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IN THE
COURT OF APPEALS OF INDIANA

JANSSEN HAMLETT,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 02A03-0606-PC-262
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable John F. Surbeck, Jr., Judge
Cause No. 02D04-9910-CF-530
(02D04-0210-PC-167)

December 29, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Janssen Hamlett appeals the denial of his petition for post-conviction relief. We affirm.

Issue

Hamlett raises three issues, which we consolidate and restate as follows: whether he received ineffective assistance of trial and appellate counsel.[1]

Facts and Procedural History

On direct appeal, this Court set forth the following facts:

> [O]n the afternoon of October 12, 1999, Hamlett went to the apartment of Ryan Guevara attempting to buy some marijuana. Ryan told Hamlett that the amount of marijuana he wanted to purchase would cost forty dollars. Hamlett left and returned shortly thereafter with an unidentified individual. Ryan, however, permitted only Hamlett to enter the apartment. While Ryan was in his bedroom bagging the marijuana, Hamlett used the restroom. When Ryan opened the door to the bedroom, Hamlett simultaneously opened the restroom door. Hamlett pointed a gun at Ryan's face from approximately five feet away and shot him in the left cheek. Hamlett then pointed the gun at John Ray, who was present in the apartment in order to cut Ryan's hair, and shot at him twice. Next, Hamlett fired shots at Ricky Guevara, Ryan's nephew, who also lived in the apartment. Ricky dove behind a futon couch in the living room. Hamlett again pointed his gun at John Ray and shot at him a third time from three to four feet away. Hamlett then fired another shot at the futon, where Ricky was hiding. John Ray died from his injuries before the police arrived.
>
> At the hospital, Ryan and Ricky were interviewed by several Fort Wayne police officers. Both men identified the shooter as an African-American male and gave similar descriptions as to the shooter's appearance and physical characteristics. Ryan and Ricky each told the officers that prior to the shooting they heard John Ray refer to the shooter as "Jay," and Ryan further mentioned that he thought John Ray knew "Jay," from Snider High

[1] Hamlett also asserts that his sentence is manifestly unreasonable and that the trial court erred in balancing aggravating and mitigating circumstances. Issues known and available on direct appeal, but not raised, are procedurally defaulted as a basis for relief in subsequent proceedings. *Williams v. State*, 808 N.E.2d 652, 659 (Ind. 2004). The sentencing issues Hamlett raises were known and available on direct appeal, and he has therefore waived these issues. We may review them only in connection with his claim of ineffective assistance of counsel.

> School. The police subsequently contacted a guidance counselor at Snider High School, who informed them that Hamlett was known as "Jay." Based on such information, the police put together a photo line-up, which was shown to Ryan and Ricky separately on October 16, 1999. Each identified Hamlett as the person who shot them. In addition to such identifications, Tocarra Whatley, who was babysitting across the street from the Guevaras' apartment at the time of the shootings, positively identified Hamlett from the photo line-up as the individual she saw go into the apartment just before hearing the gunshots.

Hamlett v. State, No. 02A03-0105-CR-138, slip op. at 2-3 (Ind. Ct. App. Nov. 14, 2001) (footnote omitted).

On October 27, 1999, the State charged Hamlett with one count of murder and two counts of attempted murder. The trial court declared Hamlett's first trial a mistrial because the jury was unable to reach a verdict. A second trial began on November 13, 2000. On November 16, 2000, the jury found Hamlett guilty as charged. On January 5, 2001, the trial court sentenced Hamlett to sixty-five years for the murder conviction and concurrent terms of thirty years for each attempted murder conviction, to be served consecutive to the murder sentence. Hamlett appealed, claiming that his convictions were not supported by sufficient evidence. On November 14, 2001, this Court affirmed the jury's verdict. *Hamlett*, slip. op. at 4.

On October 31, 2002, Hamlett filed a pro se petition for post-conviction relief. On June 24, 2005, Hamlett, by counsel, filed an amended petition for post-conviction relief, alleging that (1) his ninety-five-year sentence was inappropriate and the trial court erred in weighing aggravating and mitigating circumstances; (2) his trial counsel was ineffective in that he failed to object to inadmissible opinion testimony and to prosecutorial misconduct; and (3) his appellate counsel was ineffective in that he failed to raise the issues of improper

opinion testimony, prosecutorial misconduct, improper weighing of aggravating and mitigating circumstances, and manifestly unreasonable sentence. Appellant's App. at 56-67.

