

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001227-MR

GARY LYNN HOWARD

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE MARY C. NOBLE, JUDGE
ACTION NO. 98-CR-00246

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM, COMBS, AND TACKETT, JUDGES.

BUCKINGHAM, JUDGE: Gary Lynn Howard appeals from an order of the Fayette Circuit Court denying his RCr¹ 11.42 motion without an evidentiary hearing. Howard had previously been convicted of second-degree manslaughter and second-degree persistent felony offender (PFO II) for the shooting death of his girlfriend, Lucinda Miniard, and had been sentenced to sixteen years in prison following a jury trial. We conclude that the trial court

¹ Kentucky Rules of Criminal Procedure.

properly denied Howard's motion without allowing an evidentiary hearing, and we thus affirm.

Howard and Miniard had been romantically involved for twelve years prior to the shooting death on January 29, 1998. Miniard's fourteen year-old son, Joshua, lived in the residence with them.

On the day before the shooting death, Howard arrived home from work as a construction laborer in the early evening hours. He spent the evening at home with Miniard, Joshua, and Miniard's brother. At some point during the evening, Howard cleaned his .357 magnum handgun. According to Joshua's testimony, the gun was never loaded at any time that night. Joshua also testified that he put the gun back in Howard's bedroom inside a box after Howard had finished cleaning it.

As the night progressed, Howard drank beer and bourbon whiskey and smoked marijuana. He testified at trial that he consumed a twelve-pack of beer and a fifth of bourbon whiskey during the evening. Late in the evening, Howard and Miniard engaged in an argument which led Miniard to take Joshua and leave. Miniard and Joshua spent the night at the house of Miniard's friend, Barbara McHugh. Miniard's brother left the residence later in the evening.

Miniard and Joshua returned home around 7:30 a.m. the next morning. Howard's truck needed repairs, and Miniard had

agreed to help him transport it to a location prior to his going to work. Howard's job foreman, Jeff Kettles, had planned to meet Howard at the location and then transport him to the job site. When Howard failed to show up at the location where his truck was to be repaired, Kettles drove to the residence to get him.

Howard, Miniard, Kettles, and Joshua were all present in the residence when the shooting occurred. Miniard was in the bedroom talking with Howard, and Kettles and Joshua were outside the bedroom but were within earshot of the conversation. There was testimony at the trial that Howard and Miniard were joking about Miniard's inability to drive Howard's truck. Miniard's last words to Howard were that he should put the gun away because he had to go to work. A few seconds later, Howard fired one shot which hit Miniard in the upper left area of her chest and passed through her heart.

Immediately after the shooting, Howard was heard to say "Oh, my God," and yelled for someone to call 911. Kettles, who testified that there had been no argument between Howard and Miniard preceding the shot, ran into the bedroom and found Howard holding Miniard in his arms and screaming her name. Medical personnel responded and transported Miniard to the University of Kentucky Medical Center where she was pronounced dead.

Howard was interviewed by the police soon after Miniard was transported to the hospital. He stated that he did not know the gun was loaded and that the shooting was an accident. He initially stated that Joshua must have put the bullets in the gun. Howard also denied having argued with Miniard on the previous evening and also denied drinking. Later in the interview he admitted having argued with Miniard, admitted that he got drunk, and retracted his insinuation that Joshua must have loaded the gun. Howard also admitted, both during the interview and during his trial testimony, that he pointed the gun directly at Miniard, cocked the hammer, and pulled the trigger.

The case was tried by a jury in February 1999. The jury was given the full range of homicide jury instructions, including instructions allowing verdicts for intentional murder, wanton murder, first-degree manslaughter, second-degree manslaughter, and reckless homicide. The jury was also instructed concerning intoxication and extreme emotional disturbance. The jury returned a verdict finding Howard guilty of second-degree manslaughter and PFO II. It recommended an enhanced sentence of sixteen years in prison, and the court sentenced Howard accordingly. In an opinion rendered by this court on April 7, 2000, Howard's conviction and sentence were affirmed. The sole issue on appeal had been the prior bad acts

evidence allowed to be introduced at trial. In September 2000, the Kentucky Supreme Court denied Howard's motion for discretionary review.

In February 2001, Howard filed a motion to vacate, set aside, or correct his sentence pursuant to RCr 11.42. He raised numerous arguments and grounds in support of his motion. The court appointed counsel to assist Howard and afforded counsel an opportunity to file a supplement to the motion. Counsel filed a supplement to the motion, and the Commonwealth filed a response. On May 23, 2002, the court entered an order denying RCr 11.42 relief and explained its reasons for doing so. This appeal followed.

