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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000251-MR

CHARLES WAYNE BUSSELL — APPELLANT

v.

APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE ANDREW C. SELF, JUDGE
ACTION NO. 91-CR-00111

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, COMBS, AND D. LAMBERT, JUDGES.

CLAYTON, JUDGE: Charles Wayne Bussell appeals from a Christian Circuit Court order denying his motion made pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42 following an evidentiary hearing. He raises several claims of ineffective assistance of trial and appellate counsel, relating to the admission of prior testimony of witnesses, jury instructions, and selection of the defense expert witness. Because the trial court did not err in denying the motion, we affirm.

Bussell was first convicted of robbery and murder in 1994. The conviction was affirmed on direct appeal but ultimately vacated on the grounds of ineffective assistance of counsel. Following a mistrial in 2008, he was retried and convicted of the same charges in 2009. The underlying facts and procedural history of his case were set forth by the Kentucky Supreme Court on direct appeal following the 2009 trial:

> On December 2, 1990, Shirley Castle and his wife, Beth, became worried when his sister, Sue Lail, did not arrive at Sunday church services, as was her custom. Later that day, the Castles went to Lail's house and found no one home, though her car was parked in the driveway. A copy of the Saturday, December 1, 1990, Courier–Journal and a breakfast plate were found lying on a table. When she didn't appear the following day, the Castles called police.
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> In Lail's living room trash can, officers found a torn check in the amount of $50 partially made out to "Charles." They also noticed that the Saturday mail had not been collected. Lail's housekeeper, Mary Dudley, identified several items that were missing from the home, including Lail's robe and slippers, a vacuum cleaner, two rings, and sterling silver flatware. Neighbors told officers that they had seen Lail's handyman, Charles Bussell, working at the home on Saturday morning around 11:00 a.m.
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> Officers interviewed Bussell in the days following Lail's disappearance and learned of his long relationship with her family. Bussell's father had worked for Lail's father as a handyman. Bussell himself continued the relationship after his father died and had worked for Sue Lail directly for about six years at the time of her

disappearance. Bussell regularly performed yard work and repair jobs around Lail's home.

Bussell told officers that he did some painting and yard work for Lail on the morning of Saturday, December 1, 1990. When he was finished, at about 12:30 p.m., he went to the house to be paid. Lail wrote him a $200 check, which accounted for 28 hours worked and the cost of two bags of manure to finish a compost pile. As she wrote the check, according to Bussell, Lail asked him to paint a rental property she owned. He agreed to do the job for $350, but asked for an advance on that work. Lail consented and began to write a $50 check when Bussell interrupted her, requesting a larger advance. Lail handed him the check to tear up and throw in the trash can, then wrote a second check in the amount of $200. As was her custom, Lail wrote all of the information regarding the checks in her book. Finally, Bussell asked if he could borrow her vacuum cleaner, which he had occasionally done in the past. Lail agreed and Bussell left, placing the vacuum in the back seat of his vehicle. He then took it to the home of Bertha Chambers, his girlfriend, and left it on her front porch.

About a week later, police received a call from Kay Bobbett. Bobbett told officers that Robert Joiner, a friend, had given her a ring that she believed belonged to Sue Lail. When police questioned Joiner, he confirmed that he had purchased the ring from Bussell for $25 on the evening of December 1, 1990. He gave it to Bobbett the same day.

Bussell was arrested on December 14, 1990. Police continued to investigate Lail's disappearance, searching and taking fiber samples from Bussell's vehicle. It had a dent on the passenger fender and pieces of bark under the damaged portion. Police also recovered Lail's vacuum cleaner from Chambers. Chambers related to police that Bussell had given her the vacuum as an "early Christmas present" and that he had found it at a flea market.

> On February 23, 1991, two juveniles discovered Lail's body in a remote area of the Western Kentucky Fairgrounds. An autopsy revealed that Lail had been beaten and strangled. She was found wearing a pink robe and slippers. Police also discovered that a tree near Lail's body had been recently damaged.
>
> In 1994, Bussell was tried, found guilty of robbery and murder, and sentenced to death. This Court affirmed the conviction on direct appeal. *Bussell v. Commonwealth*, 882 S.W.2d 111 (Ky.1994), *cert. denied*, 513 U.S. 1174, 115 S.Ct. 1154, 130 L.Ed.2d 1111 (1995). In 2005, the Christian Circuit Court granted Bussell's RCr 11.42 motion, concluding that he had received ineffective assistance of counsel and that the Commonwealth had failed to disclose exculpatory evidence. This Court unanimously upheld that order in *Commonwealth v. Bussell*, 226 S.W.3d 96, 105 (Ky. 2007).
>
> Bussell was retried in Christian County in 2008. That trial ended in a mistrial following a hung jury. He was retried again in 2009 and convicted of robbery and murder. He was sentenced to life without the possibility of parole for twenty-five years.

