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Supreme Court of Kentucky.
Virginia S. CAUDILL, Appellant
v.
COMMONWEALTH of Kentucky, Appellee.
No. 2006-SC-000457-MR.

April 23, 2009.
Rehearing Denied Oct. 29, 2009.

Background: Defendant who was convicted of murder, burglary in the first degree, robbery in the first degree, arson in the second degree, and tampering with physical evidence moved for post-conviction relief. The Circuit Court, Fayette County, Pamela R. Goodwine, J., denied relief. Defendant appealed.

Holdings: The Supreme Court held that:
(1) trial counsel was not ineffective for failure to call witnesses or elicit certain testimony;
(2) counsel was not ineffective for failing to establish a separate motive for petitioner's co-defendant;
(3) counsel was not ineffective for failing to inform petitioner of her Fifth Amendment right to testify during penalty phase; and
(4) prosecutor did not commit misconduct.

Affirmed.

West Headnotes

[1] Criminal Law 110 1931

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1921 Introduction of and Objections to Evidence at Trial
110k1931 k. Experts; Opinion Testimony. Most Cited Cases
Trial counsel was not ineffective for failing to secure blood spatter expert to counter testimony of Commonwealth's forensic expert that defendant had murder victim's blood on her shoes consistent with a beating and that shoes were within three feet of where the blood originated when force was applied; defendant did not present evidence that an additional expert's testimony would differ materially from testimony of Commonwealth's expert or prove that additional expert testimony would have changed the outcome of the trial. U.S.C.A. Const.Amend. 6.

[2] Criminal Law 110 1924

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1921 Introduction of and Objections to Evidence at Trial
110k1924 k. Presentation of Witnesses. Most Cited Cases
Trial counsel was not ineffective for failing to call as a witness inmate who was incarcerated with defendant's co-defendant in prosecution for murder, burglary in the first degree, robbery in the first degree, arson in the second degree, and tampering with physical evidence; inmate's statement bore little credibility, revealed no independent knowledge of the crime or crime scene, was partially refuted by forensic evidence, and was given after inmate openly and aggressively solicited release from custody before giving it. U.S.C.A. Const.Amend. 6.

[3] Criminal Law 110 1899

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1899 k. Severance of Defendants. Most Cited Cases
Trial counsel was not ineffective for failing to elicit from defendant specific facts that would have supported motion to sever murder trial from that of co-defendant; facts were unlikely to cause trial court to grant motion, since both defendants admitted being present at commission of murder so that virtually all of the evidence against defendant was admissible

against co-defendant and vice versa, and only evidence that counsel failed to illicit from defendant was her own self-serving statements. U.S.C.A. Const.Amend. 6.

[4] Criminal Law 110 1961

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1958 Death Penalty
110k1961 k. Presentation of Evidence in Sentencing Phase. Most Cited Cases
Trial counsel was not ineffective during penalty phase of murder trial for not asking thorough questions of family members of defendant or for failure to call witnesses; availability of more evidence of mitigation that was not presented did not amount to deficient performance. U.S.C.A. Const.Amend. 6.

[5] Criminal Law 110 1909

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1908 Raising of Particular Defense or Contention
110k1909 k. In General. Most Cited Cases
Trial counsel was not ineffective for failing to establish a separate motive for co-defendant to commit murder for which defendant and co-defendant were both convicted that co-defendant owed $3,000 to a drug dealer for cocaine at time of murder; information would not have resulted in a different outcome had it been introduced at trial, since Commonwealth's theory was that defendants went to victim's house to rob her so that they could purchase drugs, evidence strongly supported conclusion that defendants acted in concert, and testimony supported conclusion that defendant had motive of anger at victim, since victim would not give her money. U.S.C.A. Const.Amend. 6.

[6] Criminal Law 110 1961

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1958 Death Penalty
110k1961 k. Presentation of Evidence in Sentencing Phase. Most Cited Cases
Trial counsel was not ineffective for failing to inform defendant of her Fifth Amendment right to testify during penalty phase of murder trial; defendant made no assertion that she ever asked counsel about testifying at mitigation phase or that she expressed a desire to do so, made no objection when attorney rested mitigation case without calling her to the stand, testified during guilt phase, and attorney's decision not to call her was reasonable, since jury had clearly rejected her testimony. U.S.C.A. Const.Amends. 5, 6.

[7] Criminal Law 110 2036

110 Criminal Law
110XXXI Counsel
110XXXI(D) Duties and Obligations of Prosecuting Attorneys
110XXXI(D)5 Presentation of Evidence
110k2032 Use of False or Perjured Testimony
110k2036 k. Duty to Correct False or Perjured Testimony. Most Cited Cases
Prosecutor did not commit misconduct by failing to correct allegedly perjured testimony of inmate who testified that defendant confessed to murder and denied receipt of any consideration from the Commonwealth in inmate's own pending charges for cooperating with investigation of murder committed by defendant and co-defendant, although Commonwealth informed trial court at inmate's sentencing hearing that inmate was cooperating in two other investigations; Commonwealth also stated at inmate's sentencing hearing that no sentencing recommendation was being made due inmate's cooperation.

