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RENDERED: JUNE 13, 2019
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2018-SC-000126-MR

FRED FURNISH — APPELLANT

V.

ON APPEAL FROM KENTON CIRCUIT COURT
HONORABLE JAY DELANEY, SPECIAL JUDGE
NO. 98-CR-00384

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

I. BACKGROUND

On August 14, 1993, Fred Furnish was indicted by the Kenton County Grand Jury for murder, first-degree burglary, first-degree robbery, receiving goods and services obtained by fraud, and theft by unlawful taking of property over $300. The Commonwealth filed notice of its intent to seek the death penalty based on the aggravating circumstances of murder during the commission of a robbery in the first degree and a burglary in the first degree.

Furnish's case was tried to a jury which found him guilty of all charges and recommended a sentence of death. On direct appeal, Furnish's convictions were affirmed, but the sentence was reversed. The case was remanded to the

trial court for a new sentencing hearing on the murder charge. *Furnish v. Commonwealth*, 95 S.W.3d 34 (Ky. 2002).

The resentencing jury again recommended a sentence of death. On direct appeal this Court affirmed the second death sentence. *Furnish v. Commonwealth*, 267 S.W.3d 656 (Ky. 2007). The United States Supreme Court denied certiorari.

Furnish filed a Motion to Vacate and Set Aside his conviction pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42 in the Kenton Circuit Court. A hearing on his motion was held on May 29, 2012 through June 1, 2012. The hearing was continued and concluded on September 20, 2012. While his RCr 11.42 motion was pending, Furnish twice requested funding to hire various expert witnesses to testify in support of several of his claims. On May 20, 2013, the trial court entered an order denying the requests for expert funds and denying the ineffective assistance of counsel claims to which those experts were relevant. On that same date, the trial court set a briefing schedule. After several modifications to that schedule, the case was finally submitted to the court for decision on or about January 8, 2015. On June 2, 2017, the trial court entered an order denying the remainder of Furnish's claims. This appeal ensued. Specific facts will be provided as necessary to decide Furnish's claims on appeal.

II. STANDARD OF REVIEW

In reviewing an RCr 11.42 proceeding, the appellate court reviews the trial court's factual findings for clear error while reviewing the application of its

legal standards and precedents *de novo*. *Commonwealth v. Pridham*, 394 S.W.3d 867, 875 (Ky. 2012). For an RCr 11.42 motion to be successful, the defendant "must convincingly establish he was deprived of some substantial right justifying the extraordinary relief afforded by the post-conviction proceeding." *Bratcher v. Commonwealth*, 406 S.W.3d 865, 869 (Ky. App. 2012) (citing *Dorton v. Commonwealth*, 433 S.W.2d 117, 118 (Ky. 1968)).

The standard for reviewing a claim of ineffective assistance of counsel is found in *Strickland v. Washington*, 466 U.S. 668 (1984), and adopted in *Gall v. Commonwealth*, 702 S.W.2d 37, 39 (Ky. 1986). This standard is two pronged. The defendant must show that: (1) counsel's performance was deficient, and (2) counsel's deficient performance prejudiced him. *Strickland*, 466 U.S. at 687. The defendant must show that counsel's performance "fell below an objective standard of reasonableness," and was so prejudicial that he was deprived "of a fair trial and reasonable result." *Id.* at 688.

On appellate review, great deference is afforded to counsel's performance. There is a strong presumption that counsel acted reasonably and effectively. *Brown v. Commonwealth*, 253 S.W.3d 490, 498 (Ky. 2008); *Mills v. Commonwealth*, 170 S.W.3d 310, 328 (Ky. 2005) (citation omitted). To succeed in his ineffective assistance of counsel claim, "the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland*, 466 U.S. at 689 (citations omitted). In evaluating trial counsel's performance, "the reviewing court must focus on the totality of evidence before the judge or jury and assess the overall

performance of counsel throughout the case in order to determine whether the identified acts or omissions overcome the presumption that counsel rendered reasonable professional assistance." *Haight v. Commonwealth*, 41 S.W.3d 436, 441-442 (Ky. 2001), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009).

In addition to showing deficient performance, in order to succeed on an ineffective assistance of counsel claim, a defendant must also show that he was prejudiced by the deficient performance. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694 (citations omitted). Because jury verdicts to impose the death penalty must be unanimous, a different result could be had if there is a reasonable probability that even one juror would have struck a different balance between the aggravating and mitigating evidence. *Id.* and *Wiggins v. Smith*, 539 U.S. 510, 534 (2003).

