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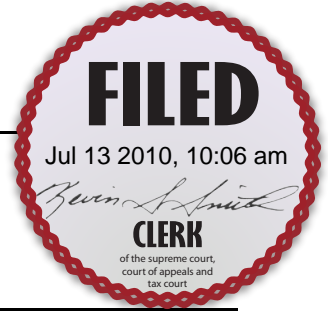
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**IN THE
COURT OF APPEALS OF INDIANA**



WILLIAM D. BAXTER,

Appellant,

vs.

STATE OF INDIANA,

Appellee.

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No. 49A02-0908-PC-724

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Kurt M. Eisgruber, Judge
Cause No. 49G01-0311-PC-197036

July 13, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

William D. Baxter appeals the denial of his petition for post-conviction relief. As he demonstrated his trial and appellate counsel were ineffective, we reverse.

FACTS AND PROCEDURAL HISTORY

On Baxter's direct appeal, we set out the facts most favorable to the conviction:

On November 11, 2003, Baxter was living with his girlfriend, Kimberly Bray, in Indianapolis. Baxter was not employed, and he and Bray spent most of their days shoplifting so that they could sell merchandise to fund their crack cocaine habits. Sometime on November 11, Baxter informed Michael Rainey, one of the individuals who was staying with them, that he was expecting a telephone call.

At some point, Marcus Williams—an acquaintance of Bray and Baxter's—telephoned the residence, stating that he needed some gasoline for his vehicle. Baxter's nephew, Taryll Miller, waited for Baxter and Bray in his car, so they could drive out to Claude and Annie's Restaurant and Bar, where Williams was playing pool, in order to give him a can of gasoline. Williams and Miller were acquaintances, and while the two did some "business" together, Miller grew to dislike Williams to the point that he wanted to see him dead. Baxter disliked Williams as well. Miller drove the three to the restaurant, and after noticing Williams and his girlfriend—Carlette Moody—inside, Miller parked the vehicle. Baxter left the car, and Miller then ordered Bray to drive to a nearby vacant lot.

At some point, Williams and Moody left the restaurant, and they noticed Baxter walking toward them with a gas can. Baxter then entered the backseat of their vehicle, and they drove to the lot and parked near the other vehicle where Bray and Miller were waiting. Shortly thereafter, Baxter fired three gunshots and fled to the car, where Miller and Bray were waiting. Baxter jumped into the front passenger seat of Miller's car, told Bray to "go" and stated "I shot him once and her twice."

The three then drove back to Bray's, and Baxter ordered her to dispose of his clothing. Bray complied and placed the clothes in a dumpster at a nearby liquor store. When the police found Williams and Moody at the scene of the shooting, Moody told emergency personnel that Baxter had shot them. The following morning, Baxter was arrested. In the end, Williams died from a gunshot wound to the head, and Moody sustained two gunshot wounds to her head but survived.

Baxter v. State, No. 49A02-0504-CR-296, slip op. at 2-3 (Ind. Ct. App. Mar. 15, 2006)

(internal citations omitted), *trans. denied*.

The State charged Baxter with murder, a felony;¹ attempted murder, a Class A felony;² and carrying a handgun without a license, a Class A misdemeanor.³ Before the presentation of evidence, the court gave the jury the following preliminary instruction:

INSTRUCTION NO. 7

The crime of Attempt Murder is defined as follows:

“A person attempts to commit a murder when, acting with the conscious purpose of killing another person, he engages in conduct that constitutes a substantial step toward killing that person.”

To convict the defendant, William Baxter, of Attempt Murder, the State must prove each of the following elements:

That the defendant, William Baxter, on or about November 11, 2003,

1. did attempt to commit Murder,
2. which is to intentionally kill another human being, that is: Carlette Moody, by engaging in conduct, that is: firing a deadly weapon, that is: a handgun, at and against the person of Carlette Moody,
3. with the specific intent to kill Carlette Moody, which conduct constituted a substantial step toward the commission of said crime of Murder.

