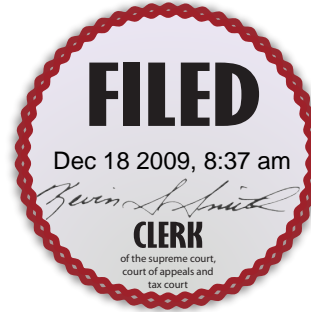


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

TREVOR T. NUNN,
Appellant- Defendant,

vs.

STATE OF INDIANA,
Appellee- Plaintiff,

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No. 48A02-0902-PC-139

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Fredrick R. Spencer, Judge
Cause No. 48D03-0807-PC-237

December 18, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Following a jury trial, Trevor Nunn was convicted of nine counts of attempted murder, all Class A felonies; one count of possession of cocaine, a Class B felony; one count of carrying a handgun without a license, a Class C felony;¹ one count of intimidation and five counts of pointing a firearm, all Class D felonies; and one count of possession of marijuana, one count of resisting law enforcement, and one count of battery, all Class A misdemeanors. He was ultimately sentenced to 134 years at the Indiana Department of Correction. Nunn's petition for post-conviction relief was granted in part and denied in part and his sentence was reduced to 132 years. Nunn now appeals the post-conviction court's denial of his petition, raising two issues for our review: 1) whether his trial counsel was ineffective for her handling of the trial court's order that he wear leg shackles in the courtroom during trial; and 2) whether his appellate counsel was ineffective for omitting several claims on direct appeal. Concluding the post-conviction court erred in denying Nunn's ineffective assistance of appellate counsel claim with regard to the sufficiency of his intimidation conviction, we reverse as to that claim but affirm as to all others.

Facts and Procedural History

Nunn beat his girlfriend Felicia Harris shortly before midnight on October 5, 1995, and threatened to get his gun when she went to call the police.

¹ Nunn was charged with carrying a handgun without a license as a Class A misdemeanor as well as with an enhanced charge of carrying a handgun without a license as a Class C felony as a result of a prior conviction. After the jury found Nunn guilty of the Class A misdemeanor charge, he pled guilty to the enhanced charge and he was sentenced only for the Class C felony.

Officer Darron Sparks was driving his marked police car and wearing his uniform when he responded to a call that Nunn had battered his girlfriend and was armed. Sparks knew Nunn by sight and saw him walking along the street. Sparks pulled to the curb, called to Nunn and turned his bright lights on Nunn. Nunn walked toward Sparks. When about a half block distant, Nunn began running toward Sparks and pulled out a handgun. He fired a shot as he came around Sparks' car door, striking Sparks in the forearm and knocking him down. Nunn then stood above Sparks, pointed the gun at Sparks' head and fired four more shots before walking away. The last four shots did not injure Sparks.

Nunn v. State, 695 N.E.2d 124, 124 (Ind. Ct. App. 1998). Sparks radioed for assistance and four other officers surrounded a nearby house (the "O'Bannon house") into which Nunn had fled. These officers testified Nunn fired his gun from within the O'Bannon house as they crouched by the front door. The officers then shot Nunn. He was arrested and found to be in possession of marijuana and cocaine.

Nunn was charged with twenty-nine counts stemming from this incident. Some of the counts were dismissed prior to trial; Nunn went to trial on twenty-one counts, including nine counts of attempted murder, five counts of pointing a firearm, intimidation, possession of marijuana, possession of cocaine, resisting law enforcement, battery, carrying a handgun without a license, and invasion of privacy. The trial court required Nunn to wear leg shackles during his trial without first holding a hearing and making a record of the reasons supporting the order. Nunn's trial counsel did not object to the order. Early in the trial, Nunn's counsel pointed out that at least two jurors, while seated in the jury box, could see the shackles when Nunn was seated at the defense table. She did not, however, make a formal objection, move for a mistrial, or otherwise request curative action. Later in the trial, both Nunn's counsel and the State acknowledged jurors had seen Nunn in shackles as he left the courtroom. Again, trial counsel did not

lodge a formal objection or move for a mistrial. The jury found Nunn not guilty of invasion of privacy and guilty of all remaining charges. He was sentenced to 334 years.

Nunn's appellate counsel argued on direct appeal the convictions on five counts of attempted murder related to the five shots fired at Officer Sparks constituted double jeopardy. This court agreed, Nunn, 695 N.E.2d at 125, and on remand, the trial court ordered that the sentences for the five attempted murder convictions related to Officer Sparks be served concurrently, reducing Nunn's sentence to 134 years.

In 2001, Nunn filed a petition for post-conviction relief, raising several issues, including sentencing errors and ineffective assistance of both trial and appellate counsel. The post-conviction court granted Nunn's petition in part, finding the intimidation and battery convictions and the attempted murders at the O'Bannon house and resisting law enforcement convictions were single episodes of criminal conduct for sentencing purposes, thereby reducing Nunn's sentence to 132 years. The post-conviction court also vacated four of the convictions for the attempted murder of Officer Sparks.² The post-conviction court denied Nunn's remaining claims, and Nunn now appeals.

Discussion and Decision

I. Standard of Review

Nunn challenges the post-conviction court's denial of his petition. The petitioner in a post-conviction proceeding has the burden of establishing grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); Brown v. State, 880 N.E.2d 1226, 1229 (Ind. Ct. App. 2008), trans. denied. When appealing the denial of a

² The trial court on remand from Nunn's direct appeal imposed concurrent sentences but did not vacate the four attempted murder convictions.

petition for post-conviction relief, the petitioner appeals a negative judgment. Brown, 880 N.E.2d at 1229. Therefore, 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. Here, the post-conviction court entered findings of fact and conclusions thereon 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.” Id. at 1230 (citation and quotation omitted).