[8] Criminal Law 110 2036

110 Criminal Law
110XXXI Counsel
110XXXI(D) Duties and Obligations of Prosecuting Attorneys
110XXXI(D)5 Presentation of Evidence
110k2032 Use of False or Perjured Testimony
110k2036 k. Duty to Correct False or Perjured Testimony. Most Cited Cases

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Prosecutor did not commit misconduct by failing to correct allegedly perjured testimony of inmate, who testified that defendant confessed to certain details of murder, that inmate did not receive beneficial treatment with respect to her own pending charges due to her cooperation with investigators of defendant's crime; inmate's testimony was essentially truthful, though technically incorrect, and inconsistency was not material to defendant's case, since point was clearly relayed to jury that inmate did receive benefit in sentencing.

[9] Criminal Law 110 2034

110 Criminal Law
110XXXI Counsel
110XXXI(D) Duties and Obligations of Prosecuting Attorneys
110XXXI(D)5 Presentation of Evidence
110k2032 Use of False or Perjured Testimony
110k2034 k. What Constitutes Perjured Testimony. Most Cited Cases
Prosecutor did not commit misconduct by failing to correct allegedly perjured testimony of defendant's housemate of petitioner for post-conviction relief that she received no benefit for her testimony against defendant in murder trial that defendant made statements to the effect that she was willing to hurt somebody in order to make money; housemate's testimony regarding the lack of a benefit was truthful.

[10] Criminal Law 110 2040

110 Criminal Law
110XXXI Counsel
110XXXI(D) Duties and Obligations of Prosecuting Attorneys
110XXXI(D)5 Presentation of Evidence
110k2039 Examination of Witnesses Other Than Accused
110k2040 k. In General. Most Cited Cases
Prosecutor did not commit misconduct by objecting to defense counsel's question of witness regarding any benefit that witness received for testifying against defendant in murder trial; objection to questions that were ultimately deemed improper and irrelevant could not amount to prosecutorial misconduct.

[11] Criminal Law 110 1999

110 Criminal Law
110XXXI Counsel
110XXXI(D) Duties and Obligations of Prosecuting Attorneys
110XXXI(D)2 Disclosure of Information
110k1993 Particular Types of Information Subject to Disclosure
110k1999 k. Impeaching Evidence. Most Cited Cases
Failure of Commonwealth to disclose parameters of any plea agreements made with witnesses who testified against defendant in murder trial was not *Brady* violation; defense was aware that plea agreements had been reached and cross-examined witnesses on that fact, and material readily available to the defense and not secreted by the Commonwealth did not fall within the *Brady* rule.

[12] Criminal Law 110 1935

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1921 Introduction of and Objections to Evidence at Trial
110k1935 k. Impeachment or Contradiction of Witnesses. Most Cited Cases
Trial counsel was not ineffective for failing to sufficiently impeach three witnesses who testified against defendant in murder trial regarding their plea agreements; testimony was not perjury and was essentially truthful.

[13] Criminal Law 110 1045

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1045 k. Necessity of Ruling on Objection or Motion. Most Cited Cases
Claim that trial counsel was ineffective for failing to call second witness during murder trial of petitioner for post-conviction relief to impeach testimony of first witness was not properly preserved; trial court made no specific mention of the claim or of the second witness in its order denying post-conviction relief. Rules Crim.Proc., Rule 11.42.

[14] Criminal Law 110 1923

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1921 Introduction of and Objections to Evidence at Trial
110k1923 k. Investigating, Locating, and Interviewing Witnesses or Others. Most Cited Cases
Trial counsel was not ineffective for failing to locate a witness in the middle of a murder trial; witness' name was mentioned for the first time at trial and was not on any witness list.

On Appeal from Fayette Circuit Court, No. 99-CR-00146-001; Pamela R. Goodwine, Judge.David Hare Harshaw, III, Dennis James Burke, Department of Public Advocacy, LaGrange, KY, Counsel for Appellant.

Jack Conway, Attorney General, David A. Smith, Michael A. Nickles, Jr., Office of Attorney General, Criminal Appellate Division, Frankfort, KY, Counsel for Appellee.

MEMORANDUM OPINION OF THE COURT

***1** Virginia S. Caudill appeals from the Fayette Circuit Court's denial of her RCr 11.42 motion for post-conviction relief. In that motion, Caudill raised numerous claims, the majority of which involved allegations of ineffective assistance of counsel and prosecutorial misconduct. The Fayette Circuit Court rejected each without an evidentiary hearing, except for a single claim of juror misconduct. Caudill now appeals twelve of the remaining issues that were denied without a hearing.

