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Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000018-MR

ROGER LEE HOLSEY, JR. — APPELLANT

V.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE REBECCA M. OVERSTREET, JUDGE
INDICTMENT NO. 99-CR-00304

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BUCKINGHAM, MINTON, AND TAYLOR, JUDGES.

MINTON, JUDGE: Roger Lee Holsey appeals the denial of his RCr 11.42 motion for relief from the judgment of conviction and sentence. He alleges ineffective assistance of counsel at trial for failing to object to jury instructions that allowed the jury to convict under a complicity theory and for failing to pursue a theory that he was the victim of discriminatory prosecution. He also claims an abuse of discretion by the trial court for imposing consecutive, rather than concurrent, ten-year sentences

as recommended by the jury. Finding no merit in any of these arguments, we affirm the trial court's orders denying relief.

FACTUAL AND PROCEDURAL SUMMARY

Kevin Shannon, a friend of Holsey's, invited Holsey to an apartment to "hang out" with him and some other friends. After Holsey arrived, a group of five persons, including Holsey, Shannon, Theodore Sharp, Regan Lancaster, and Chad Bishop, went to Reed Lane in Shannon's white Nissan Maxima automobile. Holsey was good friends with Shannon, Sharp, and Chad Bishop, who was Chad's roommate. At some point, Shannon and Sharp discussed and agreed to go to the residence of David White on Reed Lane for the purpose of robbing Tom Overby, who they had learned was going to be present at that location. In furtherance of the plan, Shannon enlisted the aid of Regan Lancaster in order to obtain entrance into the residence.

At approximately midnight, the group arrived at Reed Lane and parked the car a few houses away from White's residence.[1] Shannon, Sharp, and Lancaster left Holsey and Bishop behind in the vehicle. Lancaster went to the front door, knocked, and asked Steve Ethington, who had responded, if Sarah was there. Overby, White, and Ashley Curtis were there. Ethington and Curtis were in the living room; Overby was in a

[1] The evidence is conflicting on whether Holsey or Shannon drove the vehicle from the apartment to Reed Lane.

nearby room; and White was asleep in his nearby bedroom. When Ethington turned to ask Curtis if she knew anyone named Sarah, Shannon and Sharp pushed open the front door and rushed into the living room. They were both wearing black ski masks covering their faces, black gloves, and one had a blue bandana around his neck. Shannon had a shotgun and Sharp had a pistol. They pointed the guns at Curtis and Ethington, shouting at them to get on the floor. Hearing the commotion, Overby entered the room and was forced to lie on the floor. Shannon and Sharp proceeded to take approximately $400 in cash, a Rolex watch and a Beringer watch, and the keys to Overby's red BMW 318i from Curtis, Overby, and Ethington. David White had escaped the house unnoticed through a window. Shannon and Sharp left the residence and returned to the white Maxima. Shannon put the shotgun on the floor of the front passenger's compartment. Holsey drove the car containing the five individuals back to the apartment, where they split up with Lancaster returning to her apartment, Shannon returning to his residence in his vehicle, and Holsey returning to his apartment in his black Kia Spectra.

Following this incident, David White heard, but did not see, someone take Overby's red BMW from the driveway where it had been parked at the Reed Lane residence. Later, Ethington saw a red BMW he believed was the one belonging to Overby on Clays Mill Road. The BMW contained five individuals, and

Ethington immediately reported seeing the BMW to the police and named Holsey as the driver. He later identified Sharp as the front passenger in the car. Overby had a .357 caliber Ruger pistol in the BMW at the time it was stolen.

The police obtained and executed a warrant to search Holsey's apartment and his black Kia. During the search, the police seized several items from the bedroom normally occupied by Holsey,[2] including a .357 caliber Ruger revolver from under the mattress, several shotgun shells, a black ski mask, a pair of black glasses, and a blue bandana. The police also seized a .12 gauge Mossberg shotgun and a pair of ski goggles from Holsey's vehicle. In the living room of the apartment, they seized a marijuana bong. In a search of Holsey, the police found a bag of marijuana weighing approximately 11.4 grams in his rear left pants pocket. After Holsey waived his Miranda[3] rights, Holsey denied any involvement with the robbery at Reed Lane and indicated that he had not been present in the area at the time the robbery occurred.