II. Ineffective Assistance of Trial Counsel³

Nunn asserts he received ineffective assistance from his trial counsel during his jury trial.⁴ When reviewing ineffective assistance of counsel claims, we use the two-pronged test set forth in Strickland v. Washington, 466 U.S. 668 (1984). Under the first prong, the petitioner must establish that counsel’s performance was deficient; that is, the performance fell below an objective standard of reasonableness, thereby denying the petitioner the right to counsel as guaranteed by the Sixth Amendment to the United States Constitution. Terry v. State, 857 N.E.2d 396, 402-03 (Ind. Ct. App. 2006), trans. denied. Under the second prong, the petitioner must show prejudice; that is, the petitioner must demonstrate a reasonable probability the result of the trial would have been different if counsel had not made the errors. Id. If our confidence that the result

³ Nunn has filed a verified petition to strike this argument from his brief. We deny his petition; however, we are mindful of the reasons Nunn has requested such relief and we have limited our discussion accordingly.

⁴ A Sixth Amendment claim of ineffective assistance of trial counsel, if not raised on direct appeal, may be presented for the first time in post-conviction proceedings. Woods v. State, 701 N.E.2d 1208, 1220 (Ind. 1998), cert. denied, 528 U.S. 861 (1999). Nunn did not raise an ineffective assistance claim on direct appeal, see Post-Conviction Exhibits, Petitioner’s Exhibit 2 (Appellant’s Brief from direct appeal), and this issue is therefore properly before us on collateral review.

would have been the same is undermined, we will find a reasonable probability of a different result exists. Id. Failure to establish either prong will cause the claim to fail. French v. State, 778 N.E.2d 816, 824 (Ind. 2002).

During his jury trial, Nunn was required to wear leg shackles in the courtroom. Nunn alleges his trial counsel was ineffective for failing to object to the shackling requirement because the trial court did not first hold a hearing regarding whether the restraint was justified. Nunn also alleges his trial counsel was ineffective for failing to object and seek curative action during trial when jurors saw him wearing the shackles. The post-conviction court found:

FINDINGS OF FACT

* * *

12. That neither at the evidentiary hearing on [Nunn's] PCR nor at the Trial of this cause before a jury, was there presented any evidence that the Jury either saw or was in any way influenced by [Nunn] wearing leg shackles at the trial.

13. That the Trial Record does contain speculation by both counsel for the State and [Nunn] that the jury may have seen [Nunn's] shackles, however, speculative evidence presented at the trial and thereafter admitted at the PCR hearing is still just that, Speculative Evidence, and therefore inconclusive of the assertions in the PCR Petition.

* * *

CONCLUSIONS OF LAW

* * *

[Nunn's] assertion that jurors observed him in shackles at trial.

1. [Nunn] bears the burden of establishing his grounds for relief by a preponderance of the evidence. The Evidence presented by [Nunn] does not meet this burden. At best the evidence presented at the hearing established that [Nunn's] trial attorney and the trial prosecutor stated on the record that, in their respective opinions the jury saw [Nunn] in leg shackles. The trial record and the evidence at the PCR hearing is absent any evidence that these opinions are anything but speculation. There is no evidence from any juror that [Nunn] was in fact observed at the trial wearing leg shackles or that any Juror was in anyway [sic] influenced.

Appellant's App. at 106, 110.

A. Failure to Object to Lack of Hearing

During post-conviction proceedings, Madison County Sheriff's Department Officer John Dykes testified that since 1979, standard procedure in Madison County courts has been to have the defendant unshackled during voir dire because prospective jurors sitting behind the defendant could see if he was shackled and to have two officers present in court for security. Once the jury is selected and the trial begins, however, "we go back to just one officer transporting and guarding the prisoner during the trial and he is shackled during the trial at the feet." Post-Conviction Transcript at 56-57; see also id. at 60-61 (post-conviction judge commenting that "for as long as I can remember . . . the procedure for security of accused persons has been the same . . .").

For the basic presumption that a person accused of a crime is presumed innocent until proven guilty to be effective, trial courts "must guard against practices that unnecessarily mark the defendant as a dangerous character or suggest that his guilt is a foregone conclusion." Wrinkles v. State, 749 N.E.2d 1179, 1193 (Ind. 2001), cert. denied, 535 U.S. 1019 (2002). Therefore, a defendant has the right to appear in front of a jury without physical restraints unless such restraints are necessary to prevent the defendant's escape, to protect those in the courtroom, or to maintain order during the trial. Id. "[I]t is error for a trial court to require a defendant appearing before the court to wear restraints as a matter of course. Rather, the restraints must be necessary, and the reasons supporting the trial court's determination must be placed on the record." Id. at 1195.

The record in this case reflects that at the time of Nunn’s trial, the trial court had a policy of requiring all defendants to wear restraints without making an individualized finding justifying the restraints. As stated in Wrinkles, “the trial court’s policy would not likely withstand appellate scrutiny if the issue were presented” Id. Had trial counsel objected to the restraints from the outset, the trial court would likely have denied the objection, and such denial, if raised on direct appeal, would have been reversible error. If the trial court held a hearing, however – whether because of trial counsel’s objection or on remand – the trial court would likely have determined Nunn was required to wear the shackles, and such determination is reviewable only for an abuse of discretion. Bivins v. State, 642 N.E.2d 928, 936 (Ind. 1994), cert. denied, 516 U.S. 1077 (1996). Nunn introduced evidence at the post-conviction hearing that he had no disciplinary reports while in the Madison County Jail prior to his trial and committed only one minor offense while at the Department of Correction. Petitioner’s Exhibits 14, 16. Nonetheless, Nunn was on trial for twenty-one counts stemming from a violent confrontation with his girlfriend and police, including the attempted murder of five police officers. The nature of the offenses for which the defendant is being tried is relevant to the trial court’s decision regarding restraints. Evans v. State, 571 N.E.2d 1231, 1238 (Ind. 1991). Based upon our independent review of the record, we find facts that would have supported an individualized determination that Nunn should be shackled at trial. See Coates v. State, 487 N.E.2d 167, 169-70 (Ind. Ct. App. 1985) (reviewing record independently where no finding was made by the trial court supporting use of restraints), overruled on other grounds by Gilliam v. State, 508 N.E.2d 1270, 1271 (Ind.

