MEMORANDUM DECISION

APPELLANT PRO SE

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IN THE COURT OF APPEALS OF INDIANA

A.C. James, Jr.,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent.

June 18, 2021

Court of Appeals Case No. 19A-PC-2311

Appeal from the Allen Superior Court

The Honorable David M. Zent, Judge

Trial Court Cause No. 02D04-1411-PC-160

Baker, Senior Judge.

Statement of the Case

[1] Appellant A.C. James, Jr. appeals from the post-conviction court's denial of his petition for post-conviction relief. James argues the post-conviction court erred by denying his claims of ineffective assistance of counsel. Concluding the

errors alleged do not amount to ineffective assistance, we affirm the post-conviction court's judgment.

Facts and Procedural History

[2] The underlying facts of James' convictions follow. On February 3, 2012, Michael Lewis and Leuvenia Ellis (Ellis) stopped at a gas station in Fort Wayne, where they found a cell phone. Later, someone called and texted the phone asking that it be returned. Lewis spoke with the caller and informed him that he wanted a finder's fee. The two arranged to meet at the gas station where Lewis had found the phone. Kyree Ellis (Kyree) and Andrew Whitt accompanied Lewis. At the gas station, James, the phone owner, walked up to Lewis' vehicle, and Lewis asked for money in exchange for return of the phone. The two argued momentarily before James uttered an expletive and walked away. Lewis drove away, and James got into a two-toned truck and chased Lewis and the two men. After the chase had gone on for several minutes, Whitt heard a shot, and the rear window shattered; Kyree was shot and died just seconds later. Lewis drove to Ellis' grandmother's house and exited the vehicle. Ellis drove Kyree to the hospital, and on the way, she saw a vehicle rapidly approaching from behind and heard a shot fired. Upon turning a corner, Ellis saw a two-toned truck behind her.

[3] James had borrowed the truck he was driving from Albert Smith, and when Smith saw surveillance footage of a portion of the chase on the news, he contacted James and asked him to return the truck. James told Smith that

several young men had approached him at a gas station, claiming he owed them money, and that he had had to pull his gun to scare them away. James failed to return the truck. Smith retrieved the truck from James and subsequently allowed the police to examine it. The police recovered a .40 caliber shell casing from the pocket of the driver side door, and a subsequent search of James' home revealed an empty box of ammunition matching the caliber and brand that was found in the truck.

[4] In March 2012, James was charged with Class B felony aggravated battery and Class D felony criminal recklessness. The State later filed the additional charge of murder. Following a jury trial, James was convicted as charged. The trial court merged the convictions for murder and aggravated battery, and sentenced James to fifty-five years for murder and one year for criminal recklessness, to be served consecutively. James' convictions were affirmed on appeal. *See James v. State*, No. 02A03-1304-CR-108, 2013 WL 5943111 (Ind. Ct. App. Nov. 5, 2013), *trans. denied* (2014).

[5] James filed a pro se petition for post-conviction relief in November 2014, which he later amended. The State moved the court to require James to submit his case by affidavit, but the court denied the motion. In October 2017, the court held an evidentiary hearing on James' petition, which was cut short by the court due to James' insulting comments to the judge, the prosecutor, and his prior counsel. The court then granted the State's renewed motion to require James to submit his case by affidavit. On July 15, 2019, the court issued its findings and conclusions and denied James' petition. This appeal ensued.

Discussion and Decision

[6] To the extent the post-conviction court has denied relief, the petitioner appeals from a negative judgment and faces the rigorous burden of showing that the evidence, as a whole, leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. *Harris v. State*, 762 N.E.2d 163, 166 (Ind. Ct. App. 2002), *trans. denied*. A 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. *Kistler v. State*, 936 N.E.2d 1258, 1261 (Ind. Ct. App. 2010), *trans. denied* (2011). In this review, findings of fact are accepted unless they are clearly erroneous, and no deference is accorded to conclusions of law. *Id.* The post-conviction court is the sole judge of the weight of the evidence and the credibility of witnesses. *Witt v. State*, 938 N.E.2d 1193, 1196 (Ind. Ct. App. 2010), *trans. denied* (2011).

