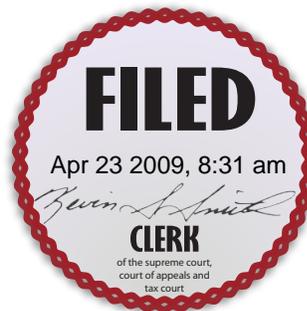


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

DEWAYNE WASHINGTON,)

Appellant-Petitioner,)

vs.)

STATE OF INDIANA,)

Appellee-Respondent.)

No. 49A05-0808-PC-491

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Patricia J. Gifford, Judge
The Honorable Steven J. Rubick, Magistrate
Cause No. 49G04-0205-PC-143985

April 23, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

DeWayne Washington was convicted of murder, and his conviction was affirmed on direct appeal. He later petitioned for post-conviction relief, which the post-conviction court denied, and he now appeals. On appeal, Washington argues that he received ineffective assistance of trial counsel because trial counsel failed to object to hearsay testimony and secure an admonishment regarding the hearsay and failed to object to an improper statement by the trial court to the jury during its deliberations. Because Washington was not prejudiced by the isolated hearsay statement and the trial court did not make an improper statement to the jury, Washington did not receive ineffective assistance of trial counsel. We affirm the denial of post-conviction relief.

Facts and Procedural History

On direct appeal, we recited the facts of the underlying offense as follows:

Andreas Robertson and Shameka Webster lived together with their child. On May 18, 2002, around 8:00 p.m., an unidentified man knocked on their door and asked for Robertson. Webster told him Robertson was not home, so the man left. Shortly thereafter, Webster left the apartment for about an hour. When she returned, Robertson was in the shower. He later went outside to his car to retrieve something.

Shortly after Robertson returned to the apartment from his car, there was a knock on the door. Robertson answered the door. At the door were Washington, Sean Strong, and Lisa Strong. Robertson let them in. Webster was in the back bedroom giving their child a bath. She heard a voice say “don’t move,” and then heard gunfire. Webster called the police and put her child in the bedroom closet for safety. Webster left the bedroom, walked toward the end of the hall, and saw Washington crawling from the dining room area, where the gunfire occurred, toward the living room area. Sean stood near the kitchen sink.

Webster hid in the bedroom and waited for police to arrive. While there, she heard more gunshots. Webster again left the bedroom and saw Lisa going through Robertson’s pants pockets as he lay on the floor in a pool of blood. Webster asked Lisa what they were doing and she

responded, “[t]hey just started shooting.” Webster did not see Washington in the apartment when she came out of the bedroom the second time.

Marion County Sheriff’s Deputy James McGunegill arrived at the scene. Inside the apartment, Deputy McGunegill found Webster, Sean, and Lisa standing around Robertson, who was lying on the floor with multiple gunshot wounds. Deputy McGunegill recovered a nine-millimeter handgun from Sean, a handgun from Robertson’s hand, and a handgun that had been dropped near Robertson’s head.

Shortly thereafter, Marion County Sheriff’s Deputy Brian Zielinski arrived at the scene. He found Washington and John Reese sitting in the back seat of a white Buick in the parking lot about 120 to 150 feet from the apartment. Washington had a gunshot wound to his stomach. Deputy Zielinski conducted a pat down search of Reese. He then found a jacket belonging to Lisa on the rear floorboard of the Buick. Inside the jacket, he discovered a .22 caliber pistol and a pair of handcuffs. Police recovered a mask and Washington’s wallet from Reese’s coat pocket.

Appellant’s PCR App. p. 130-31 (citations omitted).¹

The State charged Washington with felony murder,² murder,³ Class A felony conspiracy to commit robbery,⁴ and Class A felony robbery.⁵ During Washington’s jury trial, the State called Deputy McGunegill as its first witness. The following exchange occurred during the redirect examination of Deputy McGunegill:

Q. And counsel asked you what type of information you were able to obtain from speaking with witnesses at the apartment. What information did you obtain?

A. That they were there to either purchase or buy a watch or purchase or sell a watch from the resident there – Mr. Robertson –

Q. Uh-huh.

¹ The record contains the appendix prepared for the purpose of this appeal and Washington’s appendix submitted during his direct appeal. For the purpose of this decision, we cite to the direct appeal appendix as “Appellant’s App.” and to the appendix prepared for this appeal from the denial of post-conviction relief as “Appellant’s PCR App.”

