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**IN THE
COURT OF APPEALS OF INDIANA**

KIEARA R. CARTER,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 48A04-0611-PC-677

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Fredrick Spencer, Judge
Cause No. 48D03-9403-CF-068

October 16, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Kieara Carter appeals the denial of her petition for post-conviction relief. On appeal, Carter raises two issues, which we restate as whether the post-conviction court properly denied Carter relief on her claims of ineffective assistance of counsel and whether Carter received fair adjudication of her claims before the post-conviction court. Concluding that Carter did not receive ineffective assistance of counsel and that the post-conviction court fairly adjudicated her claims, we affirm.

Facts and Procedural History

On Carter's direct appeal, our supreme court related the following facts:

On March 14, 1994, Dana Cortrecht was taking stock in the back of a United Gas Station, where he was an assistant manager. The defendant entered the station with a gun, pointed it in Cortrecht's face, and demanded that he give her all the money. Cortrecht complied and gave her fifty dollars in cash. As he was handing her his coin changer, she shot him, at point blank range, just under the left eye. While he was falling backwards, she shot him two more times – in the right side of his face and in the mouth – and left the station.

Carter v. State, 686 N.E.2d 834, 835 (Ind. 1997). The State charged Carter with robbery and attempted murder, both Class A felonies, and also sought a sentence enhancement based on Carter's alleged status as a habitual offender. The jury found Carter guilty of both charges and also found she was a habitual offender. The trial court sentenced Carter to concurrent terms of forty-five years for robbery and attempted murder and enhanced her sentence by thirty years based on the jury's habitual offender finding, resulting in an aggregate sentence of seventy-five years. On direct appeal, the supreme court affirmed Carter's convictions and sentence. Id. at 839.

Following the supreme court's decision, Carter filed a pro se petition for post-conviction relief and later filed a second petition with benefit of counsel. The second petition raised six claims of ineffective assistance of counsel. Following a hearing on the second petition, the post-conviction court issued findings of facts and conclusions of law denying relief. Carter now appeals.

Discussion and Decision

Post conviction proceedings are civil in nature and “create a narrow remedy for subsequent collateral challenges to convictions, challenges which must be based on grounds enumerated in the post-conviction rules.” Williams v. State, 706 N.E.2d 149, 153 (Ind. 1999), cert. denied, 529 U.S. 1113 (2000). To obtain relief, a petitioner bears the burden of establishing her claims by a preponderance of the evidence. Id.; Ind. Post-Conviction Rule 1, § 5. We accept the post-conviction court's findings of fact unless they are clearly erroneous, but we do not defer to the post-conviction court's conclusions of law. Martin v. State, 740 N.E.2d 137, 139 (Ind. Ct. App. 2000). Moreover, when the petitioner appeals from a denial of relief, the denial is considered a negative judgment and the petitioner therefore must establish “that the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court.” Stevens v. State, 770 N.E.2d 739, 745 (Ind. 2002), cert. denied, 540 U.S. 830 (2003).

I. Ineffective Assistance of Counsel

A. Standard of Review

To establish a violation of the Sixth Amendment right to effective counsel, the petitioner must satisfy both prongs of the test set forth in Strickland v. Washington, 466 U.S. 668 (1984). Wesley v. State, 788 N.E.2d 1247, 1252 (Ind. 2003). First, the petitioner must show counsel was deficient. Id. “Deficient” means that counsel’s errors fell below an objective standard of reasonableness and were so serious that counsel was not functioning as “counsel” within the meaning of the Sixth Amendment. Id. Second, the petitioner must show that counsel’s deficiency resulted in prejudice. Id. Prejudice exists if “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Strickland, 466 U.S. at 694. We need not address whether counsel’s performance was deficient if we can resolve a claim of ineffective assistance based on lack of prejudice. Wentz v. State, 766 N.E.2d 351, 360 (Ind. 2002).

B. Ineffective Assistance of Counsel

Carter raises four claims of ineffective assistance of counsel. We will address each in turn.