1987). Nunn has therefore failed to prove a reasonable probability of a different result if his trial counsel had lodged an objection to the lack of a hearing. Accordingly, the post-conviction court did not commit clear error in determining trial counsel was not ineffective for failing to object on the basis there was no individualized finding of the need for shackling.

B. Failure to Object during Trial

Nunn also contends his trial counsel was ineffective for failing to object during trial to the shackles being visible to the jurors. During the post-conviction hearing, evidence was offered the ankle restraints were visible to the jurors on at least two occasions. On the first day of testimony in Nunn's trial, Nunn was escorted from the courthouse during the lunch recess. Nunn did not return to court when the lunch recess ended, and in discussing whether he intended to return or whether the trial should resume in his absence, Nunn's trial counsel stated:

I'll just go up here and sit down. Let the record show that I'm presently sitting in seven and I call [sic] see my client's but [sic] from here and along his side, so I would be able to see exactly how he's attired plus the shackles on his feet, that's just from this jury seat. I can see the same from eight, and little inhibited from nine.

Record of Proceedings at 477. In support of trial counsel's observations, pictures of the defense table taken from seats 7 and 8 in the jury box were offered into evidence at the post-conviction hearing. Testimony was also offered that neither the configuration nor the furnishings of the courtroom had changed substantially between the time of Nunn's trial in 1996 and when the pictures were taken in 2008. The pictures show a curved table with solid sides from the desktop to the floor sitting slightly askew from perpendicular to

the jury box. Three unoccupied chairs are at the table. Nunn testified at the post-conviction hearing that he either sat in the middle chair or the chair closest to the jury box during his trial. The person who took the photographs testified someone sat in the two chairs Nunn indicated he had occupied during the trial, and “depend[ing] on whether I was standing or sitting [in the jury box] and depending on how you are positioning your legs . . . in certain positions I could see your ankles.” PCR Tr. at 51. However, no photographic evidence was offered to support that testimony.

On a later day of the trial, Nunn testified on his own behalf. During his testimony, trial counsel advised she needed to talk to Nunn briefly and asked, “[m]ay we step out for a [sic] just a second?,” which the trial court allowed. Record at 1390. At the conclusion of Nunn’s testimony, the trial court dismissed the jury “so he could walk back to his chair.” Id. at 1395. Trial counsel stated, “They already [saw] him when they walked out, Judge.” Id.⁵ Later that day, Detective Terry Sollars referenced Nunn having been “in a cell” during his testimony. Id. at 1415. Trial counsel requested a bench conference, the jury was excused from the courtroom, and trial counsel moved for a mistrial based on the witness’s comment unduly prejudicing Nunn. The State replied, in part:

I think that the prejudice that there might be, if any, towards [Nunn] certainly isn’t any worse than the jury seeing him walk by here in shackles just a few minutes ago, at the initiation of his counsel. I mean he got up and walked out and they saw him [sic] shackles. The inference to be drawn from that is that he’s in jail.

⁵ The word “saw” does not appear in the original transcript of the trial. An affidavit from the court reporter who prepared the transcript was introduced at the post-conviction hearing in which she states she reviewed the recording and the word “saw” had been omitted in the original. Petitioner’s Exhibit 12.

Id. at 1416.

The judge who presided at Nunn’s trial testified at the post-conviction hearing via affidavit that he had reviewed excerpts from the trial, “but that did not refresh my memory about the shackles or whether they could be seen.” Petitioner’s Exhibit 13.⁶

Conceding it appears trial counsel believed at least two jurors could see the shackles for the duration of the trial from the jury box and all parties believed the entire jury could see Nunn in shackles once, it was deficient performance for trial counsel to fail to object, move for an admonishment or mistrial, or otherwise make a record. Stephenson v. State, 864 N.E.2d 1022, 1033 (Ind. 2007) (citing Roche v. Davis, 291 F.3d 473, 483 (7th Cir. 2002)), cert. denied, 128 S. Ct. 1871 (2008). The question is whether Nunn suffered any prejudice.

Nunn points to trial counsel’s comments at trial and the pictures introduced at the post-conviction hearing as proof the jurors could see the shackles from the jury box as Nunn sat at counsel table. Despite trial counsel’s comment as she sat in the jury box that she “would be able to see . . . the shackles on his feet,” record at 477, Nunn was not actually sitting at counsel table at the time, and trial counsel’s comments are nothing more than speculation. The pictures offered into evidence at the post-conviction hearing show an unoccupied table with solid sides. It is possible Nunn could have been sitting in a position such that a juror could see the ankle restraints. However, it is also possible Nunn was wearing pants that covered the restraints or that he was sitting such that the solid sides of the table obscured the jurors’ view of his legs completely. The key inquiry

⁶ Trial counsel died before these post-conviction proceedings began.

is whether the shackles are “readily visible” to the jury. Stephenson, 864 N.E.2d at 1032-33. There is no evidence from any juror the shackles were actually visible from the jury box, and we therefore conclude Nunn has failed to prove prejudice from trial counsel’s failure to object in this regard.⁷

As for the one instance in which it appears both trial counsel and the State agreed the jury saw Nunn in shackles, although the right to appear at trial unrestrained is grounded in the due process clause, the error is subject to harmless error analysis. Chapman v. California, 386 U.S. 18, 23-24 (1967); Coates, 487 N.E.2d at 170. We must reverse if the error complained of “might have contributed to the conviction.” Chapman, 386 U.S. at 23.

