicidal thoughts or having attempted suicide. Simon explained that while KCPC psychologists serve as neutral evaluators, they are often provided with materials from defense counsel to review. Despotis did not provide Simon with any materials to review prior to his evaluation of Mills, or at any point thereafter.

Many of the other witnesses at the hearing were members of the Mills family. They, for the most part, offered testimony similar to Shields's penalty phase testimony, *albeit* in greater depth. As to Mills's father, testimony revealed that he often drank to the point of drunkenness and the family had a very rough life. Mills and some of his siblings witnessed their father's drowning, and though he did not speak of his father's death often, Mills allegedly confided in some family members that he felt responsible for his

father's death. Family members further testified that Mills "changed" after his father's death, and began drinking at a young age. Testimony revealed that Mills was drinking when he accidentally shot himself, and some family members suspected that the shooting was a suicide attempt.

The trial court ruled that Mills's trial counsel was ineffective in failing to conduct a more thorough investigation of mitigating evidence. The trial court also found that counsel's failure to present evidence about Mills's mental health was not a tactical choice. The Commonwealth has filed a cross-appeal challenging the trial court's ruling granting a new penalty phase. Specifically, the Commonwealth argues that Mills did not want Despotes to present a great deal of mitigating evidence,¹⁷ and that Despotes was not ineffective in failing to present this evidence against the wishes of his client. In support of this position, the Commonwealth cites *Chapman v. Commonwealth*, 265 S.W.3d 156 (Ky. 2007) and *State v. Ashworth*, 706 N.E.2d 1231 (Ohio 1999) for the premise that counsel is not required to foist an affirmative penalty defense upon on a defendant who wishes to waive his or her right to present mitigating evidence.

Counsel's duty to abide by his client's decisions concerning representation is a fundamental tenet of the ethical framework of our legal system. See SCR 3.130(1.2)(a). To that end, a decision to forego mitigation evidence in deference to a client's desires may represent a constitutionally sufficient tactical decision of counsel. For example, counsel may discover

¹⁷ At the hearing, Despotes testified that Mills expressed that he did not wish to testify, and that he "declined to use" evidence that Despotes suggested eliciting during Shields's testimony.

through conversations with his client that family members or other witnesses would not be able to provide any valuable mitigation evidence. *See Foley v. Commonwealth*, 17 S.W.3d 878 (Ky. 2000) (*overruled in part on other grounds by Stopher v. Conliffe*, 170 S.W.3d 307 (Ky. 2005)). In that scenario, we would be hard pressed to find ineffective assistance of counsel in failing to investigate or present mitigation evidence against the explicit direction of the client.

However, counsel is nevertheless required to conduct a reasonable investigation based on the totality of the circumstances. *Bussell*, 226 S.W.3d at 107. Here, had counsel performed a reasonable investigation of Mills's background he would have uncovered potentially valuable mitigation evidence to present during sentencing. Despotes conceded at the evidentiary hearing that there were no impediments that would have prevented him from conducting a more thorough investigation of Mills's background. The record does not reflect what information Mills specifically asked not be disclosed during the penalty phase, but we presume that the testimony provided by Shields fell outside of that request. Other family members were able to provide similar testimony in greater detail, which would have likely proved to be valuable information for the jury to consider. We also find counsel's decision not to present the results of the KCPC evaluation particularly troubling, as there appears to be no strategic reason to support keeping that information from the jury.

In *Bussell v. Commonwealth*, attorneys for a defendant accused of murder and robbery claimed that their client was uncooperative in assisting

them in locating mitigation witnesses. *Id.* at 106. Despite having access to information that would have led the attorneys to various family members, including a KCPC report; the attorneys in *Bussell* neglected to seek out those potential witnesses. *Id.* Additionally, there was no evidence in the record to establish that the decision to forego mitigation evidence was strategic. *Id.* This Court concluded that the attorneys' failure to conduct a reasonable investigation of their client's background constituted ineffective assistance of counsel. *Id.* This case requires the same conclusion.

