

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Richard E. Simmons,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent.

October 24, 2023

Court of Appeals Case No.
22A-PC-2854

Appeal from the Morgan Circuit
Court

The Honorable Matthew G.
Hanson, Judge

Trial Court Cause No.
55C01-1610-PC-1662

Memorandum Decision by Chief Judge Altice
Judges May and Foley concur.

Altice, Chief Judge.

Case Summary

[1] Richard Eric Simmons, pro se, appeals the denial of his petition for post-conviction relief. Simmons presents four issues for our review, which we consolidate and restate as the following two:

1. Did the post-conviction court (PCR Court) err in finding that he was not denied the effective assistance of trial counsel?
2. Did the PCR Court err in finding that he was not denied the effective assistance of appellate counsel?

[2] We affirm.

Facts & Procedural History

[3] Following a jury trial, Simmons was convicted of four counts of attempted murder, two counts of criminal recklessness while armed with a deadly weapon, and one count each of unlawful use of body armor and unlawful possession marijuana. This court previously summarized the facts underlying Simmons's convictions as follows:

On October 16, 2011, thirteen police officers went to a residence where Simmons was staying in order to serve arrest warrants. Simmons was in the basement, which had a separate living area. The owner of the residence consented to a search and pounded on the basement door yelling that police were present. Officers approached the basement and then knocked and announced: "Police, warrant, get on the ground and make yourself known."

The police called out "search warrant" and "arrest warrant," and each officer announced which agency he was from. One officer

called Simmons by name and told him to come out and “resolve this if you’re in there.” An officer entered the hallway of the living area with a police dog and loudly announced: “Come out or I’m going to release my dog.” As other officers searched the various rooms in the living area, one encountered Simmons in the laundry room, where he was crouched behind the water heater. The officer was startled and left the laundry room to tell the other officers where Simmons was. The officers formed a “tactical stack” against the outside of the laundry room wall. The officers told Simmons several times to come out of the room, but he did not. One officer was in the doorway holding a shield. He was three or four feet away from Simmons. Another officer was kneeling at the left side of the doorway, with an officer behind him. The lighting was poor but both officers could see Simmons. Simmons’[s] hand was concealed, which suggested to the officers that Simmons was armed.

An officer moved into the laundry room and used a Taser, but it did not make solid contact with Simmons and did not immobilize him. Simmons pulled out a handgun and fired it twice. One officer fired two shots back, then Simmons fired a “barrage,” of gunfire at the officers at the side of the doorway. He then continued firing through the drywall “like following [the officers] down the hallway,” as they retreated.

Simmons left the laundry room and entered a bedroom across the hall. The State Police SWAT Team arrived, took charge of the situation, and negotiated with Simmons by phone for over an hour. After those negotiations failed, the Johnson County SWAT Team entered the basement and launched a gas canister toward Simmons. Simmons fired a number of shots at those officers, but he surrendered after officers launched three more gas canisters.

Simmons v. State, 999 N.E.2d 1005, 1007-08 (Ind. Ct. App. 2013) (internal record citations omitted), *trans. denied*.

[4] At trial, U.S. Marshal David Clarke explained that he was one of the officers who participated in the execution of the arrest warrants for Simmons and that at the time of entry into the basement, he was wearing a ballistics vest. Clarke testified that once the officers encountered Simmons, he was the officer who deployed the Taser and that Simmons responded by firing a gun at him. Clarke suffered no injuries from gunfire, but testified that the day after the shooting, he examined his vest closely and “saw where . . . [his] vest had been shot in [the] right shoulder.” *Trial Transcript Vol. 4* at 79. Defense counsel objected, arguing that Clarke’s testimony was stating a conclusion, not describing a fact or observation. The trial court sustained the objection in part and allowed Clarke to describe the circumstances that led to the formation of his opinion that his vest was damaged by a bullet that was fired by Simmons. Although testing on the vest could not confirm that the damage was caused by a bullet, Clarke testified that the vest was like new, having only worn it a time or two prior to this incident, and that it had not been damaged before this shooting incident but was in a damaged condition after. Photographs showing “the damage to the vest . . . where [Clarke] believe[d he] got shot” were admitted into evidence with no objection. *Id.* at 84. The vest was subsequently entered into evidence without objection as well.

