

STATEMENT OF THE CASE

Robert Perry was convicted of Conspiracy to Commit Murder, a Class A felony, following a jury trial. On direct appeal, this court affirmed his conviction. See Perry v. State, No. 71A05-0407-CR-411 (Ind. Ct. App. July 1, 2005), trans. denied (“Perry I”). Perry subsequently petitioned for post-conviction relief, which the post-conviction court denied. He now appeals, challenging the post-conviction court’s judgment, and he raises a single issue for our review, namely, whether he was denied the effective assistance of trial counsel.

We affirm.

FACTS AND PROCEDURAL HISTORY

In Perry I, we set out the facts and procedural history as follows:

On December 3, 2001, Perry and a group of people, including Gary Burnett, were together at Latisha Greenlaw’s house in South Bend. Kennedy Trout¹ and Burnett were angry with Lisa Pierce because she had allegedly stolen money and drugs from them. While at Greenlaw’s house, Trout and Burnett decided that Pierce needed to be “dealt with” and spoke to Perry about it while George Lewis, Perry’s uncle, was present. Tr. p. 307, 371. Lewis later testified that the group discussed “how they were going to get Lisa Pierce, and a plan was made to kill Lisa Pierce.” Tr. p. 526, 585.

Trout gave Burnett a .38 revolver. Perry informed the group that Pierce was staying at the Wooden Indian Motel (Motel), where he also had a room. Subsequently, Burnett, wearing Greenlaw’s hooded sweatshirt, left Greenlaw’s residence with Perry to go to the Motel to kill Pierce.

On the evening in question, Pierce and another individual were smoking crack cocaine in Room 152 of the Motel. Although the facts are somewhat hazy, it appears that Perry had sold drugs to Pierce in the past and agreed to telephone her and offer to sell her more crack cocaine to lure her out of her motel room. After speaking with someone on the telephone, Pierce left her room. Shortly after leaving, she was shot outside Room 152. A hotel security guard observed the shooter, a thin African-American man wearing a hooded sweatshirt, later determined to be Greenlaw’s. The

security officers chased the shooter but were unable to apprehend him. Police later recovered Trout's gun near the crime scene, and it was later determined to be the weapon used to kill Pierce.

Later that night, Burnett returned the sweatshirt to Greenlaw. When he returned to the gathering at Greenlaw's residence, he told Trout that "it's done," which Trout believed meant that Burnett had killed Pierce. Tr. p. 528, 552. Trout left town the next morning because he believed that he would be implicated in the murder.

On April 25, 2003, the State charged Perry with murder and conspiracy to commit murder.¹ Following a jury trial, on April 28, 2004, the jury found Perry not guilty of murder and guilty of conspiracy to commit murder. On May 28, 2004, the trial court sentenced Perry to forty years of incarceration, with thirty-five years executed and five years suspended.

Slip op. at 2-3. On appeal, this court affirmed Perry's conviction. And the post-conviction court denied Perry's conviction following a hearing. This appeal ensued.

DISCUSSION AND DECISION

The petitioner bears the burden of establishing his grounds for post-conviction relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); Harrison v. State, 707 N.E.2d 767, 773 (Ind. 1999), cert. denied, 529 U.S. 1088 (2000). To the extent the post-conviction court denied relief in the instant case, Perry appeals from a negative judgment and faces the rigorous burden of showing that the evidence as a whole "leads unerringly and unmistakably to a conclusion opposite to that reached by the [] court." See Williams v. State, 706 N.E.2d 149, 153 (Ind. 1999) (quoting Weatherford v. State, 619 N.E.2d 915, 917 (Ind. 1993)), cert. denied, 529 U.S. 1113 (2000). It is only where the evidence is without conflict and leads to but one conclusion, and the post-conviction court has reached the opposite conclusion, that its decision will be disturbed as contrary to law. Bivins v. State, 735 N.E.2d 1116, 1121 (Ind. 2000).

Perry contends that he was denied the effective assistance of trial counsel. There is a strong presumption that counsel rendered effective assistance and made all significant decisions in the exercise of reasonable professional judgment, and the burden falls on the defendant to overcome that presumption. Gibson v. State, 709 N.E.2d 11, 13 (Ind. Ct. App. 1999), trans. denied. To make a successful ineffective assistance claim, a defendant must show that: (1) his attorney's performance fell below an objective standard of reasonableness as determined by prevailing professional norms; and (2) the lack of reasonable representation prejudiced him. Mays v. State, 719 N.E.2d 1263, 1265 (Ind. Ct. App. 1999) (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)), trans. denied.

Deficient performance is representation that fell below an objective standard of reasonableness by the commission of errors so serious that the defendant did not have the "counsel" guaranteed by the Sixth Amendment. Roberts v. State, 894 N.E.2d 1018, 1030 (Ind. Ct. App. 2008), trans. denied. Consequently, our inquiry focuses on counsel's actions while mindful that isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render counsel's representation ineffective. Id. Even if a defendant establishes that his attorney's acts or omissions were outside the wide range of competent professional assistance, he must also establish that, but for counsel's errors, there is a reasonable probability that the result of the proceeding would have been different. See Steele v. State, 536 N.E.2d 292, 293 (Ind. 1989).