In Overstreet v. State, 877 N.E.2d 144, 162 (Ind. 2007), cert. denied, 129 S. Ct. 458 (2008), our supreme court noted that “in Deck there is consistent use of language indicating that being shackled during the entire proceeding, as opposed to being briefly and inadvertently seen entering the courtroom in shackles, is what the Constitution forbids.” Unlike those cases in which jurors have momentarily seen a defendant in restraints while being transported around the courthouse, see Underwood v. State, 535 N.E.2d 507, 518 (Ind. 1989), cert. denied, 493 U.S. 900 (1989), it is clear that here, Nunn was seated at the witness stand prior to exiting the courtroom in view of the jurors. There is no evidence, however, of where Nunn exited the courtroom (i.e. if there was a

⁷ In Deck v. Missouri, 544 U.S. 622, 635 (2005), the United States Supreme Court held that unnecessary shackling visible to the jury is inherently prejudicial and the State bears the burden of showing beyond a reasonable doubt that it did not contribute to the verdict. Deck was decided after Nunn’s trial, shifts the burden of proof on direct appeal, and is not retroactive. See Stephenson, 864 N.E.2d at 1031 n.1. Therefore, we continue to apply the traditional standard requiring Nunn to prove prejudice in this post-conviction appeal. See Wrinkles v. State, 915 N.E.2d 963, 971 (Ind. 2009) (Boehm, J., dissenting from denial of request to file successive petition for post-conviction relief).

door next to the witness stand so that he just took a few steps or if he had to cross the length or width of the courtroom to reach a door) or how long and to what extent he may have been in view of the jurors. As above, there is no evidence from any juror that Nunn was seen in shackles or that if he was, the sight influenced the verdicts. Unfortunately, there is no evidence available from trial counsel, but she could have believed admonishing the jury would draw attention to something it might otherwise not have noticed and chosen not to object as a tactical matter.

Moreover, constitutional error can be rendered harmless by overwhelming evidence of guilt. Milton v. Wainwright, 407 U.S. 371, 372-73 (1972). Although Nunn contended he did not intend to shoot Officer Sparks and did not fire shots from the O'Bannon house at the other four officers, Felicia testified that when she told Nunn she was going to call the police about their altercation, Nunn said, "I'm going to get my gat. I got something for you and the police." Record at 404. All five police officers testified to the events surrounding the shootings. Given the lack of evidence regarding the circumstances under which Nunn was visible to the jury while shackled or the actual impact on any of the jurors if they saw him, and the evidence at trial supporting Nunn's guilt, we conclude Nunn has failed to prove he was prejudiced by trial counsel's failure to object to his brief appearance before the jury in shackles. The post-conviction court did not commit clear error in denying Nunn's petition on the issue of ineffective assistance of trial counsel.

III. Ineffective Assistance of Appellate Counsel

Nunn also claims he was denied effective assistance of appellate counsel on direct appeal. We analyze ineffective assistance of appellate counsel claims using the same standard applicable to ineffective assistance of trial counsel claims. Williams v. State, 724 N.E.2d 1070, 1078 (Ind. 2000), cert. denied, 531 U.S. 1128 (2001). Thus, Nunn must show both defective performance and prejudice. See Terry, 857 N.E.2d at 402-03. Claims of errors by appellate counsel generally fall into three categories: (1) denial of access to an appeal; (2) waiver of issues; and (3) failure to present issues well. Henley v. State, 881 N.E.2d 639, 644 (Ind. 2008). Nunn alleges his appellate counsel failed to raise certain issues on direct appeal, which falls under the category of waiver of issues. See Weatherford v. State, 619 N.E.2d 915, 917 (Ind. 1993) (“Issues which were or could have been raised on direct appeal are not available for review in post-conviction.”). With respect to this particular claim of ineffective assistance, our supreme court has stated:

To show that counsel was ineffective for failing to raise an issue on appeal thus resulting in waiver for collateral review, the defendant must overcome the strongest presumption of adequate assistance, and judicial scrutiny is highly deferential. To evaluate the performance prong when counsel waived issues upon appeal, we apply the following test: (1) whether the unraised issues are significant and obvious from the face of the record and (2) whether the unraised issues are clearly stronger than the raised issues. . . . [E]valuat[ing] the prejudice prong . . . requires an examination of whether the issues which . . . appellate counsel failed to raise[] would have been clearly more likely to result in reversal or an order for a new trial.

Henley, 881 N.E.2d at 645 (citations and quotations omitted). The decision of what issues to raise is one of the most important strategic decisions to be made by appellate

counsel. Reed v. State, 856 N.E.2d 1189, 1196 (Ind. 2006). Therefore, we must consider

the totality of an attorney’s performance to determine whether the client received constitutionally adequate assistance . . . [and we] should be particularly sensitive to the need for separating the wheat from the chaff in appellate advocacy, and should not find deficient performance when counsel’s choice of some issues over others was reasonable in light of the facts of the case and the precedent available to counsel when that choice was made.

Bieghler v. State, 690 N.E.2d 188, 194 (Ind. 1997), cert. denied, 525 U.S. 1021 (1998).

Ineffective assistance is very rarely found in cases where a defendant asserts that appellate counsel failed to raise an issue on direct appeal. Reed, 856 N.E.2d at 1196.

A. Episode of Criminal Conduct

Nunn first claims his appellate counsel was ineffective for failing to raise two “episode of criminal conduct” claims that, if successful, would have reduced his sentence by at least sixteen years and possibly up to sixty-one years.

At the time Nunn committed his offenses in October 1995, the trial court’s authority to order consecutive sentences was limited as follows:

(b) As used in this section, “episode of criminal conduct” means offenses or a connected series of offenses that are closely related in time, place, and circumstance.

(c) [E]xcept for crimes of violence, the total of the consecutive terms of imprisonment . . . to which the defendant is being sentenced for felony convictions arising out of an episode of criminal conduct shall not exceed the presumptive sentence for a felony which is one (1) class of felony higher than the most serious of the felonies for which the person has been convicted. . . .

