IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: DECEMBER 18, 2014
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2013-SC-000231-TG

SAMUEL STEVEN FIELDS — APPELLANT

V.

ON APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE JOHN DAVID CAUDILL, JUDGE
NO. 01-CR-00142

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This appeal stems from the Floyd Circuit Court's order denying Samuel Steven Fields' motion pursuant to Kentucky Rules of Criminal Procedure ("RCr") 11.42 to vacate his conviction of murder and resulting sentence of death.

In 2003, Appellant stood trial, for the second time, for the murder of an elderly woman by the name of Bess Horton. The Commonwealth's theory of prosecution was that in the early morning hours of August 19, 1993, after a long period of heavy drinking and consuming horse tranquilizers (hereinafter referred to as "PCP"), Appellant broke into Horton's residence and murdered her. Appellant knew Horton through his girlfriend, Minnie Burton. Horton allowed Burton to live practically rent free at a duplex she owned. However, Horton was in the process of constructively evicting Burton by shutting off the

apartment's power and water. Burton suggested that she and Appellant burglarize Horton's residence, as she knew Horton kept money in her home.

The relevant facts leading up to Horton's murder began the previous morning on August 18, 1993. Appellant began consuming alcohol as soon as he woke up and continued throughout the day. In the evening, Appellant, along with Burton, Phyllis Berry, Scott Trent, and Bill Sloas drove to the home of a man by the name of James Berry in Ashland, Kentucky. The group sat around Berry's living room drinking alcohol and smoking marijuana. Appellant claims that he had also consumed PCP pills while at Berry's, but testimony surrounding this fact is disputed. Burton alleged that while the group was sitting around in Berry's apartment, Appellant looked as if he had put pills in his mouth. However, Burton could not definitively say whether Appellant consumed the pills, nor could she state what type of pills they were. Subsequently, Appellant became so intoxicated that Berry asked the group to leave. Appellant and Burton made their way back to Grayson and went to his mother's apartment shortly before midnight. Appellant's mother and brother testified that Appellant was out of control and making little sense. As Appellant's brother testified, Burton and Appellant began fighting, after which Appellant started throwing objects around the living room and breaking glass in the apartment. Burton, fearful of Appellant's behavior, decided to walk home to her apartment, but was unable to gain entry.

After midnight, Appellant went looking for Burton at her apartment and found her on the front porch. Burton informed Appellant that she was locked

out. For that reason, he decided to slam his hand through her apartment window. Burton's neighbor called the police after witnessing Appellant's actions. Meanwhile, Burton fled the area leaving Appellant behind. Burton claimed that she immediately proceeded to her aunt and uncle's home. Although Burton's aunt and uncle were able to corroborate this fact, there were discrepancies in the timing of events. Appellant then proceeded to Horton's residence, believing that he would find Burton there. Appellant claims that he entered Horton's home through an open window. He said that he noticed the bedroom had already been ransacked and began pocketing remaining items. Appellant swears that he did not know that Horton lay dead on the bed.

Shortly before 2:00 a.m., Officers Ron Lindeman and Larry Green of the Grayson Police Department were called to respond to the break in at Burton's apartment. The apartment, however, was empty upon their arrival. The officers then conducted a search of the area. Officer Green noticed the lights were on in Horton's residence. This caused Officer Green to become suspicious of criminal activity. Upon further investigation, Officer Green found that the front window had been removed and the screen torn open. He then observed Appellant rummaging through a dresser drawer located in the bedroom. Officers also found Horton in her bed, stabbed in the head so viciously that the knife protruded through the right side of her temple and came out through the other side of her head. Horton's throat was slashed as well. Appellant was immediately arrested and found to be in possession of a broken-tipped knife,

two razor blades and Horton's jewelry. Officers later alleged that Appellant confessed to the crimes when he was handcuffed.

Appellant was indicted by a Carter County Grand Jury on one count of murder and one count of first-degree burglary. On July 29, 1996, the case was transferred to the Morgan Circuit Court. Attempts to seat a jury in that county proved to be unsuccessful. The case was then transferred to the Rowan Circuit Court on December 3, 1996. After a jury trial in 1998, Appellant was found guilty of murder and burglary and sentenced to death.

This Court found reversible errors occurred during the jury trial and overturned Appellant's conviction and sentence. *Fields v. Commonwealth,* 12 S.W.3d 275 (Ky. 2000). Appellant's case was transferred to the Floyd Circuit Court on December 18, 2001 for retrial. Appellant was once again found guilty of burglary in the first degree and murder. On December 19, 2003, Appellant was once again sentenced to death. Appellant appealed his conviction and sentence as a matter of right pursuant to § 110(2)(b) of the Kentucky Constitution. Appellant brought forth forty-nine alleged errors. This Court upheld Appellant's conviction and sentence. *Fields v. Commonwealth,* 274 S.W.3d 375 (Ky. 2008)("Fields II"), *overruled in part by Childers v. Commonwealth,* 332 S.W.3d 64, 69 (Ky. 2010).

On September 21, 2010, Appellant filed a motion pursuant to RCr 11.42, alleging violations of his constitutional rights, along with specific instances of ineffective assistance of counsel ("IAC"). An evidentiary hearing was held for three days and both parties submitted extensive post-hearing memoranda.

The trial court denied Appellant's motion and issued its findings of fact and conclusions of law on January 22, 2013 (also referred to as the "trial court's order"). The following week Appellant filed a motion to vacate the trial court's order pursuant to Kentucky Rules of Civil Procedure ("CR") 59.05 and 52.02. The very next day, the trial court denied the motion and Appellant appealed to this Court.

RCr 11.42 Standard of Review

In order to obtain relief by virtue of an RCr 11.42 motion, the movant must establish that he was deprived of a substantial right which would justify extraordinary post-conviction relief. *Dorton v. Commonwealth,* 433 S.W.2d 117, 118 (Ky. 1968). The trial court's January 22, 2013, order detailing its findings of fact and conclusions of law found that Appellant failed to meet this burden. We review the trial court's determinations of law, under the *de novo* standard of review. *Brown v. Commonwealth,* 253 S.W.3d 490, 500 (Ky.2008) (citing *Groseclose v. Bell,* 130 F.3d 1161, 1164 (6th Cir. 1997)). We will only set aside the trial court's factual determinations if they are found to be clearly erroneous, meaning the findings are not supported by substantial evidence. *Id.* (citing CR 52.01). Furthermore, we will defer to the trial court's determinations in regards to the facts and witness credibility. *See Commonwealth v. Anderson,* 934 S.W.2d 276, 278 (Ky. 1996).