1. Propriety of Attempted Murder Instruction

Carter argues counsel was deficient for failing to object to the trial court’s instruction on attempted murder. To establish that counsel was deficient, Carter must show the trial court would have sustained a proper objection. Parish v. State, 838 N.E.2d 495, 503 (Ind. Ct. App. 2005). A trial court must sustain a proper objection to an instruction if the instruction

contains an incorrect statement of the law, is not supported by the evidence, is covered by another instruction, or tends to confuse or mislead the jury. See Nantz v. State, 740 N.E.2d 1276, 1283 (Ind. Ct. App. 2001), trans. denied.

The trial court's instruction on attempted murder reads in part:

Murder is defined by I.C. 35-42-1-1(1) as follows: A person who knowingly or intentionally kills another human being.

To convict the defendant of Attempted Murder, the State must have proved each of the following elements:

The defendant, Kiera Carter,

1. While acting with the intent to commit the crime of Murder (defined as knowingly or intentionally kills another human being):
2. Fired a deadly weapon at Dana Cortrecht, causing bullets to enter his body;
3. Which was conduct constituting a substantial step toward the commission of the intended crime of Murder.

Record at 182-83. Citing the inclusion of “knowingly” in the first element of the instruction, Carter argues the instruction was erroneous because it implies the jury could have found her guilty if it found she knowingly attempted to kill Cortrecht. Appellant's Brief at 10. The post-conviction court agreed the instruction was erroneous, but did not indicate whether counsel's failure to object constituted deficient performance.¹ Instead, the post-conviction court concluded that because “there is no probability of a different result,” Carter could not demonstrate prejudice. Appellant's App. at 26. We choose to address whether counsel's failure to object constituted deficient performance.

¹ The post-conviction court concluded “counsel in this instance arguably should have objected to the instruction.” Appellant's Appendix at 26. However, this does not indicate whether counsel's performance was deficient; the standard is whether a proper objection would have been sustained. See Parish, 838 N.E.2d at 503.

At the time of Carter's trial in June 1995, our supreme court had held that an attempted murder instruction must inform the jury that the defendant specifically intended to kill the victim. Spradlin v. State, 569 N.E.2d 948, 950 (Ind. 1991). Consistent with this holding, numerous attempted murder convictions were reversed where the jury was permitted to find the defendant guilty based on a "knowing" mens rea. E.g., Wilson v. State, 644 N.E.2d 555, 557 (Ind. 1994); Beasley v. State, 643 N.E.2d 346, 349 (Ind. 1994); Taylor v. State, 616 N.E.2d 748, 749 (Ind. 1993). However, prior to Carter's trial, our supreme court also had held that an attempted murder conviction may not require reversal if: 1) the erroneous instruction sufficiently conveyed the requirement of intent to kill; or 2) the perpetrator's intent was not seriously disputed at trial. See Jackson v. State, 575 N.E.2d 617, 621 (Ind. 1991); Allen v. State, 575 N.E.2d 615, 617 (Ind. 1991), cert. denied, 510 U.S. 1132 (1994). The rationale for these exceptions is that the harm resulting from the erroneous instruction was insufficient to warrant reversal. See Jackson, 575 N.E.2d at 621. Because both exceptions apply, we conclude an objection by Carter's counsel to the attempted murder instruction would not have been sustained.

First, the jury was sufficiently informed that to find Carter guilty of attempted murder, it had to find she intended to kill Cortrecht. Although the presence of "knowingly" in the first element of the instruction is troubling, it is defining the mens rea for murder, not attempted murder. The remainder of the first element states Carter must have been "acting with the intent to commit the crime of Murder" for the jury to find her guilty. R. at 182. The instruction therefore differs from those that have improperly included a "knowing" mens rea

as an element of attempted murder. See Williams v. State, 737 N.E.2d 734, 737 (Ind. 2000) (citing cases).

