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IN THE
COURT OF APPEALS OF INDIANA

LINDA CHIESI,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 64A05-1003-PC-205
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE PORTER SUPERIOR COURT
The Honorable Roger V. Bradford, Judge
Cause No. 64D01-9003-CF-46

November 4, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Linda Chiesi was convicted, following a jury trial, of murder and conspiracy to commit murder and was sentenced to 110 years. Her convictions were affirmed on direct appeal in Chiesi v. State, 644 N.E.2d 104 (Ind. 1994). Chiesi filed a petition for post-conviction relief, which the post-conviction court denied following an evidentiary hearing. Chiesi appeals the denial of post-conviction relief, raising the sole issue of whether she received ineffective assistance of appellate counsel by virtue of counsel's failure to raise the issue of error in the trial court's accomplice liability instruction as a claim of fundamental error. Concluding that appellate counsel was not ineffective, we affirm.

Facts and Procedural History

The following facts were recited by the Indiana Supreme Court in Chiesi's direct appeal:

> In early 1990, [Chiesi] conspired with others to have her husband, David Chiesi, murdered. In the early stages of the conspiracy, [Chiesi] informed her son Christopher that she planned to have her stepfather, John Ondras, shoot the victim as an intruder. She in fact did approach her stepfather and ask him to kill her husband. This he refused to do.
>
> [Chiesi] then met with Ron Battle, who resided in Bloomington, Indiana with his brother Tim, who was the boyfriend of [Chiesi]'s daughter, Kimberly. When Ron and a man named Derick Richard met with [Chiesi], she gave Ron a brown paper bag containing a .38 caliber snub nose revolver and an envelope with five $100 bills. [Chiesi] provided the two men with the address of her home and advised them that her husband would be at church.
>
> The two men then drove to [Chiesi]'s home, broke into the building through a downstairs window, took a VCR, a rifle, and a watch. Later, they gave these items to Kimberly Chiesi in Bloomington. When the victim returned home, he reported the burglary to police. Following the burglary,

> [Chiesi] called Ron Battle at least once a day for a week. During these conversations, she asked Ron if he were interested in killing the victim or whether he knew someone who would. The sum of $7,000 was mentioned during the conversations.
>
> Ron agreed to help [Chiesi] locate someone who would perform the killing. Ron made a trip to Michigan. Upon his return, he was accompanied by Vesta Simmons, who agreed to kill the victim with the snub nose revolver furnished by [Chiesi]. Before the killing, [Chiesi] furnished the two men with details of how to enter the house and in what bedroom her husband would be sleeping. She feigned a bad cold as an excuse that she would be sleeping in a separate bedroom at the appointed time.
>
> [Chiesi]'s son Christopher, who also was sleeping in a separate bedroom, was awakened by the commotion caused by the killing of the victim. He stated he heard voices and thought that his mother's voice was one. The bedrooms were upstairs in the house and Christopher said that he heard voices in the downstairs area following the commotion. He heard one person come back up the stairway before things became quiet.
>
> Ron testified that he was waiting in the car and that Simmons came running from the house carrying the snub nose revolver and said, "I got him. Let's go." Following the shooting, [Chiesi] called 911 and reported the crime.

Chiesi, 644 N.E.2d at 105-06.

The State charged Chiesi with murder and conspiracy to commit murder. In its final instructions to the jury, the trial court gave the following instruction regarding accomplice liability:

> A person is responsible for the conduct of another person when, either before or during the commission of an offense, he knowingly aids, induces or causes the other person to commit an offense.

Amended Appendix to Brief of Petitioner-Appellant at 60. The trial court also gave a pattern jury instruction defining the elements of murder and stating:

> To convict the defendant the State must have proved each of the following elements:

The defendant
1. knowingly or intentionally
2. killed
3. another human being [].

Id. at 59. The jury found Chiesi guilty as charged.

Chiesi appealed. The Indiana Supreme Court affirmed, rejecting Chiesi's arguments that dual convictions for murder and conspiracy to commit murder violated double jeopardy, that the trial court committed procedural error in playing the tape recording of Chiesi's 911 call, that a new trial should have been granted based upon newly discovered evidence, and that the evidence was insufficient to support the convictions. No issue was raised concerning the trial court's accomplice liability instruction.

Chiesi filed a petition and an amended petition for post-conviction relief in which she argued her appellate counsel was ineffective for failing to raise the issue of the trial court's accomplice liability instruction as a claim of fundamental error. On October 8, 2009, the post-conviction court held an evidentiary hearing, and on February 12, 2010, issued its order denying Chiesi's petition. Chiesi now appeals.

Discussion and Decision

I. Standard of Review

Chiesi challenges the denial of her post-conviction petition. The petitioner in a post-conviction proceeding has the burden of establishing grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5). When appealing the denial of a petition for post-conviction relief, the petitioner appeals a negative judgment. Perry v. State, 904 N.E.2d 302, 307 (Ind. Ct. App. 2009), trans. denied. Therefore, we

will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. Id.