Caudill was convicted in 2000 for the murder Lonetta White. She was tried jointly with Jonathan Wayne Goforth, whose post-conviction appeal has been considered with Caudill's. White was bludgeoned to death in her home. Her body was found in the trunk of her burning car in a field several miles away. Numerous items of valuable personable property had been taken from her home.

Both Caudill and Goforth admitted they were present in White's home when the murder occurred, but each accused the other of the actual crime. Caudill claimed that she went to ask White, the mother of her estranged boyfriend, for money, and that Goforth unexpectedly forced his way into the house and attacked White. Goforth claims that he accompanied Caudill to White's house and when White refused to give Caudill money, she began attacking the woman. Both admitted to assisting in the removal of White's body from the home and the burning of her body and vehicle. Eventually, the pair fled to Florida and New Orleans before being arrested in Mississippi.

Goforth and Caudill were jointly tried and each was convicted of murder, burglary in the first degree, robbery in the first degree, arson in the second degree, and tampering with physical evidence. Each received the death penalty for the murder conviction and the maximum allowable sentence for the remaining crimes. Their convictions were affirmed on direct appeal, where further factual details may be found. *Caudill v. Commonwealth*, 120 S.W.3d 635 (Ky.2003). The following year, Caudill filed the present motion for post-conviction relief.

Standard of Review

To prevail on a motion for post-conviction relief pursuant to RCr 11.42, the movant must establish that he was denied a substantial right. *Halvorsen v. Commonwealth*, 258 S.W.3d 1, 3 (Ky.2007). The motion must set forth all facts necessary to establish the existence of a constitutional violation. *Skaggs v. Commonwealth*, 803 S.W.2d 573, 576 (Ky.1990). Where factual issues are not resolvable through a review of the trial record, an evidentiary hearing should be held. *Id.*

When the basis of the RCr 11.42 motion is a claim of ineffective assistance of counsel, the movant must overcome the strong presumption that counsel rendered reasonably effective professional assistance. First, the movant must show that counsel's performance was deficient, meaning that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Second, the movant must demonstrate that counsel's deficiency prejudiced the defendant. *Id.* This requires a showing that, but for counsel's unprofessional errors, the

outcome of the trial would have been different. *Id.* at 694. "So the threshold issue is not whether [Caudill's] attorney was inadequate; rather, it is whether he was so *manifestly* ineffective that defeat was snatched from the hands of probable victory." *United States v. Morrow*, 977 F.2d 222, 229 (6th Cir.1992). We have also stated this standard as a determination of whether, absent counsel's errors, the jury would have had reasonable doubt with respect to guilt. *Brown v. Commonwealth*, 253 S.W.3d 490, 499 (Ky.2008).

Ineffective Assistance of Counsel Claims

Expert Witness

***2**[1] Caudill claims that her defense counsel was ineffective for not securing an expert witness to rebut the testimony of Linda Winkle, a Kentucky State Police crime lab forensic examiner. Winkle examined the shoes Caudill was wearing on the night of White's murder. Caudill was also wearing these shoes the following day when she and Goforth briefly fled to Marion County. On that trip, Goforth swerved his truck to avoid a deer, causing the truck to tumble over an embankment. Caudill sustained minor cuts and bruises in the accident.

Winkle testified at trial that White's blood was found on Caudill's shoes. She further explained that blood appeared in three forms: impact spatter, contact stains, and smears. Winkle testified that the medium impact blood spatter found on the shoes was produced when force was applied to the blood, which would be consistent with a beating or similar action. Further, the shoes were within three feet of where the blood originated when the force was applied. Winkle, however, qualified her testimony by explaining this was only one explanation, and that other potential ways existed that would cause the blood to spatter or break up. The Commonwealth argued that the blood spatter was formed when Caudill was within three feet of White during the assault.

In her RCr 11.42 motion, Caudill presented an affidavit from a DPA investigator, Douglas Blair, to support the contention that her counsel should have hired an expert to rebut Winkle's testimony. Blair related statements made to him by Edward Taylor, a blood spatter expert also employed by the KSP crime lab. According to the affidavit, Taylor stated that there was no way of telling if the spatter on Caudill's shoes was caused by impact spatter, as Winkle had testified, or by satellite spatter. Caudill argues that satellite spatter could have occurred during the subsequent car wreck, when her own blood might have impacted White's blood on her shoes. We note that this explanation for satellite spatter is Caudill's; Taylor did not indicate specifically that the car accident could have caused satellite spatter. Taylor's statements also do not address the fact that White's blood would presumably have dried on Caudill's shoes by the time of the car accident, which occurred several hours after White's murder.

