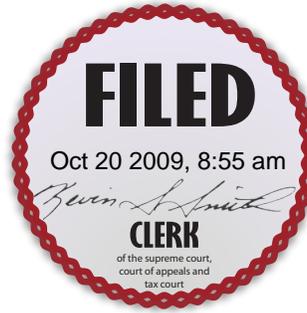


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



APPELLANT PRO SE:

ATTORNEYS FOR APPELLEE:

**DALE J. ATKINS**  
Michigan City, Indiana

**GREGORY F. ZOELLER**  
Attorney General of Indiana

**RICHARD C. WEBSTER**  
Deputy Attorney General  
Indianapolis, Indiana

---

**IN THE  
COURT OF APPEALS OF INDIANA**

---

DALE J. ATKINS, )  
 )  
 Appellant-Petitioner, )  
 )  
 vs. ) No. 49A04-0903-PC-169  
 )  
 STATE OF INDIANA, )  
 )  
 Appellee-Respondent. )

---

APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Sheila A. Carlisle, Judge  
The Honorable Mark A. Jones, Master Commissioner  
Cause No. 49G05-0405-PC-77748

---

**October 20, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**DARDEN, Judge**

## STATEMENT OF THE CASE

Dale J. Atkins appeals from the denial of his petition for post-conviction relief.

We affirm.<sup>1</sup>

### ISSUE

Whether Atkins received ineffective assistance of trial counsel.

### FACTS

On direct appeal, another panel of this Court stated the facts as follows:

Yvonne Atkins (“Yvonne”) and Atkins were married on April 8, 2003. Some time later they began living apart.

On January 26, 2004, Yvonne’s brother-in-law was at Yvonne’s home trying to get the furnace lit. He heard a boom coming from the door to the house, and when he looked in that direction, he saw Atkins standing there with a butcher knife in one hand and a butter knife in the other. Atkins was yelling to Yvonne to call the cops and 9-1-1, but he fled when her brother-in-law answered the door. On February 27, 2004, Atkins attacked Yvonne and was later convicted of domestic battery after pleading guilty. On April 29, 2004, he was served with a Protective Order (P.O.) instructing him to stay away from Yvonne and giving her exclusive possession of the home.

Three days later, on the evening of May 2, 2004, Yvonne was attending a cookout at her neighbor’s house. When she returned home, she locked her doors and called her neighbor to say that she was safely home. This was routine because Yvonne feared for her safety from Atkins. For additional protection, Yvonne’s nephew regularly stayed at her home, so she called him to say that she was home and that he could come over. She also told him that she would leave the door unlocked because she might lie down. She then unlocked the door and went back to the kitchen.

While she was in the kitchen, she heard someone at the door and thought it was her nephew, but it was Atkins. She requested that he leave, but he wanted to get a drink, so he proceeded to the kitchen and open the

---

<sup>1</sup> Atkins did not number the pages of the Appendix consecutively, as required by Indiana Appellate Rule 51(C) (“All pages of the Appendix shall be numbered at the bottom consecutively, without obscuring the Transcript page numbers, regardless of the number of volumes the Appendix requires.”). We have renumbered the pages consecutively for purposes of citing the Appendix.

refrigerator. Yvonne began screaming at him to leave and, when she started out the side door to her neighbor's house, Atkins pulled her back into the house and began attacking her. He put a knife against her neck and cut her with it. He then held her up against a doorway, said, "I'm tired of this shit, bitch," and stabbed Yvonne at least ten times, including under her arms, in her side, and in her chest. Some of the wounds were within half an inch to one inch of her heart. Air hissed out of her chest and blood spurted every time her heart beat. Atkins ran away and Yvonne ran to the cordless phone to call 9-1-1, and then to the front porch, where she screamed for help. Her neighbors provided first aid until medical personnel arrived, and Yvonne told her neighbor that Dale had stabbed her.

The State charged Atkins with Count I, attempted murder as a Class A felony, Count II, criminal confinement as a Class B felony,<sup>2</sup> Count III, domestic battery as a Class A misdemeanor,<sup>3</sup> and Count IV, invasion of privacy as a Class A misdemeanor.<sup>4</sup> A jury found Atkins guilty as charged. After hearing argument regarding aggravating and mitigating circumstances, the trial court found that the aggravators outweighed the mitigators, and sentenced Atkins to fifty years for Count I, twenty years for Count II, one year for Count III, and one year for Count IV. The sentences for Counts I and IV were ordered to run consecutively.

