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IN THE
COURT OF APPEALS OF INDIANA

STEVEN BREWER,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 49A05-0605-PC-240
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Cheryl Boone, Master Commissioner
Cause No. 49G04-8909-PC-109926

November 16, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Steven Brewer appeals the denial of his petition for post-conviction relief.

We affirm.

ISSUE

Whether the post-conviction court erred in denying relief to Brewer on his claims that he had received ineffective assistance of trial counsel.

FACTS

On September 29, 1989, the State charged Brewer with three counts: dealing in cocaine, a class A felony; possession of cocaine, a class C felony; and resisting law enforcement, a class A misdemeanor. Subsequently, the State added the allegation that Brewer was an habitual offender. Brewer was tried by a jury on May 21-22, 1990.

The initial facts presented to the jury, as summarized by the Indiana Supreme Court, are as follows:

> . . . Indianapolis Police Officers Donald Hollenback, Roy Potter and Bradford Welton responded to a call on September 28, 1989 at approximately 11:15 p.m. at the Play House pool hall. The owner, Lawrence Lawson, informed the officers when they arrived that some individuals were selling drugs in front of the pool hall. Lawson informed them that [Brewer], who was wearing a white sweat shirt and black pants, had been there selling narcotics but had walked over to the east side of the building.

Brewer v. State, 605 N.E.2d 181, 182 (Ind. 1993).

Officer Hollenback was the first officer to testify. Hollenback testified that he had responded to a report of "subjects . . . standing in front of the Play House and . . . selling drugs." (Ex. A at 135). Hollenback further testified that upon arrival, he spoke with

Lawson. When asked what Lawson told him, Hollenback responded, "He told me that there was – that the subject who had been selling drugs in front of his business," at which point Brewer's counsel "object[ed] to the hearsay." *Id.* The State argued that the answer was "not being offered for the truth of the matter asserted but why this officer acted the way he acted." *Id.* The trial court stated that "[o]n that basis," the answer could proceed. *Id.* at 136. Hollenback then testified that Lawson

> told me that the subject who had been standing in front of his business and who was selling drugs was now on the side of the Fountain Lounge. It would be the east side. He said his name was Stevie Brewer . . . a black male . . . wearing a white sweatshirt and dark-colored pants.

Id. Brewer's counsel did not object when Welton later testified that Lawson "told [him] that a person whose name was Steven Brewer . . . had been . . . selling narcotics there." *Id.* at 256.

Our Supreme Court's rendition of the facts established at trial continues as follows:

> Officers Hollenback and Potter proceeded to the east side of the building while Officer Welton remained in front of the pool hall. When Officer Hollenback saw [Brewer] approximately fifteen feet away from him, Hollenback said, "Stop, police." [Brewer] turned toward Hollenback, looked at him and then fled. Hollenback pursued [Brewer] on foot as he ran toward and entered the Fountain Lounge.
>
> [Brewer] reached under his sweat shirt and pulled out a white napkin which was rolled into a ball and threw it over an interior wall in the lounge. Officers Hollenback and Potter apprehended [Brewer] in the lounge where they also found the white napkin on the floor. The plastic bag inside the napkin contained a total of 5.2967 grams of cocaine in eighteen baggies.

Brewer, 605 N.E.2d at 182.

Our Supreme Court's opinion on Brewer's direct appeal also noted that in the final closing argument,

> the deputy prosecuting attorney made the following statement:
>
> > "Again, it's essential that – I also thought it was interesting, they have this nice diagram, and it is, and they have the sweat shirt.[1] They don't use it to show the police officers. There's a reason for that, because his job is to do whatever he can to get him off; it's not to seek truth or justice; it's to do whatever he can to get him off--."
>
> Defense counsel objected to the comment. The trial judge overruled the objection and stated that she presumed that the deputy prosecutor was quoting from a United States Supreme Court opinion.

Brewer, 605 N.E.2d at 182.

The jury found Brewer guilty of the three offenses charged and found that he was an habitual offender. The trial court entered judgment of conviction on two offenses: dealing in cocaine, a class A felony, and resisting law enforcement, a class A misdemeanor. It sentenced him to thirty years for the dealing in cocaine offense, enhanced by thirty years based on Brewer's habitual offender status, and to a one-year concurrent term for the resisting law enforcement offense, for a total of sixty years.

