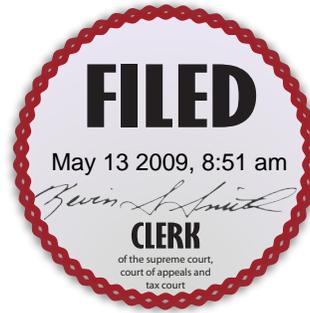


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

RUSSELL LEWIS,)
)
Appellant-Petitioner,)
)
vs.) No. 49A02-0811-PC-1040
)
STATE OF INDIANA,)
)
Appellee-Respondent.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Grant W. Hawkins, Judge
The Honorable Mark A. Jones, Master Commissioner
Cause No. 49G05-9904-PC-056795

May 13, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-petitioner Russell Lewis appeals the denial of his petition for post-conviction relief. Lewis contends that he received the ineffective assistance of appellate counsel because counsel decided not to raise a sufficiency of the evidence argument in Lewis's direct appeal. Finding no error, we affirm.

FACTS

The underlying facts, as described by this court on direct appeal, are as follows:

[O]n March 29, 1999, several items were stolen from the Indianapolis apartment of Christopher Moss ("Moss") and Naisha Goodner, Lewis's sister. Two days later, Lewis, Peter Carter ("Carter"), and Delwin Williams ("Williams") helped Moss move out of the apartment. Lewis asked Williams if he knew who had burglarized the apartment. Williams replied that Marvin Maxwell ("Maxwell") had committed the burglary. An altercation ensued, during which Lewis struck Williams in the head with a pistol. Lewis, Carter, and Moss then led Williams out of Moss's apartment in search of Maxwell.

The foursome walked to the nearby apartment of Charles Smyzer ("Smyzer") and Renee Jackson ("Jackson") and knocked on the door. Maxwell exited the apartment and exchanged blows with Moss. Williams fled. Maxwell entered the apartment, followed by Lewis, Moss, and Carter, who pummeled him with fists, firearms, and a child's bicycle. The three men took Maxwell back to Moss's apartment, where Carter beat him with a handgun and a broom. Carter then killed Maxwell with a shot to the head.

Lewis v. State, No. 49A02-0206-CR-469, slip op. p. 2-3 (Ind. Ct. App. Jan. 31, 2003).

The State charged Lewis with the murder of Maxwell, class A felony burglary, class B felony criminal confinement of Maxwell, class B felony criminal confinement of Williams, and class C felony battery of Williams. On August 9, 2000, a jury found Lewis guilty of class B felony criminal confinement of Williams and class C felony battery and was unable to reach a verdict on the remaining three charges. The trial court sentenced

Lewis to concurrent sentences of twenty years for criminal confinement and eight years for battery. Lewis appealed and this court affirmed the convictions but reversed the sentences and remanded for a new sentencing hearing. Lewis v. State, 759 N.E.2d 1077, 1087 (Ind. Ct. App. 2001).

On April 22, 2002, a jury trial commenced on the three remaining counts. The next day, the jury found Lewis guilty of class A felony burglary and class B felony criminal confinement of Maxwell.¹ On May 17, 2002, the trial court sentenced Lewis on all four convictions: thirty years for burglary, to be served concurrently with a ten-year sentence for the criminal confinement of Maxwell, and ten years for the criminal confinement of Williams, to be served concurrently with a four-year sentence for battery and consecutively to the burglary sentence, for an aggregate sentence of forty years imprisonment. Lewis appealed directly, arguing that (1) the trial court engaged in improper communication with the jury during deliberations; (2) his convictions and sentences for burglary and criminal confinement violated double jeopardy; and (3) the trial court abused its discretion in imposing consecutive sentences. This court found no improper communications, nor did it find a violation of double jeopardy. It agreed with Lewis, however, that consecutive sentences were improper, and reversed and remanded with instructions to enter findings supporting consecutive sentences or resentence Lewis to concurrent terms. Lewis, No. 49A02-0206-CR-469, slip op. p. 9. On April 25, 2003, the trial court resentenced Lewis to concurrent terms, for an aggregate thirty-year sentence.

