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**IN THE
COURT OF APPEALS OF INDIANA**

MARK P. MURRAY,)
)
Appellant-Petitioner,)
)
vs.) No. 02A03-0703-PC-102
)
STATE OF INDIANA,)
)
Appellee-Respondent.)

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Frances C. Gull, Judge
Cause No. 02D04-0301-PC-17

September 12, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Mark Murray (“Murray”) was convicted in Allen Superior Court of felony murder and sentenced to serve sixty years. He subsequently filed a petition for post-conviction relief, which was denied. He appeals and argues that he was denied effective assistance of trial and appellate counsel due to counsel’s failure to object to the prosecutor’s discussion of accomplice liability during closing argument and failure to raise the issue on appeal. Concluding that Murray was not prejudiced by counsel’s deficient performance, we affirm.

Facts and Procedural History

In 2000, Murray was convicted of felony murder and sentenced to serve sixty years in the Department of Correction. Murray appealed his conviction, which was affirmed. Facts pertinent to this appeal are found in our supreme court’s resolution of Murray’s direct appeal.

The facts most favorable to the verdict show that Murray decided to confront Anthony Watson about his verbal abuse of a mutual female friend. In the evening hours of May 17, 1999, accompanied by two associates: Thomas Thompson and David Jackson, Murray proceeded to Watson’s house. Thompson drove his van and Jackson brought along an aluminum baseball bat. After arriving at the house, Murray and Jackson exited the van while Thompson stayed behind. Murray kicked in the front door, and he and Jackson entered. Murray then began yelling at Watson who was apparently asleep on the living room couch and did not respond. What occurred next is a matter of dispute. Jackson testified at trial that while wielding the baseball bat, Murray struck Watson in the head. Murray testified in his own defense, denied handling the bat, and said he did not see anyone strike Watson with it. According to Murray, he merely hit Watson a few times in the head with his fist. In any event, the baseball bat was discarded and later recovered from a dumpster. DNA analysis revealed that a bloodstain found on the bat was consistent with Watson’s blood type. An autopsy revealed that Watson died as a result of blunt force injury to the head.

The State charged Murray with murder, felony murder, burglary as a Class A felony, and battery as a Class C felony. A jury acquitted Murray of

murder but returned guilty verdicts on the remaining charges. The trial court vacated the burglary and battery convictions and sentenced Murray to sixty years imprisonment for felony murder.

Murray v. State, 761 N.E.2d 406, 407-08 (Ind. 2002)

On January 24, 2003, Murray filed a pro se petition for post-conviction relief. The petition was later amended by counsel on May 22, 2006. At the evidentiary hearing held on August 4, 2006, Murray's trial and appellate counsel John Bohdan testified that he should have, but failed to, object to the prosecutor's discussion of accomplice liability during closing argument. P-C.R Tr. pp. 15-18.

The post-conviction court issued findings of fact and conclusions of law on January 9, 2007. The post-conviction court found in pertinent part:

15. Bohdan objected to the State's accomplice liability instructions. The court refused to instruct the jury on the theory of accomplice liability based upon evidence presented to the jury, but permitted the State to argue the evidence in its closing argument.

16. Bohdan did not object to this ruling or to the prosecutor's closing argument.

22. At the [Post-conviction relief] hearing Bohdan testified the introduction of the accomplice liability theory in closing argument undermined his trial strategy, and admitted he should have objected to both the court allowing the state to so argue, and the state's description itself during the closing argument. Further, Bohdan could offer no explanation for failing to raise these issues in the direct appeal.

7. It is not disputed that an objection to the argument should have been made and sustained; no evidence suggested that Murray aided, induced, or caused Jackson to kill Watson and it was not a probable and natural consequence of their common plan that Jackson, who came to provide support in the event of a fight, should hit the sleeping Watson with the bat. The question is whether there is a reasonable probability that Murray would have been acquitted had the jury considered only whether Murray himself killed Watson with the bat, and not whether Murray was an accomplice to the killing committed by Jackson.

Appellant's App. pp. 111-13. The post-conviction court then found that Murray was not prejudiced by counsel's deficient performance and denied his petition for post-conviction relief. Murray now appeals. Additional facts will be provided as necessary.

Standard of Review

Post-conviction proceedings are not "super appeals" through which convicted persons can raise issues they failed to raise at trial or on direct appeal. McCary v. State, 761 N.E.2d 389, 391 (Ind. 2002). Rather, post-conviction proceedings afford petitioners a limited opportunity to raise issues that were unavailable or unknown at trial and on direct appeal. Davidson v. State, 763 N.E.2d 441, 443 (Ind. 2002). 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) (2006); 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. Fisher, 810 N.E.2d at 679. 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 entered findings of fact and conclusions of law in accordance with Indiana Post-Conviction Rule 1(6) (2006). "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.'" Ben-Yisrayl v. State, 729 N.E.2d 102, 106 (Ind. 2000) (quoting State v. Moore, 678 N.E.2d

1258, 1261 (Ind. 1997)). Although we accept findings of fact unless they are clearly erroneous, we give conclusions of law no deference. Fisher, 810 N.E.2d at 679.

Discussion and Decision

Murray claims that his trial counsel was ineffective for failing to object to the prosecutor's discussion of accomplice liability during closing argument.

Claims of ineffective assistance of trial counsel are generally reviewed under the two-part test announced in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Thus, a claimant must demonstrate that counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms, and that the deficient performance resulted in prejudice. Prejudice occurs when the defendant demonstrates 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 arises when there is a "probability sufficient to undermine confidence in the outcome."