The grand jury returned a multi-count joint indictment against Holsey, Shannon, and Sharp related to the Reed Lane incident. With respect to Holsey, the indictment included two

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[2] Holsey's roommate, Chad Bishop, occupied the other bedroom.

[3] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

felony counts of robbery in the first degree,[4] stating "the above named Defendants threatened the use of physical force, while armed with a firearm, in the course of committing a theft from" Tom Overby and Steve Ethington, respectively; one felony count of burglary in the first degree,[5] stating "the above named Defendants unlawfully entered the residence of David White, with intent to commit a crime, and while armed with a firearm"; one felony count of receiving stolen property,[6] for possessing a vehicle of a value over $300 stolen from Tom Overby; a misdemeanor count of possession of marijuana;[7] and a misdemeanor count of possession of drug paraphernalia.[8]

At the jury trial, the witnesses included Holsey, Kevin Shannon, Theodore Sharp, Regan Lancaster, Ashley Curtis, Tom Overby, Steve Ethington, David White, and several police officers. The testimony was conflicting as to various facts. Holsey testified that he drove the white Nissan Maxima to Reed Lane but that he was not aware that a robbery had even occurred. Shannon testified that Holsey did not participate in planning

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[4] Kentucky Revised Statutes (KRS) 515.020.

[5] KRS 511.020.

[6] KRS 514.110.

[7] KRS 218A.1422.

[8] KRS 218A.500. The indictment also included a felony count for robbery in the first degree involving a separate incident not related to and two days after the Reed Lane incident.

the robbery and did not know the purpose of the trip to Reed Lane; but he said Holsey had let him borrow his shotgun just before they went to Reed Lane, and he returned it to Holsey immediately afterward. Holsey denied ever giving Shannon his shotgun or seeing Shannon or Sharp with guns the night of the robbery. Holsey admitted owning a shotgun and the ski mask and bandana seized in the police search. Holsey testified that he drove the white Nissan Maxima to and from Reed Lane but said Shannon told him they were going to Reed Lane to visit his girlfriend. Shannon and Sharp testified that they told Holsey they were going to Reed Lane to purchase marijuana. Sharp said that he used his shotgun during the robbery. Ashley Curtis testified that she was a good friend of Holsey's and had spoken with him approximately two hours before the robbery on the phone, telling him that she was babysitting and who was at the White's residence. Curtis said she told Holsey she was going to leave by midnight, but she was delayed and was present shortly after midnight when the robbery took place.

The trial court's instructions on robbery and burglary were based only on the theory of Holsey's acting as an aider or abettor to Shannon and Sharp. Defense counsel voiced no objection to the jury instructions. The jury found Holsey guilty of two counts of robbery in the first degree, burglary in the first degree, possession of marijuana, and possession of

drug paraphernalia.[9] The jury recommended the minimum sentences of ten years on each of the three counts for robbery and burglary, twelve months in jail and a fine of $500 for possession of marijuana, and a $250 fine for possession of drug paraphernalia, all to run concurrently for a total sentence of ten years.

The trial court sentenced Holsey consistently with the jury's recommendation to ten years on each of the three felony counts of robbery in the first degree (2 counts) and burglary in the first degree, 12 months and a $500 fine on the misdemeanor count of possession of marijuana, and a $250 fine on the misdemeanor count of possession of drug paraphernalia. But contrary to the jury's recommendation of concurrent sentences, the trial court ordered the sentences for the two first-degree robbery convictions consecutively with each other and concurrently with the other offenses for a total of 20 years in prison. On direct appeal, the Kentucky Supreme Court affirmed the convictions.[10]

THE RCr 11.42 MOTION

Holsey then filed an RCr 11.42 motion, accompanied by a request for appointment of counsel and an evidentiary hearing.

