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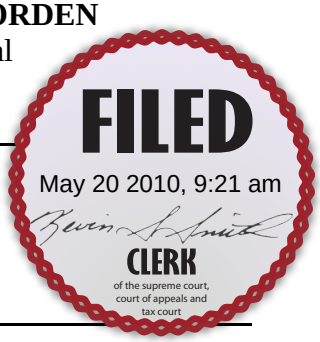

IN THE COURT OF APPEALS OF INDIANA

DARRYL GAYDEN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 27A02-0910-PC-947
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE GRANT SUPERIOR COURT
The Honorable Randall L. Johnson, Judge
Cause No. 27D02-0503-PC-45

May 20, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Darryl Gayden appeals the denial of his petition for post-conviction relief. Gayden was convicted of attempted murder following a bench trial. He alleges that his defense counsel rendered ineffective assistance by (1) not properly apprising him of his right to trial by an impartial jury, (2) committing various errors throughout the proceedings, such as pursuing unrecognized defenses, citing disadvantageous law, and failing to establish an evidentiary foundation for a self-defense claim, and (3) miscalculating the amount of jail-time credit that Gayden was entitled to at sentencing. We find no ineffective assistance and affirm the judgment of the post-conviction court. However, we remand for amendment of Gayden's sentence so that it reflects the appropriate amount of credit Gayden earned in pretrial detention.

Facts and Procedural History

The underlying facts as reported in this Court's memorandum decision on direct appeal are as follows:

> Gayden and Gretchen White became romantically involved in January 2000. Gayden and White lived together at the Eden House in Marion, Indiana. On October 6, 2000, White was staying at Regina Brewer's house because she and Gayden had been in a fight. That night, Gayden came to Brewer's house to borrow money from White. White and Gayden got into Brewer's car and White drove Gayden to the Eden House. When they arrived at the Eden House, Gayden refused to get out of the car. They began arguing, and White told Gayden that she did not want to be with him anymore and that he needed to get out of the car. Gayden said, "bitch, I'm gonna kill ya." White told Gayden that she was going to her son's house and that Gayden could not come with her because her son was tired of the arguing and fighting. At that, Gayden pulled out a knife and started stabbing White. White, in an attempt to calm Gayden down, told him that he could come with her to her son's house. Gayden told White to start driving, but when she began to drive, Gayden began stabbing her again. After White had driven approximately one block, Gayden told her that he

> wanted to drive. Gayden and White switched seats without exiting the car, and Gayden began to drive. Gayden who was "enraged" and in an "angry mad rage" continued stabbing White. He called her a "two dollar whore" and a "bitch" and told her that he was going to kill her. White saw a police car, and, as Gayden turned a corner, she opened the car door and tried to jump out. Gayden grabbed her and held her partially inside the car. When White was finally able to jump out of the car, she dislocated her shoulder. When the police officer approached White, Gayden was on top of her, and he was stabbing her. The officer told Gayden to drop his knife, and, after three demands, Gayden finally dropped the knife and laid it on the pavement. Gayden then turned toward White and said "bitch, that's why I stabbed you in your eye."
>
> White suffered twenty-one stab wounds or lacerations to her head, chest, abdomen, back, and both wrists. . . .

Gayden v. State, No. 27A02-0309-CR-827, slip op. at 2-3 (Ind. Ct. App. Feb. 10, 2004) (citations omitted).

The State charged Gayden with Class A felony attempted murder. Gayden waived his right to a jury trial and was tried to the bench in Grant County. The trial court found Gayden guilty as charged and sentenced him to fifty years with credit for time served. Gayden appealed, arguing that there was insufficient evidence to sustain his conviction, that the trial court abused its discretion in sentencing him, and that his sentence was inappropriate in light of the nature of the offense and his character. *Id.* at 2. This Court affirmed his conviction and sentence in an unpublished opinion. *Id.* at 11.

Gayden next sought post-conviction relief alleging ineffective assistance of counsel. He claimed that defense counsel rendered ineffective assistance by (1) not properly apprising him of his right to a trial by impartial jury, (2) committing several errors throughout trial, such as pursuing nonexistent defenses, citing inappropriate law, and failing to lay an evidentiary foundation for a self-defense claim, and (3) miscalculating the amount of jail-time credit that Gayden was entitled to at sentencing.

