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**IN THE
COURT OF APPEALS OF INDIANA**

FREDDIE BYERS,)
)
 Appellant-Defendant,)
)
 vs.) No. 71A04-0703-PC-170
)
 STATE OF INDIANA,)
)
 Appellee-Plaintiff.)

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Michael P. Scopelitis, Judge
Cause No. 71D04-9701-CF-59

December 27, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

Freddie Byers appeals the post-conviction court's denial of his petition for post-conviction relief. Byers raises three issues, which we revise and restate as:

- I. Whether Byers was denied the effective assistance of trial and appellate counsel; and
- II. Whether Byers was denied the effective assistance of post-conviction counsel.

We affirm.

The relevant facts, as set out in Byers's direct appeal, follow:

Byers, known to some as "Flint," was convicted of murdering Bennie Spears and James Edison and attempting to murder Almeka Dodds. Spears and Dodds lived in a South Bend home with their two children, ages one and two. Edison was visiting the home in the late afternoon of January 30, 1997, when a knock was heard at the door. Dodds recognized the two visitors as "Flint" and "Gill." Flint was a friend of Spears who had previously been to the home "[a] whole bunch of times," but Dodds had met Gill only "[a] couple of times" and he had never previously been to the home. Dodds went to the dining room where she heard Spears tell Flint not to point a gun at him, then heard a gunshot. When she turned around, she could see that Spears had been shot and Flint was holding a gun.

After Flint grabbed Dodds by the hair and asked where the money was, Dodds retrieved cash hidden in the living room sofa. Meanwhile, Flint told Gill to lock the children in the bathroom, get a knife from the kitchen, and cut Edison's neck. Gill complied. Flint then told Gill to take Dodds to the basement and shoot her twice in the head. As Dodds was being taken to the basement, Edison got up from the floor and tried to escape through a window. A neighbor saw Edison "fly[] out of the window" then fall to the ground. As he rose, Edison was shot in the head. The neighbor drove to a pay phone and called 911. Flint or Gill then fired shots into the basement, where Dodds "tried to hide until [she] could stop hearing gunshots." After Dodds believed the intruders had left the house, she ran to a neighbor's house. When police arrived, they found the two children locked in the bathroom. Spears and Edison both died of gunshot wounds.

Dodds supplied the police only with the names “Flint or Fred” and “Gill.” However, she also said that the police should have a picture of Flint from an “incident” that occurred at the home of Flint’s girlfriend Yolanda a few months earlier on the evening of the Tyson/Holyfield fight. The police identified Byers as a person who had been arrested at that time and place. They then assembled photo arrays from which Dodds identified Byers as Flint. Based largely on Dodds’ testimony and identification, Byers was charged, tried and convicted [of two counts of murder, one count of attempted murder, and one count of robbery as a class B felony].

Byers v. State, 709 N.E.2d 1024, 1025-1026 (Ind. 1999). Byers was sentenced to the maximum term of years for each count, to be served consecutively, for a total sentence of 200 years imprisonment. Id. at 1025.

On appeal, Byers argued that the trial court erred by: (1) excusing the only African-American on the jury panel for cause, (2) allowing testimony and a photograph from a prior arrest into evidence, (3) admitting a photograph of allegedly “gruesome” knife wounds to one of the victim’s neck into evidence, and (4) instructing the jury on the issue of inconsistent statements made by a witness. Id. The Indiana Supreme Court affirmed his convictions. Id. at 1029.

Byers filed a petition for post-conviction relief on May 11, 2000, and an amended petition on August 12, 2004. In the amended petition, Byers alleged in part that his trial counsel was ineffective for failing to move for a mistrial because of certain prejudicial outbursts made by spectators in front of the jury and for failing to impeach Dodds with evidence of a prior inconsistent statement. He also alleged that his appellate counsel was ineffective for failing to raise these issues on appeal.

Counsel representing Byers at his post-conviction hearing examined Byers directly on his recollection of the outbursts of spectators at trial. Counsel also tendered affidavits from Byers's trial and appellate counsel, both of whom stated that they had no independent recollection of the trial. Byers then raised several issues independently for the post-conviction court's consideration, which the court allowed. In accordance with the court's instructions, Byers's post-conviction counsel later submitted a Supplement to Amend Petition for Post-Conviction Relief concluding that, "after evaluating the additional claims submitted by [Byers], post conviction counsel finds lack of merit and no purpose in further evidentiary hearings in this cause." Appellant's Appendix at 53.