[9] The jury acquitted Holsey of the unrelated robbery charge and the receiving stolen property count.

[10] Holsey v. Commonwealth, 1999-SC-1088-MR (not to be published, rendered June 14, 2001).

In his *pro se* memorandum, Holsey alleged defense counsel was ineffective for failing to challenge the variance between the jury instructions, which were based on a theory of complicity or Holsey's acting as an aider or abettor, and the indictment charging Holsey as a principal. He also raised issues of sufficiency of the evidence and denial of the right to jury sentencing because the trial court deviated from the jury's recommended sentence. Following a response by the Commonwealth and reply to the Commonwealth's response by Holsey, the trial court appointed an attorney to represent Holsey on the motion. Holsey's counsel filed a supplemental memorandum addressing the issue involving the variance between the indictment and jury instructions and raising an additional claim of ineffective assistance for trial counsel's failure to pursue and seek an evidentiary hearing on the issue of selective prosecution.

The trial court's first opinion and order denied the motion without an evidentiary hearing with respect to all of the issues except the claim of ineffective assistance of counsel involving selective prosecution. The court granted Holsey an evidentiary hearing on that issue.

The trial court then conducted the evidentiary hearing. The only witness was Detective Christopher Schoonover, who was the lead detective in the investigation of the case. Detective Shoonover stated that Regan Lancaster was not charged

in connection with the robbery because she was the least culpable of the suspects, and she agreed to serve as a witness. Detective Schoonover indicated that Chad Bishop was not charged because of the lack of substantive evidence of his involvement. The trial court concluded that Holsey failed to establish selective prosecution because the Commonwealth had legitimate non-racial reasons for pursuing prosecution of him. This appeal followed.

ISSUES ON APPEAL

Holsey raises three issues on appeal: (1) whether trial counsel was ineffective for failing to object to the variance between the jury instructions and the indictment; (2) whether trial counsel was ineffective for failing to seek an evidentiary hearing on the issue of selective prosecution; and (3) whether the trial court abused its discretion by increasing the sentences recommended by the jury.

THE STANDARD OF REVIEW

In order to establish ineffective assistance of counsel, the movant must satisfy a two-part test showing both that counsel’s performance was deficient and that the deficiency resulted in actual prejudice resulting in a proceeding that was

fundamentally unfair.[11] The burden is on the movant to overcome a strong presumption that counsel's assistance was constitutionally sufficient or that under the circumstances, counsel's action might be considered "trial strategy."[12] A court must be highly deferential in reviewing defense counsel's performance and should avoid second-guessing counsel's actions based on hindsight.[13] In assessing counsel's performance, the standard is whether the alleged acts or omissions were outside the wide range of prevailing professional norms based on an objective standard of reasonableness.[14] "A defendant is not guaranteed errorless counsel, or counsel adjudged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance."[15] In order to establish actual prejudice, a defendant must show a reasonable probability that the outcome

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[11] Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Foley v. Commonwealth, Ky., 17 S.W.3d 878, 884 (2000).

[12] Strickland, 466 U.S. at 689, 104 S.Ct. at 2065; Moore v. Commonwealth, Ky., 983 S.W.2d 479, 482 (1998); Sanborn v. Commonwealth, Ky., 975 S.W.2d 905, 912 (1998).

[13] Harper v. Commonwealth, Ky., 978 S.W.2d at 311, 315 (1998); Russell v. Commonwealth, Ky.App., 992 S.W.2d 871, 875 (1999).

[14] Strickland, 466 U.S. at 688-689, 104 S.Ct. at 2064-2065; Wilson v. Commonwealth, Ky., 836 S.W.2d 872, 878 (1992); Commonwealth v. Tamme, Ky., 83 S.W.3d 465, 469 (2002).