Ind. Code § 35-50-1-2 (1995). None of Nunn’s crimes were defined at the time of his trial as “crimes of violence.” See Ind. Code § 35-50-1-2(a) (1995). Nunn argues his

possession of cocaine, possession of marijuana, and attempted murders at the O'Bannon house were part of an episode of criminal conduct subject to the sentencing limitation imposed by Indiana Code section 35-50-1-2. Nunn was sentenced to fifty years for each attempted murder at the O'Bannon house, to be served concurrent with each other; twenty years for possession of cocaine, to be served consecutive to the attempted murder sentences; and one year for possession of marijuana, to be served consecutive to the attempted murder and possession of cocaine convictions, for a total sentence of seventy-one years for those convictions. If they were an episode of criminal conduct, the maximum sentence allowed by Indiana Code section 35-50-1-2(c) would have been fifty-five years, the presumptive sentence for murder in 1995. Ind. Code § 35-50-2-3(a) (1995). He also argues that the attempted murder of Officer Sparks and the four attempted murders at the O'Bannon house were part of an episode of criminal conduct subject to the sentencing limitation. Nunn was sentenced to fifty years for the attempted murders at the O'Bannon house, to be served concurrent with each other, and consecutive to a fifty-year sentence for the attempted murder of Officer Sparks, for a total sentence of 100 years for these crimes. Again, if the crimes were an episode of criminal conduct, the maximum sentence allowed by Indiana Code section 35-50-1-2 would have been fifty-five years.

With regard to this issue, appellate counsel testified at the post-conviction hearing he was "aware" of Indiana Code section 35-50-1-2, he did not remember if he thought about raising the issue or if he specifically decided not to raise it, but he did not think the

convictions fit within the statute because they seemed “separate and distinct.” PC Tr. at 16-18. The post-conviction court found:

FINDINGS OF FACT

* * *

15. That the Trial Record sets forth that Anderson Police Officers, including Officers Sparks, Earley, Ash, Brooks and Demick were dispatched on one call of a disturbance concerning a battery of Felicia Harris by the defendant Trevor Nunn.

16. That the Trial Record also discloses that the events concerning the Attempted Murder of Officer Sparks, the Attempted Murders of Officers Earley, Ash, Brooks and Demick took place at separate times at distinctly different locations with separate actions being taken by [Nunn]. Indeed the witnesses to the Attempted Murder of Officer Sparks and the Attempted Murders of Officers Earley, Ash, Brooks and Demick were different witnesses giving totally different accounts of [Nunn’s] actions at different times and locations.

17. That the Trial Record reveals that [Nunn] was at the home of Ms. Harris smoking Marijuana. And that the Marijuana and Cocaine on [sic] his possession the night of the crimes in question was [sic] in fact his. That the time of [Nunn’s] possession of these controlled substances was before during and after the events surrounding the Attempted Murders.

* * *

CONCLUSIONS OF LAW

Application of “Single Criminal Episode” section of 35-50-1-2

* * *

3. The actions of [Nunn] as set out in the evidence presented at the trial of this matter as pertains to the following:

- A. The Attempted Murder of Officer Sparks.
- B. The Attempted Murders of Officers Earley, Ash, Brooks and Demick.
- C. [Nunn’s] possession of cocaine.
- D. [Nunn’s] possession of marijuana.
- E. [Nunn’s] possession of a handgun.
- F. [Nunn’s] Battery and Intimidation of Ms. Harris.

Are separate and distinct acts of [Nunn] and are not so closely related in time, place, and circumstance as to make them all a “single criminal episode.[”]

The evidence presented at the trial of this cause on each of the six separated episodes of criminal conduct came from distinctly different sets of witnesses. The evidence of the Attempted Murder of Officer Sparks

came solely from Officer Sparks, and set forth a different time, place and manner of commission totally unrelated to the other offenses committed by the defendant. Likewise the evidence of the Attempted Murders of the other officers came solely from those officers and occurred at a different time, place and manner from the Attempted Murder of Officer Sparks.

The remaining crimes of Possession of Marijuana, Possession of Cocaine and Possession of a Handgun without a license, and Battery/Intimidation of Ms. Harris were established to the Jury from, among other witnesses, [Nunn] himself when he testified that he did in fact possess the marijuana and cocaine prior to the call from Ms. Harris to the police. And further that [Nunn] armed himself with the handgun after leaving Ms. Harris' residence and before he encountered any police because he feared for his safety from an anonymous person who bumped [him] off his bicycle after leaving Ms. Harris' residence. And [Nunn's] and Ms. Harris' testimony that [Nunn's] crimes of Batter[y]/Intimidation were committed prior to the police being called.

Therefore, [Nunn's] sentence, to the extent of these six separate and distinct crimes, of 132 years is sustained.

Appellant's App. at 106-09 (citations omitted).

At the time of Nunn's direct appeal, Tedlock v. State, 656 N.E.2d 273 (Ind. Ct. App. 1995), defined what constituted an episode of criminal conduct. Tedlock held "the singleness of a criminal episode should be based on whether the alleged conduct was so closely related in time, place and circumstances that a complete account of one charge cannot be related without referring to details of the other charge." Id. at 276 (quoting State v. Ferraro, 800 P.2d 623, 629 (Haw. Ct. App. 1990)). In Tedlock, the defendant pled guilty to selling securities fraudulently represented to be insured on four different occasions over a one and one-half year period to four different victims. The defendant argued on appeal his sentence violated Indiana Code section 35-50-1-2, claiming the four sales were one episode of criminal conduct. Based upon the definition announced above, this court disagreed, noting the crimes were committed against different victims at different times over an extended period and each sale could be related without referring

to the others. Id. at 276; see also Lockhart v. State, 671 N.E.2d 893, 904 (Ind. Ct. App. 1996) (four convictions of molestation arising from acts committed against the same victim over a period of three months were separate episodes of criminal conduct because each of the four incidents could be related without referring to the details of the others); Reynolds v. State, 657 N.E.2d 438, 441 (Ind. Ct. App. 1995) (three burglaries committed on the same day were separate episodes of criminal conduct because each could be described without referring to details of the others). Alternatively, in Trei v. State, 658 N.E.2d 131 (Ind. Ct. App. 1995), the defendant was convicted of sexual misconduct with a minor and two counts of criminal confinement for accosting two children while brandishing a knife, leading them into a wooded area, and having sexual intercourse with one of the children. He offered the children money to keep the incident quiet and threatened them if they told anyone. This court held the crimes were subject to the single episode of criminal conduct sentencing limitation because the crimes were committed during a short period of time in one location, were parts of one continuous criminal plan, and were motivated by the same criminal intent. Id. at 133.