Perry contends that his trial counsel's performance was deficient in that he did not investigate a criminal conviction of one of the State's key witnesses, George Lewis. In particular, Perry maintains that, had his trial counsel obtained information about Lewis'

conviction for molesting Perry's younger sister, counsel could have impeached Lewis on cross-examination. Perry asserts that the evidence of Lewis' conviction would have shown that Lewis was biased against Perry. And Perry contends that, had the jury doubted Lewis' credibility, Perry might have been acquitted.

At trial, Perry's counsel attempted to cross-examine Lewis about the details of his child molesting conviction, but during a side bar, the trial court "concluded that absent a date of conviction or documentation of the crime, Perry could not proceed with that line of questioning." Perry I, slip op. at 5. On direct appeal, we addressed the issue as follows:

Indiana Rule of Evidence 616 provides that "[fo]r the purpose of attacking the credibility of a witness, evidence of bias, prejudice, or interest of the witness for or against any party to the case is admissible." Accordingly, on its own, Rule 616 permits the admission of any evidence showing bias or prejudice of a witness. Ingram v. State, 715 N.E.2d 405, 407 (Ind. 1999). Because of a lack of qualifiers on the admission of such evidence in Rule 616, our supreme court has held that Rule 616 should be read in conjunction with Rule of Evidence 403's balancing of probative value against the danger of unfair prejudice. Id.

In this case, Perry contended that he should be allowed to question Lewis about his possible prejudice against Perry stemming from Lewis's alleged conviction for raping Perry's sister. Perry's attorney elicited from Lewis that he had a prior conviction for child molestation. After Perry's attorney began pressing Lewis for details, the State objected and the trial court held a sidebar conference. The trial court questioned Perry's attorney closely about the incident, and discovered that the attorney did not know the date of the alleged incident—indeed, he could not even specify whether it had happened in 1970 or in 2001—and had no documentation to prove who was involved in the crime or, indeed, that the conviction had occurred at all. Tr. p. 332-34. Perry's attorney informed the trial court that his information stemmed only from Perry and his sister. Based on all of this information, the trial court concluded that absent a date of conviction or documentation of the crime, Perry could not proceed with that line of questioning.

As we consider this evidence that Perry sought to use to show Lewis's alleged bias against him,¹ we must weigh its prejudicial effect against its probative value pursuant to Rule of Evidence 403. Its prejudicial effect would have been significant—it is entirely possible that a juror who learned that Lewis raped Perry's sister would have been unable to view Lewis in an objective manner after the revelation. And neither we nor the trial court are able to determine its probative value because Perry cannot even prove that it actually happened—he has no idea when it occurred, he has no documentation of any conviction, and the only evidence he has to prove that it happened at all comes from Perry and his sister. Accordingly, it is apparent to us that the trial court acted well within its discretion to curtail this line of questioning in Perry's cross-examination of Lewis.

Id. at 4-5.

During the hearing on his petition for post-conviction relief, Perry presented evidence that Lewis was convicted of molesting Perry's younger sister in 1992, twelve years before Perry's trial. But Perry did not present any other evidence to support his assertion that Lewis held a grudge against Perry or was otherwise biased against him as a result of that conviction. Indeed, it is apparent from the facts underlying his conspiracy to commit murder conviction that he and Lewis were attending the same social gathering on the night of the murder. At the post-conviction hearing, Perry's mother testified that she was not aware that Lewis had any animosity towards Perry or others in their family at the time of the instant offense, other than towards Perry's sister, whom he had molested. Perry has not demonstrated that questioning Lewis about his child molesting conviction or presenting other evidence related to that conviction would have been sufficiently probative of his alleged bias against Perry to overcome the prejudicial effect of such evidence.¹ See id.

¹ The evidence of Lewis' conviction would certainly tend to show Perry's bias against Lewis, but that is not the issue. There is no evidence to suggest that Perry was involved in reporting Lewis' crime to police or was otherwise involved in the case against Lewis.

We hold that Perry has not satisfied his burden to prove that, but for his trial counsel's alleged deficient performance, the outcome of his trial would have been different. In addition to Perry's failure of proof on the alleged bias, we are not persuaded that any showing of Lewis' bias would have led to Perry's acquittal. Lewis was not the only witness who testified that Perry was a co-conspirator in the murder. Kenneth Sanders also testified that Perry participated in the conversation to plan the murder and told the group that he could "lure" the victim out of her motel room. Trial Transcript at 372. Sanders testified that Perry had a room at the same motel and that Perry was selling drugs there. And Sanders testified that after Perry and the others had talked about their plan to kill the victim, Perry left with Burnett, who had possession of the gun later used to kill the victim. Thus, Lewis' testimony was largely cumulative of Sanders' testimony. And, as the State points out, Perry's trial counsel elicited evidence of Lewis' and Sanders' criminal histories, generally, to impeach their credibility. Perry has not shown that he would have been acquitted had the jury been made aware of Lewis' alleged bias against him.

In sum, we need not determine whether Perry's attorney's performance fell below an objective standard of reasonableness as determined by prevailing professional norms because he has not demonstrated that the alleged lack of reasonable representation prejudiced him. See Mays, 719 N.E.2d at 1265.

Affirmed.

BAKER, C.J., and MATHIAS, J., concur.