[15] Sanborn, 975 S.W.2d at 911 [*quoting* McQueen v. Commonwealth, Ky., 949 S.W.2d 70 (1997)].

of the proceeding would have been different.[16] A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceeding considering the totality of the evidence before the jury.[17] It is not enough for the defendant to show that the error by counsel had some conceivable effect on the outcome of the proceeding.[18]

Both the performance and prejudice prongs of the ineffective assistance of counsel standard are mixed questions of fact and law.[19] While the trial court's factual findings pertaining to determining ineffective assistance of counsel are subject to review only for clear error, the ultimate decision on the existence of deficient performance and actual prejudice is subject to *de novo* review on appeal.[20] Given the movant's burden of establishing both deficient performance and actual prejudice, a court need not address both components if the movant makes an

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[16] Strickland, 466 U.S. at 694, 104 S.Ct. at 2068; Bowling v. Commonwealth, Ky., 981 S.W.2d 545, 551 (1998).

[17] Strickland, 466 U.S. at 694-695, 104 S.Ct. at 2068-2069. *See also* Moore, 983 S.W.2d at 484, 488; Foley, 17 S.W.3d at 884; Sanders v. Commonwealth, Ky., 89 S.W.3d 380, 386 (2002) ("It is not enough for the defendant to show that the error by counsel had some conceivable effect on the outcome of the proceeding.").

[18] Sanders v. Commonwealth, Ky., 89 S.W.3d 380, 386 (2002).

[19] Strickland, 466 U.S. at 698, 104 S.Ct. at 2070; Groseclose v. Bell, 130 F.3d 1161, 1164 (6th Cir. 1997).

[20] *See* McQueen v. Scroggy, 99 F.3d 1302, 1310-1311 (6th Cir. 1996); Groseclose, 130 F.3d. at 1164; Sayre v. Anderson, 238 F.3d 631, 634-635 (5th Cir. 2001).

insufficient showing on either one and should dispose of an ineffectiveness claim on lack of sufficient prejudice if possible.[21]

FAILURE TO OBJECT TO INSTRUCIONS NOT INEFFECTIVE

Holsey contends that defense counsel was ineffective for not objecting to the jury instructions because they differed from the indictment. The instructions on robbery and burglary were based solely on the theory of complicity, i.e., Holsey acted as an aider or abettor or accomplice to the commission of those offenses by Theodore Sharp and Kevin Shannon. The indictment named all three of these individuals as principals. Holsey asserts that the jury instructions constituted an illegal constructive amendment of the indictment in violation of his right to due process to be informed of the nature of the accusations against him.

There are two primary types of modifications to indictments: amendments and variances. An amendment involves a change, whether literal or in effect, in the charging terms of the indictment.[22] A variance from the indictment occurs when the charging terms are unchanged, but the evidence at trial proves facts materially different from those alleged in the

[21] Strickland, 466 U.S. at 697, 122 S.Ct. at 2064; Brewster v. Commonwealth, Ky.App., 723 S.W.2d 863, 864-865 (1986).

[22] *See* United States v. Solorio, 337 F.3d 580, 589 (6th Cir. 2003); United States v. Ford, 872 F.2d 1231, 1235 (6th Cir. 1989).

indictment.[23] Between these two classifications lies a more subtle modification referred to as a constructive amendment or sometimes a fatal variance. Variance can rise to the level of a constructive amendment when the terms of an indictment are in effect altered by the presentation of evidence and jury instructions that so modify essential elements of the offense charged that there is a substantial likelihood the defendant may have been convicted of an offense other than that charged in the indictment.[24] The distinction between a variance and an amendment has been called "sketchy" and "not always precise," but the consequences of each are significantly different.[25] "A variance will not constitute reversible error unless 'substantial rights' of the defendant have been affected, while a constructive amendment is *per se* prejudicial."[26]

Section 12 of the Kentucky Constitution creates a substantive due process constitutional right to a grand jury

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[23] *See* United States v. Chilingirian, 280 F.3d 704, 711 (6th Cir. 2002); United States v. Combs, 369 F.3d 925, 936 (6th Cir. 2004).

