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IN THE
COURT OF APPEALS OF INDIANA

BRANDON CUSTIS,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 11A01-0703-PC-120
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE CLAY CIRCUIT COURT
The Honorable Michael Eldred, Special Judge
Cause No. 11C01-0406-PC-82

September 5, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant-Petitioner Brandon Custis challenges the post-conviction court's denial of his petition for post-conviction relief. Upon appeal, Custis claims he received ineffective assistance of both trial and appellate counsel. We affirm.

FACTS

Our opinion in Custis's direct appeal, which he adopts, instruct us as to the underlying facts and procedural history leading to this post-conviction appeal:

> Custis knew that Anthony Vanet ("Tony") owed their mutual friend Orland Cyphers $300. On the evening of December 28, 2001, Custis was visiting some friends at the home of Colton Cooley in Poland, Indiana. Tony arrived at the home, he and Custis began to argue about the debt, and a scuffle ensued. By the time Cooley ordered the two men to leave, both a window and Custis' eyeglasses had been broken.
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> After leaving Cooley's house, Tony called his twin brother, Paul Vanet, who lived in Indianapolis. Tony falsely stated that six to eight men had jumped him at Cooley's house and requested Paul's help. Paul retrieved his 12 gauge shotgun, picked up his friend Bradley Hofmann, and met Tony in Poland. The three men found Custis at Cooley's house around 10:00 p.m. Tony called for Custis to come out and fight, adding that Custis had crossed his path two times and the "third was going to be a charm." (State's Exhibit 29-A at 24.) Custis, who had consumed five to six Zimas in less than an hour, argued with Tony from the window before walking across the street to a bank parking lot to fight him.
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> As Custis, Tony, and their respective friends gathered in the parking lot, a van driven by two of Custis' cohorts, Cyphers and David McGuire, entered the parking lot and stopped near Paul. Paul retrieved a shotgun from his truck, pointed it at Cyphers' van, and told the men not to get out. Meanwhile, Tony punched Custis in the face and bloodied his lip. Neighbors heard the commotion and threatened to call the police. The group disbanded, and Tony and Custis agreed to finish the fight at a church parking lot a mile away.
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> Custis and his friend Ron Ingalls drove directly to the church parking lot and found the Vanets and Hofmann standing outside their truck. According to some, Paul was holding his shotgun. Custis had not brought a weapon but as he entered the church parking lot Ingalls handed him a .380

> caliber handgun that Custis placed in his pocket. Custis then exited his vehicle and began arguing with Tony. At one point, the Vanets and Hofmann returned to their truck and started to leave but got only as far as the church entrance before Paul and Custis started to argue. Paul told Tony to get out of the truck and "kick [Custis'] ass" or Paul would kick Tony's when they got home. (Tr. at 570.) Tony, Paul, and Hofmann got out of the truck and headed for Custis.
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> There was conflicting testimony as to what occurred next. Custis and another witness testified that Custis pulled out his pistol, waved it in the air, and told the Vanets to leave. Others testified that Custis shot his gun at Tony without warning. All witnesses agreed that after shooting Tony in the face, Custis fired four additional shots. One hit Paul in the arm. In response to Custis' shots, Paul fired his shotgun five times in Custis' general direction without hitting anyone. Tony's post-mortem toxicology reports revealed the presence of amphetamines and marijuana.
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> About twelve hours after the shooting, Custis turned himself in to police and was charged with the murder of Tony and the attempted murder of Paul and Hofmann. Custis admitted to police that he shot the men, but maintained he acted in self-defense and fired his gun only because Paul had a gun and the three men would not stop "chargin' at [him]." (Tr. at 823.)
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> At trial, the State offered an autopsy photograph of Tony's empty brain cavity. Custis objected on grounds the photograph was not relevant and its prejudicial impact on the jury would far outweigh its probative value, but the trial court admitted the photograph. At the conclusion of the trial the court instructed the jury that it could return one of four verdicts on the murder count--not guilty, guilty of murder, or guilty of either of the two lesser included offenses of voluntary manslaughter or reckless homicide. Custis was convicted of murder, attempted murder, and carrying a handgun without a license.

