MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Linda Darby,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

February 18, 2022

Court of Appeals Case No. 21A-PC-1081

Appeal from the Lake Superior Court

The Honorable Daniel J. Molter, Special Judge

Trial Court Cause No. 45G01-1702-PC-1

Bailey, Judge.

Case Summary

[1] Linda Darby ("Darby") appeals the denial of her petition for post-conviction relief, which challenged her conviction for Murder.[1] We affirm.

Issues

[2] Darby presents two issues for review:

I. Whether Darby was denied due process in post-conviction proceedings when the post-conviction court excluded testimony from Darby as to what her testimony would have been had she testified at her 1970 trial; and

II. Whether Darby was denied effective assistance of trial counsel.

Facts and Procedural History

[3] In March of 1970, Darby, her husband Charles Darby ("Charles"), and their five children resided on Beech Street in Hammond, Indiana. On March 4, 1970, at approximately 12:30 a.m., firefighters were dispatched to the Darby residence, upon reports of a fire and an explosion. Initially, it appeared to firefighters that no one was home; however, as the fire was contained, a

[1] Ind. Code § 35-42-1-1.

firefighter discovered Charles's charred body on a mattress. He had been shot in the heart.

[4] The prior evening, Darby had checked into a Holiday Inn in Valparaiso, Indiana, with her children, requesting a 10:00 p.m. wakeup call. After Darby checked out, housekeeping staff found various articles of women's clothing in her room, and the hotel owner found a 12-gauge shotgun behind a vending machine. These articles were turned over to police. During the ensuing investigation, one of Darby's neighbors identified the shotgun as the one that he had sold to Charles. The shotgun was linked through ballistics testing to the shot that entered Charles's body. A convenience store clerk and his friend identified the articles of clothing as being consistent with apparel worn by a woman who had purchased two gallons of gas late on March 3, 1970, and then returned the gas can after midnight.

[5] Darby was charged with the murder of her husband. On September 24, 1970, a jury convicted her of that charge; on October 1, 1970, she received a sentence of life imprisonment. On November 28, 1970, Darby filed a motion to correct error. The motion was denied on August 4, 1971.

[6] On March 13, 1972, Darby escaped from the Indiana Women's Prison. On the following day, appellate counsel was appointed. However, no direct appeal was perfected. Decades later, on October 19, 2007, Darby was returned to the custody of the Indiana Department of Correction. In 2011, Darby petitioned for permission to file a Belated Notice of Appeal. The petition was denied and

the denial was affirmed by a panel of this Court on April 19, 2012. *Darby v. State*, 966 N.E.2d 735 (Ind. Ct. App. 2012), *trans. denied*.

[7] On February 6, 2016, Darby filed a pro-se petition for post-conviction relief, which was subsequently amended with the assistance of appointed counsel. On June 28, 2019, the post-conviction court conducted a hearing upon Darby's claim of ineffective assistance of trial counsel. The State and Darby stipulated that both attorneys who had represented Darby at her trial in 1970 were deceased. Darby elicited testimony that the distance in 1970 between the Darby residence and the next-door residence had been only 9 feet and 5 inches; she also submitted an affidavit from a skilled witness suggesting that the police investigation of fingerprints had been inadequate and, had Charles been shot while lying in his bed at home as opposed to another location, the shotgun blast would have been heard by neighbors.

[8] Darby testified regarding the circumstances surrounding her failure to provide testimony at her trial, other than in hearings upon motions to suppress evidence. According to Darby, she did not know that the decision to testify in her own defense was hers to make. Darby testified that she had inquired of one of her trial attorneys "don't I need to testify" and he replied "no." (P-C.R. Tr., pg. 31.) Darby claimed that she "would have wanted" to testify at trial and she sought to provide the omitted testimony at the post-conviction hearing. (*Id.*) The post-conviction court excluded Darby's proffered testimony but permitted her to submit a post-hearing written offer of proof.

[9] On May 6, 2021, the post-conviction court issued its findings of fact, conclusions thereon, and order denying Darby post-conviction relief. Darby now appeals.

