RENDERED: JANUARY 17, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001763-MR

HARRY ROBERT MCCROBIE — APPELLANT

v.

APPEAL FROM TAYLOR CIRCUIT COURT
HONORABLE ALLAN RAY BERTRAM, JUDGE
ACTION NO. 03-CR-00108

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; DIXON AND VANMETER, JUDGES.

ACREE, CHIEF JUDGE: The Taylor Circuit Court denied appellant Harry McCrobie's RCr[1] 11.42 motion to vacate, set aside, or correct the judgment against him due to ineffective assistance of counsel without an evidentiary hearing. McCrobie declares this was error. We disagree; accordingly, we affirm.

[1] Kentucky Rules of Criminal Procedure.

I. Facts and Procedure

A jury found McCrobie guilty of first-degree burglary, first-degree assault, three counts of first-degree wanton endangerment, and kidnapping. On November 1, 2005, the circuit court entered a judgment consistent therewith and sentenced him to twenty-four years' imprisonment. The underlying course of events was succinctly stated by the Kentucky Supreme Court in its opinion affirming McCrobie's convictions:

> McCrobie and his roommate [Will Shively] had a history of a violent relationship. The roommate finally moved out of the apartment and stayed with his sister, her husband and two children in a nearby community. [On July 29, 2003,] McCrobie appeared at the sister's home and returned some mail and personal items to his former roommate. After receiving the items, the roommate closed the front door. McCrobie then pulled out a large caliber revolver and started shooting. The first shot went through the front door and struck the sister resulting in life threatening arterial bleeding. She ultimately lost the use of her hand and wrist despite emergency treatment. The roommate took his bleeding sister and the two children and tried to hide in a bedroom. More shots were fired by McCrobie who found the group in the bedroom and while brandishing the hand gun, ordered the former roommate to leave with him or he would kill the sister and her children. McCrobie forced his former roommate into a vehicle and the two drove away. McCrobie continued to threaten the former roommate with the handgun. Finally, the victim jumped from the moving vehicle and sought shelter in a nearby store. The police arrived and arrested McCrobie ending the ordeal.

McCrobie v. Commonwealth, 2005-SC-0886-MR, 2006 WL 2987082, at *1 (Ky. Oct. 19, 2006).

On October 22, 2009, McCrobie collaterally attacked the judgment against him. In his RCr 11.42 motion, McCrobie claimed he received ineffective assistance of counsel because his trial counsel: (1) compelled McCrobie to sign a waiver of mandatory disqualification without discussing the document or adequately explaining the familial relationship between the presiding judge and the Commonwealth Attorney; and (2) failed to investigate and present to the jury evidence of McCrobie's (i) mental illness, (ii) involuntary intoxication, and (iii) status as a victim of domestic violence. He also moved for an evidentiary hearing. The Commonwealth opposed the motion.[2] By order entered August 24, 2011, the circuit court denied McCrobie's RCr 11.42 motion without conducting an evidentiary hearing. From this order, McCrobie appeals.

I. Analysis

McCrobie contends the trial court erred when it summarily denied his RCr 11.42 motion without first conducting an evidentiary hearing. McCrobie argues the factual disputes raised by his motion could not be adjudicated by reference to the record alone. McCrobie further asserts that he presented meritorious allegations of counsel's deficient performance, supported by specific facts, and maintains he was prejudiced by counsel's ineffectiveness.

[2] The Commonwealth evidently spoke with McCrobie's trial counsel and conveyed the attorney's trial strategy, investigatory steps, and investigatory findings in its response opposing McCrobie's RCr 11.42 motion. The circuit court's order reveals it relied on several of those representations. While we applaud the Commonwealth for its effort, we caution it to avoid similar practices in the future. To allow the Commonwealth to refute a movant's ineffective-assistance allegations by simply conveying trial counsel's tactics in its responsive motion would render meaningless RCr 11.42(5)'s mandate requiring an evidentiary hearing when a material issue of fact exists that cannot be determined on the face of the record.