With regard to the possession of drugs and attempted murder convictions, Nunn first contends the post-conviction court's finding he was in possession of the drugs before, during, and after the altercation with police is erroneous. We agree the finding is erroneous for this purpose. Although the evidence at trial may indeed have shown Nunn was in possession of the drugs throughout the night of October 5, 1996, he was charged with possessing cocaine within 1,000 feet of a school. The school in question was located within 1,000 feet of the O'Bannon house into which Nunn fled and he was

discovered in possession of the drugs when he was arrested after shooting at four officers from that house.

Notwithstanding the erroneous finding, we cannot say the post-conviction court committed clear error in denying Nunn's petition with respect to this issue. Nunn argues his conduct of possessing drugs at the O'Bannon house was "so closely related in time, place, and circumstance that it was part of a single episode of criminal conduct in relation to the attempted murder charges that resulted from the stand-off at the O'Bannon house," Brief of Petitioner-Appellant at 13, and based on the plain language of the statute and the Tedlock decision, his appellate counsel should have raised the issue on direct appeal. Nunn's possession of drugs was proven to be simultaneous with his shooting at the officers. However, unlike the offenses in Trei, wherein the defendant confined his victims in order to commit the sexual misconduct, Nunn's possession of drugs was not an integral part of the attempted murders but rather a matter of coincidence. Cases citing Tedlock in the time leading up to Nunn's direct appeal focused on the ability to relate the facts of the offenses independently, and Nunn's possession of drugs was not so connected to the attempted murders that it was impossible to do so in Nunn's case. Subsequent caselaw has directed focus away from the independent account language and toward the simultaneous and contemporaneous nature of the crimes. See Reed v. State, 856 N.E.2d 1189, 1199-1200 (Ind. 2006) ("[A]lthough the ability to recount each charge without referring to the other can provide additional guidance on the question of whether a defendant's conduct constitutes an episode of criminal conduct, it is not a critical ingredient in resolving the question.").

The question of whether possession of drugs during the commission of other crimes constitutes an episode of criminal conduct remains unsettled even today, however. Compare Deshazier v. State, 877 N.E.2d 200, 212-13 (Ind. Ct. App. 2007) (defendant must have come into possession of drugs and handgun prior to encountering police; as a continuing offense, possession was not closely related in time, place, and circumstance to resisting arrest), trans. denied, with Johnican v. State, 804 N.E.2d 211, 218 (Ind. Ct. App. 2004) (holding when defendant possesses contraband as he simultaneously commits other criminal offense, the possession is part of a single episode of criminal conduct). Based on the state of the law regarding Indiana Code section 35-50-1-2 at the time Nunn's appellate brief was filed, not to mention the state of the law regarding possession of drugs during the commission of unrelated crimes currently, we cannot say appellate counsel omitted a significant and obvious issue that was clearly stronger than the issue he did raise.

With regard to the multiple attempted murder convictions, Nunn contends the post-conviction court erred in concluding the attempted murder of Officer Sparks was totally unrelated to the attempted murders of the officers at the O'Bannon house. In 1997, Indiana Code section 35-50-1-2 did not define attempted murder as a crime of violence, and it was therefore subject to the episode of criminal conduct sentencing limitation. See Ellis v. State, 736 N.E.2d 731, 736 (Ind. 2000). Nunn argues because the shootings at the O'Bannon house occurred in close proximity – both in terms of time and distance – to the shooting of Officer Sparks and it is necessary to relate what happened

to Officer Sparks to fully relate the incident at the O'Bannon house, the five attempted murders were an episode of criminal conduct.

As noted above, at the time of Nunn's direct appeal in 1997, the definition of an episode of criminal conduct, pursuant to the statute and the caselaw interpreting it, was "whether the alleged conduct was so closely related in time, place and circumstances that a complete account of one charge cannot be related without referring to details of the other charge." Tedlock, 656 N.E.2d at 276.⁸ "This would cover the simultaneous robbery of seven individuals, the killing of several people with successive shots from a gun, the successive burning of three pieces of property, or such contemporaneous and related crimes as burglary and larceny, or kidnapping and robbery." Id. (quoting Ferraro, 800 P.2d at 628) (emphasis added in Tedlock). In support of his argument, Nunn points out the State tied the two incidents together in its closing argument.⁹ The State did say in its closing argument that as Nunn was in the O'Bannon house, he thought he had killed Officer Sparks and was "gonna go out in a blaze of gunfire." Record at 1455. That the State referred to the events of the night in a single narrative in its closing argument speaks more to the nature and function of closing arguments than to the legal definition of an episode of criminal conduct. We cannot say it was obvious from the

⁸ That Tedlock had been decided prior to Nunn's appeal distinguishes this case from Reed, in which our supreme court found ineffective assistance of counsel for failure to raise the question of whether attempted murder was a crime of violence within the meaning of Indiana Code section 35-50-1-2 in 1995 as an issue of first impression. 856 N.E.2d at 1197.

⁹ Nunn also claims the State "essentially admitted there had been a single episode of criminal conduct" by stating at a hearing on Nunn's motion to sever the charges against him that "[i]t's all one act . . . given such a short period of time frame [sic] and that they all act out of the same operative facts." Brief of Petitioner-Appellant at 16 (quoting Record at 291). As the standards for joinder of offenses for trial and for determining if the same offenses are an episode of criminal conduct for sentencing are different, we do not believe the State admitted anything with regard to sentencing by making this argument. As the State points out, the State's "opposition to severance does not concede Nunn's present arguments any more than Nunn's own motion for severance can be said to have waived those arguments." Brief of Appellee at 15.

state of the law in 1997 that the two incidents of attempted murder might be considered an episode of criminal conduct; as the post-conviction court found, the incidents were separated by the passage of time, occurred at different locations, and each could be related without reference to the other.