Howard's RCr 11.42 motion was based on his claim that he received the ineffective assistance of counsel. He cites ten specific instances in his brief, and we will address each of them. In doing so, we will follow the applicable law for analyzing such claims as set forth in Strickland v. Washington, 466 U.S. 668, 104 S.Ct.2052, 80 L.Ed.2d 674 (1984), and Gall v. Commonwealth, Ky., 702 S.W.2d 37 (1985).

As the Kentucky Supreme Court noted in its citation of the Strickland case in Gall, there is a two-prong test for analyzing claims that a defendant was deprived of a fair trial due to ineffective assistance of counsel. Id. at 39. The defendant must show that counsel's performance was deficient and

that the deficient performance prejudiced the defense. Id. A reviewing court "must be highly deferential in scrutinizing counsel's performance" in determining whether counsel rendered ineffective assistance. Harper v. Commonwealth, Ky., 978 S.W.2d 311, 315 (1998).

First, Howard asserts that his counsel rendered ineffective assistance by failing to request funds from the court pursuant to KRS² 31.110(1) and KRS 31.185 so as to hire an expert witness on the use of firearms. Howard claims that an expert on the use of firearms would have discovered that the handgun had a "hair trigger" and would have discovered that the time lapse between the shooting and the testing of the handgun by the Commonwealth's expert could have caused a significant difference in the amount of "pull" required to discharge the gun.³

The trial court rejected this argument on the ground that there was nothing a firearms expert could say which would have affected the outcome of the trial. The trial court noted that it was undisputed that Howard pointed the gun at Miniard, cocked the hammer, and pulled the trigger.

In order to establish prejudice to his defense, Howard "must demonstrate that, absent counsel's errors, there exists a

² Kentucky Revised Statutes.

³ The Commonwealth's witness testified that it took "3 ¼ pounds" of pull to discharge the gun.

'reasonable probability' the jury would have reached a different verdict." Bowling v. Commonwealth, Ky., 981 S.W.2d 545, 551 (1998). We agree with the trial court that because Howard admitted that he pulled the trigger, expert testimony that the gun may have had a "hair trigger" would not have affected the outcome of the trial.

Howard's second issue is his argument that he received ineffective assistance of counsel due to counsel's failure to request funds from the court so as to hire an expert witness on the effects of alcohol and marijuana on a person's memory and/or causing "blackouts." Howard maintains that such an expert would have testified that excess alcohol consumption could cause "blackouts" and that there was a real possibility that Howard had experienced such a "blackout" and truly did not remember reloading the gun. Again, in light of Howard's admission that he pointed the gun at Miniard and pulled the trigger, it is not likely that the outcome of the trial would have been different even if an expert had testified that Howard might have "blacked-out" the night before and not remembered loading the gun.

Third, Howard contends that he received ineffective assistance of counsel due to counsel's failure to request funds from the court to hire an expert witness on fingerprints so that prints could be taken from cartridges, if any, removed from the gun and analyzed. We agree with the trial court that testimony

by a fingerprint expert, even if such testimony revealed that Howard's fingerprints were not on any of the bullets, would likely not have affected the outcome of the trial. Howard was not convicted of a crime requiring proof of an element of intent, and he admitted that he pointed the gun at Miniard and pulled the trigger.

Fourth, Howard asserts that he received ineffective assistance of counsel due to counsel's failure to object to the Commonwealth's introduction of testimony concerning the discovery of a rifle and a pistol in the residence since neither weapon was connected with the shooting. His argument is without merit because his counsel did move the court to exclude reference to the weapons, and the court granted the motion. No evidence regarding other weapons in the house at the time of the shooting was introduced into the record for the jury's consideration.

Howard's fifth argument is that his counsel rendered ineffective assistance by failing to file a pretrial motion to have the video tape of the crime scene edited of all prejudicial and inflammatory parts. Specifically, he refers to portions of the video tape showing ammunition, holsters, and a tool box which displayed a sign that read "Fuck with this and die!" The record indicates that counsel did move the court to prohibit the Commonwealth from playing portions of the tape that showed

ammunition used with other weapons. The court, acknowledging that some portions of the tape were not necessarily relevant, denied counsel's motion on the ground that the irrelevant portions were not prejudicial. We conclude that the outcome of the trial would not have been different had Howard's counsel filed a pretrial motion to edit and remove the irrelevant portions of the tape. We agree with the trial court that those irrelevant portions were not prejudicial.