In his direct appeal, Brewer argued that the comments by the deputy prosecutor had denied him his right to a fair trial. Our Supreme Court held that because trial counsel had "failed to request an admonishment or move for a mistrial," the issue was not preserved for appeal and waived. 605 N.E.2d at 182. Brewer further argued that the exhibits supporting the allegation of his habitual offender status were erroneously admitted; the Court held that "if there was any error in the admission of these exhibits at

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[1] These were used during the testimony of four defense witnesses, who testified that Brewer was seated with them inside the Fountain Lounge that evening and never left the premises.

trial, the error was harmless." *Id.* at 183. Finally, Brewer claimed a violation of his right to be present at all critical stages of the proceedings; the Court held that Brewer had suffered no prejudice by not being present when a jury inquiry was answered, "Please base your verdict on the evidence as you remember it." *Id.*

Brewer retained counsel to pursue post-conviction relief, and on April 8, 2004, counsel filed a petition alleging ineffective assistance of trial counsel. Brewer asserted that trial counsel was ineffective for having failed to properly argue a hearsay objection when Officer Hollenback was initially asked about the identification of the man Lawson observed selling drugs, and for not properly objecting to such testimony by Officer Welton. As amended, Brewer's petition also asserted that trial counsel was ineffective for not seeking an admonishment or moving for a mistrial based upon the deputy prosecutor's comments in final argument.

The post-conviction court held evidentiary hearings on December 15, 2004, and October 5, 2005. Brewer testified that he had retained both his trial counsel, Stephen Dillon, and his appellate counsel, Monica Foster.

Dillon testified that he had practiced criminal defense almost exclusively since 1975, representing clients in over 100 jury trials. He further testified that he had very little recollection of Brewer's trial and had not found the case file. He remembered "something" about "identification of the defendant" had come up at trial and his "objecting to the hearsay." (Tr. 14). When asked why he had not objected to further testimony in this regard by another officer, the "only reason" Dillon could now suggest was that the trial court "was so strong on the point I didn't feel it would do any good."

Id. at 15. According to Dillon, Brewer's defense was that he was "not the man that delivered the cocaine, it's mistaken identification, and the bar owner didn't name him by name." *Id.* at 18. Thus, "one strategy" would be "to impeach the officer's testimony." *Id.* at 18, 19. And, "possibly the witness they're referring to, to try to clear that up." *Id.* at 19. Dillon was also asked why he did not ask for an admonishment or request a mistrial after the comments by the deputy prosecutor in closing. His answer was that he "knew the judge would not grant [him] either of those so it didn't occur to [him] to do it just to preserve it for appeal." *Id.* at 28.

On January 9, 2006, the post-conviction court issued its findings of fact and conclusions of law. It concluded that Brewer had not established that trial counsel was ineffective for his "failure to effectively object to hearsay evidence" or with respect to the State's closing argument. (App. 32).

DECISION

Initially, as the petitioner in this post-conviction proceeding, Brewer bore the burden of establishing grounds for relief by a preponderance of the evidence. *Fisher v. State*, 810 N.E.2d 674, 679 (Ind. 2004) (citing Ind. Post-Conviction Rule 1(5)). Now, as he appeals from the denial of post-conviction relief, Brewer stands in the position of one appealing from a negative judgment. *Id*. 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.* The 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*.

To establish a claim of ineffective assistance of counsel, Brewer was required to prove that counsel's performance fell below an objective standard of reasonableness based on prevailing norms. *Latta v. State*, 743 N.E.2d 1121, 1125 (Ind. 2001) (citing *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)). In addition, Brewer was required to prove that there was a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different. *Id.*

Brewer first argues that trial counsel was ineffective for failing to properly argue that Hollenback's testimony concerning what Lawson told him was inadmissible hearsay, and for failing to object in that regard to Welton's testimony. Brewer presses two arguments as to what trial counsel should have argued to support an objection.

