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IN THE
COURT OF APPEALS OF INDIANA

CHARLES ETIENNE,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 40A04-0705-PC-272
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE JENNINGS CIRCUIT COURT
The Honorable Jon W. Webster, Judge
Cause No. 40C01-9604-CF-433

December 31, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Charles Etienne ("Etienne") appeals the post-conviction court's denial of his petition for post-conviction relief from his conviction and sentence for murder. Specifically, Etienne contends that his trial counsel was ineffective for (1) failing to tender an instruction on voluntary manslaughter, (2) failing to object or request a continuance when the State introduced a videotape that was not properly transcribed before trial, and (3) failing to object to a jury instruction regarding intent. He also argues that he received ineffective assistance of appellate counsel for failing to challenge the identification of the impact on the victim's family as an aggravating circumstance. Finding that neither counsel was ineffective, we affirm the post-conviction court.

Facts and Procedural History

Throughout the evening of April 29, 1996, Etienne, his step-brother Joe Grider ("Grider"), and Shane and Luke Brown ("Shane" and "Luke," respectively, or the "Browns") played pool and drank together at the Eagles Club in North Vernon. The Brown brothers, accompanied at the bar by their friend James Lonaker ("Lonaker"), were vacationing from Australia and had never previously met Etienne and Grider. After a while, the men began wagering beer and then money on the pool games. After Etienne and Grider won several games, a fight erupted. After the bartender ordered the Browns to leave, all four men ended up outside of the bar.

Our Supreme Court's opinion in Etienne's direct appeal describes the ensuing events:

> According to Lonaker, Grider grabbed Luke, the two wrestled on the ground and Etienne ran from the scene. Luke soon had Grider in a

headlock, and Shane told Luke not to let go of Grider because "he's going to give up in a minute . . . ." Lonaker then saw Etienne running toward the men "with a gun straight out in front of him," heard Shane tell Etienne to put the gun down, and saw Etienne shoot Shane. Lonaker attempted to grab the gun, but Etienne stepped back, fired a shot over Lonaker's head, and said that he would "kill everyone of you mother fuckers." Luke Brown offered a similar account. Luke testified that as he and Grider were wrestling on the ground he heard someone say something about a gun, then heard Grider tell Etienne that there was "no need for that-put it away" and looked up to see Etienne walk "straight up and just shoot Shane." Although Luke did not remember hearing any subsequent shots, he testified that there could have been more.

Grider testified that, while he and Luke were wrestling on the ground, he saw Shane "swing on" or "shove" Etienne. Grider was either rendered unconscious or "had the wind knocked out of [him]" during his altercation with Luke and was unable to recall some of the events but did hear a gunshot.

Finally, Etienne testified that upon leaving the Eagles he saw Luke standing at the edge of the sidewalk. Etienne asked Luke how he was doing and Luke responded that he was waiting for Grider. Etienne told Luke that "fighting wasn't going to settle anything" and then Grider exited the club. Luke walked toward Grider, pushing Etienne to the side. Shane then exited the club and pushed Etienne onto some gravel. Grider and Luke then started screaming at each other. According to Etienne, he told Shane that he was not going to fight but Shane said "yes you are. We're going to fight." Etienne then turned and ran to his truck, pulled his gun from the console, and returned to the front of the club where Grider and Luke were fighting. Etienne screamed at Shane "[a]t least twice" to get Luke off of Grider. Shane told Etienne that he was going to "kick [Etienne's] fucking ass," and Etienne responded that he had a gun and showed the gun to Shane. Because Etienne believed that Shane was unaffected by his threat, he fired a shot over Shane's head. Etienne continued to scream at Shane to get Luke off of Grider, but Shane did not comply and instead stepped forward toward Etienne. According to Etienne, he backed away from Shane and told Shane "don't make me shoot you," but Shane "kept yelling he was going to kick my ass." Etienne then shot Shane. He agreed in cross-examination that he "pulled the trigger on purpose" and "meant to hit [Shane] with that bullet," but testified that he intended to hit Shane in the shoulder and not the chest. Shane died as the result of a single gunshot wound to the lower part of the heart.

Etienne v. State, 716 N.E.2d 457, 459-460 (Ind. 1999).