² Ind. Code § 35-42-1-1.

³ *Id.*

⁴ Ind. Code §§ 35-41-5-2; -42-5-1.

⁵ I.C. § 35-42-5-1.

A. – and a gun battle ensued and Sean received numerous gunshot wounds and Mr. Robertson had received numerous wounds and there was another person that had been shot also that dropped his weapon at the head of Mr. Robertson and fled the scene.

Q. Okay. Now the information you obtained about the person who was no longer at the scene –

[DEFENSE COUNSEL]: Your honor, may we approach please?

SIDEBAR

[DEFENSE COUNSEL]: We had a motion in limine in regards to the fleeing the scene.

[STATE]: He said escape.

[DEFENSE COUNSEL]: You said fled. That was one of the words – you said fled the scene and you had granted the motion –

THE COURT: Well fled the scene, all right. I didn't say flee. I thought escape.

[DEFENSE COUNSEL]: Flee and escape –

THE COURT: I said fleeing was all right.

[DEFENSE COUNSEL]: You said leave was all right cause fleeing the scene is –

THE COURT: All right. Well he left the scene. All right. So just be cautious.

END OF SIDEBAR

[DEFENSE COUNSEL]: Well I object and move to strike.

Q. You obtained information that a person left the scene, correct?

A. Yes.

Q. And that that person had dropped their weapon at the head of the decedent, Andreas Robertson, correct?

A. Yes.

[DEFENSE COUNSEL]: Objection, hearsay.

THE COURT: Well it is hearsay – sustained.

Trial Tr. p. 29-30.⁶

Later, during deliberations, the jury communicated to the court that it could not reach a decision on one count. The trial court engaged in the following inquiry of the jury:

⁶ The appellate record contains the trial transcript and the transcript from the hearing on Washington's post-conviction hearing. For clarity, we cite to the trial transcript as "Trial Tr." and to the post-conviction hearing transcript as "PCR Tr."

THE COURT: Ms. Heath, being the jury foreperson have you reached verdicts on some counts as you originally sent a note out?

[FOREPERSON]: Yes.

THE COURT: But there is one count you have not?

[FOREPERSON]: Yes.

THE COURT: And do you think further deliberations might resolve that or not?

[FOREPERSON]: Are you asking me personally?

THE COURT: Yes.

[FOREPERSON]: No.

THE COURT: Okay. Well let me ask you – and I have all your names here but rather than mispronounce them – juror number one, do you agree with that assessment?

JUROR NUMBER ONE: Yes.

THE COURT: Juror number two?

JUROR NUMBER TWO: No.

THE COURT: You think further deliberations could resolve this?

JUROR NUMBER TWO: Yes.

THE COURT: Juror number three?

JUROR NUMBER THREE: Yes.

THE COURT: Juror number four?

JUROR NUMBER FOUR: Yes.

THE COURT: Okay. That's – the question is further deliberations would not resolve this, right?

JUROR NUMBER FOUR: (No audible response)

THE COURT: Juror number five?

JUROR NUMBER FIVE: Yes.

THE COURT: Juror number six?

JUROR NUMBER SIX: Yes.

THE COURT: Okay. Juror number seven?

JUROR NUMBER SEVEN: No.

THE COURT: Juror number eight?

JUROR NUMBER EIGHT: No.

THE COURT: Juror number nine?

JUROR NUMBER NINE: No.

THE COURT: Juror number ten?

JUROR NUMBER TEN: No.

THE COURT: Juror number 11?

JUROR NUMBER 11: Yes.

THE COURT: Juror number 12.

JUROR NUMBER 12: I'm not sure.

THE COURT: Okay. So it looks like kind of a split to me. I would ask that you go out, deliberate further and – we don't want to keep you here all night but – I mean, it's not us it's you you understand, all right? Okay.

Id. at 271-73. The jury deliberated further and reached a verdict on all four counts, finding Washington guilty of murder and not guilty of the other charges. *Id.* at 273-74.

Washington appealed, challenging the sufficiency of the evidence to support his conviction and contending that the jury's verdicts were inconsistent. In an unpublished memorandum decision, we affirmed. *Washington v. State*, No. A02-0404-CR-341 (Ind. Ct. App. Jan. 28, 2005), *trans. denied*.

