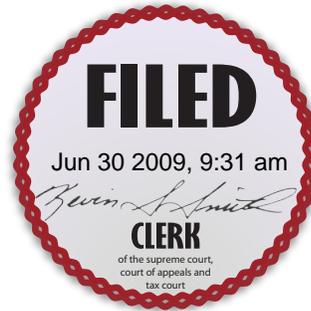


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEYS FOR APPELLANT:

ATTORNEYS FOR APPELLEE:

SUSAN K. CARPENTER
Public Defender of Indiana

GREGORY F. ZOELLER
Attorney General of Indiana

JAMES T. ACKLIN
Deputy Public Defender
Indianapolis, Indiana

MICHAEL GENE WORDEN
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

TONY LYNN REED,)
)
Appellant-Petitioner,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Respondent.)

No. 20A03-0812-PC-612

APPEAL FROM THE ELKHART CIRCUIT COURT
The Honorable Terry C. Shewmaker, Judge
Cause No. 20C01-0305-FA-102

June 30, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Tony Lynn Reed appeals the denial of his petition for post-conviction relief. Specifically, he contends that his trial counsel was ineffective for failing to object to a final jury instruction that contained paralleling language to an *Allen* charge. Although we find that the language is erroneous and therefore counsel was deficient for failing to object to it, we conclude that the error is harmless in light of the evidence of Reed's guilt and therefore there is no prejudice. Reed's ineffective assistance of counsel claim thus fails.

Facts and Procedural History

After a jury trial, Reed was convicted of Class A felony attempted murder and Class C felony criminal recklessness. The facts most favorable to the verdicts, as summarized by this Court in Reed's direct appeal, are as follows:

On May 17, 2003, sixteen-year-old Shanteshelia McKinney ("Shanteshelia"), twelve-year-old Marilyn McKinney, and nine-year-old Marissa McKinney were outside Barbara McKinney's ("Barbara") home when Rickey McKinney ("Rickey") arrived in his truck with Ezekiel Cooper ("Cooper"), Maurice Coleman, and Falicia Peters ("Peters"). Nine-year-old Montavious McKinney and Barbara were inside the house.

Immediately after Rickey's arrival, a car carrying Reed and two other men approached Barbara's house. Upon sighting the car, Rickey rushed the children into the house. As the car approached, Reed and the other two men opened fire. Rickey's truck, with Peters still inside, and Barbara's house were riddled with bullets.

The day after the shooting, Barbara noticed Reed at a neighbor's house and confronted Reed as to why he shot at her family. Reed responded by noting, "I wasn't shooting at you or your damn kids, I was shooting at [Cooper]."

Reed v. State, No. 20A03-0312-CR-509 (Ind. Ct. App. July 7, 2004) (citation omitted), slip op. at 2. The trial court ultimately sentenced Reed to an aggregate term of thirty-five years.

In August 2006, Reed filed a *pro se* petition for post-conviction relief, which was amended by counsel in April 2008. In his amended petition, Reed alleged that, similar to the defendant in *Parish v. State*, 838 N.E.2d 495 (Ind. Ct. App. 2005), *reh'g denied*, he was denied effective assistance of trial counsel because counsel did not object to the following portions of a final jury instruction:

If you should fail to reach a decision, this case will be left open and undecided. Like all cases it must be disposed of at some time. Another trial would be a heavy burden on both sides.

There is no reason to believe that the case can be tried again any better or more exhaustively than it has been. There is no reason to believe that more evidence or clearer evidence would be produced on behalf of either side.

There is no reason to believe that the case would ever be submitted to twelve people more intelligent, more impartial or more reasonable than you. Any future jury must be selected in the same manner that you were.

Appellant's App. p. 124. Following a hearing, the post-conviction court entered findings and conclusions denying relief. Reed now appeals.

Discussion and Decision

Reed contends that the post-conviction court erred in denying his petition for post-conviction relief. The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. *Henley v. State*, 881 N.E.2d 639, 643 (Ind. 2008). When appealing the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. *Id.* To

prevail on appeal from the denial of post-conviction relief, a petitioner must show that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. *Id.* at 643-44. Further, the post-conviction court in this case made findings of fact and conclusions of law in accordance with Indiana Post-Conviction Rule 1(6). Although we do not defer to the post-conviction court’s legal conclusions, “[a] post-conviction court’s findings and judgment will be reversed only upon a showing of clear error—that which leaves us with a definite and firm conviction that a mistake has been made.” *Id.* (quoting *Ben-Yisrayl v. State*, 729 N.E.2d 102, 106 (Ind. 2000), *reh’g denied*). The post-conviction court is the sole judge of the weight of the evidence and the credibility of the witnesses. *Fisher v. State*, 810 N.E.2d 674, 679 (Ind. 2004).

Reed contends that his trial counsel was ineffective. 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). A reasonable probability arises when there is a “probability sufficient to undermine confidence in the outcome.” *Id.* (quoting *Strickland*, 466 U.S. at 694).

Reed contends that his trial counsel was deficient for failing to object to the following emphasized portions of Final Instruction No. 22:

It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion if convinced it is wrong, but do not surrender your honest conviction as to the weight or effect of evidence based solely upon the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

If you should fail to reach a decision, this case will be left open and undecided. Like all cases it must be disposed of at some time. Another trial would be a heavy burden on both sides.

There is no reason to believe that the case can be tried again any better or more exhaustively than it has been. There is no reason to believe that more evidence or clearer evidence would be produced on behalf of either side.

There is no reason to believe that the case would ever be submitted to twelve people more intelligent, more impartial or more reasonable than you. Any future jury must be selected in the same manner that you were.