In the early morning hours of April 30, 1996, Etienne gave several statements to the police. His first statement, which was videotaped, ended with the following exchange:

> [Officer]: I don't understand what you said about how you shot [Shane] in the chest.
> [Etienne]: Well I tried to shoot him right there when I was shooting him.

Pet. Ex. A p. 507. However, when this videotape ("the videotape") was later transcribed, for unknown reasons, the transcript did not include this exchange.

The State charged Etienne with murder. During his jury trial, the transcript of Etienne's police interview was admitted without objection. The videotape itself was then admitted without objection and played to the jury, after which defense counsel indicated that he had not been aware of the final exchange. *Id.* at 509. However, he did not object or request a continuance. The court read its final instructions to the jury, including Jury Instruction 16, which is reproduced later in this opinion. The jury then deliberated and returned a verdict of guilt.

At the conclusion of a sentencing hearing on September 11, 1997, the trial court identified the following three aggravating circumstances: (1) the risk that Etienne would commit another crime, (2) Etienne's prior criminal history, and (3) the statements of the victim's family. Pet. Ex. A p. 274. In mitigation, the trial court found the following: (1) Etienne was gainfully employed, (2) he had custody of his minor child, and (3) Etienne had a reputation in the community for being a good father. *Id.* The court then concluded that the aggravators outweighed the mitigators and sentenced Etienne to sixty years in the Department of Correction. *Id.*

Etienne challenged his conviction on direct appeal, arguing, among other things, that the State committed a discovery violation rising to the level of fundamental error by providing a transcript of Etienne's police interview that did not include the entire exchange recorded on the videotape. Our Supreme Court rejected this argument, finding that Etienne suffered no prejudice from the alleged discovery violation. *Etienne*, 716 N.E.2d at 462. The Court then rejected Etienne's other arguments and affirmed his conviction.

Etienne filed a *pro se* petition for post-conviction relief on January 20, 2000. On May 19, 2006, by counsel, he filed an amended petition. His amended petition for post-conviction relief alleged that he received ineffective assistance of trial counsel because his trial attorney: (1) "did not tender an instruction on voluntary manslaughter as a lesser included offense of murder," (2) "did not object, request a continuance or take other corrective action when the state introduced damaging inculpatory evidence [on the videotape] of which counsel was not aware prior to trial," and (3) "did not object to [Jury Instruction 16] which unconstitutionally shifted the burden of proof on the element of intent." Appellant's App. p. 29. He also argued that he received ineffective assistance of appellate counsel because his attorney on direct appeal did not argue that the trial court improperly identified the impact on the victim's family as an aggravating circumstance. *Id.* at 36. After a hearing, the post-conviction court denied relief. Etienne now appeals.

Discussion and Decision

On appeal, Etienne raises the same four issues that he argued to the post-conviction court: that his trial counsel was ineffective for failing to tender an instruction

on voluntary manslaughter, for failing to object or request a continuance when the State introduced the videotape, and for failing to object to Jury Instruction 16, and that he received ineffective assistance of appellate counsel because his attorney on direct appeal did not argue that the trial court improperly identified the impact on the victim's family as an aggravating circumstance. *Id.* at 29.

The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5). The post-conviction court is the sole judge of the evidence and the credibility of witnesses. *Hall v. State*, 849 N.E.2d 466, 468 (Ind. 2006). When appealing the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. *Fisher v. State*, 810 N.E.2d 674, 679 (Ind. 2004). The reviewing court will not reverse the judgment unless the evidence unerringly and unmistakably leads to the opposite conclusion. *Patton v. State*, 810 N.E.2d 690, 697 (Ind. 2004). We will reverse a post-conviction court's findings and judgment only upon a showing of clear error, which is that which leaves us with a definite and firm conviction that a mistake has been made. *Hall*, 849 N.E.2d at 468.

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to effective assistance of counsel. *Koons v. State*, 771 N.E.2d 685, 690 (Ind. Ct. App. 2002), *trans. denied*. We review the effectiveness of trial and appellate counsel under the two-part test provided by *Strickland v. Washington*, 466 U.S. 668 (1984). *Bieghler v. State*, 690 N.E.2d 188, 192-93 (Ind. 1997). To succeed on his ineffective assistance claims, Etienne must demonstrate that counsel's performance fell

below an objective level of reasonableness based upon prevailing professional norms and that the deficient performance resulted in prejudice. *Strickland*, 466 U.S. at 687-88. "Prejudice occurs when the defendant demonstrates that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Grinstead v. State*, 845 N.E.2d 1027, 1030 (Ind. 2006) (quoting *Strickland*, 466 U.S. at 694)).