If the State fails to prove each of these elements beyond a reasonable doubt, you must find the Defendant, William Baxter, not guilty of Attempt Murder, a Class A Felony as charged in Count II of the Information.

If the State does prove each of these elements beyond a reasonable doubt, you should find the Defendant, William Baxter, guilty of Attempt Murder, a Class A Felony as charged in Count II of the Information.

¹ Ind. Code § 35-42-1-1.

² Ind. Code §§ 35-41-5-1; 35-42-1-1.

³ Ind. Code § 35-47-2-1.

(App. at 81-82.)⁴

Before final arguments, the State tendered an instruction on accomplice liability. Baxter's counsel objected on the ground the State had charged Baxter as a principal, not as an accomplice, and the State should not be permitted to change its theory so late in the trial. The trial court overruled the objection and gave the following instructions:

INSTRUCTION NO. 23(E)

A person is responsible for the actions of another person when, either before or during the commission of a crime, he knowingly aids, induces, or causes the other person to commit a crime even if the other person:

1. has not been prosecuted for the offense
2. has not been convicted of the offense; or a different offense
3. has been acquitted of the offense.

To aid is to knowingly support, help, or assist in the commission of a crime.

In order to be held responsible for the actions of another, he need only have knowledge that the [sic] is helping in the commission of the charged crime. He does not have to personally participate in the crime nor does he have to be present when the crime is committed.

Proof of the defendant's failure to oppose the commission of a crime, companionship with the person committing the offense, and conduct before and after the offense may be considered in determining whether aiding may be inferred.

Mere presence at the scene of an alleged crime or failure to oppose the crime is not, in of itself, aiding, inducing or causing the commission of a crime. Neither is negative acquiescence sufficient standing alone. There must be some conduct of an affirmative nature on the part of a defendant in order for that defendant to be criminally liable as an accessory. It must be proven beyond a reasonable doubt that a defendant had knowledge of and participated in the commission of the crime.

⁴ Citations to "(App. at __)" are to the appendix filed in Baxter's direct appeal. The appendix created for this appeal of the denial of post-conviction relief will be cited as "(P-C App. at __)."

INSTRUCTION NO. 23(F)

The intent to kill can be found from the acts, declarations, and conduct of the defendant at or just immediately before the commission of the offense, from the character of the weapon used, and from the part of the body on which the wound was inflicted.

The law does not require a direct statement of intent by the defendant to prove the intent to commit a particular crime.

(*Id.* at 108-10.)

The jury found Baxter guilty of murder and attempted murder. Following a sentencing hearing, the trial court sentenced Baxter to consecutive sentences of fifty-five years for murder and thirty years for attempted murder.

Baxter appealed, questioning whether “the accomplice instruction was error is [sic] because the State charged him as a principal rather than as an accomplice,” *Baxter*, No. 49A02-0504-CR-296, slip op. at 5, and whether the evidence was sufficient to sustain his convictions. We affirmed Baxter’s convictions, finding that even if the jury chose to believe Baxter’s testimony that Miller was the shooter, “the evidence showed that Baxter was present at the scene, was in companionship with Miller before and after the shooting, and there was evidence showing that Baxter affirmatively aided Miller in the crimes.” *Id.* at 5-6.

Baxter filed a petition for post-conviction relief, which was later amended to assert he was denied effective assistance of counsel when his “trial counsel failed to object to the court’s erroneous instructions on accomplice liability for attempt murder.” He claimed the instructions did not indicate Baxter had to have specific intent that Moody

die when he aided Miller's attempted murder of Moody, and his appellate counsel "failed to challenge the erroneous instructions on accomplice liability for attempt murder as fundamental error." (P-C App. at 44.)

The post-conviction court held a hearing on Baxter's petition on March 24, 2009. Baxter's trial counsel testified she did not object to the *mens rea* language in the instruction on accomplice liability because she "just wasn't thinking about the attempted murder and overlooked that part of that instruction." (P-C Tr. at 6.) Baxter's appellate counsel testified she "raised the issue of the accomplice liability instruction based on the objection [at trial], but [she] could have also raised it in the alternative as fundamental error." (*Id.* at 9.) On June 17, 2009, the post-conviction court entered its findings of fact and conclusions of law, denying Baxter's petition.