The post-conviction court denied Gayden's petition for post-conviction relief following an evidentiary hearing. Gayden now appeals.

Discussion and Decision

The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); *Fisher v. State*, 810 N.E.2d 674, 679 (Ind. 2004). 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.* The post-conviction court in this case entered findings of fact and conclusions thereon in accordance with Indiana Post-Conviction Rule 1(6). 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.* The post-conviction court is the sole judge of the weight of the evidence and the credibility of witnesses. *Id.* We accept findings of fact unless clearly erroneous, but we accord no deference to conclusions of law. *Id.*

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 (1984)), *reh'g denied*. Failure to satisfy either prong will cause the claim to fail. *French v. State*, 778 N.E.2d 816, 824 (Ind. 2002). Counsel's performance is deficient if it falls below an objective standard of

reasonableness based on prevailing professional norms. *Id.* Counsel is afforded considerable discretion in choosing strategy and tactics, and we will accord those decisions deference. *Timberlake v. State*, 753 N.E.2d 591, 603 (Ind. 2001), *reh'g denied*. A strong presumption arises that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Id.* 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.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Perez v. State*, 748 N.E.2d 853, 854 (Ind. 2001).

I. Advice to Waive Jury Trial

Defense counsel advised Gayden to forego a jury trial and have his case tried to the bench instead. Defense counsel allegedly urged Gayden to waive his jury trial rights for two reasons. First, Gayden was African-American, and counsel believed he would be unable to get a fair trial by jury in Grant County. Second, victim Gretchen White had grown up in Grant County, and counsel thought local jurors would favor her testimony. Defense counsel allegedly neglected to inform Gayden about his right to an impartial jury and the defense's ability to *voir dire* prospective jurors. The defense submitted a written "waiver of trial by jury" before trial. It stated:

> Comes now Defendant, DARRYL GAYDEN, through and by his Counsel and hereby acknowledges that my attorney on this date did discuss with me the difference between a trial by jury and a trial by court. I understand that I have the right to a jury trial wherein I would be permitted to select Twelve (12) people from the community, who would listen to all the evidence, apply the proper law and decide the issue of guilt or innocence. If I give up my right to a jury trial and the Prosecutor agrees, the court will be the one to determine the issue of guilt or

> innocence. After having considered these options, I have decided to give up my right to a trial by jury and wish to have my case heard by the Presiding Judge.

Appellant's App. p. 45. The waiver was signed by both Gayden and counsel. Incidentally, counsel noted in closing argument that "one of the things, that, that Mr. Gayden and his wife and I have been discussing is the issue of taking this matter to trial before a jury, or taking it before a judge, and one of the reasons that we did that was because of the factual and legal basises [sic] that we feel are relevant to this issue." Tr. p. 437.

Gayden argues that counsel was ineffective for "misleading [him] about his right to trial by jury and thus rendering his jury trial waiver invalid." Appellant's Br. p. 8.

We cannot say that the evidence as a whole unerringly and unmistakably shows that trial counsel misled Gayden about his right to a jury trial or neglected to inform him about the jury selection process. The waiver form reflects that counsel discussed with Gayden his jury trial rights and that Gayden understood he "would be permitted to select Twelve (12) people from the community" to serve as jurors if he so desired. With regard to counsel's reasons for urging the jury trial waiver, the closing argument excerpt quoted above indicates that counsel recommended a bench trial due to the complicated factual and legal issues involved in the case. This is a well-recognized tactic in criminal litigation. *See* 2 F. Lee Bailey & Kenneth J. Fishman, *Criminal Trial Techniques* § 39:13 (1994) (jury trial waiver may be advantageous when presenting a "complex legal defense which a jury is not likely to grasp"). Gayden maintains that counsel urged the waiver merely because Gayden was African-American and the victim would be a favored

witness. Even if these were the bases for counsel's advice, we note that the anticipation of racial prejudice and the expectation of victim sympathy are also legitimate grounds for advising a waiver of trial by jury. *See, e.g., Chambers v. State*, 496 N.E.2d 767, 768 (Ind. 1986) (where defendant was African-American and rape victim looked like "Little Bo Peep," advice to forego jury trial was strategic decision and not ineffective assistance). For these reasons, Gayden has failed to show that counsel's advice constituted deficient performance. We conclude that trial counsel did not render ineffective assistance by recommending that Gayden waive his right to a jury trial.

