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IN THE
COURT OF APPEALS OF INDIANA

BLEASE WHITE, JR.,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 20A03-1101-PC-16
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE ELKHART CIRCUIT COURT
The Honorable Terry C. Shewmaker, Judge
Cause No. 20C01-0211-MR-110

October 28, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Blease White, Jr. ("White") appeals from the trial court's order denying his petition for post-conviction relief. White presents the following restated issues for our review:

I. Whether the post-conviction court erred by denying his claim of ineffective assistance of trial counsel; and

II. Whether the post-conviction court erred by denying his claim of ineffective assistance of appellate counsel.

We affirm.

FACTS AND PROCEDURAL HISTORY

A. J. Williams ("Williams") was the owner of the Tip Top Restaurant in Elkhart, Indiana. Williams generally opened the restaurant at 5:00 a.m., but would be there earlier in order to prepare food, and sometimes would open the restaurant before 5:00 a.m. for regular customers. Because Williams distrusted banks, he would carry large amounts of cash, and spoke openly about having large amounts of cash on him. In addition to his reputation for carrying around large amounts of cash, he was said to have kept money in his car, particularly in the trunk. At the end of July 2000, Williams' daughter heard from a waitress at the restaurant and from her siblings that Williams was in possession of a large amount of cash.

Early in the morning of August 1, 2000, Williams was discovered dead on the floor of his restaurant. The restaurant was locked, with no lights on, and the glass in the west door had been broken out. Glass and gray duct tape were found in the vestibule between the outer and inner door of the restaurant. When Williams was discovered, his hands were bound behind him by duct tape, a plastic bag was partially over his head, and he had been beaten in the head. Williams' empty wallet was discovered next to his body. Outside, the trunk of

Williams' Cadillac was ajar, and a set of keys, one of which opened the restaurant door, were found laying nearby. Bloodstains were observed both inside and outside the restaurant door, as well as on the golf bag in the trunk of Williams' car. The duct tape in the vestibule appeared to have covered a substantial part of the outside door glass. An autopsy revealed that Williams died from asphyxiation caused by strangulation and that his death was the result of a homicide.

On July 31, 2000, the night prior to Williams' death, White, Tony Graham ("Graham"), and Iris Seabolt ("Seabolt") were at the Grace Motel, located approximately less than a mile from the Tip Top Restaurant. Seabolt had told White and Graham about a man at the restaurant who had a large amount of money there. Graham borrowed a "tire checker" from Dewayne Dunn, and the tire checker was in the room at the hotel. White, Graham, and Seabolt left the motel at approximately 5:00 p.m. and did not return there.

White, Graham, and Seabolt went to Williams' restaurant early on the morning of August 1, 2000, to rob him. Seabolt and Graham entered the restaurant while White remained in the car. At one point, Seabolt came running out to get White. When White entered the restaurant, Graham had Williams in a choke hold. White Grabbed Williams' legs, and he and Graham held him down while Seabolt checked Williams' pants pockets. Graham, then put a bag over Williams' head, and White and Graham proceeded to punch Williams in the head. Graham also hit Williams in the head with a wrench or some other tool. Graham knocked Williams out and left the bag over his head.

White, Graham, and Seabolt left the restaurant and bought crack cocaine with the

money they obtained from the robbery. White later stated that they had gotten only $300 or $400, far less than they had expected to get from the robbery, and that they were angry about it. White was arrested and gave a statement to the police admitting to his participation in the robbery and the murder.

White was convicted of felony murder[1] after a jury trial, and the trial court sentenced him to an aggregate sentence of sixty years to be served consecutively to a sentence White was serving for an unrelated robbery conviction. In White's direct appeal of his conviction, he raised the following issues: (1) whether the trial court erred by allowing the State to amend the charging information; (2) whether the State committed prosecutorial misconduct during voir dire and closing argument; (3) whether the trial court erred by failing to grant two separate motions for mistrial; (4) whether the trial court erred by admitting three of White's out-of-court statements without establishing the corpus delicti; and (5) whether it was proper to order White's sentence to run consecutively with his prior sentence for robbery. We affirmed White's conviction and sentence on direct appeal. *White v. State*, 20A04-0408-CR-415 (Ind. Ct. App. May 5, 2005), *trans. denied.*

On March 16, 2006, White filed a *pro se* petition for post-conviction relief and an affidavit of indigency. The State filed an answer on March 31, 2006, and the State Public Defender's office entered an appearance on April 28, 2006. After private counsel appeared on May 4, 2007, the State Public Defender's office withdrew. Following several continuances of the matter, the post-conviction court allowed White to withdraw his petition

[1] *See* Ind. Code § 35-42-1-1.

without prejudice on October 21, 2009. On January 28, 2010, White filed his second verified petition for post-conviction relief, to which the State filed an answer.