DISCUSSION AND DECISION

A post-conviction petitioner bears the burden of establishing his claims by a preponderance of the evidence. *Lindsey v. State*, 888 N.E.2d 319, 322 (Ind. Ct. App. 2008), *trans. denied*. An appeal from the denial of post-conviction relief is an appeal from a negative judgment. *Id.* To prevail, the petitioner must show that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. *Id.* In the post-conviction setting, conclusions of law receive no deference on appeal. *Id.* As to factual matters, we examine only the probative evidence and reasonable inferences that support the post-conviction court's determination and do not reweigh the evidence or judge the credibility of the witnesses. *Id.*

To establish a post-conviction claim alleging a violation of the Sixth Amendment right to effective assistance of counsel, a defendant must establish before the post-conviction court the two components set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). First, a defendant must show that counsel’s performance was deficient. This requires a showing that counsel’s representation fell below an objective standard of reasonableness and that counsel made errors so serious that counsel was not functioning as “counsel” guaranteed to the defendant by the Sixth Amendment. Second, a defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, meaning a trial whose result is reliable. To establish prejudice, a defendant must show 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 is one that is sufficient to undermine confidence in the outcome. Further, counsel’s performance is presumed effective, and a defendant must offer strong and convincing evidence to overcome this presumption.

Overstreet v. State, 877 N.E.2d 144, 151-52 (Ind. 2007) (citations omitted), *cert. denied* 129 S. Ct. 458 (2008).

Baxter asserts trial counsel was ineffective for failing to object to the instructions on accomplice liability for attempted murder because the instructions did not “advise the jury that . . . they [sic] had to find [Baxter] had the specific intent to kill Carlette Moody when he aided the shooter.” (Appellant’s Br. at 5.) Thus, “the jury may have convicted [him] of knowingly, rather than intentionally, aiding Tarryl Miller to commit Attempt Murder.” (*Id.*)

When a petitioner brings an ineffective assistance of counsel claim based on failure to make an objection, the petitioner “must demonstrate that if such objection had been made, the court would have had no choice but to sustain it.” *Sanchez v. State*, 675

N.E.2d 306, 310 (Ind. 1996). Additionally, the petitioner must demonstrate the failure to object prejudiced the petitioner. *Law v. State*, 797 N.E.2d 1157, 1162 (Ind. Ct. App. 2003).

Here, Baxter challenges his counsel's failure to object to the trial court instructions regarding his being an accomplice to attempted murder. Regarding such a charge, our Supreme Court has held:

[I]n order to establish that a defendant aided, induced, or caused an accomplice to commit attempted murder, the State must prove that the defendant, with the specific intent that the killing occur, knowingly or intentionally aided, induced, or caused his accomplice to commit the crime of attempted murder. Thus, to convict for the offense of aiding an attempted murder, the State must prove: (1) that the accomplice, acting with the specific intent to kill, took a substantial step toward the commission of murder, and (2) that the defendant, acting *with the specific intent that the killing occur*, knowingly or intentionally aided, induced, or caused the accomplice to commit the crime of attempted murder.

Bethel v. State, 730 N.E.2d 1242, 1246 (Ind. 2000) (emphasis added). Accordingly, “a trial court commits fundamental error when it fails to instruct the jury that in order to find an accomplice guilty of attempted murder, it must find that the accomplice possessed the specific intent to kill when he knowingly or intentionally aided, induced or caused the principal to commit the crime of attempted murder.” *Specht v. State*, 838 N.E.2d 1081, 1089 (Ind. Ct. App. 2005), *trans. denied*. It is not enough that an instruction specifies the State must prove the defendant acted with specific intent to commit murder where the instruction is “phrased in terms of [the defendant] being the principal, i.e., the shooter, rather than the accomplice.” *Id.* at 1090. Rather, the instructions must require the jury to

find that the defendant specifically intended that the victim be killed “*when* he knowingly or intentionally aided” another in the commission of attempted murder. *Id.* at 1090-91 (emphasis in original).