II. Invocation of Improper Defenses

Gayden suffered from mental illness and was evaluated for competency at several points before trial. Drs. Henry G. Martin and Patrick Schonbachler first evaluated Gayden and diagnosed him with psychosis and cognitive deficits. The trial court initially found Gayden lacked competency to stand trial and committed him to the Indiana Division of Health. Following further evaluation and several months of hospitalization, however, officials at the Logansport Hospital certified that Gayden had attained competency to stand trial. Throughout the trial proceedings, defense counsel alluded to Gayden's mental illness as well as his alleged intoxication on the night of the altercation. Counsel attempted to use Gayden's diminished capacity and intoxication to negate the *mens rea* elements of the offense charged. Counsel expressed his intention to call Dr. Martin as a defense witness but was prohibited from doing so by the trial court. Counsel also referenced Gayden's competency evaluations in closing argument.

Gayden argues that defense counsel rendered ineffective assistance by erroneously presenting the defenses of "diminished capacity" and "voluntary intoxication" and by effectively arguing insanity without filing the necessary pretrial notice.

Indiana does not recognize the separate legal defense of diminished capacity. *Cardine v. State*, 475 N.E.2d 696, 698 (Ind. 1985). Indiana has long held that a defendant may not submit evidence relating to mental disease or defect except through an insanity defense. *Marley v. State*, 747 N.E.2d 1123, 1128 (Ind. 2001) (citing *Holmes v. State*, 671 N.E.2d 841, 857-58 (Ind. 1996); *Cardine*, 475 N.E.2d at 698; *Sage v. State*, 91 Ind. 141, 145 (1883)). The insanity defense statute provides that "[a] person is not responsible for having engaged in prohibited conduct if, as a result of mental disease or defect, he was unable to appreciate the wrongfulness of the conduct at the time of the offense." Ind. Code § 35-41-3-6. When the defendant in a felony case intends to interpose the defense of insanity, he generally must file a notice of that intent with the trial court no later than twenty days before his omnibus date. *Id.* § 35-36-2-1. In addition, Indiana no longer recognizes voluntary intoxication as a defense in criminal cases. *Id.* § 35-41-2-5; *Sanchez v. State*, 749 N.E.2d 509, 520 (Ind. 2001).

We cannot say that counsel's presentation of "nonexistent" or improper defenses constituted deficient performance. Though Indiana law technically bars evidence of mental illness or intoxication to negate *mens rea*, counsel's plan was to put this evidence before the trial court anyway and hopefully compel an acquittal or conviction on a lesser-included offense. This was not an unreasonable approach given the strength of the State's case. Even if we assume without deciding that counsel's tactics constituted

deficient performance, Gayden fails to establish that he was prejudiced as a result. Gayden points to no other strategies that counsel declined in lieu of the intoxication/diminished capacity defense and that would likely have led to a different trial outcome. Gayden further concedes that the defense had "no actual evidence to present" in connection with an insanity defense, Appellant's Br. p. 23, so Gayden would not have benefitted even if counsel had filed timely notice with the State. We thus find no ineffective assistance.

III. Failure to Establish Foundation for Self-Defense Claim

One theory that defense counsel tried to advance at trial was that Gayden was acting in self-defense during his altercation with White. To support this claim counsel tried to introduce evidence that White had stabbed another person in a prior, unrelated incident. If White had perpetrated a prior stabbing, and Gayden was privy to it, this evidence would substantiate Gayden's reasonable fear of White justifying the use of responsive force. Defense counsel cross-examined White as follows:

> Q. You used to live in, uh, Pineview, Pineville County, and Bell County, Kenucky, am I correct?
> A. Yes.
> Q. And when was that?
> A. I'm not for sure. I'm not good with dates.
> Q. Okay. And is Middlesboro in that, Middlesboro, Kentucky, in that area too?
> A. Yes.
> Q. Okay. And do you recall an individual by the name of Henry Kyles?
> A. Yes.
> THE COURT: I'm sorry, Henry, Henry who?
> [DEFENSE]: Kyles, k, y, l, e, s.
> Q. Didn't you stab him, also?
> A. Yes.
> THE STATE []: Objection, Your Honor, it's irrelevant unless the defendant puts facts into, in the record that make this issue relevant.

