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IN THE COURT OF APPEALS OF INDIANA

LORENZO STEWART,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 02A03-1104-PC-179
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Frances C. Gull, Judge
Cause No. 02D04-0701-PC-6; 02D04-0504-MR-8

December 12, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Judge

Appellant-petitioner Lorenzo Stewart appeals the denial of his petition for post-conviction relief, claiming ineffective assistance of counsel. Specifically, Stewart claims his trial counsel was ineffective because he failed to call witnesses, did not request an instruction on lesser-included offenses, and failed to present the defense of intoxication. Finding that Stewart did not receive ineffective assistance of trial counsel, we affirm the judgment of the post-conviction court.

FACTS[1]

The underlying facts, as stated by this Court in Stewart's direct appeal, are as follows:

> On April 23, 2005, at approximately 8:00 or 9:00 p.m., four people were inside Roy Hill's (Hill) apartment in Fort Wayne, Indiana, including Hill, Stewart, Janice Coleman (Coleman), and Rene Strater (Strater). Coleman and Strater were drinking alcohol and dancing in the kitchen, while Hill and Stewart sat at the kitchen table, drank alcohol, and watched them dance. At some point, Stewart commented to Strater that Strater thought she was "too good for [him]," and threatened to "fu*k up [Strater's] face." Trial Tr. p. 231. Stewart then shot Strater in the head with a .38 pistol. Moments later, Stewart approached Coleman and shot her in the middle area of her torso. After the shootings, which resulted in Strater's death and serious injury to Coleman, Stewart exited the apartment and said to a neighbor, "I shot them bitches, I shot them bitches," and, "I fu*ked up, I fu*ked up, damn, I fu*ked up." Trial Tr. pp. 218-19. Within five minutes, police officers arrived and arrested Stewart. When the police officers asked Stewart for the gun, Stewart told them it was on the ground behind them. The police then recovered the gun.
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> On April 28, 2005, the State filed Informations charging Stewart with: Count I, murder, I.C. § 35-42-1-1; Count I, Part 2, additional penalty for use of a firearm, I.C. § 35-50-2-11; Count II, attempted murder, a Class A felony, I.C. §§ 35-42-1-1, 35-41-5-1; Count III, carrying a handgun without a license, a Class C felony, I.C. §§ 35-47-2-1, 35-47-2-23; and

[1] On September 12, 2011, Stewart filed a motion for oral argument, which we hereby deny.

> Count III, Part 2, carrying a handgun without a license, I.C. §§ 35-47-2-1, 35-47-2-23. On November 15-16, 2005, a jury trial was held, and Stewart was found guilty on all counts and charges. On January 6, 2006, the trial court sentenced Stewart to 65 years, enhanced by 5 years, for Count I, murder; 50 years for Count II, attempted murder; and 8 years for Count III, carrying a handgun without a license. The trial court ordered Stewart's sentence on Count II to be served consecutive to that on Count I, and his sentence on Count III to be served concurrent to that on Count I.

Stewart v. State, No. 02A03-0602-CR-55, slip. op. at 2-3 (Ind. Ct. App. October 13, 2006).

On direct appeal, Stewart challenged the sufficiency of the evidence supporting his conviction for attempted murder. Id. at 2. A panel of this court affirmed. Id.

On May 21, 2010, Stewart, by counsel, filed an amended petition for post-conviction relief.[2] The petition, as amended, alleged that Stewart's trial counsel rendered ineffective assistance by: asking prospective jurors, during voir dire, to protect Stewart's right to remain silent; failing to call witnesses and to present a defense; engaging in ineffective cross-examination; failing to object to hearsay and to improper questioning and argument by the prosecutor; failing to present evidence of Stewart's intoxication; failing to submit jury instructions on the lesser included offenses; and failing to present evidence at Stewart's sentencing hearing. Stewart also presented several other contentions that the post-conviction court characterized as "free-standing claims of

[2] The original petition was filed on January 12, 2007.

complete innocence", deprivation of certain rights at trial, and that the trial court abused its discretion at sentencing. Appellant's App. p. 21.