[5] Clarke also testified about a shield that he brought with him on the day the officers executed the arrest warrant for Simmons. Another officer was leading

the tactical stack and that lead officer used Clarke's shield for protection. The shield was present in the courtroom and identified as State's Exhibit 8 but was not offered into evidence by either party. Clarke testified that the shield was equipped with "two halogen lights" that he described as a "basic flashlight type [of] light." *Id.* at 30, 31. The lights on the shield were demonstrated for the jury by shining them at each juror.

[6] When it came time for the jury to begin deliberations, the trial court declined to send the shield to the jury room because the shield had not been admitted as an exhibit during trial.¹ During deliberations, the jury requested to see the shield, but the trial court declined the jury's request because it had not been admitted at trial. The trial court informed the attorneys of its response to the jury's request when they were later brought into the courtroom to discuss another jury question. The trial court asked trial counsel to advise if Simmons should be present as it discussed this jury question because Simmons was not in the courtroom at that time. Trial counsel did not object to discussing the handling of the jury question in Simmons's absence.

[7] The jury returned guilty verdicts on four counts of attempted murder, two counts of criminal recklessness while armed with a deadly weapon, and one

¹ The court made a record after it was discovered that the shield was never offered or admitted into evidence. It is unclear if the parties were present as the transcript indicates that the "parties [were] in the room" when the record was made but the trial court later notes that it made its record when no one was present and that it would discuss the matter when the parties were back together. In fact, when the attorneys were back in the courtroom, the trial court explained the status of the shield as an exhibit and informed them that it had refused to send the shield to the jury room.

count each of unlawful use of body armor and unlawful possession of marijuana.² The trial court entered convictions on each and sentenced Simmons to a total aggregate term of 132 years.

[8] On direct appeal, Simmons’s appellate counsel argued that (1) the trial court erred in denying Simmons’s motion for directed verdicts on three of the attempted murder counts; (2) the trial court erred in refusing to give Simmons’s requested jury instruction on the presumption of innocence; and (3) that Simmons’s sentence was inappropriate. This court affirmed Simmons’s convictions and sentence.

[9] Simmons filed a petition for post-conviction relief on October 31, 2016. He amended his petition on March 13, 2019. The post-conviction court held hearings on July 3 and October 4, 2019. On November 2, 2022, the post-conviction court denied Simmons’s petition for post-conviction relief. Simmons now appeals. Additional facts will be provided as necessary.

Discussion & Decision

[10] Petitions for post-conviction relief constitute civil proceedings wherein defendants may bring “limited collateral challenges to a conviction and sentence.” *State v. Hamilton*, 197 N.E.3d 356, 362 (Ind. Ct. App. 2022), *trans. denied*. Grounds for relief are limited in scope to issues unknown at trial or

² The jury acquitted Simmons of possession of methamphetamine, two counts of receiving stolen property, and possession of paraphernalia.

unavailable on direct appeal. *Id.* (citation omitted). An issue available on direct appeal but not raised is waived, and an issue litigated adversely to the defendant is res judicata. *Id.* The petitioner has the burden of proving claims by a preponderance of the evidence. *Id.*

[11] When a petitioner appeals from the denial of post-conviction relief, they “stand in the position of one appealing from a negative judgment.” *Williams v. State*, 160 N.E.3d 563, 576 (Ind. Ct. App. 2020), *trans. denied*. Thus, to prevail on appeal, the petitioner “must show that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court.” *Ritchie v. State*, 875 N.E.2d 706, 714 (Ind. 2007). In other words, reversal is warranted only when there is a definite and firm conviction that the PCR Court committed error. *Id.* Under this “clearly erroneous” standard, we cannot reweigh the evidence nor judge witness credibility, and we will only consider “probative evidence and reasonable inferences” supporting the PCR Court’s ruling. *Reeves v. State*, 173 N.E.3d 1134, 1140 (Ind. Ct. App. 2021), *trans. denied*.