Some errors are so serious as to be deemed structural errors. "[T]he defining feature of a structural error is that it 'affect[s] the framework within which the trial proceeds,' rather than being 'simply an error in the trial process itself.'" *Weaver v. Massachusetts*, — U.S. ——, 137 S.Ct. 1899, 1907-08, 198 L.Ed.2d 420 (2017) (internal citations omitted). Structural errors are not subject to harmless error analysis, as prejudice is presumed. *See Shane v.*

Commonwealth, 243 S.W.3d 336, 341 (Ky. 2007) ("Harmless error analysis is simply not appropriate where a substantial right is involved.").

III. ANALYSIS

A. Furnish's trial counsel was not ineffective in failing to obtain hearing assistance for Furnish during his 1999 trial.

Furnish's first claim of error in his RCr 11.42 proceeding is that he was unable to hear significant portions of his 1999 trial, which violated his rights under the Sixth and Fourteenth Amendments. At the time of his trial, Furnish was deaf in one ear and had diminished hearing in the other ear. He had had ear surgery as a child and other health issues that created this hearing impairment. At his original trial, Furnish was not provided with an interpreter or with any assistive technology to aid him in hearing the trial proceedings. When he could not hear something, he asked his attorneys what had happened, and they would provide him with a summary.

The post-conviction court found "no evidence that his hearing loss impaired his ability to communicate with his attorneys and hear the trial proceedings generally." The post-conviction court also found that Furnish only "occasionally would ask his attorney to repeat something that had been said." These are factual findings that we review for clear error.

On May 14, 2012, Furnish testified at a hearing on his motion to waive his appearance at his upcoming RCr 11.42 hearing. At that hearing, Furnish testified that "a lot of the time" he would have to ask his trial attorneys what was being said during the trial. He stated that this occurred approximately "six

or seven times" a day during trial. He also testified that "a few times" when he couldn't hear what was said he didn't even bother to ask his trial attorneys. The post-conviction court denied Furnish's request to waive his appearance at his upcoming RCr 11.42 hearing and ruled that his testimony at the May 14, 2012 hearing was not to be used as substantive evidence at the RCr 11.42 hearing. Furnish then chose not to testify at his RCr 11.42 hearing. Therefore, his testimony at the May 14, 2012 hearing was not evidence before the post-conviction court in ruling on the RCr 11.42 motion.

At Furnish's RCr 11.42 hearing, one of his trial attorneys, Michael Folk, testified. Folk testified that he and the rest of Furnish's trial team were aware of Furnish's hearing difficulties from early in the case. He stated that Furnish made several requests to have a hearing aid or a hearing test, and that it was obvious Furnish was unable to hear at times. He further testified that he had looked into obtaining money from the Department of Public Advocacy's "super fund" for hearing aids for Furnish but was unable to secure the money. Folk acknowledged that it was difficult to both pay attention at trial and answer Furnish's questions, and that he did not repeat trial testimony verbatim to Furnish when asked what was said.

Based on our review of the record, we do not find that the post-conviction court's findings of fact regarding Furnish's hearing difficulties are clearly erroneous. Therefore, we will use these facts in applying the law to the case at hand.

Prior to trial beginning, the trial judge addressed Furnish's hearing difficulties with him. He told Furnish, "I want to urge you, sir, that during the course of this trial....if you have any trouble hearing you need to inform your counsel so counsel can inform the court. The court will then either speak up or ask the witnesses to testify more loudly. We'll do our best." Folk testified that he never asked the trial court to stop the trial or for any other accommodations to assist Furnish in hearing and understanding testimony.

The first step in the *Strickland* analysis of a claim of ineffective assistance of counsel is whether trial counsel's performance was deficient. We do not find that trial counsel's performance as it relates to Furnish's hearing issues "fell below an objective standard of reasonableness." We must review trial counsel's actions from the time at which they were taken, not with the benefit of hindsight. It is not clear from the record what assistive technologies were available at the time of the trial or that trial counsel knew of their availability. Trial counsel had researched ways to obtain hearing aids for Furnish but were unable to do so. They made some accommodations for Furnish, including having an attorney answer his questions about what was occurring during the proceedings. While perhaps trial counsel could have or should have requested assistance from the post-conviction court in obtaining hearing assistance for Furnish, we do not find that trial counsel's performance fell outside of the range of professionally competent assistance.

