RENDERED: MAY 13, 2005; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000926-MR

O.V. MILLS — APPELLANT

v.

APPEAL FROM KNOX CIRCUIT COURT
HONORABLE RODERICK MESSER, JUDGE
ACTION NOS. 98-CR-00055 & 98-CR-00055-2

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART,
VACATING IN PART,
AND
REMANDING

** ** ** ** **

BEFORE: BARBER, BUCKINGHAM, AND JOHNSON, JUDGES.

BUCKINGHAM, JUDGE: O.V. Mills appeals from two orders of the Knox Circuit Court denying his RCr[1] 11.42 motion to vacate his convictions and life sentence for the crimes of wanton murder and first-degree robbery. We affirm in part, vacate in part and remand.

On June 16, 1996, Silas Lane was stabbed to death and robbed around the Payne's Creek Road area of Knox County. The

[1] Kentucky Rules of Criminal Procedure.

evidence indicated that Lane had been stabbed 39 times. O.V. Mills and Dennis Mills, who are not related, were indicted for the offenses of murder and first-degree robbery in connection with Lane's death.[2]

O.V. gave four separate statements to police officers during the months following Lane's murder. In the fourth statement, O.V. admitted, for the first time, that he was present when Lane was murdered. However, he claimed that it was Dennis who had stabbed and robbed the victim. O.V. claimed that he had tried to stop Dennis but that he had failed to do so because Dennis threatened him. Further, he claimed that he was under duress and fear for his own life when he helped Dennis dispose of the body and burn Lane's car.

Shortly after the murder, Dennis was arrested on separate warrants from Oklahoma and Arkansas. The custody of Dennis was then transferred to those states pursuant to their warrants. Unbeknownst by the authorities in Knox County, Dennis had apparently been involved in the Lane murder. Dennis was not transported back to Knox County to testify in O.V.'s trial.

O.V.'s case was tried by a jury in late 1998. O.V. testified on his own behalf, and he denied murdering Lane. He did, however, acknowledge that he was with Dennis when Lane was

[2] Because both defendants have the last name of Mills, we will refer to the appellant as O.V. and to his co-defendant as Dennis.

murdered. He further denied that he and Dennis had planned to rob Lane.

In addition to instructing the jury on the offense of first-degree robbery, the court also instructed the jury that it could find O.V. guilty of either intentional murder or wanton murder. It did not give a lesser-included instruction of second-degree manslaughter, and none was requested.

The jury found O.V. guilty of wanton murder and first-degree robbery. It also found him guilty of being a second-degree persistent felony offender. It recommended a sentence of life on the murder charge and 20 years on the robbery charge. On December 8, 1998, the circuit court sentenced O.V. accordingly, and it ordered the sentences to run concurrently. The judgment was affirmed by the Kentucky Supreme Court on O.V.'s direct appeal in an opinion rendered on October 25, 2001.

On January 2, 2003, O.V. filed an RCr 11.42 motion to vacate or set aside his convictions and sentences. The court appointed an attorney to represent him, and a supplemental memorandum to support the motion was filed. On October 6, 2003, the court entered an order denying O.V.'s motion without an evidentiary hearing. On April 21, 2004, the court entered an order addressing arguments that had not been addressed in its

first order and again denying O.V.'s motion.[3] This appeal followed.

O.V. raises four arguments in support of his RCr 11.42 motion, and each argument relates to his claim that he received ineffective assistance of counsel. In order to prove ineffective assistance of counsel, a defendant must satisfy a two-part test showing both that counsel's performance was deficient and that the deficiency resulted in actual prejudice affecting the outcome of the proceeding. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). The major focus is whether the proceeding was fundamentally unfair or unreliable. Lockhart v. Fretwell, 506 U.S. 364, 372, 113 S.Ct. 838, 842, 112 L.Ed.2d 180 (1993). The burden is on the defendant to establish ineffective assistance. Strickland, 466 U.S. at 690.

In measuring prejudice, the relevant inquiry is whether "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. "A reasonable probability is a probability sufficient to undermine

[3] The circuit judge, Judge Messer, addressed each and every argument made by O.V. in his motion and thoroughly explained his decision. We appreciate such a complete explanation by Judge Messer, and we encourage all judges to explain their rulings rather than simply entering cursory one-sentence orders either granting or denying the proposed action before the court. Such decisions allow for a more thorough and accurate appellate review because we are not forced to guess at the basis of the circuit court's decision.

confidence in the outcome." Id. "It is not enough for the defendant to show that the error by counsel had some conceivable effect on the outcome of the proceeding." Sanders v. Commonwealth, 89 S.W.3d 380, 386 (Ky. 2002).