We begin by noting that our Supreme Court has already addressed whether Etienne was prejudiced by the introduction of the contents of the videotape. Etienne argues that the final exchange contained in the videotape "changed his entire defense." Appellant's Br. p. 6. However, Etienne made a similar argument on direct appeal, contending that the State committed a discovery violation, rising to the level of fundamental error, by not alerting him to the final exchange in the videotape prior to trial. In its opinion on Etienne's direct appeal, our Supreme Court wrote, "[W]e fail to see how Etienne was prejudiced because his other accounts to the police and his testimony at trial were to the effect that he intentionally shot Shane, albeit in self-defense." *Etienne*, 716 N.E.2d at 462. "Although differently designated, an issue previously considered and determined in a defendant's direct appeal is barred for post-conviction review on grounds of prior adjudication – res judicata." *Overstreet v. State*, 877 N.E.2d 144, 150 n.2 (Ind. 2007) (citing *Reed v. State*, 856 N.E.2d 1189, 1194 (Ind. 2006)). To succeed on his ineffective assistance of counsel claim in the instant appeal, Etienne must prove that he was prejudiced by defense counsel's failure to object or take corrective action after the introduction of the videotape. Because it has already been determined that Etienne

suffered no prejudice from the contents of the videotape, this issue is barred by the doctrine of *res judicata*. We now proceed to address Etienne's other three arguments.

I. Failure to Tender a Voluntary Manslaughter Instruction

Etienne argues that his trial counsel was ineffective for failing to tender a jury instruction on voluntary manslaughter as a lesser-included offense of murder. We disagree. Our conclusion that counsel was not ineffective in this regard is twofold. First, as the post-conviction court found, "[t]he decision not to request a voluntary manslaughter final jury instruction was a matter of trial strategy . . . ." Appellant's App. p. 87. Indeed, Etienne acknowledges that trial counsel "failed to tender the lesser-included instruction on Voluntary Manslaughter *because he believed it would be inconsistent to argue both self-defense and that the shooting was done knowingly in sudden heat.*" Appellant's Br. p. 16 (emphasis added). Etienne argues that this strategy was "unreasonable." *Id.*

We afford counsel great deference when reviewing strategy and tactics, and we presume that counsel rendered adequate assistance and exercised reasonable professional judgment when making strategic decisions. *Timberlake v. State*, 753 N.E.2d 591, 603 (Ind. 2001) (citing *Strickland*, 466 U.S. at 689-90)). Throughout trial, Etienne employed a strategy of arguing that he killed Shane in self-defense. *See* P.C.R. Tr. p. 40 (Trial counsel testified, "[O]ur thrust had been all the way on through . . . self defense and nothing else, except for the reckless action in self-defense."). At the post-conviction hearing, Etienne's trial counsel testified regarding the possibility of tendering a voluntary manslaughter instruction: "I thought it may have appeared to the jury as . . . being unclear

and truly trying to seek a compromise[d] verdict as opposed to a lesser included, which would have further prejudiced them against us." *Id.* He further testified, "[A]t the time, my fear, it was a decision, my fear was that it would totally negate the self defense . . . ." *Id.* at 46. Indiana courts have previously addressed the question of whether a defendant, who argued self-defense at trial, received ineffective assistance of trial counsel through counsel's failure to tender a voluntary manslaughter instruction. In *Morgan v. State*, our Supreme Court reasoned:

> A voluntary manslaughter instruction would likely have conflicted with this theory of the case. . . . Defendant's defense was that he didn't intentionally kill [the victim]. It would have been a reasonable strategic decision for defense counsel to conclude that a voluntary manslaughter instruction would have been inconsistent with Defendant's testimony, which invoked a self-defense argument and adamantly insisted that there was no intent.

755 N.E.2d 1070, 1076 (Ind. 2001). Likewise, in *Sarwacinski v. State*, this Court declined to second-guess trial counsel's strategy, explaining, "If counsel had submitted an instruction on voluntary manslaughter, he would have weakened the self-defense case and diminished appellant's chances of acquittal." 564 N.E.2d 950, 951 (Ind. Ct. App. 1991), *trans. denied*. We, too, find Etienne's trial counsel's strategic decision reasonable and perceive no error.