Because we do not find Furnish's trial counsel's performance to be deficient, this Court declines to decide if, had there been an error, this error would have been structural as Furnish argues.

B. Juror A[1] was qualified to serve on Furnish's resentencing trial.

Furnish's next claim of error is that Juror A was not qualified to sit as a juror in his resentencing trial. The Commonwealth's theory of Furnish's guilt was that he used his employment as a carpet cleaner with Kiwi Carpet to gain access to his victim's home, to murder her, and to steal from her. Juror A realized, mid-trial, that Furnish had been inside of his home cleaning his carpets. Juror A did not reveal this information to the trial court. Furnish alleges that this relationship with Furnish made Juror A unqualified to serve on Furnish's resentencing jury.

"Defendants are guaranteed the right to an impartial jury by the Sixth Amendment to the United States Constitution, as well as Sections Seven and Eleven of the Kentucky Constitution. Denial of a defendant's right to an impartial jury is a structural error." *Commonwealth v. Douglas*, 553 S.W.3d 795, 799 (Ky. 2018) (citing *Hayes v. Commonwealth*, 175 S.W.3d 574, 586 (Ky. 2005)). Thus, we must assess Furnish's claim of a tainted jury for structural error. As stated previously, structural errors are not subject to harmless error analysis, as prejudice is presumed.

[1] Juror A, Juror B, and Juror C are used throughout this opinion instead of the jurors' names to protect the identity of the jurors.

Juror A testified at length at Furnish's RCr 11.42 hearing. He testified that he had used Kiwi Carpets and believed that Furnish had been inside of his home cleaning his carpets. He testified that he did not realize this until after he had been seated on the jury for the re-sentencing trial and had begun to hear evidence, but before the jury recommended a sentence of death. No testimony was elicited about how this familiarity with Furnish did or did not affect his deliberations. Juror A did not disclose this information to the court or counsel during the resentencing trial.

In analyzing this issue, this Court must determine whether Juror A's prior association with Furnish made him biased, and therefore unqualified to sit on Furnish's resentencing jury. "Doubts concerning whether or not there was bias must be resolved in the defendant's favor....A juror is qualified to serve unless there is a showing of actual bias....It is incumbent upon the party claiming bias or partiality to prove the point." *Key v. Commonwealth*, 840 S.W.2d 827, 830 (Ky. App. 1992) (internal citations omitted).

Furnish argues that "the realization that Fred [Furnish] was inside his own home, cleaning his own carpets, made Juror A wonder whether he could have been one of Fred's victims." This statement, however, is pure speculation. No testimony was elicited from Juror A that his prior knowledge of Furnish created bias, nor was there any implication that it created bias. Therefore, even under a structural error analysis, this Court finds that Juror A was not unqualified to sit on Furnish's resentencing jury and finds no error.

C. Juror B's consultation with her priest was harmless error.

Furnish's third claim of error relates to Juror B's consultation with her priest during the resentencing trial, sometime after she was selected for the jury but prior to the verdict being rendered. Furnish argues that Juror B's consultation with her priest about the Catholic Church's position on the death penalty violated the trial court's instructions and interjected extrajudicial evidence into her own deliberative process. The post-conviction court found that her conversation with her priest did violate the trial court's admonition that jurors not discuss the case with anyone but found the error to be harmless. This Court agrees with the post-conviction court.

During individual *voir dire* at Furnish's resentencing trial, Juror B was questioned about her views of the death penalty. She stated numerous times, unequivocally, that she could consider all of the possible penalties, including the death penalty. She did state that "the death penalty would be very harsh" and that she would be less likely to impose some of the potential penalties than others, but reiterated that she would be open to imposing all of the penalties.

At some point after she was selected to serve on Furnish's resentencing jury, Juror B consulted with her priest about the Catholic Church's stance on the death penalty. Details of the case were not discussed. Her priest merely told her that generally the Catholic Church was against the death penalty, but there were some exceptions. The specifics of those exceptions were not discussed. As the post-conviction court found, this was a clear violation of the trial judge's admonition to the jury.