Discussion and Decision

Standard of Review

[10] A petitioner seeking post-conviction relief bears the burden of establishing grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5). "A petitioner who is denied post-conviction relief appeals from a negative judgment, which may be reversed only if the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court." *Collins v. State*, 14 N.E.3d 80, 83 (Ind. Ct. App. 2014) (citation and quotation marks omitted). We defer to the post-conviction court's factual findings unless they are clearly erroneous. *Id.*

Due Process

[11] Citing various provisions of the United States Constitution and Indiana Constitution, Darby contends that her trial attorneys "usurped" her right to testify. Appellant's Brief at 51. Darby proposed that the post-conviction court rectify the alleged constitutional deprivation that occurred some forty-nine years earlier by allowing her, in post-conviction proceedings, to testify and contradict some of the State's trial evidence against her. The post-conviction court excluded any substitute trial testimony but permitted Darby to testify

about interactions with her attorneys. Nonetheless, the post-conviction court declined to credit Darby's account. The State now asserts that Darby showed familiarity with the option of testifying, pointing out that Darby thrice testified during her trial, albeit during hearings on motions to suppress conducted outside the presence of the jury. Darby asserts that the post-conviction court denied her due process by excluding her testimony.

[12] In her offer of proof, Darby denied having left the Holiday Inn on the evening in question, denied having killed Charles, contradicted testimony from witnesses including a neighbor, Charles' sister, and Charles' brother-in-law, and provided explanations for some of the incriminating physical evidence. In its order denying relief, the post-conviction court observed that both trial attorneys were deceased and Darby had absconded rather than assist her appellate attorney with timely raising issues in a direct appeal.

[13] A post-conviction proceeding is not equivalent to a criminal trial with the full panoply of constitutional protections. *Baum v. State*, 533 N.E.2d 1200, 1201 (Ind. 1989). "By and large, completion of Indiana's direct appellate process closes the door to a criminal defendant's claims of error in conviction or sentencing." *Ward v. State*, 969 N.E.2d 46, 51 (Ind. 2012). The scope of potential relief in post-conviction proceedings is limited to issues "that were not known at the time of the original trial or that were not available on direct appeal." *Pruitt v. State*, 903 N.E.2d 899, 905 (Ind. 2009).

[14] Darby requested that she be allowed to testify as if she were appearing at her original trial, that the post-conviction court determine the weight and credibility of that potential trial evidence, and, ultimately, that the post-conviction court grant a new trial on that basis. But Darby did not perfect a direct appeal to assert a deprivation of her constitutional rights, and post-conviction proceedings do not afford criminal defendants with "a super-appeal." *State v. Hollin*, 970 N.E.2d 147, 150 (Ind. 2012). Nor are post-conviction proceedings designed to accomplish a retrial, in whole or in part, with the post-conviction court in the role of a juror. We discern no denial of due process in the exclusion of Darby's belated trial testimony.

Effectiveness of Trial Counsel

[15] The Sixth Amendment's "right to counsel is the right to the effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)). To establish a claim of ineffective assistance of counsel, a convicted defendant must show (1) counsel's performance was deficient such that it fell below an objective standard of reasonableness based on prevailing professional norms and (2) the defendant was prejudiced by counsel's deficient performance. *Id*. at 687. When considering whether counsel's performance was deficient, there exists a "strong presumption" that counsel's performance was reasonable. *Id*. at 689. A defendant is prejudiced if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been

different." *Id*. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*.

[16] The two prongs of the *Strickland* test—performance and prejudice—are independent inquiries, and both prongs need not be addressed if the defendant makes an insufficient showing as to one of them. *Id*. at 697. For instance, "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice … that course should be followed" without consideration of whether counsel's performance was deficient. *Id*.

[17] Darby contends that her trial counsel performed deficiently by failing to: obtain a police statement; thoroughly investigate potential witnesses; develop additional testimony in regard to her telephone calls at the Holiday Inn; present evidence of the intensity of a shotgun blast; present evidence of suspicious marks on Charles's body; present evidence that the prosecution had requested that the Indiana State Police conduct an examination of clothing for the presence of gasoline; present evidence of soil comparisons; present evidence of a prior fire; object to prosecutorial comments during rebuttal; and obtain redaction of an instruction reciting the grand jury indictment of Darby. We address these contentions in turn.