A movant seeking RCr 11.42 relief is only entitled to an evidentiary hearing if there is a "material issue of fact [raised] that cannot be determined on the face of the record[.]" *Commonwealth v. Elza*, 284 S.W.3d 118, 120 (Ky. 2009) (quoting RCr 11.42(5)). This standard requires us to ascertain "whether the record refute[s] the allegations raised," not "whether the record support[s] the allegations." *Parrish v. Commonwealth*, 272 S.W.3d 161, 166 (Ky. 2008). Of course, the movant must describe factual allegations which, if true, demonstrate he is indeed entitled to RCr 11.42 relief. *See id.* (citation omitted); *Newsome v. Commonwealth*, 456 S.W.2d 686, 687 (Ky. 1970) ("An evidentiary hearing [on an RCr 11.42 motion] is not required when the issues presented may be fully considered by resort to the court record of the proceeding, or where the allegations are insufficient."). For that reason, whether McCrobie "is entitled to an evidentiary hearing accompanies [our] analysis of" his claims of ineffective assistance of counsel. *Parrish*, 272 S.W.3d at 67.

The two-prong *Strickland* test for ascertaining whether a defendant received ineffective assistance of counsel has been so often cited that it "has now become hornbook law." *Commonwealth v. Leinenbach*, 351 S.W.3d 645, 647 (Ky. 2011). "First, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).

We analyze the first *Strickland* element – deficient performance – utilizing an objective standard of reasonableness with an eye toward whether the claimed deficient acts or omissions fell outside the wide range of prevailing professional norms. *Id.* at 688-89, 104 S.Ct. at 2065. To satisfy this component, McCrobie must show that his trial counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Hodge v. Commonwealth*, 68 S.W.3d 338, 344 (Ky. 2001) (citation omitted).

The second component – prejudice – "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. Prejudice is established if, but for counsel's errors, "the result of the proceeding would have been different." *Id.* at 694, 104 S.Ct. at 2068.

Now that we have identified the proper standards, we will address whether McCrobie was entitled to an evidentiary hearing on his asserted ineffective-assistance-of-counsel claims.

A. Waiver of Judicial Disqualification

McCrobie first asserts he was entitled to an evidentiary hearing on his allegation that trial counsel ineffectively advised him concerning the mandatory disqualification of the trial judge. It is undisputed that a waiver of disqualification was necessary because the trial judge was the Commonwealth Attorney's nephew.[3]

[3] Supreme Court Rule (SCR) 4.300, the Kentucky Code of Judicial Conduct, Canon 3E(1)(d)(ii), requires a judge to disqualify himself in a proceeding in which "a person within the third degree of relationship" to the trial judge "is acting as a lawyer in the proceeding" unless the parties and their lawyers properly waive the disqualification pursuant to SCR 4.300, Canon 3F.

On this issue, McCrobie claims trial counsel: (1) failed to inform him of the relationship between the trial judge and the Commonwealth Attorney; (2) failed to inform him that such a relationship required the trial judge to disqualify himself absent a signed waiver; and (3) did not permit him to read the waiver disqualification prior to signing the document. Had he been properly advised, McCrobie asserts, he would not have signed the waiver. We conclude McCrobie was not entitled to an evidentiary hearing on this issue as it is adequately refuted by the record.

On direct appeal, McCrobie disputed the disqualification waiver's validity, arguing he lacked the requisite competency to sign the waiver. In the course of its review, the Supreme Court noted the following factual findings demonstrated by the record:[4]

> At arraignment, ***McCrobie, his attorney*** and the assistant Commonwealth Attorney prosecuting the case ***all examined*** and signed a waiver provided by the Court. ***The waiver indicates that each party knew that the trial judge's uncle was the Commonwealth Attorney*** for that county yet acknowledged that the relationship was immaterial to the proceedings.

---

[4] We are in no way indicating that the Supreme Court's discussion of the disqualification waiver is dispositive of McCrobie's related RCr 11.42 claim. Our Supreme Court has "recognized the difference between an alleged error and a separate collateral claim of ineffective assistance of counsel related to the alleged error, and held that a claim of the latter may be maintained even after the former has been addressed on direct appeal, so long as they are actually different issues." *Leonard v. Commonwealth*, 279 S.W.3d 151, 158 (Ky. 2009). On direct appeal, McCrobie took issue with his competency to sign the waiver; in his RCr 11.42 motion, McCrobie took issue with his counsel's advice pertaining thereto. While undoubtedly related, McCrobie's ineffective-assistance claim is not the same claim as that raised on direct appeal. Nevertheless, we are certainty entitled to accord considerable deference and weight to the Supreme Court's relevant factual observations, drawn as it is from a part of the same record we now have before us.

. . . .

> ***He consulted with his attorney prior to signing the waiver .*** His counsel additionally signed the waiver. McCrobie does not suggest that his attorney was in any way deficient.

