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IN THE
COURT OF APPEALS OF INDIANA

JAMES HAMILTON,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 49A02-0901-PC-49
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Patricia J. Gifford, Judge
The Honorable Steven J. Rubick, Magistrate
Cause No. 49G04-0101-PC-010431

July 15, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-petitioner James Hamilton appeals the denial of his petition for post-conviction relief, claiming ineffective assistance of both trial and appellate counsel. Specifically, Hamilton argues that his trial counsel was ineffective for failing to tender jury instructions on the offenses of aggravated battery and involuntary manslaughter as lesser-included offenses of murder. Hamilton also contends that his appellate counsel on direct appeal was ineffective for failing to challenge the separate convictions and sentences for battery and voluntary manslaughter on double jeopardy grounds. Finding no error, we affirm the judgment of the post-conviction court.

FACTS

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

> In the early morning hours of December 31, 2000, Hamilton, Michael Jones, and others were drinking around a barrel fire near 33rd Street and Broadway Avenue in Indianapolis. Hamilton and Jones began to argue about a recent killing of Jones' friend because Jones thought that Hamilton had something to do with it. After the argument, Jones kicked the barrel over and left. As Jones left, he told Hamilton that "he better not be here" when he gets back or else he would "smack him in the mouth." Tr. p. 94. Hamilton left but came back, parking his car in an adjacent alley to allow it to warm up. Jones returned about fifteen to twenty minutes later and asked Hamilton why he was still here. The two then resumed their argument. Hamilton tried to leave by getting in his car. However, Jones kept kicking Hamilton's door closed. Jones also stood on Hamilton's car and would not move. Hamilton then pulled out a pistol and fired three shots, hitting Jones in the shoulder and thigh. At this point, Jones told Hamilton "[y]ou know you've got to kill me" and started to walk away from him. Tr. p. 100. However, Jones turned around and started to walk back towards Hamilton, again telling him, "Bitch, you've got to kill me." Tr. p. 102. Hamilton then started firing at Jones as he ran towards Jones. When Hamilton got close to Jones, he shot him twice in the head. Hamilton then drove away in his car. Jones died at the scene.
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> The State subsequently charged Hamilton with Murder, Battery as a Class C felony, and Carrying a Handgun without a License as a Class C

> felony. At trial, the trial court instructed the jury on these offenses as well as Voluntary Manslaughter as a Class A felony and Reckless Homicide as a Class C felony as lesser-included offenses of murder. Following the jury trial, Hamilton was convicted of voluntary manslaughter, battery, and carrying a handgun without a license.

Hamilton v. State, 783 N.E.2d 1266, 1267-68 (Ind. Ct. App. 2003). The trial court subsequently sentenced Hamilton to an aggregate executed term of fifty-five years imprisonment.

On appeal to this court, Hamilton argued that the trial court erred in refusing to give his tendered jury instruction on criminal recklessness as a lesser-included offense of murder and in instructing the jury on reasonable doubt. We affirmed Hamilton's convictions in all respects. Id. at 1270.

Thereafter, on May 29, 2008, Hamilton filed an amended petition for post-conviction relief, claiming the ineffective assistance of trial counsel.[1] Specifically, Hamilton contended that his trial counsel was ineffective for failing to tender final jury instructions for aggravated battery and involuntary manslaughter as lesser-included offenses of murder. Hamilton alleged that

> [a] criminal defendant in Indiana is entitled to an instruction on any defense which has some foundation in the evidence, even when the evidence is weak or inconsistent. . . . [citations omitted]. Under Wright v. State, 658 N.E.2d 563, 567 (Ind. 1995), if the jury could conclude that the lesser offense was committed but not the greater, it is reversible error to refuse to give the requested instruction. Id. at 567.

Appellant's App. p. 55. Hamilton filed a subsequent amended petition for post-conviction relief, alleging that his counsel on direct appeal was ineffective for failing to

[1] Hamilton initially filed a pro se petition for post-conviction relief on May 17, 2005.

challenge the convictions and sentences for battery and voluntary manslaughter on double jeopardy grounds. In particular, Hamilton alleged that

> [w]hile crimes of violence against the same victim can occur separately enough to justify separate convictions and sentences, . . . where the multiple acts occur closely together and culminate in death, the others must merge into it for sentencing purposes. Nunn v. State, 695 N.E.2d 124 (Ind. Ct. App. 1998). In Nunn, the Court noted that if the officer had died, there would only have been one Murder conviction, so it was irrational to sentence him for multiple counts of Attempted Murder. Therefore[,] in the Petitioner's case[,] the Battery conviction should have been merged with the Murder conviction, and appellate counsel was ineffective in failing to ensure that that happened.