Jury Misconduct

Part of the Commonwealth's theory was that Appellant gained entry into Horton's residence by removing a large storm window located in the front of the

home. Appellant allegedly used a broken-tipped knife to unscrew from the window seventeen paint covered screws. Appellant disputed this theory by arguing that (1) it was impossible to use the knife as a screwdriver in this situation; (2) Appellant was too intoxicated to perform such a feat; and (3) even if the knife could have been used to remove the window, Appellant could not have performed such a task within the fourteen minutes that he was last seen and the point at which Officer Green arrived at Horton's residence. While the jury did hear these arguments, they did not have the benefit of witnessing an in-courtroom experiment or hearing from a tool mark analyst.

According to the affidavits of two jurors, the jury decided to conduct their own experiment during deliberations by using the broken tipped-knife, introduced into evidence as Commonwealth's exhibit 44, and attempting to unscrew the door off of a cabinet located in the jury room. Appellant argues that he is entitled to a new trial because this experiment violated his rights to confrontation, due process, and a fair trial as guaranteed by the United States and Kentucky Constitutions. *See* U.S. Const. amend. V, VI, XIV; Ky. Const. § 2, 11.

During the evidentiary hearing, the Commonwealth objected to allowing the two jurors to testify about the experiment. The trial court agreed and excluded both jurors testimony, finding that such testimony was incompetent. The trial court relied on RCr 10.04, which states that "[a] juror cannot be examined to establish a ground for a new trial, except to establish that the verdict was made by lot." The Court then stated that even taking into account

from the Fourth, Seventh, and Eighth Federal Circuits, the trial court reasoned that juror misconduct does not occur simply because the jury, using admissible evidence, tries to "re-create circumstances discussed by those that testif[ied]."

We will assume for the purposes of our analysis that the jurors' affidavits and testimony qualified as admissible evidence. Even so, this Court does not believe the jurors' testimony demonstrated misconduct. We note that "the bar to challenge a jury verdict based upon jury misconduct during deliberations is high." *Commonwealth v. Abnee,* 375 S.W.3d 49, 56 (Ky. 2012). Like the trial court, we find guidance from the Sixth Circuit in *U.S. v. Avery*, 717 F.2d 1020 (6th Cir. 1983). The defendant in *Avery* was convicted of attempting to destroy, by the use of explosives, a building used in interstate commerce. *Id.* at 1022. The prosecution's theory alleged that the defendant moved propane canisters and milk containers full of gasoline to a crawl space beneath the building within a three minute period of time. *Id.* at 1024. The defendant sought to impute reasonable doubt into the jurors' minds by claiming that moving that amount of explosives in such a short amount of time was implausible. *Id.* The defendant even put an expert on the stand to attest to the amount of time he would have needed to move the explosives. *Id.* at 1026. In his closing argument, the prosecutor urged the jury to "try this scenario", which included attempting to hold two jugs of milk in each hand while crawling on their hands and knees. *Id.*

The Sixth Circuit found that there was no error in asking the jury to handle the milk cartons and try to recreate the defendant's actions. *Id.* The court's conclusion was based on the fact that the defendant placed the issue before the jury, utilized expert testimony to buttress his claim, and that the experiment did not expose the jurors to extraneous materials. *Id.* The court pointed out that juries must be able to use "common experiences and illustrations in reaching their verdict." *Id.*

The trial court also relied on several other cases to support its finding that the experiment did not qualify as jury misconduct. In *Banghart v. Origoverken,* 49 F.3d 1302 (8th Cir. 1995), for example, the plaintiff sued the manufacturer of a stove when his sailboat caught on fire. *Id.* The plaintiff's theory was that the boat fire occurred due to a lit wood-burning match continuing to burn after being dropped into the stove burner. *Id.* at 1303. During deliberations, the jury obtained wood matches and conducted its own experiment using the stove in question. *Id.* The purpose of the experiment was to determine if matches could in fact be dropped into the stove. The experiment's results showed that the matches would not fall into the stove. *Id.* The Eighth Circuit agreed with the lower court that the jury's experiment did not constitute misconduct. *Id.* at 1306. In doing so, the court stated the following:

> The matches and toothpicks used in the testing were not evidence considered by the jurors in reaching their decision, but merely objects used in scrutinizing the physical nature of the piece of evidence upon which the case turned, the stove, and in evaluating the expert's testimony regarding his experiments with the stove. . .

> . In conducting the experiment the jurors were not exposed to extrinsic evidence, but merely tested the truth of statements made. . . .

Id. What we garner from these two cases is that jurors are free to use their own senses, observations, and experiences to conduct an experiment or reenactment with already admitted evidence. *See Fletcher v. McKee,* 355 Fed.Appx. 935 (6th Cir. 2009) (jury did not engage in misconduct by using the admitted murder weapon and allowing it to fall to the ground, as it would have during the crime, to ascertain where it landed). This is exactly what the jury did in conducting its experiment. Moreover, the experiment did not contribute to their verdict because it simply proved that it was possible to remove the screws using the knife, not that Appellant murdered the victim. Therefore, we agree with the trial court that the jury's experiment did not constitute misconduct.

Furthermore, even assuming that the jury did engage in misconduct, we believe it to be harmless. *Gould v. Charlton Co., Inc.* 929 S.W.2d 734, 740 (Ky. 1996)("Juror misconduct only results in a new trial when the misconduct so prejudices a party that a fair trial was not obtained."). Indeed, we cannot say beyond a reasonable doubt that the jury experiment contributed to the verdict. Looking at Juror H's testimony, she stated that witnessing the juror remove the screws satisfied her curiosity regarding whether it was possible for Appellant to remove Horton's window. Similarly, Juror G also confirmed that the experiment was conducted to determine "if it was possible and could be done." However, and as is discussed *supra,* there is no dispute that Appellant

entered the home. We believe it is extraneous to debate how he managed to get in Horton's residence. Thusly, we find no error in the trial court's ruling on this issue.