[7] James alleges ineffective assistance of both trial and appellate counsel. To prevail on a claim of ineffective assistance of counsel, a defendant is required to establish both (1) that counsel's performance was deficient and (2) that counsel's deficient performance prejudiced the defendant. *Johnson v. State*, 948 N.E.2d 331, 334 (Ind. 2011) (citing *Strickland v. Washington*, 466 U.S. 668, 687-96, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). To satisfy the first element, the defendant must show that counsel's representation fell below an objective standard of reasonableness and that counsel's errors were so serious that the defendant was denied the counsel guaranteed by the Sixth Amendment. *Bethea*

v. State, 983 N.E.2d 1134, 1138 (Ind. 2013). In order to satisfy the second element, the defendant must show prejudice; that is, a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Id.* at 1139. There is a strong presumption that counsel rendered effective assistance and made all significant decisions in the exercise of reasonable professional judgment, and the defendant has the burden of overcoming this presumption. *Harris*, 762 N.E.2d at 168-69. Moreover, failure to satisfy either element of the two-part test will cause the defendant's claim to fail. *Henley v. State*, 881 N.E.2d 639, 645 (Ind. 2008). If we can easily dispose of an ineffective assistance claim based upon the prejudice element, we may do so without addressing whether counsel's performance was deficient. *Id.*

I. Assistance of Trial Counsel

[8] James claims that trial counsel failed to challenge the filing of the additional charge of murder; requested a continuance of trial; failed to impeach a witness; erred in choosing a defense; and failed to request a jury instruction.

A. Failure to Challenge Additional Charge

[9] It appears James is arguing his trial counsel was ineffective for failing to challenge the filing of the murder charge after a case file was opened and dismissed and then an information was filed under a different cause number.

[10] As the post-conviction court determined, Trial Rule 41(A) provides that a plaintiff may dismiss an action, and, unless otherwise stated, the dismissal is without prejudice. Moreover, pursuant to Indiana Code section 35-34-1-13

(1982), the prosecuting attorney may move for the dismissal of charges at any time prior to sentencing. A dismissal under Section 35-34-1-13 is not necessarily a bar to refiling; rather, the State may refile unless jeopardy has already attached, refiling serves to evade the defendant's speedy trial rights, or doing so will prejudice the substantial rights of the defendant. *Cobbs v. State*, 987 N.E.2d 186, 189 (Ind. Ct. App. 2013). Situations that do not necessarily prejudice a defendant's substantial rights include where the State dismisses a charge because it is not ready to prosecute and then refiles an information for the same offense; where the State dismisses an information in order to avoid an adverse evidentiary ruling and then refiles an information for the same offense; and where the State dismisses a charge and refiles an amended information charging the same offense. *Id.* In these situations, the defendant's substantial rights are not prejudiced primarily because the defendant can receive a fair trial on the same facts and employ the same defense. *Id.* Furthermore, public policy favors the prosecution of persons accused of criminal offenses when a fair trial is available. *Id.*

[11] Here, the State opened a case in cause number 02D05-1203-MC-572 ("MC-572") on March 2, 2012 but did not file any charges. At James' initial hearing on that date, the deputy prosecutor informed the court that murder charges were forthcoming and requested that James be held without bond. *See* Appellant's App. Vol. II, p. 65. On March 7, the State moved to dismiss MC-572, and the trial court granted the request. On the same day, the State filed an information for aggravated battery and criminal recklessness under cause

number 02D06-1203-FB-41 ("FB-41"), the cause underlying this post-conviction proceeding.

[12] Later, at a hearing on February 8, 2013 just a few days before trial, the State explained to the court, "The reason we wanted to have a hearing today was as you can see we've added a Count III, Murder, and though it appears to be late in the game however, we've tolled filing this for virtually the length of this case in plea negotiation purposes so it's not a surprise to the Defense." Prior Case Tr., p. 4. James' counsel agreed and stated that in March 2012 the State had advised that a murder charge would be filed if James did not plead to the underlying aggravated battery. Counsel further stated, "So certainly we've had almost a year of knowledge so it doesn't change anything going into next week for the prime jury trial setting. If you would show that granted over our objection, I did review with Mr. James the charging information against him, we'd waive the formal reading. Additionally I've reviewed with him the sentencing range, possible penalties with the charge of murder compared to what he had been charged with, B felony and he tells me he's prepared for trial and wants to go to trial Your Honor." *Id.* at 4-5.

