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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2025-CA-0467-MR

ROBERT H. STONE — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 20-CR-00967-002

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CALDWELL, ECKERLE, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Robert H. Stone, by counsel, appeals the March 17, 2025, order of the Kenton Circuit Court which denied his motion for relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42.[1] Following careful examination of the record and the law, we affirm.

[1] Attorney Mattew M. Robinson was permitted to withdraw as counsel for Robert H. Stone after filing the appellant's brief by order entered April 14, 2026. The Court further permitted Stone to file a Reply Brief, *pro se*.

Background

In the early hours of June 5, 2020, 62-year-old James Thompson was home alone in his apartment in Covington. Thompson heard a knock on his door and when he looked through the peephole, he saw a young woman who he did not recognize. Thinking that she might have been seeking help, Thompson opened the door.[2]

As Thompson opened the door, two men rushed inside the apartment. Thompson recognized one as his neighbor, Anthony Cornist. He did not recognize the second man who was younger and larger than Cornist. That person was later identified as Stone.

Surveillance video shows Cornist and Stone dragging Thompson into the hallway, with Stone punching Thompson, who fell onto the floor. Stone continued punching Thompson and kicked him in the face. At that point, Thompson passed out and the two assailants searched Thompson's pockets. Finding nothing, they felt around Thompson's neck, apparently examining a necklace believed to be a rosary.[3]

[2] The identity of the woman will be fleshed out below.

[3] The surveillance video did not capture any audio during the attack.

Cornist is seen picking up an unknown object and the two men proceeded to the elevator where the unknown woman had the door open and waiting. All three individuals then left together.

Thompson summoned emergency medical assistance. He had received a broken arm which was treated with permanent surgical pins. Thompson also sustained a broken eye socket. It was stitched and caused temporary sinus problems as it healed.

On October 1, 2020, Stone was indicted for complicity to burglary in the first degree, complicity to robbery in the first degree, and assault in the second degree. On December 2, 2021, a jury found Stone guilty of all three charges. He received an aggregate sentence of thirty years' imprisonment.

The Kentucky Supreme Court affirmed Stone's conviction on September 28, 2023. On October 2, 2024, Stone filed a motion to vacate his sentence pursuant to RCr 11.42, alleging ineffective assistance of counsel. On November 18, 2024, he filed an additional motion seeking an evidentiary hearing. The Kenton Circuit Court denied both motions by order entered on March 17, 2025. This appeal followed.

Preliminary Matter

As a preliminary matter, Appellant's brief does not comply with the Kentucky Rules of Appellate Procedure (RAP). RAP 32 controls organization and

content of briefs. RAP 32(A)(3) instructs that the statement of the case, which includes the facts, must have "ample references to the specific location in the record supporting each of the statements contained in the summary."

Stone's brief does not include any citations to the trial record. It relies on his RCr 11.42 motion filed in the trial court and the trial court's order denying the motion. "A lower-court's discussion of the facts cannot satisfy our obligation to read or view the trial proceeding[.]" *Commonwealth v. Roth*, 567 S.W.3d 591, 594 (Ky. 2019). This Court has specifically stated that citing to a brief's own appendix does not meet the requirement of citing to the record. *Serv. Fin. Co. v. Ware*, 473 S.W.3d 98, 102 n.4 (Ky. App. 2015). "Supporting factual assertions with pinpoint citations may, in fact, be the most substantial requirement of [this Rule]." *Roth*, 567 S.W.3d at 595.

Among the sanctions that may be imposed for failure to comply with the Rules, is striking the brief or dismissing the appeal. RAP 10(B)(3) and (5). In this case, however, we will consider Stone's brief as the issues are not complicated.

Standard of Review

To succeed on a claim of ineffective assistance of counsel, an appellant must prove that trial counsel's assistance was ineffective, which resulted in actual prejudice. *Strickland v. Washington*, 466 U.S. 668, 692-93 (1984). "A

motion made under RCr 11.42 must state facts to support it." *Sharp v. Commonwealth*, 385 S.W.2d 317 (Ky. 1964). An evidentiary hearing is only necessary when a defendant presents "a material issue of fact that cannot be determined on the face of the record." *Cawl v. Commonwealth*, 423 S.W.3d 214, 218 (Ky. 2014) (quoting RCr 11.42(5)). The alleged material fact must be "sufficient to invalidate the conviction" for a court to be compelled to conduct a hearing. *Cawl*, 423 S.W.3d at 218.