Erroneous Findings of Facts and Conclusions of Law

After the three-day RCr 11.42 evidentiary hearing, the trial judge made his ruling. He thereafter contacted the prosecutor and asked that she submit proposed findings of facts and conclusions of law. Once received, the judge reviewed the findings and believed that the proposed order touched upon all of the relevant matters. Consequently, he adopted, verbatim, the Commonwealth's proposed findings of fact and conclusions of law. In doing so, Appellant believes the trial court provided deference to the Commonwealth and violated his rights to due process, along with RCr 11.42(6). For those reasons, Appellant filed a motion to strike the trial court's order.

The record reveals that at the conclusion of the hearing, Judge John David Caudill took the matter under submission. Subsequently, Judge Caudill decided in the Commonwealth's favor. Judge Caudill then contacted the Commonwealth Attorney's office and asked the prosecutor to prepare a proposed order, including findings of fact and conclusions of law. After reviewing the proposed findings, Judge Caudill believed that all pertinent matters were correctly and adequately addressed. Accordingly, he adopted the proposed order in full.

RCr 11.42 states that "[a]t the conclusion of the hearing or hearings, the court shall make findings determinative of the material issues of fact and enter

a final order accordingly." This rule does not forbid the trial court from adopting a party's findings of fact and conclusions of law. *See Prater v. Cabinet for Human Res.*, 954 S.W.2d 954, 956 (Ky. 1997)("It is not error for the trial court to adopt findings of fact which were merely drafted by someone else."). In fact, this practice is not uncommon and by no means prevents the trial court from analyzing the evidence thoroughly. *See Bingham v. Bingham,* 628 S.W.2d 628, 629 (Ky. 1982). We do note, however, that the practice of announcing a decision and leaving it to the prevailing party to write the findings of fact and conclusions of law is frowned upon. *See Anderson v. Bessemer,* 470 U.S. 564, 572 (1985). It is more appropriate for the trial court to prepare its own findings in order to avoid an appearance of partiality. Nonetheless, the trial judge explained at the January 29, 2013, hearing that he did not have the staff to prepare an order himself. Thus, for the sake of judicial economy, the trial judge relied on the prevailing party to submit a proposed order. *See Ky. Milk Mktg. & Anti-Monopoly Comm. v. Borden Co.,* 456 S.W.2d 831, 834 (Ky. 1969)("We do not condemn this practice in instances where the court is utilizing the services of the attorney only in order to complete the physical task of drafting the record."). Since Judge Caudill confirmed that he "looked at [the order], it covered every item that [he] felt needed to be covered [and] was consistent with [his] decision[,]" we find no violation of the rules of criminal procedure.

Recusal of Judge Caudill

Along with Appellant's motion to strike, he also filed a motion to have Judge Caudill recuse himself so that a special judge could preside over the RCr 11.42 hearing. Appellant's argument is predicated on the above-discussed *ex parte* communication between Judge Caudill and the Commonwealth, along with an alleged instance of bias during the hearing. In support of his argument, Appellant cites *Commonwealth v. Wilson,* 384 S.W.3d 113 (Ky. 2012), wherein we held that it was improper for a defense attorney to contact the judge and have the judge set aside a warrant of arrest. Yet, in *Wilson* we clarified that "Kentucky's Judicial Canons forbid one-sided contacts relating to all judicial proceedings, except in regards to scheduling, initial fixing of bail, *administrative purposes*, or emergencies that do not deal with substantive matters or issues on the merits." *Id.* at 116 (citing SCR 4.300, Canon 3(B)(7)(a)). During the trial court's January 29, 2013 hearing on the matter, Judge Caudill explained that he considered the matter to be administrative since he did not have a law clerk to prepare an order. Again, we note that the trial court had already decided on the merits of Appellant's RCr 11.42 motion. Therefore, we are confident that Judge Caudill did not engage in a one-sided discussion on the motion's substantive issues, rather the trial court requested administrative help. This communication in no way demonstrates that Judge Caudill harbored a personal bias against Appellant. *See* KRS 26A.015(2)(a).

Appellant also attempts to prove bias by calling into question Judge Caudill's treatment of Appellant's counsel and his witness during the RCr

11.42 evidentiary hearing. More specifically, during the hearing, Appellant attempted to have a mitigation expert testify whether she had an opinion regarding Appellant's mental fitness. The Commonwealth objected to the witness's testimony to the extent she would offer a "diagnosis". The trial court sustained the objection and warned Appellant's counsel, on more than one occasion, not to do so. The trial judge further stated that if trial counsel attempted to procure such an answer, she would be held in contempt. After reviewing this particular part of the hearing, we do not believe the trial judge acted inappropriately. Instead, it is clear that Judge Caudill made a ruling and was stern in enforcing it. Appellant fails to provide analogous case law to support his argument; and for good reason, as a reasonable person would not find the trial court's actions to show partiality.

Expert Witness Funds

Appellant next alleges that Judge Caudill erred in refusing to approve the distribution of funds so that Appellant could obtain three expert witnesses to support his RCr 11.42 motion. Appellant argued to Judge Caudill that the expert testimony was needed to demonstrate the extent of his counsel's ineffectiveness during the trial. Thusly, the expert witness testimony Appellant sought to provide during the RCr 11.42 hearing is actually testimony that he wanted presented during his jury trial. The requested experts are as follows: (1) a mitigation expert to testify regarding the psychological, biological, and neurological aspects of drug and alcohol abuse and addiction; (2) a tool mark analyst to testify that the knife Appellant used to gain entry into the victim's

residence could not have removed the window; and (3) a blood splatter expert to testify that Appellant did not stab the victim due to a lack of blood transfer between the two.

Judge Caudill delayed ruling on the motion for funds until he could determine whether the anticipated testimony would in fact show that trial counsel was ineffective. Subsequently, Appellant requested that this Court issue a writ a mandamus ordering the trial court to allow the release of funds to obtain the experts for use in the RCr 11.42 evidentiary hearing. We denied the motion in August of 2011 due to Appellant's failure to show that he lacked an adequate remedy by appeal. *Fields v. Caudill,* 2011-SC-000252-OA (Ky. 2011). The issue now reaches us through Appellant's direct appeal of his RCr 11.42 motion.

In *Mills v. Messer,* 268 S.W.3d 366, 367 (Ky. 2008), this Court explained that "a petitioner may be entitled to state funds for the procurement of expert testimony upon a showing that such witness *is reasonably necessary for a full presentation of the petitioner's case.*" (Emphasis added). During Appellant's hearing on this motion, Judge Caudill stated the following:

> I'm not going to address the issue about experts until such time I address the issue about whether or not there was in fact ineffective assistance of counsel because what [you are] alleging in your motions and your request for funding is that . . . if they done this the outcome would have been different . . . we can go on the basis of what you allege they should have done without actually hearing the experts. . . . I'm going to assume what your experts were going to say . . . and whether that would have made a difference.