¹ The jury did not reach a verdict on the murder charge, and the State later dismissed it.

On October 1, 2007, Lewis filed an amended petition for post-conviction relief,² arguing that he had received the ineffective assistance of appellate counsel because counsel failed to argue that there was insufficient evidence supporting his burglary conviction on direct appeal. Following a hearing, the post-conviction court denied Lewis's petition on September 29, 2008, finding, in pertinent part, as follows:

12. [Appellate counsel] believed the trial record suggested that there was force used or that there was circumstantial evidence of a force being used, and she would not bring up an issue on appeal if the facts didn't support it. As a result of her research and looking at the other "viable" issues, she believed that the facts in this case excluded the [sufficiency of the evidence supporting the] breaking and entering [elements of the burglary conviction] as a viable issue. She did not base her decision to not raise sufficiency of the evidence regarding force or breaking upon the decision of Wadsworth v. State, 750 N.E.2d 774 (Ind. 2001).

CONCLUSIONS OF LAW

5. Petitioner has proven neither deficient performance nor prejudice.

a. Deficient Performance. [Appellate counsel] examined all of the potential issues, researched them, and decided which issues merited raising and which did not. As seen above, the record contains evidence, direct and circumstantial, that the entry of Petitioner and the others into the apartment was a forceful breaking. Counsel submitted a solid, nineteen-page Brief of Appellant, and her decision to not include the issue about which Petitioner now complains was strategic and the choice appears reasonable in light of the facts of the case and the precedent available to counsel at the time her decision was made. She also submitted a Reply Brief and, after winning remand on sentencing issues, she still filed a Petition To Transfer. [Her] work on

² Lewis filed a pro se petition for post-conviction relief on March 22, 2004.

Petitioner's case was thus well within an objective standard of reasonableness based on prevailing professional norms.

b. Prejudice. Petitioner alleges that [counsel's] failure to raise the sufficiency issue prejudiced him because raising it would have resulted in the Court of Appeals' reversal of the conviction for burglary. . . .

In Petitioner's trial, evidence existed from which [the] trier of fact could have reasonably found that some force, however slight, was used by the defendants to gain unauthorized entry into the apartment. As to this breaking element, the combined trial testimony of Delwin Williams, Renee Jackson and Charles Smyzer constituted evidence of forceful breaking of the plane [of entry] by three men who were not invited into the residence, at least one of whom was armed. As fact-finder, Petitioner's jury was free to accept or reject the testimony that supported the element of breaking. Had a sufficiency of the evidence claim been raised on appeal, the higher court would have neither reweighed the evidence nor assessed the credibility of the witnesses, and would have been required to respect the jury's province to weigh conflicting evidence. Petitioner has thus failed to show that there is a reasonable probability that, but for counsel's alleged unprofessional errors, the result of the proceeding would have been different.

Appellant's App. p. 140-47 (internal citations omitted). Lewis now appeals.

DISCUSSION AND DECISION

I. Standard of Review

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); McCarty v. State, 802 N.E.2d 959, 962 (Ind. Ct. App. 2004), trans. denied. When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. Id. On review, we will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a

conclusion opposite that reached by the post-conviction court. Id. Post-conviction procedures do not afford petitioners with a “super appeal.” Richardson v. State, 800 N.E.2d 639, 643 (Ind. Ct. App. 2003). Rather, they create a narrow remedy for subsequent collateral challenges to convictions that must be based upon grounds enumerated in the post-conviction rules. Id.; see also P-C.R. 1(1).

