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**IN THE
COURT OF APPEALS OF INDIANA**

STEPHEN GASKEY, Jr.,
Appellant-Petitioner,
vs.
STATE OF INDIANA,
Appellee-Respondent.

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) No. 45A03-0812-PC-603
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APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Salvador Vasquez, Judge
The Honorable Kathleen A. Sullivan, Magistrate
Cause No. 45G01-0710-PC-00016

May 6, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-petitioner Stephen Gaskey, Jr., appeals the denial of his petition for post-conviction relief, claiming ineffective assistance of both trial and appellate counsel. Specifically, Gaskey argues that his trial counsel was ineffective for failing to object to a final instruction that was given with regard to Burglary, a class B felony. Gaskey also contends that his counsel on direct appeal was ineffective for failing to claim that the instruction was fundamental error. Finding no error, we affirm the judgment of the post-conviction court.

FACTS

The facts, as reported in Gaskey's direct appeal, are as follows:

On February 13, 2006, Mary Zuffa ("Zuffa") returned to her Highland, Indiana home to find a vehicle parked in her driveway, with a man in the driver's seat. A second man, whom she later identified as Gaskey, came from behind the house and said to Zuffa, "We're here looking for a young lady named Thompson. . . ." Zuffa replied that she knew no one on the block by that name. Gaskey got into the vehicle, and the driver, later identified as his brother, Tony Gaskey ("Tony"), drove away. Zuffa wrote down the license plate number of their vehicle.

Zuffa started to park her vehicle in her garage when she noticed her back door. It was open, the door frame was broken, and drywall was lying on the plastic floor runner. Zuffa summoned a neighbor who was a police officer in another town, and they contacted the Highland Police. Zuffa gave the responding officers the license plate number that she had obtained. A walk-through of Zuffa's house revealed that none of its contents were out of order or missing.

Later that day, Griffith Police Officer Ryan Olson saw the brothers at a convenience store and took Tony into custody. Gaskey initially eluded arrest, but was eventually apprehended. A search of the vehicle driven by Tony yielded some items reportedly stolen, but not any items belonging to Zuffa.

Gaskey v. State, No. 45A05-0610-CR-577, slip op. at 2 (Ind. Ct. App. May 23, 2007).

As a result of this incident, the State charged Gaskey as follows: Count I, class B felony Burglary; Count II, class D felony Residential Entry; and Count III, class A misdemeanor Resisting Law Enforcement. A theft charge from an unrelated case—designated as Count IV—was subsequently joined with the present cause for trial.

Following the presentation of the evidence at Gaskey’s jury trial, which concluded on August 7, 2006, the trial court conducted a conference on instructions. Gaskey did not object to any of the final instructions. Gaskey was found guilty as charged, but the trial court did not enter judgment on Count II. Thereafter, Gaskey was sentenced to an aggregate term of seventeen years of incarceration. We affirmed Gaskey’s burglary conviction¹ and sentence on direct appeal. Id.

On May 5, 2008, Gaskey filed an amended petition for post-conviction relief,² claiming that his trial counsel was ineffective for failing to object to Final Instruction 13 that was given, which provided that “A person has ‘entered’ a building or structure of another when he has essentially put himself in a position to commit a felony within the confines of the building or structure.” Appellant’s App. p. 73. Gaskey further claimed that trial counsel was ineffective for failing to object to a detective’s testimony on the basis of hearsay, and that counsel on direct appeal was ineffective for failing to challenge instruction 13 on the grounds of fundamental error.

¹ Gaskey did not appeal the other convictions.

² Gaskey filed his original petition for post-conviction relief on October 19, 2007.

At an evidentiary hearing on Gaskey’s post-conviction relief petition, Lemule Stigler—Gaskey’s trial counsel—testified that he did not consider objecting to the instruction and admitted that he did not object to the detective’s testimony on hearsay grounds. Additionally, Paul Stanko—Gaskey’s counsel on direct appeal—testified that he did not raise the issue concerning the instruction because there was no objection at trial. Stanko further testified that the issues presented were “good issues.” Tr. p. 12.