This Court reviews a denial of an RCr 11.42 motion to determine whether the trial court abused its discretion. *Bowling v. Commonwealth*, 981 S.W.2d 545, 548 (Ky. 1998). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

Analysis

Stone first claims that he should have been granted an evidentiary hearing because his motion was *pro se*. Stone asserts that the trial court held him to the higher standard which is applied to attorneys. He essentially says that because he did not use "legalese" to present his arguments, the trial court did not properly consider whether his claims were refuted by the record.

Stone's argument is unsupported by the record. The trial court entered a thorough order that addressed all of Stone's claims. The order was

thoughtful and not dismissive of Stone's arguments. We note that Stone's appellate counsel abandoned most of his claims, presumably finding them to be meritless. We agree with the trial court that all of Stone's contentions are easily disposed of by examination of the record and an evidentiary hearing was not necessary.

Stone next claims that the Commonwealth withheld exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). "There is no question that a defendant's due process rights are violated when a prosecutor, either in good or bad faith, knows of and fails to disclose material evidence to the defense." *Nunley v. Commonwealth*, 393 S.W.3d 9, 13 (Ky. 2013).

Stone's argument is related to the unknown woman in the video presented at trial. She was subsequently identified as Dairee Brown, and she plead guilty to several offenses arising from her participation in the attack on Thompson.[4] Stone alleges that when Brown entered her guilty plea, she denied having knowledge that Stone and Cornist stole anything from Thompson. Stone characterizes Brown's statements as exculpatory evidence that the Commonwealth should have shared with defense counsel.

Stone alleges that the Commonwealth failed to provide Brown's testimony from "a hearing held in her case" which refuted grand jury testimony

[4] Kenton Circuit Court No. 22-CR-00271.

and the Commonwealth's trial theory in his case. Stone's Brief at 13. He claims that Brown corroborated his defense that he did not actually take anything from Thompson during the assault and therefore, did not commit robbery.

We agree with the trial court's finding that Brown's statements were not exculpatory in nature. "Exculpatory evidence is defined as 'evidence favorable to the accused and material to guilt or punishment[.]'" *Dunn v. Commonwealth*, 360 S.W.3d 751, 767-68 (Ky. 2012) (quoting *Commonwealth v. Barroso*, 122 S.W.3d 554, 564 (Ky. 2003)). Evidence is material "'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Mills v. Commonwealth*, 718 S.W.3d 577, 582 (Ky. 2025) (quoting *Kyles v. Whitley*, 514 U.S. 419, 433-34 (1995)).

Brown's alleged testimony would not have been material to Stone's defense. There is no reasonable probability that it would have changed the outcome of Stone's trial. The jury watched a video of the attack and heard Stone testify that while it appeared he went through Thompson's pockets, he denied doing so. According to Stone, Brown stated that she did not see him take anything from Thompson. The video shows that Brown's back was turned to Stone, Cornist, and Thompson during the attack. She had walked away to the elevator. The video refuted any testimony by Brown that Stone did not commit the robbery.

Furthermore, the Commonwealth could not have withheld anything with respect to Brown because she was not charged until March of 2022, approximately three months after Stone's trial. Stone knew her identity and even perjured himself to avoid identifying her at his trial.[5] The prosecution asked him on cross examination if Brown was in the video, and Stone answered that she was not. He refused to identify her because he did not want to implicate her in the crime.

We also note that neither the grand jury proceedings nor the purported hearing in Brown's case are included in the record on appeal. "We will not engage in gratuitous speculation as urged upon us by appellate counsel, based upon a silent record. It has long been held that, when the complete record is not before the appellate court, that court must assume that the omitted record supports the decision of the trial court." *Commonwealth v. Thompson*, 697 S.W.2d 143, 145 (Ky. 1985); *see also* RAP 25(B).