[18] Police Statement of Robert Lininger. Robert Lininger ("Lininger"), was Charles's brother-in-law and an individual that the defense alluded to as an alternate suspect. Charles and Lininger had worked together in the past and there had apparently been some disagreement between the two. At times,

defense counsel suggested that Lininger had a motive to harm Charles. For example, during closing argument, defense counsel urged the jury to consider that Darby lacked a motive for murder and that Charles "only had trouble with his brother-in-law," comprising "the only evidence of any bad feeling." (Tr. Vol. IV, pg. 216.)

[19] Despite any tension between Charles and Lininger, Charles and his sister, Mary Lininger ("Mary"), had maintained some contact. Mary testified that Darby had called her for assistance on March 4, 1970. Lininger testified that he had driven to the Holiday Inn to pick up Darby and the children but intended to refrain from talking about Charles's death with the children present. According to Lininger, Darby had asked what happened, Lininger had feigned a lack of knowledge, and Darby had asked three times "how Charlie's face looked." (Tr. Vol. II, pg. 195.) Defense counsel cross-examined Lininger and unsuccessfully attempted to obtain a copy of Lininger's police statement. Darby now argues that Lininger's testimony gave the jury a misleading impression that she would have asked about the condition of Charles' face only if she had firsthand knowledge of his death. According to Darby, her counsel potentially could have effectively countered this impression if he had obtained a copy of Lininger's police statement.

[20] The trial court explained that it would not order the State to produce Lininger's police statement, if the State had access to such a statement, because "nothing said on direct [testimony] is about anything this witness said to the police department." (Tr. Vol. II, pg. 206.) Darby now contends that defense counsel

should have argued that Darby was entitled to a copy under the authority of *Antrobus v. State*, 253 Ind. 420, 254 N.E.2d 873 (1970). In *Antrobus*, the Court held that it was "error for the trial court, in the absence of the appellee showing a paramount interest in non-disclosure, to deny appellants' motion requesting production by [the State] of the witness' pre-trial statements made to the police officers for the purpose of cross examination and impeachment of the witness." *Id.* at 426; 254 N.E.2d at 876. The Court set forth the following procedure for obtaining such statements:

> First, the defendant must lay the proper foundation for his motion or the trial court may properly deny it. An adequate foundation is laid when: (1) The witness whose statement is sought has testified on direct examination; (2) A substantially verbatim transcription of statements made by the witness prior to trial is shown to probably be within the control of the prosecution; and, (3) The statements relate to matters covered in the witness' testimony in the present case.
>
> After laying this foundation, the defendant may move the trial court to require the State to produce such statements for use by the defense in cross examination and impeachment of the witness. If the foundation is proper the trial court must grant the motion and order the statements turned directly over to the defendant unless the State alleges: (a) There are no such statements within the control of the State. The trial court must conduct a hearing on the conflicting claims of the parties to resolve this issue. (b) There is a necessity for keeping the contents of the statements confidential. (c) The statement also contains matter not related to the matters covered in witness' testimony and the State does not wish to reveal that portion. In the latter two cases the statements need not be given directly to the defendant but should be given to the trial court for his

> decision concerning the State's claim. If the trial court agrees with the State, then on (b) and (c) the trial court may deny defendant's motion or turn over to the defendant only the relevant portion of the statement.

Id. at 427-28; 254 N.E.2d at 876-77.

[21] The *Antrobus* decision was handed down several months before Darby's trial and was presumably available to defense counsel. At first blush, it would appear that an *Antrobus* argument could have been made within the bounds of reasonable professional norms. That is not to say that the argument would have been availing.

