MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Tommy Townsend,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent.

September 6, 2022

Court of Appeals Case No. 21A-PC-2285

Appeal from the Allen Superior Court

The Honorable Frances C. Gull, Judge

Trial Court Cause No. 02D04-1701-PC-13

Bradford, Chief Judge.

Case Summary

[1] In 2015, a jury convicted Tommy Townsend of Class A felony burglary and Class B felony criminal confinement and sentenced him to an aggregate term of fifty-five years. After an unsuccessful direct appeal, Townsend sought post-conviction relief ("PCR"), claiming that he had received ineffective assistance of trial counsel. The PCR court denied Townsend's petition, finding that trial counsel was not ineffective. Townsend appeals, alleging that trial counsel provided ineffective assistance by: (1) failing to request blood testing and to employ a toxicologist to show that he was not voluntarily intoxicated; (2) failing to prepare for the State's impeachment evidence regarding his prior convictions; and (3) failing to present testimony from Townsend that he was permitted to enter Ortiz's residence. We affirm.

Facts and Procedural History

[2] Our decision in Townsend's direct appeal, handed down on November 5, 2015, establishes the facts and procedural history leading to his post-conviction appeal:

> The facts most favorable to the verdicts show that in January 2014, Townsend and Zaida Ortiz separated after nineteen years of marriage. The following month, Ortiz filed for divorce. Townsend remained living at their family home, while Ortiz moved into an apartment, both in Fort Wayne. Townsend and Ortiz have two sons, who were eight and twenty-three years old at

the time. Due to the couple's estrangement, Townsend became depressed and drank regularly.

In April 2014, on the Friday before Easter, the children went to stay with Townsend. That weekend Townsend was "ill." Tr. at 45–46. On Saturday night, he took 50 milligrams of Flexeril, a prescription muscle relaxant that he received from Ortiz, and one or two capsules of Dimetapp, an over-the-counter cold medicine. He also took another pill, which was unidentified.

At approximately 9:30 a.m. on Easter, Ortiz finished work and returned to her apartment. She became alarmed because some of her things were strewn all over her bed, which was not how she had left it. She found Townsend hiding in her bathroom. She was not expecting him to be in her apartment. She had not given him a key to the apartment or permission for him to be there. Ortiz asked Townsend what he was doing there. He told her that they needed to talk. She told him to leave. He said that he wanted to talk about the divorce. He wanted Ortiz to call her attorney and call off the divorce. Ortiz persuaded Townsend to exit the apartment by telling him that she would be willing to talk to him outside, but after he went out she remained inside. They argued at the front door. She told him, "You're obviously not sick." *Id.* at 48. She did not think that Townsend appeared to have a cold or the flu. She started to close the door. Townsend blocked it with his foot, but she managed to close it.

Ortiz called her elder son to see whether he had given Townsend a key to her apartment and left a voicemail message. Then she heard noises at the front door and was afraid that Townsend was trying to get back in. She went to the front door. Townsend flung the door open and punched her in the head. Her phone flew across the room. Townsend came at her with a knife, and she started screaming. Townsend told her that she should have called the attorney and stopped the divorce as he had told her to do. He grabbed Ortiz and slammed her to the ground. She felt him hit her three times in the back, and "it hurt so bad [she] could barely breathe." *Id.* at 50. Townsend flipped her over. He got on top of her, held her down, and stabbed her in the chest. At that point she realized that he had stabbed her in the back. Townsend put his hand over her mouth and nose and said, "[D]ie bitch die." *Id.* Ortiz could not breathe.

Townsend got up and said, "[O]h my God. What did I do? What did I do? [...] you need to help me. You need to help me." *Id.* at 51. Ortiz was still lying on the floor. She told Townsend to call 911. He pretended to call the EMS. He went into the kitchen. Ortiz tried to stand up and walk to the front door, but she fell down. Townsend picked her up and put her back where she had been. She saw blood on the carpet and watched as Townsend tried to clean it with bleach. She wondered why it was taking so long for the EMS to arrive. She asked Townsend if he had really called the EMS. He had not, but he told her that he had. *Id.* at 52.