Finding that an error occurred, this Court must determine whether that error was harmless beyond a reasonable doubt. Prior to speaking with her priest, Juror B had already stated, unequivocally, that she could consider all possible penalties, including the death penalty. The conversation with her priest, at most, confirmed that her beliefs about the death penalty were consistent with her church's doctrine. The conversation did not create those beliefs or cause her to change her beliefs from being unable to consider the death penalty to suddenly being able to consider it as a potential punishment. In fact, Juror B testified at Furnish's RCr 11.42 hearing that the conversation with her priest actually *discouraged* her from recommending a sentence of death. Based on our review of the record, we find this error harmless beyond a reasonable doubt.

D. Jurors A and C did not provide dishonest answers during their *voir dire* in Furnish's resentencing trial.

Furnish's next claim of error is that Jurors A and C failed to answer questions honestly during the resentencing trial *voir dire*. This Court has previously described the inquiry that must be completed by a reviewing court when a defendant argues that a juror was untruthful in his or her answers during *voir dire*.

> Essentially there are three elements a defendant must show to deserve a new trial because of juror mendacity during *voir dire*. First, a material question must have been asked. Second, the juror must have answered the question dishonestly. And finally, the truthful answer to the material question would have subjected the juror to being stricken for cause.

Taylor v. Commonwealth, 175 S.W.3d 68, 74–75 (Ky. 2005), *as modified on denial of reh'g* (Nov. 23, 2005). Furnish argues that Juror C was dishonest in two separate areas of inquiry, and A was dishonest in one. We will discuss each allegation of dishonesty in turn.

1. Juror C was never asked a material question that would require him to disclose that his father was a bailiff.

Furnish argues that Juror C was dishonest in his answer to the question of whether he knew the trial judge "or [was] close to anyone connected to the people involved in the case." This question was never asked during the group *voir dire*. The group *voir dire* included questions about any relationships potential jurors had with the attorneys in the case, those attorneys' assistants, the victim, the defendant, the victim's daughter, and the defendant's family members. They were not asked about relationships with "anyone connected to the case" as Furnish alleges in his brief. Further, Juror C was not asked if he was "close to anyone connected to the people involved in the case" during his individual *voir dire*. Therefore, the first part of the *Taylor* analysis has not been met by Furnish – a material question was never asked of Juror C that would require him to disclose that his father was a bailiff in the courtroom during portions of Furnish's resentencing trial. Because Furnish did not meet the first prong of the *Taylor* test, we decline to address the other two prongs and find no error.

2. Juror C was able to consider the full range of punishments.

Furnish argues that Juror C was also dishonest when he said during *voir dire* that he could consider the full range of penalties. "A question about whether a potential juror believes she can consider the full range of penalties upon a conviction for murder is about as material as they come." *Taylor*, 175 S.W.3d at 75. Juror C was asked during individual *voir dire* about his ability to consider the entire range of penalties. Having determined that a material question was asked, we next turn to the issue of whether Juror C's answer was dishonest.

In our analysis, the post-conviction court's findings of fact are given great deference. We will review its factual findings for clear error. *Pridham*, 394 S.W.3d at 875. The post-conviction court found that Juror C did not provide false information during *voir dire*. During Juror C's individual *voir dire*, he confirmed at least three different times that he could consider the full range of penalties in a murder case. He further confirmed that he could consider the lower range of penalties even if the murder at issue had an "extra factor that makes it one of the more serious ones." Furnish's argument that Juror C was dishonest in providing these answers relies primarily on Juror C's 2010 affidavit stating that he would "automatically vote to impose a death sentence for a premeditated murder." Juror C's testimony at Furnish's RCr 11.42 hearing regarding his feelings about the death penalty was not certain. It was not clear when he formed the opinion that he stated in his affidavit regarding the death penalty. Based on our review of the record, we do not find that the

post-conviction court's factual finding that Juror C did not provide false information is clearly erroneous. Therefore, we find no error.

3. Juror A was able to consider the full range of punishments.

Finally, Furnish argues that Juror A was dishonest when he said that he could consider the full range of penalties. As stated above, "A question about whether a potential juror believes she can consider the full range of penalties upon a conviction for murder is about as material as they come." *Taylor*, 175 S.W.3d at 75. Juror A was asked during individual *voir dire* about his ability to consider the entire range of penalties. We now turn to whether Juror A's answer to this inquiry was dishonest.

Again, we will review the post-conviction court's findings of fact for clear error. The post-conviction court found that Juror A did not provide false evidence during *voir dire*. During individual *voir dire*, Juror A acknowledged that, after doing "a little bit of soul searching", he believed that he could consider the full range of penalties. He even stated that imposing the death penalty would cause him some concern, which is why he had to give it great thought prior to his individual *voir dire*.