[24] *See* Chilingirian, 280 F.3d at 711-712; United States v. Zidell, 323 F.3d 412, 432 (6th Cir. 2003).

[25] Chilingirian, 280 F.3d at 712; Carter v. United States, 826 A.2d 300, 304 (D.C. Cir. 2003).

[26] Solorio, 337 F.3d at 590 (*citing* Chilingirian, *supra*). *See also* Ingram v. United States, 592 A.2d 992, 1006 (D.C. Cir. 1991).

indictment for prosecution on a felony offense.[27] The purpose of an indictment is to inform the accused of the nature of the charged crime to allow the accused to prepare a defense and prevent further prosecutions or retrial on the same offenses.[28] The adoption of the notice theory of pleading eliminated the need for precise details in an indictment so that an indictment is sufficient if it fairly informs the accused of the nature of the charge without detailing the formerly essential factual elements and does not mislead him.[29] Under notice pleading, if a defendant needs additional factual information concerning the details of a charge, this information is supplied in a bill of particulars.[30]

Kentucky courts have long held that where two or more persons are jointly indicted as principals, any one of them, although tried separately, may be convicted of complicity, or aiding and abetting, even though the indictment does not charge aiding and abetting.[31] In Broughton v. Commonwealth,[32] the court

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[27] *See* Malone v. Commonwealth, Ky., 30 S.W.3d 180, 182 (2000); RCr 6.02.

[28] *See* Malone, *supra*; Johnson v. Commonwealth, 299 Ky. 72, 184 S.W.2d 212 (1944); A.E. v. Commonwealth, Ky.App., 860 S.W.2d 790 (1993).

[29] Thomas v. Commonwealth, Ky., 931 S.W.2d 446, 449 (1996).

[30] Thomas, 931 S.W.2d at 449-450; Violett v. Commonwealth, Ky., 907 S.W.2d 773, 776 (1995); RCr 6.22.

[31] *See* Neal v. Commonwealth, Ky., 302 S.W.2d 573, 578 (1957); Hartman v. Commonwealth, Ky., 282 S.W.2d 48 (1955); Alexander v.

held that where a defendant is jointly indicted as a principal and the evidence conclusively indicated that he acted solely as an aider or abettor, the trial court should instruct the jury only on the complicity theory in a separate trial of the defendant.[33] In Carroll v. Commonwealth,[34] the court stated that evidence at trial showing a defendant acted as an aider and abettor did not constitute a "fatal variance" from a joint indictment naming the defendant as principals. In Neal v. Commonwealth, the court justified this approach based on the lack of prejudice. "To indict both the principal and the aider and abettor as principals gives notice that the Commonwealth can or will attempt to prove that one did the act and the other aided and abetted."[35]

Holsey contends that the principle allowing persons jointly indicted as principals to be convicted as aiders or abettors should be reconsidered in light of *dictum* in the case

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Commonwealth, 285 Ky. 233, 147 S.W.2d 401 (1941); Gambriel v. Commonwealth, 283 Ky. 816, 143 S.W.2d 514 (1940); Short v. Commonwealth, 240 Ky. 477, 42 S.W.2d 696 (1931).

[32] 303 Ky. 18, 196 S.W.2d 890 (1946).

[33] *Id.* at 24-25, 196 S.W.2d at 893.

[34] 273 Ky. 429, 116 S.W.2d 977 (1938).

[35] 302 S.W.2d at 578. *Cf*. Wolbrecht v. Commonwealth, Ky., 955 S.W.2d 533 (1997) (where court held amendment to joint indictment of three defendants as principals and complicitors that broadened potential principals from the three defendants to other unnamed persons was improper because the amendment represented a substantial change that prejudiced the defendants without adequate notice).

of Houston v. Commonwealth.[36] In Houston, the court held that the defendant, who was convicted as a principal of trafficking in cocaine, was not entitled to a jury instruction on criminal facilitation as a lesser-included offense. The court said that facilitation is a lesser-included offense of complicity but not a primary object offense. The court also stated, "We need not decide whether, under Kentucky law, a conviction of complicity can be obtained under an indictment charging a defendant only as a principal, for Appellant did not request an instruction on that offense."[37] As Holsey concedes, this statement recognizes that any decision on the issue of a variance between an indictment of a defendant as a principal and conviction for complicity was unnecessary and would be *dictum*.[38] One simply cannot draw a negative inference prohibiting conviction for complicity following indictments as a principal from this statement alone. In addition, the statement does not address the situation involving joint indictments.

