



## STATEMENT OF THE CASE

Appellant-Petitioner, Jerry Joe Fuentes (Fuentes), appeals the post-conviction court's denial of his petition for post-conviction relief.

We affirm.

## ISSUES

Fuentes raises two issues on appeal, which we restate as follows:

- (1) Whether Fuentes' trial counsel was ineffective when he tendered jury instructions on self-defense and criminal confinement; and
- (2) Whether his appellate counsel was ineffective when he failed to challenge two jury instructions and the sufficiency of the evidence.

## FACTS AND PROCEDURAL HISTORY

We adopt this court's statement of facts as set forth in our memorandum opinion issued in Fuentes' direct appeal, *Fuentes v. State*, No. 79A02-0305-CR-436 (Ind. Ct. App. Sept. 16, 2003), *trans. denied*:

Fuentes lived with his fiancée, Patty McLaughlin, and her two children in Lafayette. Fuentes was in the business of dealing large quantities of marijuana. His supplier was Alberto Garcia, who was known as "Veto." Garcia was supplied marijuana by his mother, Manuela Garcia, from Texas and a man named "Sammy" from Chicago. Garcia typically supplied Fuentes with 100-pound shipments of marijuana, and Fuentes would then sell the marijuana to Tony Guajardo and Roger Sloan, who sold it on the street.

In late 2001, Garcia supplied Fuentes with a shipment of marijuana that he had received from Sammy, and Fuentes paid him the \$60,000 asking price. Garcia was supposed to give the money to Sammy. Around the same time, however, Garcia's mother arrived with a 200-pound shipment of marijuana. Garcia took the \$60,000 intended for Sammy and paid his mother. The marijuana supplied by his mother was not of good quality and could not be

sold. Garcia owed Sammy \$60,000, and Fuentes became indebted to Garcia for \$30,000.

Garcia began to pressure Fuentes to pay him the money and assigned Alejandro Rodriguez to collect the money. Rodriguez frequently went to Fuentes' home in an effort to collect the money. On February 4, 2002, Rodriguez came to the house in the afternoon and talked to McLaughlin until Fuentes returned home. After Fuentes told Rodriguez that he did not have the money, Rodriguez left.

Later that evening, Rodriguez returned and was let in by one of McLaughlin's children. McLaughlin told Fuentes that Rodriguez was there and then told Rodriguez to go to the bedroom. Rodriguez went into the bedroom, shut the door behind him, and told Fuentes that they needed to go see Garcia. While sitting on a couch, Fuentes asked Rodriguez why they need to go see Garcia. Rodriguez responded that there was business to take care of. When Fuentes refused, Rodriguez told Fuentes that he had no choice and that there was someone waiting outside to make sure that he went with him.

Fuentes continued to refuse and reached for his cell phone to call Garcia. Rodriguez struck Fuentes on the back of the neck with his fist. Rodriguez told Fuentes that his entire family would be in trouble if he did not go. Fuentes stood up and head-butted Rodriguez, causing a cut across Rodriguez' forehead.

In response, Rodriguez grabbed Fuentes in a headlock and shocked him on the neck and arm with a stun gun. Fuentes agreed to go with Rodriguez and Rodriguez backed away. Fuentes reached into his closet to get a sweatshirt, but also grabbed an aluminum bat and struck Rodriguez in the mouth with it. As Rodriguez reached his arm out toward Fuentes, Fuentes hit Rodriguez across the top of his head with the bat. Fuentes then struck Rodriguez four or five more times on his head to get him to drop the stun gun. Rodriguez fell to his knees, and Fuentes struck him a couple more times. Rodriguez then fell onto his face on the floor.