After the hearing, the post-conviction court entered findings of fact and conclusions thereon as follows:

* * * * *

8. Petitioner claims his trial counsel was ineffective in failing to object to spectator outbursts during trial, to request jury admonishments and a mistrial in relation thereto.

9. Apparently, the first outbursts occurred during the voir dire while the court was reading the charges. Immediately preceding the commencement of the prosecutor's opening statement, the prosecutor asked to approach the bench. At that time a sidebar conference was held outside the hearing of the jury during which the prosecutor made reference to ". . . some reaction in the back of the courtroom" when the court read the charges. (R. 495-499). Both the state and the defense agreed that the court remove the jury and admonish all spectators that any outbursts would not be tolerated. The trial court did so. What the record does not reveal is the nature of the interruption by the spectators that prompted the prosecutor to approach the bench. Whatever the verbal reaction to the reading of the charges by the spectators, the prosecutor responded by

suggesting to the court that the jury be removed and the spectators admonished. (R. 496-499). The petitioner claims that while the state was making its opening statement, spectators, in front of the jury, made comments such as “you’re guilty motherfucker”; “I hope you fry for this you bastard” and other derogatory and prejudicial statements. The petitioner also claims the statements must have been egregious to warrant the prosecutor’s intervention. However, no such statements appear of record. Petitioner’s trial counsel also recalls no such statements. In fact, there is no evidence that such statements were made other than petitioner’s claim that they were made. Additionally, petitioner is obviously mistaken as to when the outbursts he refers to occurred since defendant admits the prosecutor asked to approach the bench as a result of the outbursts and cites to that point in the record at which the prosecutor asked to approach the bench immediately before commencing his opening statement.

10. Another spectator outburst occurred when spectator, Jeannie Dunlap, is heard by a sheriff’s deputy making noise during the direct examination of one of the state’s witnesses, A. Dodds. The officer instructed Ms. Dunlap to keep silent. Ms. Dunlap became angry and left the courtroom, while making boisterous comments. The court thereupon excused the jury and when Ms. Dunlap re-entered the courtroom, the court found her in contempt and sentenced her to spend the night in jail. (R. 564-567). It appears from the record that Ms. Dunlap’s outburst related to her son having been removed from the courtroom by the police, probably due to the fact that there was an outstanding warrant for his arrest. It does not appear that the outburst related to the petitioner or the testimony of the witness who was on the stand at the time of the outburst. There is certainly no indication in the record that the outburst was directed at or derogatory to the defendant.
11. The following day, the trial court reminded spectators that they must not make any interruptions, audible or visible. There were also further admonishes [sic] to the spectators on several occasions. These admonishes [sic] appear from the record to have been precautionary and not prompted by any further outbursts. (R. 548, 666, 792 and 847).

12. The record reveals that trial counsel did not object at any time during the trial to spectator outbursts, did not request jury admonishments or move for a mistrial.
13. At the post-conviction hearing the petitioner introduced affidavits from trial and appellate counsel. The affidavit of trial counsel states that the attorney has no independent recollection of the trial proceeding. The affidavit from appellate counsel states that the attorney has no independent recollection of the matters presented on appeal but that the brief filed on direct appeal would be the best source ascertaining those facts.
14. At the post-conviction hearing, Petitioner Byers testified in support of his claims. He testified that trial counsel refused to raise objections to spectator outbursts at trial that were prejudicial to his right to a fair trial and trial counsel failed to use the taped statement of Almeka Dodds for impeachment of that witness. Further, Byers testified that appellate counsel failed to adequately confer with him on the issues to be presented on direct appeal and refused to raise the claim of trial counsel's ineffective assistance. Post-conviction counsel also introduced the appellate briefs and Supreme Court opinion and trial record as exhibits during the hearing.
15. The State of Indiana presented no witnesses at the post-conviction hearing in this case.
16. The petitioner introduced a document, which the Court designated as defendant's Exhibit D compromising [sic] approximately thirteen (13) additional claims for post conviction relief. The Court granted leave for post-conviction counsel to further amend the post-conviction petition after evaluating those additional claims. In compliance therewith, post-conviction counsel filed an in depth analysis of the claims and a finding of no merit.

Conclusions of Law

1. Post-conviction procedures are reserved for subsequent collateral challenges and may not provide a "super appeal" for the convicted. *Weatherford v. State*, 619 N.E.2d 915, 916 (Ind. 1993).

2. Post-conviction petitioner, Freddie Byers, bears the burden of establishing his grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); *Weatherford*, 619 N.E.2d at 917.
3. Petitioner claims that his trial counsel was ineffective in failing to object to outbursts, seek admonishment and mistrial.

