

STATEMENT OF THE CASE

Otis Chandler, *pro se*, appeals the denial of his petition for post-conviction relief.

We affirm.

ISSUE

Whether the post-conviction court erred in denying Chandler's petition for post-conviction relief.

FACTS

Our Supreme Court summarized the facts as follows in its review of Chandler's direct appeal:

. . . [I]n the afternoon of September 18, 1978, [Chandler] and several others burglarized the residence of Telesfor Radomski in South Bend, Indiana, during the course of which Mr. Radomski was shot and killed.

Chandler v. State, 419 N.E.2d 142 (Ind. 1981). On May 21, 1979, the State charged Chandler with felony murder in the St. Joseph Superior Court, Judge Norman Kopec presiding. Chandler and his co-defendants, Dennis Knight and Craig Allen Scott, were tried to a jury from January 7-14, 1980. Chandler was convicted,¹ and on February 1, 1980, Judge Kopec imposed a fifty-year sentence.

Chandler subsequently filed a direct appeal. The Indiana Supreme Court affirmed the trial court on April 20, 1981. On February 15, 1994, Chandler filed a petition for post-conviction relief in the Madison Superior Court.² He alleged, *inter alia*, ineffective assistance of trial counsel. The Madison Superior Court did not rule on Chandler's

¹ Scott was convicted, and Knight was found not guilty.

² Chandler is incarcerated in the Pendleton Correctional Facility in Madison County.

petition. On February 23, 2009, Chandler filed another petition for post-conviction relief; however, he subsequently withdrew his petition.

On August 7, 2009, Chandler filed a verified petition for state writ of habeas corpus in the Madison Superior Court. He argued that he could not lawfully be convicted of felony murder for a killing during the commission of a felony, without having also been convicted of an underlying felony. On September 2, 2009, Chandler filed a motion for stay of jurisdiction and grant of his state writ of habeas corpus.

On September 4, 2009, the trial court ordered Chandler's petition for writ of habeas corpus transferred to St. Joseph Superior Court, the court of conviction and sentencing, to be treated as a petition for post-conviction relief. Accordingly, on October 16, 2009, his petition was transferred, pursuant to Indiana Post-Conviction Rule 1(c),³ to St. Joseph Superior Court, Judge Jane Woodward Miller presiding.

On March 4, 2010, the trial court scheduled an evidentiary hearing for March 19, 2010. On March 11, 2010, Chandler filed a motion for leave to amend his petition for post-conviction relief. At the evidentiary hearing on March 19, 2010, the post-conviction court denied Chandler's motion to amend as untimely filed.

No witnesses were called to testify at the post-conviction hearing. Chandler introduced the docket entry reflecting the jury verdict and Judge Kopec's commitment

³ Indiana Post-Conviction Rule 1(c) provides as follows:

This Rule does not suspend the writ of habeas corpus, but if a petitioner applies for a writ of habeas corpus, in the court having jurisdiction of his person, attacking the validity of his conviction or sentence, that court shall under this Rule transfer the cause to the court where the petitioner was convicted or sentenced, and the latter court shall treat it as a petition for relief under this Rule.

order into evidence. The trial court also admitted a copy of its final instructions into evidence and took judicial notice of the trial record. On April 30, 2010, the post-conviction court denied Chandler's motion for post-conviction relief. He now appeals.

DECISION

Chandler challenges the denial of his petition for post-conviction relief.

The purpose of a post-conviction proceeding is to give a petitioner the limited opportunity to raise issues that were unavailable or unknown at trial and on direct appeal. Such proceedings are not super appeals through which convicted persons can raise issues that they failed to raise at trial or on direct appeal. In post-conviction proceedings, complaints that something went awry at trial are generally cognizable only when they show deprivation of the right to effective counsel or issues demonstrably unavailable at the time of trial or direct appeal.

A post-conviction petitioner bears the burden of establishing his claims by a preponderance of the evidence. When reviewing the denial of a petition for post-conviction relief, we will neither reweigh the evidence nor judge the credibility of the witness. Thus, to prevail on appeal from the denial of post-conviction relief, the petitioner must show that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite to that reached by the post-conviction court. We will disturb the post-conviction court's decision only if the evidence is without conflict and leads to but one conclusion and the post-conviction court has reached the opposite conclusion.

Donnegan v. State, 889 N.E.2d 886, 891 (Ind. Ct. App. 2008) (internal citations and quotations omitted), *trans. denied*.