Thereafter, the post-conviction court determined that Stigler’s failure to object to the detective’s hearsay testimony constituted ineffective assistance of counsel. As a result, Gaskey’s theft conviction was vacated. The post-conviction court denied Gaskey’s request for relief with regard to the instruction issue and entered the following findings of fact and conclusions of law:

9. At the hearing on the petition for post-conviction relief, the petitioner called the petitioner’s trial attorney . . . Stigler . . . and appellate attorney, . . . Stanko. Mr. Stigler’s trial strategy was to argue that the defendant did not “enter” the dwelling, despite the fact there may have been a “breaking.” Further, Mr. Stigler did not object to the jury instruction regarding “entry.”
10. Attorney Stanko testified that he did not consider raising the issue that the jury instruction was erroneous because there was no objection to the instruction at trial, and he believed that raising the insufficiency of the evidence was the appropriate appellate strategy.
11. The court took judicial notice of the trial file, and the Record of Proceedings was accepted into evidence during the post-conviction relief hearing.
12. No other evidence was presented by the Petitioner to support his allegations.

CONCLUSIONS OF LAW

. . .

6. The law in Indiana is clearly established as it relates to what constitutes entry in a burglary case. A person “enters” within the meaning of the burglary statute when he puts himself in a position to commit a felony inside a structure. Perdue v. State, 398 N.E.2d 1290, 1293 (Ind. Ct. App. 1979), Lee v. State, 349 N.E.2d 214 (Ind. App. 1976). This was the exact jury instruction given to the jury in Petitioner’s trial.

7. This instruction and established law in Indiana in no way takes away from the burden of the State. The State was and is still required to prove that the defendant’s acts did in fact fit within the law and within the definition of ‘entry’ as spelled out in the jury instruction and case law.

8. It has been established by the United States Supreme Court that a jury instruction that shifts the State’s burden of proving every material element of a crime beyond a reasonable doubt is unconstitutional and violates the defendant’s due process rights under the Fourteenth Amendment. Sandstrom v. Montana, 442 U.S. 510, 544 (1979). In that case, the jury had been instructed that the law presumes that a person intends the ordinary consequences of his voluntary acts. Id. The Supreme Court determined that the jury could have found this to be a “mandatory presumption” and that the jury was therefore required to find the defendant intended the consequences of his acts so long as they found the defendant had voluntarily performed them. Id. The court concluded that because the jury might have interpreted the instruction to shift the burden of proof regarding the defendant’s intent, the instruction was therefore unconstitutional. Id.

9. In McCorker v. State, 797 N.E.2d 257, (Ind. 2003), the Sandstrom interpretation of mandatory presumptions was specifically analyzed, and the Court stated that Sandstrom outlaws mandatory presumptions that indicate that the State has met its burden of proof on an element of the charged offense. Id.

10. Petitioner alleges that the jury instruction given created a mandatory presumption for the jurors which then relieved the State of its burden of proving every element of the burglary charged.

11. The jury instruction in this case simply defined “entry.” The State was still required to prove that the defendant had put himself in a position to commit a felony within the confines of a building or structure to even reach the level of “entry.” The instruction did not create a mandatory presumption, nor did it remove the State’s burden of proof regarding the elements of burglary.

...

13. The Petitioner is not entitled to relief under his claim of ineffective assistance of trial and appellate counsel regarding Final Instruction 13, as the instruction was a correct statement of law. Counsel's performance did not fall below profession[al] standards regarding the instruction, and the petitioner has not established that he was, in fact, harmed by that instruction. Because the instruction was a correct statement of law, appellate counsel cannot be found to have been ineffective for failing to pursue this issue as fundamental error on appeal.

Appellant's App. p. 74-77. Gaskey now appeals.