The post-conviction court held an evidentiary hearing on August 19, 2010. The sole witness White called to testify was his former attorney, James Thiros ("Thiros"), who had represented White both at trial and on his direct appeal. Thiros has been licensed to practice law since 1988, devoting the majority of his practice to criminal defense at the trial and appellate levels. Thiros testified that he filed a belated notice of alibi and was allowed to present an alibi defense at trial. Thiros did not recall whether he had interviewed persons identified as Johnny Morgan ("Morgan") or June Selles ("Selles"), and had no independent recollection of Detective Steve Rezutko's ("Detective Rezutko") or Lora Watson's ("Watson") testimony at trial.

The certified record, including a transcript of voir dire, of the trial, and of the sentencing hearing, was admitted into evidence. White offered into evidence witness statements from Morgan, Selles, Watson, and Danny Jackson ("Jackson"), but those witnesses were not called to testify at the hearing. The State objected to the admission of those statements on hearsay grounds. The post-conviction court accepted the statements for the limited purpose of proving that trial counsel had received them in discovery. The briefs submitted in White's direct appeal and this court's memorandum decision affirming White's conviction were also admitted into evidence without objection.

The post-conviction court denied White's petition for post-conviction relief by an order entered on December 6, 2010. White now appeals.

DISCUSSION AND DECISION

The petitioner for post-conviction relief bears the burden of establishing the grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); *Timberlake v. State*, 753 N.E.2d 591, 597 (Ind. 2001), *cert. denied*, 537 U.S. 839 (2002). White is appealing from a negative judgment, and he must convince us that the evidence is without conflict and leads unerringly and unmistakably to a conclusion opposite the one reached by the post-conviction court. *Id.*; *Jervis v. State*, 916 N.E.2d 969, 972 (Ind. Ct. App. 2009), *trans. denied* (2010), *cert. denied*, 131 S. Ct. 472 (2010). The reviewing court will not reverse the judgment unless the petitioner shows that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. *Jervis*, 916 N.E.2d at 972. Further, the post-conviction court in this case made findings of fact and conclusions thereon, albeit entitled "Order," in accordance with Indiana Post-Conviction Rule 1(6). We will reverse a post-conviction court's findings and judgment only upon a showing of clear error, which leaves us with a definite and firm conviction that a mistake has been made. *Fisher v. State*, 810 N.E.2d 674, 679 (Ind. 2004). Findings of fact are accepted unless clearly erroneous, but no deference is accorded to conclusions of law. *Id.* The post-conviction court is the sole judge of the weight of the evidence and the credibility of the witnesses. *Id.*

I. Trial Counsel

White contends that his trial counsel rendered ineffective assistance to him. The following standard of review is applicable to ineffective assistance of trial counsel claims:

> To prevail on a claim of ineffective assistance of counsel, a petitioner must demonstrate both that his counsel's performance was deficient and that the petitioner was prejudiced by the deficient performance. A counsel's performance is deficient if it falls below an objective standard of reasonableness based on prevailing professional norms. To meet the appropriate test for prejudice, the petitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Failure to satisfy either prong will cause the claim to fail.

Walker v. State, 843 N.E.2d 50, 57 (Ind. Ct. App. 2006) (internal citations omitted), *trans. denied* (2006), *cert. denied*, 549 U.S. 1130 (2007). There is a strong presumption that counsel rendered adequate assistance. *Stevens v. State*, 770 N.E.2d 739, 746 (Ind. 2002), *cert. denied*, 540 U.S. 830 (2003).

White asserts that his trial counsel was ineffective for failing to interview Morgan and Selles. The post-conviction court record reveals, however, only that Thiros testified that he could not recall whether he interviewed the two witnesses. Furthermore, White did not call Morgan or Selles as witnesses at the evidentiary hearing. Therefore, the record before the post-conviction court was that Thiros was in receipt of the witness statements, that the witnesses did not testify, thus leaving unanswered the question of whether they were available at the time of the investigation or if they had been contacted by Thiros, and that Thiros could not remember if he interviewed them. The trial court correctly concluded that White had not proven by a preponderance of the evidence that his trial counsel's performance was deficient in this regard.