Townsend offered to take Ortiz to the hospital, and she agreed. He took her outside and put her in the front passenger seat of his Yukon. She looked for someone to help her, but saw no one. Townsend drove away. He told Ortiz that he did not have enough gas. She gave him her debit card, and he stopped for gas. Townsend then drove Ortiz to their family home and parked the Yukon in the garage so that the passenger door was so close to the wall that Ortiz could not open it. Townsend went inside the house. Ortiz was afraid that he was going to kiss their younger son goodbye and then kill her and kill himself. She saw her cell phone, grabbed it, and called 911. She told the operator that she had been stabbed, needed help, and was in a tan Yukon. That was all she was able to say before Townsend came back and grabbed the phone.

Townsend drove away. Ortiz began to go in and out of consciousness. She thought that Townsend appeared to be driving toward Decatur, Indiana. At one point, Townsend stopped the car so that she could urinate. Townsend then dressed the knife wounds in her back with bandages that were in a first-aid kit. He did not have enough bandages for the chest wound, so Ortiz held a towel over it.

They drove on. Ortiz started to suspect that Townsend was driving to Piqua, Ohio, about a two hours away, because he had family there. Townsend made at least four more stops: when he asked for directions; when Ortiz lost control of her bowel; when Townsend got her a drink; and when she woke up vomiting. Ortiz, a registered nurse, believed that she was going into shock. She kept asking Townsend to take her to the hospital, but he did not.

Ortiz asked Townsend to take her to his uncle, Richard King, who lived in Piqua. Townsend drove by King's house several times. At around 5:00 p.m., King had arrived home, and he saw Townsend pull up. King asked Townsend what he was doing there, but Townsend drove away. Townsend immediately returned, and King asked what was going on. King realized that Ortiz was in the Yukon with Townsend. King went over to the passenger side to talk to Ortiz and saw a little bit of blood. King asked Townsend what was going on, but Townsend was unresponsive. Townsend drove away again but returned. King again asked Townsend what was going on, and Townsend still did not respond. King looked at Ortiz, who shook her head. King told Townsend to let Ortiz out of the car so that King could take her to the hospital. Townsend eventually agreed, and King rushed her to the hospital. Ortiz had to be transferred to a hospital with a trauma center due to her critical condition. Ortiz had three stab wounds to her back and one to her chest. She also had a cut on her hand from trying to defend herself.

Townsend did not follow King to the hospital. Police found Townsend around 5:47 p.m. He had crashed his Yukon and was unresponsive. The Yukon was still running, so the officer opened the passenger door to turn the vehicle off and a box of Sleepinal pills fell out. *Id.* at 131.

The State charged Townsend with [C]lass A felony burglary, [C]lass B felony aggravated battery, [C]lass B felony criminal confinement, and [C]lass C felony intimidation. Townsend filed a notice of intent to offer an insanity defense. The trial court appointed Drs. Rebecca Mueller and Stephen Ross to provide expert testimony on whether Townsend was legally insane when he committed the offenses. Both interviewed Townsend in July 2014.

A two-day jury trial was held. Dr. Mueller testified that when she interviewed Townsend he was experiencing some short-term memory loss. Townsend told her that the night before he committed the offenses he took a Flexeril pill that he got from Ortiz, one or two Dimetapp capsules, and "another pill that he described as not being Flexeril." *Id.* at 225. Dr. Mueller testified that she "later found out that he had taken more Flexeril than he realized. He had taken probably 50 mg. of Flexeril the night before." *Id.* The therapeutic dose of Flexeril is 15 to 30

milligrams in a 24-hour period. *Id.* at 227. Dr. Mueller concluded that Townsend was legally insane at the time of the offenses. *Id.* at 216. Specifically, she concluded that he suffered anticholinergic intoxication with secondary psychosis as a result of "[v]arying kinds of medications." *Id.* at 216, 233–34. Dr. Mueller explained that psychosis generally means "a break from reality" where a person does not "perceive things as they are truly happening." *Id.* at 220. She testified that any psychosis that Townsend had was a result of the medication and that all the information available to her showed that he took the medicines voluntarily. *Id.* at 234–35. She further testified that Townsend's depression from his divorce probably contributed to "some poor judgment about taking too much medication." *Id.* at 274. She also testified that Townsend did not have a history of psychosis and that he had no memory of the events after he took the medication until he woke up two days later chained to a hospital bed.