On May 1, 2006, the post-conviction court denied Hamlett's petition. Hamlett appeals. Additional facts will be provided as necessary.

Discussion and Decision

Hamlett challenges the denial of his petition for post-conviction relief. Our standard of review is well settled:

> The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. 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. Further, the post-conviction court in this case entered findings of fact and conclusions of law 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. In this review, findings of fact are accepted unless clearly erroneous, but no deference is accorded conclusions of law.

Fisher v. State, 810 N.E.2d 674, 679 (Ind. 2004) (citations and quotation marks omitted).

Hamlett argues that he received ineffective assistance of trial and appellate counsel. We first address whether trial counsel was ineffective. To prevail on a claim of ineffective assistance of trial counsel, Hamlett must satisfy a two-prong test:

> First, the defendant must show that the counsel's performance was deficient by falling below an objective standard of reasonableness and the resulting errors were so serious that they resulted in a denial of the right to counsel guaranteed under the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced his defense. Prejudice is shown with a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. This reasonable probability is a probability sufficient to undermine confidence in the original outcome of the

proceeding.

McKorker v. State, 797 N.E.2d 257, 267 (Ind. 2003) (citations omitted). Further, we may dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, if that is the easiest route. *Robinson v. State*, 775 N.E.2d 316, 319 (Ind. 2002).

Hamlett first claims that his trial counsel was ineffective in failing to object to opinion testimony provided by Fort Wayne Police Detective Garry Hamilton. In reviewing this issue, we note that when a claim of ineffective assistance of counsel is based on the failure to object, the defendant must show that a proper objection would have been sustained. *Smith v. State*, 765 N.E.2d 578, 585 (Ind. 2002). As part of his investigation, Detective Hamilton had informed Hamlett's mother that he needed to speak to Hamlett, who was at that time in Marion, Ohio. Hamlett voluntarily returned to Fort Wayne and was interviewed by Detective Hamilton. At trial, the prosecutor questioned Detective Hamilton about the interview:

> [Prosecutor]: Now at this time, after Janssen Hamlett told you this, that he met this guy, happened to be named Jay, was gonna buy a dime bag. What'd you say? What'd you ask him further?
>
> [Detective Hamilton]: Well, *the story was just too unbelievable*. I said, so, some guy you don't know, walking down the street, smoking a joint, you ask him for a hit of your joint, he passes to you. You go to a drug house, basically, over this [sic] guy's house, they wouldn't let you in to buy any dope but you come back a hour [sic] later and they sell you some dope? He said, all they want to do is make money. And then at that time, I then stated, well, I've got two people has [sic] positively identified you as the person who did the shooting. … *I said, that's undisputable evidence*. He said, I know that.

Appellant's App. at 169-70 (emphases added).

Hamlett contends that Detective Hamilton's testimony was inadmissible pursuant to Indiana Evidence Rule 704(b), which provides in relevant part, "Witnesses may not testify to

opinions concerning intent, guilt, or innocence in a criminal case; the truth or falsity of allegations; whether a witness testified truthfully; or legal conclusions." The rule protects the province of the jurors to determine what weight they should ascribe to a witness's testimony. *Callis v. State*, 684 N.E.2d 233, 239 (Ind. Ct. App. 1997). Detective Hamilton's statement that Hamlett's story was unbelievable reflects on Detective Hamilton's belief that Hamlett is guilty. Detective Hamilton's statement that the identifications were undisputable bears on the legal effect of the eyewitness identifications. Thus, we agree that Detective Hamilton's testimony would have been inadmissible pursuant to Evidence Rule 704(b).[2] *See Smith v. State*, 721 N.E.2d 213, 217 (Ind. 1999) (concluding that admission of portion of police interview in which detective stated that he believed defendant was the perpetrator was error); *Oldham v. State*, 779 N.E.2d 1162, 1171 (Ind. Ct. App. 2002) (observing that officer should not have been permitted to testify about his belief that defendant committed murder but determining no fundamental error occurred), *trans. denied* (2003); *Hornbostel v. State*, 757 N.E.2d 170, 182 (Ind. Ct. App. 2001) (determining that trial court erred in allowing prosecutor to ask detective whether he believed various assertions made by defendant but finding no prejudice to defendant), *trans. denied* (2002).