The trial court determined that Blair's affidavit, if taken as true, failed to establish any deficiency of defense counsel. We agree. Taylor's statements do not directly contradict Winkle's testimony, contrary to Caudill's characterization. Though Winkle did not specifically testify that the impact spatter might have occurred in the subsequent car wreck, her testimony did not absolutely rule out the possibility. In fact, she stated that any time a medium impact force is applied to the blood, it would break up. This testimony effectively embodies Taylor's statement about satellite spatter. Further, Winkle's testimony did not preclude the argument that the blood spatter occurred while Caudill helped Goforth remove White's body from the home. Indeed, defense counsel specifically argued this point in closing argument to explain why White's blood was on Caudill's shoes. Defense counsel ably buttressed this argument by pointing out that there was decidedly little blood on Caudill's jeans, in contrast to her shoes, which was consistent with her claim that she only helped to move the body.

***3** It is unnecessary, in every case, for defense counsel to hire rebuttal expert witnesses to avoid being deemed ineffective. *Thompson v. Commonwealth*, 177 S.W.3d 782, 786 (Ky.2005). Caudill has not presented evidence that an additional expert's testimony would differ materially from Winkle's. Taylor's statements do not dispute the fact that White's blood was on Caudill's shoes, nor rule out the possibility that the impact spatter occurred while Caudill was assaulting White. The only testimony that Taylor might have provided is the theory that the blood stains were satellite, not impact, spatter, thus providing an explanation other than Caudill's proximity to the assault. However, this possibility was not expressly rejected by Winkle's testimony and was presented to the jury through defense counsel's cross-

examination of Winkle, as well as during closing argument. For this reason, we are unconvinced that additional expert testimony would have changed the outcome of Caudill's trial. *See* *Mills v. Commonwealth*, 170 S.W.3d 310, 329 (Ky.2005) ("Although it is *possible* that testimony from an expert might have convinced the jury that Appellant was even more intoxicated [than indicated by other witness' testimony], it is unlikely that this would have changed the outcome of the trial."). Caudill's arguments in this regard are refuted by the trial record and fail to meet the burden of showing that there is a reasonable probability that testimony from an additional expert would have changed the outcome of the proceeding. Therefore, the trial court did not err in rejecting this claim without an evidentiary hearing.

Goforth's Confession

[2] Jeffrey Spence was an inmate who notified the Commonwealth shortly before trial that he had spoken with Goforth in prison, and that Goforth had made incriminating statements regarding White's murder. According to Spence, Goforth said that he had assaulted White in an attempt to quiet her during a burglary and robbery attempt. Goforth also indicated his intention to place the blame on Caudill.

However, Spence also openly solicited a release from custody on his own charges, which included a charge of assaulting his girlfriend. He told investigators that his girlfriend planned to drop the charges against him because she had simply fallen down the stairs by accident. This statement proved false and his girlfriend denied any intention to drop the charges.

The Commonwealth ultimately chose not to call Spence, but provided defense counsel with a memorandum containing the details of the statement. Caudill claims counsel was ineffective for failing to call Spence as a witness. We disagree. Spence's statement bore little credibility and revealed no independent knowledge of the crime or crime scene. In fact, the assertion that Goforth killed White "by accident" is wholly refuted by the forensic evidence indicating that she died from multiple and repeated blunt force injuries to the head. Further, Spence openly and aggressively solicited a release from custody before even giving the statement. Trial counsel exercised reasonable judgment in declining to call a witness of such questionable veracity. Decisions relating to witness selection are left to counsel's sound judgment and will not be second-guessed by hindsight. *Foley v. Commonwealth*, 17 S.W.3d 878, 885 (Ky.2000). The trial court did not err in rejecting this claim based on the trial record alone.

Motion to Sever

***4**[3] Defense counsel moved to sever Caudill's trial from Goforth's. The motion was denied and the trial court's decision was upheld on direct appeal. *Caudill*, 120 S.W.3d at 651 ("The trial judge did not abuse his discretion in denying Caudill's motion for a separate trial."). Nonetheless, Caudill now argues that defense counsel failed to elicit from her specific facts that would have supported the motion. In the verification of her post-conviction motion, Caudill claims that she fled with Goforth because he informed her, after the crimes at White's home, that he had been in prison for armed robbery. She further claims that defense counsel failed to ask her any questions about her knowledge of Goforth's prior crimes. According to Caudill, this information would have been inadmissible at a joint trial with Goforth, and the trial court would have granted the motion to sever had it been available.

This claim is entirely unsupported by the record. At trial, Caudill gave no indication that she fled with Goforth because she had learned of his violent criminal history. In fact, she testified that she fled because she felt she was implicated in the crime and because Goforth had threatened her. Her explanation is also highly suspect. Caudill claimed Goforth unilaterally attacked White and tied her in a separate bedroom while he ransacked the house. It is simply incredible to believe that Caudill felt compelled to flee with Goforth because of a later admission that he had committed a violent crime, especially since she had supposedly just witnessed his violence first-hand.