For example, in *Hopkins v. State*, 759 N.E.2d 633, 638 (Ind. 2001), Hopkins participated in ordering both victims to the basement, ordering them to strip, and taking their cash. He handed his brother a handgun while he went upstairs to ransack the house for drugs and/or money. His brother then, without any new conduct or provocation from either victim, simply pointed the handgun at Martinez’s head and shot him. When Defendant returned to the basement, where Martinez was lying on the floor apparently dead, his brother handed him back the handgun, and Defendant proceeded without saying anything, and without any new conduct or provocation from McCarty, to fire the handgun at her face from three feet away.

Hopkins’ trial court did not instruct the jury that, to find Hopkins guilty of accomplice liability for attempted murder based on his brother’s shooting of Martinez, the jury was required to find Hopkins had specific intent that Martinez die when he aided his brother. Our Supreme Court reversed Hopkins’ conviction of attempting to kill Martinez based on this omission in the jury’s instruction regarding accomplice liability:

[B]ecause Defendant’s intent to kill Martinez was squarely at issue and because the jury was not properly instructed that it was required to find beyond a reasonable doubt that Defendant possessed the specific intent to kill Martinez, we are unable to affirm the trial court’s judgment on this count. We conclude that, at minimum, the probable impact on the jury on every material element of the crime of the trial court’s failure to instruct was not sufficiently minor as not to adversely affect Defendant’s substantial rights.

Id. at 639 (citations omitted).⁵

⁵ This 2001 *Hopkins* decision is the direct appeal of Anthony Hopkins’ convictions of robbery, attempted murder, criminal confinement, and carrying a handgun without a license. His co-defendant was his

The accomplice liability instruction for Baxter's attempted murder charge also lacked the necessary "specific intent to kill" language, so it permitted the jury to convict Baxter of *knowingly* aiding Miller, who intended to kill Moody. This was error. *See also Williams v. State*, 737 N.E.2d 734, 737-38 (Ind. 2000) (Because "Williams's intent as a non-shooting accomplice was seriously disputed at trial," and the instructions did not tell the jury that the State had a burden to prove Williams specifically intended to kill the victim, this case presented a "rather straightforward case of reversible *Spradlin* [*v. State*, 569 N.E.2d 948 (Ind. 1991)] error.").

The question then is whether Baxter was prejudiced by this failure to object. Failure to instruct the jury on the intent required to establish accomplice liability for attempted murder is *not* reversible fundamental error if "the evidence of [the accomplice's] specific intent that [the victim] be killed is sufficient to conclude that [the accomplice] suffered no prejudice from the failure of the trial court to instruct" the jury properly. *See Hopkins v. State*, 782 N.E.2d 988, 991 (Ind. 2003) (because defendant shot first victim and then gave gun to brother, who shot second victim, evidence indicates defendant intended his brother kill second victim). Baxter's intent was at issue and his conviction must therefore be reversed.

The State notes that, in attempted murder cases, we may infer a defendant's intent

brother, Edward Hopkins, whose direct appeal concluded with a 2003 *Hopkins* decision, to which we refer below. The cases are especially illuminating, as the factual differences in the cases -- Edward shot the first victim while Anthony was upstairs, and then Anthony shot the second victim after Edward handed him the gun -- led our Supreme Court to determine the same erroneous instructions regarding accomplice liability for attempted murder were fundamental error as to one brother (Anthony) but not the other (Edward).

to kill from the manner in which the shooting occurred. *See, e.g., Specht*, 838 N.E.2d at 1094 (that shooter shot the victim in the head from point-blank range supported inference the shooter had specific intent to kill). However, when a defendant is charged as an accomplice, the State must prove intent to kill for both the shooter and the accomplice. *Bethel*, 730 N.E.2d at 1246. That Moody was shot in the head twice from close range as she sat in a car permits us to infer the shooter intended to kill her. But if Miller was the shooter and Baxter the accomplice, the details of the shooting imply nothing about Baxter's intent. *See Hopkins*, 759 N.E.2d at 639 (reversing conviction of accomplice due to lack of evidence about intent).