Washington filed a *pro se* petition for post-conviction relief, later amended by counsel. Appellant's PCR App. p. 66-73. In his amended petition, Washington argues that he received ineffective assistance of trial counsel "when trial counsel: (1) improperly handled inadmissible hearsay testimony; and (2) failed to object to judicial statements/*Allen* charges." *Id.* at 66. After a hearing, the post-conviction court denied relief. *Id.* at 111-123. Washington now appeals.

Discussion and Decision

Washington appeals from the denial of post-conviction relief. He raises two issues on appeal: (1) whether he received ineffective assistance of trial counsel because trial counsel failed to properly respond to hearsay evidence elicited by the State and (2) whether trial counsel was ineffective for failing to object to an improper admonishment by the trial court to the jury during its deliberations.

The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5). The post-conviction court is the sole judge of the evidence and the credibility of witnesses. *Hall v. State*, 849 N.E.2d 466, 468-69 (Ind. 2006). When appealing the denial

of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. *Fisher v. State*, 810 N.E.2d 674, 679 (Ind. 2004). The reviewing court will not reverse the judgment unless the evidence unerringly and unmistakably leads to the opposite conclusion. *Patton v. State*, 810 N.E.2d 690, 697 (Ind. 2004). Pursuant to Indiana Post-Conviction Rule 1(6), the post-conviction court issued findings of fact and conclusions of law. We will reverse a post-conviction court's findings and judgment only upon a showing of clear error, which is that which leaves us with a definite and firm conviction that a mistake has been made. *Hall*, 849 N.E.2d at 469.

In post-conviction proceedings, claims that are known and available at the time of direct appeal, but are not argued, are waived. *Timberlake v. State*, 753 N.E.2d 591, 597 (Ind. 2001), *reh'g denied*. They cannot be subsequently raised in the post-conviction setting. One exception to the waiver rule is the argument that a defendant was deprived of the right to effective counsel as guaranteed by the Sixth Amendment to the United States Constitution. *Singleton v. State*, 889 N.E.2d 35, 38 (Ind. Ct. App. 2008).

We review the effectiveness of trial counsel under the two-part test provided by *Strickland v. Washington*, 466 U.S. 668 (1984). *Bieghler v. State*, 690 N.E.2d 188, 192-93 (Ind. 1997), *reh'g denied*. A claimant must demonstrate that counsel's performance fell below an objective level of reasonableness based upon prevailing professional norms and that the deficient performance resulted in prejudice. *Strickland*, 466 U.S. at 687-88. "Prejudice occurs when the defendant demonstrates that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Grinstead v. State*, 845 N.E.2d 1027, 1031 (Ind. 2006) (quoting *Strickland*,

466 U.S. at 694). We presume that counsel rendered effective performance, and a defendant must offer strong and convincing evidence to overcome this presumption. *Loveless v. State*, 896 N.E.2d 918, 922 (Ind. Ct. App. 2008) (citing *Overstreet v. State*, 877 N.E.2d 144, 152 (Ind. 2007), *reh'g denied*), *trans. denied*. “[A] court need not determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.” *Strickland*, 466 U.S. at 697. “If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed.” *Id.*

I. Hearsay Evidence

Washington first argues that trial counsel rendered ineffective assistance by failing to object to inadmissible hearsay evidence and failing to seek an admonishment after counsel later successfully objected to the evidence on hearsay grounds.

Washington points to Deputy McGunegill’s following testimony about information he learned from eyewitnesses: “[T]here was another person that had been shot also that dropped his weapon at the head of Mr. Robertson and fled the scene.” Trial Tr. p. 29. After Deputy McGunegill testified to this information, Washington’s trial counsel objected to the testimony, but on the basis that it improperly referenced the additional person’s action of fleeing the scene, in violation of an order *in limine*. *Id.* at 29-30. Moments later, Deputy McGunegill again testified regarding the additional person about whom the eyewitnesses had told him:

Q. You obtained information that a person left the scene, correct?

A. Yes.

Q. And that that person had dropped their weapon at the head of the decedent, Andreas Robertson, correct?

A. Yes.

Id. at 30. Washington's counsel immediately objected on hearsay grounds, and the trial court sustained the objection. Counsel then orally moved for the testimony to be stricken, but the trial court apparently never ruled on this motion.