Caudill has offered no proof that defense counsel failed to elicit this information from her, other than her own self-serving statements. Further, even if this information had been contained in the motion to sever, we find it highly unlikely that the trial court would have granted the motion. Both defendants admitted being present at the commission of the crimes, thus virtually all of the evidence against Caudill was admissible at a trial against Goforth and vice versa. *See* *Parker v. Commonwealth*, 952 S.W.2d 209, 215

(Ky.1997). Caudill has failed to establish any likelihood that the trial court would have granted the motion to sever, even had this information been included in the motion. The trial court properly rejected this claim and no evidentiary hearing was necessary.

Penalty Phase

[4] Caudill claims defense counsel was ineffective in the presentation of mitigation evidence during the penalty phase of the trial. She claims that certain family members who did testify were not asked thorough questions regarding Caudill's victimization as a child, and that they were inadequately prepared by counsel. She also cites witnesses that should have been called to testify, such as former teachers, workers at a domestic violence shelter where Caudill once sought help, and former boyfriends who would admit that they had abused her. Finally, Caudill claims that defense counsel should have called a second mental health expert to testify regarding "probable cerebral brain damage."

***5** We have reviewed the trial record and Caudill's lengthy claims with respect to the penalty phase of her trial and find no constitutional deficiency in counsel's performance. Caudill's mother, brother, and sister were each called and described the violence and abuse that was an everyday part of Caudill's childhood. Each also gave details of Caudill's kindness as a child, her struggle with substance abuse, and her history of abusive relationships with men. Two additional family witnesses testified regarding Caudill's character as an adult, her desire for rehabilitation, and her participation in religious activities while in custody.

Dr. Peter Schilling, a psychologist, evaluated Caudill and testified regarding his findings. His testimony included an assessment of Caudill as an extremely submissive person, particularly with men. He also relayed detailed background information gleaned from his four interviews with Caudill. This included a description of Caudill's violent and abusive relationships with former boyfriends, and the abuse she suffered as a child at the hands of her father. He concluded that Caudill suffered from either a learning disability, brain damage, or a combination of both.

When carefully analyzed, the heart of Caudill's ineffective assistance of counsel claim is that defense counsel failed to present *more* mitigation evidence of the same quality that had already been presented. This is not a case where defense counsel wholly failed to present a mitigation case. *See* *Hodge v. Commonwealth*, 68 S.W.3d 338, 344 (Ky.2001). Nor is this a case where defense counsel failed to conduct a reasonably thorough investigation into the defendant's background. *See* *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). A reasonable investigation is not the one that the best defense lawyer would conduct when blessed with unlimited time and resources. *See* *Baze v. Commonwealth*, 23 S.W.3d 619 (Ky.2000). Defense counsel's investigation and presentation of mitigation evidence in this case revealed Caudill's abusive childhood, her substance abuse issues, her violent relationships with males, and her cognitive deficiencies. That additional witnesses existed who would have corroborated or expanded upon this testimony does not amount to deficient performance by counsel. *See* *Parrish v. Commonwealth*, 272 S.W.3d 161, 170 (Ky.2008) ("That the lawyers' approach to this evidence may have been imperfect, or that they did not track down every possible expert or piece of evidence available, does not render their assistance ineffective."). The record reveals that counsel conducted an investigation into Caudill's background and presented sufficient evidence in mitigation of the crimes so as to satisfy Sixth Amendment requirements. Caudill was not entitled to an evidentiary hearing on this issue, nor is she entitled to relief from this Court.

Goforth's Separate Motive

[5] Caudill argues that defense counsel was ineffective for failing to establish a separate motive for Goforth to commit the murder. She claims that defense counsel failed to elicit testimony that Goforth owed three thousand dollars to a drug dealer for cocaine at the time of the murder.

***6** Caudill makes no claim that counsel failed to discover this evidence. At a bench conference mid-trial, the Commonwealth asked defense counsel if he planned to inquire of a witness if she knew about Goforth's outstanding drug debt. Caudill's counsel replied that he would not ask this question because he was concerned the additional evidence of Goforth's drug debts would hurt Caudill as well. He expressed an intentional decision to avoid this line of questioning altogether.

We disagree with the trial court's summary finding that defense counsel's strategy in this respect was reasonable. There is no evidence in the record to support this conclusion, and no evidentiary hearing was held that would develop counsel's reasoning for this decision. Without further explanation, we believe the record does not shed light upon whether this decision was reasonable or unreasonable.

However, upon careful review of the trial record, we believe that this information would not have resulted in a different outcome had it been introduced at trial. The Commonwealth's theory was that Goforth and Caudill went to White's house to rob her so they could purchase drugs. Substantial evidence of both defendants' drug use was introduced, including their own admissions. The essence of the Commonwealth's theory was that the pair acted in concert.

