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IN THE
COURT OF APPEALS OF INDIANA

JOSE MACIAS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 20A03-0902-PC-45
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ELKHART CIRCUIT COURT
The Honorable Terry C. Shewmaker, Judge
Cause No. 20C01-0307-MR-127

December 8, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Petitioner Jose Macias ("Macias") appeals the denial of his petition for post-conviction relief, which challenged his conviction for Murder.[1] We affirm.

Issue

Macias presents a single issue for review: whether he was denied the effective assistance of trial counsel.

Facts and Procedural History

On July 15, 2002, Macias and Samuel Cummings were charged with the murder of Bill Kohli. See Macias v. State, No. 20A03-0403-CR-120 (Ind. Ct. App. April 27, 2005). Cummings pled guilty and testified for the State at Macias's trial, disclosing the following facts, as stated by this Court on direct appeal:

> [I]n the early morning hours of July 5, 2003, Macias, Cummings, and another friend, Bill Kohli (Kohli), drove to and burglarized a Penguin Point. They subsequently drove together to Rensberger Field in Elkhart County, Indiana, allegedly to meet someone. The three young men exited their vehicle and walked single file along a narrow path into a nearby wooded area, with Macias in front, Kohli in the center, and Cummings, who was carrying a semiautomatic assault rifle taken from Michiana Pools, walking behind Kohli. Cummings was carrying the weapon with the butt of the rifle on his hip and his finger in the trigger area. Cummings tripped and accidentally pulled the trigger of the rifle twice, shooting Kohli in the leg. Cummings and Macias ran out of the wooded area as Kohli lay on the ground, crying for help. Once they were outside the wooded area, Macias told Cummings to go back and "finish him off" and that "if [Cummings] didn't [Macias] was going to kill [Cummings]." (Trial Tr. 248-49). Cummings turned around and fired two shots in the direction of Kohli's cries and then returned to Macias. Macias took the gun from Cummings and headed back into the wooded area. Cummings, waiting in the parking lot, heard gunshots coming from the

[1] Ind. Code § 35-42-1-1.

> wooded area. Macias and Cummings then returned to Cummings's house, where Macias played video games until Cummings went to sleep.

See id., slip op. at 2-3. A jury found Macias guilty of murder and he was sentenced to sixty-five years in prison. See id. Macias appealed his conviction and raised three issues: (1) sufficiency of the evidence; (2) admissibility of prior bad acts evidence; and (3) sentencing. See id. at 2. On April 27, 2005, Macias' conviction and sentence were affirmed. See id.

On December 15, 2007, Macias filed a pro-se petition for post-conviction relief, alleging ineffectiveness of trial counsel. An evidentiary hearing was held on October 30, 2008. At the conclusion of that hearing, Macias, by counsel, moved to amend the petition for post-conviction relief. The post-conviction court granted Macias leave to amend his petition to include allegations of trial counsel's failure to conduct pretrial investigation, to present expert witnesses, and to request lesser-included offense instructions. On December 15, 2008, Macias was denied post-conviction relief.

Macias appealed the denial of post-conviction relief. On July 31, 2009, this Court remanded the matter to the Elkhart Circuit Court with instructions that the post-conviction court enter further findings of fact and conclusions of law. The post-conviction court complied, and we accepted Macias' Amended Brief.

Discussion and Decision

I. 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. Stevens

v. State, 770 N.E.2d 739, 746 (Ind. 2002). Post-conviction proceedings are civil in nature and a defendant must establish his claims by a preponderance of the evidence. Ben-Yisrayl v. State, 738 N.E.2d 253, 258 (Ind. 2000). 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. Stevens, 770 N.E.2d at 745. We do not defer to the post-conviction court's legal conclusions, but accept its factual findings unless they are clearly erroneous. Id.

II. Analysis

Macias was represented at trial by two attorneys. He claims that he received ineffective assistance of counsel because counsel did not adequately prepare to challenge the State's expert witnesses.[2]

Ineffectiveness claims are evaluated under the standard of Strickland v. Washington, 466 U.S. 668 (1984). To prevail on a claim of ineffective assistance of counsel, a petitioner must show two things: (1) the lawyer's performance fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. The two prongs of the Strickland test are separate and independent inquiries. Id. at 697. Thus, "[i]f it

[2] Macias also quotes counsel's post-conviction testimony that he lacked memory as to whether he and co-counsel discussed or requested an instruction on the lesser offense of reckless homicide. However, Macias wholly fails to develop any argument in this regard.

is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice ... that course should be followed." Id.

We will presume that a trial counsel's performance has met the standard of reasonableness, and a defendant must overcome this presumption with strong and convincing evidence to prevail on his claim. Coleman v. State, 694 N.E.2d 269, 272-73 (Ind. 1998). "Allegations that counsel failed adequately to consult with the appellant or failed to investigate issues and interview witnesses do not amount to ineffective assistance absent a showing of what additional information may have been garnered from further consultation or investigation and how that additional information would have aided in the preparation of the case." Id. at 274.

Macias has argued that counsel should have deposed witnesses and consulted experts in the fields of DNA, crime scene reconstruction, and ballistics. He has not particularly described what additional information may have been garnered, but has suggested that counsel might have been able to challenge the investigative methodology employed by Detective Dennis Chapman[3] and to challenge the "credentials, training [and] methods" of DNA experts. Appellant's Brief at 19. Macias has not, however, shown how this would have aided him.

Independent of DNA evidence indicating his presence at the crime scene, Macias's own July 9, 2003 statement to police placed him there. Macias's statement also provided evidence that he acted in concert with Cummings. Macias admitted "that he went out to

[3] Detective Chapman made multiple trips to the crime scene to retrieve shell casings with a metal detector.

Rensberger Field with Cummings and Kohli, that he did nothing to help Kohli after he had been shot, and that he had called Cummings and [James] Lemar to tell them to dispose of the guns." Macias, slip op. at 5.

Cummings had admitted to shooting Kohli twice, leaving as a disputed matter whether Cummings or Macias had fired the final shot into Kohli. The State's ballistics expert did not claim to have evidence implicating one as opposed to the other. Nevertheless, even assuming that Macias's counsel could have developed evidence indicating that Cummings rather than Macias fired a final and fatal shot, such would not have been outcome determinative, as the jury could properly have found Macias guilty of Kohli's murder as an accomplice. See Berry v. State, 819 N.E.2d 443, 449-50 (Ind. Ct. App. 2004) (observing that "a defendant may be convicted as a principal upon evidence that he aided or abetted in the perpetration of the charged crime" and "mere tangential involvement in the crime can be sufficient to convict a person as an accomplice."), trans. denied.[4]

As such, Macias has not demonstrated that he was denied the effective assistance of trial counsel. The post-conviction court properly denied Macias relief.

Affirmed.

BAKER, C.J., and ROBB, J., concur.

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[4] Our supreme court has historically considered four factors: (1) presence at the scene of the crime; (2) companionship with another engaged in criminal activity; (3) failure to oppose the crime: and (4) the defendant's conduct before, during, and after the crime. Id. at 450.