* * * * *

4. The trial record is devoid of any mention of the words spoken by any spectator. In addition, there is no evidence that any prospective juror or juror ever heard or could have heard what Ms. Dunlap or any unidentified spectator might have said.
5. There is no basis to believe that petitioner was prejudiced by any of the outbursts that occurred at trial. There is no evidence that trial counsel heard what any spectator said or that trial counsel realized that the jury heard or may have heard what any spectator said. There is no evidence to indicate that trial counsel should have taken the measures petitioner argues for. Stated differently, it has not been shown that trial counsel had any reasons to act. It has merely been shown that some outbursts occurred. In this regard, defendant's trial counsel was neither ineffective nor incompetent.
6. It is likely that the trial court determined that the content of the outbursts had not come to the attention of any prospective jurors or jurors and that the risk of prejudice appeared non-existent or minimal and therefore the Court chose not to interrogate the jury to determine who, if any, might have been exposed to the comments. Therefore, the trial court did not commit reversible error by not inquiring of the jury. In any event, petitioner waived such a claim by failing to raise it on direct appeal. *Woods v. State*, 701 N.E.2d 1208 (Ind. 1998).
7. The Court having reviewed the brief prepared and submitted to the Indiana Supreme Court by petitioner's appellate counsel concludes that said counsel did not render a deficient or incompetent performance and therefore there was no resulting prejudice to the petitioner.

8. Any issues petitioner claims were prejudicially omitted by appellate counsel from the direct appeal were insignificant and clearly weaker than those presented by appellate counsel on behalf of the petitioner.
9. The claims now raised by petitioner are clearly weaker than those raised on direct appeal. There is no reasonable likelihood that a different result would have occurred on direct appeal if these issues had been raised at that time.

ORDER

1. For the foregoing reasons the amended and supplemental petition for post-conviction relief is hereby DENIED. Petitioner/defendant's conviction is affirmed.

Id. at 13-20. Thus, the post-conviction court denied Byers's petition for post conviction relief.

Before discussing Byers's allegations of error, we note the general standard under which we review a post-conviction court's denial of a petition for post-conviction relief. The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. Fisher v. State, 810 N.E.2d 674, 679 (Ind. 2004); Ind. Post-Conviction Rule 1(5). When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. Id. On review, 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. Further, the post-conviction court in this case entered findings of fact and conclusions thereon in accordance with Indiana Post-Conviction Rule 1(6). Id. "A post-conviction court's findings and judgment will be reversed only upon a

showing of clear error – that which leaves us with a definite and firm conviction that a mistake has been made.” Id. In this review, we accept findings of fact unless clearly erroneous, but we accord no deference to conclusions of law. Id. The post-conviction court is the sole judge of the weight of the evidence and the credibility of witnesses. Id.

I.

The first issue is whether Byers was denied the effective assistance of trial and 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), reh’g denied, cert. denied, 531 U.S. 1128, 121 S. Ct. 886 (2001). 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. Ben-Yisrayl v. State, 729 N.E.2d 102, 106 (Ind. 2000) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984), reh’g denied), reh’g denied, cert. denied, 534 U.S. 830, 122 S. Ct. 73 (2001). A counsel’s performance is deficient if it falls below an objective standard of reasonableness based on prevailing professional norms. French v. State, 778 N.E.2d 816, 824 (Ind. 2002). 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. Id. Failure to satisfy either prong will cause the claim to fail. Id. Most ineffective assistance of counsel claims can be resolved by a prejudice inquiry alone. Id.

A. Trial Counsel.

Byers claims that, at trial, “many spectators in front of the jury made comments such as ‘You’re guilty, mother-fucker’; ‘I hope you fry for this you bastard’; and other derogatory and prejudicial statements.” Appellant’s Brief at 15. He also claims that, when one spectator was arrested because of “possible outstanding warrants,” the spectator’s mother, Jean Dunlap, “stated that there should not even be a trial and hollered prejudicial statements regarding [Byers’s] guilt or innocence.” Id. at 17. Byers argues, therefore, that his trial counsel was ineffective for failing “to object, move for a mistrial or otherwise have the jury interrogated in an effort to learn what the impact of the outbursts were having [sic] on the jury.” Id. at 15.

At the trial, the prosecutor made the following statement, as quoted by Byers:¹

I believe that Mr. Edison’s family or some family members are here as we speak. When the court read the charges, there was some reaction on the back of the courtroom. I’m going to be fairly graphic and straight forward as to the facts of this thing starting in the opening statements, and I don’t know if it would be an appropriate time to remove the jury and admonish the spectators tht [sic] if they can’t keep their comments to themselves and their emotions to themselves, they are not to be in the courtroom.