Until the Kentucky Supreme Court speaks more definitively on the issue, we are bound to follow the existing

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[36] Ky., 975 S.W.2d 925 (1998).

[37] *Id*. at 930-931 (citation omitted).

[38] *See also* Varble v. Commonwealth, Ky., 125 S.W.3d 246, 251 (2004) (where court declined to decide whether amending indictment charging defendant as a principal to include a charge as an accomplice was improper).

law.[39] Holsey also suggests precedential value of Neal is diminished because it is "nearly fifty (50) years old." This Court does not have authority to declare that decisions of the Kentucky Supreme Court or its predecessor court have been implicitly overruled because of age.[40]

In addition, Holsey had notice prior to trial that the Commonwealth would pursue an accomplice theory with respect to his participation in the robbery/burglary on Reed Lane. The prosecution provided police reports and interviews with various persons including Kevin Shannon and Regan Lancaster consistent with the Commonwealth's proof at trial indicating that Holsey did not enter the residence. Consequently, Holsey was not surprised by an alleged variance between the indictment and the evidence at trial. Given the state of the current law, Holsey has not shown that defense counsel's failure to object to the jury instructions on the grounds that they constituted a constructive amendment or improper variance was unreasonable or deficient performance or that he suffered actual prejudice because the jury instructions were not erroneous as a matter of law.

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[39] *See* Fields v. Lexington-Fayette Urban County Government, Ky.App., 91 S.W.3d 110, 112 (2001). Rules of the Supreme Court 1.030(8)(a).

[40] *See* Revenue Cabinet v. Kentucky American Water Co., Ky., 997 S.W.2d 2, 7 (1999).

FAILURE TO PURSUE SELECTIVE PROSECUTION THEORY NOT INEFFECTIVE

Holsey's second issue involves a claim that defense counsel was ineffective for failing to seek an evidentiary hearing on the issue of selective prosecution at the end of the trial. Defense counsel raised the issue of selective prosecution in his motion for default judgment at the close of the prosecution's case. The trial court indicated that it would allow a hearing after the case was submitted to the jury, but defense counsel did not further pursue the issue.[41] However, the trial court did conduct an evidentiary hearing on the issue in the RCr 11.42 proceeding.

A selective prosecution claim is based on the Fifth and Fourteenth Amendment right to equal protection.[42] The decision whether to prosecute generally rests within the broad discretion of the prosecutor.[43] Although broad prosecutorial discretion is not unfettered and is subject to constitutional restraints prohibiting prosecution based on race, religion, or

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[41] Defense counsel did argue this issue in closing argument to the jury. This was not a proper argument because selective prosecution is not a defense, but the prosecution did not object and responded to the claim in its closing argument.

[42] *See* Oyler v. Boles, 368 U.S. 448, 82 S.Ct. 501, 7 L.Ed.2d 446 (1962); 21A Am.Jur.2d Criminal Law § 983 (1998); John S. Herbrand, Annotation: What Constitutes Such Discriminatory Prosecution or Enforcement of Laws as to Provide Valid Defense in State Criminal Proceedings, 95 ALR3d 280 (1979).

