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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000443-MR

DONALD LEE ROSS — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 06-CR-00541

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; CAPERTON AND NICKELL, JUDGES.

ACREE, CHIEF JUDGE: By order entered February 6, 2012, the Fayette Circuit Court, without conducting an evidentiary hearing, denied Appellant Donald Lee Ross's motion for relief under Kentucky Rules of Criminal Procedure (RCr) 11.42. We agree with the trial court that Ross did not receive ineffective assistance of counsel and affirm.

I. Facts and Procedure

Ross was convicted of first-degree robbery and pleaded guilty to being a first-degree persistent felony offender (PFO). He was sentenced to ten years' imprisonment enhanced to twenty years due to his PFO conviction. The Kentucky Supreme Court affirmed his conviction and sentence. *Ross v. Commonwealth*, No. 2007-SC-000172-MR, 2009 WL 2707227, at *1 (Ky. Aug. 27, 2009).

The Supreme Court painted the underlying factual scenario in its opinion resolving Ross's direct appeal. We quote at length:

> On the morning of February 2, 2006, Walter Cooper was driving around with his friend Donald Ross. Cooper and Ross soon ran into Keith Dunson and Dunson's girlfriend, Jessica Brown. Brown testified that she and Dunson were walking home after visiting Dunson's uncle. After Cooper offered to give Dunson and Brown a ride, the pair accepted and climbed into the back seat of Cooper's car. Brown testified at trial that once she and Dunson were in the car, Cooper told them he was interested in buying drugs from Dunson, but that he did not have any money. Cooper then informed the group that he knew where he could get some money. After Cooper pulled up to an unknown apartment, the three men exited the vehicle and Dunson told Brown to remain in the car.
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> Cooper knocked on Claudia Santos-Vasquez's apartment door located on Michigan Avenue in Lexington, Kentucky, where Claudia lived with her husband, niece, and brother. Claudia's brother answered the door and encountered three men. According to the Commonwealth, the three men were Cooper, Dunson, and Ross. Although Claudia could not identify two of the robbers, she testified that she recognized Cooper because he frequently visited her apartment in order to

sell beer, stereos, and DVD players. Cooper testified at trial that after he, Ross, and Dunson entered the apartment, Ross brandished a firearm and instructed Claudia and her brother to remain on the sofa while he and Dunson went into the bedroom to look for money. Claudia revealed that at one point, the man with the gun pushed the barrel into her stomach, put the barrel into her mouth, demanded money from her brother, and hit her brother with the weapon. [Claudia testified the man brandishing the gun was young, but not the youngest of the group]. Claudia's husband, Perez, who had been sleeping in the bedroom, woke up when Dunson and Cooper came into the room looking for money. Perez testified that one of the men hit him on the head and told him not to look up, so he was unable to identify either man at trial.

Dunson also testified at trial, and his account of the burglary differed from Cooper's only in regard to his own level of participation. Dunson testified that after he and Ross joined Cooper in the apartment, he saw Ross with what appeared to be a shotgun. Dunson stated that he saw Cooper go into the back bedroom, but that he refused to help Cooper in his search for money and Cooper responded by calling him names and insulting him. Dunson testified that after they left the apartment and drove away, he told Cooper he wanted to get out of the car, but Cooper would not let him. Eventually, Cooper stopped the car and Dunson and Brown exited the car.

The robbers escaped with approximately $1700 in cash, some jewelry, clothes, and a cell phone. Several hours after the robbery, the police found a vehicle that matched the description of the one Santos-Vasquez and a neighbor saw at the time of the robbery. After locating the vehicle and obtaining a search warrant for it, the police found a black change purse, a fake shotgun, and a jail identification card belonging to Anthony Weathers in the car. Although evidence at trial established that Weathers owned the vehicle, Weathers claimed that it had been stolen prior to the robbery. [During trial, Weathers testified to and described the course of events