[12] Allegations of ineffective assistance of counsel may serve as proper grounds for post-conviction relief. *McKnight v. State*, 1 N.E.3d 193, 199 (Ind. Ct. App. 2013) (citing *Wilkes v. State*, 984 N.E.2d 1236, 1240 (Ind. 2013)). In *Strickland v. Washington*, the U.S. Supreme Court established the standard through which we analyze claims of ineffective assistance of counsel. 466 U.S. 668, 686 (1984) (addressing the Sixth Amendment’s guarantee of the right to counsel, which implicates the right to effective assistance of counsel). A defendant alleging

ineffective assistance of counsel must demonstrate (1) that counsel's performance was deficient and (2) that counsel's deficient performance prejudiced the defense. *Id.* at 687. If the petitioner fails to prove either one of these two prongs, their petition for relief fails. *Id.* Thus, claims of ineffective assistance of counsel may be resolved on a prejudice inquiry alone. *Hamilton*, 197 N.E.3d at 363. To satisfy a claim of deficient counsel, the petitioner must prove that the representation fell below an objective standard of reasonableness. *Ritchie*, 875 N.E.2d at 714. As for prejudice, the defendant must demonstrate that but for counsel's unprofessional errors, there is a reasonable probability that the outcome of the proceedings would have been different. *Id.*

[13] There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment. *McCullough v. State*, 973 N.E.2d 62, 74 (Ind. Ct. App. 2012). Further, there is "no constitutional requirement that a defense attorney be a flawless strategist or tactician." *Woodson v. State*, 961 N.E.2d 1035, 1042 (Ind. Ct. App. 2012); *see also Bivins v. State*, 735 N.E.2d 1116, 1134 (Ind. 2000) (holding that counsel is permitted to exercise reasonable judgments in strategy).

Ineffective Assistance of Trial Counsel

[14] Simmons argues that his trial counsel was ineffective in several respects. First, he maintains that trial counsel should have objected to the admissibility of Clarke's ballistics vest because the cause of the damage to the vest was undetermined. In this regard, Simmons, citing Ind. Evidence Rule 403,

maintains that the probative value of the vest was outweighed by the danger of unfair prejudice.

[15] In rejecting Simmons’s argument, the PCR Court noted that trial counsel’s decision not to object to admission of the vest was supported by “extremely cogent” reasoning. *Appellant’s Appendix Vol. 2* at 171. Trial counsel testified that he did not think there was a valid legal reason to object, explaining that “[Clarke] was going to say that’s the vest he wore, and he was going to testify as to how he believed the damage got there. That wouldn’t have been suppressible, in my opinion.”³ *PCR Transcript* at 29. The PCR Court further noted that appellate counsel agreed with trial counsel’s assessment of the admissibility of the vest. Indeed, the jury heard Clarke’s testimony as well as testimony from a chemist that it could not be confirmed that the damage was caused by a bullet. How the vest was damaged was a matter for the jury to decide based on the evidence provided. Like the PCR Court, we conclude that Simmons did not meet his burden to show that, had trial counsel objected to admission of the vest, the objection would have been sustained. *See Glotzbach v. State*, 783 N.E.2d 1221, 1224 (Ind. Ct. App. 2003) (noting that to succeed on a claim of failure to object, appellant must show that a proper objection would have been sustained). Further, in terms of Evid. R. 403, Simmons did not demonstrate unfair prejudice created by admission of the vest. *Hall v. State*, 177

³ Simmons’s trial counsel did object to Clarke’s conclusory statement that the damage to his vest was caused by a bullet, and this objection was sustained.

N.E.3d 1183, 1193 (Ind. 2021) (noting that unfair prejudice considers the capacity of the evidence to persuade by illegitimate means or the tendency to suggest a decision on an improper basis).