In addition, Thiros testified at the evidentiary hearing about the factors he considers when determining whether to call a witness to testify. Those factors included the witness'

criminal history, substance abuse history, biases, and how a witness might present before a jury. "[A] decision regarding what witnesses to call is a matter of trial strategy which an appellate court will not second-guess." *Johnson v. State*, 832 N.E.2d 985, 1003 (Ind. Ct. App. 2005). Therefore, White has failed to rebut the presumption that Thiros rendered adequate assistance in deciding which witnesses were most strategically advantageous to White's defense. Moreover, since Morgan and Selles did not testify at the post-conviction evidentiary hearing, White has also failed to establish prejudice because there is no evidence as to what Morgan and Selles would have testified.

White also claims that his trial counsel's performance was deficient by failing to impeach a witness. In particular, Jackson testified at trial about two conversations he had with White about White's involvement in the murder of Williams. White contends that Thiros should have questioned Jackson about the discrepancy between his pretrial statement regarding the amount of money stolen, $1,500, and his testimony at trial, that they stole $300 or $400 from Williams. White contends that the State had Jackson testify only to the amount of money stolen, and the failure to impeach by exposing discrepancies on that issue amounted to ineffective assistance of counsel.

Contrary to White's assertion, the record reveals that Jackson testified to far more than merely the amount of money stolen from Williams. Jackson testified consistently with his pretrial statement that Seabolt informed the others that the owner of the restaurant was known to have a large amount of cash on hand. He testified that White was to wait in the car and blow the horn should anyone approach the restaurant while Seabolt and Graham

attempted to rob Williams in the restaurant. Thiros, on cross-examination of Jackson, attempted to discredit Jackson's testimony by questioning his motivation for coming forward with information about the robbery and murder, and by highlighting Jackson's criminal convictions. Thus, the choice of strategy regarding the impeachment was a reasonable one, and White has failed to show otherwise. "[T]he method of impeaching witnesses is a tactical decision and a matter of trial strategy that does not amount to ineffective assistance." *Kubsch v. State*, 934 N.E.2d 1138, 1151 (Ind. 2010) (citing *Bivins v. State*, 735 N.E.2d 1116, 1134 (Ind. 2000)). Thiros' representation of White was not ineffective in that regard.

Furthermore, White has failed to establish prejudice from this approach. Another witness testifying for the State, David Wilson, testified to admissions made by White concerning White's involvement in the robbery. That testimony was not challenged in White's petition for post-conviction relief. Therefore, White was not prejudiced by the manner in which Thiros chose to cross-examine Jackson.

White next challenges Thiros' decision not to cross-examine Detective Rezutko about the multiple statements White gave to the police. White claims that, in his opening statement, Thiros stated that "White changed his story only after the police promised him things and fed him information." *Appellant's Br*. at 19. White concludes that introduction of the multiple prior statements was the means to have proven this assertion, and failure to do so amounted to deficient performance.

At the evidentiary hearing, Thiros testified that he had concerns about the jury hearing the additional statements White had made to the police because he wished to limit the amount

of prejudicial information the jury might hear and avoid opening the door on other aspects of the statements. White admitted in one of his prior statements that he and Graham were looking for someone to rob and admitted to participating in other robberies with Graham. He also admitted that the plan for the crime at issue included his involvement.

In light of the content of the prior statements, it is clear that Thiros, by choosing not to cross-examine Detective Rezutko about White's prior statements, had made a strategic decision in an effort to limit the chance of prejudicial information being heard by the jury and to avoid opening the door to other aspects of the statements. "[W]e will not second-guess defense counsel's decision to limit cross-examination . . . as it involved a tactical matter of trial strategy subject to the attorney's deliberate choice." *Monegan v. State*, 721 N.E.2d 243, 251 (Ind. 1999). Furthermore, White testified at trial and was able to present his version to the jury. White has failed to establish either deficient performance or prejudice on this issue.

White also alleges that Thiros pursued an unreasonable theory of defense, thinking that he was defending against a charge of intentional murder rather than felony murder. Thiros argued unsuccessfully in White's direct appeal that the trial court erred by granting the State's motion to amend the charging information the morning of White's jury trial. The original charging information allowed the jury to consider whether White was guilty of murder of Williams by asphyxiation or of felony murder. The amended information limited the jury's consideration to the question of White's guilt or innocence on the charge of felony murder.

In his petition for post-conviction relief, White claimed that the trial counsel

erroneously prepared for trial to defend against intentional murder rather than felony murder. White, however, has failed to establish deficient performance or prejudice in relation to this allegation. Thiros testified that he was able to present an alibi defense at trial via White's and Watson's testimony. That defense was equally available under each version of the information. White argues that counsel "prepared a meritless defense for trial (proving that White was not the actual killer based on DNA, etc.)." *Appellant's Br.* at 20. However, the choice of defenses for trial is a matter of trial strategy. *Overstreet v. State*, 877 N.E.2d 144, 154 (Ind. 2007). White's argument, notwithstanding, Thiros' choice of defense, *i.e.*, an alibi defense, was a reasonable one. White has failed to establish either deficient performance or prejudice here.