> culminating in Cooper stealing his car prior to the robbery]. Weathers stated that he did not learn of the robbery until he saw coverage of it on the afternoon news and did not learn that his car had been involved until the police told him.
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> . . . .
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> During Jessica Brown's testimony, in addition to revealing information about Dunson's and Ross's involvement in the robbery, she also explained in her cross-examination that the reason she had failed to originally appear as a witness at trial was because she was afraid that Ross would injure her or her family if she testified against him. Brown also claimed that before Ross was arrested, he had asked her a threatening question once at a gas station that made her afraid for her life. After the close of the evidence but before the verdict, the trial court held a contempt hearing to address Brown's failure to appear at court. While being questioned by the court, Brown admitted that she was scared to testify because she was afraid people would see her face and not because Ross had threatened her. Brown acknowledged that no one had threatened her or her family and admitted that she had lied about this during trial. [Ross's trial counsel raised no objection to Brown's perjured testimony until after the jury returned its guilty verdict].

Ross, 2009 WL 2707227, at *1-2, 7.

On December 20, 2006, a jury found Ross guilty of first-degree robbery. Ross chose not to proceed to the penalty phase and, instead, pleaded guilty to being a first-degree PFO. The circuit court sentenced Ross to ten years' imprisonment enhanced to twenty years due to his PFO conviction. Ross appealed to the Kentucky Supreme Court as a matter of right. The Supreme Court affirmed Ross's conviction and sentence. *Id.* at *1.

Following his direct appeal, in November 2010, Ross moved to alter, amend, or vacate his sentence under RCr 11.42 claiming his trial counsel rendered ineffective assistance of counsel. Ross claimed his trial counsel was deficient, resulting in substantial prejudice, when he: (1) failed to move for a mistrial, strike testimony, and/or reopen the proof portion of the trial upon learning that a witness for the Commonwealth had committed perjury; and (2) failed to ensure the jury was properly instructed regarding the first-degree robbery charge by requiring the jury to make a separate determination that the object used in the robbery was a deadly weapon. Ross also requested an evidentiary hearing and appointment of counsel. By order entered February 6, 2012, the circuit court denied Ross's motion without conducting an evidentiary hearing. From this order, Ross appeals.

II. Standard of Review

The two-prong *Strickland* test for ascertaining whether a defendant has fallen prey to ineffective assistance of counsel has been so oft-cited 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).

Deficient performance is the first *Strickland* component. *Id.* The standard to be applied "for attorney performance is that of reasonably effective assistance" in view of "prevailing professional norms." *Id.* at 687-88, 104 S.Ct. at 2064-65.

Trial counsel was deficient if he or she "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 prejudice component looks at whether "defeat was snatched from the hands of probable victory." *Fegley v. Commonwealth*, 337 S.W.3d 657,659 (Ky. App. 2011) (citation omitted). Prejudice occurred if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2064. *Strickland* defines reasonable probability as "a probability sufficient to undermine confidence in the outcome[,]" thereby depriving "the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687, 694, 104 S.Ct. at 2064, 2052.

It bears repeating that "[a] defendant is not guaranteed errorless counsel, or counsel judged ineffective by hindsight, but counsel likely to render reasonably effective assistance." *Fegley*, 337 S.W.3d at 659. With the above standards in mind, we turn to Ross's ineffective-assistance allegations.

III. Discussion

Ross's claims of ineffective assistance of counsel, and arguments pertaining thereto, before this Court mirror those raised before the circuit court. We will address each ground in turn.

A. Brown's Perjured Testimony

Ross first argues his trial counsel was deficient when he failed to move for a mistrial, strike testimony, and/or reopen the proof portion of the trial upon learning

that Jessica Brown, a witness for the Commonwealth, had committed perjury. We ardently agree with the Supreme Court's assessment that trial counsel "should have made a motion to strike the perjured portion of Brown's testimony immediately following the contempt hearing" instead of dilly-dallying until after the jury returned its verdict. *Ross*, 2009 WL 2707227, at *7.

In this regard, trial counsel failed to render reasonably effective assistance and was thereby deficient.