Washington contends that counsel should have objected to this evidence the first time Deputy McGunegill mentioned it and that counsel also should have ensured that the jury was admonished to disregard the evidence. Assuming, *arguendo*, that Washington is correct that counsel's performance in these regards was deficient, Washington did not suffer prejudice as a result. In order to convict Washington of murder, the State had to prove that he knowingly or intentionally killed another human being. I.C. § 35-42-1-1. At Washington's trial, the jury was instructed on accomplice liability. Appellant's App. p. 111. An accomplice is "criminally liable for the acts done by [the accomplice's] confederates which were a probable and natural consequence of their common plan[.]" *Edgcomb v. State*, 673 N.E.2d 1185, 1193 (Ind. 1996), *reh'g denied*. As we held in our decision on Washington's direct appeal, the evidence presented at trial, *not including the testimony at issue from Deputy McGunegill*, was such that a reasonable jury could find that Washington either killed Robertson *or* aided and abetted in his killing. *Washington*, No. A02-0404-CR-341, slip op. at 7. In reaching this conclusion, we referenced the following evidence:

The State elicited testimony from Webster that Robertson opened the door to their apartment and let in the individuals who came to the door. She also testified what happened after Robertson opened the door to let the individuals in the apartment:

A. Then he introduced the female he had with him and then he introduced his cousin he had with him and then I heard him say, well

what kind of car do you drive now [Robertson] and I couldn't recall [Robertson] saying anything. Then I heard a voice say don't move -- the same voice.

Q. Okay. Then what happened?

A. Then I heard all these altercations of all these gunfires [sic] going off.

Q. Okay. The voice that said don't move was that [Robertson's] voice?

A. No.

Webster stated that after she heard gunfire, she walked into the hallway of her apartment. She saw Washington crawling from the dining room area, where he had been shot in the stomach and where the gunfire occurred, to the living room area. Webster went back into the bedroom to hide and wait for police. While she was waiting she heard additional gunfire. At this point, she testified, she again left the bedroom and saw Lisa taking money from Robertson's pants pockets while he was lying in a pool of blood on the floor. Webster then asked Lisa what they were doing. Lisa told her, "they just started shooting."

After arriving at the scene, Deputy McGunegill recovered three weapons inside of the apartment. He recovered a nine-millimeter handgun Sean was carrying in a holster. The deputy also recovered a handgun from Robertson's pocket and a handgun that had been dropped near Robertson's head. A fourth gun was found inside Lisa's jacket pocket in the back of the Buick where Washington and Reese were found. There were no bullets recovered from that gun. The Buick was in the parking lot of the apartment complex.

The State presented forensic evidence about the bullets recovered from Robertson's body. Robertson had sustained six gunshot wounds to his head and torso. One bullet entered Robertson's head near his left ear, fragmented his skull and passed through his brain before lodging itself on the inside of his right eye. Another bullet entered Robertson's left upper lip and fragmented in his jawbone. A piece of the bullet came out of his body near the jawline. Robertson was also shot in his back near his right shoulder. This bullet fragmented and lodged inside the fractured scapula and clavicle. He also sustained two gunshot wounds to his front chest area. One bullet passed through his heart, while the other bullet entered through Robertson's right nipple directed down the front of the body. The bullet recovered from Robertson's heart was fired from the gun police found in Sean's possession at the apartment. The bullets recovered from Robertson's upper lip, left ear, and right back were fired from the gun found near his head.

Id. at 5-7 (citations omitted). Having reviewed this evidence, we conclude that Washington did not suffer prejudice as a result of any error in his trial counsel's handling of the isolated hearsay testimony. Given the magnitude of other evidence that Washington participated in the gun fight that left Robertson dead, we cannot say that there is a reasonable probability that the outcome of Washington's trial would have been different had trial counsel responded differently to Deputy McGunegill's hearsay testimony. *Grinstead*, 845 N.E.2d at 1031. The post-conviction court did not err in reaching this conclusion and determining that trial counsel was not ineffective in this regard. Appellant's PCR App. p. 120.

II. Statement to the Jury

Washington next argues that trial counsel was ineffective for failing to object to an improper statement by the trial court to the jury during its deliberations. Where a trial court gives an instruction to a jury to "urge an apparently deadlocked jury to reach a verdict[,] [s]uch additional instructions are closely scrutinized to ensure that the court did not coerce the jury into reaching a verdict that is not truly unanimous." *Parish v. State*, 838 N.E.2d 495, 502 (Ind. Ct. App. 2005) (emphasis removed) (citation omitted), *reh'g denied*. Such a "supplemental charge given by a trial judge to an apparently deadlocked jury" is commonly called an "Allen charge," named after *Allen v. United States*, 164 U.S. 492 (1896). *Lewis v. State*, 424 N.E.2d 107, 109 (Ind. 1981). "[T]here can be no Allen violation in the absence of some evidence suggesting that the jury was deadlocked when an alleged Allen charge was read." *Clark v. State*, 597 N.E.2d 4, 7-8 (Ind. Ct. App. 1992), *reh'g denied, trans. denied*.

