

Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

HILARY BOWE RICKS
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

MONIKA PREKOPA TALBOT
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

BAKARI LEFLORE,)
)
Appellant-Defendant,)
)
vs.) No. 49A02-0809-PC-861
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Mark D. Stoner, Judge
The Honorable Jeffrey L. Marchal, Master Commissioner
Cause No. 49G06-0304-PC-54375

July 13, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Bakari LeFlore appeals the post-conviction court's denial of his petition for post-conviction relief. Specifically, he contends that his trial counsel was ineffective on several grounds, including failing to request that the remaining jurors be questioned once a juror was dismissed because she was unable to vote her conscience. Finding either res judicata or no ineffective assistance of counsel, we affirm.

Facts and Procedural History

The underlying facts of this case, taken from this Court's opinion in LeFlore's direct appeal, are as follows:

On March 31, 2003, Aaron Hart and Colter Norris drove to the Speedway gas station on the corner of Washington Street and Emerson Avenue in Indianapolis. When Hart got out of the car at the gas station, Terry Farries approached him and asked where the "weed" was. Farries then asked Hart if he would like to buy some marijuana. Hart said that he did but needed to get some money to make the purchase. Hart then asked Farries to follow him so he could get money. Farries got into LeFlore's car, and when Hart left the gas station in his car, LeFlore and Farries followed him. Hart dropped Norris off at a friend's house, and then continued on to his mother's house to get money.

Hart parked in a church parking lot directly across the street from his mother's house. When Hart got out of his car, LeFlore and Farries approached him, brandishing guns. LeFlore and Farries told Hart to put his hands on the car, and Hart complied. LeFlore and Farries then demanded that Hart empty his pockets. After Hart complied, LeFlore and Farries demanded that Hart give them the necklace that he was wearing. At that point, LeFlore pointed his gun at Hart's head and stated that they ought to "do this white boy in."

During this time, Hart's mother began walking over to the church parking lot, when she noticed that Hart was there with two other men. She observed one of the men pulling on Hart's necklace and pointing a gun at his head. She then yelled at the men to find out what was going on. At that point, Hart pushed the gun away from his head, causing it to discharge. Hart then ran to his mother's house. When he arrived, he looked back and saw LeFlore driving away. Hart's mother also ran back to her house and called the police.

When police responded, they found Farries dead in the church parking lot from a gunshot wound through his left eye. Ultimately, the State charged LeFlore with felony murder, attempted murder as a Class A felony, attempted robbery as a Class B felony, and carrying a handgun without a license, a Class A misdemeanor. After a jury trial, LeFlore was convicted of felony murder, attempted robbery, and carrying a handgun without a license. LeFlore waived his right to a jury trial for a Class C felony enhancement on the handgun conviction due to a prior felony conviction. The trial court merged the attempted robbery conviction into the murder conviction and sentenced LeFlore to fifty years for the felony murder conviction and four years for the enhanced carrying a handgun without a license conviction, sentences to run concurrently.

LeFlore v. State, 823 N.E.2d 1205, 1207-08 (Ind. Ct. App. 2005) (citation omitted), *trans. denied*. On direct appeal, LeFlore argued that the trial court erred by removing a juror from service during deliberations and substituting an alternate, by admitting into evidence copies of recorded phone conversations that LeFlore made to his brother while LeFlore was in jail awaiting trial and allowing the State to use transcripts of the recorded phone conversations to impeach LeFlore's brother, and by admitting LeFlore's confession without independent evidence of a *corpus delicti*. *Id.* at 1208. We affirmed.

In December 2005, LeFlore filed a petition for post-conviction relief, which was amended by counsel in May 2008. Specifically, LeFlore alleged that his trial counsel was ineffective for failing to request that the remaining jurors be questioned once the juror was dismissed to see if they were prejudiced, for failing to use available evidence to impeach Norris, for failing to explain how LeFlore knew the size of the bullet used in the shooting, and for failing to seek suppression of and object to LeFlore's pre-trial statements on the ground that *Miranda* warnings were not given. Following a hearing,

the post-conviction court entered findings of fact and conclusions of law denying relief. LeFlore now appeals.