[22] It is not entirely clear from the trial record that a police statement from Lininger in fact existed. During post-conviction proceedings, Darby has not located such a statement. She apparently believes that the State is responsible for its loss and urges that prejudice should be presumed. But Darby bears the burden of showing prejudice from counsel's deficient performance. *Strickland*, 466 U.S. at 687. Although the prosecutor did not tender a police statement to defense counsel (possibly because one did not exist), the prosecutor clarified on re-direct examination that Lininger did not know, "from his own personal knowledge, whether [Darby] knew that Charles was dead" at the time of the conversation at issue. (Tr. Vol. II, pg. 204.) Defense counsel elicited, on re-cross examination, an admission from Lininger that he and Charles were "not on friendly terms." (*Id.* at 208.) Darby's speculation that there might have been additional support for her defense within a police statement does not establish prejudice.

[23] Investigation of Potential Witnesses. Police interviewed two of Charles's co-workers, Lawrence Moran ("Moran") and Herbert Marshall ("Marshall"). Darby contends that these interviews revealed inconsistencies that should have prompted defense counsel to conduct further investigation.

[24] "When deciding a claim of ineffective assistance of counsel 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). Doing so is consistent with *Strickland*, wherein the United States Supreme Court observed that:

> [S]trategic 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 the limitation on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.

Strickland, 466 U.S. at 690-91.

[25] Moran was interviewed regarding the last time that he saw Charles, specifically, February 25, 1970. Moran related that he and Charles worked together that day and that he had seen Charles cash a check for $200.00. Marshall's account of the same day was contradictory, in that he stated there had been insufficient work and he, Moran, and Charles had played cards that day. Darby now argues that defense counsel "should have interviewed anyone who knew Charles well" and should have "presented" Moran and Marshall's "conflicting

statements." Appellant's Brief at 37. Darby does not explain what relevant evidence might have surfaced had counsel pursued the alleged inconsistency in the co-workers' accounts of a workday one week before Charles was killed. Darby failed to establish prejudice from defense counsel's decision to not follow up on the co-worker statements.

[26] Development of Night Clerk Testimony. Brian Callahan ("Callahan") was the night clerk on duty at the Holiday Inn where Darby stayed the night of March 3, 1970. At trial, Callahan testified that Darby had requested a 10:00 p.m. wakeup call and he had complied with the request. Defense counsel did not conduct a cross-examination. Darby maintains that she placed four calls from the hotel room, none of which was placed to Mary; rather, she maintains that she received a call from the Liningers. Darby asserts that defense counsel should have obtained any statement given by Callahan and "explored" the telephone calls in more depth, ultimately learning that Darby had not called the Liningers. Appellant's Brief at 37. Darby also contends that defense counsel should have elicited testimony from Callahan that he did not see Darby leave the premises during the evening she stayed at the Holiday Inn.

[27] The State and the defense agreed that a telephone call on March 4, 1970, preceded the arrival of Lininger to transport Darby and her children. And there was no dispute that the Holiday Inn had an exit other than the one near the front desk. We are not persuaded that, had the jury learned which party placed the telephone call and that Callahan had not personally observed Darby exit the premises, the outcome of the trial would have been different. Simply put,

counsel was not obliged to pursue a defense to the extent that Darby deems desirable in hindsight. *See Badelle v. State*, 754 N.E.2d 510, 539 (Ind. Ct. App. 2001).

[28] Shotgun Blast. Darby asserts that her attorneys failed to bring "crucial facts" before the jury. Appellant's Brief at 40. Specifically, Darby contends that counsel should have elicited testimony as to how closely the residences were located, how loudly a gunshot reverberates, and the lack of a neighbor reporting hearing a gunshot. Darby is of the opinion that such evidence, properly emphasized, would have bolstered the defense theory that Charles was killed elsewhere and transported, and ultimately would have changed the outcome of the trial.

[29] At the post-conviction hearing, Darby presented evidence that the residences in her former neighborhood were located very close together. She also presented evidence that the blast from a shotgun is extremely loud. But she did not present evidence that a neighbor was at home earlier than the time at which the explosion was reported. Darby has not established that trial counsel performed deficiently in this instance.