The State asserts the erroneous instruction was harmless because Baxter's defense focused more on the identity of the shooter than on Baxter's intent. However, Baxter was not charged with accomplice liability for attempted murder until after all evidence had closed; he had no opportunity to present evidence addressing his intent as an accomplice. When Baxter took the stand, he testified Miller was the shooter, Miller leaned in the car door to do the shooting as Baxter was getting out of the car, and Baxter did not know Miller was planning to shoot. In closing argument, Baxter's counsel argued Baxter lacked knowledge⁶ of Miller's plan:

If [Baxter] knew there was going to be a shooting in that car that night,

⁶ As "knowledge" is a lower level of culpability than "intent," Baxter could not have had intent if he had no knowledge. *Compare* Ind. Code § 35-41-2-2(a) ("A person engages in conduct 'intentionally' if, when he engages in the conduct, it is his conscious objective to do so.") *with* Ind. Code § 35-41-2-2(b) ("A person engages in conduct 'knowingly' if, when he engages in the conduct, he is aware of a high probability that he is doing so."). Thus, by arguing he had no knowledge, Baxter implicitly was arguing also that he had no intent.

whether by himself or by [Miller], why would he have a gas can between his legs. As [Prosecutor] pointed out, he could have put that gas can in the trunk at Claude & Annie's. He said, "I don't know. It didn't occur to me at that time. I'd -- I'd had it with me in the car, you know, I just came to put it in the car with me." If he knows there's going to be a shooting, why would he risk igniting fumes off that gas can when that gun goes off? Well, they got lucky and it didn't, but if you're planning a shooting, what [sic] would you do that?

* * * * *

[T]he instructions tell you there doesn't have to be a motive. You don't have to know what the motive is for a killing. But why did Dion Baxter kill his best friend of 30 years? The motive thing goes to [Miller] too. And you don't have to know why [Miller] would do it. But who would be more likely to do it? [Baxter], the best friend of 30 years, or [Miller]? Who is less unlikely to do it? Let's put it that way. I think you figured out the only issue here is the who? The very first element of each charge. Basically the red, white and blue element of the flag question. All of the other ones are irrelevant, because they're there. But it's that main, main issue. And in order to find that it was [Baxter] who committed these crimes or who intentionally -- knowingly, intentionally, with the intent that this happened, set this up beyond a reasonable doubt. That's the only way you can -- you can find him guilty. Now, you're going to be getting an in -- instruction on accessory. And it tells you, you know, you can't consider what may or may not have happened to the other person. But in order to be held responsible for the actions of another, you have to have knowledge that you're helping in the commission of the charged crime. Mere presence or failure to oppose is not enough to -- to constitute aiding, inducing or causing. You have to prove beyond a reasonable doubt that the defendant had knowledge of and participated in the commission of the crime. Just putting [Miller] and [Baxter] together is not enough. There would have to also be the knowing participation of [Miller] killing [Williams]. And, again, we go to, it's his best friend. To set him up to be killed right in front of his own eyes with a gas can at his feet, doesn't make sense.

(Tr. at 600, 602-03.)

We acknowledge evidence that would support finding Baxter was the principal in the shootings; Moody and Bray both so testified. *See Baxter*, No. 49A02-0504-CR-296, slip op. at 11 (holding evidence was sufficient to convict Baxter as principal). We also

held, on direct appeal, the evidence was sufficient to convict Baxter as the accomplice; however, we did not address whether there was evidence Baxter had *intended Moody die when he aided Miller* -- the very element missing from the trial court's erroneous jury instruction.⁷