Sixth, Howard urges this court to accept his argument that he received ineffective assistance of counsel due to counsel's failure to object and request a mistrial when Commonwealth witness Jessica Fairbanks offered prejudicial hearsay testimony to the jury. Fairbanks, Miniard's daughter, testified as to threats Howard had made against her mother. Specifically, she testified that Howard had told her mother that he would kill her if she tried to leave him and got the police involved. Howard states that Fairbanks was allowed to testify that her mother had told her about such threats and that counsel rendered ineffective assistance in not objecting to this inadmissible hearsay testimony.

We have reviewed the portion of the tape to which Howard makes reference. Fairbanks testified that she heard Howard make these threats herself and that her mother had told her of other similar threats by Howard. Because Fairbanks

testified as to having heard threats of this nature, we are unable to conclude that counsel's failure to object to the hearsay portion of her testimony would have affected the outcome of the trial. We conclude that the hearsay portion of the testimony was not prejudicial.

Howard's seventh argument is that his counsel rendered ineffective assistance by failing to have defense witness Judy Rhodus declared to be a hostile witness. The trial court rejected Howard's argument on the ground that Howard failed to state any effect Rhodus' status as a hostile witness would have had on the outcome of the trial. Likewise, Howard does not state in his brief how treating Rhodus as a hostile witness would have altered the trial's outcome. We reject Howard's argument for the reason given by the trial court.

Howard's eighth argument is that his counsel rendered ineffective assistance by admitting Howard's guilt to the jury during counsel's closing argument. Counsel stated to the jury that Howard's actions constituted "reckless conduct." Howard contends that this statement was made without his consent and was contrary to his assertion that the shooting was an accident. In rejecting this portion of Howard's RCr 11.42 motion, the trial court stated that "the argument must be viewed as a whole rather than in isolated parts." The trial court also stated, "There was zero evidence to support a finding of pure accident.

Movant admitted firing the fatal shot. It was certainly reasonable trial strategy for counsel to seek credibility with the jury by admitting some responsibility while arguing that his client was entitled to the lowest possible verdict. Anything else would have insulted the jury's intelligence."

The jury was instructed on the full range of homicide offenses, including intentional murder, wanton murder, first-degree manslaughter, second-degree manslaughter, and reckless homicide. Reckless homicide was the least serious of the offenses, requiring proof of only reckless conduct. Since Howard had admitted pointing the gun at Miniard and pulling the trigger, an argument that the incident was an accident would have, as stated by the trial court, "insulted the jury's intelligence."

Effective assistance of counsel does not "deny to counsel freedom of discretion in determining the means of presenting his client's case." Ramsey v. Commonwealth, Ky., 399 S.W.2d 473, 475 (1966). Further, "[t]here is a strong presumption that, under the circumstances, the actions of counsel might be considered sound trial strategy." Russell v. Commonwealth, Ky. App., 992 S.W.2d 871, 875 (1999). Also, it is not the function of an appellate court "to usurp or second guess counsel's trial strategy." Baze v. Commonwealth, Ky., 23 S.W.3d 619, 624 (2000). We agree with the trial court that counsel's

attempt to persuade the jury that Howard's actions amounted to only reckless conduct was sound trial strategy and did not amount to ineffective assistance of counsel.

Howard's ninth argument relates to his counsel's failure to object to all the jury instructions. He asserts in his brief that "any jury instruction, other than a directed verdict, was not warranted." He states that "[a]ll the testimony and evidence offered during Howard's trial clearly proved that Lucinda's death was the result of an accident." Because there was clear evidence that Howard pointed the gun at Miniard and pulled the trigger, we conclude that instructions on the full range of homicide offenses were warranted and that counsel did not render ineffective assistance in failing to object to the instructions.

Howard's tenth and last argument is that he received ineffective assistance of counsel due to counsel's failure to file pretrial motions to exclude the testimony of Commonwealth witnesses Jessica Fairbanks, Joseph Fairbanks, Barbara McHugh, Maston Childers, Matt Miniard, and William Miniard. The trial court rejected this argument on the ground that counsel had objected to the testimony during the trial proceedings and that the court had ruled the testimony admissible in a KRE⁴ 404(b) hearing prior to trial. Howard's response to the trial court's

⁴ Kentucky Rules of Evidence.

ruling was that the court had ruled the testimony admissible to support the Commonwealth's claim that Howard intentionally shot Miniard but that the prosecutor argued in closing argument that Howard's acts were wanton and not intentional. Because the case proceeded to trial on some charges that involved intentional conduct, we conclude that counsel did not render ineffective assistance. Rather, counsel challenged the admissibility of the testimony but was unsuccessful.

For the foregoing reasons, the order of the Fayette Circuit Court denying Howard's RCr 11.42 motion is affirmed.

ALL CONCUR.

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