Custis v. State, 793 N.E.2d 1220, 1222-24 (Ind. Ct. App. 2003), *trans. denied*.

On August 28, 2002, Custis was sentenced to serve fifty-five years in the Department of Correction for his murder conviction, thirty years for his attempted murder conviction, and one year for his carrying-a-handgun conviction, with the sentences to run concurrently. Following the affirmance of his conviction by this court, on June 15, 2005,

Custis filed his petition for post-conconviction review alleging ineffective assistance of trial and appellate counsel. Following a hearing, on December 19, 2006, the post-conviction court adopted the State's proposed findings of fact and conclusions of law and denied relief. Custis now appeals.

DISCUSSION AND DECISION

In turning to Custis's claims before us, we are mindful that the petitioner bears the burden to establish his grounds for post-conviction relief by a preponderance of the evidence. *Godby v. State*, 809 N.E.2d 480, 481-82 (Ind. Ct. App. 2004) (citing Ind. Post-Conviction Rule 1(5)), *trans. denied*. Because the post-conviction court denied relief in the case at hand, Custis is appealing from a negative judgment and faces the rigorous burden of showing that the evidence as a whole "'leads underringly and unmistakably to a conclusion opposite to that reached by the [] court.'" *Id*. at 482 (quoting *Williams v. State*, 706 N.E.2d 149, 154 (Ind. 1999) (quotation omitted)). We will disturb a post-conviction court's decision as being contrary to law only where the evidence is without conflict and leads to but one conclusion, and the post-conviction court has reached the opposite conclusion. *Id*. The post-conviction court is the sole judge of the weight of the evidence and the credibility of the witnesses. *Fisher v. State*, 810 N.E.2d 674, 679 (Ind. 2004). We accept the post-conviction court's findings of fact unless they are clearly erroneous, and no deference is given to its conclusions of law. *Id*.

Post-conviction procedures do not afford a petitioner with a super-appeal, and not all issues are available. *Timberlake v. State*, 753 N.E.2d 591, 597 (Ind. 2001). A claim of ineffective assistance of trial counsel is properly presented in a post-conviction

proceeding if such claim is not raised on direct appeal. *Id*. A claim of ineffective assistance of appellate counsel is an appropriate issue for post-conviction review. *Id*.

To prevail upon a claim of ineffective assistance of counsel, Custis must present strong and convincing evidence to overcome the presumption that counsel's representation was appropriate. *Wieland v. State*, 848 N.E.2d 679, 681 (Ind. Ct. App. 2006), *trans. denied*. In assessing such claims, we follow the two-pronged test enunciated in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *Id*. A petitioner must first show that his counsel's performance was deficient, which requires a showing that counsel's representation fell below an objective standard of reasonableness, thereby denying him the right to counsel guaranteed by the Sixth Amendment to the United States Constitution. *Timberlake*, 753 N.E.2d at 603. Second, the petitioner must demonstrate that he was prejudiced by his counsel's deficient performance. *Id*. 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. *Id*. A probability is reasonable if it undermines confidence in the outcome. *Id*. This same standard is applicable to claims of ineffective assistance of appellate counsel. *Strickland*, 466 U.S. at 687.

1. Ineffective Assistance of Trial Counsel

a. Contemporaneous Crime

Custis, whose theory at trial was self-defense, first claims ineffective assistance of trial counsel on the grounds that trial counsel should have objected to certain statements made by the prosecutor on the subject of self-defense and should have requested a

specific jury instruction modifying the State's self-defense instruction. Custis bases his claims upon the Indiana Supreme Court's interpretation of the self-defense statute, Indiana Code section 35-41-3-2(d)(1) (2001)[1] in *Mayes v. State*, 744 N.E.2d 390, 392-93 (Ind. 2001).