The State requested a jury instruction informing the jury that it could consider Townsend's demeanor before, during, and after the crime to determine whether he was legally insane because his demeanor might be more indicative of his mental health than mental exams conducted weeks or months later ("the State's Demeanor Instruction"). Appellant's App. at 71 (State's Proposed Instruction No. 8); Tr. at 195–96. Townsend objected that the State's Demeanor Instruction was already covered by other instructions, invaded the province of the jury, was unsupported by the evidence, and was confusing. The trial court gave the State's Demeanor Instruction over Townsend's objection.

Townsend also requested a jury instruction on demeanor evidence ("Townsend's Demeanor Instruction"), which stated that demeanor evidence before and after the crime was of more limited probative value than demeanor evidence during the crime. Appellant's App. at 84 (Defendant's Proposed Instruction No. 6). The State conceded that it was an accurate statement of the law and did not object to it, but the trial court refused it on the grounds that it was already covered by other instructions. Tr. at 201–02.

The trial court also instructed the jury that temporary mental incapacity produced by voluntary intoxication is not an excuse for a crime, and that such temporary mental incapacity is not considered a mental disease or defect under Indiana's insanity

> statute. Appellant's App. at 47. During deliberations, the jury sent the foreman out with a note asking whether voluntary intoxication was the same as voluntary consumption. Tr. at 367. The trial court directed the jury to rely on the evidence and the court's instructions.
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> The jury found Townsend guilty as charged. The trial court entered judgment of conviction for [C]lass A felony burglary and [C]lass B felony criminal confinement and vacated the remaining counts to avoid double jeopardy. The trial court sentenced Townsend to consecutive terms of forty years for burglary and fifteen years for criminal confinement, for an aggregate term of fifty-five years.

Townsend v. State, 45 N.E.3d 821, 824–27 (Ind. Ct. App. 2015) (footnote omitted). Townsend appealed his conviction and sentence, which we affirmed. On January 23, 2017, Townsend filed a petition for PCR alleging ineffective assistance of counsel. Specifically, Townsend argues that trial counsel failed: (1) to request blood testing and employ a toxicologist to show he was not voluntarily intoxicated; (2) to prepare for the State's impeachment evidence regarding his prior convictions; and (3) to present testimony from Townsend that he was permitted to enter Ortiz's residence. After an evidentiary hearing, the PCR court denied Townsend's petition.

Discussion and Decision

[3] Townsend argues that the PCR court erred in denying his PCR petition. Our post-conviction rules "create a narrow remedy for subsequent collateral challenges to convictions." *Williams v. State*, 706 N.E.2d 149, 153 (Ind. 1999). Importantly, a "petitioner who has been denied post-conviction relief appeals from a negative judgment and as a result, faces a rigorous standard of review on

appeal." *Dewitt v. State*, 755 N.E.2d 167, 169 (Ind. 2001). In fact, we will reverse the PCR court's findings "only upon a showing of clear error … which leaves [us] with a definite and firm conviction that a mistake has been made." *Hollowell v. State*, 19 N.E.3d 263, 269 (Ind. 2014) (citing *Ben-Yisrayl v. State*, 729 N.E.2d 102, 106 (Ind. 2000)). Put simply, Townsend must show that the evidence "leads unerringly and unmistakably to a conclusion opposite that reached" by the PCR court. *Id*. at 269.

Ineffective Assistance of Trial Counsel

[4] To prove ineffective assistance of counsel, Townsend must satisfy both prongs of *Strickland v. Washington*'s two-part test. 466 U.S. 668 (1984). First, Townsend must show that trial counsel's performance fell below an objective standard of reasonableness based on professional norms. *J.J. v. State*, 858 N.E.2d 244, 250 (Ind. Ct. App. 2006). We presume that counsel performed adequately and defer to counsel's tactical and strategic decisions. *Smith v. State*, 765 N.E.2d 578, 585 (Ind. 2002). Second, Townsend must also prove that trial counsel's deficient performance prejudiced him such that, but for trial counsel's error or omission, the PCR court's determination would have been different. *Id*.

A. Toxicology Evidence

[5] Townsend argues that trial counsel was ineffective for failing to request a blood test to investigate his toxicology and to employ a toxicologist to testify that psychosis could result after taking the recommended doses of the medicines at

issue. Townsend explains that he received, and was prejudiced by, ineffective assistance of counsel for three reasons: first, blood work would have shown the amount of medication that he had in his system. Second, a toxicologist would have testified that psychosis and other side effects can occur after taking the normal recommended amount of certain medications. Third, trial counsel's reason for avoiding the involuntary intoxication argument, potential alcohol consumption, fails to explain why trial counsel would not have pursued evidence relating to other substances.