This does not mean that those favoring any particular position should surrender their honest convictions as to the weight or effect of any evidence solely because of the opinion of the other jurors or because of the importance of arriving at a decision.

This means that you should give respectful consideration to each other's views and talk over any differences of opinion in a spirit of fairness and candor. If at all possible, you should resolve any differences and come to a common conclusion so that this case may be completed.

Appellant's App. p. 124-25 (emphases added). Reed's jury trial was in September 2003. In December 2005, this Court decided *Parish*, which involved a final instruction that contained the same emphasized portions as Final Instruction No. 22. *See Parish*, 838 N.E.2d at 502. Similar to this case, the trial court in *Parish* did not give the challenged

instruction to an apparently deadlocked jury; rather, it gave the instruction to the jury before deliberations began. In addressing whether Parish's trial counsel's failure to object constituted deficient performance, we turned to *Broadus v. State*, 487 N.E.2d 1298 (Ind. 1986), which was decided well before Reed's jury trial.

In *Broadus*, as in *Parish* and in this case, an instruction containing the same emphasized portions was given to the jury before deliberations began. On appeal, the Indiana Supreme Court distinguished a final instruction containing this language from a supplemental instruction given to a deadlocked jury, *see id.* at 1303 ("It is clear that the giving of a *supplemental* instruction in the nature of an 'Allen charge' is reversible error pursuant to the decisions of this Court.") (emphasis added), but nevertheless cautioned that this language should not be used in final instructions:

Although we do not condone the use of paralleling language to the "Allen charge," in the case at hand where the modified "Allen charge" was given with the initial set of instructions, it was clearly harmless error.

Id. at 1304.

The Indiana Supreme Court repeated this warning in 1997, which was also well before Reed's 2003 jury trial. In *Bowen v. State*, 680 N.E.2d 536, 537 n.2 (Ind. 1997), our Supreme Court noted that "[t]o the extent that trial courts address the possibility of juror disagreement in preliminary or final instructions, we find the general pattern instruction regarding jury deliberations to be preferable and adequate, *not warranting supplementation.*" (Emphasis added). The Court then quoted the relevant portion of the Indiana Pattern Jury Instruction regarding jury deliberations that the trial court should

have given without embellishment. *Id.* (quoting 2 Ind. Pattern Jury Instruction (Criminal) 13.23 (2d ed. 1993)).¹

Even though, as the State points out, *Parish* was decided in 2005, which was after Reed's 2003 jury trial, based on both *Broadus* and *Bowen*, which had been around for years at the time of Reed's trial, we conclude that the emphasized portions of Final Instruction No. 22 are erroneous. The trial court should have given the pattern jury instruction on jury deliberations without supplementation. Therefore, Reed's trial counsel should have objected to the emphasized portions of Final Instruction No. 22, and counsel was deficient for failing to do so. The question then becomes whether there is prejudice.

In *Broadus*, our Supreme Court found that the error was harmless. 487 N.E.2d at 1304. If the error here is harmless, then there can be no prejudice and thus no ineffective assistance of counsel. Reed, who concedes that there were eyewitnesses who identified him as the shooter and witnesses who testified that he made an admission of guilt, *see* Appellant's Br. p. 9, argues that the error is not harmless and therefore prejudicial because the jury deliberated for five hours and ten minutes, the only contested issue was

¹ Indiana Pattern Jury Instruction (Criminal) 13.23 (3d ed. 2008), entitled Jury Deliberations, currently provides, in pertinent part:

To return a verdict, each of you must agree to it.

Each of you must decide the case for yourself, but only after considering the evidence with the other jurors. It is your duty to consult with each other. You should try to agree on a verdict, if you can do so without compromising your individual judgment. Do not hesitate to re-examine your own views and change your mind if you believe you are wrong. But do not give up your honest belief just because the other jurors may disagree, or just to end the deliberations. After the verdict is read in court, you may be asked individually whether you agree with it.

identity, and the jury requested to rehear Shanteshelia's testimony regarding her statement to a detective. He likens this case to *Parish*, where we noted that the jury deliberated for nine hours and then concluded:

Given that the only issue at trial was identification, the jury had several questions concerning two of the main eyewitnesses, and the jury did not hear testimony that the crime may not have occurred as the eyewitnesses testified, [trial counsel's] failure to object to the instruction was not clearly harmless.

838 N.E.2d at 503.

However, this case is distinguishable from *Parish*. We first point out that the fact that the jury in *Parish* did not hear testimony that the crime may not have occurred as the eyewitnesses testified stemmed from trial counsel's failure to investigate, which we found to be a separate incident of trial counsel deficiency. *See id.* at 502. Importantly, a failure to investigate is not present here. In addition, here the jury only sent one question about one eyewitness's, Shanteshelia's, testimony. Appellant's App. p. 92. In *Parish*, there were several questions about two eyewitnesses' testimony. Finally, as this Court found on direct appeal in rejecting Reed's sufficiency of the evidence challenge, there was testimony other than Shanteshelia's that established Reed as the shooter, and the inconsistencies in Shanteshelia's testimony were minor. *Reed*, No. 20A03-0312-CR-509, slip op. at 3. And, the inconsistencies that Reed alleges exist in his admission of guilt have nothing to do with the content of his admission but rather only the location where he made the admission. *See* Appellant's Br. p. 10. As such, we find that the error is harmless and therefore Reed has failed to prove that there is a reasonable probability that,

but for counsel's unprofessional error, the result of the proceeding would have been different.

Affirmed.

NAJAM, J., and FRIEDLANDER, J., concur.