Bussell v. Commonwealth, No. 2009-SC-000647-MR, 2011 WL 3793151, at *1–2 (Ky. Aug. 25, 2011).

Bussell's 2009 conviction was affirmed on direct appeal. *Id*. at 9. He then filed a motion pursuant to RCr 11.42, alleging ineffective assistance of trial and appellate counsel. Following a lengthy evidentiary hearing, at which testimony was heard from an attorney who assisted at his 2008 trial, his defense

counsel, his appellate counsel, and a forensic expert, his motion was denied and this appeal followed.

Bussell raises three main arguments: first, that his trial counsel was ineffective for failing to move to exclude the 1991 testimony of Robert Joiner and Kay Bobbett and for failing to impeach that testimony with Joiner and Bobbett's testimony from his first RCr 11.42 hearing; second, that his trial counsel was ineffective for failing to object to jury instructions on first-degree robbery, and that appellate counsel was ineffective for failing to brief the issue of the jury instructions on first-degree robbery; and finally, that his trial counsel was ineffective in his selection and retention of defense expert Dr. Richard Saferstein.

Standard of Review

An ineffective assistance of counsel claim has two components:

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

Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).

"[B]oth parts of the *Strickland* test for ineffective assistance of counsel involve mixed questions of law and fact, [but] the reviewing court must defer to the determination of facts and credibility made by the trial court." *Brown v. Commonwealth*, 253 S.W.3d 490, 500 (Ky. 2008) (citing *McQueen v. Commonwealth*, 721 S.W.2d 694, 698 (Ky.1986)). "Ultimately however, if the findings of the trial judge are clearly erroneous, the reviewing court may set aside those fact determinations." *Id*. (citing Kentucky Rules of Civil Procedure (CR) 52.01). The final review regarding whether counsel's performance was deficient and the defendant suffered prejudice as a result is made *de novo* by the appellate court. *Id*. (citations omitted).

In order to prove ineffective assistance of appellate counsel for failure to raise an issue on direct appeal, the defendant must establish that "'counsel's performance was deficient, overcoming a strong presumption that appellate counsel's choice of issues to present to the appellate court was a reasonable exercise of appellate strategy.'" *Commonwealth v. Pollini*, 437 S.W.3d 144, 148-49 (Ky. 2014) (quoting *Hollon v. Commonwealth*, 334 S.W.3d 431, 436 (Ky. 2010)). "The omitted issue must be 'clearly stronger' than those presented for the presumption of effective assistance to be overcome." *Id.* at 149. The defendant must also show by a reasonable probability that his appeal would have succeeded

had the issue been presented. *Id.* The components of an ineffective assistance of counsel claim are reviewed *de novo*. *Id*.

Joiner and Bobbett's 1991 Testimony and RCr 11.42 Testimony

Bussell's first argument on appeal concerns his trial counsel's decision not to move to exclude the 1991 trial testimony of Joiner and Bobbett. Neither Joiner nor Bobbett was available testify at Bussell's 2009 trial as they were both deceased by that time. The prosecutor read the transcripts of their testimony from the original 1991 trial to the jury, without objection from defense counsel. Bussell claims that the admission of the testimony was a violation of the Confrontation Clause, because defense counsel's cross-examination of Joiner and Bobbett in 1991 was ineffective.