[30] Markings on Body. Darby claims that there were unusual markings on Charles's upper body, something she deems consistent with straps used to transport heavy objects. Darby contends that her trial counsel should have focused upon the markings as support for the argument that Charles was killed somewhere other than his home and then moved to his bed. But the pathologist

and coroner did not identify any such markings. We cannot say that defense counsel was deficient for failing to further develop a defense strategy based upon markings not documented in close examinations.

[31] Indiana State Police Testing for Gasoline on Clothing. On March 3 and March 4, 1970, Guy Rozhon ("Rozhon") was working an overnight shift at a gas station near the Holiday Inn in question. Rozhon sold two gallons of gasoline to a woman wearing clothing like that retrieved from Darby's hotel room. He permitted the woman to take away a gas can that belonged to the gas station and the same woman returned the gas can. Rozhon gave the gas can to investigating officers and it was tested for fingerprints. Clothing retrieved from Darby's hotel room was shown to Rozhon during the trial and he testified that it was consistent with the clothing worn by the woman who had handled the gas can. Fingerprint examination was conducted, and the results were revealed at trial. According to Darby, the State had requested that the Indiana State Police examine the clothing for the presence of gasoline, but this request was either withdrawn or the results discarded.

[32] During its case-in-chief, the State elicited testimony from a fingerprint examiner that no fingerprints were found on the gas can. The witness identified possible reasons for the lack of fingerprints as the gas can having been covered in a petroleum substance or the gas can having been handled by a person who did not put forth sufficient moisture to leave a fingerprint. Defense counsel sought to create the impression that proper testing would have revealed a person other than Darby used the gas can. Defense counsel challenged the thoroughness of

the testing and inquired why the handle was not tested and why a good thumbprint could not be obtained. Although the gas can was viewed in open court, it was not entered into evidence as an exhibit. Defense counsel later pointed to a lack of physical evidence against Darby.

[33] According to Darby, these efforts did not go far enough; in her view, defense counsel should have made it plain to the jury that the Indiana State Police had received a request to perform testing for gasoline. Overall, trial counsel vigorously challenged the contention that the woman who purchased gasoline from Rozhon was Darby, and repeatedly pointed to a perceived lack of physical evidence. Although counsel did not go to the lengths desired by Darby in hindsight, counsel's performance did not fall below prevailing professional norms.

[34] Soil Sample Comparisons. Police investigators obtained soil samples and made plaster casts of tire tracks in an alley near the back entrance of the Darby residence. Darby's station wagon was impounded and her tires were examined. Darby contends that her counsel should have elicited trial testimony that the soil taken from the station wagon tire did not match soil samples from the alley. However, police did not impound Darby's station wagon until several days after Charles's death. By this time, Lininger and Darby had driven the vehicle to various locations. We cannot say that trial counsel overlooked something of significant evidentiary value.

[35] Previous Fire. Prior to the fire and explosion that destroyed the Darby residence, there had been two other fires. A neighbor referenced one fire when she was explaining how she met Darby; according to Darby, this was an electrical fire. The jury did not learn of the second fire, which was an outdoor fire. Darby has taken the position that the jury should have been informed of the specific details of each fire. In her view, had the jury known that the first fire was caused by an electrical problem, it may have dispelled suspicion that Darby had a history of setting fires. And had the jury known that Darby battled a yard fire while wearing a coat, this could have explained why the woman's coat introduced into evidence was partially heat-singed.

[36] Had defense counsel elicited additional details about prior fires, such evidence may conceivably have raised inferences favorable to Darby. But again, defense counsel is not required to pursue strategies and defense theories to the extent deemed desirable in hindsight. As explained by our Indiana Supreme Court,

> With the benefit of hindsight, a defendant can always point to some rock left unturned to argue counsel should have investigated further. The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that it deprived the defendant of a fair trial. *Strickland*, 466 U.S. at 686[.]

Ritchie v. State, 875 N.E.2d 706, 719 (Ind. 2007).