Brewer cites *Bonner v. State*, 650 N.E.2d 1139, 1141 (Ind. 1995) for the proposition that when "the State argues that the non-hearsay purpose is to show the propriety of the police initiating an investigation, and that issue is irrelevant, then the admission of the statement was error." Brewer's Br. at 11. According to Brewer, the "defense did not question the propriety of the officers' approach of the people at the side of the building." *Id.* at 12. However, Brewer's exhibit containing the trial transcript does not include the opening statements, and Hollenback was the first witness and had barely begun his testimony when asked what Lawson told him upon his arrival to investigate the report of drug-dealing in front of the pool hall. Thus, as the post-conviction court concluded, to have precluded Hollenback's answering the question of what Lawson had

told him about the drug-selling "would have left the jury to speculate on why the officers chose to single out [Brewer] from the other persons in the area."[2] (App. 32).

Brewer also argues that the objection should have focused on the prejudice posed to Brewer by the hearsay. However, counsel is afforded considerable discretion in choosing strategy and tactics, and we will accord those decisions deference. *Smith v. State*, 765 N.E.2d 578, 585 (Ind. 2002). A strong presumption arises that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Id.* Even the finest, most experienced criminal defense attorneys may not agree on the ideal strategy or the most effective way to represent a client. *Id.* Brewer's trial counsel called Lawson as its own witness and elicited Lawson's testimony that he did not talk to the officers upon their arrival, did not tell them that Brewer was dealing drugs, and that he did not see Brewer that night until "they had him down on the ground in front of the Fountain Lounge." (Ex. A at 301). In addition, Brewer's counsel subjected both Hollenback and Welton to vigorous cross-examination concerning their interaction with Lawson. Further, although Brewer's post-conviction relief submission does not include his trial counsel's opening argument, Brewer's closing argument asserted that Lawson "told you the truth," and argued,

> Mr. Lawson, he didn't see drug trafficking; he didn't see any specific activity; he didn't see the Defendant do anything wrong; he didn't provide coffee to the police; he didn't give Steve Brewer's name, and the first time

[2] Further, throughout the remainder of the trial, Brewer's defense seemed directed toward establishing that the officers were out "to get" Brewer. For example, on cross-examination, Brewer's counsel asked Hollenback whether Welton had told him "he wanted to get Steve Brewer?" (Ex. A at 173). The closing argument by Brewer's counsel also highlighted conflicts in the details in testimony by the three officers concerning their observations of people in the area upon their arrival.

> he saw him was after he was under arrest on the ground out front. That's his clear statement.

(Ex. A at 499, 504). Based on the foregoing, if trial counsel chose to allow the State to elicit the two officers' testimony that Lawson gave them Brewer's name and description, it was a reasonable strategy in that it allowed the defense to raise questions about the officers' credibility, which was left to the discretion of the jury to determine who was telling the truth.

Further, testimony from the three officers was that Welton and Potter saw Brewer come around the corner and run into the Fountain Lounge with Hollenback only feet behind him; Hollenback and Potter saw Brewer throw the napkin; Hollenback then grabbed Brewer, and immediately thereafter Potter found the napkin – containing packets of cocaine – where he had seen Brewer throw it. Therefore, even if counsel erred in not arguing as Brewer now suggests, we do not find a reasonable probability that if the trial court had excluded Hollenback's testimony that Lawson identified Brewer as the man selling drugs, the outcome would have been different. However, the foregoing remained an issue of fact and credibility for the jury to determine.

Brewer also argues that trial counsel's failure to request an admonishment or mistrial based on the closing remarks of the deputy prosecutor constitutes ineffective assistance of counsel that warrants post-conviction relief. Essentially, he asserts that had Brewer so acted, this would have supported a successful claim on direct appeal of prosecutorial misconduct.

An evaluation of a prosecutorial misconduct claim begins "by asking whether misconduct in fact occurred." *Brown v. State*, 746 N.E.2d 63, 69 (Ind. 2001). If so, we consider whether the misconduct placed the defendant in a position of grave peril – "based on the probable persuasive effect of the misconduct on the jury's decision." *Id.* at 70.