Caudill testified that she went to White's house to borrow money, and that Goforth unexpectedly barged into the home and attacked White. She claimed that she participated in the removal of White's body and the robbery of White's home out of fear of Goforth. Goforth's trial testimony was the mirror image: he claimed that Caudill unilaterally attacked White, and that he assisted in the removal of White's body because he feared Caudill. Goforth claimed that he did not take any items from White's house, though he admitted to later being in possession of two rifles belonging to White.

The evidence supporting the Commonwealth's theory of the crimes was substantial and relied heavily on the defendants' own damning testimony. In short, neither Caudill's nor Goforth's stories were plausible. Both claimed total surprise at the other's attack on White, yet neither attempted to stop the attack and neither fled. Both admitted to assisting in the removal of White's body and the removal of valuable items from her home, despite claiming total innocence of the murder. Each party's claim of fear of the other is implausible. It is not credible that Goforth, a 200 pound man, would believe he could not escape Caudill, who was armed only with a hammer. Nor is it believable that Caudill felt she could not escape Goforth, when she admitted driving alone for five miles in a separate vehicle to the location where White's body and car were burned. The circumstantial evidence strongly supported the conclusion that the two acted in concert, particularly in light of the fact that they fled the state together for some two weeks.

With respect to motive, the Commonwealth argued that Goforth wanted money to buy drugs. The evidence of Caudill's motive was more fully developed. Caudill admitted she had no money on the night of the murder, and that she had, in fact, obtained money from White earlier in the day as an advance for cleaning her house the following week. Further, Caudill had had a disastrous argument with White's son earlier in the week, and he had kicked her out of his house upon learning that she was using drugs again. Sometime between Caudill's first visit to White's house and the time she was murdered, White's son instructed his mother not to give Caudill any more money. This testimony supported a reasonable conclusion that Caudill was angered that White would not give her more money, or that she attacked White to exact revenge on her son.

***7** The jury adopted the Commonwealth's theory of the case, finding both defendants equally culpable. Even if counsel had elicited testimony regarding Goforth's drug debt, thereby establishing a firmer motive, we do not believe it would have overcome the compelling evidence against Caudill. While this testimony might have been further evidence of Goforth's guilt, it does little to exonerate Caudill or to undermine the substantial evidence of her guilt. For these reasons, our review of the trial record does not convince us that a different result would have been reached had counsel pursued this line of questioning. The trial record does not support a finding that Caudill was prejudiced by counsel's supposed deficiency and, therefore, she is not entitled to relief.

Right to Testify

[6] Caudill claims that defense counsel failed to inform her of her Fifth Amendment right to testify during her penalty phase. Caudill did testify during the guilt phase of her trial. In the verification of her RCr 11.42 motion, Caudill makes no assertion that she ever asked her counsel about testifying at the mitigation phase or that she expressed a desire to do so. She made no objection at trial when her defense counsel rested its mitigation case without calling her to the stand.

The defendant's right to testify on her own behalf is

fundamental and can be relinquished only by the defendant. *Rock v. Arkansas*, 483 U.S. 44, 49-53, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987). Such waiver must be knowing and intentional. *United States v. Webber*, 208 F.3d 545, 550-51 (6th Cir.2000). "Barring any statements or actions from the defendant indicating disagreement with counsel or the desire to testify, the trial court is neither required to sua sponte address a silent defendant and inquire whether the defendant knowingly and intentionally waived the right to testify, nor ensure that the defendant has waived the right on the record." *Id.* at 551.

Though Caudill does not claim ineffective assistance in this claim, we note that defense counsel's decision not to call her as a witness during the penalty phase was reasonable. The jury had clearly rejected Caudill's testimony, finding her equally culpable for White's murder. Caudill expressed no disagreement with this tactical decision and made no indication to the trial court that she wished to testify. Having testified during the guilt phase, we find it improbable that Caudill was unaware of her right to do so during the penalty phase. *See Watkins v. Commonwealth*, 105 S.W.3d 449, 453 (Ky.2003).

Caudill's motion fails to establish a constitutional violation of her right to testify. The trial court properly rejected this claim without an evidentiary hearing, as the record rejects Caudill's contention that she wished to testify.

Testimony of Caudill's Fellow Inmates

Prosecutorial Misconduct

Caudill alleges prosecutorial misconduct where three witnesses gave perjured testimony. In order to establish prosecutorial misconduct for failing to correct perjured testimony at trial, the movant must show that the statement was false, that the statement was material, and that the prosecution knew the statement was false. *Commonwealth v. Spaulding*, 991 S.W.2d 651, 654 (Ky.1999). Caudill has failed to meet this burden.

Cynthia Ellis

***8**[7] Cynthia Ellis, a fellow inmate, testified that Caudill confessed the crime to her. In the present motion, Caudill claims that Ellis gave false testimony when she denied receiving any consideration from the Commonwealth in her own pending charges by cooperating with officers investigating White's murder. According to Caudill, Ellis further falsely testified that her charges had already been resolved when she spoke to police about White's murder. The record refutes this claim.