[37] Closing Argument. During closing argument, the prosecutor summarized the testimony of each of the witnesses. Defense counsel then responded with

challenges to the adequacy of the investigation, the strength of the evidence, and the proof of venue. In rebuttal, the prosecutor offered an analysis of the evidence with commentary. Darby now argues that she received ineffective assistance of counsel because the prosecutor went unchallenged as he told jurors that they had a responsibility to the deceased, elicited sympathy for Charles's family, stated that certain witnesses had told the truth, and indicated that Charles was presumed to have died where his body was found.

> To prove ineffective assistance for failure to object to the State's closing argument, a defendant must prove that his objections would have been sustained, that the failure to object was unreasonable, and that he was prejudiced. During closing argument, a "prosecutor may argue both law and facts and propound conclusions based upon his or her analysis of the evidence. It is proper to state and discuss the evidence and all reasonable inferences to be drawn therefrom, provided the prosecutor does not imply personal knowledge independent of the evidence."

Potter v. State, 684 N.E.2d 1127, 1134 (Ind.1997) (quoting *Marsillet v. State*, 495 N.E.2d 699, 708 (Ind.1986)) (citations omitted).

[38] "[W]e will uphold the post-conviction court if the trial court could have overruled the objection under applicable law. That is, we will reverse the post-conviction court only if the trial court was compelled as a matter of law to sustain an objection." *Lambert v. State*, 743 N.E.2d 719, 732 (Ind. 2001).

[39] At the time of Darby's trial, it was the law that "[v]enue is an essential element of any criminal charge in Indiana" for which "the State bears the burden of

proof." *Quassy v. State*, 338 N.E.2d 283, 285 (Ind. Ct. App. 1975). In closing argument, Darby's counsel challenged the sufficiency of the evidence to prove venue. Defense counsel questioned "whether Charles Darby was killed in this county" and opined, "I do not think he was killed at Beech Street." (Tr. Vol. IV, pg. 216.) Counsel suggested that Charles "had been killed and placed there." (*Id.*) In light of the challenge to venue, the prosecutor stated: "I would like to inform you under Indiana law, death is presumed to occur where a body is found." (*Id.* at 229.) Darby has not shown by argument and citation to authority that this statement was contrary to the law as it existed in 1970, such that the trial court would have been "compelled to sustain an objection." *Lambert*, 743 N.E.2d at 732.

[40] The prosecutor urged jurors to "never forget responsibility to Charles" and offered his opinion that Darby's daughter, the gas station clerk, and another witness had "told the truth." (Tr. Vol. IV. 228, 238.) He summarized: "If you require more, you will be telling the world there is a perfect crime, telling officers, courts and prosecutors to lock up the courthouse and close down the jails and go home." (*Id*. at 240.) Whether trial counsel declined to object based upon some strategic reason can never been known, because both attorneys who represented Darby are deceased. That said, at the time of Darby's trial, it was the law that "[t]he right to argue forcefully for a certain result is given to both sides in a criminal case by statute." *Shelby v. State*, 258 Ind. 439, 442; 281 N.E.2d 885, 887 (1972). Although an objection may have been prudent, we are not persuaded from argument or authority provided by Darby that, based upon

the law as it existed fifty years ago, a trial court would have been "compelled to sustain an objection" *Lambert*, 743 N.E.2d at 732, and that Darby was prejudiced by the lack of an omission.

[41] Final Instruction on Indictment. As part of the final instructions, the jury was read, verbatim, the indictment handed down by the grand jury against Darby. Darby now contends that defense counsel should have moved to have extraneous language excised, because it suggested that an official body had already determined that she was guilty of murder. Darby argues that federal rules of court would have permitted trial counsel to present a reasonable argument for excision. But she admits that Indiana law did not require a redacted indictment. Under such circumstances, we cannot say that trial counsel performed deficiently by failing to challenge the language of the indictment.

[42] In sum, trial counsel's efforts and strategy, although they did not ultimately achieve the result desired by Darby, were not so unreasonable as to constitute ineffective assistance of counsel.

Conclusion

[43] Darby was not denied due process of law in the post-conviction proceedings. Darby was not denied the effective assistance of trial counsel.

[44] Affirmed.

Mathias, J., and Altice, J., concur.