In 2010, Juror A signed an affidavit and in 2012 he testified at Furnish's RCr 11.42 hearing. Furnish argues that this affidavit and that testimony show that Juror A was not truthful in his *voir dire* in 2004. Relevant to this claim of error, in 2012, Juror A testified that he was a huge proponent of the death penalty, partly because it costs too much money to keep people in prison. He also testified he could not have imposed a sentence less than death for an

aggravated, intentional murder. He further testified that he held those beliefs while he was a juror in Furnish's resentencing trial, but that he kept an open mind while he was a juror. He confirmed during his testimony at the RCr 11.42 hearing that during *voir dire*, his answer that he could consider all of the possible punishments was true at the time that he gave it. He did also state that his feelings regarding the death penalty had been impacted by his service on the jury at Furnish's resentencing trial. After reviewing the record, we do not find that the post-conviction court's factual finding that Juror A did not provide false evidence during *voir dire* is clearly erroneous. Therefore, we find no error.

E. Jurors A and C were able to consider mitigation evidence.

Furnish's next claim of error is that Jurors A and C were unable to consider mitigation evidence and that this violated his Sixth and Fourteenth Amendment rights to a fair and impartial jury.

1. Juror A

During Juror A's testimony at Furnish's RCr 11.42 hearing, he stated that he viewed the resentencing hearing as "a Furnish Family reunion" that the taxpayers had to pay for. He also stated that he believed the mitigation evidence provided on behalf of Furnish was "too little, too late" and that even if the Pope had testified on behalf of Furnish, it would not have made a difference in his verdict. He further stated that nothing would have changed his mind about sentencing Furnish to death.

The post-conviction court found that Juror A "developed these views during the presentation of the case." We agree with this factual finding by the post-conviction court. Juror A stated that his views were impacted by the evidence that he heard during Furnish's resentencing hearing. He was deeply disturbed by the heinous nature of this particular crime. He became emotional and hostile during his testimony at the RCr 11.42 hearing, but it was clear this was based on what he experienced during Furnish's resentencing trial.

Furnish argues that because Juror A "developed these views during the presentation of the case," he held them at the time he voted to impose the death penalty and was therefore unable to consider mitigating evidence. After reviewing the record, we disagree. Juror A did not completely refuse to consider mitigating evidence presented on behalf of Furnish, even at the time he deliberated and voted to impose the death penalty. He just did not find the mitigating evidence to be persuasive after hearing the factual evidence regarding the murder. We do not find error in the post-conviction court's finding regarding Juror A's consideration of mitigation evidence.

2. Juror C

Furnish's argument that Juror C was unable to consider mitigation evidence during the resentencing trial is based almost exclusively on one paragraph in an affidavit Juror C signed on June 22, 2010. This paragraph states as follows:

> Whether I would automatically vote to impose a death sentence for an intentional murder would depend solely on the facts of the crime. I would automatically vote to impose a death sentence for a premeditated murder. Once I knew a case

> involved a premeditated murder, I would not need or want any further information before deciding to impose a death sentence. I felt the same way at the time I served on Mr. Furnish's sentencing jury.

Juror C did not provide any additional explanation of this statement during his testimony at Furnish's RCr 11.42 hearing in 2012. He testified that he was not sure if he felt this way about the death penalty at the time he served on the sentencing jury. He then said that he "guess[ed]" on the day that he signed the affidavit he had said that he felt that way when he served on the sentencing jury. His testimony was rather vague and uncertain. Based on our review of the record, it is unclear when Juror C actually formed these opinions and whether he held them at the time that he voted to sentence Furnish to death. We do not find error in the post-conviction court's finding regarding Juror C's consideration of mitigation evidence.

F. Counsel was not ineffective in failing to present evidence regarding Furnish's time spent in solitary confinement.

Furnish's next argument is that his counsel at his resentencing trial was ineffective for failing to investigate and present evidence regarding his extended stay in solitary confinement. As stated before, there is a strong presumption that trial counsel's performance was effective. *Brown*, 253 S.W.3d at 498; *Mills*, 170 S.W.3d at 328. We must assess counsel's overall performance to determine whether an individual omission can overcome that presumption. *Haight*, 41 S.W.3d at 441-442. "The reasonableness of an investigation by defense counsel must take into consideration all the circumstances. It is not an investigation that the best criminal defense lawyer in the world would

conduct." *Sanders v. Commonwealth*, 89 S.W.3d 380, 390 (Ky. 2002), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009).