Discussion and Decision

LeFlore contends that the post-conviction court erred in denying his petition for post-conviction relief. The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. *Henley v. State*, 881 N.E.2d 639, 643 (Ind. 2008). When appealing the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. *Id.* To prevail on appeal from the denial of post-conviction relief, a petitioner must show that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. *Id.* at 643-44. Further, the post-conviction court in this case made findings of fact and conclusions of law in accordance with Indiana Post-Conviction Rule 1(6). Although we do not defer to the post-conviction court's legal conclusions, "[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." *Id.* (quoting *Ben-Yisrayl v. State*, 729 N.E.2d 102, 106 (Ind. 2000), *reh'g denied*). The post-conviction court is the sole judge of the weight of the evidence and the credibility of the witnesses. *Fisher v. State*, 810 N.E.2d 674, 679 (Ind. 2004).

LeFlore argues that his trial counsel was ineffective on four grounds. We review the effectiveness of trial 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), *reh'g denied*. A claimant 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, 1031 (Ind. 2006) (quoting *Strickland*, 466 U.S. at 694). A reasonable probability arises when there is a "probability sufficient to undermine confidence in the outcome." *Id.* (quoting *Strickland*, 466 U.S. at 694).

I. Removal of Juror During Deliberations

LeFlore first argues that his trial counsel was ineffective as follows: "Although the trial Court did not err in replacing Juror Number Eight during deliberations, as confirmed by the Court of Appeals in the direct appeal, counsel erred in failing to request that the remaining jurors be questioned to determine whether there was any prejudicial effect from, or even improprieties which led to, that situation." Appellant's Br. p. 11. During deliberations, the bailiff informed the trial court that Juror Number Eight "was having a breakdown and she wanted to come out of [the jury room]." *LeFlore*, 823 N.E.2d at 1209 (citation omitted). The trial court brought the jury into the courtroom and admonished them as follows:

Ladies and gentlemen, some information has been brought to the attention of the Court, and we've been doing research to try to deal with the proper procedure about how to handle it. What we're going to do is question one of you outside the presence of the rest of you, and those of you who are sent back to the jury room, which will be everybody except our juror number [eight], you are admonished at this point you may not deliberate. You may not discuss the case back in the jury room until the jury is back together. And you may not discuss what we're discussing in here or what

you think we're discussing in here or anything else. So everyone except our juror number [eight] will be sent back to the jury room with the Court's instruction at this point, you may not deliberate on the cases [sic] until further order from the Court.

Id. (citation omitted). Juror Number Eight was then examined as follows:

[COURT]: All right. [Juror Number Eight,] you've communicated to [the bailiff] a concern you have about further deliberation, is that true?

[JUROR]: Uh huh. Yes.

[COURT]: All right. And I need to ask you a question. Do you understand you took an oath to try the case?

[JUROR]: Yes.

[COURT]: Okay. And is that something that you are willing to do, deliberate with your fellow jurors?

[JUROR]: I've tried.

[COURT]: Okay. Are you refusing to deliberate with them?

[JUROR]: No.

[COURT]: Okay. Are you willing to continue deliberating with them?

[JUROR]: I'm not able.

[COURT]: Okay. And when you say you're not able, I don't want you to talk about the substance of the conversations, but just from your perspective can you tell us why you're not able?

[DEFENSE]: I'm sorry, Judge, and I don't mean to interrupt, but could the record reflect that juror number [eight] is visibly shaken and she is crying?

[COURT]: Yes, ma'am-yes, sir, it will.

[DEFENSE]: Thank you.

[COURT]: Go ahead.

[JUROR]: Because I can't determine somebody's fate, I can't.

[COURT]: Okay.

[JUROR]: I can't.

[COURT]: Okay.

[JUROR]: That's why.

[COURT]: All right. All right. Do you understand as a juror you have the right to vote your conscience? You have to answer out loud, I'm sorry.

[JUROR]: Yes.

* * * * *

[DEFENSE]: You, you can't, you can't vote your conscience?

[JUROR]: I can't. I can't.

[DEFENSE]: And that is because?

[JUROR]: I cannot live with the consequences. It's just something I, I'm not fit to do. There are people that are fit to make those kinds of decisions, and I've never been in this, this predicament before, and I'm just not fit to make that decision. I just can't.

* * * * *

[COURT]: When [defense counsel] asked you if you could vote your conscience[,] was your answer I can, or I cannot?

[JUROR]: I can't.

[COURT]: I can't?

[JUROR]: No, I can't.

[COURT]: Okay. Okay, all right. And do you believe you're unable to serve on this jury?

[JUROR]: Yes, I'm unable to serve.

[COURT]: All right. Thank you. You will be excused.