That would require some evidence of self defense, for which there has been none offered, and –
[DEFENSE]: Well, my client hasn't testified, yet.
THE STATE []: If I may finish, that would also require the defendant stating he was aware of a prior act of violence on the part of the victim. That's not in the record, so I object to the question.
[DEFENSE]: It's not in the record, Your Honor, because I'm just starting.
THE COURT: At this point in time, I'm going to sustain the objection.

Q. You had, you've had instances in which you've been involved in, in a situation similar to this one, am I correct?
THE STATE []: You know, I don't know how many times, we're going to be here a long time, but this is simply an in-your-face comment by the defense after that previous question was objected and sustained.
THE COURT: Sustained.
THE STATE []: And I object-
THE COURT: Sustained.

Tr. p. 360-62. Defense counsel introduced no further evidence related to White's criminal history. Nor did he elicit that Gayden was aware of White's earlier stabbing. Gayden testified at his post-conviction hearing that he knew at the time of the confrontation that White had stabbed someone in Kentucky.

Gayden argues that counsel rendered ineffective assistance by failing to establish a complete evidentiary foundation for his self-defense claim.

A person is justified in using deadly force only if the person reasonably believes that such force is necessary to prevent serious bodily injury to the person or a third person or to prevent the commission of a forcible felony. Ind. Code § 35-41-3-2(a). A self-defense claim can prevail in a homicide prosecution only if the defendant had a reasonable fear of death or great bodily harm. *Zachary v. State*, 888 N.E.2d 343, 347 (Ind. Ct. App. 2008), *trans. denied*. Where a defendant raises a self-defense claim,

evidence of the victim's specific bad acts is admissible to prove that the victim had a violent character which gave the defendant reason to fear her. *Holder v. State*, 571 N.E.2d 1250, 1253-54 (Ind. 1991); *see also Littler v. State*, 871 N.E.2d 276, 279 (Ind. 2007). When offering specific bad acts evidence to prove the victim's violent character frightened him, the defendant must also provide a foundation showing that he knew about the victim's bad acts at the time of the confrontation. *See Holder*, 571 N.E.2d at 1254.

Again we have difficulty finding deficient performance on the part of defense counsel. Counsel tried to lay an evidentiary foundation for Gayden's self-defense claim but was denied the opportunity by the trial court. He began by asking White about an incident in which she allegedly stabbed another person. The State objected, arguing that White's criminal history was irrelevant unless there was evidence Gayden was aware of it. Counsel responded that Gayden had not testified yet. Counsel explained, "It's not in the record, Your Honor, because I'm just starting." The trial court nonetheless sustained the State's objection. Counsel tried again by rewording his question, but the trial court prohibited any further inquiry. Granted, defense counsel could have requested conditional admission of the testimony and then asked Gayden about his knowledge of White's prior stabbing. This might have satisfied the trial court and established the self-defense foundation that counsel sought. But assuming *arguendo* that counsel's failure to do so constituted deficient performance, Gayden still fails to persuade us that he was prejudiced as a result thereof. Gayden stabbed White roughly twenty-one times. He grabbed White when she tried to escape. He continued to stab her after the police arrived. So even if counsel had established a more complete evidentiary foundation for

Gayden's self-defense claim, the State's evidence overwhelmingly refuted the reasonableness of Gayden's self-defensive force. We thus find no probability that, but for trial counsel's alleged error, the self-defense claim would have prevailed and the outcome of Gayden's trial would have been different.

IV. Use of Incorrect Statute to Seek Conviction of Lesser Offense

Gayden was charged with attempted murder. Defense counsel argued in closing that the court could instead convict Gayden of various lesser-included offenses:

> If it's not Attempted Murder, what is it? And you heard Mr. Gayden, hey, I did wrong. I know I did wrong, but I did not attempt to commit murder. I know that what I did, I should not have done. He accepts it, but it's not Attempted Murder, and it's not Attempted Murder, because, Your Honor, Battery, and related offenses, a person, Indiana Code 35-42-2-1, a person who knowingly or intentionally touches another person in a rude, insolent, or angry manner commits Battery, Class B Misdemeanor, however, the offense is a Class C Felony if it results in serious bodily injury to any other person or, or if it is committed by means of a deadly weapon. That clearly fits. Then we go to the Battery as a Class B Felony, With Serious Bodily Injury, and I think that that still goes a little bit further, better than Attempted Murder. . . .