[43] Wayte v. United States, 470 U.S. 598, 607, 105 S.Ct. 1524, 1530, 84 L.Ed.2d 547 (1985); United States v. White, 972 F.2d 16, 18 (2nd Cir. 1992).

the exercise of protected statutory and constitutional rights.[44] In United States v. Armstrong,[45] the Supreme Court held that a person claiming selective prosecution must show that the prosecutorial decision had both a discriminatory effect and was motivated by a discriminatory purpose.[46] Given the presumption of regularity afforded prosecutorial decisions, both elements must be proven by clear and convincing evidence. The discriminatory effect prong requires a showing that similarly situated individuals of a different classification were not prosecuted.[47] In elaborating on the first prong of the Armstrong test, the Eleventh Circuit Court of Appeals in United States v. Smith, addressed the analysis for determining "similarly situated" persons, stating:

> One who engaged in the same type of conduct, which means that the comparator committed the same basic crime in substantially the same manner as the defendant so that any prosecution of that individual would have the same deterrence value and would be related in the same way to the Government's enforcement priorities and enforcement plan and against whom the evidence was as strong

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[44] Wayte, 470 U.S. at 608, 105 S.Ct. at 1531; Bordenkircher v. Hayes, 434 U.S. 357, 364, 98 S.Ct. 663, 668, 54 L.Ed.2d 604 (1978); United States v. Mullins, 22 F.3d 1365, 1373 (6th Cir. 1994).

[45] 517 U.S. 456, 465, 116 S.Ct. 1480, 1487, 134 L.Ed.2d 687 (1996).

[46] *See also* Gardenhire v. Schubert, 205 F.3d 303, 318 (6th Cir. 2000).

[47] Armstrong, 517 U.S. at 465, 116 S.Ct. at 1487; United States v. Jones, 159 F.3d 969, 977 (6th Cir. 1998).

> or stronger than that against the defendant.[48]

The second prong involving discriminatory purpose requires more than intent as awareness of consequences; it requires a showing that the prosecutor "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[49] Where direct evidence of discriminatory purpose is unavailable, a court may review other factors such as disparate impact, historical background, and specific events leading up to the challenged decision.[50]

Holsey maintains that he was a victim of selective prosecution based on race because he is part African-American; while Regan Lancaster and Chad Bishop are white.[51] The Commonwealth asserts it had insufficient evidence to prosecute Chad Bishop. Detective Schoonover testified at the RCr 11.42 hearing the only person that implicated Bishop's possible involvement in the incident was Sharp, who told police that Bishop was in the white Maxima on the trip to Reed Lane.

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[48] 231 F.3d at 810. *See also* United States v. Correa-Gomez, 160 F.Supp.2d 748, 751 (E.D. Ky. 2001).

[49] Wayte, 470 U.S. at 610, 105 S.Ct. at 1531-1532. *See also* United States v. Alameh, 341 F.3d 167, 174 (2nd Cir. 2003).

[50] *See* Correa-Gomez, 160 F.Supp.2d at 751 [*citing* Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266-267, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977)].

[51] Kevin Shannon and Theodore Sharp are also African-American.

Detective Schoonover discounted Sharp's statement for various reasons, including Shannon's failure to confirm this fact. Regan Lancaster twice specifically denied that Bishop was in the vehicle in interviews with the police. The police and prosecutor both indicated they were surprised when Lancaster testified at the trial that Bishop was in the vehicle. Detective Schoonover also testified that the police had surreptitiously recorded a telephone call from Shannon, who was being held at the jail on unrelated charges at the time, to Sharp, who was at Holsey's apartment. Chad Bishop initially answered the phone and engaged in a short conversation with Shannon during which Bishop stated that "they" should have gone to the Millennium nightclub with him on the night of the robbery. Shannon responded, "that's right."

The police first learned of Regan Lancaster's involvement through interviews with Shannon and Sharp. Shannon initially told police that Lancaster was unaware of the robbery plan, and he merely asked her to knock on the door of the residence and ask for his girlfriend. Lancaster also denied knowing of a plan to commit a robbery beforehand. Lancaster later, however, admitted receiving some cash from Shannon when they returned to the apartment after the robbery. Nevertheless, Detective Schoonover stated that Lancaster was not charged

because she was less culpable than the three defendants and she agreed to testify for the prosecution against the others.