Id. at 1209-10 (citations omitted). LeFlore objected to the removal of Juror Number Eight and moved for a mistrial, claiming that because Juror Number Eight was the only African-American left on the jury, LeFlore was denied his right to a jury venire that represented a cross-section of the community. The trial court denied LeFlore's motion and replaced Juror Number Eight with an alternate juror. The trial court then called the jury back into the courtroom and admonished the jurors as follows:

Ladies and gentlemen, [Juror Number Eight] has been excused from service by the Court. [Alternate juror], you are now a member of the regular jury panel. Ladies and gentlemen, the, the fact of [Juror Number Eight's] excuse by the Court and/or the reasons for it are not the proper subject of deliberations, but you may begin your deliberations, or resume your deliberations at this time with [the alternate juror] being permitted to participate.

Id. at 1210 (citation omitted).

On direct appeal, LeFlore argued that the trial court failed to make an adequate record supporting the removal of Juror Number Eight. We held:

After admonishing the jury, the trial court examined Juror Number Eight about why she should be excused from service. Juror Number Eight told the trial court that she was unable to continue to deliberate because she could not in good conscience make a decision about another person's fate. Thus, under Indiana Trial Rule 47(B), Juror Number Eight was unable to perform her duties as a juror. LeFlore had an opportunity to examine the juror and, in fact, did so. *LeFlore never showed that the rest of the jury*

panel's deliberations would be prejudiced, or that his right to an impartial jury was infringed. Therefore, the trial court did not err in replacing Juror Number Eight with an alternate juror.

Id. at 1210 (emphasis added).

“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) (re-designating refusal to give jury instructions as ineffective assistance of counsel), *reh’g denied, cert. denied*, 129 S. Ct. 458 (2008). Whether Juror Number Eight should have been removed includes the effect it may have had on the remaining jurors. That is, whether the trial court should have questioned the remaining jurors is part of the broader issue of whether Juror Number Eight should have been removed. In fact, this Court already determined on direct appeal that LeFlore has not shown on this record that the rest of the jury panel’s deliberations would be prejudiced or that his right to an impartial jury was infringed, making it impossible to show that any alleged error of counsel resulted in prejudice. *Res judicata* thus bars LeFlore from recouching this issue in terms of ineffective assistance of counsel.

II. Failure to Impeach

LeFlore, whose theory of defense at trial was that he was not the shooter or a participant in the robbery but rather that Norris was, next contends that trial counsel was ineffective for failing to use Norris’s and Tara Imel’s deposition testimony to impeach Norris, who denied being at the scene. The trial court’s findings on this topic provide:

3. During its case-in-chief, the prosecution called Colter Norris as a witness. Norris gave a pre-trial deposition on September 12, 2003. At trial

Norris testified that following the encounter at the Speedway gas station, Aaron Hart dropped him off prior to the shooting. Norris rushed to the scene of the shooting after receiving a phone call around fifteen minutes later. He spoke to a detective at the scene.

4. Petitioner's counsel cross examined Norris and specifically questioned him about perceived inconsistencies between his trial testimony and his deposition testimony. Counsel accused Norris of being the actual shooter.

5. The Court has reviewed both the trial testimony and deposition testimony of Norris. The Court finds that the two statements are consistent.

6. The prosecution also called Tara Imel as a State's witness. Imel gave a taped statement sometime prior to trial. Imel confirmed that Aaron Hart dropped Norris off at a house where she was located and that Norris left after receiving a phone call from someone advising him that Aaron Hart had been shot.

7. The Court finds that Imel's testimony, both trial and pre-trial, is consistent with that of Norris' version of events.

Appellant's App. p. 45-46 (citations omitted).

LeFlore argues that trial counsel erred by failing to use Norris's and Imel's deposition testimony to impeach Norris because "their versions of how Norris learned of the shooting . . . were very inconsistent, indicating that they were untrue, having been made up to cover for the fact that he knew because he was there." Appellant's Br. p. 13 (citations omitted). However, the information that LeFlore says trial counsel should have cross-examined Norris further on is consistent with Norris's version of events, that is, a phone call was received at the house, which Norris did not initially pick up, that erroneously reported Aaron Hart had been shot. The trial court found that Norris's and Imel's deposition and trial testimony were consistent with Norris's trial testimony. A post-conviction court's factual findings are only reversed for clear error, which LeFlore does not allege on appeal. Because of the similarities in the testimony, trial counsel cannot be deficient for failing to impeach Norris's trial testimony with his and Imel's deposition testimony. This ineffective assistance claim thus fails.