[13] There is no evidence the State was attempting to circumvent an adverse ruling by dismissing cause MC-572; indeed, the State did not file any charges under that cause number. Likewise, there is no evidence the State was attempting to punish James by later adding the murder charge to FC-41; the State informed James from the beginning that a murder charge would be filed. James clearly had sufficient time to prepare a defense for the murder charge, and he was not

forced to discard his prior preparation for trial and begin again with new strategies and defenses. Moreover, his counsel specifically requested the court to show their objection to the filing of the murder charge. Thus, James has failed to show that trial counsel's performance was deficient in this instance.

B. Request to Continue Trial

[14] James also asserts his trial counsel was ineffective for requesting a continuance on August 24, 2012 of the trial scheduled to begin on August 28 because at that time he had not yet been charged with murder so he would have been tried only for the offenses of aggravated battery and criminal recklessness. Particularly, James alleges that his counsel requested the continuance because he was conspiring with the State to deny James' rights and that "[t]here was no other substance behind counsel's motion for continuance." Appellant's Br. p. 24.

[15] The record shows that the continuance had nothing to do with the murder charge being added. Rather, the State informed James and his counsel in March 2012 that a murder charge would be filed if James decided not to plead to the aggravated battery. Further, as the motion for continuance explains, the State had advised counsel it had obtained newly discovered evidence and that, in light of this evidence, James' counsel believed there was insufficient time to adequately prepare for trial. When James asked about this at the hearing on his post-conviction petition, his trial counsel testified that it was his recollection that the State had received some ballistics information that might have pointed to another suspect and that that information would have been helpful to James' case. He testified that he filed the continuance because he "thought it was in

[James'] benefit to investigate that additional information." Appellant's App. Vol. II, p. 227. James has failed to demonstrate that counsel's decision to request a continuance was outside the scope of reasonable professional judgment.

C. Failure to Impeach

[16] Next James claims his counsel was ineffective for not impeaching State's witness Valentina Ellis with her alleged criminal offenses of criminal conversion and deception. To prove that failure to impeach a witness was ineffective assistance of counsel, the petitioner must demonstrate a reasonable probability that, but for counsel's deficient cross-examination, he would not have been found guilty. *Johnson v. State*, 675 N.E.2d 678, 686 (Ind. 1996).

[17] Valentina Ellis, Kyree's aunt, testified at trial that she took Lewis and Whitt to the police station so they could tell the police what happened. She also testified that her mother found the cell phone in her backyard, after which she turned it in to police. James fails to explain how impeaching Valentina with her alleged criminal history would have changed the verdict, and we see no reasonable probability that doing so would have led to a different result.

D. Identity Defense

[18] James further alleges that his trial counsel performed deficiently by relying on an identity defense. Particularly, he maintains that it was not logical to present such a defense when some of the State's witnesses had placed him at the scene. He suggests that a better defense would have been that he did fire "the one shot

that became fatal to Kyree, during that reckless vehicle chase as described 'swerving back and forth.'" Appellant's Br. p. 33.

[19] The choice of defenses for trial is a matter of strategy. *Overstreet v. State*, 877 N.E.2d 144, 154 (Ind. 2007).

> Counsel is given significant deference in choosing a strategy which, at the time and under the circumstances, he or she deems best. A reviewing court will not second-guess the propriety of trial counsel's tactics. Trial strategy is not subject to attack through an ineffective assistance of counsel claim, unless the strategy is so deficient or unreasonable as to fall outside of the objective standard of reasonableness. This is so even when such choices may be subject to criticism or the choice ultimately proves detrimental to the defendant.

Benefield v. State, 945 N.E.2d 791, 799 (Ind. Ct. App. 2011) (quotations, alterations, and citations omitted).

[20] Here, James' trial counsel argued that the evidence did not show beyond a reasonable doubt that it was James who drove the truck and fired the fatal shot. He elicited testimony that when James left Smith's house with the truck, he left with a woman and that both a male and a female called the cell phone when it was in Lewis' possession. Counsel also underscored that the police did not find a .40 caliber gun during the search of James' home and car, and that, although they found an ammunition box, it was empty and found in the basement of the home where it appeared other people lived in addition to James. In his closing argument, counsel contended that no one could place James in the truck that night—he pointed out that the surveillance video did not show the driver of the

truck, and, based on the timing shown in the video, he called into doubt Lewis' testimony that he was able to see the person who came to the car window enter the truck. Finally, counsel mentioned the possibility of a female passenger in the truck that night. Thus, we cannot say counsel's strategy of an identity defense was so deficient or unreasonable as to fall outside the objective standard of reasonableness.