II. Assistance of Appellate Counsel

Lewis’s sole argument on appeal is that the post-conviction court erred by concluding that he did not receive the ineffective assistance of appellate counsel. When evaluating a claim of ineffective assistance of counsel, we apply the two-part test articulated in Strickland v. Washington, 466 U.S. 668 (1984). Pinkins v. State, 799 N.E.2d 1079, 1093 (Ind. Ct. App. 2003). First, the defendant must show that counsel’s performance was deficient. Strickland, 466 U.S. at 687. This requires a showing that counsel’s representation fell below an objective standard of reasonableness and that the errors were so serious that they resulted in a denial of the right to counsel guaranteed to the defendant by the Sixth and Fourteenth Amendments. Id. at 687-88. Second, the defendant must show that the deficient performance resulted in prejudice. Id. To establish prejudice, a defendant must show that there is a reasonable probability that but for counsel’s unprofessional errors, the result of the proceeding would have been different. Id. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

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, ineffectiveness is rarely found when the issue is the failure to raise a claim on direct appeal. Id. To show that counsel was deficient for failing to raise an issue on direct appeal, the defendant must overcome the strongest presumption of adequate assistance, and judicial scrutiny is highly deferential. Ben-Yisrayl v. State, 738 N.E.2d 253, 261 (Ind. 2000), cert. denied, 534 U.S. 1164 (2002).

In evaluating appellate counsel’s performance, we consider whether the unraised issues are significant and obvious from the record and whether the unraised issues are “clearly stronger” than the issues that were presented. Bieghler, 690 N.E.2d at 194. If that analysis demonstrates deficient performance by counsel, the court then examines whether “the issues which . . . appellate counsel failed to raise, would have been clearly more likely to result in reversal or an order for a new trial.” Id.

Initially, we echo the post-conviction court’s conclusion that Lewis has failed to establish deficient performance. Without repeating the list of appellate counsel’s efforts on Lewis’s behalf as set forth above in the post-conviction court’s order, we emphasize that counsel filed a brief and a reply brief and was successful on one of the arguments she raised. She made a reasoned decision to focus on three arguments and omitted sufficiency of the evidence because she did not believe it was Lewis’s strongest argument.³ We certainly cannot conclude that her representation fell below an objective standard of reasonableness.

³ Lewis argues that counsel misinterpreted relevant law and that this mistake was the basis for her decision to omit a sufficiency argument. We cannot agree, inasmuch as she specifically testified that she did not raise the arguments because “the facts here don’t comport to raising it” PCR Tr. p. 14-16. And in any event, as explained below, Lewis has failed to establish prejudice as a result of the omission of the argument.

Furthermore, as for prejudice, to convict Lewis of burglary, the State was required to prove beyond a reasonable doubt that he broke and entered the dwelling of Smyzer and Jackson with the intent to commit the felony of confinement therein. Ind. Code § 35-43-2-1. The “breaking” element, which is the only one at issue herein, may be proved entirely by circumstantial evidence. Wadsworth v. State, 750 N.E.2d 774, 777 (Ind. 2001). This element is satisfied if the evidence or inferences that may reasonably be drawn therefrom establishes that even the slightest force was used to gain unauthorized entry. Davis v. State, 743 N.E.2d 751, 753 (Ind. 2001). Among other things, acts of sufficient force include opening a closed but unlocked door and pushing open a door that may have been slightly ajar. Creasy v. State, 518 N.E.2d 785, 786 (Ind. 1988). The force need not be actual—when access is accomplished by threatening the victim with force to allow entry, a breaking has occurred. Dew v. State, 439 N.E.2d 624, 625 (Ind. 1982).

As noted above, Lewis, Carter, and Moss led Williams at gunpoint to the apartment of Smyzer and Jackson. At trial, Williams testified that Lewis and his cohorts “bum-rushed” into the apartment in an effort to attack Maxwell:

Williams: . . . [Maxwell] answered the door and they just bum-rushed the door and just—I just seen punches, and I left, I ran.

Deputy Prosecutor: And bum-rushed. Please clarify that?

Williams: They just ran up in there, just rushed in.

Deputy Prosecutor: And they, you need to be clear, who’s they?

Williams: Carter, Russell Lewis and Moss.

Deputy Prosecutor: All three of them?

Williams: Yes.