This statement reveals Judge Caudill's reasoning that expert testimony was unnecessary at the RCr 11.42 hearing because he could simply rule on the

matter by making a blanket assumption that the experts would testify exactly how Appellant stated they would. This practice conserves the already limited resources and funds of the Commonwealth by first determining whether an IAC claim is even possible given the anticipated testimony. In addition, we note that Appellant may have been better served by this method, because as Appellant's counsel conceded, she did not know if the requested experts would provide favorable testimony. In any event, we can find no reason to conclude that the trial court must hear the actual testimony of an expert before it can determine whether that expert's testimony is reasonably necessary.

That determination was made by the trial court and we review it subsequently as part of the issues dealing with ineffective assistance of counsel.

Brady Violation

During the RCr 11.42 hearing, Appellant supplied the trial court with the testimony of its post-conviction mitigation expert, Heather Drake. She testified that she interviewed James Berry in October of 2009, while he was serving time in Roederer Correctional Complex. Berry told Drake that years prior he was called into the prison office and told that he had a phone call. The caller identified himself as someone from the Attorney General's Office. This individual inquired into the events Berry witnessed on the night in question.

Berry described to Drake the contents of this conversation which consisted of the following information: Berry's half-sister, Phyllis Berry, along with Appellant, Burton, Trent, and Sloas came to his home on the night in

question to have a party. Appellant was highly intoxicated and continued drinking throughout his stay. Phyllis told Berry that Appellant's behavior was due to his consumption of PCP. Berry privately traded Appellant pills for marijuana. Berry then witnessed Appellant ingest three pills that he believed to be Dilaudid, a strong opioid. Berry also detailed the extent of Appellant's intoxication, stating that he was making little sense and he even fell over the living room coffee table. Appellant was so intoxicated that Berry asked him to leave. Drake, however, could not get Berry to sign a sworn affidavit containing these alleged statements.

In *Brady v. Maryland,* 373 U.S. 83 (1963), the U.S. Supreme Court held that it is a violation of a defendant's due process rights for the prosecution to withhold material exculpatory evidence from the defense. Appellant claims that a violation of *Brady* occurred when the Commonwealth failed to disclose this secret conversation and the information contained therein. The Commonwealth denies that this interview transpired and claims that no one at the Commonwealth's office contacted or interviewed Berry. The trial court agreed that there was insufficient proof that a *Brady* violation occurred. As the trial court stated in its order, "the prosecution cannot 'suppress' information already known to the defendant or his attorney" and "there is no credible evidence that any secret interview actually occurred." For the following reasons, we believe the trial court's findings on this issue are supported by the record and relevant case law.

First, we note that there is ample evidence in the record to support the trial court's proposition that Berry is an unreliable witness, and that his accusation alone is not sufficient to prove a *Brady* violation. The only testimony that this secret interview occurred came from Berry himself. There is no evidence to corroborate his claim and we have reservations in finding his testimony credible. Besides the fact that Berry is a convicted felon suffering from paranoid schizophrenia, his testimony during the RCr 11.42 hearing differed substantially from the testimony that Drake claimed he previously told her. For example, Berry denied (1) knowing what drugs Appellant had taken; (2) trading pills with Appellant for marijuana; (3) and conversing with Appellant privately, away from the group. A *Brady* violation cannot be found without proof beyond mere speculation that this interview actually took place. *See Mills v. Commonwealth,* 2011-SC-000541-MR, 2011-SC-000585-MR, 2014 WL 2809790 (Ky. June 19, 2014)("Without proof beyond mere speculation that this evidence exists, we cannot conclude that a *Brady* violation has occurred.")(citing *U.S. v. Agurs,* 427 U.S. 97, 109-10 (1997)).

Secondly, we find merit in the trial court's conclusion that the Commonwealth could not have "suppressed" information that Appellant's counsel already knew. Indeed, a *Brady* violation applies to exculpatory evidence which is known by the prosecution, but not to the defense. *Agura,* 427 U.S. at 103. Appellant's counsel utilized Burton as a witness. She disclosed the same information elicited from Berry. That is, Appellant touted that he had been consuming PCP on the day of Horton's murder and that

Appellant was highly intoxicated, displaying out-of-control behavior. In addition, Burton was present while the group sat together drinking in Berry's apartment. She witnessed the same display as Berry—Appellant placed pills in his hand and then likely consumed those pills. Since the purported exculpatory evidence was already known by Appellant's counsel, the trial court did not err in concluding that a *Brady* violation did not occur.

Prosecutorial Misconduct

Appellant complains that the Commonwealth engaged in prosecutorial misconduct by making incorrect statements during its closing arguments which prejudiced Appellant to such a degree as to render his entire trial, including the penalty phase, fundamentally unfair. The incorrect statements Appellant is referring to are based on the testimony elicited from Burton that Appellant possessed and possibly ingested pills, which has since been called into question by the post-trial testimony of Berry.

In closing arguments, the Commonwealth discussed the voluntary intoxication instruction, and stated the following: "[V]oluntary intoxication, that means someone putting on a buzz, someone taking in alcohol. And that's all we've heard is alcohol that this defendant had." Appellant objected to the Commonwealth's statement, arguing that the prosecutor was misleading the jury into believing that the evidence only showed that Appellant had been drinking alcohol, not taking pills. The trial judge overruled Appellant's objection because, in his recalling of the evidence, Burton could not definitively say whether Appellant swallowed the pills, rather she saw his hand go to his

mouth. At that point, the Commonwealth resumed its argument and stated the following:

> You know what, you go with what you remember, Don't go with what the lawyers say what happened, go with what you recall. Minnie Burton said something about the defendant telling her something about horse tranquilizers. My recall of Ms. Burton's testimony is that she couldn't say whether he did or didn't. . . . But, look at the evidence. Was this guy so intoxicated that he didn't know what was going on? No, he knew what was happening.

Before analyzing this issue, we note that Appellant's claim of prosecutorial misconduct, at least as it relates to Burton's instead of Berry's testimony, is one that should have been asserted in his direct appeal. Since issues that could have or should have been raised on direct appeal cannot be raised in an RCr 11.42 motion, Appellant's claim should have been barred. *See Leonard v. Commonwealth,* 279 S.W.3d 151,156 (Ky. 2009). Even so, we are in agreement with Judge Caudill that the above-referenced statements did not qualify as prosecutorial misconduct.