On direct appeal, the Kentucky Supreme Court set forth the factual and procedural background to the admission of the 1991 Joiner and Bobbett testimony:

> In 2005, the Christian Circuit Court conducted a hearing on Bussell's RCr 11.42 motion, alleging ineffective assistance for, in part, his counsel's failure to adequately investigate and cross-examine Joiner and Bobbett. At that hearing, Bussell called both as witnesses. The trial court granted Bussell's RCr 11.42 motion and this Court affirmed that judgment.
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> Thereafter, the Commonwealth brought new charges and the case proceeded to retrial in 2008. However, by that time, both Joiner and Bobbett had died. Accordingly, the Commonwealth sought to introduce their videotaped

> testimony at the 1991 trial. Defense counsel vigorously objected, arguing that the admission of the testimony was a clear violation of Bussell's confrontation rights because no adequate cross-examination had occurred.
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> The issue of the testimony of Joiner and Bobbett was debated for nearly a year during pre-trial hearings. Multiple motions and memoranda of law were submitted and two lengthy hearings held. Ultimately, the trial court ruled that testimony from both the 1991 trial and the RCr 11.42 hearing would be admitted. The trial judge opined that the 1991 trial testimony alone would not be admissible because the cross-examination had been deemed ineffective. Though defense counsel disagreed, the trial court believed that the RCr 11.42 testimony would sufficiently augment the 1991 cross-examinations so as to cure this deficiency. Accordingly, the 2008 jury heard both the 1991 trial and RCr 11.42 testimony of both Joiner and Bobbett.
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> After the 2008 trial ended in mistrial, the Commonwealth retried Bussell for a second time in 2009. Following the 2008 mistrial, defense counsel for Bussell changed. At the 2009 trial, the Commonwealth again introduced the 1991 trial testimony of both Joiner and Bobbett. However, neither party introduced the RCr 11.42 hearing testimony.

Bussell, supra at *2–3.

Bussell argues that if his counsel had raised an objection to the 1991 testimony, thereby preserving the purported error, the review on direct appeal would have been conducted under the harmless error standard, which he contends would have required reversal of the verdict. Thus, he claims to satisfy both the performance and prejudice components of the *Strickland* test.

Bussell's argument is founded on the assumption that his Confrontation Clause rights were violated by the admission of the 1991 testimony. The Confrontation Clause of the Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." In *Crawford v. Washington,* 541 U.S. 36, 53–54, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the United States Supreme Court "held that this provision bars 'admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a **prior opportunity** for cross-examination.'" *Davis v. Washington*, 547 U.S. 813, 821, 126 S.Ct. 2266, 2273, 165 L.Ed.2d 224 (2006) (emphasis supplied).

This "prior opportunity" was afforded to Bussell at the evidentiary hearing on the RCr 11.42 motion that resulted in the vacating of his first conviction and a new trial. At that hearing, Joiner and Bobbett were both rigorously cross-examined by defense counsel. The Kentucky Supreme Court concluded that the RCr 11.42 hearing provided an opportunity for cross-examination and confrontation of Joiner and Bobbett that cured any deficiencies in the 1991 testimony. The opinion of the Supreme Court describes how defense counsel "challenged Joiner about numerous inconsistent statements he had given on the stand at the 1991 trial and to the police[,]" *Bussell, supra* at *4 , how Joiner was "confronted with the differing stories that he had told police detectives about the

ring[,]" and how Joiner's mental limitations came to light during the hearing. *Id*. Similarly, Bobbett's testimony at the RCr 11.42 hearing contradicted Joiner's previous statements and damaged her credibility. *Id*. at *5. She was also confronted with a supposed lie she told Joiner, and contradicted several key aspects of his testimony. Revealingly, the Supreme Court opinion relates that, "[i]n his brief before this Court, Bussell explains that the RCr 11.42 examination of Joiner and Bobbett approximates the cross-examination that *should* have been conducted at the 1991 trial." *Id*. at *6 (emphasis in original).

We conclude, based on the analysis by the Supreme Court and Bussell's own admission, that the RCr 11.42 hearing afforded Bussell an opportunity for meaningful cross-examination of Joiner and Bobbett that satisfies the requirement of the Confrontation Clause.

This brings us to Bussell's related argument that his counsel was ineffective for failing to introduce that RCr 11.42 testimony of Joiner and Bobbett. But Bussell's defense counsel was not obligated to introduce the testimony if he believed that its introduction was inimical to his trial strategy. As Indiana's highest court has observed, "*Crawford* speaks only in terms of the 'opportunity' for adequate cross-examination. . . . Whether, how, and to what extent the opportunity for cross-examination is used is within the control of the defendant."