Next, Stone claims that his counsel was ineffective by failing to file a motion for a separate trial from his co-defendant. The trial court ruled correctly when it found that such a motion would have been futile; therefore, counsel was not ineffective. Our courts possess "a strong preference for . . . joint trials."

[5] According to CourtNet, Stone was convicted of perjury resulting from his testimony in this case. *See* Kenton Circuit Court Action No. 22-CR-00288. This Court takes judicial notice of those proceedings.

Bratcher v. Commonwealth, 151 S.W.3d 332, 340 (Ky. 2004). A trial court must order separate trials of co-defendants when a joint trial would prejudice the Commonwealth or a defendant. RCr 8.31. In the context of the propriety of separate trials, "'[p]rejudiced' means unfairly prejudiced. A defendant is prejudiced, of course, by being tried at all." *Ware v. Commonwealth*, 537 S.W.2d 174, 176 (Ky. 1976), *overruled on other grounds as recognized by Jenkins v. Commonwealth*, 496 S.W.3d 435, 471 n.11 (Ky. 2016).

Stone's claim of error is based on admission of a confessional letter which Cornist had written to the property manager of the apartments where Thompson lived. In it, Cornist admits being at Thompson's apartment but claims to not know who the other man and woman in the video were. He did not identify Stone. Stone argues that he was unfairly prejudiced because he was unable to cross-examine Cornist concerning the letter.

We fail to perceive the merit of this argument. Stone never denied his participation in the crime. He claims that Cornist should have been questioned about Stone's knowledge or lack of knowledge and intentions regarding theft at the time they went to Thompson's apartment. However, there is no proof that Cornist's potential testimony would have been favorable to Stone. At best, it would have been speculative. Instead, the jury heard Thompson testify that he heard Cornist and Stone talk about finding money and taking his television. Stone

then offered his own testimony denying that he had intended to commit a theft. There was no error regarding separate trials.

Stone next argues that his counsel was ineffective by failing to investigate and impeach witnesses. Specifically, Stone looks again to Dairee Brown as a prospective witness. He asserts that if counsel had investigated her, they would have learned that she would have testified in his favor. This argument is totally speculative without any evidentiary basis.

As the Commonwealth pointed out in its closing argument, if the then-unidentified woman (Dairee Brown) in the video had been present, she would have been a co-defendant and would have had the constitutional right to not testify. Furthermore – as mentioned above – Stone refused to identify Brown during his testimony. Therefore, he cannot blame his counsel for her not being called as a witness.

Stone likewise argues that his counsel failed to effectively impeach Thompson's trial testimony based upon his initial interview with police investigators and his grand jury testimony. However, neither the grand jury proceedings nor Thompson's police interview is included in the record before this Court. Again, as we have previously stated, in cases with missing records, we must assume the trial court was correct. *Thompson*, 697 S.W.2d at 145.

Stone's next argument is that counsel was ineffective by not moving for a mistrial based on prosecutorial misconduct throughout trial. Stone's counsel did not object contemporaneously; thus, our review is whether the prosecutor engaged in flagrant misconduct. *Duncan v. Commonwealth*, 322 S.W.3d 81, 87 (Ky. 2010).

The test to determine whether a prosecutor's remarks constitute flagrant misconduct is "'(1) whether the remarks tended to mislead the jury or to prejudice the accused; (2) whether they were isolated or extensive; (3) whether they were deliberately or accidentally placed before the jury; and (4) the strength of the evidence against the accused.'" *Dickerson v. Commonwealth*, 485 S.W.3d 310, 329 (Ky. 2016) (quoting *Mayo v. Commonwealth*, 322 S.W.3d 41, 56 (Ky. 2010)). We note that in Stone's direct appeal, our Supreme Court applied the *Dickerson* test to a separate claim of error and found the evidence of Stone's guilt "overwhelming." *Stone v. Commonwealth*, No. 2022-SC-0104-MR, 2023 WL 6372892, at *14 (Ky. Sep. 28, 2023). With the fourth prong satisfied, our analysis could end. Nonetheless, we will briefly address Stone's arguments regarding the prosecutor's conduct during the trial.