Appellant's App. p. 65.

At the post-conviction hearing that commenced on August 20, 2008, Hamilton's trial counsel—Jennifer Lukemeyer—testified that she has been involved in more than 100 major felony jury trials and had tried several murder cases prior to representing Hamilton. Co-counsel Robert Hill has been involved in criminal defense work since 1982. Hill served as the Chief Trial Deputy of the Marion County Public Defender Agency at one time.

While representing Hamilton, Lukemeyer and Hill filed a number of motions on Hamilton's behalf, took several depositions, gave an opening statement at trial, lodged objections, cross-examined each of the State's eight witnesses, tendered instructions, and presented closing arguments.

At some point during the post-conviction hearing, Lukemeyer testified that her practice was to discuss the possibility of giving jury instructions on lesser-included offenses with the client. Lukemeyer was able to recall some of the details of Hamilton's

case, and believed that the facts supported his claim of self-defense. On the other hand, Hill did not remember much about the case and could not recall whether there were any discussions regarding what instructions on lesser-included offenses should be offered.

Hamilton's counsel on direct appeal, Teresa Harper, also testified at the post-conviction hearing. Harper remembered filing Hamilton's appeal and recalled speaking with Hamilton about his case over the telephone. Harper testified that she discussed the issues with Hamilton that she intended to raise on appeal, but she did not recall any mention of presenting a double jeopardy claim. Moreover, Harper stated that she would have raised a double jeopardy issue if she thought it was meritorious. Harper concluded that she must have discounted double jeopardy as an issue in this case.

Following the hearing, the post-conviction court denied Hamilton's request for relief and entered the following order:

> In this case, the trial court would have refused a jury instruction regarding aggravated battery because the evidence did not show "a substantial risk of death or: (1) serious permanent disfigurement; (2) protracted loss or impairment of the function of a bodily member or organ; or (3) loss of a fetus." I.C. 35-42-2-1.5. The evidence instead showed death, and the jury's verdict was consistent with unchallenged evidence that Defendant's actions caused the victim to die. . . . Had the victim not died and had the defendant been charged with attempted murder instead, perhaps a lesser included aggravated battery instruction would have been applicable. See McCann v. State, 854 N.E.2d 905, 911 (Ind. Ct. App. 2006). An aggravated battery instruction was not [supported] by the evidence and was clearly inapplicable.
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> Similarly[,] if Defendant's counsel would have tendered an instruction for involuntary manslaughter, the court would have refused it. While involuntary manslaughter is not an inherently included lesser offense of murder, involuntary manslaughter is a factually included offense when the charging information for murder asserts that a battery accomplished the killing by alleging the defendant knowingly killed the victim by shooting

him to death. Ketcham v. State, 780 N.E.2d 1171, 1177-78 (Ind. Ct. App. 2003). Such was the situation here. Accordingly, the final part of the three-step . . . analysis [in] Wright [v. State, 658 N.E.2d 563 (Ind. 1995)] requires the trial court to determine whether there is a serious evidentiary dispute that distinguishes the greater offense from the lesser offense. Id. at 567. The evidence presented at trial pointed to the conclusion that Defendant did not merely intend to batter the victim when he fired his gun in the second set of shots—he shot the victim twice in the head, then drove away. . . . That it was two shots, the location in the victim's body, the fairly close proximity between defendant and victim, that the defendant was running toward the victim as he shot him, and that the jury convicted of voluntary manslaughter instead of reckless homicide—all militate against the giving of an involuntary manslaughter instruction and indicate that the jury would not have convicted thereon if given that option. The lack of instruction on involuntary manslaughter (or aggravated battery) in this case did not render the convictions fundamentally unfair or unreliable. . . . Here again, Defendant has failed to show prejudice.

Defendant has also failed to prove that the trial court would have found an instruction on involuntary manslaughter to be supported by the evidence, and has therefore failed to prove deficient performance as well. "Counsels' performance is not deficient for failing to seek an instruction that the trial court would and could deny." Lambert, 743 N.E.2d at 739. The trial court would not have been required to instruct on involuntary manslaughter if requested that the evidence supported a refusal of such an instruction, and the ineffective assistance of counsel claim fails.

. . .