[16] Simmons also argues that trial counsel should have objected to admission of the vest on chain of custody grounds. He points out that Clarke did not discover the damage to his vest until the day after the incident, that Clarke sent photographs of the damage to another officer three days later, and that he did not turn his vest in for evidence purposes for a month and a half. To establish a proper chain of custody, the State must give reasonable assurances that the evidence remained in an undisturbed condition. *Troxell v. State*, 778 N.E.2d 811, 814 (Ind. 2002). However, the State need not establish a perfect chain of custody, and once the State “strongly suggests” the exact whereabouts of the evidence, any gaps go to the weight of the evidence and not to admissibility. *Id.* To mount a successful challenge to the chain of custody, one must present evidence that does more than raise a mere possibility that the evidence may have been tampered with. *Cliver v. State*, 666 N.E.2d 59, 63 (Ind. 1996).

[17] At trial, Clarke testified as to how and when he came to discover the damage to his vest and there is no dispute as to the timeline for the damage being documented and the vest being turned over for evidence purposes. The jury also heard evidence that it could not be confirmed that a bullet caused the damage. This evidence was before the jury and it was for the jury to decide whether the damage to the vest was caused by Simmons’s bullet. We further note that Simmons presented no evidence suggesting that the vest was tampered

with in any way. He thus did not establish that an objection to admission of the vest on the basis of chain of custody would have been successful. In sum, the post-conviction court did not err in concluding that trial counsel did not render ineffective assistance in not objecting to admission of the vest on the basis of unfair prejudice or chain of custody.

[18] Next, Simmons argues that trial counsel was ineffective for failing to challenge the arrest warrants as the basis to enter the home where he was staying. Simmons, however, provides no basis on which trial counsel could have made such an argument. Trial counsel testified that the warrants used to arrest Simmons were reviewed and, finding no obvious defects, counsel concluded that there was no basis on which to have them quashed. Simmons presented no evidence to the contrary. We also note that trial counsel explained that the strategy was to not attack the warrants because the jury might then hear that law enforcement came to the residence to execute the arrest warrants because they believed Simmons was a drug dealer. The PCR Court agreed with trial counsel's assessment of the arrest warrants and counsel's strategy to keep reference to drug dealing out of evidence and thus concluded that Simmons failed to establish that an objection to the arrest warrants would have been sustained. The PCR Court did not err in this regard.

[19] Simmons also argues that trial counsel was ineffective for failing to admit the tactical shield into evidence. At the PCR hearing, trial counsel testified that Simmons's contention was that the police officers "were not visible to [him]," in part because of the light that was shined at him when the police encountered

him in the laundry room. With regard to the shield, trial counsel explained: “I got what I wanted out of it. I got to shine it [referring to the lights on the shield] in the jurors’ eyes.” *PCR Transcript* at 15. Trial counsel further explained that “[w]hether it’s in evidence or not really didn’t matter. I just wanted the jury to see how bright those lights were. And see them.” *Id.* at 39. Trial counsel testified that, even in hindsight, he “would not have wanted [the jury] taking [the shield] back into the jury room, because if they’d start playing with it and turning it on and saying oh those lights aren’t that bright or you know it’s not that big of a deal.” *Id.* at 40. The PCR Court found that trial counsel acted in accordance with Simmons’s self-defense strategy that was based, in part, on his claim that the lights on the shield were bright and that Simmons was scared and did not know who had entered the basement. Further, as the PCR Court noted, Simmons presented no argument that a different result would have been reached had the shield been admitted into evidence. The PCR Court did not err in concluding that trial counsel was not ineffective for failing to offer State’s Exhibit 8, i.e., the shield, into evidence.