1. Fundamental Error

Chandler contends that the post-conviction court did not address the merits of his claim, but rather, “manage[d] to change the question . . . [and] answered the question that

she changed.” Chandler’s Br. at 9. Thus, he argues that the post-conviction court’s analysis failed to address the merits of his claim. Chandler’s Br. at 10. We disagree.

Fundamental error is a substantial violation of basic principles rendering the trial unfair to the defendant. *Townsend v. State*, 632 N.E.2d 727, 730 (Ind. 1994); *see Benson v. State*, 762 N.E.2d 748, 755 (Ind. 2002) (“Fundamental error is an error that makes a fair trial impossible or constitutes clearly blatant violations of basic and elementary principles of due process presenting an undeniable and substantial potential for harm.”). It is well-settled that “free-standing claim[s] of fundamental error [are] not available in post-conviction proceedings.” *Taylor v. State*, 922 N.E.2d 710, 716 (Ind. Ct. App. 2010), *trans. denied*.

In his petition, Chandler alleged that he suffered a “fundamental miscarriage of justice for a void felony murder conviction, without a conviction for an underlying felony.” (See App. 4; *see also* App. 3, 5, 6). In its order, the post-conviction court found that Chandler’s complaint was “arguably of fundamental error”; however, it “constru[ed] [the] petition as based upon a claim of ineffective assistance of counsel” and decided it on the merits. P-C Order 7. We cannot say that the trial court erred in so finding.

2. Ineffective Assistance of Trial Counsel

In his petition, Chandler argued that his felony murder conviction was void by law because the jury did not convict him of any of the underlying felonies alleged in the indictment; and that his trial counsel rendered ineffective assistance by failing to object to the “illegal” judgment. (App. 6).

Claims of ineffective assistance of trial counsel are generally reviewed under the two-part test announced in *Strickland v. Washington*, 466 U.S. 668 (1984).

[A] claimant must demonstrate that counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms, and that the deficient performance resulted in prejudice. Prejudice occurs when the defendant demonstrates that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability arises when there is a probability sufficient to undermine confidence in the outcome.

Grinstead v. State, 845 N.E.2d 1027, 1031 (Ind. 2006) (internal citations omitted).

“Although the two parts of the *Strickland* test are separate inquiries, a claim may be disposed of on either prong.” *Id.* Because the “object of an ineffectiveness claim is not to grade counsel's performance, [i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed.” *Id.* (citing *Strickland*, 466 U.S. at 697). Isolated poor strategy, bad tactics, a mistake, carelessness, or inexperience, do not necessarily constitute ineffective assistance. *Grinstead*, 845 N.E.2d at 1036.

Here, the post-conviction court made several findings of fact from which it concluded that trial counsel's performance was not deficient. Specifically, it found that the sole count of the grand jury indictment alleged that Radomski's killing resulted while Chandler and his codefendants were committing or attempting to commit burglary and theft. The post-conviction court also found, and Chandler does not dispute, that the trial

court properly instructed the jury regarding the statutory elements of murder, burglary, theft, and attempt to commit a crime.

The post-conviction court concluded therefrom that Chandler's claim was premised upon a misunderstanding of law concerning felony murder. It concluded, in pertinent part, the following:

Petitioner has not provided any authority, nor has the court found any, which would lead this court to conclude that Mr. Chandler's counsel was ineffective at trial or upon appeal. Rather, this court has relied on *Taylor v. State, supra*, as instructive on the issue of felony murder instructions. Taylor was convicted of felony murder predicated on robbery as the underlying felony. He was not charged separately with the robbery. At [the] post-conviction hearing, Taylor claimed both trial and appellate counsel were ineffective. According to Taylor, counsels' ineffectiveness revolved around their handling of the felony murder instruction given to the jury. The instructions given to the jury did not include an advisement regarding the elements of robbery[.] At the trial level, counsel failed to object to the trial court's final instructions. [] Appellate counsel then failed to raise the issue of the trial court's error on appeal. Finding it the defendant's right to have the jury instructed on the elements of the felony underlying a felony murder charge, the *Taylor* court granted post-conviction relief and ordered a new trial for the Petitioner.

Taylor demonstrates what Petitioner has not understood: That a defendant charged with felony murder is absolutely entitled to have the jury advised the State must prove the essential elements of the predicate felony; however, a defendant is not entitled to have that felony separately charged. The real question the court here must address is this: Was the jury adequately instructed that it could not find the Petitioner guilty of the murder charged unless the State proved, beyond a reasonable doubt, the essential elements of the underlying felony?

