

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2007-CA-001088-MR

RYAN M. DAVIS

APPELLANT

v. APPEAL FROM CASEY CIRCUIT COURT  
HONORABLE JAMES G. WEDDLE, JUDGE  
ACTION NO. 05-CR-00001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

\*\* \*\* \* \* \* \*\*

BEFORE: CAPERTON, LAMBERT, AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Ryan M. Davis appeals from an order of the Casey Circuit Court denying his motion for post-conviction relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. For the reasons stated herein, we affirm.

On December 27, 2003, Maleen Lawless' residence was invaded, and she was accosted at gunpoint. The intruder went from room to room and, after several minutes, exited the residence with jewelry boxes and a cedar chest. After

Sheriff Jerry Coffman responded to the scene, Lawless informed him that the intruder was Davis because she recognized his voice from their former landlord-tenant relationship.

After interviewing Lawless, Sheriff Coffman went to the home of Davis' uncle, Ronnie McMullin, to search for Davis. Upon arriving, Sheriff Coffman observed a black Ford Thunderbird with jewelry boxes inside the vehicle. After speaking with McMullin, Sheriff Coffman found Sherman Townsend inside McMullin's home. After arresting and searching Townsend, Sheriff Coffman discovered the keys to the Thunderbird and recovered the jewelry boxes later identified as belonging to Lawless. Subsequently, Davis was apprehended in Pulaski County.

Thereafter, Davis was indicted by a Casey County grand jury for one count each of first-degree robbery as a principal or accomplice (complicity), and for one count each of first-degree burglary as a principal or accomplice (complicity). After Townsend was charged under a separate indictment, the two were jointly tried with each denying any involvement in the crimes. Townsend testified he was with Davis on the morning of the robbery but only to accompany him to retrieve stereo equipment from Davis' former wife.

Davis testified he was not involved in the crimes, and that he only met Townsend to exchange drugs for the jewelry already in Townsend's possession. Davis testified that he did not have a gun on the morning of the crime. McMullin

testified Davis came to his home on the morning in question with a handgun and some jewelry.

Following the jury trial, Davis was convicted on one count of first-degree robbery and one count of first-degree burglary. The jury recommended concurrent sentences of thirteen and one-half years. At sentencing, the trial court disregarded the jury's recommendation and sentenced Davis to seventeen years' imprisonment. Ten years of each sentence was ordered to run concurrently, and three and one-half years of each sentence was ordered to run consecutively with each other and consecutive to the ten-year terms for a total seventeen-year sentence.

This Court affirmed Davis' conviction on direct appeal in Case No. 2005-CA-001109-MR. Subsequently, Davis filed a motion pursuant to RCr 11.42 to set aside his conviction on the basis that his defense counsel rendered ineffective assistance during his trial. On May 1, 2007, the trial court denied Davis' motion. This appeal follows.

Davis first contends that his defense counsel rendered ineffective assistance when counsel failed to object to the trial court's impermissible imposition of consecutive sentences. Specifically, he contends the trial court was required to follow the jury's recommendation that his sentences run concurrently and, thus, his sentencing to consecutive terms of imprisonment was unconstitutional.

On appellate review of a claim of ineffective assistance of counsel, we are governed by the standard set out in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Under this standard, the movant must demonstrate: (1) that counsel made serious errors resulting in a performance outside the range of professionally competent assistance guaranteed by the Sixth Amendment; and (2) that the deficient performance prejudiced the defense so seriously that there is a reasonable likelihood that the outcome of the trial would have been different absent the errors. *MacLaughlin v. Commonwealth*, 717 S.W.2d 506, 507 (Ky.App. 1986).

Notwithstanding Davis' contention of ineffective assistance, the trial court's sentence of consecutive terms of imprisonment was proper. Although the jury recommended that his sentences be served concurrently, the trial court has the authority to disregard a jury's sentencing recommendation and impose consecutive or concurrent sentences. *Wombles v. Commonwealth*, 831 S.W.2d 172, 176 (Ky. 1992). Thus, defense counsel's failure to object was not error.

Davis next contends that his defense counsel rendered ineffective assistance when counsel failed to notify the trial court that a juror had a discussion with a prosecution witness during a recess. Citing *Remmer v. United States*, 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654 (1954), for the proposition that this exchange was presumptively prejudicial, he contends his counsel was required to notify the court of this contact to ensure that his right to a fair and impartial trial was protected.

In *Remmer*, the U.S. Supreme Court held that private communication, directly or indirectly, with a juror during the course of a trial is presumptively prejudicial. *Id.* at 229. However, as held by our Supreme Court, a defendant must demonstrate bias regarding the contact before he can be granted appropriate relief. *Bowling v. Commonwealth*, 168 S.W.3d 2, 10-11 (Ky. 2004). A hearing is only required when the alleged contact manifests a likelihood of affecting the outcome of the trial. *Id.*

Davis claims he informed his counsel that a prosecution witness talked with a female juror during a recess. However, Davis' brief does not provide other information, if any, given to his counsel regarding the content or circumstances surrounding the juror's contact with the witness. Accordingly, Davis' defense counsel's failure to notify was not ineffective assistance because counsel was not aware of sufficient facts to believe the contact manifested a likelihood of affecting the outcome of the trial.

Davis next contends that his defense counsel rendered ineffective assistance when counsel failed to move for the suppression of evidence. Specifically, because his counsel was aware of the Commonwealth's failure to produce physical evidence establishing that a gun was used during the crime, Davis contends his counsel was ineffective when he did not file a pre-trial motion to suppress evidence pursuant to RCr 7.24(9). Further, he contends all testimony regarding his gun possession and use should have been excluded because there was no physical evidence to substantiate such testimony.