O.V.'s first argument is that he received ineffective assistance of counsel when his counsel failed to object to alleged improper cross-examination by the prosecutor regarding Dennis's statements to the authorities. O.V. testified in his own defense, and on cross-examination the prosecutor asked the following:

> Why is it for the first time you lay the blame on him in this fourth statement. The first time you blame him for it, but it's only after Ancil Hall goes out and says: "O.V., I talked with Dennis, do you want to tell me the truth?" And you didn't know what Dennis had said about you, did you? And isn't it true that you knew that Dennis had blamed you or you were afraid that Dennis had told the truth and told what you did - - to start stabbing him because of that advance on you - - and you got afraid and said, "by golly, I better blame it on Dennis before they start believing that I did it."

The admission of a non-testifying co-defendant's statement that expressly implicates the defendant violates the Confrontation Clause. See Bruton v. United States, 391 U.S. 123, 137, 88 S.Ct. 1620, 1628, 20 L.Ed.2d 476 (1968). O.V. argues that his attorney should have objected to the above questions by the prosecutor on the grounds that they violated his right to

confront his accuser by relating to the jury that Dennis had implicated O.V. in the stabbing.

In Tennessee v. Street, 471 U.S. 409, 105 S.Ct. 2078, 85 L.Ed.2d 425 (1985), the U.S. Supreme Court held that a confession by an accomplice who does not testify may nonetheless be used for the nonhearsay purpose of impeaching a defendant's testimony concerning his own confession. 471 U.S. at 413-14. Similarly, in this case the prosecutor made mention of Dennis's statement to the authorities, not for the purpose of proving the truth of the statements, but for the nonhearsay purpose of attacking O.V.'s credibility because he had changed his story in his fourth statement after learning that Dennis had given a statement.

In short, we conclude that the prosecutor's cross-examination was not improper and that O.V. did not receive ineffective assistance of counsel in this regard. Furthermore, Dennis's statement was not read to the jury or otherwise mentioned, and we conclude that O.V. suffered no prejudice such as would allow a new trial based on an unreliable result.

Second, O.V. argues that he received ineffective assistance of counsel when his counsel failed to object to alleged improper direct examination of Lisa Peters (aka Lisa Gist). The Commonwealth called Peters as a witness, and she testified that O.V. and Dennis visited her home immediately

before going to meet with the victim. She testified that Dennis told her that they had a "deal" to make money that night and that afterward he would have plenty of money. She testified that Dennis said this in O.V.'s presence and that O.V. responded by reminding Dennis that they had only fifteen minutes until they were to meet with Lane. The Commonwealth used this testimony to present an inference that O.V. was involved in a plan to rob the victim.

O.V. argues that this testimony was inadmissible hearsay of statements made by Dennis and that his counsel rendered ineffective assistance in failing to object to it. The circuit court concluded that the testimony was admissible as an exception to the hearsay rule under KRE[4] 801A(b)(2). This rule provides that an out-of-court statement by a declarant who is available as a witness but does not testify is not excluded by the hearsay rule if the statement is offered against a party and is "[a] statement of which the party has manifested an adoption or belief in its truth." Id. We agree with the circuit court that the statements were admissible as adoptive admissions. Furthermore, even assuming the statements were not admissible and that counsel rendered ineffective assistance in failing to object, we conclude that the prejudice requirement of the Strickland test was not met.

[4] Kentucky Rules of Evidence.

O.V.'s third argument is that he received ineffective assistance of counsel when his counsel failed to object to improper cross-examination by the prosecutor. The prosecutor asked O.V. about the statements of various witnesses who were family and friends of his. He asked O.V. about the testimony of Kelly Teague, O.V.'s friend, who testified that O.V. indicated he had stabbed the victim in the throat after the victim made a sexual advance toward him. The prosecutor also asked about a statement made by O.V.'s sister-in-law that indicated O.V. desired to retrieve the victim's CB radio after Dennis was arrested. The prosecutor also asked O.V. about Peters's testimony concerning the "deal" referred to by Dennis and O.V.'s insistence that they had only fifteen minutes to meet Lane. After O.V. denied making these statements, the prosecutor, in an attempt to discredit him, insinuated that O.V. was alleging that his friends and family had lied about the statements.