Ellis testified that at the time she spoke with detectives, her charges were still pending, but that she had agreed to enter a plea. She did not testify that the details of the plea agreement had already been reached, contrary to Caudill's assertions. She further testified that she was informed that "no deals were to be made" in exchange for her cooperation in the investigation. The record of Ellis' ultimate plea agreement makes no mention of her cooperation in White's murder investigation or of her testimony at Caudill's trial.

The evidence presented by Caudill in support of her RCr 11.42 motion does not contradict this testimony. Caudill presented a transcript of Ellis' sentencing hearing, during which the Commonwealth Attorney advised the trial court that Ellis was cooperating in two other investigations. However, immediately thereafter, the Commonwealth specifically stated that no sentencing recommendation was being made due to Ellis' cooperation. This statement does not qualify as a "benefit" from the Commonwealth so as to render Ellis' previous testimony false. No prosecutorial misconduct occurred.

Julia Davis

[8] Julia Davis was also a fellow inmate who testified that Caudill confessed certain details of the crime to her, including an admission that Caudill assaulted White and took her jewelry. Davis testified that she contacted the Commonwealth about this information. When asked if she had received beneficial treatment with respect to her own pending charges, Davis gave a somewhat confusing answer. She explained that she was facing a maximum of seven years' imprisonment, but that the Commonwealth ultimately recommended two years' imprisonment. She further stated that she and her co-defendant received the same charges, but that her co-defendant's sentence was probated.

In the present motion, Caudill insists Davis lied be-

cause she and her co-defendant did not receive the same charges, and because Davis actually faced a possible sentence of twenty years. Davis and her co-defendant were each charged with obtaining a controlled substance by fraud, trafficking in a controlled substance, and possession of drug paraphernalia, all arising from a scheme to procure controlled substances with forged prescriptions. Davis, however, also received an additional charge for criminal possession of a forged prescription, while her co-defendant alone was charged with second degree possession of a controlled substance. Thus, though technically incorrect, Davis' testimony is essentially truthful in that she and her co-defendant each received four charges, three of which were identical. "The burden is on the defendants to show that the testimony was actually perjured, and mere inconsistencies in testimony by government witnesses do not establish knowing use of false testimony." *U.S. v. Lochmondy*, 890 F.2d 817, 822 (6th Cir.1989).

***9** Likewise, it is unlikely that Davis knowingly perjured her testimony by stating that she faced a maximum sentence of five to seven years. As even Caudill acknowledges, Davis was likely initially offered a five to seven year sentence. It cannot be deemed perjury that Davis, a non-lawyer, was unaware of the maximum possible sentence under law. Further, we do not find this inconsistency material to Caudill's case. The point was clearly relayed to the jury that Davis did, in fact, receive a benefit in sentencing due to her cooperation with investigators. Caudill has failed to satisfy the burden to establish prosecutorial misconduct.

Jeanette Holden

[9] Finally, Caudill claims that Jeanette Holden gave perjured testimony regarding her plea agreement. Holden, who lived in the house where Caudill was eventually found by police, testified as to statements made by Caudill to the effect that she was willing to hurt somebody in order to make money. At trial, Holden testified that she received no benefit on her own charges that were pending at the time she cooperated with investigators.

Caudill claims this testimony was perjured because Holden's ultimate plea agreement reflects a reduction in sentence in exchange for trial testimony. This argument is entirely without merit. Holden received a reduction in sentence in exchange for her testimony against her co-defendant, not Caudill. When considered in context, it is clear that Holden testified truthfully that her testimony at Caudill's trial did not earn any benefit from the Commonwealth.

Caudill also claims that she was prevented from fully cross-examining Holden at trial. The claim centers on defense counsel's attempt to question Holden about her alleged cooperation in a case against a third inmate, Christine Halvorsen. The Commonwealth objected to the question, and the objection was sustained because defense counsel was unable to provide the trial court with any independent information or testimony to establish that Holden benefited from such cooperation.

[10] On direct appeal, Caudill alleged that she was improperly prevented from impeaching Holden on this issue. We found no error. "The trial judge did not abuse his discretion in sustaining the prosecutor's objection to defense counsel's attempted inquiry as to whether Holden had cooperated with the police in another case absent a good faith belief that she had benefitted [sic] from that cooperation." *Caudill, id.* at 661.

In the present motion, Caudill now argues that the Commonwealth's failure to allow the question amounts to prosecutorial misconduct. The Commonwealth's objection to questions that were ultimately deemed improper and irrelevant cannot amount to prosecutorial misconduct. This argument lacks any merit.