Deficient performance, however, isn't enough to warrant RCr 11.42 relief. *See Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064 (emphasizing both criteria of deficient performance and prejudice must be met). Instead, *Strickland* instructs that "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside a judgment of a criminal proceeding if the error had no effect on the judgment." *Id.* at 692, 104 S.Ct. at 2066. To succeed, Ross must prove trial counsel's error prejudiced his defense. *Id.* at 687, 104 S.Ct. at 2064

As evidence of prejudice, Ross proffers Brown's perjured testimony considerably influenced the jury's finding of guilt. Ross points out that Brown was the only seemingly uninterested witness against Ross, and Brown's perjured testimony implied Ross harbored violent tendencies. Ross also posits that, had trial counsel challenged Brown's credibility, there is a reasonable probability the jury would have discounted Brown's entire testimony, resulting in a finding of not guilty.

"When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 695, 104 S.Ct. at 2068-69. After a thorough review, we simply cannot say with reasonable certainty that trial counsel's decision not to move to strike Brown's perjured testimony or to reopen the proof phase of the trial altered the outcome of Ross's trial or would have instilled in the jury a notion of reasonable doubt. *See id.* at 694, 104 S.Ct. at 2068 (explaining to establish prejudice the defendant must show that, but for trial counsel's errors, "the result of the proceeding would have been different").

In light of all the evidence at trial, Brown's perjured testimony was trivial. It consisted of two isolated statements that had no bearing on the robbery itself. The absence of Brown's perjured testimony would neither have critically hindered the Commonwealth's case nor significantly bolstered Ross's defense. Ross was certainly not convicted based solely on Brown's perjured testimony. As noted by the Supreme Court in its opinion affirming Ross's convictions,[1] even absent Brown's perjured testimony, there still remains Brown's damaging testimony concerning Ross's involvement in the robbery, including Brown's unequivocal statement that "Ross entered the Santos-Vasquez apartment with Dunson and Cooper[,]" which was "consistent with the Commonwealth's other evidence

[1] While the Supreme Court was concerned with whether the circuit court erred when it denied Ross's request for a new trial based on Brown's perjured testimony, the review standard utilized by the Supreme Court is substantially similar to that used when analyzing whether a defendant was prejudiced by trial counsel's deficient performance: that is, whether, absent the perjured testimony, there is a reasonable certainty the verdict or result of the trial would be different. *See Commonwealth v. Spaulding*, 991 S.W.2d 651, 657 (Ky. 1999).

against Ross." *Ross*, 2009 WL 2707227, at *7. Such other evidence included Dunson's and Cooper's respective testimony "that Ross was with them and wielded the shotgun during the robbery." *Id.* Furthermore, Claudia described the man brandishing the gun as young, but not the youngest of the group. At the time of trial, Cooper was 37 years old, Ross 33, and Dunson 26.

In sum, the jury had substantial evidence upon which to find Ross guilty, and we cannot say the outcome of Ross's trial would have been different absent trial counsel's error. Ross has failed to prove prejudice sprung from trial counsel's error. This claim of ineffective assistance of counsel fails.

B. First-Degree Robbery Instruction

Next, Ross argues trial counsel rendered ineffective assistance of counsel when he failed to adequately prepare and research the law prior to trial. Ross contends trial counsel failed to make certain the jury was properly instructed as to the first-degree robbery charge by ensuring: (i) the jury instructions included a definition for "deadly weapon" and (2) the instructions required the jury to make a separate finding that the object used in the robbery was a deadly weapon. For support, Ross cites *Thacker v. Commonwealth*, 14 S.W.3d 287 (Ky. 2006).