In its initial closing argument, the State informed the jury that it was to "decide if what we said is factual in nature versus what you find the evidence is," and that "the evidence comes from the witness stand." (Ex. A at 487). The State further advised the jury that "you are the finders of fact, you can determine who to believe and not to believe, and to weigh each individual's advantages and disadvantages in testifying the way they did."[3] *Id.* at 492. Finally, the State asked the jury to listen to defense counsel's arguments "and realize that it's your job to determine who is telling the truth, because somebody is not telling the truth." *Id.* at 495.

Brewer's counsel then argued that Lawson "told you the truth. You determine what the truth is. You weigh each individual witness's testimony." *Id.* at 499. Counsel noted various conflicts in the testimony of the three officers, emphasized the testimony of Brewer's witnesses, and concluded by reminding the jury that it was to "judge the credibility of the witnesses." *Id.* at 507.

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[3] Brewer's four witnesses testified that not only had Brewer been sitting with them at a table inside the lounge for several hours, but that an unknown man had run through the lounge and shortly thereafter, a single officer (some identified him as Welton) walked in the bar, came directly to Brewer, and proceeded to arrest him.

In rebuttal, the State argued that defense counsel had suggested that the officers were "lying," and "trying to frame" Brewer. *Id.* at 508, 509. It was at this point that the comments about defense counsel's job being "to do whatever he can to get him off" were made. *Id.* at 510.

Whether prosecutorial misconduct occurred -- such that the failure of trial counsel to seek an admonishment or move for a mistrial was performance that fell below an objective standard of reasonableness -- is debatable. As noted in FACTS, Brewer was tried in 1990. In 2001, the Indiana Supreme Court noted that in a 1993 case, *Miller v. State*, 623 N.E.2d 403, 408 (Ind. 1993), it disapproved of

> the prosecutorial tactic of reading from Justice White's concurrence and dissent in *Wade v. State*, 388 U.S. 218, 256s-58, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967) ("Law enforcement officers . . . must be dedicated to making the criminal trial a procedure for the ascertainment of the true facts"; defense counsel's role may require conduct that "in many instances has little, if any relation to the search for truth.").

Brown v. State, 746 N.E.2d 63, 70 (Ind. 2001). In *Brown*, after defense counsel's closing argument that implied misconduct by law enforcement, the prosecutor's rebuttal included the statement that "[t]he role of the defense counsel is to get you off [the] road" of the sworn testimony. *Id.* at 69. The prosecutor further argued that defense counsel's rhetoric showed "defense counsel's role" -- that counsel was "doing his job" and knew "what he [wa]s doing" by "trying to get you off the elements of the crime." *Id.* The trial court overruled the defendant's objection and motion for a mistrial. Our Supreme Court noted "the key role of the judicial officer on the scene," and its previous observation that "which [statements] represent fair or harmless techniques and which are abusive is a call

best placed in the hands of trial judges." *Id.* at 70 (quoting *Coy v. State*, 720 N.E.2d 370, 373 (Ind. 1999). It held that the remarks in *Brown* had not "crossed the line" so as to constitute prosecutorial misconduct. *Id.* More recently, in *McAbee v. State*, 770 N.E.2d 802, 804 (Ind. 2002), the prosecutor stated that the "defense role" was to "[b]asically say and do anything to get [the defendant] off." Our supreme court did not find the comments "to constitute fundamental error." *Id.* at 805.

Moreover, a claim of prosecutorial misconduct requires not only such misconduct but also that it placed the defendant in a position of grave peril by virtue of its probable persuasive effect on the jury's decision. *Brown*, 746 N.E.2d at 69, 70. Such a finding is akin to that of "actual prejudice," the second prong of the ineffective assistance of counsel claim. The post-conviction court found that Brewer had failed "to demonstrate actual prejudice" as a result of the remarks. (App. 33). We must agree -- based upon the substantial eyewitness testimony of the three officers, as cited in the previous discussion.

Brewer failed to establish that he received ineffective assistance of trial counsel. Therefore, the post-conviction court did not err when it denied him relief.

We affirm.

NAJAM, J., and FRIEDLANDER, J., concur.