Indiana Code section 35-41-3-2(d)(1) provided in pertinent part that, "a person is not justified in using force if . . . the person is committing or is escaping after the commission of a crime." In *Mayes*, the Supreme Court interpreted section 35-41-3-2(d)(1) to require that there be an immediate causal connection between the crime being committed and the confrontation leading to the claim of self-defense in order to preclude the self-defense claim. 744 N.E.2d at 392-93. The Court further provided a test to determine whether such an immediate causal connection between the crime and the confrontation existed: if, but for the defendant committing the crime, the confrontation with the victim would not have occurred, such a causal connection existed and precluded a claim of self defense.[2] Having provided for this nuanced interpretation of section 35-41-3-2(d)(1), however, the Court did not find error in the trial court's failure to instruct the jury accordingly. Rather, observing that matters of instructing the jury were within the trial court's discretion, the *Mayes* court found no error in the trial court's tender of the traditional self-defense jury instruction because (1) it correctly stated the law; (2) it was not covered by other instructions; and (3) there was evidence in the record demonstrating

[1] Former Indiana Code section 35-41-3-2(d) is current Indiana Code section 35-41-3-2(e) (2007), but it contains the same language.

[2] In their separate concurrence to *Mayes*, Justices Boehm and Dickson expressed concern that this "but for" test was too broad. 744 N.E.2d at 396-97 (Boehm and Dickson, J.J., concurring).

that, but for the defendant's criminal act, the confrontation leading to the harm of the victim would not have occurred. 744 N.E.2d at 394-95.

Although *Mayes* was in effect at the time of Custis's trial, defense counsel made no objections during trial to the prosecutor's multiple references to his alleged crimes including using methamphetamine and smoking marijuana, possessing a stolen gun and using a gun without a permit, being intoxicated, committing disorderly conduct, and trespassing on the church parking lot at the time of the shooting, nor did he object to the prosecutor's corresponding statement that any one of these alleged crimes precluded Custis from making a valid claim of self-defense. Defense counsel further did not seek a jury instruction regarding the *Mayes* nuance to the traditional instruction under section 35-41-3-2(d)(1).[3]

It is Custis's position that trial counsel rendered ineffective assistance by failing to object to the prosecutor's statements or proffer an instruction on self-defense mirroring the *Mayes* standard. In order to establish that counsel's failure to object to a jury instruction qualified as ineffective assistance, a defendant must prove that if a proper objection had been made, the trial court would have had to sustain it. *Lambert v. State*, 743 N.E.2d 719, 741 (Ind. 2001). Further, a defendant claiming ineffective assistance of counsel based upon counsel's alleged failure to object must demonstrate sufficient prejudice such that a reasonable probability exists that the outcome would have been different had counsel leveled an objection. *Id*.

[3] Jury Instruction 9 stated, in pertinent part, that "a person is not justified in using force if . . . [h]e is committing or is escaping after the commission of a crime." (App. 330) This language tracks section 35-41-3-2 (d)(1). Trial Appendix at 330.

Under the *Mayes* standard, we conclude Custis cannot demonstrate prejudice. As the *Mayes* court held, the question of causal connection is a question of fact, not a question of law, and a trial court does not err in failing to submit a jury instruction regarding the *Mayes* rule so long as the evidence supports a factual finding of the causal connection. 744 N.E.2d at 394. Under this standard, even if trial counsel had sought the nuanced jury instruction, so long as evidence supported a finding of a causal connection, there can be no showing as a matter of law that the trial court was required to instruct the jury accordingly.

Here, the facts supported a logical finding by the jury that, but for Custis's drug use and intoxication, his disorderly conduct, his illegal gun use, and his trespassing, he would not have been in an altered state of mind, nor would he have had the means or been in the location necessary to have the confrontation with the victims resulting in their injury. Because the question of the existence of a causal connection is one of fact, and a jury instruction failing to specify the *Mayes* nuance is not erroneous so long as the facts support a finding of causal connection, which they do in this case, we conclude that Custis suffered no prejudice. The evidence in this record does not unerringly and unmistakably demonstrate there was no causal connection. Under *Mayes*, therefore, the trial court would not have been required to instruct the jury regarding the *Mayes* nuance if counsel had so requested. *See Mayes*, 744 N.E.2d at 394; *Randolph v. State*, 802 N.E.2d 1008, 1014-15 (Ind. Ct. App. 2004), *trans. denied*.