Tr. p. 446-47.

Gayden argues that defense counsel rendered ineffective assistance by seeking conviction on an inapplicable lesser-included offense.

Indiana's general battery statute provides as follows:

> (a) A person who knowingly or intentionally touches another person in a rude, insolent, or angry manner commits battery, a Class B misdemeanor. However, the offense is:
>
> * * * * *
>
> (3) a Class C felony if it results in serious bodily injury to any other person or if it is committed by means of a deadly weapon;
>
> * * * * *

> (4) a Class B felony if it results in serious bodily injury to a person less than fourteen (14) years of age and is committed by a person at least eighteen (18) years of age;
>
> * * * * *
>
> (7) a Class B felony if it results in the death of an endangered adult . . . .

Ind. Code § 35-42-2-1. Indiana's aggravated battery statute provides:

> A person who knowingly or intentionally inflicts injury on a person that creates a substantial risk of death or causes:
>
> (1) serious permanent disfigurement;
>
> (2) protracted loss or impairment of the function of a bodily member or organ; or
>
> (3) the loss of a fetus;
>
> commits aggravated battery, a Class B felony.

Id. § 35-42-2-1.5.

We cannot say defense counsel rendered deficient performance here. Counsel first suggested that the trial court convict Gayden of Class C felony battery under Indiana Code section 35-42-2-1(a)(3). This was a favorable alternative to attempted murder and would have been sustained by the trial evidence. Counsel also suggested convicting Gayden of "Battery as a Class B Felony, With Serious Bodily Injury." Counsel's terminology was perhaps incorrect or confusing. The only Class B felony battery that might have been applicable in this case was "aggravated battery" under Section 35-42-2-1.5, and counsel did not turn the trial court's attention to that statute. But we surmise that counsel was referring to aggravated battery and simply used the wrong nomenclature. Assuming for the sake of argument that counsel's misstatement and failure to specify Section 35-42-2-1.5 constituted deficient performance, we still would find no prejudice in this case. Gayden was tried to the bench, and there exists a strong presumption that the trial court knows and follows the applicable law. *Emerson v. State*, 695 N.E.2d 912, 919

(Ind. 1998). We thus presume the court was aware of the aggravated battery statute as an alternative basis for conviction. Accordingly, we find no prejudice and no ineffective assistance.

V. Impeachment of Client With Criminal History

Gayden took the stand at trial and testified in his own defense. He told his version of what happened, explaining that White pulled out a knife first and that he reacted in self-defense. Defense counsel then asked Gayden about his criminal history, apparently to preempt a future impeachment and enhance Gayden's credibility before the court:

> Q. Okay, let me ask you this, you have been convicted of offenses, have you not?
> A. Of what?
> Q. You've been convicted, have you not?
> A. Convicted of what?
> Q. Well, let me ask it this way, then, do you have any convictions in Chicago?
> A. I didn't, I haven't been convicted in Chicago.
> Q. Never?
> A. No.
> Q. Okay. Now you have been arrested in Chicago on various occasions.
> A. Yes. Yes.
> Q. Okay. But you were never convicted?
> A. Nope. No, Sir.
> Q. Okay. And you're gonna be asked about that, alright?
> A. Yes.
> Q. Uh, you understand that they have the right to question you about that?
> A. Yes.
> Q. Okay. You've never been convicted, you've never been convicted of theft?
> A. I never stoled nothin', no, I don't steal, I, I don't steal, I ain't never broke in no one house, I ain't never stoled a car, I ain't even ever been in or stoled nothin'. No, I don't steal, Sir.
> Q. Okay, now let me ask you this, what's the worse thing that you've been arrested for?
> A. In Chicago?

Q. Anywheres.
A. Battery.
Q. Okay, and in Chicago?
A. Yeah.

Tr. 406-08. According to his pre-sentence investigation report, Gayden was convicted in Cook County, Illinois, of theft in 1984 and domestic battery in 1998. Appellant's App. p. 51. He was also convicted in Marion, Indiana, of public intoxication, battery on a police officer, resisting law enforcement, disorderly conduct, criminal mischief, and battery with bodily injury in 2000. *Id.* at 51-52.