Fuentes went outside and told fifteen-year old Juan Hernandez, who was sitting in Rodriguez' car, to leave and that he and Rodriguez would take care of business by themselves. Hernandez refused to leave without Rodriguez and followed Fuentes into the house. Hernandez and Fuentes struggled in the kitchen over Hernandez' stun gun. Fuentes then called to McLaughlin's son to help him. McLaughlin's son helped subdue Hernandez and assisted Fuentes when he taped and tied Hernandez's hands and feet together. McLaughlin's

son and Fuentes loaded Rodriguez' body, which was wrapped in plastic, into the back of Fuentes' truck. They then loaded Hernandez, who was alive and unhurt, into the truck and covered them up with bales of hay.

Fuentes drove to a rural location in Illinois and dumped the men in a ditch along the side of the road. Fuentes then drove to Garcia's brother's house and told him to tell Garcia to go pick up Rodriguez and Hernandez. The same day, the bodies were discovered where Fuentes had left them. An autopsy revealed that Rodriguez died from cerebral injuries caused by multiple blunt force trauma and that he had sustained three stab wounds to his back after his death. Hernandez had sustained eleven stab wounds to his back, some of which penetrated his chest cavity and caused his death.

Shortly thereafter, Fuentes went to California, where he was arrested. He consented to a search of his Dodge Durango, which was not the truck he had used to transport Rodriguez and Hernandez. A large knife in a sheath was found behind the driver's seat. No traces of blood were detected on the knife during forensic testing.

On March 22, the State charged Fuentes with two counts of murder, two counts of criminal confinement as a Class B felony, two counts of aggravated battery as a Class B felony, two counts of battery as a Class C felony, and two counts of criminal recklessness as a Class D felony. By agreement of the parties, the trial was set for September 23, 2002. Fuentes was not released pending trial. . . . The jury convicted Fuentes of voluntary manslaughter, criminal confinement, two counts of aggravated battery, two counts of battery and two counts of criminal recklessness. The jury found him not guilty on one count of murder and one count of criminal confinement.

The trial court sentenced Fuentes to forty-seven years executed on the voluntary manslaughter count, and to eighteen years executed on the aggravated battery count, with both sentences to run consecutively. Fuentes appealed. He raised three issues on direct appeal: (1) the denial of a speedy trial; (2) the admission of the knife and DNA evidence; and (3) the sufficiency of the voluntary manslaughter conviction with respect to his self-defense claim. On September 16, 2003, we affirmed his conviction.

On February 2, 2005, Fuentes filed his petition for post-conviction relief, which was amended respectively on August 30, 2007, September 10, 2007, and October 16, 2007. On April 13, 2009, following a post-conviction hearing on October 2, 2008, the post-conviction court issued findings of fact and conclusions of law denying relief.

Fuentes now appeals. Additional facts will be provided as necessary.

## DISCUSSION AND DECISION

### *I. Standard of Review*

Under the rules of post-conviction relief, the petitioner must establish the grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1, § 5; *Strowmatt v. State*, 779 N.E.2d 971, 974-75 (Ind. Ct. App. 2002). To succeed on appeal from the denial of relief, the post-conviction petitioner must show that the evidence is without conflict and leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. *Id.* at 975. The purpose of post-conviction relief is not to provide a substitute for direct appeal, but to provide a means for raising issues not known or available to the defendant at the time of the original appeal. *Id.* If an issue was available on direct appeal but not litigated, it is waived. *Id.*

### *II. Ineffectiveness of Trial Counsel*

First, Fuentes contends that his trial counsel was ineffective. Specifically, Fuentes claims that his counsel's performance was defective when tendering a pattern jury instruction on self-defense because it included the contemporaneous crime exception and when tendering a jury instruction on criminal confinement.