Washington contends that the following statement by the trial court to the jury constituted an improper *Allen* charge to which counsel should have objected: “I would ask that you go out, deliberate further and – we don’t want to keep you here all night but – I mean, it’s not us it’s you you understand, all right? Okay.” Trial Tr. p. 272-73. We disagree with Washington’s contention that trial counsel performed deficiently by failing to object to this statement.

First, the evidence before the trial court did not indicate that the jury was deadlocked. As recounted earlier in this opinion, after the jury communicated to the court that it could not reach a decision on one count, the trial court asked each juror individually whether further deliberations might resolve the disagreement. Members of the jury gave mixed responses to this inquiry, and the trial court observed that the jury was “split” on the question of whether further deliberations would result in a unanimous decision. *Id.* at 272. The record does not reflect that the jury was apparently deadlocked, and, for that reason alone, there could be no *Allen* violation. *Clark*, 597 N.E.2d at 7-8; *see also Hero v. State*, 765 N.E.2d 599, 604 (Ind. Ct. App. 2002), *trans. denied*.

Further, the trial court’s statement to the jury did not improperly coerce members of the jury to reach a verdict that was not truly unanimous. *Parish*, 838 N.E.2d at 502. “[W]e must look at the context of a statement to determine its meaning.” *Hero*, 765 N.E.2d at 604. After examining the context in which the trial court made the statement at issue, we observe that the court had earlier advised the jury as follows:

THE COURT: You can reach a verdict on any counts that you all unanimously agree on. If there’s a count you cannot agree on we would like to send you back for further deliberations until you’re firmly convinced that you cannot reach a verdict on that particular count and then you can

ring us and we'll address that issue when you are firmly convinced that you can't do that.

Trial Tr. p. 269. We agree with the State “[t]he court’s subsequent comment that ‘we don’t want to keep you here all night but . . . it’s not us[] it’s you’ was not a threat that the jurors would remain until they reached a verdict.” Appellee’s Br. p. 14. Instead, “[i]t was an explanation that they would remain until the jurors themselves decided that further deliberations would not assist them in reaching a verdict” *Id.* Nothing about the trial court’s statement to the jury indicated that it had to reach a verdict, thereby encouraging members of the jury to settle upon a verdict that was not truly unanimous. *Parish*, 838 N.E.2d at 502. Thus, the challenged statement in this case is different from the improper charge given by the trial court in *Long v. State*, 448 N.E.2d 1103 (Ind. Ct. App. 1983), the primary case upon which Washington relies. In *Long*, the trial court called the jury back into the courtroom after a period of deliberation and gave the following supplemental instruction:

The jury has deliberated the case for a period of time and as a matter of fact, the jury retired for deliberation at about 4:15 and it’s now 6:15 p.m. In considering this case, ladies and gentlemen of the jury, does it appear that you’ll be able to reach a verdict in this matter? The issues are not very complicated in connection with it and I would like you to discuss it amongst yourselves and reach a verdict in connection with it so that the matter may be resolved. With that, I would like you to return to the jury room, discuss the case in light of the evidence presented and the instructions given to you by the Court so that you may reach a verdict.

Id. at 1104. In reviewing the propriety of this instruction, we wrote that when “the judge instructed the jury that ‘[t]he issues are not very complicated’, [he] indicat[ed] his opinion of the evidence,” and that when the trial court told the jury that “he ‘would like’ them to ‘reach a verdict’, [the trial court] impl[ied] they should abandon their beliefs in

order to arrive at a decision.” *Id.* at 1105. Such is not the case here. The trial court’s comment to Washington’s jury did not encourage members of the jury to abandon their beliefs to reach a unanimous verdict and, therefore, the statement did not constitute an improper *Allen* charge. The post-conviction court did not err in reaching this conclusion and determining that Washington’s trial counsel was not ineffective for failing to object to the trial court’s statement to the jury. Appellant’s PCR App. p. 122-23.

The post-conviction court did not clearly err in denying Washington’s petition for post-conviction relief.

Affirmed.

RILEY, J., and DARDEN, J., concur.