Howard v. State, 853 N.E.2d 461, 470 (Ind. 2006), citing *Maryland v. Craig*, 497 U.S. 836, 847, 110 S.Ct. 3157, 3164, 111 L.Ed.2d 666 (1990).

Bussell's trial counsel testified that he believed the trial court would rule, as it had prior to the 2008 trial, that the 1991 testimony was admissible only on the condition that the RCr 11.42 testimony was also admitted. He believed that the issue had been "argued to death" at that time and that moving to have it excluded would not lead to a different ruling from the trial court. This was a reasonable conclusion in light of the fact that, as the Supreme Court opinion relates, the issue had been debated for nearly a year prior to the 2008 trial.

Defense counsel further determined, as a matter of trial strategy, that he did not want the RCr 11.42 testimony admitted because it contained statements that were very damaging to his client. He explained that his strategy was to couple "the finer elements" of his predecessor's preparation for the 2008 trial with the new strategy of having Bussell testify in his own defense, "looking at the jury and telling them that he did not kill Ms. Lail." He further testified that he had reviewed and thought about the RCr 11.42 testimony of Joiner and Bobbett for a long time. He reached the following conclusions:

> I decided that . . . Joiner repeated again in 2004 [at the RCr 11.42 hearing] which was I think fourteen years after Ms. Lail died, that he was still frightened of Mr. Bussell. And I did not want that, I did not want the jury to hear that again because Mr. Bussell was going to testify. And that Mr. Joiner had asked, uh, Ms. Bobbett

> to call the police for him because he was afraid of Mr. Bussell. And Mr. Bussell – no one needed to be afraid of him, he was going to testify. And also Ms. Bobbett, uh, at the 11.42 hearing that she [testified] had overheard, uh, allegedly overheard Mr. Bussell threaten to blow Joiner's brains out, or something to that effect. And I didn't want the jury to hear that again. So, I chose after that, and right up to the point of trial, not playing that 11.42 testimony.

When he was questioned whether he was aware that at the RCr 11.42 hearing, Bussell's defense attorney impeached Joiner's testimony regarding the threats from Bussell, he replied, "Yes, I was aware of that. I read through that, and I read through what he said, and I considered that again when I was deciding on whether to play it."

"There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065. Thus, fearing that if he sought to exclude the 1991 testimony, the trial court would probably choose to admit it only with the RCr 11.42 hearing testimony which he did not want included as it would undermine his strategy of having Bussell testify, defense counsel made a tactical decision not to object to the Joiner and Bobbett 1991 trial testimony. "It would be improper for us to highjack what may have been defense counsel's trial strategy and classify it as palpable error." *Sheets v. Commonwealth*, 495 S.W.3d 654, 667 (Ky. 2016).

In any event, "the damaging potential of the cross-examination of Joiner and Bobbett was fully realized through other means. . . . [D]efense counsel was able to seriously attack both Joiner's and Bobbett's credibility through the testimony of Audrey Canterbury [a friend of Joiner's mother] and Mame Bobbett, Kay Bobbett's mother." *Bussell, supra* at *6.

On review, "[t]he focus of the inquiry must be on whether trial counsel's decision not to pursue evidence or defenses was **objectively** reasonable under all the circumstances. Matters involving **trial strategy**, such as the decision to call a witness or not, generally will not be second-guessed by hindsight." *Robbins v. Commonwealth,* 365 S.W.3d 211, 214 (Ky. 2012) (emphasis added) (internal citations omitted).

Defense counsel's strategy was entirely reasonable under the circumstances. Bussell has not met his burden of showing that his representation was professionally deficient.

First-degree Robbery Instructions

Bussell argues that his trial counsel and appellate counsel were ineffective for failing to object to and subsequently to brief the first-degree robbery jury instructions, which stated as follows:

> 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 Christian County on or about December 1, 1990 and before the finding of the Indictment herein; the Defendant stole a sum of money and/or a sapphire and diamond ring, and/or a vacuum cleaner from Sue Spears Lail;
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> AND
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> B. That in the course of so doing and with intent to accomplish the theft, he caused physical injury to Sue Spears Lail by strangulation or other means.
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> "A unanimous verdict is required in all criminal trials by jury."