A defendant claiming a violation of the right to effective assistance of counsel must establish the two components set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). First, the defendant must show that counsel's performance was deficient. *Id.* at 687. This requires a showing that counsel's representation fell below an objective standard of reasonableness, and that the errors were so serious that they resulted in a denial of the right to counsel guaranteed the defendant by the Sixth Amendment. *Id.* Second, the defendant must show that the deficient performance prejudiced the defense. *Id.* To establish prejudice, a defendant must show that 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.*

Counsel is afforded considerable discretion in choosing strategy and tactics and we will accord those decisions deference. *Timberlake v. State*, 753 N.E.2d 591, 603 (Ind. 2001), *reh'g denied, cert. denied*, 537 U.S. 839 (2002). A strong presumption arises that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Id.* The *Strickland* Court recognized that even the finest, most experienced criminal defense attorneys may not agree on the ideal strategy or the most effective way to represent a client. *Id.* Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective. *Id.* The two prongs of the *Strickland* test are separate and independent inquiries. *Id.* Thus, "[i]f it is

easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed.” *Id.* (quoting *Strickland*, 466 U.S. at 697).

A. *Jury Instruction on Self-Defense*

During trial, Fuentes’ defense counsel chose to defend his client against the murder charges by raising a claim of self-defense. At the close of the evidence, Fuentes tendered and the trial court read the following jury instruction on self-defense:

INSTRUCTION 10.03

The defense of self-defense is defined by law as follows:

- a. A person is justified in using reasonable force against another person to protect himself or a third person from what he reasonably believes to be the imminent use of unlawful force. However, a person is justified in using deadly force only if he reasonably believes that the force is necessary to prevent serious bodily injury to himself or a third person or the commission of a felony. No person in this State shall be placed in legal jeopardy of any kind whatsoever for protecting himself or his family by reasonable means necessary.
- b. A person is justified in using reasonable force, including deadly force, against another person if he reasonably believes that the force is necessary to prevent or terminate the other person’s entry or of attach on his dwelling or curtilage.
- c. With respect to property other than a dwelling or curtilage, a person is justified in using reasonable force against another person if he reasonably believes that the force is necessary to immediately prevent or terminate the other person’s trespass on or criminal interference with property lawfully in his possession, lawfully in possession of a member of his immediate family, or belonging to a person whose property he has authority to protect. However, a person is not justified in using deadly force unless the force is justified under subsection (a) of this section.
- d. Notwithstanding subsections (a), (b) and (c) of this section, a person is not justified in using force if:

1. *he is committing, or is escaping after the commission, of a crime;*
2. *he provokes unlawful action by another person with intent to cause bodily injury to the other person; or*
3. *he has entered into combat with another person or is the initial aggressor, unless he withdraws from the encounter and communicates to the other person his intent to do so and the other person nevertheless continues or threatens to continue unlawful action.*

The State has the burden of disproving this defense beyond a reasonable doubt.

(Petitioner's Exh. H, p. 28) (emphasis added).

Fuentes contends that his defense counsel was ineffective for tendering this instruction because of the included language that self-defense is not an available defense if Fuentes was committing a crime. Although Fuentes acknowledges that the instruction was taken from the Indiana Pattern Jury Instruction Book and mirrored the statutory language on self-defense, he now claims that the instruction was objectionable because no evidence existed to support including the contemporaneous crime exception and it misled the jury surrounding the central issue of his defense. In other words, Fuentes asserts that the jury instruction, as given, was overbroad and subjected him to prejudice.

In *Mayes v. State*, 744 N.E.2d 390, 393 (Ind. 2001) our supreme court analyzed this statutory provision and noted that a literal application of the contemporaneous crime exception would nullify claims for self-defense in a variety of circumstances and produce absurd results in the process. As a result, the *Mayes* court held that

because a defendant is committing a crime at the time he is allegedly defending himself is not sufficient standing alone to deprive the defendant of the defense of self-defense. Rather, there must be an immediate causal connection between the crime and the confrontation. Stated differently, the evidence must show that but for the defendant committing a crime, the confrontation resulting in injury to the victim would not have occurred.

*Id.* at 394.

The record shows that the jury appeared to focus on the contemporaneous crime exception of the self-defense statute. During deliberations, the jury submitted a written question to the trial court which read “is collection of money for a drug debt a crime?” (Petitioner’s App. Direct Appeal p. 801). The trial court responded “I am sorry but I am not permitted to answer your question.” (Petitioner’s App. Direct Appeal p. 801). Although at first glance, the jury’s question seems to point to Fuentes’ drug activities, we agree with the State that the facts indicate that Fuentes was not collecting a debt, rather Rodriguez was. The jury was thus asking whether Rodriguez was committing a crime and evaluating whether Rodriguez was engaging in unlawful force against Fuentes.