On October 15, 2010, the post-conviction court held an evidentiary hearing during which Stewart, trial counsel, Mary O'Keefe Null, and character witnesses testified. On March 16, 2011, the post-conviction court denied Stewart's petition. The post-conviction court then entered findings of fact and conclusions of law. On the three issues relevant to this appeal, it concluded that trial counsel was not ineffective for failing to call Stewart, Null, or character witnesses because Stewart refused to testify, counsel would have lost credibility if he had called Null, and the testimony of the character witnesses would not have affected the outcome of the trial. The court also concluded that trial counsel's decision not to a tender jury instruction on lesser-included offenses was a strategic decision to present a defense consistent with the theory that Stewart was not the shooter. Lastly, the trial court concluded that voluntary intoxication is not a defense to a criminal charge, and thus, counsel cannot be held to be ineffective. Stewart now appeals.

DISCUSSION AND DECISION

I. Standard of Review

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); Perry v. State, 904 N.E.2d 302, 307 (Ind. Ct. App. 2009). When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. Id. at 307. 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. Post-conviction procedures do not afford petitioners with a "super appeal." Richardson v. State, 800 N.E.2d 639, 643 (Ind. Ct. App. 2003). Rather, they create a narrow remedy for subsequent collateral challenges to convictions that must be based upon grounds enumerated in the post-conviction rules. Perry, 904 N.E.2d at 307; see also P-C.R. 1(1).

II. Assistance of Counsel

Stewart argues that the post-conviction court erroneously found that he did not receive ineffective assistance of trial counsel despite trial counsel's failure to call witnesses, request a jury instruction on the lesser included offenses, or present the defense of intoxication. When making a claim of ineffective assistance of counsel, the defendant must first show that counsel's performance was deficient. Strickland v. Washington, 466 U.S. 668, 687 (1984); Pinkins v. State, 799 N.E.2d 1079, 1093 (Ind. Ct. App. 2003). This requires a showing that counsel's representation fell below an objective standard of reasonableness and that the errors were so serious that they resulted in a denial of the right to counsel guaranteed to the defendant by the Sixth and Fourteenth Amendments to the U.S. Constitution Strickland, 466 U.S at 687-88. Second, the defendant must show that the deficient performance resulted in prejudice—in other words, that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. at 694. If a claim of

ineffective assistance can be disposed of by analyzing the prejudice prong alone, we will do so. Wentz v. State, 766 N.E.2d 351, 360 (Ind. 2002).

A. Failure to Call Witnesses

Stewart argues that trial counsel was ineffective for failing to call Stewart, Mary O'Keefe Null and character witnesses to testify in his defense. In reviewing Stewart's claim, we must be mindful that a decision regarding what witness to call is a matter of trial strategy that we will not second-guess. Johnson v. State, 832 N.E.2d 985, 1003 (Ind. Ct. App. 2005).

Stewart contends that trial counsel was ineffective because he failed to call Stewart to testify in his own defense. But, at the PCR hearing, Stewart testified that he initially told trial counsel that his memory was hazy, he thought he would not make a good witness, and therefore he did not want to testify. PCR Tr. p. 51, 77, 81. Trial counsel testified that he tried to get Stewart to testify, but Stewart refused. Id. at 117. As the trial progressed, Stewart claimed he decided that he would rather testify, but never communicated this change in mind to trial counsel. Id. at 77. Defense counsel is not expected to act when his client fails to communicate a desire to testify after having first refused to testify, and, therefore, Stewart's trial counsel's performance was not deficient for failing to call Stewart to testify.

Next, Stewart alleges that trial counsel was ineffective for failing to interview Null because, had he interviewed her, he would have called her as witness. Stewart claims her testimony would have provided exculpatory evidence because it showed that Coleman had expressed an intent to harm Strater and there was a "hit" out on Strater.