Nonetheless, Hamlett has not established sufficient prejudice. Here, both surviving victims of the shooting independently and unequivocally identified Hamlett as the person who shot them both before and during trial. Additionally, a neighbor identified Hamlett as

[2] The State asserts, without citation to authority, that Detective Hamilton's testimony was admissible because he did not testify as to whether Hamlett's trial testimony was truthful but whether Hamlett's pre-trial statement was truthful. Appellee's Br. at 9. We think Detective's Hamilton's statement that Hamlett's story was "unbelievable" demonstrates the detective's opinion that Hamlett is guilty and therefore is prohibited by Evidence Rule 704(b).

the person she saw enter the apartment just before hearing gunshots. Despite the fact that Hamlett presented an alibi defense, these eyewitness identifications are powerful evidence, and we therefore cannot say that the outcome of his trial would have been different absent the erroneous admission of Detective's Hamilton's testimony.

Next, Hamlett asserts that his trial counsel was ineffective in failing to object to prosecutorial misconduct. When we review a claim of prosecutorial misconduct, we determine (1) whether the prosecutor engaged in misconduct and (2) whether that misconduct, under all the circumstances, placed the defendant in a position of grave peril to which he should not have been subjected. *Muex v. State*, 800 N.E.2d 249, 251 (Ind. Ct. App. 2003). The gravity of peril is based upon the probable persuasive effect that the misconduct had on the jury's decision, rather than on the extent of the misconduct's impropriety. *Id*.

In the case at bar, the prosecutor made the following statement during closing argument: "The defense attorney is trying to get you caught up on little itty-bitty minertia [sic] in this case. Trying to get you buried in a smoke screen so you don't see the fire ladies and gentlemen." Appellant's App. at 171. A few moments later, the prosecutor cautioned the jury not to get caught up in the "smoke screen" but to "look at the evidence." *Id*. at 172.

To support his argument that the prosecutor's comment constituted misconduct, Hamlett cites *Lynch v. State*, 262 Ind. 360, 316 N.E.2d 372 (1974), and *Nevel v. State*, 818 N.E.2d 1 (Ind. Ct. App. 2004). We acknowledge that in both cases, the reviewing courts concluded that the prosecutors' comments, similar to the one made here, were improper. We observe, however, that neither court determined that the improper comment warranted a new

trial. In fact, we noted in *Nevel* that "on a case-by-case basis, the prosecutor may characterize the defense's evidence as 'smoke and mirrors' if such is warranted." 818 N.E.2d at 5. Thus, neither case cited by Hamlett persuades us that his claim should prevail. Rather, we think *Donnegan v. State*, 809 N.E.2d 966 (Ind. Ct. App. 2004), *trans. denied*, is dispositive of this issue.

In *Donnegan*, the prosecutor stated that the defendant's entire defense was "smoke and mirrors." *Id*. at 973 (quotation marks omitted). We held that the prosecutor's remark concerned "the quality" of the defense and was "a permissible comment on the evidence." *Id*. at 974. We think that the prosecutor's comment in this case is similar. Accordingly, we conclude that the prosecutor's remark here does not constitute prosecutorial misconduct. Thus, we find no grounds for ineffectiveness here.

We now turn to Hamlett's claim that he received ineffective assistance of appellate counsel. We review claims of ineffective assistance of appellate counsel using the same standard applicable to claims of trial counsel ineffectiveness. *Fisher*, 810 N.E.2d at 676. The defendant must establish that appellate counsel was deficient in his performance and that the deficiency resulted in prejudice. *Id.* at 677. Ineffective assistance of appellate counsel claims generally fall into three basic categories: (1) denial of access to an appeal, (2) waiver of issues, and (3) failure to present issues well. *Id.* Hamlett's claim falls in the second category.

Hamlett asserts that appellate counsel was ineffective for failing to raise the issues of improper testimony and prosecutorial misconduct and for failing to challenge Hamlett's sentence. To establish that counsel was ineffective in failing to raise an issue upon appeal,

the defendant must overcome the strongest presumption of adequate assistance. *Id.* To evaluate a waiver of issue claim, we use a two-prong analysis: (1) whether the unraised issues are significant and obvious from the record, and (2) whether the unraised issues are "clearly stronger" than the raised issues. *Id.* If that analysis demonstrates that counsel's performance was deficient, we then examine whether the issues that appellate counsel failed to raise would have been more likely to result in reversal or an order for a new trial. *Bieghler v. State*, 690 N.E.2d 188, 194 (Ind. 1997).