Stone's first two contested instances of prosecutorial misconduct come from statements made during closing arguments. Closing arguments are not evidence and lawyers are afforded wide latitude to "draw reasonable inferences

from the evidence and propound their explanations of the evidence and why the evidence supports their particular theory of the case." *Wheeler v. Commonwealth*, 121 S.W.3d 173, 180-81 (Ky. 2003). Stone first takes issue with the Commonwealth's theory that Stone and Cornist attacked Thompson to steal his disability check. Stone claims that the Commonwealth wanted to simply inflame the jury. We disagree. Thompson testified that his income was a monthly disability check which he received on the third day of the month. Cornist was acquainted with him and would have known about the check. The attack was within 48 hours of when Thompson received his check, and Thompson heard Stone and Cornist arguing about finding his money. We agree with the trial court that it was reasonable for counsel to not object to the prosecutor's statements and had an objection been sustained, it would not have affected the jury's verdict.

Secondly, Stone claims that his trial counsel should have objected when the Commonwealth remarked that Cornist sought a hitman to assist him in robbing Thompson. Stone claims that the Commonwealth unfairly characterized him as a killer. This is not supported by the record. For context, both Stone and Cornist were on trial for attacking Thompson. Both Stone and Thompson testified that they had never met each other. Cornist was the common link. In parsing out its robbery theory, the Commonwealth pointed out to the jury what was visibly obvious in the video – Thompson is significantly physically larger than Cornist.

Therefore, as the Commonwealth explained, Cornist needed an accomplice to commit the robbery. Unfortunately for Stone, when the investigator testified about the process of identifying Stone as the aggressor in the video, he used an exhibit of one of Stone's Facebook posts. It showed that Stone's self-chosen username was "robhitmanjr." The Commonwealth did not use the term hitman to suggest there had been a murder plot. An objection would not have been successful nor would it have affected the outcome of the case.

The next instance of prosecutorial misconduct alleged by Stone revolves around an erroneous statement by the Commonwealth that Thompson testified he was aware that Stone and Cornist went through his pockets. The trial court sustained this objection. Nonetheless, Stone argues counsel should have moved for a mistrial based on this false statement. Again, we disagree. The video record shows Stone reaching into Thompson's pockets, which supported the trial court's position that a mistrial was not warranted.

Finally, Stone claims that his trial counsel should have objected to what he characterizes as victim impact testimony during the guilt phase of his trial. At the beginning of Thompson's testimony, he explained that he was a retired veteran whose sole income was a disability check. Stone asserts this testimony was improper. Evidence of a victim's background is relevant to understanding the circumstances of a crime and is permissible evidence in the guilt phase of a trial.

Richmond v. Commonwealth, 534 S.W.3d 228, 233 (Ky. 2017). Impermissible victim impact evidence, on the other hand "is 'generally intended to arouse sympathy for the families of the victims, which, although relevant to the issue of penalty, is largely irrelevant to the issue of guilt or innocence.'" *Id*. (quoting *Ernst v. Commonwealth*, 160 S.W.3d 744, 763 (Ky. 2005), *overruled on other grounds by Mason v. Commonwealth*, 559 S.W.3d 337 (Ky. 2018)). In this case, it was relevant for the victim to identify his source of income because it provided motivation for the attack. Furthermore, Stone claimed during the trial that Thompson had been the aggressor. That made Thompson's physical condition also relevant to the case. *See Ernst*, 160 S.W.3d at 763, *overruled on other grounds by Mason*, 559 S.W.3d 337. We agree with the trial court that any objection to this testimony would have been futile and there is nothing in the record to indicate that this testimony would have affected the outcome of the trial. To the extent there was error, it was harmless error at most. *Hubers v. Commonwealth*, 617 S.W.3d 750, 786 (Ky. 2020). Based on our review of the record, Stone has not set forth any evidence that constitutes prosecutorial misconduct, flagrant or otherwise.

Finally, as Stone has not demonstrated that his counsel committed any substantive errors at trial, Stone's claim of cumulative error must also fail. *See Elery v. Commonwealth*, 368 S.W.3d 78, 100 (Ky. 2012).

In summation, the trial court did not abuse its discretion in denying Stone's motion. Accordingly, for the reasons stated, we affirm the March 17, 2025, order of the Kenton Circuit Court denying Stone's motion for RCr 11.42 relief.

ALL CONCUR.

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