DISCUSSION AND DECISION

I. Standard of Review

We initially observe that a petitioner who has been denied post-conviction relief faces a "rigorous standard of review" on appeal. Dewitt v. State, 755 N.E.2d 167, 170 (Ind. 2001). The post-conviction court's denial of relief will be affirmed unless the petitioner shows that the evidence "leads unerringly and unmistakably to a decision opposite" that reached by the post-conviction court. Williams v. State, 706 N.E.2d 149, 154 (Ind. 1999). The petitioner has the burden of establishing the grounds for relief by a preponderance of the evidence. Id. A petitioner who has been denied post-conviction relief is, therefore, in the position of appealing from a negative judgment. Collier v. State, 715 N.E.2d 940, 942 (Ind. Ct. App. 1999). Thus, we will not disturb the denial of relief unless "the evidence is without conflict and leads to but one conclusion, and the post-conviction court has reached the opposite conclusion." Johnson v. State, 693 N.E.2d 941, 945 (Ind. 1998). We consider only the probative evidence and reasonable inferences therefrom that support the post-conviction court's determination and will not reweigh the

evidence or judge the credibility of the witnesses. Bigler v. State, 732 N.E.2d 191, 194 (Ind. Ct. App. 2000).

II. Gaskey's Claims

A. Trial Counsel

Gaskey argues that his request for post-conviction relief should have been fully granted because his trial counsel failed to object to Final Instruction 13, as set forth above. Gaskey claims that the instruction “created a mandatory presumption by compelling the jury to find [that he] had entered Zuffa’s home upon proof he put himself in a position to commit a felony therein.” Appellant’s Br. p. 7. Moreover, Gaskey claims that his appellate counsel was ineffective for failing to raise this issue on direct appeal as fundamental error.

To prevail on a claim of ineffective assistance of counsel, the defendant must establish the two components of the test first set out in Strickland v. Washington, 466 U.S. 668 (1984). Specifically, it must be demonstrated that counsel’s performance was deficient. Smith v. State, 765 N.E.2d 578, 585 (Ind. 2002). This part of the test requires the petitioner to demonstrate that counsel’s representation fell below an objective standard of reasonableness and that counsel’s errors were so serious that they resulted in a denial of the right to counsel guaranteed under the Sixth Amendment of the United States Constitution. McCorker v. State, 797 N.E.2d 257, 267 (Ind. 2003). Moreover, counsel’s performance is evaluated as a whole. Lemond v. State, 878 N.E.2d 384, 391 (Ind. Ct. App. 2007), trans. denied. The court must determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of

professionally competent assistance. There is a strong presumption that counsel's representation was adequate. Stevens v. State, 770 N.E.2d 739, 746 (Ind. 2002). This presumption can be rebutted only with strong and convincing evidence. Elisea v. State, 777 N.E.2d 46, 50 (Ind. Ct. App. 2002).

To establish the second part of the test, the petitioner must demonstrate that counsel's deficient performance resulted in prejudice to the defendant. Smith, 765 N.E.2d at 585. The petitioner must show that but for counsel's unprofessional errors, there is a reasonable probability that the results of the proceeding would have been different. McCorker, 797 N.E.2d at 267. A reasonable probability for the prejudice requirement is a probability sufficient to undermine confidence in the outcome. Wesley v. State, 788 N.E.2d 1247, 1252 (Ind. 2003).

We also note that this court defers to counsel's choice of strategy and tactics. Douglas v. State, 800 N.E.2d 599, 607 (Ind. Ct. App. 2003). Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective. Id. Finally, we need not even evaluate counsel's performance if the defendant suffered no prejudice from that performance, and most ineffective assistance claims can be resolved by a prejudice inquiry alone. Vermillion v. State, 719 N.E.2d 1201, 1208 (Ind. 1999).

Although Gaskey contends that Instruction 13 amounted to an improper mandatory instruction, we note that the language set forth in the instruction states a legal proposition that has been found to constitute a correct statement of the law. Williams v. State, 873 N.E.2d 144, 147-48 (Ind. Ct. App. 2007). Moreover, legal counsel is not

generally ineffective for failing to make an objection to an instruction when the instruction has not yet been determined to be reversible error. Gann v. State, 550 N.E.2d 73, 75 (Ind. 1990). And Gaskey has not directed us to any case where this instruction has been determined to be improper.