II. Ineffective Assistance of Appellate Counsel

Chiesi argues she was denied effective assistance of counsel on direct appeal. When evaluating claims of ineffective assistance of appellate counsel, Indiana courts apply the two-part test articulated in Strickland v. Washington, 466 U.S. 668 (1984). Carter v. State, 929 N.E.2d 1276, 1278 (Ind. 2010). Thus, Chiesi must show defective performance and prejudice. Reed v. State, 856 N.E.2d 1189, 1195 (Ind. 2006). Claims of defective performance by appellate counsel fall into three categories: (1) denial of access to an appeal; (2) waiver of issues; and (3) failure to present issues well. Carter, 929 N.E.2d at 1278. Chiesi's argument that her counsel failed to raise an issue falls under the category of waiver of issues. To evaluate the performance prong of such claims, we consider (1) whether the unraised issue is significant and obvious from the face of the record, and (2) whether the unraised issue is "clearly stronger" than the raised issues. Id. (quotation omitted). The defendant must show that appellate counsel's failure to present a significant and obvious issue "cannot be explained by any reasonable strategy." Id. at 1279 (quotation omitted). To evaluate the prejudice prong, we consider whether the issue appellate counsel failed to raise would have been "clearly more likely to result in reversal or an order for a new trial." Henley v. State, 881 N.E.2d 639, 645 (Ind. 2008) (quotation omitted). "Although the performance prong and the prejudice prong are separate inquiries, failure to satisfy either prong will cause the claim to fail." Id.

In arguing that appellate counsel was ineffective for failing to raise the issue of the trial court's accomplice liability instruction as a claim of fundamental error, Chiesi does not dispute that the instruction given was a correct statement of the law. See Ind. Code § 35-41-2-4 ("A person who knowingly or intentionally aids, induces, or causes another person to commit an offense commits that offense . . . ."). Nonetheless, Chiesi contends the instruction was ambiguous and confusing, "failed to correctly instruct Chiesi's jury on the law of accomplice liability as it should have been applied to the State's specific charge of Murder against Chiesi," and lessened the State's burden "in the matter of whether or not Chiesi was guilty of the specific crime of Murder as an accomplice." Reply Brief of Petitioner-Appellant at 1-2. Chiesi contends that because the instruction was given in general terms and did not refer explicitly to the murder charge, it allowed the jury to mistakenly believe that it could convict Chiesi of murder as an accomplice based merely upon the elements of conspiracy or by believing she aided, induced, or caused a conspiracy entered into by others who subsequently committed the murder without her further participation. Chiesi contends that appellate counsel should have raised as a claim of fundamental error the trial court's failure to give a pattern instruction setting forth the elements of accomplice liability for the specific crime of murder.

However, research has revealed no authority in Indiana – neither at the time of Chiesi's direct appeal nor today – that requires a trial court to give such "hybrid" instructions synthesizing the elements of murder and accomplice liability. In Specht v. State, 838 N.E.2d 1081, 1092-93 (Ind. Ct. App. 2008), trans. denied, this court concluded trial counsel was not ineffective for failing to tender "hybrid 'accomplice liability

element instructions' that combine[d] the elements of accomplice liability with the elements of the crimes charged," which included murder. In Smith v. State, 765 N.E.2d 578 (Ind. 2002), a murder prosecution, our supreme court concluded that error, if any, in not giving such hybrid instructions "d[id] not begin to rise to the level of fundamental error." Id. at 584.

Further, we can perceive no substantial harm to Chiesi by virtue of the trial court's failure to give such instructions to the jury in her specific case. Chiesi was the sole defendant at her trial, so there was no prospect of the jury confusing what the State needed to prove against her with what the State was trying to prove against another defendant. The jury was properly instructed regarding all the elements of murder, as shown by the pattern instruction that was given and correctly defined those elements. Moreover, the crime of murder – which may be knowing or intentional – does not require a greater mens rea than stated in the trial court's instruction regarding accomplice liability, which defined "knowingly" as the requisite culpability. Amended App. to Br. of Petitioner-Appellant at 60. Thus, Chiesi's case is unlike the Spradlin line of cases where Indiana courts have found fundamental error in the absence from the jury charge of the specific intent element of attempted murder.[1] In sum, there is nothing in the record nor in Indiana law to indicate that if Chiesi's appellate counsel had raised a claim of fundamental error she would have prevailed. Therefore, Chiesi has shown neither

[1] See, e.g., Williams v. State, 737 N.E.2d 734, 740 (Ind. 2000) (holding trial court committed fundamental error by not instructing jury that it was required to find defendant possessed specific intent to kill when he knowingly or intentionally aided, induced, or caused accomplice to commit attempted murder) (citing Spradlin v. State, 569 N.E.2d 948 (Ind. 1991)).

deficient performance by her appellate counsel nor resulting prejudice, and the post-conviction court properly denied her petition.

Conclusion

The post-conviction court properly concluded Chiesi's appellate counsel was not ineffective, and its denial of Chiesi's petition for post-conviction relief is therefore affirmed.

Affirmed.

MAY, J., and BRADFORD, J., concur.