III. Failure to Inquire About Murder Weapon

LeFlore next contends that his trial counsel was ineffective for failing to question him during trial about how he knew that the bullet used to kill Farries was a 9 millimeter. He argues that counsel's "failure to prepare and counter the accusation/implication so prejudiced LeFlore before the jury and adversely affected the verdict." *Id.* at 14. The trial court made the following dispositive findings on this issue:

14. During the defense case-in-chief, the State cross examined Petitioner regarding certain telephone conversations from jail with his brother and father. Specifically, the State questioned Petitioner regarding conversations about a gun clip, a .380 handgun and a .9 millimeter handgun. Petitioner denied that he was instructing his family to get rid of the weapons. As it pertained to Petitioner's knowledge of the murder weapon, the following colloquy took place on cross examination:

Q: On the May 10, 2003, phone call, your testimony today is that it was a .45 that killed Terry Farries, isn't that right?

A: No. I don't know what killed Terry [Farries]. I said it looked like a .45.

Q: Page 2, line 10. Regardless of what happened he didn't even get hit with no .38, you know [w]hat I'm saying. He get, he got hi[t] with a .9 mill, you know what I'm saying. You told your brother that Terry [Farries] got killed with a .9 mill.

A: Yeah. I later learned that information from my daddy at a visit.

Q: And on page 3 you said, he got hi[t] with a .9 mill through the left eye. Isn't that right?

A: I also learned that from my daddy.

Q: I didn't ask you that, did I, Mr. LeFlore?

A: I'm telling you how it came about.

Q: When is it you learned that?

A: Oh, I can't remember when I learned that, but—

Q: You can't remember, right?

A: Uh uh.

Q: But you're sure it was a .9 millimeter that killed Terry Farries, isn't that right?

A: That's what my daddy said the lawyer said.

Q: Yeah. In May of 2003, right?

A: I think so. I don't know.

Q: When the firearms examiner, Dave Brundage, didn't distinguish between a .38 or a .9 millimeter until July of 2003, isn't that right, Mr. LeFlore?

A: I don't know, sir. I know when he came he told me that in a visit.

Q: The firearms examiner didn't even talk to the attorneys about what caliber killed Terry Farries until he met with the attorneys and told them it was a .9 millimeter, not a .38, isn't that right?

A: No, sir. I don't know. I know my daddy came to a visit when I was over in the jail side and told me that—

Q: Thank you, Mr. LeFlore.

15. Petitioner argues that his defense counsel was ineffective for failing to properly explain to the jury that Petitioner only knew of the .9 millimeter handgun because that information was provided to Petitioner by counsel. However, as the record adequately demonstrates, Petitioner already provided that explanation on cross-examination. Petitioner attempted to explain his knowledge of the type of gun used in the shooting by claiming that this information came from his father who, in turn, was told this by defense counsel. Petitioner has failed to demonstrate how further inquiry by defense counsel would have otherwise affected the outcome of trial.

Appellant's App. p. 48-50. As noted above, we only reverse a post-conviction court's findings upon a showing of clear error. LeFlore has not only failed to allege clear error in these findings, but he has also failed to prove any added value in having trial counsel bring out this information on direct or redirect examination (as opposed to the State eliciting it on cross examination). This ineffective assistance claim fails.

IV. Failure to Seek Suppression

LeFlore next contends that trial counsel was ineffective for failing to seek suppression of statements he made to detectives in his home on April 1, 2003, because he was not advised of his *Miranda* rights. When an ineffective of assistance of counsel claim is based on a failure to move to suppress statements, we will not find deficient performance where no showing is made that any such motion would have resulted in

suppression of the statements. *Shields v. State*, 699 N.E.2d 636, 640 (Ind. 1998). Here, the post-conviction court found:

8. Lt. Mark Rice testified during the State's case-in-chief. He and Det. Lesia Moore of the Indianapolis Police Department sought to question Petitioner at his home shortly after the shooting. At the time they sought the interview, the detectives were working under the theory that Petitioner had accidentally shot Farries. When the detectives arrived, Petitioner's father called Petitioner and asked him to return home to speak to the officers. Petitioner was eighteen on the date he was interviewed. The detectives told Petitioner they were investigating an accidental shooting of his friend and had information that Petitioner had been seen with the victim earlier at the Speedway gas station. During the course of the interview, Petitioner gave varying accounts of what took place. Petitioner initially started crying and claimed that the victim shot himself. Then he said there was a struggle between Aaron Hart and Farries at which time a white male known as "Devon" took the gun from the victim and shot him. Petitioner later modified his story again and told the detectives that Farries initially pulled a gun on Hart in a robbery attempt. Following a struggle over the gun, a white male shot Farries.