McCrobie, 2006 WL 2987082, at *1-2 (emphasis added).

In keeping with the Supreme Court's astute observations, the trial judge, in its order denying McCrobie's RCr 11.42 motion, described McCrobie's trial counsel as competent, and proclaimed that she always goes over a form in detail and explains how it impacts a defendant's case so that the defendant can make an informed decision. Likewise, the record reveals that, at McCrobie's arraignment, McCrobie's trial counsel stated on the record that she had gone over the disqualification waiver with McCrobie. McCrobie was clearly in good voice during the hearing as he spoke several times. Yet, McCrobie did not refute trial counsel's assertion, or request additional time to examine the waiver disqualification, or to discuss it with his attorney. Moreover, the waiver disqualification form itself is clear, concise, direct, and easy to read. It states unambiguously that "the Commonwealth's Attorney . . . is an uncle to the Circuit Judge[.]" (R. at 7). The record refutes McCrobie's position that his trial counsel's guidance concerning the factual underpinnings and ultimate import of the waiver of disqualification was deficient. There was no need for a hearing on this issue.

B. Mental Illness

McCrobie next contends the circuit court erroneously rejected, without a hearing, his claim that trial counsel failed to investigate and introduce evidence of his mental illness at trial, thereby significantly prejudicing his defense. The record reveals otherwise.

Immediately following McCrobie's arrest, his trial counsel feared McCrobie was suicidal. At trial counsel's request, McCrobie was evaluated by a psychiatrist at Communicare in Lebanon, Kentucky. Based on that psychiatrist's recommendation, the trial court ordered McCrobie to be examined at Kentucky Correctional Psychiatric Center (KCPC). While at KCPC, McCrobie was evaluated by a host of medical personnel, including an admitting psychiatrist, a treating psychiatrist, and an evaluating psychologist. McCrobie's evaluating psychologist, Dr. Richard Johnson, ultimately submitted a report discussing McCrobie's competency to stand trial and his criminal responsibility for the criminal acts at issue. Dr. Johnson opined that McCrobie was competent to stand trial, but declined to issue a definite opinion as to McCrobie's criminal responsibility. Nevertheless, pertinent to the latter, Dr. Johnson diagnosed McCrobie with Dissociative Amnesia and Anxiety-Depressive Disorder with Post-Traumatic Stress Disorder (PTSD) symptoms and panic attacks. In forming his diagnoses, Dr. Johnson relied, in part, on McCrobie's statements that: he had no memory of the events of July 29, 2003; prior to July 29, 2003, he had experienced lost periods of time on several other occasions; he was sexually abused by multiple

family members as a child; and a relationship of which he was part had recently ended.

After being released from KCPC, McCrobie continued treatment at Communicare with Lynita Greer, a licensed professional counselor. Like Dr. Johnson, Greer also diagnosed McCrobie with Dissociative Amnesia, along with PTSD, Major Depressive Disorder without Psychotic Features, and Panic Disorder without Agoraphobia.

In providing effective assistance, counsel has a duty to conduct a reasonable investigation, including defenses to the charges. *See Wiggins v. Smith*, 539 U.S. 510, 521-23, 123 S. Ct. 2527, 2535-36, 156 L. Ed. 2d 471 (2003); *McQueen v. Commonwealth*, 721 S.W.2d 694, 700 (Ky. 1986). "A reasonable investigation is not an investigation that the best criminal defense lawyer in the world, blessed not only with unlimited time and resources, but also with the benefit of hindsight, would conduct." *Robbins v. Commonwealth*, 365 S.W.3d 211, 214 (Ky. App. 2012) (citation omitted). Instead, counsel's investigation need only be reasonable under the totality of the circumstances. *See id.*

Here, the record reveals McCrobie's trial counsel reasonably investigated McCrobie's mental health. As explained, Dr. Johnson submitted a report, to which trial counsel had access, which discussed, *inter alia*, the mental illnesses from which McCrobie suffered. Thereafter, during the competency hearing, at which Dr. Johnson testified, trial counsel thoroughly examined Dr. Johnson concerning his treatment of and opinions relating to McCrobie's mental health diagnoses.