White also states that Thiros' representation was deficient because he failed to move for a mistrial after the deputy prosecuting attorney made inappropriate comments during closing argument. However, the record reflects that Thiros objected to the improper comments, and the trial court *sua sponte* admonished the jury immediately. That admonishment correctly instructed the members of the jury that they were to base their decision on the evidence and that the arguments of counsel were not evidence. *Tr.* at 596.

When an improper argument is alleged to have been made, the correct procedure is to request the trial court to admonish the jury. *Dumas v. State*, 803 N.E.2d 1113, 1117 (Ind. 2004). If the party is not satisfied with the admonishment, then he or she should move for a mistrial. *Id*. Here, White has failed to show deficient performance or prejudice. Thiros objected to the comments, thus triggering the trial court's admonishment. "The remedy of

mistrial is 'extreme,' strong medicine that should be prescribed only when 'no other action can be expected to remedy the situation' at the trial level." *Lucio v. State*, 907 N.E.2d 1008, 1010-11 (Ind. 2009) (internal citations omitted). The trial court's admonition to the jury, coupled with the strong presumption that juries follow a trial court's instructions, defeat White's argument here.

In addition, White contends that Thiros should have moved for a mistrial when Jackson was asked on direct examination if there was a time when he was "housed with" White. *Tr*. at 292. White argues that this question indicated to the jury that White had prior convictions. The record reflects, however, that Thiros objected to the question and Jackson did not answer it. The use of "housed with" in the question could have other meanings not suggesting incarceration for a prior conviction. White has failed to establish deficient performance or prejudice here.

White next asserts that Thiros' representation was deficient because he failed to elicit testimony from Watson about other "viable" suspects and by failing to properly introduce prior consistent statements made by Watson. *Appellant's Br.* at 24. Watson did not testify at the evidentiary hearing however, and White is thus unable to establish how Watson would have testified if so questioned at trial. Furthermore, White has failed to show us how the contents of Watson's prior statements would have undermined our confidence in the outcome of White's trial given his own admission of guilt to police and the testimony of Jackson and Wilson to that effect. "Our supreme court has observed that it is not unreasonable for an experienced trial lawyer to refrain from presenting additional evidence through testimony."

Blanchard v. State, 802 N.E.2d 14, 37 (Ind. Ct. App. 2004). Furthermore, the choice of defenses for trial is a matter of trial strategy. *Overstreet*, 877 N.E.2d at 154.

White also challenges Thiros' failure to object to the portion of the trial court's final instruction thirty, which he contends contains an impermissible *Allen* charge.[2] White claims that Thiros should have objected to the following language of that 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. at 151.

To support his argument, White directs our attention to *Parish v. State*, 838 N.E.2d 495 (Ind. Ct. App. 2005). In *Parish* we considered the propriety of the trial court's decision to give an instruction containing identical language to that which is challenged here. In that case, we cited to our Supreme Court's opinion in *Broadus v. State*, 487 N.E.2d 1298 (Ind. 1986). In *Broadus*, the Supreme Court held that the giving of an *Allen* charge in the initial set of instructions was not condoned, but that such error was clearly harmless error. 487

[2] *Allen v. United States*, 164 U.S. 492 (1896) (considering charge given by trial court to deadlocked jury about duty to decide the case if they could conscientiously do so).

N.E.2d 1304. We reversed the decision of the post-conviction court in *Parish* because trial counsel should have objected to the instruction as an impermissible supplementation of the preferred pattern instruction. *Parish*, 838 N.E.2d at 502-03. In that case, the error from the giving of the instruction to which a properly lodged objection would have been sustained, was not clearly harmless error as in *Broadus*. *Id*. at 503. The jury had deliberated for over nine hours and had submitted several questions to the trial court during that time about two of the main eyewitnesses. *Id*. As the only issue at trial was identification, the jury had questions concerning the main eyewitnesses, and did not hear testimony that the crime may not have occurred as the eyewitnesses testified, the failure to object to the instruction constituted reversible error supporting a claim of ineffective assistance of counsel. *Id*.