Although the instruction lacks serious deficiencies, we are troubled by the parties' repeated statements during voir dire that the mens rea for attempted murder is "knowing[] or intentional[]." R. at 520, 589-90, 670, 683, 687, 706, 739. Nevertheless, these improper statements are offset by a second, more accurate attempted murder instruction and the charging information, both of which were read to the jury. The second instruction states:

Regarding the charge of Attempted Murder, in order to attempt to commit a crime, one must intend to commit that crime while taking a substantial step toward the commission of the crime. Therefore, the State must prove, beyond a reasonable doubt, that the defendant acted with the specific intent to commit the crime attempted; and second, she must have engaged in an overt act which constituted a substantial step toward the commission of that crime.

R. at 189. The charging information as read to the jury stated:

Kieara R. Carter did attempt to commit the crime of murder by firing a deadly weapon, to-wit: [a] firearm, causing bullets from said firearm to enter the head and neck area of one Dana L. Cortrecht, which conduct constituted a substantial step toward the commission of the crime of murder.

Id. at 1192. The second instruction and the charging information further informed the jury that to find Carter guilty of attempted murder, it had to find she intended to kill Cortrecht.

Although the charging information is less explicit regarding the required mens rea, the allegation that Carter attempted to commit murder implies Carter intended to commit murder.

See Jackson, 575 N.E.2d at 621 (substituting "attempting" for "intending" does not create a "significant potential for harm" because "by finding that the defendant was attempting to kill [the victim] when he shot him, it was logically necessary for the jury to find that he intended

to kill him”). Considering all the information the jury received on attempted murder, we are convinced it was sufficiently informed that it had to find Carter intended to kill Cortrecht in order to find her guilty of attempted murder.

Second, the perpetrator’s intent was not seriously disputed at trial. During his opening statement, Carter’s counsel stated, “I would agree with [the State] that the evidence is going to show that on March 14th, 1994, somebody went into that gas station and robbed Dana Cortrecht and shot Dana Cortrecht in the face and that Dana Cortrecht was extremely, severely injured.” R. at 774. Our review of the record indicates intent was not the focus of any witness’s testimony and neither party discussed intent during closing argument. Indeed, it would have been difficult for Carter’s counsel to argue successfully that the perpetrator did not intend to kill Cortrecht after shooting him once in the face at point-blank range and two more times as he fell to the ground. Compare Jackson, 575 N.E.2d at 619 (concluding the perpetrator’s intent was not seriously in dispute where the victim was shot in the neck “from a distance of inches”), with Grundy v. State, 695 N.E.2d 167, 170 (Ind. Ct. App. 1998) (concluding the perpetrator’s intent was in dispute where it was “unclear whether [the perpetrator] intended to merely beat [the victim] up to the point where [he] could rob him, or whether [he] acted with the specific intent to kill”). Instead, the central issue at trial was whether Carter was the perpetrator. The prosecutor reinforced this point during closing argument. After arguing that most of the evidence was “undisputed,” he stated, “So what’s that leave? It leaves one question. Identification. Is [Carter] the right person?” R. at 1152-53. Thus, intent was not seriously disputed at trial.

Because we conclude the jury was sufficiently informed that attempted murder required a finding of intent to kill and intent was not seriously disputed at trial, we are convinced an objection by Carter's counsel to the attempted murder instruction would not have been sustained. Because Carter cannot establish an objection would have been sustained, it follows that counsel's performance was not deficient. Thus, Carter did not receive ineffective assistance based on counsel's failure to object to the attempted murder instruction.

2. Sufficiency of Habitual Offender Finding

Carter argues counsel was deficient for failing to move to dismiss the jury's habitual offender finding. To establish that counsel was deficient, Carter must show the motion to dismiss would have been granted. See Polk v. State, 822 N.E.2d 239, 249 (Ind. Ct. App. 2005), trans. denied. Carter argues the motion would have been granted because there was insufficient evidence to support the jury's habitual offender finding. In reviewing the sufficiency of the evidence, we neither reweigh evidence nor judge witness credibility. McHenry v. State, 820 N.E.2d 124, 126 (Ind. 2005). Instead, we consider only the probative evidence and reasonable inferences supporting the jury's finding. Id.