With regard to appellate counsel's failure to raise the issue of Detective Hamilton's testimony, any error found on appeal would have been harmless for the reason discussed earlier, namely, that the unequivocal identification of Hamlett by both victims of the crime as well as the identification of a witness who saw him enter the apartment is potent evidence. Harmless errors do not warrant reversal. Ind. Trial Rule 61. "Counsel will not be deemed ineffective for failing to present meritless claims." *Lowery v. State*, 640 N.E.2d 1031, 1049 (Ind. 1994), *cert. denied* (1995). In addition, having found that the prosecutor did not commit misconduct, we conclude that failing to raise that issue was not ineffective assistance of appellate counsel. *See id*.

Thus, the remaining issue is whether appellate counsel was ineffective in failing to challenge Hamlett's sentence.[3] Hamlett first contends that appellate counsel should have argued that the trial court erred in weighing aggravating and mitigating circumstances. At

[3] Hamlett was sentenced on January 5, 2001, and his direct appeal was decided on November 14, 2001, before the United States Supreme Court decision in *Blakely v. Washington*, 542 U.S. 296 (2004), and the Indiana legislature's sentencing amendments in response thereof, effective April 25, 2005. Consequently, we apply the sentencing statutes in effect at the time of Hamlett's sentencing.

the sentencing hearing, the trial court found the following mitigating factors: (1) Hamlett had no prior felony record; and (2) Hamlett was nineteen years old at the time he committed the crimes. Hamlett had also argued that his incarceration would be a hardship on his dependent, but the trial court declined to find this a mitigating factor because Hamlett had no contact with the child and was not court-ordered to pay child support. The trial court found the following aggravating factors: (1) Hamlett's criminal history, including true findings for resisting law enforcement and battery on a police officer as a juvenile and a class C misdemeanor conviction for never receiving a license; and (2) the nature and circumstances of the offense, in that the crime was premeditated and planned. The trial court found that the aggravating factors outweighed the mitigating factors. Hamlett received a sixty-five year sentence for his murder conviction, an enhancement of ten years over the presumptive term.[4] He received concurrent sentences of thirty years each for his attempted murder convictions, to be served consecutive to his murder sentence in light of the fact that there were multiple victims. Appellant's App. at 44.[5] Thus, he received an aggregate sentence of ninety-five years.

As we consider this issue, we are guided by our standard of review. Sentencing is a determination within the sound discretion of the trial court, and we will not reverse the trial

[4] At all relevant times, Indiana Code Section 35-50-2-3 provided, in relevant part, "A person who commits murder shall be imprisoned for a fixed term of fifty-five (55) years, with not more than ten (10) years added for aggravating circumstances or not more than ten (10) years subtracted for mitigating circumstances[.]"

[5] At all relevant times, Indiana Code Section 35-50-2-4 provided in relevant part, "A person who commits a Class A felony shall be imprisoned for a fixed term of thirty (30) years, with not more than twenty (20) years subtracted for mitigating circumstances[.]"

court's decision absent an abuse of discretion. *Allen v. State*, 722 N.E.2d 1246, 1250 (Ind. Ct. App. 2000). Given the degree of subjectivity that cannot be eliminated in the sentencing process, it would be inappropriate for us merely to substitute our opinions for those of the trial judge. *Id*. "When enhancing a presumptive sentence, the trial court must identify all significant aggravating and mitigating factors, state why each is considered aggravating or mitigating, and articulate the balancing process by which the court determined that the aggravating factors outweighed the mitigating factors." *Coleman v. State*, 694 N.E.2d 269, 279 (Ind. 1998).

Hamlett argues that neither of the aggravating factors is particularly strong. With regard to his criminal history, we agree with his characterization, and we note that the trial court stated that it did not weigh this factor heavily. Appellant's App. at 177. However, we disagree with Hamlett that the nature and circumstances of the crime were not entitled to significant weight. The trial court noted that the crime was premeditated and planned. Contrary to Hamlett's assertion, the premeditated nature and planning of the crime is not merely an element of the offense or derivative of Hamlett's criminal history. To convict a person of murder, the State must prove that he knowingly or intentionally killed another. Ind. Code § 35-42-1-1. The State is not required to prove that a person planned in advance to kill another. We think the premeditated planning of murder demonstrates a callous, unfeeling disregard for human life that goes beyond that associated with a murder committed without forethought. *See Bustamante v. State*, 557 N.E.2d 1313, 1322 (Ind. 1990) (stating that planning murder evinces a higher degree of moral culpability deserving of enhanced sentence).