Thiros should have objected to the instruction. However, White has failed to establish how he was prejudiced by the giving of the instruction. White had admitted his guilt to the police, and Wilson and Jackson testified as to White's admission to them of his participation in the crime. White claims that even though the jury did not deliberate for nearly as long as the *Parish* jury, he was nonetheless prejudiced because the evidence against him was not overwhelming. We disagree. In this situation, the giving of the objectionable language in the instruction amounted to harmless error, which in turn does not support a finding of ineffective assistance of trial counsel.

White claims that even if the allegations of error individually do not constitute ineffective assistance of trial counsel, the cumulative effect of the alleged errors rendered the representation ineffective. As is the case with all other claims of ineffective assistance of

counsel, White must show the existence of cumulative errors in Thiros' performance and that such errors resulted in prejudice. *Potter v. State*, 684 N.E.2d 1127, 1135 (Ind. 1997). However, White had admitted his involvement in the crime to the police and others. Assuming without deciding that Thiros' made mistakes during the trial, White has failed to establish prejudice. We cannot say that without any potential cumulative errors the jury would have reached a different result.

II. Ineffective Assistance of Appellate Counsel

We apply the same standard of review to claims of ineffective assistance of appellate counsel as we apply to claims of ineffective assistance of trial counsel. *Williams v. State*, 724 N.E.2d 1070, 1078 (Ind. 2000). Claims of ineffective assistance of counsel generally fall into three categories: (1) denial of access to an appeal; (2) waiver of issues; and (3) failure to present issues well. *Carter v. State*, 929 N.E.2d 1276, 1278 (Ind. 2010).

White claims that Thiros, who represented him on his direct appeal as well, performed deficiently in that direct appeal. In particular, White claims that Thiros should have challenged his sentence by making a *Blakely*[3] claim. He notes that the *Blakely* opinion was issued after he was sentenced but prior to the deadline for the filing of a notice of appeal. White further argues, that even though our Supreme Court's opinion in *Smylie v. State*, 823 N.E.2d 679 (Ind. 2005), which resolved the issue of the effect of the *Blakely* decision on

[3] *Blakely v. Washington*, 542 U.S. 296 (2004) (other than fact of prior conviction or facts admitted by defendant, fact used to increase penalty for a crime beyond statutory maximum must be submitted to jury, unless jury is waived by defendant).

Indiana's sentencing provisions, was not issued until March 9, 2005, Thiros could have sought permission to file an amended brief that included the *Blakely* claim.

"Ineffectiveness is rarely found when the issue is failure to raise a claim on direct appeal." *Taylor v. State*, 717 N.E.2d 90, 94 (Ind. 1999). For White to succeed on his claim, he must show "from the information available in the trial record or otherwise known to appellate counsel that appellate counsel failed to present a significant and obvious issue and that this failure cannot be explained by any reasonable strategy." *Ben-Yisrayl v. State*, 738 N.E.2d 253, 261 (Ind. 2000). In challenging the selection and presentation of issues, White must overcome the strongest presumption of adequate assistance, and our scrutiny of that decision is highly deferential. *Id*.

In the present case, Thiros raised many issues in White's direct appeal, including one regarding the propriety of consecutive sentences. Our Supreme Court stated in *Smylie* that the *Blakely* decision represented "a new rule that was sufficiently novel that it would not have been generally predicted, much less envisioned to invalidate part of Indiana's sentencing structure. . . ." 823 N.E.2d at 689. Furthermore, White's case was fully briefed before the *Smylie* opinion was issued.

"[T]he reviewing court should be particularly sensitive to the need for separating the wheat from the chaff in appellate advocacy, and should not find deficient performance when counsel's choice of some issues over others was reasonable in light of the facts of the case and the precedent available to counsel when that choice was made." *Bieghler v. State*, 690 N.E.2d 188, 194 (Ind. 1997). A reviewing court compares the unraised obvious issues to

those actually raised, and will find ineffective assistance where the ignored issues are clearly stronger than the presented issues. *Id*.

In sentencing White, the trial court noted White's criminal history consisting of seven misdemeanor convictions and three prior felony convictions, including felony convictions for battery. *Tr*. at 648. Based on this record, it would have been reasonable for Thiros to determine that a *Blakely* claim would not likely change White's sentence. A sentence may be enhanced by a single aggravating circumstance. *Haddock v. State*, 800 N.E.2d 242, 245 (Ind. Ct. App. 2003). An enhancement based upon criminal history does not trigger a *Blakely* analysis as a defendant's criminal history was excluded from the requirement of a jury finding the facts to support the enhancement. *Dillard v. State*, 827 N.E.2d 570, 575 (Ind. Ct. App. 2005). White has failed to establish ineffective assistance of appellate counsel.

Affirmed.

BAKER, J., and BROWN, J., concur.