Furnish's counsel at his resentencing trial called multiple witnesses to testify, including family members and an employee of the Kenton County Detention Center. Defense counsel chose to focus the presentation of its mitigation evidence on Furnish's good behavior since the crime was committed. The evidence presented during the resentencing trial was consistent with the overall theory of mitigation that Furnish was like the "Prodigal Son." This involved acknowledging prior bad behavior, without providing excuses, and then focusing on subsequent good behavior. Failure to present evidence regarding Furnish's extended stay in solitary confinement can be seen as sound trial strategy, given this theory of mitigation. Therefore, we find that Furnish's resentencing trial counsel's performance was not deficient, and therefore was not ineffective under *Strickland.*

G. Counsel was not ineffective in failing to present evidence of Furnish's drug addiction.

We next turn to Furnish's argument that his resentencing trial counsel was ineffective for failing to investigate and present evidence regarding his drug addiction. At the RCr 11.42 hearing, resentencing trial counsel Sornberger testified that he and co-counsel had consulted with Ed Dearing, a drug addiction counselor. He planned to call Mr. Dearing to testify at Furnish's resentencing hearing, but eventually chose not to do so. This decision was based on Sornberger's belief that Mr. Dearing was not qualified to testify as an

expert in the area in which Sornberger had hoped he would testify. He could not remember exactly when this decision was made, but he believed it was made after the resentencing trial was already underway. Sornberger admitted that he had wanted to present expert testimony regarding cocaine addiction and its effects but was unable to because he did not have a qualified expert. He further testified, however, that he believed his decision not to call Mr. Dearing to testify was in Furnish's best interest.

This is not a case "where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence." *Harrington v. Richter*, 562 U.S. 86, 106 (2011). Had Furnish's counsel made a strategic decision not to call an expert to testify regarding cocaine addiction, that decision would likely not be challenged. However, that is not the case here. Sornberger made a strategic decision *to* call an expert to testify about cocaine addiction, but then hired someone who was not qualified to provide the expert testimony he wanted to introduce. This was not a tactical decision but was deficient performance.

Because we find that resentencing trial counsel's performance fell below an objective standard of reasonableness, we must now determine whether that deficient performance prejudiced Furnish. At Furnish's resentencing trial, jurors heard from the victim's daughter, as well as from members of Furnish's family and an employee of the Kenton County Detention Center. They heard that Furnish was addicted to cocaine when he committed the crime. They heard that he had previously attempted and failed at drug treatment. They

heard that prior to killing Jean Williamson, he asked his sister to help him get back into drug treatment. The jury heard that Furnish had a big heart, cared about other people, and tried hard to rebuild family relationships. They heard about his good behavior since being incarcerated for this murder.

The jury also heard, however, some of the details of the murder itself. They saw photos of Ms. Williamson's body. They heard that Furnish had pled guilty to murdering someone else. They heard that during his incarceration prior to committing these murders, Furnish assaulted a corrections officer and escaped from a minimum security prison.

Given all of the evidence presented to the jury at Furnish's resentencing trial, this Court does not believe a reasonable probability exists that the result would have been different had defense counsel introduced expert testimony regarding the effects of cocaine addiction. Therefore, we do not find counsel's performance ineffective under *Strickland.*

H. Cumulative Error

Furnish's final argument is that his conviction should be reversed on the basis of cumulative error. Cumulative error is "the doctrine under which multiple errors, although harmless individually, may be deemed reversible if their cumulative effect is to render the trial fundamentally unfair. We have found cumulative error only where the individual errors were themselves substantial, bordering, at least, on the prejudicial." *Brown v. Commonwealth,* 313 S.W.3d 577, 631 (Ky. 2010) (internal citation omitted). While some of the alleged errors in this case arguably stem from ineffective assistance of counsel,

none were so great as to raise any real question of prejudice. Even taken together, they did not render the trial fundamentally unfair. Therefore, we decline to reverse Furnish's conviction based on cumulative error.

IV. CONCLUSION

For the foregoing reasons, we affirm the Kenton County Circuit Court's denial of Furnish's motion to vacate and set aside his conviction pursuant to RCr 11.42.

All sitting. All concur.

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