After receiving Dr. Johnson's report, McCrobie's trial counsel moved for, and the circuit court granted, funding for a defense mental health expert. The record demonstrates trial counsel then consulted with a clinical and forensic psychologist.[5] In addition to reviewing Dr. Johnson's report and consulting with an independent mental-health expert, trial counsel also subpoenaed Greer's treatment records. The record demonstrates trial counsel's investigation of McCrobie's mental health was in all respects reasonable. McCrobie fails to identify what, if any, additional investigatory steps his trial counsel needed to take. The record convincingly refutes McCrobie's allegation that his trial counsel failed to adequately investigate McCrobie's mental illness.

McCrobie's next argument – that his trial counsel failed to introduce evidence of McCrobie's mental illness at trial – is again conclusively refuted by the record. At trial, both Dr. Johnson and Greer testified for the defense. Both stated McCrobie suffered from Dissociative Amnesia and some form of PTSD, referenced McCrobie's self-proclaimed history of blackouts and lost gaps in time, and explained McCrobie's mental health conditions stemmed from childhood sexual abuse and trauma. Dr. Johnson defined dissociative amnesia as a predominant event, usually of a traumatic or stressful nature, that has a significant impact on a person; because of that event, the person is unable to recall a period of time. Dr. Johnson described this ailment as a psychological coping mechanism, and clarified that the memory loss is not due to intoxication, whether from a

[5] The mental health expert submitted an invoice for five hours of consultation and review work on McCrobie's behalf. (R. at 167-168).

chemical substance or alcohol, or from a physical condition or injury. Dr. Johnson testified to his belief that McCrobie was not "faking" amnesia. Similarly, Greer described dissociative amnesia as an unintentional coping mechanism. Greer opined that a break in a relationship of trust can trigger a PTSD episode, and a person "copes" or responds with dissociative amnesia. McCrobie's trial counsel plainly presented at trial substantial evidence of McCrobie's diagnosed mental illnesses.

The core of McCrobie's position is that trial counsel erred by failing to present at trial *independent* expert testimony to aid in his defense. Dr. Johnson, McCrobie asserts, did not qualify as an independent defense expert witness. In support, McCrobie relies on our Supreme Court's opinion in *Binion v. Commonwealth*, 891 S.W.2d 383 (Ky. 1995). In *Binion*, the Supreme Court recognized that, when a defendant is asserting an insanity defense, a neutral mental-health expert is insufficient to satisfy constitutional due process mandates. *Id.* at 386. Instead, a personal mental health expert "should be provided so as to permit that expert to conduct an appropriate examination and assist in the evaluation, preparation and presentation of the defense." *Id.*

Binion concerned "the state's duty to appoint or provide funding for an independent expert to an indigent defendant." *Halvorsen v. Commonwealth*, 258 S.W.3d 1, 7 (Ky. 2007). The situation here is different from that in *Binion*. McCrobie was provided funding for an independent mental health expert. Indeed, trial counsel consulted with an independent expert, but ultimately decided not to

utilize the independent expert's service. Instead, trial counsel chose to rely on testimony from Dr. Johnson and Greer.

In our view, trial counsel's decision not to present testimony from a third mental-health expert was consistent with reasonable trial strategy. There are, of course, many plausible explanations for trial counsel's decision not to call an independent mental-health expert to supplement Dr. Johnson and Greer's testimony, the most likely, perhaps obvious, being that the independent mental-health expert could issue no opinion helpful to McCrobie's defense. "Competent representation does not demand that counsel seek repetitive examinations of [a defendant] until an expert is found who will offer a supportive opinion." *Harper v. Commonwealth*, 978 S.W.2d 311, 315 (Ky. 1998). Perhaps trial counsel viewed additional expert testimony on this issue as cumulative, and sought to prevent overwhelming or annoying the jury by the needless presentation of such evidence. In any event, we decline to take advantage of hindsight to second-guess "[m]atters involving trial strategy, such as the decision to call a witness or not[.]" *Robbins v. Commonwealth*, 365 S.W.3d 211, 214 (Ky. App. 2012) (citing *Moore v. Commonwealth*, 983 S.W.2d 479, 484 (Ky. 1998)). Trial counsel presented evidence from two professionals concerning McCrobie's diminished mental state at the time of the offenses. Based on this, trial counsel could have reasonably concluded that testimony from a third *albeit* independent expert was unnecessary.

Furthermore, "an argument may be made that a jury would view a court-appointed expert more credibly than an expert hired to assist and testify for the

defense." *Harper*, 978 S.W.2d at 315. Trial counsel took care to elicit Dr. Johnson's testimony that he was not retained by the defense and that it was "relatively rare" that he testified for the defense.