Gayden argues that defense counsel rendered ineffective assistance by impeaching him with an admissible criminal history.

Indiana Evidence Rule 609 provides in pertinent part:

> **(a) General Rule.** For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime or an attempt of a crime shall be admitted but only if the crime committed or attempted is (1) murder, treason, rape, robbery, kidnapping, burglary, arson, criminal confinement or perjury; or (2) a crime involving dishonesty or false statement.
>
> **(b) Time Limit.** Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or, if the conviction resulted in confinement of the witness then the date of the release of the witness from the confinement unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. . . .

Evidence of a witness's specific acts of misconduct which are not reduced to a conviction is not admissible for impeachment purposes. *Turnbow v. State*, 637 N.E.2d 1329, 1332 (Ind. Ct. App. 1994), *trans. denied*.

Whether defense counsel rendered deficient performance here is a difficult question. Conceding a witness's criminal history is considered an acceptable strategy for strengthening the witness's credibility and building confidence with the fact-finder. *See, e.g., Carter v. State*, 738 N.E.2d 665, 675 (Ind. 2000); *Grigsby v. State*, 503 N.E.2d 394, 397 (Ind. 1987). On the other hand, defense counsel proceeded under the assumption that the State would be allowed to ask about Gayden's convictions and arrests on cross-examination. This was a mistaken belief. Gayden's theft conviction was a crime involving dishonesty, but it would not have been available for purposes of impeachment because it was more than ten years old. Gayden's other convictions would not have been available for impeachment because they were not among the offenses enumerated in Rule 609(a). His arrests would not have been admissible because they were not reduced to conviction. Nor was there any other theory of relevance justifying introduction of Gayden's prior misconduct. In any event, even if we assume counsel's questioning constituted deficient performance, we would again find no prejudice. The State's physical and testimonial evidence strongly disproved the self-defense explanation offered by Gayden. We find no reasonable probability that, but for the discussion of Gayden's criminal history, the trial court would have credited Gayden's testimony and the outcome of the trial would have been different. We therefore find no ineffective assistance.

VI. Citation to Adverse Case Law

Defense counsel moved for "involuntary dismissal" at the close of the State's case. Counsel argued that the State had presented sufficient evidence for a conviction of aggravated battery but insufficient evidence to sustain a conviction for attempted murder.

He maintained that the "quantity of . . . alleged lacerations" was insufficient to prove the requisite specific intent. Tr. p. 277. Counsel cited *Martin v. State*, 657 N.E.2d 430 (Ind. Ct. App. 1995), *trans. denied*, in support of his motion.

In *Martin*, the defendant confronted his estranged wife Tonya and her friend Damon Garrett out on the street. 657 N.E.2d at 432. He told Tonya she was going to die and stabbed her in the arm and stomach. *Id.* Garrett tried to intervene, and Martin stabbed him in the stomach as well. *Id.* Martin was charged with attempted murder of both Tonya and Garrett. *Id.* He maintained at trial that he stabbed Garrett in self-defense. *Id.* A jury acquitted Martin of the attempted murder of Garrett but convicted him of the attempted murder of Tonya. *Id.* Martin argued on appeal that the verdicts were contradictory and irreconcilable. *Id.* at 434. This Court disagreed, explaining that "[t]he jury could have found that the unprovoked stabbing of Tonya, accompanied by Martin's statement that she was going to die, clearly and unequivocally evinced his intent to kill her." *Id.* "The jury could also logically have found that when Martin stabbed Garrett, his intent was not to kill but to defend himself." *Id.*

Gayden argues that counsel rendered ineffective assistance by citing an adverse case and undercutting his defense.

We find no ineffective assistance here. We acknowledge that the *Martin* case would be unavailing to Gayden in a motion for judgment of acquittal. If *Martin* were relevant at all, it would show that the State had presented sufficient evidence to sustain an attempted murder conviction. However, we decline to find defense counsel's citation to controlling, adverse case law a basis for an ineffective assistance claim, namely because

our professional rules mandate disclosure of such authority. *See* Ind. Professional Conduct Rule 3.3 ("A lawyer shall not knowingly . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel . . . .").