In order to answer that question, a review of the instructions is required. The instructions need [to] be reviewed as a whole to determine if they were adequate. *Ringham v. State*, 768 N.E.2d 893, 898 (Ind. 2002). After reviewing the instructions as a whole and paying particular attention to those cited in the above Findings of Fact, this court concludes the jury

was adequately instructed that the State had the burden to prove beyond a reasonable doubt the essential elements of the burglary Petitioner was accused of committing or attempt to commit at the time of the killing of Mr. Radomski. *Hackett v. State*, 661 N.E.2d 1231 (Ind. Ct. App. 1996). (“[J]ury instructions are not to be considered in isolation, but as a whole and with reference to each other.” When read with other instructions, instruction reciting indictment [was] sufficient to advise jury of elements of felony murder. *Id.* at 1234).

Mr. Chandler has not proved by a preponderance of the evidence deficient performance by his attorney at trial or on appeal, nor that he was prejudiced by the manner in which his counsel represented him.

(Order 8-10) (emphasis added).

The trial record contains support for the post-conviction court’s findings of fact. First, the grand jury indictment specifically alleged that Radomski’s killing resulted while Chandler and his codefendants were committing or attempting to commit the underlying felonies of burglary and theft. The indictment provides as follows:

. . . [O]n or about the 18th day of September, 1978, in St. Joseph County, State of Indiana, CRAIG ALLEN SCOTT, ODIS [sic] CHANDLER, and DENNIS KNIGHT did kill Telesfor Radomski by shooting at and against the body of the said Telesfor Radomski with a handgun loaded with gunpowder and bullets and thereby inflicted a mortal wound upon the said Telesfor Radomski causing him to die, while the said CRAIG ALLEN SCOTT, ODIS [sic] CHANDLER, and DENNIS KNIGHT were committing or attempting to commit the crime of burglary by breaking and entering into the dwelling of the said Telesfor Radomski . . . with the intent to commit a felony therein, to-wit, theft, by obtaining and exerting unauthorized control over the property of the said Telesfor Radomski intending to deprive Telesfor Radomski of the value or use thereof.

(P-C Order 3-4; App. 13-14) (emphasis added).

The trial record also reveals that the trial court instructed the jury as follows regarding the elements of murder, burglary, theft, and attempt:

The following four instructions were read to the jury before deliberations began:

1). Court's Preliminary Instruction No. 2, given again as Final Instruction No. 2:

I instruct you that on the 18th day of September, 1978, there was in full force and effect in the State of Indiana the following Statute[:]

35-42-1-1(2). Murder. A person who kills another human being while committing or attempting to commit arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape, or robbery; commits murder, a felony.

* * *

2). State's Requested Instruction No. 2, given as Final Instruction No. 3:

The State of Indiana has charged the defendants with murder, alleging that the defendants were committing or attempting to commit the crime of burglary when the alleged murder occurred.

At the time this offense was alleged to have been committed, there was in full force and effect in the State of Indiana, the following statute, in relevant part, to-wit:

[35-43-2-1. Burglary.] "Sec. 1. A person who breaks and enters the building or structure of another person, with the intent to commit a felony in it, commits burglary."

The State of Indiana has further charged in the Indictment that the defendants, in committing or attempting to commit the crime of burglary, intended to commit the felony of theft by obtaining and exerting unauthorized control over the property of Telesfor Radomski.

There was in full force and effect in the State of Indiana, at the time this offense was alleged to have been committed, the following statute, in relevant part, which reads:

[35-43-4-2. Theft.] "Sec. 2. A person who knowingly or intentionally exerts unauthorized control over property of another person, with intent to deprive the other person of any part of its value or use, commits theft . . . [.]"

* * *

3). State's Requested Instruction No. 3, given as Final Instruction No. 4:

At the time this offense was alleged to have been committed, there was in full force and effect in the State of Indiana, the following statute in pertinent part, to-wit:

[35-41-5-1. Attempt.] “Sec. 1. (A). A person attempts to commit a crime when, acting with the culpability required for commission of the crime, he engages in conduct that constitutes a substantial step toward commission of the crime. An attempt to commit a crime is a felony or misdemeanor of the same class as the crime attempted . . .”

“(B). It is no[] defense that, because of a misapprehension of the circumstances, it would have been impossible for the accused person to commit the crime attempted.”

* * *

4). Defendants' Requested Instruction No. 8, given as Final Instruction 6:

The defendants are charged in the indictment with the offense of murder, killing a human being while committing or attempting to commit a felony. The State has the burden of proving beyond a reasonable doubt the essential elements of the felony defendants are charged to have been committing or attempting to commit at the time of the killing. Since the defendants are charged with murder while committing or attempting to commit a burglary, before you may find any one of the defendants or all of the guilty of such charge, you must be convinced beyond a reasonable doubt that the defendant specifically intended to commit a burglary.