*Atkins v. State*, 49A05-0506-CR-00339, slip op. at 2-3 (Ind. Ct. App. January 18, 2006) (internal citation omitted).

On direct appeal, Atkins challenged the sufficiency of the evidence to sustain his conviction for attempted murder. He also alleged that the trial court had improperly weighed and failed to find potentially-mitigating circumstances at sentencing. In an unpublished memorandum, the *Atkins I* court held that the evidence was sufficient to support Atkins' attempted murder conviction and found that the trial court had not abused

---

<sup>2</sup> Ind. Code § 35-42-3-3. Also, we note that the State charged Atkins for Count III because he allegedly grabbed and squeezed Yvonne around the neck, resulting in bodily injury consisting of pain and/or bruising. (Appellant's App. at 34). Thus, there is no double jeopardy issue regarding Counts I and III.

<sup>3</sup> Ind. Code § 35-42-2-1.3.

<sup>4</sup> Ind. Code § 35-45-1-15.1.

its sentencing discretion. On November 30, 2006, Atkins filed a petition for post-conviction relief, wherein he argued that his trial counsel, Todd Ess, had rendered ineffective assistance by pursuing an “irrational alibi defense.” Atkins’ Br. at 12.

On July 16, 2008, and August 27, 2008, the trial court conducted a hearing on Atkins’ petition for post-conviction relief. Atkins called Ess as a witness. He testified that during his trial preparations, he had met with Atkins four or five times, including the eve of trial. He testified that during their conversations, Atkins had repeatedly denied having been at Yvonne’s home during the crime, but had occasionally “vacillated between saying that he was there and that he wasn’t there.” (P-C. Tr. 61). He testified that on the eve of trial, however, Atkins admitted not only to being at the scene, but also to stabbing Yvonne, insisting however, that he had accidentally stabbed Yvonne during mutual combat and that he had not intended to kill her.

Ess testified that he had asked Atkins whether he wanted to proceed with an accident defense or to pursue the misidentification defense; Atkins insisted on the latter. Ess testified that he then advised Atkins that the best available defense was for him to testify as to how the incident occurred and as to his state of mind at the time of the incident, whereby Ess could then seek an instruction on a lesser-included offense. Ess testified that Atkins adamantly refused to testify, to answer any questions about the stabbing or his relationship with Yvonne, or to pursue a lesser-included offense. Ess testified that he then contemplated other potential defenses based upon Atkins’ lack of specific intent to kill, but ultimately decided to abandon those defenses given Atkins’ unwillingness to testify and his insistence on Ess’ pursuing the misidentification defense.

On March 31, 2009, the trial court issued its findings of fact and conclusions of law and an order denying Atkins' petition for post-conviction relief. Atkins now appeals.

## DECISION

### 1. Standard of Review

Defendants who have exhausted the direct appeal process may challenge the correctness of their convictions and sentences by filing a post-conviction petition. Post-conviction proceedings are civil in nature and a defendant must establish his claims by a preponderance of the evidence. A petitioner who has been denied post-conviction relief appeals from a negative judgment, and to the extent that his appeal turns on factual issues, he must convince this Court that the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court. We do not defer to the post-conviction court's legal conclusions, but accept its factual findings unless they are clearly erroneous.

*Sweeney v. State*, 886 N.E.2d 1, 6 (Ind. Ct. App. 2008) (internal citations omitted).

When ruling on a petition for post-conviction relief, a court must render findings of fact and conclusions of law on all issues presented in the petition. P-C.R. 1(6). Our review is limited to these findings and conclusions. We apply a deferential standard of review when examining these findings and conclusions. *Allen v. State*, 749 N.E.2d 1158, 1164 (Ind. 2001). The findings must be supported by the evidence and the conclusions must be supported by law. *Id.* We must accept the post-conviction court's findings of fact and may only reverse if the findings are clearly erroneous. *Kien v. State*, 866 N.E.2d 377, 381 (Ind. Ct. App. 2007), *trans. denied*.

### 2. Ineffective Assistance of Trial Counsel

A claim of ineffective assistance of trial counsel requires the petitioner to show by a preponderance of the evidence that (1) counsel's performance was below the objective

standard of reasonableness based on prevailing norms; and (2) the defendant was prejudiced by counsel's substandard performance, i.e., there is a reasonable probability that, but for counsel's errors or omissions, the outcome of the trial would have been different. *Stephenson v. State*, 864 N.E.2d 1022, 1031 (Ind. 2007) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694.