Id. at 15-16. The trial court excused the jury and admonished the spectators. Later, when Dunlap “made an outburst because her son was being arrested because of possible

¹ The Clerk of the Court of Appeals received the original four volume record combined with the post-conviction transcript and exhibits. The four volume record and transcript were returned to the county clerk so that the clerk could correct the record. The clerk then sent the one volume transcript and one volume of exhibits from the post-conviction hearing. The clerk’s office failed to return the original record from Byers’s direct appeal. We have resolved this appeal based upon Byers’s quotations of the original record, which the State and the post-conviction court’s order confirm.

outstanding warrants,” the trial court again excused the jury, found Dunlap to be in contempt of court, and ordered that she spend the night in jail. *Id.* at 17. Although the record, as quoted by Byers, does indicate that there was “some reaction” from the audience, Byers concedes both that “[t]he record does not indicate the exact words that were said” by the spectators and that Dunlap’s alleged statement that “the court should not have a trial but go straight to sentencing . . . was off the record.” *Id.* at 17. Thus, we agree with the post-conviction court that “there is no evidence such statements were made other than [Byers’s] claim that they were made.” Appellant’s Appendix at 15. We conclude that Byers has failed to show that the alleged outbursts occurred, or that he was prejudiced by his trial counsel’s failure to object, move for a mistrial, or have the jury interrogated. Accordingly, the post-conviction court’s denial of Byers’s claim that his trial counsel was ineffective for failing to object, move for a mistrial, or have the jury interrogated because of outbursts among the spectators is not clearly erroneous. *See, e.g., Toan v. State*, 691 N.E.2d 477, 480 (Ind. Ct. App. 1998) (holding that defendant’s claim of ineffective assistance must fail where defendant has not shown that he was prejudiced by the alleged deficiency in his counsel’s performance).

Byers also claims that his trial counsel was ineffective for failing to impeach Dodds with an alleged prior inconsistent statement. Specifically, he claims that “in a statement that [Dodds] gave . . . she stated that she saw [Byers] shot [sic] one of the male victims (Mr. Spears)” but that, at trial, she testified that “she did not actually see Spears shot.” Appellant’s Brief at 20. He also claims that “there is a videotape in conflict with

the testimony that . . . Dodds testified to,” although he does not specify how the two are at variance. Id. As the Indiana Supreme Court noted, Byers was charged, tried and convicted of two counts of murder, one count of attempted murder, and one count of robbery as a class B felony based largely on Dodds’s testimony and identification. Byers, 709 N.E.2d at 1025-1025. However, Byers has not shown how he was prejudiced by his trial counsel’s failure to impeach Dodds on one detail of her testimony. Moreover, isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective. Timberlake v. State, 753 N.E.2d 591, 603 (Ind. 2001). Finally, testimony that Dodds did not see Byers shoot Spears was more favorable to Byers’s defense than testimony that she did, and, thus, embracing rather than attacking Dodds’s account was a reasonable judgment on the part of the defense. See Stephenson v. State, 864 N.E.2d 1022, 1043 (Ind. 2007) (holding that, where the witness’s testimony supported defendant’s defense, embracing, rather than attacking, the witness’s account was a reasonable judgment on the part of the defense).

B. Appellate Counsel.

Byers also argues that he was denied the effective assistance of appellate counsel. As previously noted, 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 at 1078. A petitioner must demonstrate both that his counsel’s performance was deficient and that the petitioner was prejudiced by the deficient performance. Ben-Yisrayl v. State, 729 N.E.2d at 106. Because the strategic

decision regarding which issues to raise on appeal is one of the most important decisions to be made by appellate counsel, appellate counsel's failure to raise a specific issue on direct appeal rarely constitutes ineffective assistance. See Taylor v. State, 717 N.E.2d 90, 94 (Ind. 1999). The Indiana Supreme Court has adopted a two-part test to evaluate the deficiency prong of these claims: (1) whether the unraised issues are significant and obvious from the face of the record; and (2) whether the unraised issues are "clearly stronger" than the raised issues. Bieghler v. State, 690 N.E.2d 188, 194 (Ind. 1997), reh'g denied, cert. denied, 525 U.S. 1021, 119 S. Ct. 550 (1998). If this analysis demonstrates deficient performance by counsel, the court then examines whether the issues that appellate counsel failed to raise "would have been clearly more likely to result in reversal or an order for a new trial." Id.