To establish Carter was an habitual offender, the State had to prove beyond a reasonable doubt that Carter had been convicted of two prior unrelated felonies. See Ind. Code § 35-50-2-8. Prior felonies are unrelated if the commission of the second felony is subsequent to sentencing for the first felony and sentencing for the second felony precedes the commission of the felony for which the enhanced sentence is sought. Toney v. State, 715

N.E.2d 367, 369 (Ind. 1999). The State presented evidence that Carter was sentenced for robbery, a Class B felony, on March 26, 1990; committed escape, a Class D felony, on July 18, 1991; was sentenced for escape on October 28, 1991; and committed the instant felonies on March 14, 1994. This evidence established the necessary sequence; that is, the second felony of escape was committed subsequent to sentencing for the first felony of robbery, and sentencing for the second felony of escape preceded commission of the instant felonies of robbery and attempted murder.² Because the State presented sufficient evidence to support an habitual offender finding, it follows that a motion to dismiss would not have been granted. Thus, Carter did not receive ineffective assistance based on counsel's failure to move to dismiss the jury's habitual offender finding.³

3. Dismissal of Habitual Offender Charge

Carter argues counsel was deficient for failing to move to dismiss the habitual offender charge. To establish that counsel was deficient, Carter must show the motion to dismiss would have been granted. See Polk, 822 N.E.2d at 249. Carter argues the motion

² The abstract of judgment for the predicate robbery felony and the abstract of judgment for the escape felony state sentencing dates of March 26, 1990, and October 28, 1991, respectively. However, these abstracts also state "1/6/92 – Prob. Violation" beneath these dates. R. at 1239, 1240. Thus, Carter argues the sentencing date for both of these felonies was January 6, 1992. This argument is an invitation to reweigh the evidence, an act which our standard of review precludes. The jury was free to consider either date as the sentencing date.

³ After the parties had filed their briefs, Carter filed a motion with this court to add a claim of ineffective assistance of appellate counsel based on counsel's failure on direct appeal to challenge the sufficiency of the evidence supporting the habitual offender finding. We conclude Carter's appellate counsel was not deficient for the same reason trial counsel was not deficient; that is, because there was sufficient evidence to support the jury's habitual offender finding, Carter cannot establish appellate counsel was deficient for failing to raise this issue. See Lambert v. State, 743 N.E.2d 719, 746 (Ind. 2001), cert. denied, 534 U.S. 1136 (2002) (concluding the petitioner did not receive ineffective assistance of appellate counsel for the same reasons he did not receive ineffective assistance of trial counsel).

would have been granted because the habitual offender charge contained an error and the State failed to correct it. Although Carter does not explain what the error is, the State notes the coversheet to the charging information labels attempted murder “Count I,” robbery “Count II,” and Carter’s habitual offender status “Count III.” R. at 13. However, the charging information page detailing the allegations that support Carter’s habitual offender status is labeled “Count I.” Id. at 16. To the extent Carter argues this error constitutes a deficiency, we agree with the State that “[c]ounsel cannot be deemed deficient for not drawing the court’s attention to such a minor error.” Appellee’s Brief at 14.

4. Dismissal of Attempted Murder Charge

Carter argues counsel was deficient for failing to move to dismiss the attempted murder charge. To establish that counsel was deficient, Carter must show the motion to dismiss would have been granted. See Polk, 822 N.E.2d at 249. The State charged Carter with attempted murder in pertinent part as follows:

On or about the 14th day of March 1994, in Madison County, State of Indiana, Kieara R. Carter, did attempt to commit the crime of Murder by firing a deadly weapon, to-wit: a firearm, causing bullets from said firearm to enter the head and neck area of one Dana L. Cortrecht, which conduct constituted a substantial step toward the commission of the crime of murder.