Furthermore, Gaskey's claim that Instruction 13 contained an unconstitutional mandatory presumption is misplaced. Such a presumption, which amounts to a violation of due process, is one in which the instruction "relieves the State of its burden of proof and thereby subverts the presumption of innocence and invades the truth-finding tasks of the jury in a criminal case." Carella v. California, 491 U.S. 263, 265 (1989). Put another way, a "mandatory presumption instructs the jury that it must infer the presumed fact if the State proves certain predicate facts." Francis v. Franklin, 471 U.S. 307, 314 (1985) (emphasis added). However, a "permissive inference suggests to the jury a possible conclusion to be drawn if the State proves predicate facts, but does not require the jury to draw that conclusion." Id. Permissive inference instructions are not unconstitutional unless the conclusion suggested by the instruction is not one that reason and common sense justify, based on the proven facts. Brown v. State, 691 N.E.2d 438, 444 (Ind. 1998).

In this case, the State was required to prove beyond a reasonable doubt that Gaskey "broke" and "entered" Zuffa's home in order to convict him of burglary. Ind. Code § 35-43-2-2(1)(B)(i). In our view, Final Instruction 13 did not compel a jury to find that the State met its burden of proof regarding the "entering" of the dwelling for purposes of the burglary statute merely because certain facts were proved at trial. Rather,

the instruction leaves entirely to the jury the determination of what constitutes a defendant “essentially put[ting] himself into a position to commit a felony within” the dwelling. Appellant’s App. p. 73. Hence, we cannot say that Final Instruction 13 constituted an unconstitutional mandatory presumption that relieved the State of its burden of proof on an essential element of the charge. As a result, an objection to the instruction by counsel would not have been sustained, and we conclude that Gaskey’s trial counsel was not ineffective on this basis. See Little v. State, 819 N.E.2d 496, 506 (Ind. Ct. App. 2004) (observing that where an objection to an instruction would not have been sustained, counsel is not ineffective for not objecting).

B. Appellate Counsel

In addressing Gaskey’s contention that his appellate counsel on direct appeal was ineffective for failing to raise the alleged instruction error, we note that the standard of review for a claim of ineffective assistance of appellate counsel is the same as for trial counsel in that the defendant must show appellate counsel was deficient in his or her performance and that the deficiency resulted in prejudice. Reed v. State, 856 N.E.2d 1189, 1195 (Ind. 2006). There are three basic ways in which appellate counsel may be considered ineffective: 1) when counsel’s actions deny the defendant his right of appeal; 2) when counsel fails to raise issues that should have been raised on appeal; and 3) when counsel fails to present claims adequately and effectively such that the defendant is in essentially the same position after appeal as he would be had counsel waived the issue. Grinstead v. State, 845 N.E.2d 1027, 1037 (Ind. 2006).

The decision of what issue or issues to raise on appeal is one of the most important strategic decisions made by appellate counsel. Bieghler v. State, 690 N.E.2d 188, 193 (Ind. 1997). Thus, we give considerable deference to appellate counsel’s strategic decisions and will not find deficient performance in appellate counsel’s choice of some issues over others when the choice was reasonable in light of the facts of the case and the precedent available to counsel at the time the decision was made. Taylor v. State, 717 N.E.2d 90, 94 (Ind. 1999). To establish deficient performance for failing to raise an issue, the petitioner must show that the unraised issue was “clearly stronger” than the issues that were raised. Bieghler, 690 N.E.2d at 194.

As discussed above, we have already determined that Gaskey’s ineffective assistance of trial counsel claim with regard to Instruction 13 to be without merit. Therefore, Gaskey’s appellate counsel was not ineffective for failing to raise that issue on direct appeal. See Hall v. State, 646 N.E.2d 379, 382 (Ind. Ct. App. 1995) (observing that the failure to raise what would have been a meritless claim is not deficient performance).

The judgment of the post-conviction court is affirmed.

MAY, J., and BARNES, J., concur.