VII. Concession of Essential Element in State's Case

Defense counsel argued in closing:

> The State has contended, and has maintained a charge of Attempted Murder against Mr. Gayden, but it seems to me that they have failed to recognize or realize that this is a specific intent crime. Specific intent crime. That has not been proven beyond a reasonable doubt in my mind. The *mens rea* is lacking, and it's lacking not because it did not exist, it's lacking not because it was not shown, or did not appear, it is lacking because nobody paid attention to it. . . .

Tr. p. 437.

Gayden argues that counsel rendered ineffective assistance by conceding an element of the State's case and admitting that the requisite *mens rea* had been proven.

We disagree with Gayden's interpretation of the record. Counsel argued that "*mens rea* is lacking." He said that the specific intent "has not been proven beyond a reasonable doubt." His rationale is unclear, but he nonetheless disputed that the State had proven the requisite culpability. Futhermore, counsel's principal theory throughout trial was that Gayden's intoxication or diminished capacity negated *mens rea*. We thus identify no basis here for a finding of deficient performance.

VIII. Counsel's Health and Cognitive Function

The State called one of the responding police officers to testify at trial. Defense counsel attempted to cross-examine the officer about a police report he had submitted:

Q. And did you not submit another subsequent report, uh, where is it, and you testified that Mr. Gayden and Ms. White were both intoxicated, and you had to wait on talking with them?

A. Sir, I, I can't say either way, I don't, I don't recall that, but if there's a statement, I'd be glad to look at it.
[DEFENSE]: I want this part marked and I'll check it in the morning, Your Honor. I will get exactly what he said.
THE STATE []: I don't know what marked means.
[DEFENSE]: Well, marked on the, on the, uh, recorder at 4:40.
THE STATE []: Mark what?
[DEFENSE]: What he just finished testifying to.
THE STATE []: I'm confused, Your Honor, I have –
THE COURT: So am I.
THE STATE []: I have no idea what he's talking about.
[DEFENSE]: He's testified that, uh, Ms. White was not intoxicated.
THE STATE []: That is not his testimony, Your Honor.
[DEFENSE]: Or was less intoxicated.
THE STATE []: He testified he couldn't make a determination of intoxication because of her physical condition and the injuries she had.
[DEFENSE]: Okay. Well that's what he testified to. He wrote something different, and I'll find it.
THE COURT: But you don't have it now.
[DEFENSE]: I do not have it now.
THE COURT: Alright. I don't know what we can mark, uh, are you going to recall this witness tomorrow, is that what you're saying?
[DEFENSE]: Yes, Your Honor.

Id. at 119-20.

Later, in an unrelated part of the proceedings, counsel tried to call Dr. Martin as a witness. The State objected on relevancy grounds. Defense counsel responded:

> Well, Your Honor, I wouldn't think that the State has the right to question my, uh, case in chief, uh, they complained yesterday, or they've been complaining since Tuesday because I kept asking questions about their witnesses. Uh, they told me that their case in chief is their case in chief, and they can bring whoever they want to testify. I agree. My case in chief goes to the mental state of Mr. Gayden on the night of the, this incident and the mental state of Mr. Gayden since the date of the incident to the day that he was incompetent to testify. I do believe that it goes to his, uh, uh, culpability, goes to his knowing and his intentions of that night. I think

> that's the only person that can make a viable, uh, uh, explanation, uh, would be a doctor that evaluated Mr., Mr. Gayden.

Id. at 299.

And on the third day of trial, counsel asked for a five-minute recess because he was "sweating too much." *Id.* at 346. The deputy prosecutor followed counsel into the restroom out of concern for his health. The prosecutor brought him a glass of water and made sure he was okay.

Gayden argues that the foregoing incidents and colloquies demonstrate counsel's "ongoing problems thinking straight" as well as his potentially poor health condition. Appellant's Br. p. 24.

We do not believe Gayden's contentions are substantiated by the record. In the first exchange, defense counsel had temporarily misplaced a document and wanted the court reporter to mark the record for future reference. In the second incident, counsel was trying his best to introduce a favorable witness to testify on behalf of Gayden and disprove *mens rea*. And in the final episode, counsel was just not feeling well and needed a short break. We have no basis on this record to conclude that counsel was suffering from a particular health or cognitive problem which hindered his performance throughout trial. We thus find no ineffective assistance.