As noted in *Thacker*, a person is guilty of first-degree robbery "when, in the course of committing theft, he uses or threatens the immediate use of physical force upon another person with intent to accomplish the theft and when he . . . [i]s armed with a deadly weapon." *Id.* at 290 (quoting Kentucky Revised Statutes (KRS) 515.020)). KRS 500.080, in relevant part, defines a deadly weapon as

"[a]ny weapon from which a shot, readily capable of producing death or other serious physical injury, may be discharged." KRS 500.080(4). The Kentucky Supreme Court ruled in *Merritt v. Commonwealth*, 386 S.W.2d 727 (Ky. 1965), that "any object that is intended by its user to convince the victim that it is a pistol or other deadly weapon and does so convince him is one." *Id.* at 728.[2]

Here, the circuit court instructed the jury that it shall find Ross guilty of first-degree robbery if it believed beyond a reasonable doubt all of the following:

> A. That in this county on or about February 2, 2006 and before the finding of the Indictment herein, he stole or attempted to steal property from Rogacino Santos-Vasquez and/or Claudia Santos-Vasquez and/or Luis Olvra-Perez;
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> AND
>
> B. That in the course of doing so, and with intent to accomplish the theft, he used or threatened the immediate use of physical force upon Rogacino Santos-Vasquez and/or Claudia Santos-Vasquez and/or Luis Olvra-Perez;
>
> AND
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> . . . .
>
> D. That in the course of so doing, and with the intent to accomplish the theft, he was armed with what appeared to be a deadly weapon from which a shot, readily capable of producing death or other serious physical injury, may be discharged regardless of whether it was operable on the occasion in question or not.

[2] Since Ross's conviction, the Kentucky Supreme Court overruled *Merritt* in *Wilburn v. Commonwealth*, 312 S.W.3d 321, 327-28 (Ky. 2010), holding that it is inapplicable to the statutes now in effect. However, *Merritt* was the law at the time of Appellant's trial and direct appeal.

Ross's first claim – that trial counsel submitted an erroneous jury instruction that did not contain the definition for a deadly weapon – is clearly refuted by the record. The definition of a deadly weapon was incorporated in Part D of the first-degree robbery instruction and published to the jury. The instruction, in part, parroted verbatim the definition in KRS 500.080(4).

Similarly, Ross's second argument – that trial counsel failed to ensure the jury instructions required the jury to make a separate determination of whether the fake gun was a deadly weapon – also fails. *Thacker* dictates that determining whether an object used in a robbery was, in effect, a deadly weapon is a question of fact for the jury. 194 S.W.3d at 290. The jury instructions in *Thacker* deprived the jury of this factual determination by merely instructing that the defendant "was armed with a 22-caliber revolver." *Id.* This instruction presupposed that a 22-caliber revolver was a deadly weapon. *See id.* *Thacker* then illustrated a proper jury instruction, which may read:

> C. That when he did so, he was armed with a deadly weapon, to wit: a .22-caliber revolver.
>
> D. As a matter of law, a deadly weapon is defined to include any weapon from which a shot, readily capable of producing death or other serious physical injury, may be discharged.

Id. at 291.[3]

The jury in the instant case was published instructions very similar to those approved in *Thacker*. The trial judge did not declare as a matter of law or presuppose the fake gun to be a deadly weapon. Instead, it instructed the jury as to the elements of first-degree robbery and included in that instruction the definition of a deadly weapon. Consistent with *Thacker*, the jury was afforded the opportunity to determine whether the object wielded by Ross during the robbery was a deadly weapon.

As a corollary to the foregoing, Ross also argues trial counsel erroneously informed the jury that the gun's fake status was immaterial. We discern no

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[3] Subsequent to *Thacker*, in *Wright v. Commonwealth*, 239 S.W.3d 63 (Ky. 2007), our Supreme Court propounded another example of a proper instruction for first-degree robbery:

> You will find the Defendant guilty of first-degree robbery under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:
>
> A. That in this county on or about _____, and before the finding of the Indictment herein, he stole money from _____;
>
> B. That in the course of so doing and with intent to accomplish the theft, he used or threatened the immediate use of physical force upon; and
>
> C. That when he did so, he was armed with a pistol.
>
> D. That the pistol is a deadly weapon as defined in Instruction No. _____.