Under the *Strickland* test, counsel's performance is presumed effective. *Douglas v. State*, 663 N.E.2d 1153, 1154 (Ind. 1996). A petitioner must present convincing evidence to overcome the strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Strickland*, 466 U.S. at 690. "The purpose of an ineffective assistance of counsel claim is not to critique counsel's performance, and isolated omissions or errors and bad tactics do not necessarily mean that representation was ineffective." *Grinstead v. State*, 845 N.E.2d 1027, 1036 (Ind. 2006).

Atkins contends that he admitted to attacking Yvonne approximately five months before trial, and that Ess' subsequent decision to proceed with a "false and unsupportable" misidentification defense "denied [hi]m a reasonable opportunity to receive a lesser conviction corresponding with his apparent mind state." Atkins' Br. at 11, 17. Atkins argues further that Ess' misidentification defense diverted the jury's attention from the critical issue of whether he had the requisite intent to kill and assured his attempted murder conviction. He further argues that Ess should have argued that he had lacked the requisite intent to kill and was, therefore, guilty of a lesser-included

offense. He asserts that had Ess done so, “there is a better than negligible chance that the jury would not have been convinced beyond a reasonable doubt that [he] possessed the specific intent to kill Yvonne when he assaulted her.” Atkins’ Br. at 19. We are not persuaded.

The following colloquies ensued between Ess and counsel on direct and cross examination:

[Direct examination]

Q: And turning our attention to the, to the substance of your conversation with Mr. Atkins, at what point in time did a discussion occur, if it did occur, regarding an alibi defense?

A: Mr. Atkins had, I mean since the beginning of my representation had told me that he had not been present. However, I will say this that he, at sometimes I thought, you know, waffled between or vacillated between saying that he was there and that he wasn’t there, but I think that as far as the defense that he was not there, that came up pretty early in the representation, and I think that that was based in part on the fact that he was not apprehended at the, at the scene.

Q: But you testified earlier that, as trial approached, he did admit being there and in a confrontation with Yvonne Atkins, correct?

A: Correct. I remember clearly a conversation that took place the day before trial where I went to visit Mr. Atkins in the jail where he disclosed to me basically, you know, the whole, the whole story and that he had, in fact, been present and that, you know, he had stabbed her.

Q: Okay. Is there a reason you did not ask for a continuance of the trial?

A: Well –

Q: At that point?

A: I think at that time, what I asked Mr. Atkins was, you know, if he wanted to present that defense, you know, we could, we could do so however, I mean, it was my opinion that I wouldn’t be able to elicit the, I mean, the facts that I needed from the [S]tate’s, you know witnesses, specifically, you know, Yvonne Atkins and I asked him if he still wanted to go through, you know, with the trial based on, you know, this defense that he wasn’t there or rather that, you know, . . . the State couldn’t make the identification of the attacker and I believe it was his choice to go forward I mean, without a, without a continuance. I did not ask for one.

Q: Did you talk to Mr. Atkins about testifying?

A: Yes. That was a point of contention between us because as I said, or at least if I didn't say so[,] I alluded to it that I thought that the best defense would have been to ask for a lesser included, or at least to get the jury to hear what Mr. Atkins' state of mind was and I wasn't able to do that without his, you know, participation but that was his, you know, his right.

Q: When did you have the discussion with him regarding his testimony?

A: I can't recall specifically but I mean over the course of the, my representation. I mean, if, and actually one of your exhibits kind of jarred my memory. I mean, the alleged victim, Yvonne Atkins, I think, had 13 or so stab wounds and I mean, I thought it was kind of incredulous that, you know, he wasn't there. \* \* \*

Q: I was asking when you first discussed him possibly testifying in this case?

A: I think that that came up sometime, I mean, earlier than that visit that I paid to him in the jail. There was at least one or two occasions where, I'm sure we spoke of him testifying but I can't recall exactly when.

Q: And did you advise him to testify or not testify?