Furthermore, reviewing the record, we note that all parties agreed that Fuentes had engaged in dealing marijuana and that his dealer, Garcia, was attempting to collect a drug debt through Rodriguez. At trial, the central issue was whether Fuentes intentionally killed Rodriguez by using unreasonable force against him or whether he acted with no intent to kill at all in self-defense to an attack by Rodriguez. Fuentes argued the “illicit drug operation” theory to the jury in an attempt to convince them of the violent tendencies of this organization. (Tr. Direct Appeal p. 471). Focusing on the Mexican criminal organization’s violent nature, he stressed that “if payment isn’t made, examples have to be made.” (Tr. Direct Appeal p. 472). The State argued that Fuentes’ action of repeatedly striking

Rodriguez with a baseball bat and killing him was unreasonable force in response to Rodriguez' initial threat. The State elaborated at length

The evidence from the autopsy shows that [Rodriguez] was hit more times than any reasonable man could hit anyone. And ask yourselves if you get hit in the face with an aluminum bat, break at least four of your teeth, fracture others, do you think you could still come forward, not even take a step back to figure out what was going on? Do you think you'd still grip a stun gun? The getting hit in the forehead enough to expose your brain to outside air and still a threat. Okay. And hit again and again and again. And that's just a minimum of the times that he could possibly have been hit. A minimum. Now part of the self-defense instruction is gonna tell you that you're not entitled to it if you're committing a crime. Okay. That's exactly what the defendant did himself, by committing a crime he is not entitled to an instruction on self-defense but you and I or any other honest citizen would be. If you're committing a crime, that no longer applies to you because you put yourself in that violent situation.

(Tr. Direct Appeal pp. 466-67).

In response, Fuentes argued that he was in "real fear," that he was hit with Rodriguez' stun gun and that he hit Rodriguez with the bat until he hit the floor. (Tr. Direct Appeal p. 475). Fuentes' counsel clarified

The only thing that makes sense is what [Fuentes] has described for you. At some point he's hit with the stun gun and he said he was not disabled by it, he was able to - - he was stunned and he's hurt but he's full of adrenaline and something is happening and when he reaches for his coat he grabs the bat and he swings with everything he's got with his right hand and he cracks [Rodriguez]. How many times did he hit him? Did he study where the bat landed? No. He grabs it and he swings and he beats until that individual is on the floor and he's done and probably those blows killed him very soon afterwards.

(Tr. Direct Appeal pp. 476-77). At no point was Fuentes' engagement in drug dealing an issue with regard to self-defense. Moreover, even in his direct appeal, Fuentes' challenge to

the sufficiency of the evidence of the voluntary manslaughter conviction centered on the reasonableness of his fear and the force used to defend himself.

In sum, it is clear that the State did not argue that Fuentes was committing drug dealing and thus a crime at the time of the killing. Rather, the State argued that Fuentes' act of killing Rodriguez went beyond self-defense and therefore the defense did not apply. In turn, Fuentes disagreed and claimed that his use of force which led to Rodriguez' death was reasonable in light of the threat. At no point did the parties argue the contemporaneous crime exception to the jury. Therefore, we conclude that Fuentes did not demonstrate how the inclusion of the language in the jury instruction prejudiced him. Accordingly, trial counsel did not provide ineffective assistance of counsel.