Even if we accept Nunn's argument the issue was significant and obvious and therefore should have been raised, we cannot say Nunn was prejudiced by the failure to do so. In Newman v. State, 690 N.E.2d 735, 737 (Ind. Ct. App. 1998), this court held the defendant engaged in three distinct episodes of criminal conduct when he 1) committed burglary and larceny at a tavern, after which he was sitting in his car in the tavern parking lot when police officers arrived and 2) committed resisting law enforcement and driving while suspended by refusing to get out of his car when ordered to do so by officers and speeding away from the scene, crashing his vehicle into a cement wall so he had to be transported to the hospital 3) where he committed escape by fleeing an examination room and running down the hall. Although the facts of Nunn's case, like the facts in Newman, can be strung together to form one narrative of the events of the evening, that does not make the crimes an episode of criminal conduct. Nunn, like the defendant in Newman, engaged in distinct episodes of criminal conduct when he shot Officer Sparks, then fled the scene, and when surrounded at the O'Bannon house, shot at pursuing officers. Cf. Ellis, 736 N.E.2d at 737-38 (defendant who went to the house where his estranged wife was living after seeing her kissing another man and shot her, the man, and her stepfather, killing her and injuring the other two, could be sentenced to a maximum of fifty-five years for the two attempted murder convictions as they were

part of an episode of criminal conduct). Had the issue been raised on appeal, it is not obvious Nunn's sentence would have been reduced. Nunn has failed to convince us the post-conviction court made a clear error in concluding his appellate counsel was not ineffective for failing to raise the episode of criminal conduct issues on direct appeal.

B. Insufficient Evidence of Intimidation

Nunn also claims his appellate counsel omitted a significant and obvious claim on appeal that his intimidation conviction was not supported by sufficient evidence. Nunn was charged with intimidation for:

knowingly communicat[ing] a threat to another person, to-wit: Felicia Harris, with the intent that Felicia Harris be place[d] in fear of retaliation for a prior lawful act, to-wit: associating with persons other than [Nunn], and in so doing, [Nunn] did threaten to commit a forcible felony, to-wit: [Nunn] did state to Felicia Harris, "Bitch, I am going to kill you," "I'[m] going to get my gat and take care of this," "I've got something for you and the police," and "If I can't have you, I'll kill you[.]"

Record at 32-33. With respect to this issue, the post-conviction court found:

The testimony given at trial was sufficient to sustain the jury's verdict of guilty to Count XV, Intimidation, D Felony. Both [Nunn] and Ms. Harris (the victim of count XV) testified as to the facts surrounding their confrontation. [Nunn] testified that he kicked Ms. Harris in the "lipps" [sic]. Ms. Harris testified that she had obtained a protective order against [Nunn], they had an argument, [Nunn] "kicked her[.]" gave her a "bleeding face[.]" and said to her[.] "bitch I'm gonna kill you." This Court will not reweigh the evidence or determine the credibility of the witness, but will view the evidence most favorable to the verdict and all of the reasonable inferences that evidence allows.

Appellant's App. at 109.

In order to support an intimidation conviction as charged, the State had to prove beyond a reasonable doubt that Nunn 1) communicated a threat to Harris 2) to commit a

forcible felony 3) with the intent that Harris be placed in fear of retaliation for her prior lawful act of associating with persons other than Nunn. Ind. Code § 35-45-2-1(a)(2), (b)(1)(A). Nunn contends there was no evidence at trial that Nunn threatened Harris with intent to place her in fear of retaliation for the prior lawful act of association with other persons; rather, the only evidence was that Harris had a protective order against Nunn, had an altercation with him, and was headed to a friend's house to call the police.¹⁰

The State does not contend the evidence does in fact prove Nunn threatened Harris regarding her prior association with other persons. Rather, the State acknowledges the evidence establishes Nunn threatened Harris because she announced her attention to call the police. See Brief of Appellee at 19; Ind. Code § 35-45-2-1(a)(1). The State contends this is but a variance between the charging information and evidence at trial that is not fatal. “A variance is an essential difference between the pleading and the proof.” Mitchem v. State, 685 N.E.2d 671, 677 (Ind. 1997). In Madison v. State, 234 Ind. 517, 532, 130 N.E.2d 35, 42 (1955), the court gave the following explanation of a “variance”:

¹⁰ Nunn also contends Harris's act of going to call the police was not a prior lawful act, citing Casey v. State, 676 N.E.2d 1069 (Ind. Ct. App. 1997). In Casey, this court reversed a conviction for intimidation where neither the charging information nor the evidence at trial revealed a prior lawful act for which the defendant was seeking retaliation because the State had failed to establish a legal act occurred prior to the threat and the defendant intended to place the victim in fear of retaliation for that act. Id. at 1072. Unlike the situation in Casey, the charging information in this case did specify a prior lawful act; the State simply failed to adduce any evidence at trial to support the allegation that Nunn threatened Harris regarding her prior association with other people. Rather, the evidence at Nunn's trial established that while he and Harris argued over money, he hit Harris and she told him she was going to call the police. After Harris was sure Nunn had left the house, she began to walk to a friend's house to use the friend's phone. Nunn “came out of nowhere” and shoved her head into a fence, kicked her, hit her, and told her he was going to get his gun for her and the police. Although Harris had not yet called the police, she had told Nunn she was going to do so and left her house to find a phone. Nunn laid in wait and ambushed Harris as she tried to walk two blocks to a phone. We disagree with Nunn's contention the evidence was insufficient even to support a charge alleging the prior lawful act of going to call the police, as Harris's statement she was going to call the police to report Nunn had battered her and violated a protective order and her attempt to make the call was a prior lawful act.

[W]here it is charged that the defendant stole a white horse . . . [i]f the State fails to prove any horse was stolen it is a failure of proof, but if the state proves a horse different from that charged was stolen it is a variance[.]

(Quotation and citation omitted.) Nunn does not contend the State's charge alleged one specific fact but proved another specific fact; Nunn contends the State failed to prove an element of the crime charged altogether. An insufficiency argument and a variance argument are not interchangeable. See Wilcher v. State, 771 N.E.2d 113, 116 n.3 (noting defendant "does not argue that there was a difference between the allegations contained in the information and the proof adduced at trial. Instead, his argument is that the proof was insufficient to support the allegations charged in the information." (emphasis in original)), trans. denied. Here, the State failed to prove an essential element of the crime it charged. That the evidence may have proved another crime does not save the conviction.