As to the mitigating factors, Hamlett asserts that the two recognized by the trial court are strong and that the trial erred in failing to consider two additional mitigators proffered by defense counsel. Under these circumstances, we disagree that Hamlett's relatively minimal criminal history and young age are of such mitigating significance as to outweigh the aggravating weight of the nature and circumstances of the crime. Where a youthful offender is "hardened and purposeful", young age may not be given any mitigating weight. *See Ellis v. State*, 736 N.E2d 731, 736 (Ind. 2000) (concluding that trial court did not abuse its discretion in declining to give mitigating weight to fact that defendant was twenty-one at time of crime). Here, Hamlett's planning and execution of the crimes indicates that although he is young, he is hardened and purposeful. Consequently, we do not think that his age and lack of felony convictions are entitled to as much mitigating weight as Hamlett contends.

With regard to the trial court's failure to consider two additional mitigators, we note that the finding of mitigating factors is not mandatory; it rests within the discretion of the trial court. *Bunch v. State*, 697 N.E.2d 1255, 1258 (Ind.1998). A court is not obligated "to credit or weigh a possible mitigating circumstance as defendant suggests it should be credited or weighed." *Archer v. State*, 689 N.E.2d 678, 684 (Ind. 1997). "Only when the trial court fails to find a significant mitigator that is clearly supported by the record is there a reasonable belief that it was improperly overlooked." *Legue v. State*, 688 N.E.2d 408, 411 (Ind. 1997).

Hamlett argues that his voluntary withdrawal from a gang during his teenage years and his cooperation with police by voluntarily coming from Ohio to Indiana for questioning should have been accepted by the trial court as mitigating factors. The mere fact that Hamlett withdrew from a gang, without more detail, and without an explanation as to how his

withdrawal is related to the current offenses, is not a significant mitigator clearly supported by the record. In addition, the cases cited by Hamlett to support his argument are not on point.

As for voluntarily coming to police for questioning, Hamlett fails to cite any case where voluntarily agreeing to talk to police has been considered a mitigating factor. Hamlett cites *Hurt v. State*, 657 N.E.2d 112 (Ind. 1995). There, our supreme court held that a defendant's surrender was an appropriate consideration in imposing concurrent rather than consecutive sentences. However, it does not follow that the trial court is required to consider a defendant's surrender a mitigating factor. Of particular significance to us is the fact that Hamlett did not surrender; he did not report or confess to the crimes. Where the defendant did not confess or explain the events relevant to the crime, our supreme court has held that the trial court did not err in failing to find that a defendant's surrender to police was a mitigating factor. *Brown v. State*, 698 N.E.2d 779, 783 (Ind. 1998). Therefore, we cannot say that the trial court abused its discretion in failing to find additional mitigators.

Having decided that the trial court accorded the appropriate weight to the aggravating and mitigating factors, we conclude that the trial court did not abuse its discretion in finding that the aggravating factors outweighed the mitigating factors. Accordingly, appellate counsel was not ineffective in failing to raise this issue.

Hamlett finally argues that appellate counsel was ineffective in failing to argue that his sentence was manifestly unreasonable. At the time of Hamlett's direct appeal, a sentence could not be revised on appeal unless it was "manifestly unreasonable in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B) (2001).

In support of his argument that his sentence is manifestly unreasonable, Hamlett asserts that he was a young man who had withdrawn from a gang and voluntarily surrendered himself for questioning. He also urges that his crime is far from being the worst murder or attempted murder and he is not the most culpable offender. If Hamlett had received only the presumptive sentence for each of his three offenses, and if there had been no aggravators other than the fact of multiple victims, he could have received consecutive sentences totaling 110 years—fifty-five years for murder, and an additional fifty-five years for the two counts of attempted murder. *See Ellis*, 736 N.E.2d at 737-38 (determining that the limitation for consecutive sentencing for attempted murder convictions may not exceed the presumptive sentence for the felony one class above it, that is murder); Ind. Code § 35-50-1-2(c) (2001). Thus, Hamlett's sentence is fifteen years less than the sentence he could have received had the trial court imposed consecutive presumptive sentences. Accordingly, we cannot say that his sentence is manifestly unreasonable. We conclude that Hamlett did not receive ineffective assistance of appellate counsel.

Affirmed.

BAKER, J., and VAIDIK, J. concur.