Moreover, sufficient evidence to convict a defendant does not necessarily mean an erroneous jury instruction is harmless. *See Hopkins*, 759 N.E.2d at 638 (reversing for identical instructional error after stating: "We agree with the State that it presented sufficient evidence at trial from which a jury could conclude that Defendant was guilty of attempted murder.")⁸ The jury could have relied on the improper accomplice liability

⁷ In finding the evidence sufficient to affirm for accomplice liability, our analysis provided:

As an aside, we note that even if the jury had believed Baxter's testimony that Miller shot the victims, Baxter could nonetheless have been convicted as an accomplice. As noted above, there is no separate crime of accessory or aiding and abetting. *Cowan*, 783 N.E.2d at 1276. Rather, a defendant may be convicted as a principal upon evidence that he aided or abetted in the perpetration of the charged crime. *Vandivier v. State*, 822 N.E.2d 1047, 1054 (Ind. Ct. App. 2005), *trans. denied*. For a defendant to be convicted as an accomplice, it is not necessary that he participate in every element of the offense. *Alexander v. State*, 837 N.E.2d 552, 555 (Ind. Ct. App. 2005). In fact, a defendant may be convicted as an accomplice to murder where he had only tangential involvement in the killing. *Ajabu v. State*, 693 N.E.2d 921, 937 (Ind. 1998). Conviction as an accomplice requires proof of the defendant's affirmative conduct, by acts or words, from which an inference of common design or purpose to effect the commission of the crime may reasonably be drawn. *Id.* at 555.

When examining Baxter's potential guilt under an accomplice theory, the evidence showed that Baxter was a companion of Miller's both prior to and after the commission of the offense. Baxter led the victims directly to Miller, and he attempted to hide his clothing after the shootings. Tr. p. 119-24, 312-14, 472-77. Baxter signaled and aided Miller by opening the back door of Williams's vehicle. Tr. p. 477-78. In light of this evidence, the jury could have drawn an inference of a common design or purpose between Miller and Baxter to commit the crimes on the basis of accomplice liability, even if it chose to disbelieve Moody and Bray's testimony.

Baxter, slip op. at 11-12.

⁸ Based on the explicit language from our Supreme Court in *Hopkins*, 759 N.E.2d at 638, we decline to follow *Cowherd v. State*, 791 N.E.2d 833, 841 n.9 (Ind. Ct. App. 2003), *trans. denied*, in which a panel of this court stated in dictum that a sufficiency finding on direct appeal was *res judicata* for whether an

instruction to convict Baxter as the accomplice to attempted murder without finding he had the specific intent to kill required for a proper conviction.

We also note this jury acquitted Baxter of carrying a handgun without a license. If the jurors did not believe Baxter had a gun, they presumably believed he was Miller's accomplice. As this is the crime for which the erroneous instructions would have permitted the jury to convict Baxter without finding he had intent that Moody be killed, we hold Baxter was prejudiced by the erroneous instructions. *See id.* at 639 (reversing conviction of accomplice due to lack of evidence about intent).

Because Baxter demonstrated an objection should have been sustained and he was prejudiced to such an extent that the result of his trial may have been different, his counsel was ineffective for not objecting to the lack of a specific intent requirement in the instructions on accomplice liability for attempted murder.⁹ *See Specht*, 838 N.E.2d at

improper intent instruction was harmless error.

Moreover, *Cowherd* is distinguishable in important respects. In *Cowherd*, there was a shooting at the gas station where Cowherd's ex-girlfriend worked. Cowherd and his co-defendant fled in Cowherd's car. Police saw Cowherd throw one gun from the car and found a second gun in the car after Cowherd crashed. Forensic testing determined both weapons had shot bullets into the gas station. Because there were bullets from two guns, two guns recovered, and two defendants, Judge Sharpnack wrote: "Here, the evidence demonstrated that Cowherd was a principal, not an accomplice to the shootings." 791 N.E.2d at 840-41. In contrast, the shooting of Williams and Moody involved one gun and one shooter. Both Baxter and Miller could not be convicted as principals.