R. at 14. Carter argues a motion to dismiss would have been granted because “the State’s charging information clearly fails to set forth the requisite statutory element of the intent to commit murder” Appellant’s Br. at 16.

Indiana Code section 35-34-1-2(a)(4) states a charging information must “set[] forth the nature and elements of the offense charged in plain and concise language without

unnecessary repetition.” This requirement furthers the charging information’s goal of “advis[ing] the accused of the particular offense charged so that he can prepare a defense . . . and so that he can be protected from being twice placed in jeopardy for the same offense.” Truax v. State, 856 N.E.2d 116, 123 (Ind. Ct. App. 2006) (citation omitted). Although we agree with Carter that the charging information does not contain the intent element of attempted murder, “[t]o constitute fundamental error, the charging information[] must have so prejudiced [the defendant’s] rights that a fair trial was impossible.” Id. Carter does not explain how the absence of the intent element either prevented her from knowing the charge against her or was so prejudicial to her defense that she was denied a fair trial. Because Carter cannot establish such prejudice, we are not convinced a motion to dismiss would have been granted. Thus, it follows Carter cannot establish that counsel’s performance was deficient for failing to move to dismiss the attempted murder charge.

II. Fairness of Post-Conviction Court’s Adjudication

Carter argues the post-conviction court unfairly adjudicated her claims when it adopted the State’s proposed findings of fact and conclusions of law. In Prowell v. State, 741 N.E.2d 704, 708-09 (Ind. 2001), our supreme court addressed the problems associated with wholesale adoption of a party’s proposed findings, but refused to ban the practice:

The trial courts of this state are faced with an enormous volume of cases and few have the law clerks and other resources that would be available in a more perfect world to help craft more elegant trial court findings and legal reasoning. We recognize that the need to keep the docket moving is properly a high priority of our trial bench. For this reason, we do not prohibit the practice of adopting a party’s proposed findings. But when this occurs, there is an inevitable erosion of the confidence of an appellate court that the findings reflect the considered judgment of the trial court. This is particularly true

when the issues in the case turn less on the credibility of witnesses than on the inferences to be drawn from the facts and the legal effect of essentially unchallenged testimony.

To counterbalance the problems associated with the wholesale adoption of a party's findings, the court implied that such findings warrant corrective action where they are "clearly erroneous" within the meaning of Trial Rule 52(A). Id. at 709; cf. Stevens, 770 N.E.2d at 762 (stating that "near verbatim reproductions [of proposed findings] may appropriately justify cautious appellate scrutiny").

Although we agree with Carter that the post-conviction court's adoption of the State's proposed findings was "wholesale," Carter's post-conviction hearing did not involve factual disputes. Cf. Prowell, 741 N.E.2d at 709-12 (reviewing testimony during the post-conviction hearing and concluding some of the post-conviction court's factual findings were not supported by the testimony). Carter conceded as much during the hearing when her counsel questioned her:

Q [Y]ou recognized that all of the issues that we have raised under what is known as ineffective assistance of counsel standard [sic] are what are known as legal issues?

A Yes, sir.

Q That is to say that nothing that you could testify to today in regard to what happened legally would be germane for this court's consideration?

A That's true.

Q That would also be to say that it would be up to [the post-conviction court] to interpret whether or not the legal standards were met, whether or not we can meet all the burden under ineffective assistance of standard [sic] rules in post[-]conviction pleadings. And we would proceed without the necessity of you having to articulate your opinion on what the law is on those issues?

A Yes, sir.

Transcript at 11-12. Thus, we interpret Carter's argument as an attempt to reargue that the post-conviction court improperly denied her claims of ineffective assistance of counsel, and

we have already rejected this argument. It therefore follows that Carter cannot establish the post-conviction court unfairly adjudicated her claims.

Conclusion

We conclude Carter did not receive ineffective assistance of counsel and the post-conviction court fairly adjudicated her claims.

Affirmed.

VAIDIK, J., and BRADFORD, J., concur.