In short, we agree with Nunn that at the time of his appeal the sufficiency of the evidence supporting his intimidation conviction was an obvious and significant issue and if the issue had been raised on appeal, Nunn would have prevailed. We therefore hold his appellate counsel rendered ineffective assistance in failing to raise the issue on direct appeal and reverse the post-conviction court's finding denying this claim, remanding with instructions for the post-conviction court to vacate Nunn's conviction for intimidation and adjust his sentence accordingly. See Thompson v. State, 690 N.E.2d 224, 237 (Ind. 1997) (double jeopardy precludes a retrial when a conviction is reversed for insufficient evidence).

C. Double Jeopardy

Finally, Nunn contends his appellate counsel omitted a significant and obvious claim that his five attempted murder and five pointing a firearm convictions violated double jeopardy. Nunn contends the only evidence he pointed a gun at the officers was when they testified he pointed a gun at them and shot, making pointing a firearm a necessary element of the attempted murder convictions. The post-conviction court concluded:

The four convictions for pointing a firearm do not violate double jeopardy principles.

1. The Crime of Attempted Murder does not contain an element of pointing a firearm. This Court will not speculate on what evidence the jury used on what counts. The evidence presented at the trial of this cause is sufficient to sustain the convictions of Attempted Murder of Officers Earley, Ash, Brooks, and Demick as well as the convictions for Pointing a Firearm. It is not necessary to point a firearm at a person in order to use that firearm in a [sic] attempt to harm or kill.

Appellant's App. at 111.

At the time of Nunn's trial, Indiana's double jeopardy analysis conformed to the federal "same elements" test set forth in Blockburger v. United States, 284 U.S. 299 (1932). Under the Blockburger test, a defendant's conviction for multiple offenses is not precluded by double jeopardy principles if each offense "requires proof of a fact which the other does not." Id. at 304. In Tawney v. State, 439 N.E.2d 582, 588 (Ind. 1982), our supreme court held that in applying the test, "we must look to the manner in which the offenses are charged and not merely to the statutory definitions of the offenses" In Tawney, the defendant was charged with robbery by force and with battery. The court looked at the charging informations and vacated the battery conviction because it was the force used to commit the robbery: "[t]he battery was not merely an offense that occurred

in the same criminal episode, it was a necessary element of the robbery, as charged.” Id. (emphasis in original). Nunn argues Tawney presaged the Indiana double jeopardy analysis announced in Richardson v. State, 717 N.E.2d 32, 49 (Ind. 1999), and although acknowledging Richardson is not to be applied retroactively, see Taylor v. State, 717 N.E.2d 90, 95 (Ind. 1999), argues his appellate counsel should have raised the double jeopardy claim based on Tawney.

The appellate brief in Nunn’s direct appeal was filed on July 29, 1997. On July 22, 1997, our supreme court had handed down two cases acknowledging the Tawney court should not have looked to the manner in which the offenses were charged in analyzing the double jeopardy claim because doing so was not “an accurate statement of the law under Blockburger.” Carter v. State, 686 N.E.2d 834, 837 (Ind. 1997) (citing Grinstead v. State, 684 N.E.2d 482, 486 (Ind. 1997) and Games v. State, 684 N.E.2d 466, 474 (Ind. 1997), cert. denied, 525 U.S. 838 (1998)). If appellate counsel had raised a claim on appeal based on the Tawney court’s interpretation of the double jeopardy analysis, it would not have prevailed.

Nonetheless, Nunn contends his convictions for attempted murder and pointing a firearm violate the Blockburger test. To establish attempted murder, the State must prove beyond a reasonable doubt the defendant 1) acted with specific intent to kill and 2) engaged in conduct constituting a substantial step toward commission of the crime. Mitchem, 685 N.E.2d at 676. “A person who knowingly or intentionally points a firearm at another person commits a Class D felony.” Ind. Code § 35-47-4-3. The specific weapon used is not an element of attempted murder. Mitchem, 685 N.E.2d at 676.

When a firearm is involved, the elements of attempted murder consist of intentionally using a firearm in a manner likely to kill. The elements of pointing a firearm consist of knowingly or intentionally pointing a firearm at a person. The statutory elements alone do not establish a double jeopardy violation.¹¹ Although this may well be one of those “narrow class of cases” in which subsequent caselaw has acknowledged that “it is necessary to take certain core facts into account,” see Burk v. State, 716 N.E.2d 39, 44 (Ind. Ct. App. 1999) (citing Bracksieck v. State, 691 N.E.2d 1273, 1275 (Ind. Ct. App. 1998)), such was not obvious at the time of Nunn’s direct appeal. Moreover, there was evidence adduced at trial that Nunn continued to point his gun at officers at the O’Bannon house even after he fired a shot. See Record at 928 (Officer Ash testifying that after he saw Nunn shoot the gun and saw Officer Earley spin away from the door, it “appeared that he was still pulling the trigger” although he did not see any further shots come from the gun). It is not impossible for the jury to have found Nunn guilty for pointing a firearm apart from having shot the gun at the officers. In short, Nunn has failed to meet his burden of showing the post-conviction court clearly erred in finding his appellate counsel did not provide ineffective assistance by not raising this claim.

Conclusion

Nunn has shown a reasonable probability the result of his appeal would have been different if his appellate counsel had raised a sufficiency of the evidence claim with regard to his intimidation conviction, and the post-conviction court clearly erred in denying his petition with regard to this claim. We therefore reverse and remand for

¹¹ Because we conclude pointing a firearm is not an inherently included lesser offense of murder, we do not address Nunn’s argument his appellate counsel should have raised a claim based on Indiana Code sections 35-41-1-16(1) defining an included offense and 35-38-1-6 limiting judgment and sentencing for included offenses.

proceedings consistent with this opinion on this claim. As for Nunn's remaining post-conviction claims, he failed to prove clear error in the post-conviction court's denial of his claims, and the post-conviction court is affirmed as to those claims.

Affirmed in part, reversed and remanded in part.

DARDEN, J., and MATHIAS, J., concur.