IX. Miscalculation of Credit for Time Served

Gayden had another unrelated criminal case pending at the time of this attempted murder. The case originated in Marion City Court and involved a misdemeanor battery charge. The following timeline summarizes the pertinent procedural history of both the unrelated battery case and the attempted murder charge at issue here:

	Battery Charge	Attempted Murder Charge
6/23/00	Gayden is arrested and charged with Class A misdemeanor battery in Marion City Court.	
8/24/00	Gayden is released on his own recognizance.	
10/6/00		Gayden is arrested for the present attempted murder.
10/12/00	Gayden is convicted and sentenced on the battery charge to 365 days in jail.	
10/18/00	Gayden files a request for trial *de novo* in the battery case.	
4/28/03		Gayden is sentenced to 50 years for attempted murder.
5/28/03	The misdemeanor battery charge is dismissed in Grant Superior Court.	

At the sentencing hearing in the present case, defense counsel asked that Gayden receive 752 actual days of jail-time credit. The trial court granted counsel's request.

Gayden contends that trial counsel was ineffective for miscalculating the amount of jail-time credit that Gayden had earned from presentence detention.

A defendant is entitled to credit for the time spent in confinement before sentencing. *McAllister v. State*, 913 N.E.2d 778, 782 (Ind. Ct. App. 2009). Credit is calculated from the date of arrest to the date of sentencing for that same offense. *French v. State*, 754 N.E.2d 9, 17 (Ind. Ct. App. 2001). Additional credit can be earned based

on a prisoner's credit time classification. *Robinson v. State*, 805 N.E.2d 783, 789 (Ind. 2004). Prisoners in Indiana are placed into a "class" for the purpose of earning credit time. *Neff v. State*, 888 N.E.2d 1249, 1250 (Ind. 2008). Generally, a person "imprisoned for a crime or imprisoned awaiting trial or sentencing is initially assigned to Class I." Ind. Code § 35-50-6-4(a). "A person assigned to Class I earns one (1) day of credit time for each day the person is imprisoned for a crime or confined awaiting trial or sentencing." *Id.* § 35-50-6-3(a).

Credit applies "only to the sentence for the offense for which the presentence time was served." *Dolan v. State*, 420 N.E.2d 1364, 1373 (Ind. Ct. App. 1981). "Credit time allowed by legislative grace toward a specific sentence clearly must be for time served for the offense for which that specific sentence was imposed." *Id.* Where a defendant awaits trial during the same time period for multiple offenses and the offenses are tried separately, the defendant is entitled to a "full credit" for each offense on which he is sentenced. *Id.* Moreover, where a defendant awaits trial on two separate and unrelated charges, one of which results in conviction and one of which is dismissed, credit from the overlapping portion of his pretrial detention may be applied to the sentence he receives from conviction. *See Brown v. State*, 907 N.E.2d 591, 596 (Ind. Ct. App. 2009).

A defendant convicted in city court can automatically receive a new trial in circuit or superior court by filing a request for trial *de novo*. Ind. Trial de Novo Rule 3; *Jones v. State*, 789 N.E.2d 478, 480 (Ind. 2003). The request results in a completely new adjudication of guilt or innocence by the "appeal" trial court. *State ex rel.*

Rodriguez v. Grant Circuit Court, 261 Ind. 642, 645-46, 309 N.E.2d 145, 147 (1974). The city court conviction "evaporates" unless and until the prosecution proves its case once more. *Jones*, 789 N.E.2d at 480.

Gayden was arrested for attempted murder on October 6, 2000, and sentenced in that case on April 28, 2003. This period spanned 934 days. However, Gayden was convicted on the unrelated battery charge on October 12, 2000. He requested a trial *de novo* in that case on October 18, 2000. Gayden thus served 6 days of a sentence in the battery case which cannot be counted as presentence detention for the attempted murder charge. Gayden's request for trial *de novo* nullified the conviction and sentence for battery, and the battery charge was ultimately dismissed in superior court. In line with the foregoing authority, we conclude that Gayden was entitled to 934 actual days of credit time, less the 6 days he served for the transient battery conviction. Gayden should therefore have been awarded 928 actual days' credit. We remand so that Gayden's sentence can be amended accordingly.

Affirmed in part, reversed in part, and remanded.

NAJAM, J., and BROWN, J., concur.