Null testified during the post-conviction hearing that she overheard Coleman say she would "get that bitch alone and beat the sh*t out of her." Id. at 16. Although Stewart claims that Coleman was referring to Strater when she made those statements, Null testified at trial that she had "no clue" who Coleman was referring to. Id. at 17. Stewart also points to Null's testimony that Strater was rumored to be a "snitch" and she believed that Strater's murder was a "hit." Id. at 17, 20. Null, however, conceded that her conclusion was nothing more than a "gut feeling" and not based on any actual evidence. Id. at 20. Null's testimony is neither exculpatory nor convincing, particularly in light of the fact that Coleman was also shot during the same incident. As trial counsel testified during the hearing, he thought that it was highly implausible that Coleman would have had herself shot in order to cover up a hit. Furthermore, he believed the jury would have rejected such a theory. Id. at 127-28. Therefore, even if trial counsel would have known the substance of Null's testimony, we cannot say that counsel's performance was deficient when he failed to call Null to testify.

Moreover, we conclude that Stewart has failed to show prejudice and, in doing so, dispense with Stewart's claim that trial counsel was deficient for failing to call character witnesses who would testify to Stewart's reputation for nonviolence on the prejudice

prong alone. The evidence presented at trial shows that Stewart said to Strater, "You think you are pretty, you think you are pretty, you think you are too good for me, I'll f*ck up your face." Trial Tr. p. 231. Then, he shot her in the head. Id. at 367-68. He next walked over to Coleman and shot her point-blank in the chest. Id. at 156. Stewart walked out of the apartment with the gun and said to a neighbor, "I shot them bitches, I shot them bitches" and, "I f*cked up, I f*cked up, damn, I f*cked up." Id. at 218, 219, 230. Coleman called the police and dragged herself from the apartment. Id. at 156-57. The police arrived within five minutes and arrested Stewart while he walking around in the apartment's parking area. Id. at 158, 262. The police asked Stewart where the gun was, and he replied, "On the ground behind me." Id. at 262-63. The police recovered a black .38 pistol on the ground within two feet from where Stewart was standing. Id. at 263. In light of the overwhelming evidence the State presented at trial, Stewart has failed to show that he was prejudiced when trial counsel did not call Stewart, Null, or character witnesses to testify at trial. Thus, his claims of ineffective assistance of trial counsel fail on this basis.

B. Instruction on Lesser-Included Offenses

Stewart argues that his trial counsel's performance was deficient because trial counsel did not tender an instruction on the lesser-included offenses. Our Supreme Court has held that "a tactical decision not to tender a lesser-included offense does not constitute ineffective assistance of counsel, even where the lesser-included offense is

inherently included in the greater offense." Autrey v. State, 700 N.E.2d 1140, 1141 (Ind. 1998).

Here, Stewart's trial counsel, because Stewart maintained that he was not involved in the shootings, argued that Stewart was not the shooter and, accordingly, decided not to tender an instruction on the lesser-included offenses. PCR Tr. p. 133-35. Without the instruction on the lesser-included offenses, the jury could only convict Stewart as charged or acquit. Albeit a risky strategy, we find that, given the facts of the case and Stewart's proclamation of complete innocence, counsel's strategy was reasonable. See Lane v. State, 953 N.E.2d 625, 630 (Ind. Ct. App. 2011) (holding that counsel's decision to pursue an "all or nothing" strategy and not tender an instruction on the lesser-included offenses was completely reasonable.) Thus, Stewart has failed to establish that his trial counsel rendered ineffective assistance.

C. Intoxication Defense

Lastly, Stewart claims that his trial counsel should have presented evidence of his intoxication. Although Stewart argues that the jury could have considered Stewart's intoxication in order to determine whether he could form the requisite intent for murder and attempted murder, our Supreme Court has determined that a voluntarily intoxicated defendant cannot successfully claim that his actions were neither knowing nor intentional. Sanchez v. State, 749 N.E.2d 509, 517 (Ind. 2001). Thus, Stewart's trial counsel was not ineffective for failing to present evidence of intoxication.

The judgment of the post-conviction court is affirmed.

DARDEN, J., and BAILEY, J., concur.