In addition, we agree with the post-conviction court that there was simply insufficient evidence to prove the sudden heat necessary to convict Etienne of this offense. In order for the jury to convict Etienne of voluntary manslaughter, it would have to find that he "knowingly or intentionally . . . kill[ed] another human being . . . while acting under sudden heat." Ind. Code § 35-42-1-3. Sudden heat is "anger, rage,

resentment, or terror, to a degree sufficient to obscure the reason of an ordinary person, prevent deliberation and premeditation, and render the defendant incapable of cool reflection." *Conner v. State*, 829 N.E.2d 21, 24 (Ind. 2005). As the post-conviction court explained in its order denying relief,

> The evidence at trial indicated, without question, Mr. Etienne walked some distance from the location of a fight outside a club to get his handgun from his truck and walked back and fired a warning shot before shooting the victim in the heart area. There was ample time for reflection; it is clear Mr. Etienne appreciated what he was about to do by firing a warning shot first.

Appellant's App. p. 87.[1] We agree with the post-conviction court that Etienne's alleged fear, use of alcohol, and the physical altercation that he witnessed did not rise to the level of sudden heat. This bolsters our conclusion that trial counsel's strategic decision not to tender a voluntary manslaughter instruction did not fall below prevailing professional norms. Trial counsel was not ineffective for failing to tender a voluntary manslaughter instruction.

II. Failure to Object to Jury Instruction 16

Etienne next argues that he received ineffective assistance of counsel because his trial counsel failed to object to Jury Instruction 16, which read:

> You are instructed that where an intent to kill is required to make an act an offense, such as in the charges filed against the Defendant, the State is not required to make proof of intent by direct evidence, for purpose and intent are subjective facts. That is, they exist within the mind of man, and since you cannot delve into a person's mind and determine his purpose and intent, you may look to all the surrounding circumstances, including what was said and done in relation thereto. The State is only required to produce such evidence as will satisfy the jury beyond a reasonable doubt that the

[1] On appeal, Etienne attacks this characterization of the evidence, contending that there was a "serious evidentiary dispute as to whether a warning shot was fired." Appellant's Br. p. 16. We find this argument disingenuous, given that it was Etienne's own unwavering testimony that he fired a warning shot before firing the fatal shot. Pet. Ex. A p. 1113, Appellant's App. p. 106.

> crime charged was committed by the defendant with the degree of culpability charged in the Information. Everyone is presumed to intend the natural and probable consequences of his voluntary acts, unless the circumstances are such to indicate the absence of such intent. A determination of the Defendant's intent may be arrived at by the jury from a consideration of the Defendant's conduct and the natural and usual sequence to which such conduct logically and reasonably points.
>
> The intent to kill may be inferred from the use of a deadly weapon in a manner likely to cause death or great bodily harm.

Appellant's App. p. 97-98. Etienne contends that this instruction improperly shifts the burden of proof in violation of his due process rights. We disagree.

Our Supreme Court upheld the use of a nearly identical final instruction in *Van Orden v. State*, 469 N.E.2d 1153 (Ind. 1984). Etienne acknowledges this but argues that the United States Supreme Court's subsequent decision in *Francis v. Franklin*, 471 U.S. 307 (1985), requires us to find that the language upheld by *Van Orden* violates due process. In *Francis*, the Supreme Court drew a distinction between jury instructions that create mandatory presumptions versus those that create permissive inferences and held that those creating mandatory presumptions violate due process. *Id.* at 314. "A mandatory presumption requires the jury to find the presumed fact if the predicate fact is proved, whereas a permissive inference only suggests that such conclusion may be made." *Blackburn v. State*, 519 N.E.2d 554, 556 (Ind. 1988) (citing *Francis*, 471 U.S. at 314), *reh'g denied*. However, language must be considered in the context of the instruction as a whole, and "[o]ther instructions might explain the particular infirm language to the extent that the instruction would not create an unconstitutional presumption in a reasonable juror." *Id.* (citing *Francis*, 471 U.S. at 315).