We further observe that Custis fired multiple shots. *Custis*, 793 N.E.2d at 1223. The firing of multiple shots undercuts a claim of self-defense. *See Mayes*, 744 N.E.2d at

395 n.2; *Randolph*, 802 N.E.2d at 1015. Additionally, Custis testified that he willingly drove to the agreed-upon location for the fight in order to "get it over with[,]" that upon arriving at the fight location he threatened Paul by telling him, "Next time we meet up, [Tony's] got one coming," and that he shot Tony, who was unarmed and at a distance of two to three feet, before firing multiple shots and hitting Paul. Trial Tr. at 814, 822. There was therefore substantial evidence before the jury suggesting Custis was not acting in self-defense, irrespective of the contemporaneous crime language in Indiana Code section 35-41-3-2(d)(1), such that we remain unconvinced that Custis suffered any prejudice from his trial counsel's failure to seek the nuanced instruction. *See Mayes*, 744 N.E.2d. at 395 n.2; *Randolph*, 802 N.E.2d at 1015.

Based upon the authority of *Mayes*, we further decline Custis's claim of ineffective assistance on the basis of counsel's failure to object to the prosecutor's statements. Custis claims that the prosecutor, in referring to his alleged crimes and stating that they precluded a claim of self defense, was misstating the law. In light of the *Mayes* court's conclusion that a statement of self defense law reflecting the language of Indiana Code section 35-41-3-2(d)(1) is a correct statement of law, as well as the above evidence suggesting Custis was not acting in self defense, we again find no prejudice.

We recognize, as Custis points out, that some courts have concluded that the failure to instruct the jury on the causal connection element of self-defense constitutes error. *See Harvey v. State*, 652 N.E.2d 876, 877 (Ind. Ct. App. 1995), *trans. denied*; *see also Henderson v. State*, 795 N.E.2d 473, 480 (Ind. Ct. App. 2003), *trans. denied*; *Smith v. State*, 777 N.E.2d 32, 36-37 (Ind. Ct. App. 2002). Given the *Mayes* standard and the

evidence in this case suggesting Custis was not acting in self defense, however, we are unwilling to conclude that an evaluation of the evidence leads unerringly and unmistakably to the conclusion that the trial court must have given the jury instruction on causal connection had it been proffered or sustained counsel's objections had they been made, and that such would have affected the outcome of the case.

b. Duty to retreat

Custis also claims ineffective assistance of trial counsel stemming from trial counsel's alleged failure to request a jury instruction on the duty to retreat and his failure to object to certain statements made by the prosecutor regarding that duty. In making this argument, Custis points to the fact that hours prior to the shooting, one of the eventual victims and Custis had fought, as well as to our court's reference in Custis's direct appeal to "conflicting" evidence regarding the ultimate confrontation in the church parking lot. Given this evidence, Custis argues his counsel was ineffective for failing to seek a jury instruction on the lack of a duty to retreat and in failing to object to the prosecutor's comments arguing Custis had not attempted to retreat. In support of his argument, Custis cites *French v. State*, 273 Ind. 251, 256-57, 403 N.E.2d 821, 825 (1980) for the proposition that "fairness seems to demand [a self-defense instruction] be balanced with an advisement that one who is not the aggressor is not required to retreat."

We conclude that Custis suffered no prejudice on this point. Even if counsel had objected to the prosecutor's statements and sought an instruction on the lack of a duty to

retreat,[4] an evaluation of the evidence as a whole does not lead unerringly and unmistakably to the conclusion that such objections and instruction were proper and would have affected the outcome of the trial.