Byers argues that appellate counsel was ineffective because he failed to raise the issue "regarding the outbursts from the audience" at trial as discussed in Part A, supra. Appellant's Brief at 21. Because Byers has failed to show that the alleged outbursts occurred or that he was prejudiced by his trial counsel's failure to object, move for a mistrial, or have the jury interrogated, we cannot say that his appellate counsel was ineffective for failing to raise the issue on appeal. See Part A, supra. Accordingly, the post-conviction court's denial of Byers's claim that his appellate counsel was ineffective is not clearly erroneous.² See Walker v. State, 843 N.E.2d 50, 60 (Ind. Ct. App. 2006)

² Byers also "maintains that appellate counsel should have raised the issue of the trial court's

(holding that the post-conviction court’s denial of defendant’s claim of ineffective assistance of appellate counsel is not clearly erroneous), trans. denied, cert. denied, 127 S. Ct. 967 (2007).

II.

The second issue is whether Byers was denied the effective assistance of post-conviction counsel. Byers argues that his post-conviction counsel was ineffective for failing to move for “default judgment” because the “State did not file its proposed findings of fact and conclusions of law until . . . nearly ten (10) months” after Byers filed his own proposed findings. Appellant’s Brief at 9. He also claims that his post-conviction counsel was ineffective for failing to “proceed with meritorious issues that [Byers] brought to the court’s attention,” in particular, that the jury saw Byers in restraints at his trial. Id. at 10.

The right to counsel in post-conviction proceedings is guaranteed by neither the Sixth Amendment of the United States Constitution nor Article I, § 13 of the Constitution of Indiana. Daniels v. State, 741 N.E.2d 1177, 1190 (Ind. 2001), reh’g denied, cert. denied, 128 S. Ct. 241 (2007). “A petition for post-conviction relief is not generally regarded as a criminal proceeding and does not call for a public trial within the meaning

failing to give a jury instruction.” Appellant’s Brief at 21. He neither identifies the jury instruction in question nor explains why counsel should have raised it. Failure to put forth a cogent argument acts as a waiver of the issue on appeal. Davenport v. State, 734 N.E.2d 622, 623-624 (Ind. Ct. App. 2000), trans. denied. Consequently, Byers has waived this argument. See, e.g., Sheperd v. Truex, 819 N.E.2d 457, 463 (Ind. Ct. App. 2004) (holding that “we will not consider an appellant’s assertion on appeal when he has failed to present cogent argument supported by authority and references to the record as required by

of these constitutional provisions.” Baum v. State, 533 N.E.2d 1200, 1201 (Ind. 1989). “It thus is not required that the constitutional standards be employed when judging the performance of counsel when prosecuting a post-conviction petition at the trial level or at the appellate level.” Id.

We review claims of ineffectiveness of post-conviction counsel “under a standard that is ‘responsive more to the due course of law or due process of law principles which are at the heart of the civil post-conviction remedy.’” Daniels, 741 N.E.2d at 1190 (quoting Baum, 533 N.E.2d at 1201). “[I]f counsel in fact appeared and represented the petitioner in a procedurally fair setting that resulted in a judgment of the court, it is not necessary to judge his performance by the rigorous standard set forth in Strickland v. Washington[, 466 U.S. 668, 104 S.Ct. 2052 (1984)].” Id. (quoting Baum, 533 N.E.2d at 1201).

Here, counsel appeared and represented Byers at his post-conviction hearing and directly examined Byers on his recollection of the outbursts of spectators at trial. Counsel tendered affidavits from Byers’s trial and appellate counsel, both of whom stated that they had no independent recollection of the trial. Although Byers raised several issues independently for the court’s consideration, his post-conviction counsel submitted a Supplement to Amend Petition for Post-Conviction Relief concluding that, “after evaluating the additional claims submitted by [Byers], post conviction counsel finds lack

the rules”), reh’g denied.

of merit and no purpose in further evidentiary hearings in this cause.” Appellant’s Appendix at 53. Finally, we note that Byers does not allege that that his post-conviction hearing was procedurally unfair. Under these circumstances, we cannot say that Byers was denied effective assistance of post-conviction counsel. See, e.g., Graves v. State, 823 N.E.2d 1193, 1197 (Ind. 2005) (holding that post-conviction counsel did not abandon defendant where counsel appeared at the post-conviction relief hearing, directly examined defendant, and tendered affidavits).

For the foregoing reasons, we affirm the post-conviction court’s denial of Byers’s petition for post-conviction relief.

Affirmed.

RILEY, J. and FRIEDLANDER, J. concur