Appellate review of the post-conviction court's decision is narrow. We give great deference to the post-conviction court and reverse that court's decision only when "the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court."

Although the two parts of the *Strickland* test are separate inquiries, a claim may be disposed of on either prong. *Strickland* declared that the "object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, ... that course should be followed."

Grinstead v. State, 845 N.E.2d 1027, 1031 (Ind. 2006) (internal citations omitted).

Murray was charged and convicted of felony murder. See Ind. Code § 35-42-1-1(2) (2004 & Supp. 2007) ("A person who kills another human being while committing or attempting to commit . . . burglary . . . commits murder, a felony."). A felony murder conviction requires proof of intent to commit the underlying felony but not of intent to kill. See Luna v. State, 758 N.E.2d 515, 571 (Ind. 2001).

A person is subject to conviction for felony murder based on accomplice liability for the underlying offense. See Ind. Code § 35-41-2-4 (2004) (A person “who knowingly or intentionally aids, induces, or causes another person to commit an offense commits that offense[.]”). It is well settled that “the responsibility of a principal and an accomplice is the same.” Taylor v. State, 840 N.E.2d 324, 338 (Ind. 2006). A defendant may be charged as a principal yet convicted on proof that he aided another in the commission of a crime. Id. Importantly, “while jury unanimity is required as to the defendant’s guilt, it is not required as to the theory of the defendant’s culpability.” Id. at 333.

In this case, Murray cannot establish prejudice because the evidence was sufficient to convict him whether he was the principal or an accomplice. In his direct appeal, Murray claimed that the evidence was not sufficient to sustain his felony murder conviction because “the State failed to show that he intended to commit a felony when he broke and entered Watson’s house.” Murray, 761 N.E.2d at 409. Our supreme court rejected that argument and concluded that Murray’s intent to commit felony battery could be inferred from his “subsequent conduct once inside the premises.” Id. at 409-410. Murray admitted to punching Watson and Jackson testified that Murray struck Watson with the baseball bat. Trial Tr. p. 432; Murray, 761 N.E.2d at 408. This evidence was sufficient to convict Murray of felony murder.

Moreover, we are not persuaded by Murray’s claim that he was prejudiced by the State’s references to accomplice liability in its closing argument.¹ “Accomplice liability

¹ We agree that Murray’s counsel should have objected to the State’s accomplice liability argument both because the State’s accomplice liability instruction was refused and because the State mischaracterized

‘applies to the contemplated offense and all acts that are a probable and natural consequence of the concerted action.’” Kendall v. State, 790 N.E.2d 122, 131 (Ind. Ct. App. 2003), trans. denied (quoting Wieland v. State, 736 N.E.2d 1198, 1202 (Ind. 2000)). “Thus, the accomplice is liable ‘for everything . . . which follows incidentally in the execution of the common design, as one of its natural and probable consequences, even though it was not intended as a part of the original design or common plan[.]’” Id. at 132 (quoting Fox v. State, 497 N.E.2d 221, 227-228 (Ind. 1986)). See also Vasquez v. State, 762 N.E.2d 92, 95 (Ind. 2001) (“An accomplice can be held criminally liable for everything done by his confederates which was a probable and natural consequence of their common plan.”).

We cannot conclude that Murray was prejudiced by counsel’s failure to object because although Watson’s death might not have been a contemplated consequence of the original offense, it was a probable and natural consequence of Murray’s and Jackson’s common plan. At trial, Murray testified that he went to Watson’s house with the intention of confronting him because Watson was allegedly abusing his pregnant girlfriend. Trial Tr. pp. 423-24. Murray stated that he anticipated “a lot of words said or

the law of accomplice liability. However, we need not fully address that argument because Murray has not demonstrated that he was prejudiced by counsel’s deficient performance.

Yet, we do note that in support of his argument, Murray cites to a Washington Supreme Court case, in which that court held that “[w]hile it is not unconstitutional to charge a person as a principal and convict him as an accomplice, the *court must instruct* the jury on accomplice liability.” State v. Davenport, 675 P.2d 1213, 1218 (Wash 1984) (emphasis in original). Indiana has no analogous rule, and we cannot conclude that an Indiana defendant is necessarily prejudiced when the State argues accomplice liability to the jury, yet no instruction is given. See Whitener v. State, 696 N.E.2d 40, 43-44 (Ind. 1998) (Defendant’s counsel was not ineffective for failing to object to the State’s change of theory and its “repeated mention of the aiding or inducing theory of guilt. . . . [T]he State is entitled to argue the facts and the law which the facts support.”). This would also seem to be in accord with Article One, Section Nineteen of the Indiana Constitution, which provides: “In all criminal cases whatever, the jury shall have the right to determine the law and the facts.”

some punches thrown.” Id. at 424. He asked Jackson to come along to “get [his] back.” Id. at 425.

Jackson brought a bat with him in anticipation of a fight and Murray testified that he was aware that Jackson took the bat into Watson’s house. Id. at 429, 431. Under these facts and circumstances, we conclude that Watson’s death was a probable and natural consequence of Murray’s and Jackson’s common plan, i.e. to commit burglary and battery. Consequently, even if Murray’s testimony was credible and it was Jackson who struck Watson with the bat, the evidence was sufficient to convict Murray of felony murder.

Murray has not demonstrated that he was prejudiced by trial counsel’s failure to object to the State’s references to accomplice liability in its closing argument. For these same reasons, we conclude that Murray cannot establish that he was prejudiced by appellate counsel’s failure to raise the issue on direct appeal.

Affirmed.

NAJAM, J., and BRADFORD, J., concur.