Parties are given wide latitude during closing arguments. *See Bowling v. Commonwealth,* 873 S.W.2d 175, 178 (Ky. 1993). As the trial court properly stated, prosecutors are entitled to draw reasonable inferences from the evidence. *Commonwealth v. Mitchell,* 165 S.W.3d 129, 131-32 (Ky. 2005). Considering that Burton would not specify if Appellant actually consumed the pills, we believe the Commonwealth made an inference that Appellant was intoxicated solely due to his alcohol use. Again, the jurors heard the same testimony and were free to imply that Appellant swallowed the pills that were in his hand. Furthermore, we have already upheld the trial court's finding that a

Brady violation did not occur. It follows then, that we cannot now conclude that the Commonwealth committed prosecutorial misconduct for making a statement in contravention of Berry's post-trial testimony, when the prosecutor was unaware of such testimony when making the closing argument. Therefore, we find no merit in Appellant's allegation that the Commonwealth committed prosecutorial misconduct.

Ineffective Assistance of Counsel

Appellant's remaining arguments allege instances of IAC. In reviewing the trial court's order, this Court must rely on the following two-part test espoused in *Strickland v. Washington*, 466 U.S. 668, 687 (1984):

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance *prejudiced the defense*. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

In regards to the first prong, we must keep in mind that "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.* at 688. Moreover, this Court must also provide Appellant's attorneys with "a strong presumption" that their conduct fell "within the wide range of reasonable professional assistance." *Haight v. Commonwealth,* 41 S.W.3d 436, 442 (Ky. 2001), *overruled on other grounds by Leonard v. Commonwealth,* 279 S.W.3d 151, 158-59 (Ky. 2009). As to the second prong, *Strickland* requires that there be a "reasonable

probability" that counsel's deficient conduct more likely than not altered the verdict. *Id.* at 694 ("[t]he result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome."). This finding does not require that the prejudice be so strong that but for it, an acquittal would have occurred. *Norton v. Commonwealth,* 63 S.W.3d 175, 177 (Ky. 2001).

We note that Appellant was represented by two different public defenders during his 2003 retrial and sentencing. Rebecca Lytle represented Appellant during the guilt phase, while Mark Baker represented Appellant during the sentencing phase.

Failure to Present Witnesses

Appellant brings forth a claim of IAC based on his attorneys' failure to interview and place on the stand individuals who witnessed Appellant's behavior and level of intoxication on the night in question. Appellant contends that his defense team was unreasonably deficient in not pursuing these witnesses and that prejudice resulted in the form of a guilty verdict. We will address each witness in turn.

James Berry

As discussed above, James Berry testified at the RCr 11.42 hearing that Appellant and other individuals came to his home on the night of Horton's murder. The group sat around Berry's living room drinking and smoking marijuana. Berry inquired as to what Appellant had consumed to cause his

level of intoxication, to which Phyllis replied that he had been drinking heavily and consumed PCP. While the group was "partying" in Berry's living room, he witnessed Appellant consume some pills, but he could not identify what the pills were. Appellant contends that his counsel was ineffective due to their failure to interview Berry and place him on the stand. Appellant believes that if his counsel had done so, the jury would have determined that Appellant was too intoxicated to: (1) remove Horton's window and gain access to her residence; and (2) form the *mens rea* needed to commit the crime of murder. Appellant also maintains that Berry's testimony could have been used to lay the foundation for the use of a drug expert for mitigation purposes.

There is no doubt that Appellant's counsel had a duty to conduct a reasonable investigation, including investigating potential defenses. *Wiggins v. Smith,* 539 U.S. 510, 521-22 (2003). With that being said, we must provide Appellant's counsel with a presumption that their pretrial investigation was sufficient under the circumstances, and that their actions were based on "trial strategy." *See Strickland*, 466 U.S. at 689. The burden is on Appellant to overcome this strong presumption. *Id.* After hearing testimony from both Lytle and Baker, the trial court concluded that Appellant failed to clear this high hurdle, as it believed it was trial strategy for his counsel not to call Berry to the stand. The trial court's reasoning was that Barry was an unreliable witness who possessed information that was obtainable from other more reliable sources, namely Burton. For the following reasons, the trial court's determinations were not clearly erroneous.

First, there was sufficient evidence to support the trial court's determination that Appellant's counsel knew of Berry and could have interviewed him if so desired. It should be noted that at the time of the RCr 11.42 hearing, over seven years had lapsed since the trial. Seven years. That reality should not be ignored when assessing the evidence at the 11.42 hearing. Consequently, Appellant's trial counsel had minimal recollection of some of the specifics of Appellant's case. Even so, when asked if Lytle remembered Berry, she responded that she did and that he was in prison at the time. Lytle also stated that she could have tracked Berry down if she so desired to interview him.

Secondly, despite never interviewing Berry, we believe there was sufficient evidence that Appellant's counsel knew of the general information Berry possessed, but had obtained that information from Burton. Lytle explained that she was aware Berry was with Appellant on the night in question, along with several other individuals, including Burton. Logically, these witnesses would have roughly the same information. In fact, Lytle testified that Burton had provided her with an adequate account of Appellant's level of intoxication on the night of Horton's murder, including that he possessed and consumed pills. We acknowledge that Lytle did not, and could not have known the extent of Berry's knowledge, but she had no reason to believe that he would have provided any additional information that had not already been obtained from Burton.

In regards to trial strategy, we agree that it was counsel's trial strategy not to call Berry to the stand. For example, when asked why she did not interview Berry, Lytle answered that she could not recall, but speculated that it was strategic. Lytle claimed that one of her many "jobs" at trial was to have Burton disclose to the jury that Appellant consumed pills, particularly PCP. The reason for this was to have a "factual predicate" so that Baker could discuss it for mitigation purposes in the penalty phase. In fact, Baker had already obtained the expert testimony of Dr. Adams to discuss the effects of PCP. Therefore, Lytle likely believed that an interview of Berry was unnecessary.