In sum, in light of the substantial testimony presented concerning McCrobie's mental health diagnoses and the impact on his criminal culpability, we find McCrobie has not demonstrated either defective performance or prejudice under *Strickland*. 466 U.S. at 694, 104 S.Ct. at 2068; *Harper*, 978 S.W.2d at 315 (trial counsel's resolution not to retain an independent mental health expert was not unreasonable and was consistent with trial strategy); *Mills v. Commonwealth*, 170 S.W.3d 310, 329 (Ky. 2005) *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009) (finding no ineffective assistance where trial counsel chose not to hire an expert to support his voluntary intoxication defense because other evidence was introduced which tended to support the defense). On this issue, we affirm.

C. Involuntary Intoxication

McCrobie next asserts his trial counsel was ineffective in "failing to investigate and present exculpatory evidence at trial that McCrobie was involuntarily intoxicated at the time of the offenses to such an extent that it deprived him of substantial capacity to form a culpable mental state for these offenses." (Appellant's Brief at 15-16). McCrobie maintains this allegation cannot be refuted by the record, thereby mandating an evidentiary hearing.

Our task is to determine whether trial counsel's decision not to pursue a particular defense was objectively reasonable in light of all the circumstances, again "applying a heavy measure of deference to counsel's judgments." *Strickland*, 466 U.S. at 691, 104 S.Ct. at 2066. "Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable[.]" *Id.* at 690, 104 S.Ct. at 2066. Hence, if counsel's decision not to pursue a defense was tactical, it is afforded "a strong presumption of correctness and the inquiry is generally at an end." *Hodge*, 68 S.W.3d at 344 (citation omitted); *Moore*, 983 S.W.2d at 485 (explaining counsel's strategic trial decisions will generally not be second-guessed by hindsight).

McCrobie claims that at the time of the offenses he was suffering from a severe adverse reaction to Lexapro, an antidepressant medication. The drug supposedly caused him to have extended psychotic episodes and blackouts.

Taking McCrobie's allegation that he was involuntarily intoxicated at the time of the offenses as true, we are unable to conclude trial counsel's decision not to reference McCrobie's state of involuntary intoxication amounts to deficient performance. As explained, McCrobie's trial strategy was to present a mental health defense, *i.e.*, that he was functioning under such impairment from the dissociative amnesia and PTSD that he could not form the requisite criminal intent. According to Dr. Johnson, dissociative amnesia and intoxication are mutually exclusive. That is, a person may only be diagnosed with dissociative amnesia *if* the memory lapse or blackout is *not* the result of intoxication, whether from alcohol or any other chemical substance.

The presentation of conflicting, alternative defense theories may only serve to confuse the jury, and possibly cause the jury to question the credibility of the defense's entire case. The record discloses trial counsel chose to attribute McCrobie's blackout, memory loss, and claimed psychotic episode to McCrobie's mental diagnoses, not to his involuntary intoxication. To reiterate, counsel "must enjoy great discretion in trying a case, especially with regard to trial strategy and tactics . . . [and this Court] must be especially careful not to second-guess or condemn in hindsight [counsel's decisions]." *Harper*, 978 S.W.2d at 314. We think trial counsel's decision to focus on an insanity defense to the exclusion of an involuntary-intoxication defense was based on sound trial strategy and was reasonable under the circumstances. We find no error.

D. Domestic Violence

Finally, McCrobie argues that trial counsel provided ineffective assistance when she failed to investigate whether McCrobie was a victim of domestic violence, and then failed to move the trial court to apply the domestic violence exemption to the violent offender statute pursuant to Kentucky Revised Statutes (KRS) 439.3401(5). We disagree.

Under the violent offender statute, KRS 439.3401(3), McCrobie must serve 85% of his twenty-four year sentence prior to becoming parole eligible. The domestic violence exemption to this requirement, KRS 439.3401(5), exempts any "person who has been determined by a court to have been a victim of domestic violence or abuse pursuant to KRS 533.060 with regard to the offenses involving . . . serious physical injury to the victim." KRS 439.3401(5); *Fuston v. Commonwealth*, 217 S.W.3d 892, 898 (Ky. App. 2007).[6] If exempted, the defendant is afforded the more lenient parole-eligibility guidelines specified in KRS 439.340. *Holland v. Commonwealth*, 192 S.W.3d 433, 436 (Ky. App. 2005).