9. At trial, Detective Moore confirmed that Petitioner changed his account of events several times. During cross examination by defense counsel, Detective Moore acknowledged that Petitioner was not advised of his *Miranda* rights prior to being questioned by herself and Rice. Detective Moore discussed the circumstances surrounding the statement given to her and Rice by Petitioner. The following colloquy occurred:

Q: Bakari did speak to you voluntarily, right?

A: Yes.

Q: Without the presence of any lawyer.

A: Yes.

Q: And without any kind of advisements of his rights.

A: Yes.

10. Among the defense witnesses was Petitioner's mother, Diane LeFlore. Ms. LeFlore was present during the questioning of Petitioner by the detectives as they gathered in the LeFlore family kitchen. She confirmed that Petitioner freely answered the detectives' questions. Petitioner was not arrested following the conversation with police. At no point in her testimony did she claim or otherwise imply that her son was coerced into giving a statement to Rice and Moore.

11. . . . Counsel later questioned Petitioner about the statements he made to Rice and Moore. Petitioner testified as follows:

Q: Okay. What did you do when you got inside the house?

A: I walked in and greeted my mother and father, then I began talking with them.

Q: Did they tell you, did –them. Do you mean Det. Moore?

A: Yeah, Det. Moore and Det. Rice.

Q: Did they indicate to you why they wanted to talk with you?

A: She said, like she had said earlier, there had been an accidental shooting.

Q: Did you talk freely to them?

A: Yes, I did.

12. The detectives left at the conclusion of the interview without arresting Petitioner. Petitioner voluntarily surrendered himself to the police on a later, unspecified date.

Appellant’s App. p. 46-48 (citations omitted). The court concluded:

Petitioner has failed to establish that a challenge under *Miranda* to the admission of his statements to law enforcement would have been successful. Petitioner was questioned in his home with his parents present during the interview. At the time he was questioned, the detectives believed that they were investigating an accidental shooting. Petitioner was not arrested following the interview. He has not shown that he was deprived of his freedom of action in any appreciable way. The Court concludes that as a reasonable defendant would not have believed himself to be in custody in this situation, Petitioner was not subjected to a custodial interrogation and *Miranda* warnings were therefore not required in this case.

Id. at 59-60.

A defendant is entitled to the procedural safeguards of *Miranda* only if he is subject to custodial interrogation. *See White v. State*, 772 N.E.2d 408, 412 (Ind. 2002). “To determine whether a defendant is in custody we apply an objective test asking whether a reasonable person under the same circumstances would believe themselves to be under arrest or not free to resist the entreaties of the police.” *Kubsch v. State*, 784

N.E.2d 905, 917 (Ind. 2003) (quotation omitted). “Further, a person is not in custody where he is unrestrained and ha[s] no reason to believe he could not leave.” *Id.* (quotation omitted).

Here, the evidence shows that the detectives came to LeFlore’s house to investigate an accidental shooting, not a felony murder. LeFlore’s parents were present during the interview. According to LeFlore’s own statement, he spoke freely to the detectives. Once the interview was concluded, the detectives left LeFlore’s house without arresting him. Under these facts, we believe a reasonable person would not believe himself to be under arrest or unable to resist the entreaties of the police. As such, LeFlore has not shown that the trial court would have suppressed his statements to the detectives had trial counsel moved to suppress them. Counsel was not deficient, and thus this ineffective assistance claim fails.

V. Cumulative Prejudice

As a final matter, LeFlore contends that while counsel’s individual errors may not sufficiently prove ineffective assistance of counsel, they add up to ineffective assistance when viewed cumulatively. *See French v. State*, 778 N.E.2d 816, 826 (Ind. 2002) (“Errors by counsel that are not individually sufficient to prove ineffective representation may add up to ineffective assistance when viewed cumulatively.”). However, we have found that trial counsel did not commit any individual errors and therefore was not deficient in any respect, so LeFlore’s cumulative errors argument fails. We therefore affirm the post-conviction court.

Affirmed.

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