On the other hand, the Commonwealth points to several facts implicating Holsey in the incident. First, Shannon, Sharp, and Lancaster indicated that Holsey drove the white Maxima the night of the robbery. Shannon told police that Holsey was aware of the plan, supplied information about the persons at the residence, and provided the shotgun he used in the robbery. Ashley Curtis said that Holsey knew the persons at the residence and had spoken with her on the telephone only a few hours before the robbery. Several items connected with the robbery were recovered from Holsey's bedroom and vehicle, including a ski mask, black leather gloves, a .357 Ruger handgun, a blue bandana, a pair of ski goggles, and a shotgun. Ethington also identified Holsey as the person driving Tom Overby's red BMW the night after the robbery. In his conversations with the police, Holsey denied any involvement in the robbery and denied even being in the white Maxima.

We believe that Holsey has not established a legitimate claim of selective prosecution. The Commonwealth has presented evidence that the evidence against Holsey was stronger than that against Chad Bishop and Regan Lancaster. The Commonwealth also presented legitimate non-racial reasons for prosecuting Holsey, as opposed to Chad Bishop and Regan

Lancaster, rather than because of race. The fact that Shannon and Sharp, who were also African-American, were prosecuted as well does not indicate a discriminatory pattern or policy because they both admitted acting as principals in the crimes. Holsey has not satisfied his burden of showing by clear and convincing evidence both discriminatory effect and discriminatory purpose sufficient to support a constitutional claim of selective prosecution. As a result, Holsey has not demonstrated actual prejudice resulting from ineffective assistance of counsel in that defense counsel's failure to pursue the claim of selective prosecution would have affected the outcome of the prosecution against him.

DEVIATING FROM JURY RECOMMENDAION NOT ABUSE OF DISCETION

Holsey's third issue involves a claim of abuse of discretion by the trial court for increasing his sentence to twenty years, despite a recommended total concurrent sentence of ten years by the jury. The reasons given by the court for not following the jury's recommendation were the methodical planning involved in the crimes, the serious nature of the offenses, and the risk of danger to the victims. Curtis, Ethington, and Overby testified that the two robbers pointed the guns at them with one robber placing the shotgun on Overby's neck and

threatening to kill him. A two-year-old child was also present in the living room during the robbery.

First, we note that this issue generally is not properly preserved because it could and should have been raised on direct appeal rather than in this collateral proceeding under RCr 11.42.[52] Second, it is well established that the trial court has no mandatory obligation to accept the recommendation of the jury on concurrent sentencing.[53] An abuse of discretion occurs when a trial judge's decision is arbitrary, unreasonable, unfair, or unsupported by sound legal principles.[54] The trial court provided several reasons for declining to follow the jury's recommendation to run all the sentences concurrently. We are unpersuaded that the trial court abused its discretion.

For the foregoing reasons, we affirm the opinion of the Fayette Circuit Court denying Holsey's RCr 11.42 motion.

ALL CONCUR.

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[52] *See* Sanders v. Commonwealth, Ky., 89 S.W.3d 380, 385 (2002); Baze v. Commonwealth, Ky., 23 S.W.3d 619, 626 (2000); Sanborn v. Commonwealth, Ky., 975 S.W.2d 905, 908 (1998).

[53] *See* Murphy v. Commonwealth, Ky., 50 S.W.3d 173, 178 (2001); Swain v. Commonwealth, Ky., 887 S.W.2d 346, 348-349 (1994); Nichols v. Commonwealth, Ky., 839 S.W.2d 263, 265 (1992); Dotson v. Commonwealth, Ky., 740 S.W.2d 930, 932 (1987).

[54] *See* Lester v. Commonwealth, Ky., 132 S.W.3d 857, 863 (2004) [*citing* Goodyear Tire and Rubber Co. v. Thompson, Ky., 11 S.W.3d 575, 581 (2000)]; Commonwealth v. English, Ky., 993 S.W.2d 941, 945 (1999).

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