As for the Commonwealth's challenge to the trial court's ruling in this case, we note that the *Chapman* case is readily distinguishable. 265 S.W.3d at 156. The defendant in *Chapman* proceeded pro se with the assistance of hybrid counsel, therefore this Court's scrutiny of his decision not to present mitigation evidence was fundamentally different than how we approach an ineffective assistance of counsel claim under *Strickland*. *Id.* at 171. Furthermore, *Chapman* involved a direct appeal of a capital murder sentence. *Id.* at 160. Our rationale in *Chapman* concerning a pro se litigant's right to waive the presentation of mitigation evidence on direct appeal, based largely on the Ohio Supreme Court's decision in *Ashworth*, is simply inapplicable to the question of whether an attorney fails to render effective assistance of counsel in neglecting to reasonably investigate mitigation evidence.

This case also differs materially from *Hodge v. Commonwealth*, 2011 WL 3805960 (Ky. 2011). In *Hodge*, this Court upheld the denial of RCr 11.42 relief notwithstanding defense counsel's decision to forego penalty-phase mitigation

evidence concerning the defendant's deplorably abusive upbringing. Counsel opted instead for a stipulation that the defendant had a loving and supportive family and a history of gainful employment. School records, we noted, indicated that Hodge was of normal intelligence and had received average grades through elementary school, although his grades declined when a particularly abusive step-father entered the family. Whether counsel's decision not to pursue potential mitigation testimony regarding Hodge's difficult childhood amounted to deficient representation under *Strickland*, or was a legitimate compromise for the sake of keeping the sentencing jury from hearing evidence of Hodge's extensive criminal history we did not have to decide, because there was no reasonable probability, "in light of the particularly depraved and brutal nature of [Hodge's] crimes, that [the jury] would have spared Hodge the death penalty," even had it heard mitigation testimony. 2011 WL 3805960 at 5.

While *Hodge* might be thought similar to this case in the penalty phase, the cases are readily distinguishable. With respect to prejudice, Mills's crime, though gruesome, appears to have been spontaneous, the result of drunken rage, not the cold-blooded execution-style killing and assault of two victims carried out by Hodge. Mills's crime, therefore, unlike Hodge's, was not "so depraved and brutal" as to rule out a reasonable possibility that the jury would have been swayed by effective mitigation testimony. With respect to *Strickland*'s deficient performance prong, there is absolutely no suggestion here, as there was in *Hodge*, that counsel's failure to investigate and develop

the substantial mitigation evidence was somehow a legitimate trial tactic to avoid revealing an extensive criminal history because Mills did not have one, his only prior felony conviction being a sexual abuse conviction when he was young. Furthermore, Mills's mitigation testimony would not have been limited to a very difficult upbringing but would have centered on his very low IQ scores and mental health status which resulted in particularly compelling testimony from the KCPC examiner, testimony that seems all the more significant in light of the United States Supreme Court's recent decision in *Hall v. Florida*, ___ U.S. ___, 134 S. Ct. 1986 (2014) (applying Eighth Amendment bar against executing persons with intellectual disability). With these significant differences, it is understandable that the trial court in this case, unlike the trial court in *Hodge*, readily found deficient performance and prejudice under the *Strickland* standard, as do we.

In sum, Despotes's election not to investigate or present mitigation evidence was unreasonable under the circumstances. We find no basis in the record to conclude that this decision was the result of trial strategy. As such, we affirm the trial court's grant of Mills's RCr 11.42 motion for a new penalty phase.

CONCLUSION

For the reasons set forth herein, we affirm the Knox Circuit Court's order denying that portion of Mills's RCr 11.42 motion which challenges his conviction, and granting the portion of Mills's motion as it relates to his

sentence. Accordingly, this case is remanded to the Knox Circuit Court for new penalty phase proceedings.

All sitting. All concur.

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