Claim of Ineffective Assistance of Appellate Counsel. Defendant lastly claims that appellate counsel was ineffective.

. . .

Defendant specifically alleges deficiency in appellate counsel's failure to challenge the sentences for battery (count II) and voluntary manslaughter as violative of double jeopardy.

While Ms. Harper does not specifically recall considering double jeopardy as a potential issue, her testimony that it would have been her practice to look at such an issue and raise it if she thought it was meritorious is circumstantial evidence that she did so in this case. . . . [T]he issues that Ms. Harper did select, if successful, would have resulted in reversible error and a new trial for her client; whereas, a double jeopardy claim if successful would have meant only a five-year reduction of defendant's fifty-five year sentence. That appellate counsel did not raise double

> jeopardy as an issue appears reasonable in light of the facts of the case and the precedent available to counsel when that choice was made. Stevens v. State, 770 N.E.2d 739, 760 (Ind. 2002). Based [on] the testimony of appellate counsel, as well as the other post-conviction evidence, Defendant has failed to prove deficient performance of appellate counsel.
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> Defendant has also failed to prove prejudice. Where the time sequence sets out the two crimes at issue as separate and distinct, a trial court does not err in imposing separate sentences for the separate offenses. Johnston v. State, 578 N.E.2d 656, 658-59 (Ind. 1991). Because of the lapse of time that separated the first shooting of Jones by Defendant (battery) and the second shooting when Defendant shot Jones twice in the head causing his death (voluntary manslaughter), Defendant has also failed to meet his burden of proving a reasonable probability that the outcome of the direct appeal would have been different had the allegation at issue been raised on appeal. Stevens, 770 N.E.2d at 760.
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> . . .
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> The battery offense and the voluntary manslaughter offense in Defendant's case were two distinct acts, separated by time and intent. Defendant was not charged and convicted for each of the four or five shots fired, but simply for the two separate shooting incidents—the C-felony battery and the voluntary manslaughter. Defense counsel in closing argument noted that at the time of the first shooting or afterward when the victim was walking away, the defendant had every opportunity to kill the victim but he did not, and that instead between the two shooting incidents "he is watching him, hoping that the situation has kind of calmed down." T.R. 375. Defendant has failed to prove that a double jeopardy issue would have been meritorious if it had been raised, and has failed to prove deficiency in appellate counsel's decision not to include it as an appellate issue.

Appellant's App. p. 119-26. Hamilton 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. Hamilton's Claims

A. Ineffective Assistance of Trial Counsel

Hamilton argues that his request for post-conviction relief should have been granted because his trial counsel failed to tender instructions for aggravated battery and involuntary manslaughter. Hamilton contends that the trial court would have been required to instruct on those offenses if his counsel would have requested them.

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 and counsel is afforded considerable discretion in choosing strategy and tactics. 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).

With regard to Hamilton's claims, we note that the failure to submit an instruction is not deficient performance if the court would have refused the instruction anyway. Lambert v. State, 743 N.E.2d 719, 739 (Ind. 2001). Indeed, a trial court may not accept a tendered instruction unless it correctly states the law, is supported by evidence in the record, and is not covered by other instructions. Id.

Our Supreme Court has observed that jury instructions on aggravated battery or involuntary manslaughter are not warranted if there is no serious evidentiary dispute that the defendant was aware of a high probability that he was engaged in killing the victim. Lehman v. State, 730 N.E.2d 701, 704 (Ind. 2000). An individual "knowingly kills when he is aware of a high probability the he is engaged in killing." Id.

In Lehman, the evidence showed that the defendant grabbed the victim by the throat and choked her rendering her unconscious. After the victim regained consciousness, she screamed and attempted to get out of Lehman's vehicle. Lehman again administered a choke hold cutting off the victim's airway until she lost consciousness. After the victim again regained consciousness, Lehman punched the victim and broke her neck, killing her. Thereafter, Lehman hid the victim's body in a cornfield. At some point, Lehman told a friend that he had "snapped the victim's neck." Id.

The State charged Lehman with murder, and he testified at trial that he "intended only to cause the victim to lose consciousness." Id. at 704. The trial court refused Lehman's tendered instruction on aggravated battery, and our Supreme Court affirmed the murder conviction, determining that the trial court properly refused the proposed instruction because there was no serious evidentiary dispute upon which the jury could have concluded that the defendant committed an aggravated battery but not a knowing killing.