Moreover, Lytle testified that she had never before placed a witness on the stand that suffered from a psychological illness. In light of the fact that Berry was a convicted felon suffering from schizophrenia, in addition to the cumulative nature of the information he would have provided, we have little doubt that it was trial counsel's strategy not to expend their already limited resources on investigating Berry. We find it telling that Appellant's counsel in his first trial did not interview or investigate Berry either. As this Court has explained, "[d]ecisions relating to witness selection are normally left to counsel's judgment and this judgment will not be second-guessed by hindsight." *Foley v. Commonwealth,* 17 S.W.3d 878, 885 (Ky. 2000), *overruled on other grounds* by *Stopher v. Conliffe,* 170 S.W.3d 307, 310 (Ky. 2005). Consequently, we will not disturb the trial court's findings on this issue.

Cindy Mosley

Next we will focus on Appellant's IAC claim based on his trial counsel's failure to call and investigate Cindy Mosley, Berry's live-in girlfriend at the time. Mosley was present at the home when the lively group arrived. Neither the Commonwealth, nor Appellant's counsel interviewed Mosley. Appellant claims that Mosley would have provided further testimony that Appellant was intoxicated that night, which he claims would have resulted in a not guilty verdict. Appellant's claim has no merit. For the sake of argument, even if we were to assume that trial counsel was deficient in failing to call Mosley, Appellant cannot establish that but for his counsel's deficiency, the outcome of the trial would have been different. Mosley testified at the RCr 11.42 hearing and explained that when the group arrived at her home, she and her two small children went back to her bedroom where they remained until the group left. She further claimed that while Appellant seemed drunk, she could not comment on the extent of his intoxication, nor did she witness him consume any pills. Clearly, this testimony would have made no difference in Appellant's trial.

Michael Stanaford and Roger Jessie

Appellant also brings forth IAC claims based on his trial counsel's failure to call Michael Stanaford and Roger Jessie to the stand. Stanaford is a deputy jailer at the Carter County Jail and Jessie is a police officer for the City of Grayson. Appellant's trial counsel conducted pretrial interviews with both individuals, but ultimately did not call either to the stand to testify. Jessie's

pretrial interview disclosed that when he arrived on the scene, Appellant was acting strange, appeared to be intoxicated, and was unsteady on his feet. However, Jessie could not confirm that Appellant was intoxicated, as he was not close enough to smell the scent of alcohol on Appellant's person. Similarly, Stanaford also observed Appellant's strange behavior when he was brought to the jail. Stanaford explained that Appellant would not make eye contact or speak to any of the jailers. Once placed in the jail cell, Appellant immediately passed out and it was difficult to wake him up mere minutes later. Like Jessie, Stanaford could not confirm whether or not Appellant was intoxicated, but believed something was wrong with him.

Based on this information, Appellant contends that both witnesses should have been called to testify, as their claims buttressed other witnesses' testimony that Appellant was intoxicated on the night in question. The trial court concluded that it was sound trial strategy not to call Stanaford and Jessie to testify. We agree.

During the RCr 11.42 hearing, Lytle explained that she did not call Stanaford to testify because there were relevancy issues regarding his impression of Appellant's behavior as he did not see Appellant until hours after Horton's murder. More importantly, Lytle stated that Stanaford's testimony ran the risk of opening the door into Appellant's lengthy criminal past. During the RCr 11.42 hearing, Stanaford stated that he had known Appellant for quite some time, as Appellant had been in and out of the Carter County Jail since turning eighteen. Considering that Stanaford's arguably irrelevant information

was that Appellant may have been intoxicated, it was reasonable trial strategy to keep him from testifying so as to prevent the risk of Appellant's lengthy criminal past from being revealed to the jury.

In regards to Jessie, we also believe Lytle likely omitted his opportunity to testify in order to prevent damaging evidence from surfacing. Jessie disclosed in his pretrial interview that Appellant had verbally threatened him after his arrest. More specifically, Jessie claimed that Appellant said, "Roger, you son of a b****, you wanna die too." Clearly, this statement could be seen as an admission to Horton's murder. Thusly, we believe any reasonable attorney would have determined that Jessie's value as a witness was minimized by the risk of Appellant's threat being disclosed to the jury. However, when Lytle was asked why Jessie was not called to the stand, she testified that she did not recall, and that it was likely a mistake.

Assuming *arguendo*, that Lytle did make a mistake in failing to call Jessie to the stand, and assuming that failure qualifies as a deficient performance, we still do not believe that Appellant satisfied the second prong of *Strickland*. It is highly unlikely that the jury's verdict or sentence would have been different had the jury heard Jessie's testimony that shortly after his arrest, Appellant appeared to be intoxicated. As we have mentioned numerous times, Burton and other witnesses attested that Appellant was extremely intoxicated during the time frame in which he went to look for Burton at Horton's residence. For these reasons, we agree with the trial court's

conclusion that Appellant failed to demonstrate that his trial counsel was ineffective by not calling Jessie to the stand.

Drug and Alcohol Expert

Appellant's next argument alleges that his trial counsel was ineffective by failing to present testimony during the guilt stage of trial regarding the effects of ingesting PCP. Appellant called "Psycho-Pharmacologist" Dr. Robert Adams to the stand during the RCr 11.42 hearing. He testified that when used in large doses, PCP induces psychotic reactions such as psychosis, delusions and paranoia. Dr. Adams also explained that PCP can cause impaired coordination. The trial court concluded that it was reasonable trial strategy not to call Dr. Adams as a witness. In doing so, the trial court focused on Appellant's adamant opposition to presenting an intoxication defense to the jury. The trial court stated that since Appellant's defense was complete innocence, it was a reasonable trial tactic to refrain from drawing any more attention to Appellant's drug and alcohol use. The trial court further concluded that any favorable testimony elicited from Dr. Adams would have had minimal effect on the outcome of the trial. After reviewing the record, we do not find the trial court's findings to be clearly erroneous.

To begin our analysis, it is important to underscore that both Lytle and Baker conceded that Appellant's theory of defense was that he was innocent, meaning that he did not commit the crime. Implicit in this defense was the theory that Burton was the individual that had killed Horton after she awoke to find her home being burglarized. According to Baker, Appellant was

exceedingly engaged in his representation and was highly opposed to putting on evidence or testimony that made him appear guilty, including an intoxication defense. As will be discussed, Appellant was so obdurate on this point that he requested Baker not put on mitigating evidence. Of course, Baker ultimately talked Appellant into allowing him to present mitigating evidence in the sentencing phase. The point, however, is that Baker obtained Dr. Adams as an expert for the sole purpose of presenting him for mitigation purposes. Lytle even testified that there was no discussion of utilizing Dr. Adams or any drug expert in the guilt stage.