Kingrey v. Commonwealth, 396 S.W.3d 824, 830 (Ky. 2013) (citing Kentucky Revised Statutes 29A.280(3); Kentucky Constitution § 7). Bussell argues that he was deprived of a unanimous verdict because there was no way of determining whether the jurors believed he stole the money, the ring, or the vacuum cleaner, or some combination or all of the three. He contends that his situation is analogous to that found in *Kingrey v. Commonwealth*, 396 S.W.3d 824 (Ky. 2013), because the jury instructions allowed the jury to convict him under three alternative theories of the crime. In *Kingrey*, the jury was instructed on the crime of use of a minor under the age of eighteen in a sexual performance. The instruction required the jury to find that the defendant committed the crime between January 1, 2007, and May 31, 2008. This time period encompassed two distinct, separate events (a party and a modeling session) at which the crime could have been committed. The Supreme Court ruled that the instruction violated the right to a unanimous verdict because it

"allowed the jury to convict Kingrey of one crime based on two separate and distinct criminal acts that violated the same criminal statute." *Kingrey*, 396 S.W.3d at 831. By contrast, a jury instruction allowing the jury to convict a defendant of one crime under two theories is acceptable if the evidence supports conviction under both theories. *Id*. at 830.

In this case, there is no dispute that Bussell was alleged to have committed robbery on one distinct occasion; the character of the object or objects stolen does not affect the crime. The evidence supports the conviction if he stole any or all of the objects listed in the instruction. As long as the jury found from the evidence that he caused physical injury to Sue Lail in the course and with the intent of accomplishing a theft, whether the object of that theft was the ring, vacuum cleaner, money or any combination thereof is not vital. *Travis v. Commonwealth*, 327 S.W.3d 456, 460 (Ky. 2010). A "defendant who uses physical force with the requisite intent is guilty of robbery regardless of whether any of the property intended to be taken is in fact taken." *Id*. at 460-61 (citing *Kirkland v. Commonwealth*, 53 S.W.3d 71, 76 (Ky. 2001)).

Because the instruction does not violate the requirement of unanimity, trial counsel was not professionally deficient in not objecting to it nor was appellate counsel professionally deficient for failing to raise the claim on direct appeal as palpable error, as such a claim would not have been successful.

Expert Witness

Finally, Bussell argues that his trial counsel was ineffective in his selection and retention of an expert witness, Dr. Richard Saferstein. Dr. Saferstein was initially retained during Bussell's first post-conviction proceedings to analyze the evidence and conclusions of the Commonwealth's forensic experts at the 1991 trial. Dr. Saferstein also testified as a defense expert in the 2008 retrial. Bussell argues that by the time of the third trial in 2009, Dr. Safterstein, who had been retired from an active lab position for eighteen years, was using outdated techniques and shaky methodology. He argues that if defense counsel had adequately reviewed Dr. Saferstein's performance at the 2008 trial, he would have sought to retain a different expert. The main physical evidence at issue was cloth fibers taken from Bussell's car which matched those of the housecoat in which the victim's body was recovered, and paint samples and bark also taken from his car.

At both trials, Saferstein testified that he had expertise in over twenty areas of trace analyses but did not perform the actual tests himself. Bussell contends that this jack of all trades, master of none reputation was used by the prosecutor to harm the defense. He argues that his defense counsel failed to impeach the prosecution's expert witnesses and that he should have impeached Saferstein.

In his RCr 11.42 testimony, defense counsel testified that he reviewed Saferstein's testimony from the 2008 trial and found it to be very effective. He explained that Saferstein was the pre-eminent expert on paint analysis, that his predecessor defense counsel had engaged him, and that he chose not to engage anyone else. He said that his review led him to think that Saferstein's testimony was sufficient to "muddy the waters" about whether Bussell's car was at the scene where the body was recovered. He admitted he did not know that Saferstein was the supervisor of paint and fiber analysis rather than performing the analysis himself. He recalled how on cross-examination the prosecutor did bring out that Saferstein was an expert in many different areas and in hindsight, he might have sought a different expert.

Defense counsel's candid testimony about his choice to retain Dr. Saferstein shows that his decision was based on his best judgment at the time. In reviewing this issue, we are mindful that "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065. "'RCr 11.42 motions attempting to denigrate the conscientious efforts of counsel on the basis that someone else would have handled the case differently or better will be accorded short shrift in this court." *Moore v.*

Commonwealth, 983 S.W.2d 479, 485 (Ky. 1998), *as amended* (Nov. 19, 1998) (quoting *Penn v. Commonwealth*, 427 S.W.2d 808, 809 (Ky. 1968)). Simply because Saferstein had expertise in many areas and worked in a supervisory capacity would not necessarily have led the jury to discount his testimony. Similarly, the fact that Saferstein had retired by the time of the third trial did not necessarily disqualify him from serving as an expert.