(Order 4-6) (internal citations omitted) emphasis added.

Chandler cannot carry his burden. In *Taylor*, which was heavily relied upon by the post-conviction court, the defendant and two accomplices went to the home of a woman who kept drugs and money in her home. At some point in time, they decided to rob her. They forced their way into her apartment, shot her in the head, and then stole her jewelry, cocaine, and money. The victim died, and the trio was charged with felony

murder. During their jury trial, the court's instructions did not include the elements of the underlying felony of robbery. Each defendant was convicted.

Following an unsuccessful direct appeal, Taylor sought post-conviction relief, alleging that his trial counsel had rendered ineffective assistance by failing to object to the trial court's jury instructions. In granting Taylor's petition and remanding for a new trial, we cited our supreme court's holding that where a defendant has been charged with the offense of felony murder, the trial court must, as a matter of fundamental due process, instruct the jury as to the specific elements of the underlying felony. *Taylor*, 922 N.E.2d at 718 (citing *Thomas v. State*, 827 N.E.2d 1131, 1135 (Ind. 2005)). Noting the trial court's failure to properly instruct the jury, we granted Taylor's requested relief.

Here, the post-conviction court correctly concluded that Chandler was not denied fundamental due process by the jury's failure to convict him of felony murder and the underlying felony offense(s). *Taylor* establishes that a defendant who is charged with felony murder need not also be charged with (and convicted of) the underlying felony offense(s) for the judgment of conviction to be deemed valid. Chandler was not simultaneously charged with felony murder and the underlying felony because such is not required at law. *See Webb v. State*, 284 N.E.2d 812 (Ind. 1972) (charging defendant with felony murder also, in effect, necessarily charges him with the underlying felony); *see also Glenn v. State*, 884 N.E.2d 347, 357 (Ind. Ct. App. 2008) (convicting and sentencing a defendant for both felony murder and the underlying felony violates Indiana's prohibition against double jeopardy), *trans. denied*.

Taylor refutes Chandler’s claim that the State is required to simultaneously charge a defendant with felony murder and an underlying felony, or that the trier of fact must return a verdict of guilty to both an underlying felony and felony murder in order to constitute a valid conviction. Thus, being charged with and convicted of felony murder alone does not result in a void judgment, provided that the trial court properly instructed the jury that the State had to prove the essential elements of an underlying felony beyond a reasonable doubt. Chandler does not dispute that the trial court here instructed the jury regarding the elements of the alleged underlying felonies of burglary and theft. See Chandler’s Br. at 11 (“I, Petitioner, agree with the post conviction trial court . . . that the jury was justly informed about the charges included in the indictment; burglary (I.C. 35-43-2-1); attempted burglary (I.C. 35-41-5-1); and Theft (I.C. 35-43-4-2)”); (“[B]ecause the trial court did read these instructions to the jury on the underlying felonies, under the above I.C. Codes, which the State of Indiana had to prove beyond a reasonable doubt [] the jury had to be in agreement in order to convict [Chandler] of felony murder.”).⁴

Based upon the foregoing, Chandler cannot demonstrate that he suffered prejudice or that it was fundamental error when trial counsel failed to object to the trial court entering a judgment of conviction for murder. See *Grinstead*, 845 N.E.2d at 1031 (citing *Strickland*, 466 U.S. at 697). He cannot prevail on his claim of ineffective assistance of

⁴ Lastly, it is well-settled that convicting and sentencing a defendant for both felony murder and the underlying felony violates Indiana’s prohibition against double jeopardy. *Glenn v. State*, 884 N.E.2d 347, 357 (Ind. Ct. App. 2008), *trans. denied*.

trial counsel.⁵ Because our review of the record does not lead us “unerringly and unmistakably” to an opposite conclusion than that reached by the post-conviction court, we conclude that it did not err in denying Chandler’s petition for relief. *See Donnegan*, 889 N.E.2d at 891,

Affirmed.

NAJAM, J., and BAILEY, J., concur.

⁵ We do not reach Chandler’s claim of ineffective assistance of appellate counsel. *See Dawson v. State*, 810 N.E.2d 1165, 1177 (Ind. Ct. App. 2004) (finding that where defendant’s claims of ineffective assistance of trial counsel have not satisfied the *Strickland* requirements, he cannot prevail on his claim of ineffective assistance of appellate counsel).