[20] Simmons’s final criticism of trial counsel is that his trial counsel did not ensure that Simmons was present for discussions about two responses to questions from the jury. He claims that by not demanding that he be brought into the courtroom for those discussions, his trial counsel deprived him of his right to be present for a critical stage of prosecution. *See Carter v. State*, 501 N.E.2d 439, 440 (Ind. 1986) (citing *Martin v. State*, 457 N.E.2d 1086, 1086 (Ind. 1984)) (“The

rule is that the defendant must be personally present at every critical state of the proceedings unless he knowingly or voluntarily waives that right.”).

[21] Even if we assume without deciding that the discussion about how to respond to the jury’s questions was a critical stage of the proceedings, it remains that it is Simmons’s burden to demonstrate prejudice. As the PCR Court found, Simmons failed to meet this burden. Simmons presented no evidence that his presence would have made any difference in the trial court’s rulings. The trial court denied the jury’s request to see the shield on the basis that the shield was not admitted into evidence. With regard to the jury’s second question, the trial court’s response to the jury was to reread the instructions provided. This response was thoroughly discussed by the attorneys prior to answering the jury’s question. Simmons has failed to demonstrate that he received ineffective assistance of trial counsel.

2. Ineffective Assistance of Appellate Counsel

[22] The standard for a claim of ineffective assistance of appellate counsel is the same as that for trial counsel in that the defendant must show that appellate counsel was deficient in his performance and that the deficiency resulted in prejudice. *Overstreet v. State*, 877 N.E.2d 144, 165 (Ind. 2007). Ineffective assistance of appellate counsel claims generally fall into three categories: (1) denial of access to appeal; (2) failure to raise issues that should have been raised; and (3) failure to present issues well. *Reed v. State*, 856 N.E.2d 1189, 1195 (Ind. 2006). Simmons argues that two of the three issues on appeal were not presented well.

[23] Here, Simmons’s appellate counsel, although acknowledging that imposition of consecutive sentences was proper, argued that where the trial court’s statement that the aggravators “only slightly” outweighed the mitigators, imposition of consecutive sentences resulting in an aggregate sentence of 132 years was inappropriate. *Simmons*, 999 N.E.2d at 1012. Stated differently, appellate counsel argued that due to a finding of minimal aggravators, a slightly enhanced sentence which was then stacked with other slightly enhanced sentences was an improper decision by the trial court. Appellate counsel, however, did not make any arguments that Simmons’s character mandated a lesser sentence.

[24] Simmons argues that appellate counsel failed to properly challenge his sentence as inappropriate, noting that this court deemed his appellate challenge waived for failure to argue both components of the inappropriate standard. *See Simmons*, 999 N.E.2d at 1013. Specifically, this court found that appellate counsel argued only that his sentence was inappropriate as to nature of the offense and that appellate counsel did not make any argument that the sentence was inappropriate in light of his character. *See id.*; *see also Williams v. State*, 891 N.E.2d 621, 633 (Ind. Ct. App. 2008) (noting that review under Ind. Appellate Rule 7(B) requires appellant to demonstrate that his sentence is inappropriate “in light of *both* the nature of his offenses and his character) (emphasis in original).

[25] This court found that Simmons waived review of the inappropriateness of his sentence by failing to address Simmons’s character. Waiver notwithstanding,

this court nevertheless concluded that imposition of consecutive sentence was appropriate because there were multiple victims. Simmons cannot demonstrate that he was prejudiced by counsel's decision to challenge the imposition of consecutive sentences as inappropriate.

[26] Simmons also argues that his appellate counsel was ineffective for failing to challenge on appeal the admission of the tactical vest. As noted previously, both trial counsel and appellate counsel did not find a challenge to the admission of the vest to be viable claim. There was no way to prevent Clarke from testifying about what he was wearing during the incident and what he observed in terms of damage to the vest following the incident. In any event, there was no dispute that Simmons fired his gun in the direction of Clarke, so damage to the vest was immaterial as to whether Simmons was guilty of attempted murder. Simmons has failed to show that a challenge to the admission of the vest would have been successful. He therefore cannot show prejudice. In sum, Simmons failed to establish that he received ineffective assistance of appellate counsel.

[27] Judgment affirmed.

May, J. and Foley, J., concur.