As noted above, evidence at trial largely indicated that Custis was a willing participant in the fight at issue, even suggesting where it should take place and driving his car there for the ultimate confrontation before firing the first of multiple shots, as our court noted in Custis's direct appeal. A mutual combatant, whether or not the initial aggressor, must declare an armistice before he or she may claim self-defense. *Wilson v. State*, 770 N.E.2d 799, 801 (Ind. 2002). Further, the only evidence Custis points to in support of his argument that he did not have a duty to retreat is that he was in an earlier fight with the victim and that our court indicated there was "conflicting" testimony in Custis's direct appeal. The fact that Custis was in an earlier fight supports a finding that he was a mutual combatant and therefore did not lack the duty to retreat. Additionally, while our court acknowledged there was "conflicting" testimony regarding what had transpired in the parking lot, the conflicting nature of this testimony had to do with whether Custis, who fired the first shots, warned his victim before shooting him or simply just shot him, not with who the aggressor was. *Custis*, 793 N.E.2d at 1223. The post-conviction court concluded there was overwhelming testimony, including Custis's confessions to police, implicating Custis at trial. We conclude this record does not

[4] Jury Instruction 9 provided in pertinent part regarding the defense of self defense that "a person is not justified in using force if . . . [h]e enters into combat with another person or is the initial aggressor, unless he withdraws from the encounter and communicates his intent to do so and the other person nevertheless continues or threatens to continue the unlawful action." (App. 330) This language tracks Indiana Code section 35-41-3-2(d)(3).

support a finding of ineffective assistance based upon counsel's failure to highlight Custis's alleged lack of a duty to retreat.

c. Evidentiary objections

Custis further claims several additional errors by trial counsel, including counsel's failure to make various evidentiary objections which Custis argues should have been made. Custis concedes that each of these isolated errors alone would not support a claim of ineffective assistance of counsel but argues the cumulative effect of all of trial counsel's alleged errors constitutes ineffective assistance.

Custis claims that trial counsel should have objected to or not elicited testimony with respect to the following: Detective Smiley's stated opinion as to Custis's truthfulness; Detective Smiley's allegedly erroneous testimony regarding the alcoholic content of the Zimas Custis drank; that Custis did not have a permit for his gun; that Custis used methamphetamine and bought it for others; that Custis "knew" that the others were not a threat when he fired his weapon; that it was unknown whether Custis's gun was stolen; and that one of Custis's friends said he was a liar. Custis further claims defense counsel erred in failing to respond properly to one of the prosecutor's evidentiary objections, in telling the jury he could not object, and in misspeaking to the jury with respect to the charges against Custis.

As Custis concedes that none of these alleged errors, standing alone, constitutes ineffective assistance, we find it unnecessary to address each one. We first observe that trial counsel indicated at the post-conviction hearing that he refrained from objecting several times as a matter of trial strategy, believing that too many objections would upset

the jury, with any short-term gain on any one objection offset in the long run by his reduced credibility. Further, apart from arguing that these errors demonstrate the overall incompetence of trial counsel, Custis does not suggest how trial counsel's alleged ineffective assistance was specifically prejudicial other than to specify that his self-defense claim was seriously undermined in light of the errors previously alleged. But Custis's own testimony, including that he agreed to the fight and that he fired his gun multiple times, directly undermined his self-defense claim such that the above claims of error could not have caused significant prejudice. In light of this evidence and the post-conviction court's determination that overwhelming evidence established Custis's guilt, as well as our above determination that trial counsel did not render ineffective assistance regarding Custis's claim of self-defense, these specific alleged errors do not establish the requisite prejudice.

2. Ineffective Assistance of Appellate Counsel

Custis also challenges the effectiveness of his appellate counsel by claiming his appellate counsel rendered ineffective assistance in failing to raise the aforementioned ineffective-assistance-of-trial-counsel claims in Custis's direct appeal. Custis claims these claims were more meritorious than the challenges appellate counsel made in Custis's direct appeal.

Upon claiming ineffective assistance of appellate counsel, Custis must demonstrate that appellate counsel's performance was deficient and that, but for the deficiency of his appellate counsel, trial counsel's performance would have been found deficient and prejudicial. *Timberlake*, 753 N.E.2d at 604. Having concluded Custis's

claim of ineffective assistance of trial counsel is without merit, we decline to find appellate counsel ineffective for failing to raise this claim.

The judgment of the post-conviction court is affirmed.

NAJAM, J., and MATHIAS, J., concur