Bussell's arguments regarding counsel's allegedly deficient retention of Dr. Saferstein rely heavily on the opinions of Dr. Christopher Palenik, a forensic expert who submitted a report and testified at the RCr 11.42 evidentiary hearing. Dr. Palenik testified that he was never provided with any actual samples to examine, was never asked to view the samples and never performed any testing on any of the samples. His opinions were based solely on a review of the information he was provided. He acknowledged that it is always better to have the original samples and data. Dr. Palenik was particularly critical of Dr. Saferstein's methodology regarding the paint samples taken from Bussell's car and the fibers found in the car that matched Lail's housecoat.

The prosecution's witnesses testified at trial that the fibers found in Bussell's car "matched" or were the "same" or "identical" to those of Lail's housecoat. Bussell points out that the defense failed to elicit testimony from these experts regarding how many other pieces of clothing might exist composed of

fibers exactly the same as those of the housecoat. As support for this contention, Bussell relies on a report of the National Research Council Committee on Identifying the Needs of the Forensic Sciences Community, entitled *Strengthening Forensic Science in the United States: A Path Forward* (August 2009). Dr. Palenik testified that he is familiar with the report, which sets forth the general rule that there is no way to determine whether a fiber came from a particular garment. Neither defense counsel nor Dr. Saferstein could have been aware of this report, however valuable its conclusions, as it was published two months after the trial.

In any event, as the trial court observed in denying the RCr 11.42 motion, on cross-examination defense counsel was able to elicit testimony from the Commonwealth's expert that he was not 100 percent sure that the fibers removed from the back seat of Bussell's vehicle came from Lail's housecoat. He admitted, "I can't say that they [the fibers] came from the housecoat. I can say that the fibers that I found are indistinguishable from the fibers from the housecoat." Saferstein testified that housecoats like the victim's are mass produced and are therefore not as unique an identifier as something like a fingerprint.

As to the paint evidence, Dr. Palenik testified that the prosecution's expert witness compared the samples visually, rather than employing the more accurate method of using a microspectrophotometer. Palenik also questioned the evidentiary foundation for the prosecution witness's report that paint texture was

used as a point of comparison, and disagreed about his attribution of a difference in the paint samples to a repaint of Bussell's car.

Bussell assumes that Dr. Palenik's methodological criticisms, which are not based on the study of any actual samples, should also have been known and employed by defense counsel and Dr. Saferstein to impeach the reliability of the Commonwealth's evidence. The United States Supreme Court has cautioned against this approach. "The selection of an expert witness is a paradigmatic example of the type of 'strategic choic[e]' that, when made 'after thorough investigation of [the] law and facts,' is 'virtually unchallengeable.' *Strickland,* 466 U.S., at 690, 104 S.Ct. 2052. We do not today launch federal courts into examination of the relative qualifications of experts hired and experts that might have been hired." *Hinton v. Alabama*, -- U.S. --, 134 S.Ct. 1081, 1089, 188 L.Ed. 2d 1 (2014).

In the context of obtaining the assistance of an expert on the issue of a defendant's sanity, the Eighth Circuit Court of Appeals has noted that where counsel has obtained such a qualified expert "and nothing has happened that should have alerted counsel to any reason why the expert's advice was inadequate, counsel has no obligation to shop for a better opinion. The fact that a later expert, usually presented at habeas, renders an opinion that would have been more helpful to the defendant's case does not show that counsel was ineffective for failing to

find and present that expert." *Marcrum v. Luebbers*, 509 F.3d 489, 511 (8th Cir. 2007) (internal citations omitted). This observation is especially apt in this case, where the matters being testified to were of a highly technical nature. Defense counsel's decision to retain of Dr. Saferstein, based on reviewing and evaluating the effect of his performance at the preceding mistrial, was not professionally deficient.

For the foregoing reasons, the Christian Circuit Court order denying Bussell's RCr 11.42 motion is affirmed.

ALL CONCUR.

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