

Commonwealth of Kentucky
Court of Appeals

NO. 2006-CA-001292-MR

ROGER MORRISON

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 02-CR-00786

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: STUMBO, JUDGE; BUCKINGHAM AND HENRY, SENIOR JUDGES.¹

STUMBO, JUDGE: This appeal is from the summary denial of a post-judgment RCr 11.42 motion alleging ineffective assistance of counsel. Appellant (Morrison) was convicted of second-degree burglary, enhanced as a first-degree persistent felon offender. He was sentenced to twenty years in prison. His RCr 11.42 motion was denied by the circuit court and we affirm that decision.

¹ Senior Judges David C. Buckingham and Michael L. Henry, sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

The facts of this case are disputed by the parties. Appellant was the boyfriend of Carolyn Walker. Ms. Walker, her three children, and Appellant were at one time living together. One day, while Appellant was not home, Ms. Walker moved out of the house and did not tell Appellant. Eventually Appellant located Ms. Walker. On the morning of May 20, 2002, Appellant went to Ms. Walker's new residence and they talked about their relationship. Eventually they went for a walk and continued their discussion. At this point, the two versions of the story diverge. Appellant claims that he and Ms. Walker were together all night long. Upon their return to the house, they found that Ms. Walker had been locked out of the house by her children. They were unable to get any of the doors open so, allegedly at Ms. Walker's request, Appellant broke the bathroom window in order to gain entrance into the house. At this point, Appellant contends that members of Ms. Walker's family found him at the house, attacked him, subdued him, and called the police.

The Commonwealth's version is that Ms. Walker and Appellant parted ways after lunch. When they split up, Ms. Walker went to her sister's house (Aunt Liz). Appellant then returned to Ms. Walker's residence and tried to gain entry. Two of the children (Jerome and Michael) were at the house and would not let him in. Appellant then broke the bathroom window and entered the house. Upon seeing Appellant in the house, Jerome called Aunt Liz. Both children then left the house and Michael ran down the street to his uncle's house. Michael and Uncle Billy returned to the house to meet Jerome. As they were doing so, Aunt Liz arrived. Aunt Liz had left the children's

mother at her house. Aunt Liz had brought the third child, Dominique, and a friend, Geneva, with her. Uncle Billy then called the police.

Appellant then exited the house and Uncle Billy told him the police were coming. Appellant tried to run away, but Uncle Billy wrestled him to the ground and held him until the police could arrive. At trial, one of the officers testified that when they arrived, Appellant was uncooperative, smelled of alcohol, and slurred his speech.

Appellant was convicted of second-degree burglary, alcohol intoxication, and first-degree persistent felony offender in relation to the incident. The Supreme Court affirmed this conviction on January 20, 2005.

On October 5, 2005, Appellant filed a RCr 11.42 motion, collaterally attacking the judgment on grounds of ineffective assistance of counsel. He claimed that counsel was ineffective because of a failure to investigate Appellant's claims, to ask for a voluntary intoxication jury instruction, and on the basis of cumulative ineffectiveness. The circuit court denied the first and third claims for their non-specificity and the failure to show that claims would entitle him to post-conviction relief. The court also denied the second claim because Appellant had testified during trial that he was not intoxicated and thus, there was no showing he would be entitled to the instruction. This appeal followed.

We find that the reasons set forth by the circuit court for dismissing the motion are sound. Appellant did nothing to strengthen his argument on this appeal. His first and third arguments (lack of investigation and cumulative ineffectiveness) are still general assertions with no specific facts to show ineffective assistance. Appellant gives

the correct analysis for ineffective counsel as set forth in *Strickland v. Washington*, 466 U.S. 668 (1984) by saying the defendant must show that counsel's performance was deficient as being outside the range of reasonable professional norms and that these deficiencies prejudiced the defense in such a way that but for them, the outcome of the proceeding would have been different. He then expounds on the importance of counsel and how pretrial investigation is essential.

For his first argument, Appellant generally says that his counsel failed to interview any witnesses or investigate any claims, but says nothing about who or what the witnesses and claims were. The only thing specifically mentioned in this argument is that counsel failed to impeach one of the witnesses. Appellant claims that this witness, Elizabeth Richardson (Aunt Liz), stated prior to trial that she had tried to stop Appellant from entering the house, but then at trial stated she was not at the house when he entered.

This Court is hard pressed to see how this failure to impeach a witness prejudiced Appellant to the point of it being ineffective assistance of counsel. First, Appellant claimed throughout trial that he entered the house with Ms. Walker's permission. Richardson's testimony that she was not at the residence does not prejudice this claim. Had Richardson testified similarly to her prior statement that she had tried to restrain Appellant from entering the house, then that would have contradicted Appellant's claim that he was entering the house with permission. This is the only specific factual instance that Appellant mentions in regard to this argument and it does not appear

prejudicial to Appellant's case. Appellant's general assertion that his counsel did no investigation is unfounded.

Appellant's second argument that his counsel was ineffective because there was no jury instruction as to voluntary intoxication is also without merit. In order for such an instruction to be required, the defendant must put forth evidence that he was intoxicated and did not know what he was doing. *Callison v. Commonwealth*, 706 S.W.2d 434, 436 (Ky. App. 1986). Appellant did not put forth any evidence that he was drunk or that he did not know what he was doing. In fact, Appellant claimed he was not drunk at the time and that he was entering the house with permission. Appellant also fought the alcohol intoxication charge during trial. Had Appellant conceded to the intoxication charge, then an instruction of intoxication may have been required. The only evidence put forth regarding alcoholic intoxication was from the testimony of Aunt Liz, Uncle Billy, and the two officers who came onto the scene. Aunt Liz and Uncle Billy stated that Appellant was drunk and the officers stated that he smelled of alcohol and exhibited some characteristics of being drunk. Even with this testimony there was not sufficient evidence to require a voluntary intoxication instruction to the jury. There was no evidence that Appellant was so drunk that he did not know what he was doing. "Evidence of mere drunkenness is not sufficient to warrant an instruction." *Morgan v. Commonwealth*, 189 S.W.3d 99, 113 (Ky. 2006), citing *Jewell v. Commonwealth*, 549 S.W.2d 807 (Ky. 1977). Absent some evidence that Appellant was drunk and did not know what he was doing, an instruction of intoxication was not required.

Appellant's final argument is that defense counsel committed several prejudicial errors that seriously affected the outcome of the trial to the point of cumulative error. This argument is also without merit. Appellant goes on for five pages about the role of counsel and an attorney's duties to his client, but nowhere does he say how this applies to his counsel. Appellant gives no examples or specific instances of prejudicial acts of his counsel. In fact, his counsel is not even mentioned in this argument. Appellant's cumulative error argument is nothing more than five pages of case law, academic text, and legal reference material.

For the forgoing reasons, we affirm the circuit court's denial of Appellant's 11.42 motion.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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