#### *B. Criminal Confinement Instruction*

On March 22, 2002, the State charged Fuentes with Class B felony criminal confinement for confining Hernandez which resulted in serious bodily injury. At trial, the jury was instructed that confinement as a Class B felony is “committed while armed with a deadly weapon *or* results in serious bodily injury.” (Petitioner's Exh. H, p. 20) (emphasis added). The jury was also instructed that serious bodily injury, as applied in the confinement statute, is defined as “bodily injury that creates a substantial risk of death or that causes serious permanent disfigurement, unconsciousness, extreme pain, or permanent or protracted loss of impairment of the function of a bodily member or organ.” (Petitioner's Exh. H, p. 26). In line with his previous argument, Fuentes now asserts that the language of the instruction was overbroad because Fuentes was specifically charged with committing

confinement resulting in serious bodily injury. Asserting that there was no evidence that Hernandez had incurred serious bodily injury as a result of the confinement, Fuentes maintains that the jury must have convicted him based on the insertion of the deadly weapon provision, a crime he was not charged with.

In *Potter*, our supreme court stated that prejudicial error does not arise solely because a jury instruction has been given in the language of the statute which is broader than the crime as charged. *Potter v. State*, 684 N.E.2d 1127, 1132 (Ind. 1997). The defendant is not prejudiced by such an erroneous instruction if there is no evidence in the record to support the uncharged portions of the crime. *Id.* (quoting *Dixon v. State*, 425 N.E.2d 673, 678 (Ind. Ct. App. 1981)). Also the defendant is not prejudiced if the jury is expressly informed of the specific crime charged against defendant and that the State must prove the material allegations of that charge beyond a reasonable doubt before the jury may convict. *Id.* If, along with the erroneous final instruction, the jury is plainly made aware (for example by an express or referential reading of the charging information) that the jury can only convict upon a finding that the defendant committed the specific acts charged in the information, then there is no prejudice. *Id.*

The record establishes that Fuentes was not prejudiced by the instruction and, therefore, he did not receive ineffective assistance of counsel. In jury instruction No. 6, the jury was read a verbatim account of the charging information in Count IV which specifically referenced the removal of Hernandez “resulting in serious bodily injury.” (Petitioner’s Exh. H, p. 7). The jury was instructed in jury instruction No. 13.09 that the State had the burden

of proving “each essential element of the crime charged beyond a reasonable doubt.” (Petitioner’s Exh. H, p. 30). In addition, the jury was told in jury instruction No. 13.01 to consider all instructions as a whole. (Petitioner’s Exh. H., p. 1). Finally, the jury was read in the final instructions and received in writing the verdict form which specifically referred to the charge in Count IV. Thus, although Fuentes’ counsel may have erred in not objecting to the overbroad final instruction No. 3.25, Fuentes cannot show that he was prejudiced. The jury was aware of the exact crime charged and that his conviction was solely for that crime. Fuentes did not receive ineffective assistance of trial counsel on this claim.

### III. *Ineffectiveness of Appellate Counsel*

Continuing his ineffectiveness claim, Fuentes next focuses on the performance of his appellate counsel. Specifically, with regard to his appellate counsel on direct appeal, Fuentes presents this court with a three-fold claim: (1) he failed to raise the self-defense instruction under the fundamental error theory; (2) he failed to raise the overbroad criminal confinement instruction under the fundamental error theory; and (3) he failed to raise a sufficiency claim with respect to the serious bodily injury evidence pertaining to the criminal confinement charge.

#### A. *Standard of Review*

The standard by which we review claims of ineffective assistance of appellate counsel is the same standard applicable to claims of trial counsel ineffectiveness. *Wright v. State*, 881 N.E.2d 1018, 1022 (Ind. Ct. App. 2008), *reh’g denied, trans. denied*. In *Bieghler*, our supreme court identified three categories of appellate counsel ineffectiveness claims,

including: (1) denial of access to an appeal; (2) waiver of issues; and (3) failure to present issues well. *Bieghler v. State*, 690 N.E.2d 188, 193-95, *reh'g denied, cert. denied*, 525 U.S. 1021 (1998). Fuentes' three claims are reviewed as a *Bieghler* type two issue. Our supreme court has noted several times the need for a reviewing court to be deferential to appellate counsel on this issue:

[T]he reviewing court should be particularly sensitive to the need for separating the wheat from the chaff in appellate advocacy, and should not find deficient performance when counsel's choice of some issues over others was reasonable in light of the facts of the case and the precedent available to counsel when that choice was made.