In this case, the evidence demonstrated that there was even less of an evidentiary dispute than in Lehman. Specifically, Hamilton had already shot Jones in the shoulder and leg before shooting him twice in the head. Tr. p. 229. The wounds to Jones's shoulder and leg occurred at approximately the same time because the weapon was fired from the same location. Id. at 232. The fatal shots were fired later after Jones initially turned away and walked back toward Hamilton. Id. at 100-02. An eyewitness to the shooting testified that Hamilton "ran" toward Jones and shot him twice in the face. Id. at 102-03.

The evidence clearly showed that Hamilton shot Jones in the head at close range. Hamilton has made no showing that his actions could have been anything but a knowing killing, and no reasonable jury could have found that Hamilton committed only an aggravated battery or an act of involuntary manslaughter when he shot Jones in the head. As a result, we conclude that the post-conviction court properly determined that Hamilton's trial counsel were not ineffective when they did not tender jury instructions

on those two offenses. Thus, Hamilton's claim of ineffective assistance of trial counsel fails.

B. Appellate Counsel

In addressing Hamilton's contention that his appellate counsel on direct appeal was ineffective for failing to raise the issue of double jeopardy with regard to the separate convictions and sentences for battery and voluntary manslaughter, 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.

Our Supreme Court has determined that a defendant cannot be convicted of two separate crimes stemming from a single act where one is a lesser included offense of the other. Mihay v. State, 515 N.E.2d 498, 501 (Ind. 1987). However, such a prohibition against double jeopardy does not include situations where the two crimes have multiple victims, or where the crimes occur separately and independently of each other. Simmons v. State, 793 N.E.2d 321, 327 (Ind. Ct. App. 2003).

To illustrate, in Johnston v. State, 578 N.E.2d 656 (Ind. 1991), the defendant was charged and convicted on two charges of attempted murder of the victim he was also charged with murdering. Id. at 658. Although Johnston argued on appeal that the two convictions for attempted murder should have merged into the murder conviction, our Supreme Court found that the time sequence revealed that the charged offenses were separate and distinct. Id. Specifically, the evidence showed that Johnston attacked the victim after robbing him. Although Johnston initially left the victim for dead, he returned to the scene with some others, and found that the victim was still alive. As a result, Johnston and the others severely beat the victim. Thereafter, Johnston wrapped the victim in a tarp and threw him over a bridge. However, when the victim did not land in the water, Johnston and the others approached the area and discovered that the victim was still living. The attackers then placed the victim underwater and held him there until he stopped moving. Id.

In affirming Johnston's convictions for two counts of attempted murder and one count of murder, our Supreme Court observed that Johnston and his accomplices had, on at least two separate occasions, attempted to kill the victim. Id. The victim was not killed until the third assault and, because there were two separate attempts at murdering the victim before the killing was accomplished, the trial court properly imposed separate sentences on the separate offenses. Id. at 659.

In this case, the evidence established that Hamilton and Jones engaged in an argument. At some point, Jones told Hamilton that he would hit him in the mouth if Hamilton was still at the scene when he returned. Although Hamilton remained at the scene but attempted to leave at some point after Jones's return, Jones kicked Hamilton's car door. In response, Hamilton pulled a gun and shot Jones in the shoulder and the leg. Tr. p. 100. Jones then said, "you know you've got to kill me" and walked away from Hamilton. Id. Although Jones continued walking away, at some point he turned around, called Hamilton a "bitch," and stated, "you've got to kill me." Id. at 102. In response, Hamilton "ran" toward Jones and shot him twice in the face. Id. at 102-03.

When considering this evidence, it is apparent that Hamilton's act of battery and his act of voluntary manslaughter were separate and distinct offenses. The first set of gunshots appeared to be Hamilton's warning to Jones to stay away. Although Hamilton may not have intended to kill Jones at that point, he nonetheless committed battery with a deadly weapon. After this shooting, Hamilton's initial attack on Jones ended. However, as described above, when Jones returned to the scene and taunted Hamilton, Hamilton "ran" toward Jones and shot him twice in the face at close range. Id. at 102-03.

In our view, the fatal shooting is distinct from the first in that it was separated in time from the initial shooting. Moreover, it is apparent that the shots to Jones's face were different with regard to Hamilton's intent because the evidence shows that Hamilton committed the second shooting with an almost unquestionable intent to kill. As a result, double jeopardy prohibitions were not implicated and Hamilton was properly convicted and sentenced on both offenses. Thus, Hamilton's claim of ineffective assistance of appellate counsel fails.

The judgment of the post-conviction court is affirmed.

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