Trial Tr. p. 70-71. After they “bum-rushed” the door to that apartment, Maxwell emerged and engaged in a physical altercation with Moss. At that point, Williams fled, and Lewis, Carter, and Moss followed Maxwell into the apartment—it was this entry that the burglary charge and conviction were based upon. Thus, Lewis argues that Williams’s testimony is irrelevant, inasmuch as it does not relate to the actual entry into the apartment at issue herein. As explained below, we do not find this argument to be compelling, inasmuch as Williams’s testimony provided a piece of the puzzle from which the jurors could have drawn reasonable inferences regarding the circumstances of the entry into Smyzer and Jackson’s apartment.

Jackson testified as follows:

Deputy Prosecutor: Do you remember seeing any guns?

Jackson: I seen—it happened so fast when they came in and everything, so.

Deputy Prosecutor: When they came in, I know. But, I’ve got to be specific here. Do you remember seeing any guns?

Jackson: Yeah.

Id. at 83. Smyzer also testified about the incident:

Deputy Prosecutor: So you heard a knock at the door, what did you do, sir?

Smyzer: I went to the door and opened it.

Deputy Prosecutor: And who was at the door?

Smyzer: That guy. [Indicates Lewis.]

Deputy Prosecutor: . . . Did [Maxwell] go outside with this guy, or whoever else was out there?

Smyzer: Yeah, he went out there with him.

Deputy Prosecutor: Okay. What's the next thing you saw happening at that door?

Smyzer: After I closed the door I heard like somebody trying to get in or something. I heard another knock at the door.

Deputy Prosecutor: Okay. Can you describe the knock, was it kind of like a knock like that?

Smyzer: No, it was like somebody was on the ground or something trying to get in or something, you know what I'm saying, hitting the door.

Deputy Prosecutor: Did that door come open?

Smyzer: Yeah, I opened the door.

Deputy Prosecutor: Okay. What happened after you opened the door?

Smyzer: . . . [A]ll three of them came in, came in, [Maxwell] was on the floor, all four of them came in and they was—the three of them was beating him.

Deputy Prosecutor: The fourth would be [Maxwell] and three guys?

Smyzer: Yes.

Deputy Prosecutor: Okay. The guy you pointed out in the Courtroom a few minutes ago, did he come in the apartment?

Smyzer: Yeah. All three.

Deputy Prosecutor: Did you see any weapons, any handguns?

Smyzer: Yeah, they had guns.

Id. at 96-99. During cross-examination, Smyzer testified as follows:

Defense Attorney: So, would the three individuals—the first thing that came in your door wasn't three people doing like a bum-rush or something like that, is that right?

Smyzer: Not the first time.

Defense Attorney: It was later on?

Smyzer: Right.

Id. at 108. Finally, Moss testified that after Lewis and the other men beat Maxwell outside the apartment,

Moss: [Maxwell] knocked on the door and they opened the door.

Deputy Prosecutor: And then what?

Moss: He went in the house.

Deputy Prosecutor: Did anybody invite you in?

Moss: No, nobody told us to come in.

Deputy Prosecutor: Did you go in that apartment?

Moss: Yes.

Id. at 170-71.

In sum, the evidence in the record establishes that Lewis and his cohorts “bum-rushed” into Williams’s apartment, accosted him with a gun, and led him at gunpoint to Smyzer and Jackson’s apartment. At that point, they knocked on the door of the apartment and Williams fled. Maxwell emerged and shut the door behind him, at which time Lewis and his cohorts beat Maxwell. Smyzer heard the beating from inside the apartment, and at some point he observed that Lewis and the other attackers were

carrying guns. During a break in the attack, Maxwell knocked on the door and Smyzer opened it. The beaten Maxwell crawled inside, with Lewis and the other men following behind, carrying guns, and entering the apartment without permission. Even if we were to find that there was no direct evidence of actual force used to gain entry—though a “bum-rush” certainly implies force—there was a wealth of evidence from which a jury could have reasonably inferred an implicit threat of force used to gain entry. Under these circumstances, even if Lewis’s appellate counsel had raised a sufficiency of the evidence issue on direct appeal, the result would not have been different. Thus, Lewis has failed to establish prejudice and the post-conviction court properly denied his petition.

The judgment of the post-conviction court is affirmed.

CRONE, J., and BROWN, J., concur.