Additionally, Dr. Adams testified that PCP could prevent an individual from having control over their own actions and cause hostility and violence towards others. The proof also indicated that unlike marijuana or alcohol, PCP is the type of drug that can induce a psychotic episode, consistent with causing an otherwise non-violent individual to stab an elderly woman in the head. As Baker explained, any seasoned prosecutor would have twisted Dr. Adams testimony to stand for the proposition that Appellant was capable of brutally murdering Horton after ingesting PCP. Consequently, if Dr. Adams testified, it would have been more likely that the jury would have found that Appellant was capable of, and had in fact, committed the offense.

In light of our presumption that trial counsel's decisions regarding the presentation of witnesses are assumed to be based on trial strategy, we agree with the trial court that the decision to not utilize a drug expert was reasonable under the circumstances. *See Harper v. Commonwealth,* 978 S.W.2d 311, 315

(Ky. 1998) (trial counsel's decision not to present an expert was not unreasonable and was consistent with trial strategy); *see also, Mills v. Commonwealth,* 170 S.W.3d 310, 329 (Ky. 2005), *overruled on other grounds by Leonard,* 279 S.W.3d at 158-59 (counsel was not ineffective by failing to hire an expert to support his defense of intoxication because other evidence was produced which tended to support the claim).

Tool Mark Analyst

Appellant makes an additional argument that trial counsel was ineffective by not obtaining a tool mark analyst to testify during the trial. Appellant claims that an expert in this area would have opined that there was no possibility that Appellant's knife could have unscrewed the window's painted-covered screws. In rejecting Appellant's argument, the trial court explained that obtaining an expert to analyze the window would have been challenging since the actual window was not available to analyze. Also, prejudice did not result because trial counsel was able to obtain favorable expert testimony from the cross-examination of the Commonwealth's expert, thereby rendering an independent expert unnecessary.

A review of the record supports the trial court's findings on this issue. Since this case has been tried before, Baker had the benefit of knowing in advance what the Commonwealth's expert would testify to. Specifically, the Commonwealth's expert conducted a paint analysis which revealed that the white paint found on Appellant's knife was a different color and chemical compound from the white paint found on the window screws. Baker testified

that he believed this information sufficiently discredited the Commonwealth's knife theory. For that reason, Baker believed that it was unnecessary to expend resources to obtain a tool mark analyst. Furthermore, we reemphasize our previous conclusion that the method Appellant employed to gain entry into Horton's home is extraneous.

Blood Spatter Expert or Pathologist

Similar to Appellant's previous argument, he complains that his trial counsel was ineffective due to their failure to obtain a blood spatter expert or pathologist. Forensic evidence divulged that despite the massive amount of blood loss Horton experienced when she was murdered, none of her blood was found on Appellant. Likewise, Appellant deposited a significant amount of blood on various objects he touched after injuring himself while trying to gain access to Burton's apartment. Yet, Appellant's blood was not found on or near Horton. Appellant maintains that Baker—the trial attorney that was in charge of obtaining expert witnesses for Appellant's jury trial—should have obtained a blood spatter expert to testify regarding the improbability that Appellant committed the murder given the aforementioned forensic evidence, or lack thereof. The trial court made the following findings:

> Mr. Baker believed that the medical examiner had made certain concessions during the first trial that were very likely to be repeated in the trial at issue. Thus, he reasonably believed that it would be more beneficial to present information through cross examination. This was a reasonable trial strategy.

Baker's testimony at the RCr 11.42 hearing supported the trial court's conclusion. Again, Baker had the benefit of utilizing the transcript from the

previous trial and therefore knew the favorable testimony that the medical examiner would provide. Moreover, Baker stated that he had met with the witness prior to trial and knew that certain evidentiary "goals" concerning blood flow and probable spurting distance would be met. Consequently, we agree with the trial court that Appellant's trial counsel made a strategic decision to take advantage of an expert who was already endorsed by the Commonwealth. *See Harper v. Commonwealth*, 978 S.W.2d at 315 ("[T]estimony from an independent expert was unnecessary [considering that]. . . a jury would view a court-appointed expert more credibly than an expert hired to assist and testify for the defense.").

IAC in Closing Arguments

Next Appellant alleges IAC due to Lytle's failure to assert, during the closing arguments of the guilt stage, that Appellant was under the influence of pills on the night in question. Appellant takes specific aim at the following closing argument statement: "We do not know what happened [on the night in question]. We've heard testimony that drugs may or may not have been ingested. But, certainly, we have testimony that for sure drinking continued." Appellant maintains that Lytle ignored testimony that he had consumed pills and was therefore ineffective.

We believe Appellant is taking this comment out of context. Lytle had presented an extensive closing argument, which spanned over twenty pages of court records. During her closing argument, Lytle put forth the theory of defense and summarized the weaknesses in the Commonwealth's case.

Evidence that was not completely proven and not beneficial to Appellant's defense was that he ingested pills, namely PCP, before Horton's murder. Lytle obviously believed that Burton's testimony that Appellant consumed pills on that fateful day was equivocal. We will not allow the 'harsh light of hindsight' to manipulate Lytle's closing argument so as to make it appear as though she provided deficient legal assistance. *Strickland,* 466 U.S. at 689. Not only is Appellant's contention improper, but he also fails to demonstrate that had Lytle pointed out to the jury that he consumed pills that a different result would have occurred. We find no error.

Mitigating Evidence of Childhood Trauma

Appellant's IAC claim is also based on trial counsel's alleged failure to present sufficient evidence of Appellant's childhood trauma and abuse. During the penalty phase of the trial, the jury was presented with the testimony of Appellant's mother, Sharon Callihan, and brother, John Fields. Both Sharon and John described with specificity the abuse the family endured at the hands of Appellant's father, Ronnie Fields, Sr., a former police officer. For most of their childhood and adolescences, Appellant and his two biological brothers lived with Ronnie, his wife, and her children. John described Ronnie as a violent father who instituted a constant state of fear within the household. The family frequently worried that something would set him off into a rage.