Id. at 67. "The jury instructions would then include with other definitions the proper definition of a deadly weapon from KRS 500.080." *Id.* We agree that "this jury instruction is easier for a jury to understand [than *Thacker*'s illustrative instruction] and still allows the jury to determine the essential elements of the offense[.]" *Id.* at 68. Of course, *Wright* was not yet decided when Ross's trial occurred in December 2006, and *Thacker* was merely in its infancy. We cannot fault the trial court for appreciably following the illustrative example contained in *Thacker* nor is that the purpose of our review for ineffective assistance of counsel.

deficiency because, at the time of Ross's trial, *Thacker* made clear "[f]or purposes of first degree robbery, the gun's operability is immaterial to the question of whether it is a deadly weapon." *Thacker*, 14 S.W.3d at 291 n. 2 (citing *Helpenstine v. Commonwealth*, 566 S.W.2d 415, 416 (Ky. 1978) ("Whether the handgun was operable is not relevant.")))[4] To reiterate, when Ross was convicted, the law in the Commonwealth of Kentucky was that a deadly weapon includes an object intended by its user to convince the victim it is a deadly weapon, and does so convince the victim. *Merritt*, 386 S.W.2d at 728. Here, Ross entered the Santos-Vaquez's apartment brandishing what appeared to be a firearm. Ross then pushed the barrel into Claudia's stomach and put the barrel into her mouth. Claudia's testimony reveals she was convinced the object was a firearm. Under

[4] Since *Thacker* was decided in 2006, the entire makeup of our Supreme Court, with the exception of one justice, changed. After Ross's conviction, the more recent Court addressed these issues at length in *Wilburn v. Commonwealth*, 312 S.W.3d 321 (Ky. 2010), and therein reversed *Merritt*, *Helpenstine*, and *Kennedy v. Commonwealth*, 544 S.W.2d 219 (Ky. 1977), stating among other things, that "while we reject the rationale used in *Kennedy* and *Helpenstine* to support the holding that the operability of a firearm used in a robbery is immaterial, we do not necessarily adopt the opposite conclusion that operability of the weapon is an essential element of proof in an armed robbery case." *Wilburn*, 312 S.W.3d at 327 (plurality opinion). That same year, the Court rendered unanimously *Wiley v. Commonwealth*, 348 S.W.3d 570 (Ky. 2010), in which the Court admitted that "the operability requirement is currently somewhat in flux," *id.* at 576, but did not retreat from its rejection of the concept that the victim's subjective belief that his perpetrator controlled a deadly weapon would support a first-degree robbery conviction. Still, the unanimous Court went on to state:

> [T]he plurality [in *Wilburn*] noted that the victim's description of the item will ordinarily provide sufficient evidence to permit the jury to decide whether it was among the items the legislature defined as a "deadly weapon." [citing *Wilburn*] However, the plurality cautioned that an unseen and unknown item or an item the witness clearly recognizes as a toy, does not qualify as a "deadly weapon." *Id.*

Wiley, 348 S.W.3d at 577. This jurisprudence evolved after Ross's conviction, so it does not factor in our analysis of Ross's claim of ineffective assistance of counsel.

the longstanding principle espoused in *Merritt* and, until 2010, followed by our courts, the mere fact that the object wielded by Ross was a fake gun and, therefore, not operable, did not negate the jury's ability to determine that it was a deadly weapon.

In sum, we discern no deficiency by trial counsel regarding the first-degree robbery instruction. This claim of ineffective assistance also fails.

C. Evidentiary Hearing

Finally, Ross argues he is entitled to an evidentiary hearing to prove the truth of his claims of ineffective assistance of counsel. Ross has raised no grounds meriting RCr 11.42 relief. The circuit court correctly deduced an evidentiary hearing was not warranted. *See Parrish v. Commonwealth*, 272 S.W.3d 161, 166 (Ky. 2008) (reiterating an RCr 11.42 movant is only afforded an evidentiary hearing if the movant proves that the "alleged error is such that the movant is entitled to relief under the rule").

III. Conclusion

The Fayette Circuit Court's February 6, 2012 order denying Ross's RCr 11.42 motion without an evidentiary hearing is affirmed.

ALL CONCUR.

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