In considering this issue, the circuit court concluded that it was clear the Commonwealth had erred in asking O.V. to comment on the credibility of the Commonwealth's witnesses. The court cited Moss v. Commonwealth, 949 S.W.2d 579, 583 (Ky. 1997). However, the circuit court concluded that the questions did not constitute palpable error and that the error was not of such magnitude as to discredit the reliability of the jury's

verdict. We agree. Again, we conclude that the prejudice requirement of the Strickland test was not met.

Finally, O.V. argues that he received ineffective assistance of counsel when his counsel failed to request a jury instruction for the lesser-included offense of second-degree manslaughter. We conclude that the evidence supported the giving of such an instruction and, therefore, that the matter should be remanded to the trial court for a determination concerning whether counsel's failure to request such an instruction amounted to ineffective assistance of counsel.

With the adoption of the penal code, the "felony murder" concept was abandoned in Kentucky. Caudill v. Commonwealth, 120 S.W.3d 635, 669 (Ky. 2003). Now, under KRS 507.020(1)(b), "participation in a dangerous felony, *e.g.*, armed robbery, may supply the elements of aggravated wantonness, *i.e.*, extreme indifference to human life, necessary to convict of wanton murder." Id. The Caudill court further stated that "[i]n that scenario, second-degree manslaughter becomes a lesser-included offense of wanton murder if the jury could believe that the defendant's participation in the dangerous felony amounted to wantonness but not extreme indifference to human life." Id. See also Kruse v. Commonwealth, 704 S.W.2d 192, 194 (Ky. 1985).

In this case the jury rejected the prosecution's theory that O.V. was guilty of intentional murder while acting alone or in complicity with Dennis. Rather, it found that he was guilty of wanton murder because of his participation in the robbery that resulted in the death of the victim at the hands of O.V.'s cohort. Under the principles of the Caudill and Kruse cases, O.V. was entitled to an instruction on the lesser-included offense of second-degree manslaughter.

In its opinion affirming O.V.'s conviction and sentence on direct appeal, the Kentucky Supreme Court stated that it appeared an instruction for second-degree manslaughter was not given by the court due to the trial strategy of O.V.'s counsel. However, that statement was dicta, and there was nothing in the record to support it. Furthermore, even if counsel for O.V. purposefully declined to request the instruction, there may be an issue concerning whether such trial strategy was appropriate. If not, the issue becomes whether, considering the evidence and counsel's overall performance, such inappropriate trial strategy overcomes the presumption of effective assistance of counsel. See Haight v. Commonwealth, 41 S.W.3d 436, 441-42 (Ky. 2001).

The trial court rejected O.V.'s claim of ineffective assistance of counsel on this ground for two reasons. First, it noted our supreme court's statement in its opinion that the

instruction appeared to be "precluded" due to trial strategy. The trial court stated that "[s]uch a finding discredits Movant's claim of ineffective assistance of counsel." For the reasons stated above, we disagree. Second, the trial court reasoned that even if counsel's failure to request the instruction constituted ineffective assistance, then the findings of the supreme court that the record supported the verdict of guilt on wanton murder indicated that "effective performance by counsel would not have produced a reasonable probability of a favorable result for Movant." The trial court reasoned that O.V. failed to show that but for counsel's actions, a reasonable probability of a favorable result existed. Again, we disagree.

Although the evidence may have supported a verdict of guilt for wanton murder, that is not the standard for determining whether the court should nevertheless have instructed the jury on the lesser-included offense. "An instruction on a lesser-included offense is required only if, considering the totality of the evidence, the jury might have a reasonable doubt as to the defendant's guilt of the greater offense, and yet believe beyond a reasonable doubt that he is guilty of the lesser offense." Neal v. Commonwealth, 95 S.W.3d 843, 850 (Ky. 2003). The jury in this case could have had a reasonable doubt as to the degree of wantonness required to

convict O.V. of wanton murder and yet have believed beyond a reasonable doubt that he had such a degree of wantonness as to constitute guilt for the lesser-included offense of second-degree manslaughter.

The orders of the Knox Circuit Court are affirmed in part and are vacated in part and remanded for an evidentiary hearing concerning whether counsel's failure to request a jury instruction for the lesser-included offense of second-degree manslaughter overcomes the presumption that O.V. received effective assistance of counsel.

ALL CONCUR.

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