Specific stories of Ronnie's abuse were told. For example, John stated that one time Ronnie used his gun to shoot a pan his stepmother was holding. Another illustration of Ronnie's abuse occurred during what John termed

"swirlies", a humiliating experience whereby Ronnie would hold his step-mother's head in the toilet while it was flushed. Ronnie's physical abuse often extended to Appellant. In fact, John informed the jury that one time Ronnie threw Appellant into the wall so hard that he went through the drywall.

During Sharon's testimony, she explained that she divorced Ronnie shortly before Appellant was born. Afterwards she gained custody of the children. Sharon also disclosed to the jury that she has battled drug addiction for much of Appellant's childhood. As a result, Sharon admitted that she neglected and abandoned Appellant. Custody of the children transferred to her mother and then eventually to Ronnie. Sharon explained that Appellant had trouble in school, failing the first grade and dropping out when he was a freshman in high school. Sharon also claimed that Appellant suffered from drug addiction and attended rehabilitation three times as a child.

The jury ultimately believed that Appellant's troubled upbringing did not mitigate the horrendous murder of the elderly victim. Appellant's RCr 11.42 motion points to several details that trial counsel failed to procure, all of which he believes would have convinced the jury that mitigation was appropriate. One area that Appellant argues should have been better presented to the jury is the extent of his mother's drug use. Other facts concern the death of several good friends and the abuse he suffered at the hands of his older brothers. Finally, Appellant complains that additional mitigating evidence could have been obtained had Baker placed his father and/or childhood neighbor on the stand.

The trial court correctly analyzed the issue to find that Baker's assistance was reasonable trial strategy. The trial court based its finding on Appellant's request that Baker not present any mitigating evidence. To further this point, it is necessary to explain the situation Baker was placed in. As we have already discussed, Appellant's theory of defense was that he was not the individual who murdered Horton. Since the jury took over eight hours to return their guilty verdict, Appellant believed the jury may have had some residual doubt. Consequently, Appellant requested that Baker not present any mitigating testimony, as doing so would have been inconsistent with his defense of innocence. In an attempt to compromise, Baker agreed to limit the mitigating evidence presented to the jury to that which was reasonably necessary.

In light of this agreement, Baker concluded that the testimony of Appellant's mother and brother was all that was necessary. Appellant's father did not testify to the jury because he would have likely provided testimony casting doubt or minimizing the extent of his abuse. Also, Appellant's neighbor was not pursued to testify because her testimony only indicated that the children were outside often and that she heard yelling coming from Appellant's residence.

We agree with the trial court that Baker's mitigation strategy was reasonable under the circumstances. Considering that the Commonwealth did not contest Appellant's claim that he endured a traumatic and abusive upbringing, we believe John and Sharon's testimony was adequate. *See*

Brown, 253 S.W.3d at 503 (counsel's presentation of mitigating evidence which was designed to minimize evidence defendant did not want disclosed, was sound trial strategy and, therefore, not ineffective assistance of counsel).

Evidence of Alcohol and Drug Addiction

Parallel to the preceding argument, Appellant also believes that trial counsel was ineffective for failing to present mitigating evidence of Appellant's alcohol and drug addiction. Appellant also maintains that an addiction expert should have been called to explain to the jury the psychological, biological, and neurological components of addiction. The trial court ruled that Appellant's mother and brother provided adequate reference to Appellant's substance abuse, and that an expert witness was unnecessary. We agree.

Once more, we point to Appellant's desire that trial counsel refrain from presenting evidence that contradicts his claim of innocence. It appears that Baker proceeded precisely in this fashion. Instead of overwhelming the jury with copious amounts of evidence and testimony of Appellant's substance abuse, Baker simply procured testimony from his mother and brother. Sharon, for example, testified that Appellant had been in drug rehabilitation three times. John also stated that Appellant was only twelve or thirteen when he started consuming drugs and alcohol on a daily basis. Therefore, the use of additional evidence or expert testimony was unnecessary and, at the time, unwelcomed. Similar to our ruling in *Brown,* Baker's mitigation strategy which omitted testimony to decrease culpability was "neither deficient [n]or unreasonable." 253 S.W.3d at 502. Accordingly, we find no error.

Testimony of Dr. Schilling

Baker originally intended on calling Dr. Peter Schilling, a forensic psychiatrist, to testify about the mitigating effects of trauma in childhood development. However, when the jurors took a substantial amount of time to render their guilty verdict, Appellant and Baker reevaluated the presentation of mitigating evidence. We have already detailed the agreement Appellant and Baker made with respect to mitigating evidence, so there is no need to rehash those particular facts. However, we find it important to underscore the fact that Baker revised the proposed mitigation plan at Appellant's request. The new plan ignored evidence justifying the crime, and instead exposed any lingering doubt the jurors may have had. For that reason, expert testimony regarding the effects of childhood trauma was not needed. *Id.* ("The jury simply did not need expert testimony to understand the " humanizing" evidence; it could use its common sense or own sense of mercy."). The lay jurors were well equipped to evaluate this type of mitigating evidence, which was "neither complex nor technical". *Wong v. Belmontes,* 130 S.Ct. 383, 388 (2009).

In addition, Baker pointed out during the RCr 11.42 hearing that calling Dr. Schilling may have been more harmful than beneficial. As he explained, the Commonwealth was most certainly prepared to cross-examine Dr. Schilling. If given the opportunity, the Commonwealth would have likely brought up unflattering details of Appellant's mental health, such as his history of abusing animals. Therefore, we find substantial support for the trial

court's finding that Baker's decision not to call Dr. Schilling to the stand was sensible trial strategy.

Cumulative Error

Lastly, Appellant complains that because of the cumulative effect of numerous instances of IAC, he was denied a fair trial. We will reverse for cumulative error when the "individual errors were themselves substantial, bordering, at least, on prejudicial." *Brown v. Commonwealth,* 313 S.W.3d 577, 631 (Ky. 2010). In the case before us, none of the errors were substantial enough to raise a legitimate question of actual prejudice. Consequently, there was no cumulative error.

Conclusion

For the forgoing reasons, the Floyd Circuit Court's order denying Appellant RCr 11.42 relief is hereby affirmed.

Minton, C.J.; Abramson, Cunningham, Keller, Noble, and Venters, JJ., sitting. All concur. Scott, J., not sitting.

COUNSEL FOR APPELLANT:

Euva Denean Blandford
Meggan Elizabeth Smith
Amy Robinson Staples
Department of Public Advocacy

COUNSEL FOR APPELLEE:

Jack Conway
Attorney General

Heather Michelle Fryman
Assistant Attorney General