⁹ Baxter also asserts the post-conviction court erred by denying his ineffective assistance of appellate counsel claim based on counsel's failure to argue this instructional error constituted fundamental error. Appellate counsel can be ineffective regarding the selection and presentation of issues if the petitioner demonstrates based on the information available in the trial record or otherwise known to appellate counsel that counsel failed to present a significant and obvious issue and that this failure cannot be explained by any reasonable strategy. *Seeley v. State*, 782 N.E.2d 1052, 1059 (Ind. Ct. App. 2003), *trans. denied, cert. denied* 540 U.S. 1020 (2003). As we held Baxter was prejudiced by his trial counsel's failure to properly object to these erroneous instructions regarding accomplice liability for attempting murder, Baxter would have been entitled to reversal on this issue if counsel had raised it on direct appeal. *See, e.g., Hopkins*, 759 N.E.2d at 633 (reversing for fundamental error). Thus, Baxter was prejudiced by

1091-1092. Thus, we reverse the denial of his petition for relief as to his conviction of attempted murder of Moody and vacate that conviction. *See id.* at 1092. Because on direct appeal we held the record contained sufficient evidence to convict Baxter of attempted murder of Moody, the State may retry Baxter for this crime without violating double jeopardy principles. *See id.* at 1095 (holding Specht could be retried).

CONCLUSION

Because Baxter received ineffective assistance when counsel failed to challenge on the proper ground the fundamentally erroneous instructions for attempted murder of Moody, we reverse the denial of Baxter's petition for post-conviction relief and order vacated his conviction of attempted murder.

Reversed.

KIRSCH, J., concurs.

DARDEN, J., dissents with opinion.

his appellate counsel's failure to raise this significant and obvious issue on direct appeal.

**IN THE
COURT OF APPEALS OF INDIANA**

WILLIAM D. BAXTER,)	
)	
Appellant,)	
)	
vs.)	No. 49A02-0908-PC-724
)	
STATE OF INDIANA,)	
)	
Appellee.)	

DARDEN, Judge, dissenting

I respectfully dissent as to the holding that the failure of trial counsel to object to the trial court’s accomplice liability instruction prejudiced Baxter. The evidence in this case was sufficient to demonstrate beyond a reasonable doubt that Baxter was the shooter; again, Moody and Bray both testified that Baxter was the shooter. We held on direct appeal that the evidence was sufficient to sustain Baxter’s conviction for attempted murder as the principal. *See* No. 49A02-0504-CR-296, slip op. at 11. The determination that the evidence was sufficient to support the conviction is res judicata. *See Cowherd v. State*, 791 N.E.2d at 841 n.9.

Although the finding of Baxter guilty as a principal is inconsistent with acquitting him of carrying a handgun without a license, I do not presume that the jury believed that Baxter was Miller's accomplice merely because the jury acquitted him of carrying a handgun without a license. *See Yeager v. U.S.*, 129 S. Ct. 2360, 2368 (2009) ("Courts properly avoid . . . explorations into the jury's sovereign space[.]"). More importantly, an inconsistent verdict has no bearing on whether the evidence was sufficient to convict Baxter as the principal. *Cf. Beattie v. State*, 924 N.E.2d 643, 648 (Ind. 2010) ("The evaluation of whether a conviction is supported by sufficient evidence is independent from and irrelevant to the assessment of whether two verdicts are contradictory and irreconcilable."). Here, the evidence clearly was sufficient to convict Baxter as the principal.

Finally, the trial court properly instructed the jury on attempted murder. Thus, I cannot say that there is a reasonable probability that the outcome of the trial court would have been different. I believe that Baxter has failed to demonstrate that he was prejudiced by his trial counsel's performance. *See Cowherd*, 791 N.E.2d at 841 (finding no prejudice in failing to object to the instruction on accomplice liability for attempted murder, where the evidence was sufficient to sustain the defendant's conviction as the principal; and "the jury was properly instructed regarding the elements of attempted murder"). As such, I also find Baxter's argument that appellate counsel was ineffective to be without merit. Accordingly, I would affirm the denial of Baxter's petition for post-conviction relief.