A: I think my advice to him was to testify. The reason that I stated, I didn't feel like I could get a lesser included instruction for, say, like a C felony battery or even, and I know, actually I know we discussed this because I told him I said, I said, you know, based on this, you could be convicted of a lesser included, I mean, theoretically down to a misdemeanor but more likely a felony but your felony, the felony choices you're facing are criminal recklessness as a D felony or C felony battery or some kind of, you know, B felony aggravated battery, which all would have been better in my opinion than the A, you know, felony attempted murder that he was, he was facing so I know that, you know, we discussed that and, I mean, the only way to, you know, get that evidence in, since he was the, you know, the attacker was to put him on the stand and I, I just, I didn't see any witness giving me the evidence that I needed to get those instructions in, because they have to be supported by the record.

Q: Okay, and obviously if, . . . you were discussing him testifying as the attacker, you were discussing him testifying regarding the mutual combat, correct?

A: Right. Exactly.

[Cross-examination]

Q: \* \* \* [S]o, it's my understanding that right before trial you were left with a situation where the defendant had given you two different versions of what happened. He said he wasn't there at some points and then he'd also said that he'd done it, is that correct?

A: That's correct.

Q: Okay. And you had to – and also in that mix he had told you he did not want to testify, is that correct?

A: That's correct.

Q: Okay, and so you needed to determine what the best defense would be to present given those circumstances?

A: That's correct. I did not feel like I could, as I said before, cross examine the State's witnesses and get on the record evidence that there was a lesser included here and so in the alternative, the option was to argue identification.

Q: To argue that there were problems in the State's proving that it was actually the defendant?

A: Correct.

Q: Okay. And so you chose to point the deficiencies in the State's case at to the identification only?

A: That's right, that was the, that was the theory, the theory of my case.

Q: And in essence that was sort of an all or nothing type defense too, is that correct?

A: It was, absolutely and on that point, that, that's the nature of the discussion that I had with Mr. Atkins. I mean, it was, he, he felt very concretely about it. As I said before, I know that I had talked to him about lesser includeds [sic] and how, you know, if, if we could just, you know, attack the *mens rea* or the mental, you know, component of the charge that maybe we could get a lesser included but I said, you know, you know, on the lesser included you might get, you know, on the C felony eight years and that was not appealing to him. I mean, that's the way he wanted it, he wanted it all or nothing.

\* \* \*

Q: Given the large number of stab wounds to the victim in this case, wasn't it likely for – even if, even if you were able to argue for a lesser included offense, that that might have just been a B felony aggravated battery or even an A felony attempted voluntary manslaughter?

\* \* \*

A: I don't know about the A felony that you mentioned, but certainly that B felony was yeah, an option and, quite possible, right, exactly. But in my mind six to 20 was better than 20 to 50, you know.

Q: But the defendant didn't agree with that.

A: Correct.

Q: Okay, and so is it your testimony then that the defense that you did present was something at the time that the defendant was in agreement with?

A: Yes.

\* \* \*

Q: Okay. And so you, in your preparation for this case, you took a deposition of the alleged victim, or the victim, is that correct?

A: I did.

Q: Okay, and do you remember in general what else you would have done in preparation?

A: You mean besides looking over the State's discovery and my conversations with Mr. Atkins, I mean, I developed a, you know, a trial strategy, a theory, I looked for ways to attack Ms. Atkins' credibility and impeach her and, you know, bringing up instances where, you know, she had made inconsistent statements or at least, you know, raised the question of her credibility. \* \* \*

\* \* \*

Q: Mr. Ess, so given all of the facts of the State's case and what your client was telling you, did you choose the defense theory that you believed had the best chance of success?

A: Well, it depends what you define, how you define success.

Q: Okay.

A: No. I think that the more successful defense would have been to ask for, I mean, to ask for the lesser included, to get the evidence in front of the jury, to get Mr. Atkins' version of what happened in front of the jury and then, you know, to have asked for a lesser included and yeah, if we had walked away with a C or a B felony, that would have been success in my mind.

Q: Okay, but that wasn't an option based upon your client not wanting to testify.

A: That's correct.

\* \* \*

\* \* \* Like I said, in my mind I did not believe that I was going to be able to elicit facts from specifically Yvonne Atkins that would have allowed me to tender a lesser included instruction to the jury or, you know, for that matter any kind of self defense. Certainly not, certainly not self-defense but, but I didn't even think a lesser included, I could elicit the facts based on . . . the injuries and all so yeah, I went with what I thought was the, you know, not the best theory but the most, you know, I guess [best] available theory, I mean, out of the options that I had.

[Re-direct]

Q: [D]id Mr. Atkins tell you he did not want to testify?