Applying *Francis*, our Supreme Court reaffirmed *Van Orden* in *Blackburn*, 519 N.E.2d at 556, and has since cited *Blackburn* with continuing approval in *Winegeart v. State*, 665 N.E.2d 893, 904 (Ind. 1996). *See also Brown v. State*, 691 N.E.2d 438, 445 (Ind. 2002) ("We reiterate our reasoning in *Winegeart*, where we stated that the phrases 'may look to,' 'may infer,' and 'may consider,' are indicative of permissive inferences, not mandatory presumptions."). Jury Instruction 16 did not impermissibly shift the burden of proof to Etienne, and therefore Etienne's trial counsel's performance was not deficient for failing to object to it. Trial counsel was not ineffective in this regard.[2]

III. Failure to Challenge the Use of An Aggravating Circumstance

Finally, Etienne argues that he received ineffective assistance of appellate counsel because his attorney on direct appeal did not argue that the trial court improperly identified the impact on the victim's family as an aggravating circumstance. When evaluating an ineffective assistance of appellate counsel claim for failure to raise issues that should have been raised on appeal, we will only find deficient performance where "the omitted issues were significant, obvious, and clearly stronger than those presented." *Wrinkles v. State*, 749 N.E.2d 1179, 1203 (Ind. 2001) (citation omitted). Appellate counsel is not ineffective for failing to raise issues that are unlikely to succeed. *Johnson v. State*, 674 N.E.2d 180, 184 (Ind. Ct. App. 1996), *reh'g denied*, *trans. denied*.

[2] It is unclear from Etienne's appellate brief whether he also argues that appellate counsel was ineffective for failing to raise this issue on direct appeal. *See* Appellant's Br. p. 21. In the last paragraph of his argument regarding the intent instruction, Etienne contends simply, "[Counsel] also unreasonably failed to raise this error as fundamental error on appeal." Assuming, *arguendo*, that Etienne sufficiently raised this argument, it would fail. Where we determine that a defendant did not receive ineffective assistance of trial counsel, the defendant "can neither show deficient performance nor resulting prejudice as a result of his appellate counsel's failure to raise [the] argument[s] on appeal." *Davis v. State*, 819 N.E.2d 863, 870 (Ind. Ct. App. 2004), *trans. denied*.

It is true that "where there is nothing in the record to indicate that the impact on the families and victims in [a] case was different than the impact on families and victims which usually occur in such crimes, this separate aggravator is improper." *McElroy v. State*, 865 N.E.2d 584, 590 (Ind. 2007) (citation omitted). However, where "the defendant's actions . . . have had an impact of a destructive nature that is not normally associated with the commission of the offense in question and this impact . . . [is] foreseeable to the defendant," the impact upon a family may qualify as a valid separate aggravating circumstance. *Leffingwell v. State*, 793 N.E.2d 307, 310 (Ind. Ct. App. 2003) (citing *Bacher v. State*, 686 N.E.2d 791, 801 (Ind. 1997)).

In this case, the impact upon the victim's family was of a nature not normally associated with the offense, and this impact was foreseeable to Etienne. Etienne shot and killed Shane in the presence of Shane's brother. At his sentencing hearing, the Browns' mother testified about Shane "being murdered by a complete stranger in the presence of his brother who idolized him." Pet. Ex. B p. 12. Luke witnessed the death of his brother. Further, Etienne was aware of Luke's presence, and he knew that the two men were brothers who were vacationing together. *See* Appellant's App. p. 104. We have previously examined a situation in which a close family member witnessed an offense and determined that this proximity heightened the impact upon the family member such that this aggravating factor was properly considered. *Kien v. State*, 782 N.E.2d 398, 414 (Ind. Ct. App. 2003) (child abuse victim's ten-year-old brother witnessed the abuse), *reh'g denied*, *trans. denied*. Likewise, we find that under the facts of this case, the trial court properly considered the impact of the offense upon a third party. For this reason,

had appellate counsel challenged this aggravator on direct appeal, the challenge would not have likely succeeded. Therefore, Etienne's appellate counsel was not ineffective for failing to raise this claim. *See Johnson*, 674 N.E.2d at 184.

Conclusion

We conclude that the post-conviction court did not clearly err in denying Etienne's petition for post-conviction relief. Etienne's argument regarding the videotape is barred by the doctrine of *res judicata*. Trial counsel's performance was not deficient in choosing not to tender an instruction on voluntary manslaughter or object to Jury Instruction 16. Appellate counsel's performance was not deficient for failing to challenge a properly-found aggravating circumstance.

Affirmed.

BAKER, C.J., and BAILEY, J., concur.