The record reveals the domestic violence exemption contained in KRS 439.3401(5) was not raised at sentencing, nor was there a request made prior to sentencing for a hearing to determine whether McCrobie was, in fact, a victim of domestic violence. To support the assertion that he was a victim of domestic violence, McCrobie claimed that:

[6] We pause to note, and not merely in passing, that this Court has interpreted "KRS 439.3401 as only referencing that part of KRS 533.060 having to do with the procedures for determining whether a person is a victim of domestic violence." *Holland v. Commonwealth*, 192 S.W.3d 433, 437 (Ky. App. 2005).

> [prior to his arrest,] McCrobie had just ended a romantic relationship with Shively. The two had been living together in Elizabethtown until Shively had moved out just two days prior to the incident. The relationship between Shively and McCrobie had recently become abusive and violent.
>
> Prior to this incident, McCrobie was a victim of domestic violence perpetrated by Shively. For the three to four months prior to July 29, 2003 [the date on which the criminal acts occurred], the relationship between McCrobie and Shively had become increasingly violent and abusive. Verbal arguments frequently escalated to physical altercations. McCrobie frequently had to miss work due to injuries caused by Shively's attacks. On multiple occasions, Shively tore pictures off the wall of the apartment and threw them at McCrobie. Among other injuries, Shively gave McCrobie a black eye, and hit him with a broom, leaving McCrobie with bruised ribs. As the relationship became more violent, Shively became increasingly abusive. He often refused to let McCrobie leave there [sic] home. This started with Shively taking McCrobie's keys so he could not leave, but escalated into Shively sleeping on a couch pushed in front of the only door to the apartment so McCrobie could not leave while Shively was asleep.

Taking these assertions as unrefuted fact, we still conclude that McCrobie's counsel was not ineffective in her representation for one simple reason – these facts will not support the exemption.

It is not enough to demonstrate that the defendant is a victim of domestic violence. That is only the first step in the analysis. It is essential that the defendant "have been a victim of domestic violence or abuse . . . *with regard to the offenses involving the death of the victim or serious physical injury to the victim*." KRS 439.3401(5) (emphasis added). Absent "death . . . or serious physical injury

to [a] victim[,]" this exemption will not apply. Fortunately, no one died as a result of McCrobie's crimes; therefore, we must consider whether McCrobie's crimes "involve[ed] . . . serious physical injury to [a] victim."

For purposes of the Kentucky Penal Code, KRS Chapter 500 *et seq*., "'Serious physical injury' means physical injury which creates a substantial risk of death, or which causes serious and prolonged disfigurement, prolonged impairment of health, or prolonged loss or impairment of the function of any bodily organ[.]" KRS 500.080(15). When the jury returned verdicts convicting McCrobie under various sections of the Penal Code, the circuit court found, in accordance with KRS 439.3401(1), that "*a*[, *i.e.*, one] victim of the crimes in question suffered serious physical injury." (R. 187) (Emphasis added). There were a total of four victims of McCrobie's crimes: his former roommate; the roommate's sister; and the two children of the roommate's sister. Unquestionably, the most serious injury suffered by any of these victims was the gunshot wound McCrobie inflicted upon the roommate's sister. We have no doubt who the circuit court found was the only victim suffering serious physical injury; it was McCrobie's roommate's sister. However, the fact that one of McCrobie's victims suffered serious physical injury still does not make him eligible for the exemption of KRS 439.3401(5).

"[I]n order to be eligible for the exemption, a defendant, who is also the victim of domestic violence, must establish a connection or relationship between the domestic violence and the violent offense for which the defendant stands convicted." *Commonwealth v. Vincent*, 70 S.W.3d 422, 425 (Ky. 2002). It should

go without saying, but we will say it anyway, that for the exemption to apply the domestic violence suffered by the defendant must have been perpetrated by the defendant's victim who suffered serious physical injury (or death). That did not happen in this case. Therefore, the exemption could not apply.

Because the exemption to the violent offender statute contained in KRS 439.3401(5) could not apply, McCrobie's counsel could not have been ineffective for failing to argue the exemption. Furthermore, this determination could be made by examining the record; a hearing was unnecessary. For these reasons, McCrobie's final argument fails.

III. Conclusion

The Taylor Circuit Court's August 24, 2011 order denying McCrobie's RCr 11.42 motion is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Michael L. Goodwin
Louisville, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Matthew R. Krygiel
Assistant Attorney General
Frankfort, Kentucky