Brady violations

[11] Caudill asserts that the facts underlying the aforementioned prosecutorial misconduct claims also support a finding that the Commonwealth violated *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Specifically, Caudill claims that the Commonwealth had an affirmative obligation to disclose the parameters of any plea deals made with Ellis, Davis, and Holden. As the trial court noted in its order, plea agreements are matters of public record. The defense was aware that plea agreements had been reached in all three cases, and each witness was cross-examined on this fact. Material readily available to the defense, and not secreted by the Commonwealth, does not fall within the *Brady* rule. In *Bowl-*

ing v. Commonwealth, we considered an identical argument concerning a witness' alleged plea agreement: "The defense ... could have-without the Commonwealth's assistance or permission-obtained the transcript of the federal sentencing hearing. Thus ... there could have been no *Brady* violation...." 80 S.W.3d 405, 410 (Ky.2002). This claim was properly rejected by the trial court without an evidentiary hearing. Further, having found no *Brady* violation, the trial court did not err in refusing Caudill's discovery request.

Ineffective Assistance in Cross-Examination

***10**[12] Caudill argues that her counsel was ineffective for failing to impeach Ellis, Davis, and Holden regarding their plea agreements.

As explained above, we agree with the trial court that Ellis did not testify falsely. As such, counsel was not deficient for failing to cross-examine Ellis about a benefit from the Commonwealth that was never bestowed. Insofar as Caudill argues that Ellis could nonetheless have been cross-examined for her general truthfulness, we believe Ellis' credibility was adequately explored on cross-examination. This claim, having no merit, was properly rejected without an evidentiary hearing.

Caudill's claim of ineffective assistance of counsel where defense counsel did not cross-examine Davis is equally without merit. As explained above, Davis' explanation that she faced a maximum of five to seven years was truthful within her understanding of her own circumstances. The fact that, under maximum allowable sentences, she could have faced twenty years' imprisonment is immaterial. Even if this information had been elicited on cross-examination, we do not believe the outcome of the trial would have been different. The jury was made well aware of the fact that Davis received a benefit in sentencing as a result of her cooperation in the investigation of White's murder. The trial court properly rejected this claim and no evidentiary hearing was necessary.

[13] Insofar as Caudill argues that defense counsel was ineffective for failing to call Heather Harris to impeach Davis' testimony, this argument is unpreserved for appellate review. Despite being raised in Caudill's motion, the trial court makes no specific mention of the claim or of Heather Harris in its order denying the RCr 11.42 motion. Our review is limited to those issues raised and ruled upon by the trial court. *Commonwealth v. Maricle*, 15 S.W.3d 376, 380 (Ky.2000) ("Nor will we address issues raised, but not decided by the trial court."). For the same reason, we decline to review Caudill's claim that defense counsel was deficient for failing to cross-examine Holden regarding any supposed plea agreement or relationship with the police.

[14] Caudill avers that defense counsel was ineffective for failing to call Charles Clark as a witness to impeach Holden. Holden testified that, prior to White's murder, Caudill had relayed her willingness "to hurt somebody" to get money. She further testified that Clark was present during this conversation. After the trial was completed, Clark signed an affidavit stating he knew both Caudill and Holden, and that he had never heard such a conversation between the two. It must be noted that Clark's name was never mentioned prior to trial and he appears on no witness lists.

The fact that Clark, in a later affidavit, stated he did not recall the conversation is of little probative value, particularly in light of the heavy drug use by all participants in the alleged conversation. Considering the fact that Clark's name was mentioned for the first time at trial, counsel cannot be deemed constitutionally deficient for failing to track down a witness mid-trial. The trial court properly rejected this claim.

***11** In a statement to police, Holden said that Caudill had similarly solicited Elizabeth Wollum to participate in a robbery. Wollum gave a statement to police that no such conversation transpired. Caudill now claims that defense counsel was deficient for failing to call Wollum as a witness to impeach Holden.

Caudill's argument herein is based on the erroneous assumption that Holden overheard the conversation between Wollum and Caudill. In fact, she never indicated to police that she had first-hand knowledge of this conversation; she merely stated that she "believed" Caudill had solicited Wollum. Moreover, she did not testify at trial regarding this alleged conversation, presumably because it constituted rank hearsay. Understandably, defense counsel did not question Holden about this conversation of which she lacked any first-hand knowledge, thus avoiding any mention of another attempt by Caudill to solicit criminal con-

spirators. Trial counsel's decision is entirely reasonable and the trial court did not err in rejecting this claim without an evidentiary hearing.

Conclusion

For the foregoing reasons, we do not believe that Caudill was entitled to an evidentiary hearing on her claims of ineffective assistance of counsel, prosecutorial misconduct, and other constitutional errors. Having found that no error occurred, or that Caudill was not prejudiced by any supposed errors, we reject her claim of cumulative error. The judgment of the Fayette Circuit Court is affirmed.

All sitting. All concur.
Ky.,2009.
Caudill v. Com.
Not Reported in S.W.3d, 2009 WL 1110398 (Ky.)

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