During trial, two witnesses testified that Davis had a gun at or near the time of the crime. The victim testified Davis fired a gun near her after invading her residence, and Davis' uncle testified that Davis possessed a handgun the morning of the crime. Despite his contention that this testimony was improper, each witness was competent to testify as to their personal observations. *Bart v. Commonwealth*, 951 S.W.2d 576, 579 (Ky. 1997).

Davis next contends that his defense counsel rendered ineffective assistance when counsel failed to adequately investigate his case, in particular, the evidence regarding his use of a firearm during the commission of the crime. Further, he contends his counsel failed to subject the Commonwealth's proof to meaningful adversarial testing. Thus, he contends his defense counsel's representation constituted no representation at all.

General and vague allegations regarding counsel's ineffective performance without specific factual claims of error and prejudice cannot be grounds for the granting of post-conviction relief. *Mills v. Commonwealth*, 170 S.W.3d 310, 330 (Ky. 2005). Conclusionary allegations unsupported by specific facts do not warrant relief under RCr 11.42. *Sanders v. Commonwealth*, 89 S.W.3d 380, 385 (Ky. 2002).

Davis makes a general allegation that his defense counsel failed to adequately investigate his case and subject the Commonwealth's proof to meaningful adversarial testing. Davis has not stated what evidence would have been found and how this evidence would have beneficially changed the outcome of

his case, or what evidence was not adequately contested and how this uncontested evidence prejudiced his case. Accordingly, Davis' unsupported allegations do not rise to constitutional error.

To the extent that Davis specifically contends that his defense counsel failed to investigate his use of a firearm during the commission of the crime, the record demonstrates that counsel's trial strategy foreclosed Davis' use of a gun during the crime. Davis' theory was that he did not participate in the robbery and, thus, he could not have been armed during the commission of the crime. However, the jury decided to believe the Commonwealth's version of the facts, and we will not second-guess counsel's strategy. *Meadows v. Commonwealth*, 550 S.W.2d 511, 513 (Ky. 1977).

Davis next contends that his defense counsel rendered ineffective assistance when counsel failed to object to Sheriff Coffman's testimony in which he used notes, taken by the prosecutor during an interview with Fisher, to impeach Fisher's trial testimony. Specifically, he contends Sheriff Coffman's use of the notes constituted impermissible testimony from the prosecuting attorney. Further, he contends this testimony violated the confrontation clause because he was unable to cross-examine what was in effect the prosecutor's testimony.

However, from a review of the record, Davis' counsel introduced the prosecutor's notes into the record during his cross-examination of Sheriff Coffman. It appears that Davis' counsel attempted to bolster the testimony of Fisher, who was impeached by the Commonwealth, through the use of his prior statements.

While Davis contends the introduction of the notes constituted error, our function is not to second-guess counsel's strategy or tactics. *Baze v. Commonwealth*, 23 S.W.3d 619, 624 (Ky. 2000). Accordingly, defense counsel's decision to pursue this line of questioning was not error.

Moreover, even if we were to assume counsel's decision was error, Davis has not met his burden of proving that the error prejudiced the outcome of his case because he failed to establish why the notes deprived him of the ability to confront the evidence. Essentially, as required by the second prong of *Strickland*, he has not established that the introduction of the notes prejudiced his defense so seriously that there is a reasonable likelihood that the jury's verdict would have been different absent their introduction.

Davis next contends that his defense counsel rendered ineffective assistance when counsel failed to object to the indictment on the basis that it impermissibly charged him with multiple offenses in each paragraph when it could only charge him with one offense in each paragraph.

Davis' indictment met the requirements for legal sufficiency. An indictment is valid when it informs a defendant of the specific offense with which he is charged without misleading him and fairly informs the defendant of the facts constituting the specific offense. *Thomas v. Commonwealth*, 931 S.W.2d 446, 449 (Ky. 1996). In compliance with *Thomas*, Davis' indictment specifically listed the charged offenses and the factual basis for each of the charges. Therefore, Davis' counsel's decision not to object to the indictment was not error.

Davis next contends that his defense counsel rendered ineffective assistance when counsel failed to object to the jury instructions. Specifically, he contends the jury instructions improperly prevented jurors from reaching a unanimous verdict because the instructions permitted him to be found guilty under two theories (principal and complicity) of first-degree robbery and burglary charges. Therefore, he argues that jurors could find him guilty without all believing in the same theory of his guilt.

When a jury is instructed on two theories of a defendant's guilt, the unanimity of the verdict is not compromised if the evidence supports a conviction under both theories. *White v. Commonwealth*, 178 S.W.3d 470, 484 (Ky. 2005). However, the unanimity of the verdict is violated when a conviction is supported under only one of the two alternative theories. *Id.*

In this case, the evidence supports Davis' guilt under the principal and accomplice (complicity) theories. As we concluded in Davis' direct appeal, "the evidence showed either that Davis and/or Townsend committed robbery first and burglary first while using a firearm, or that they committed no robbery and burglary at all." Therefore, Davis' contention warrants no relief.

Finally, Davis contends that his numerous ineffective assistance contentions if not individually, then cumulatively, violated his constitutional right to a fair trial. However, this contention is without merit because none of Davis' claims have risen to a level of constitutional deprivation. Thus, there can be no

cumulative constitutional error. *Epperson v. Commonwealth*, 197 S.W.3d 46, 65-66 (Ky. 2006).

For the foregoing reasons, the order of the Casey Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Ryan M. Davis, *Pro Se*  
Eddyville, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo  
Attorney General of Kentucky

Gregory C. Fuchs  
Assistant Attorney General  
Frankfort, Kentucky