A: Yes.

Q: When did he tell you that?

A: ... I think that, that night before trial when I went to see him in the jail and he, you know, disclosed – and I guess that was the kind of paradox

that I saw that he was at the same, I mean willing to, I mean really he told a very, you know, compelling story, I mean, when he just, you know, he told me everything that happened and, but for some reason he didn't want to, you know, tell that to the jury so I believe that it was, I mean, at least on that one occasion, probably earlier too, but certainly then that, you know, the, the subject was broached and he did not want to, you know, talk that way, or you know, discuss it openly, answer questions about it, I guess.

Q: And when you're referring to the compelling story, you're referring to Mr. Atkins telling you that he was in some type of mutual combat or struggled with Yvonne Atkins on the night of the incident?

A: Right, because that was more consistent with the evidence. I mean it was, you know, her testimony, I mean, she's his wife so the identification is going to be, you know, I thought, you know, pretty compelling when a wife identifies her husband but yes, aside from that, the fact that he was there, I mean at least it, you know, it explained a lot of things, I mean, the, the fact, actually refreshing my memory with my notes reminds me that yeah, she had kind of invited him, you know, to the home which I thought that was, you know, compelling that okay, well, you know, it wasn't like he had, because, you know, maybe that was her version that he had snuck in there. I can't recall but the way, according to Mr. Atkins, happened was that he was invited, that she was, you know, trying to make him comfortable, maybe setting something up for him to sleep out in the car, and it just, it just filled in the gaps. I mean, it just made more sense, I mean, here's the thing. Ultimately what he described to me as far as this, you know, this, the penetration of her body by the knife and he, he would describe it as having a blackout. He described it as, you know, not quite remembering and I remember he associated some kind of phrase with it like, and I'm not trying to be clever, but it was something akin to, you know, now look what's happened or now, you know, now what have you done kind of thing. But yeah, I thought that that would have been the best thing to do, I mean, under the circumstances but, I mean, you'd still have to account for the 13 wounds but otherwise I thought that that would have been the better –

Q: And at the time that the trial began, though, you were aware that he was with her in Indiana on the night of the stabbing, correct?

A: Right....

(P-C. Tr. 61-65, 66-68, 69-70, 74-80).

Atkins has not overcome the strong presumption that Ess' performance was effective. The record reveals that faced with Atkins' wavering accounts of what occurred

on the night of the stabbing, Ess advised him to testify, strategizing that the best available defense was to have Atkins testify to the jury about his state of mind and the series of events, i.e., mutual combat or accidental contact which led to his stabbing Yvonne; after Atkins' testimony, Ess would then seek an instruction for a lesser-included offense. When, however, Atkins vehemently refused to testify, Ess weighed the other available defenses and decided that the best available option was to proceed with the misidentification defense -- the aim of which was to highlight deficiencies in the State's proof that Atkins was, in fact, the person who had stabbed Yvonne.

Ess' decision to pursue the misidentification defense is a strategic decision that we will not second-guess. *Johnson v. State*, 832 N.E.2d 985, 997 (Ind. Ct. App. 2005). Counsel has the discretion to determine what strategy is best under the circumstances. *Id.* It is not for us to speculate as to what may or may not have been advantageous trial strategy. *Id.* Atkins has not persuaded us, with convincing evidence, that Ess rendered inadequate assistance and exercised unreasonable professional judgment. *Strickland*, 466 U.S. at 690. Nor has he demonstrated that Ess' representation fell below an objective standard of reasonableness or that Ess' errors, if any, were so serious that he did not function as counsel guaranteed by the Sixth Amendment.

Having failed to establish the first element of the *Strickland* test, Atkins' claim of ineffective assistance of counsel must fail. *See Young v. State*, 746 N.E.2d 920 (Ind. 2001).

Affirmed.<sup>5</sup>

ROBB, J., and MATHIAS, J., concur.

---

<sup>5</sup> Atkins also argues that the order denying his petition for post-conviction relief was invalid because it was signed by a master commissioner and not by a duly-elected judge. We disagree. The record reveals that Master Commissioner Mark Jones was the properly appointed judge *pro tempore* when he signed the order denying Atkins' petition for post-conviction relief. (P-C. App. 36). Indiana Trial Rule 63 provides that a judge *pro tempore* exercises all the authority and jurisdiction of the regular judge for whom the judge *pro tempore* is substituting. We find no error.