[6] When reviewing an ineffective assistance of counsel claim for failure to investigate, "we apply a great deal of deference to counsel's judgments." *Boesch v. State*, 778 N.E.2d 1276, 1283 (Ind. 2002). In fact, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support" such choices. *Strickland*, 466 U.S. at 690.

[7] Here, the PCR court's findings indicate that trial counsel's performance on this issue was not deficient. Indeed, trial counsel knew of the blood test results; however, he focused on the insanity defense. Trial counsel felt as though Townsend "was not sane at the time of these events and I found, in my experience, when you're throwing multiple defenses toward a jury, you become less successful, so I wanted to stay with the insanity, which I had the two Court-appointed experts in agreement on." PCR Tr. Vol. I p. 30. Moreover, Townsend indicated to trial counsel that "he had ingested alcohol on that date"

and trial counsel "couldn't see where a toxicologist would be of assistance." PCR Tr. Vol. I p. 32. Trial counsel, exercising his professional judgment, strategized "to keep the jury clearly focused on the strength of [the insanity] case." PCR Tr. Vol. I p. 32. Such tactical and strategic decisions warrant deference. *See Smith*, 765 N.E.2d at 585. Thus, we cannot say that trial counsel provided ineffective assistance in this regard.

B. Townsend's Prior Convictions

[8] Next, Townsend argues that trial counsel's performance was deficient and prejudiced him because trial counsel did not make a pretrial request for notice of the prior conviction evidence and failed to object to inadmissible propensity evidence under Indiana Evidence Rule 404(b).

[9] Townsend contends that trial counsel's failure to seek a pretrial 404(b) disclosure led trial counsel to focus on the relevance of the prior conviction instead of on its prejudicial effect under Indiana Evidence Rule 403. However, trial counsel did not have "any reason to expect that the State would offer evidence of [Townsend's] prior bad acts under Evidence Rule 404(b), which occurred only after [defense] witness Richard King made an unelicited remark that [Townsend] had never been in trouble." App. Vol. II pp. 161–62. While trial counsel was aware of the prior convictions, and prepared to address them, the State gave no indication that it intended to offer these prior convictions as 404(b) evidence at trial. Because the State made no effort to admit these convictions as evidence under Rule 404(b), trial counsel had no reason to make

a 404(b) pretrial request. Consequently, trial counsel did not perform deficiently in this regard.

C. Burglary Charge

[10] Finally, Townsend argues that trial counsel's failure to present evidence that undermined the burglary charge resulted in deficient performance and prejudiced him. To prove Class A felony burglary, the State needed to show that Townsend broke into and entered the dwelling of another, resulting in bodily injury. Ind. Code § 35-43-2-1 (2014). Townsend argues that he had information negating the required breaking and entering elements. Namely, Townsend testified at his PCR hearing that he would have testified at trial that Ortiz had allowed him to be at her apartment at the time of the incident. Townsend contends that trial counsel's failure to have him testify at trial deprived the jury of the full picture.

[11] As a matter of trial strategy, trial counsel recommended Townsend not to testify. Trial counsel is an experienced trial attorney who has tried over 500 felony jury trials. He advised Townsend not to testify "because of the facts of the case" and "because his intoxication at the time … would really impair his credibility with the jury[.]" PCR Tr. Vol. I. p. 33. In fact, trial counsel explained that he believed Townsend's "testimony would hurt him more than it would help him." PCR Tr. Vol. I p. 36. Townsend has failed to show how trial counsel's performance here was unreasonable. In the PCR hearing, Townsend even admitted that he agreed with trial counsel's recommendation "because of [his] memory issues." PCR Tr. Vol. I p. 42.

[12] Trial counsel acted within the bounds of professional conduct when he recommended that Townsend not testify. "[W]e do not second-guess strategic decisions requiring reasonable professional judgment even if the strategy or tactic, in hindsight, did not best serve the defendant's interests." *State v. Moore*, 678 N.E.2d 1258, 1261 (Ind. Ct. App. 1997) (citing *Butler v. State*, 658 N.E.2d 72, 78–79 (Ind. 1995)). Therefore, we cannot say that the PCR court erred in finding that trial counsel did not perform deficiently when he recommended Townsend not to testify.

[13] The judgment of the PCR court is affirmed.

Bailey, J., and Pyle, J., concur.