*Id.* at 194. *See also Timberlake*, 753 N.E.2d at 605. In evaluating these claims, we use the following two part test: (1) whether the unraised issues are significant and obvious from the face of the record; and (2) whether the unraised issues are clearly stronger than the raised issues. *Bieghler*, 690 N.E.2d at 194. Otherwise stated, to prevail on a claim of ineffective assistance of appellate counsel, a defendant must show from the information available in the trial record or otherwise known to appellate counsel that appellate counsel failed to present a significant and obvious issue and that this failure cannot be explained by any reasonable strategy. *Ben-Yisrayl v. State*, 738 N.E.2d 253, 260-61 (Ind. 2000), *reh'g denied, cert. denied*, 534 U.S. 1164 (2002).

#### B. *Self-Defense Instruction*

Fuentes first alleges that his appellate counsel's performance on direct appeal was deficient because he failed to raise, as fundamental error, the perceived erroneous jury instruction on self-defense. We conclude that no prejudicial error occurred, much less a

fundamental error. As we explained above, the evidence presented at trial did not implicate the contemporaneous crime exception incorporated in the jury instruction, nor did either party address it. Rather, the sole issue raised and presented related to the reasonableness of Fuentes' use of force against Rodriguez. In this light, we do not find that appellate counsel was ineffective.

### *C. Instruction on Criminal Confinement*

Similarly, Fuentes argues that his appellate counsel's performance on direct appeal was deficient because he failed to raise, as fundamental error, the perceived overbroad jury instruction on criminal confinement. Again, we do not conclude that appellate counsel was ineffective. As explained above, although Fuentes' counsel may have erred in not objecting to the overbroad final jury instruction No. 3.25, Fuentes cannot show that he was prejudiced by his trial counsel's performance as the jury was aware of the exact crime charged and that his conviction was solely for that crime. While this issue was available to appellate counsel based on the information in the trial record, we do not find the issue so significant that the failure to raise it amounts to ineffective assistance of appellate counsel. *See Ben-Yisrayl*, 738 N.E.2d at 260-61.

### *D. Sufficiency of Evidence on Criminal Confinement*

Lastly, Fuentes asserts that his appellate counsel was ineffective for failing to raise the sufficiency of the evidence on the serious bodily injury element under the criminal confinement charge.

Fuentes was charged in Count IV with Class B felony criminal confinement for knowingly or intentionally confining Hernandez without Hernandez' consent or removing Hernandez by fraud, enticement, force or threat of force from one place to another resulting in serious bodily injury. I.C. § 35-42-3-3. Serious bodily injury is defined as "bodily injury that creates a substantial risk of death or that causes serious permanent disfigurement, unconsciousness, extreme pain, or permanent or protracted loss or impairment of the function of a bodily member or organ." I.C. § 35-41-1-25.

The evidence presented at trial establishes that Hernandez had incurred eleven stab wounds to his back, five of which were fatal and six of which were not. The jury could reasonably find that Fuentes had inflicted some or all of the non-fatal wounds as the evidence was inconclusive as to whether the same knife caused all eleven wounds. In addition, Fuentes was alone when he dumped Hernandez at the side of the road. Thus, the jury was free to find incredible Fuentes' testimony that Hernandez was alive and unhurt when he left him. In sum, the evidence supports a conclusion that Hernandez suffered serious bodily

injury while confined by Fuentes. As a result, we cannot say that appellate counsel's representation fell below an objective standard of reasonableness.

### CONCLUSION

Based on the foregoing, we conclude that the post-conviction court did not err when it found that both trial counsel and appellate counsel had offered Fuentes effective assistance and denied his petition for post-conviction relief.

Affirmed.

VAIDIK, J., and CRONE, J., concur.