E. Failure to Request Jury Instruction

[21] It seems James additionally contends that trial counsel's failure to tender an instruction on reckless homicide amounted to ineffective assistance of counsel. It is well established that counsel is afforded considerable discretion in choosing trial strategy and tactics. *Id.* Indeed, unless the strategy is so deficient or unreasonable that it fails to comport with objective standards of reasonableness, it is not subject to attack through an ineffective assistance of counsel claim. *Id.*

[22] James' counsel pursued an all-or-nothing identity defense by discounting Lewis' testimony and arguing that "[t]here's no other evidence out there putting A.C. James in that truck" that night. Prior Case Tr. Vol. 2, p. 195. Thus, not requesting an instruction on a lesser-included offense was in line with counsel's trial strategy. The post-conviction court properly denied James' claim on this issue. *See Autrey v. State*, 700 N.E.2d 1140, 1141 (Ind. 1998) (tactical decision not to tender lesser-included offense does not constitute ineffective assistance of counsel, even where lesser-included offense is inherently included in greater offense).

II. Assistance of Appellate Counsel

[23] Finally, James asserts that his appellate counsel was ineffective for failing to raise the issue of the trial court's denial of his counsel's request to question Lewis about his then-pending guilty plea to the offense of voluntary manslaughter.

[24] Because the strategic decision regarding which issues to raise on appeal is one of the most important decisions to be made by appellate counsel, counsel's failure to raise a specific issue on direct appeal rarely constitutes ineffective assistance. *Brown v. State*, 880 N.E.2d 1226, 1230 (Ind. Ct. App. 2008), *trans. denied*. "For countless years, experienced advocates have 'emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most a few key issues.'" *Walker v. State*, 988 N.E.2d 1181, 1191 (Ind. Ct. App. 2013) (quoting *Bieghler v. State*, 690 N.E.2d 188, 194 (Ind. 1997)), *trans. denied*. Accordingly, on review, we should be particularly deferential to appellate counsel's strategic decision to exclude certain issues in favor of other issues more likely to result in a reversal. *Id.* To evaluate whether appellate counsel performed deficiently by failing to raise an issue on appeal, we apply a two-part test: (1) whether the unraised issue is significant and obvious from the face of the record, and (2) whether the unraised issue is "clearly stronger" than the raised issues. *Walker*, 988 N.E.2d at 1191.

[25] At trial, James' counsel requested permission to question Lewis about his plea to the offense of voluntary manslaughter, which was reduced from the charge of murder. In doing so, counsel acknowledged to the court that voluntary manslaughter is neither an *Ashton* offense nor an impeachable offense under Evidence Rule 609. The State responded that Lewis gave a statement to police about the incident with James well before the incident that resulted in the murder charge took place. In addition, the State told the court that Lewis' plea did not require him to testify against James and that he had not yet been sentenced. The trial court denied the request, and counsel subsequently made an offer to prove.

[26] Presently, James claims his appellate counsel was ineffective for not raising this alleged trial court error in his direct appeal. However, he failed to make the required showing in his affidavit to the post-conviction court and in his brief to this Court that this unraised issue is significant and obvious and that it is clearly stronger than the issues raised on appeal. On this basis alone, his claim fails.

[27] Nevertheless, we briefly note that a claim on appeal that the trial court erred by denying counsel's request to question Lewis about his plea would not have been successful. Rule 609 is limited to impeachment by evidence of a conviction, and Lewis had not yet been convicted of voluntary manslaughter. *See* Ind. Evidence Rule 609(a). In addition, voluntary manslaughter is not included in the list of convictions to which the rule applies. *See id.* Thus, appellate counsel did not perform deficiently, and the post-conviction court did not erroneously deny James' claim on this issue.

Conclusion

[28] Based on the foregoing, we conclude the post-conviction court properly denied James' petition for relief.

[29] Affirmed.

Riley, J., and Tavitas, J., concur.