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APPELLANT PRO SE:

EARL E. WILSON
Michigan City, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

EARL E. WILSON,)
)
 Appellant,)
)
 vs.) No. 45A03-1006-PC-305
)
 STATE OF INDIANA,)
)
 Appellee.)

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Thomas P. Stefaniak, Judge
The Honorable Natalie Bokota, Magistrate
Cause No. 49G04-0902-PC-2

April 26, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Earl E. Wilson (“Wilson”) was convicted in Lake Superior Court of Class A felony voluntary manslaughter. After his conviction was affirmed on direct appeal, Wilson filed a petition for post-conviction relief, alleging *inter alia* ineffective assistance of trial counsel and ineffective assistance of appellate counsel. The post-conviction court denied Wilson’s petition. Wilson appeals and argues that the post-conviction court erred in concluding that he was not denied the effective assistance of trial and appellate counsel. We affirm.

Facts and Procedural History

The facts underlying Wilson’s conviction were set forth in his direct appeal as follows:

By late 2005, Earl Wilson and Antonise Gaines had been in a turbulent and sometimes violent relationship for some seventeen years. On December 23, 2005, Gaines was living with their three children at 1325 Chase Street in Gary. Wilson came to the front door, knocked, and yelled that he needed his clippers. Wilson then went to his car in the driveway. Gaines put the clippers on the front porch and closed the door.

Shortly afterward, their 12-year-old daughter R. and 10-year-old son E. heard glass breaking outside the front door. The front door was kicked in, and Wilson entered. R., who was in the room immediately inside the front door, saw that Wilson had a handgun. As Wilson was “dragging [her] mom on the floor,” R. got E. (who had by then seen that Wilson was brandishing a 9 mm. handgun) and both hid in the back bedroom closet. Both children heard “clicking sounds” and yelling. When Gaines told them it was safe to come out, the children emerged from the closet. Wilson was gone. The glass in the front storm door had been broken out, and the front door had been forced in – such that it could no longer be closed.

Gary Police Officer Marvin Bankhead was dispatched to the residence that day, in response to a report of a disturbance. Bankhead observed that the glass on the storm door had been broken out and that the front door had sustained damage to its frame. Bankhead described Gaines as “upset” and “crying” when she repeatedly told the officer, “He’s going to kill me.” When asked by Bankhead who, she responded that it was Wilson, and that

he had “forced his way into her residence, put a gun to her head, . . . threatened to kill her, . . . put it to her head by pulling the slide back and ejecting a round.” Gaines handed Bankhead a 9 mm. live round, which he secured and placed in the department’s property locker.

That same day, Gaines moved with the children to her mother’s house. Eight days later, on the afternoon of December 31, Gaines and her sister Shirena went to the 1325 Chase Street house for Gaines to collect some of the family’s belongings. Again, Wilson knocked on the front door and said that he needed his clippers. Gaines told Wilson to leave, or she would call the police. Wilson went to his car and drove away. Soon thereafter, Shirena “heard the big boom” of the back door being kicked in. Shirena saw Wilson coming from the kitchen with “a gun in his hand,” “a silver .38 revolver.” Shirena heard Wilson say to Gaines, “I told you,” as he followed her into E.’s bedroom. Shirena heard a gunshot and saw Gaines fall to the floor. As Shirena ran toward the back door, she heard Gaines say, “Oh, Eagle Beak [pet name for Wilson], don’t shoot me,” and heard another shot. Shirena ran from the house, screaming for help. Someone called the police and gave the phone to Shirena, who reported that her sister had been shot.

Gary Police Officer Christopher Stark was the first to respond. He found a crying Shirena, screaming that her sister had been shot inside the house. Stark observed a muddy shoe print on the back door, which had been “kicked in” such that it was “shattered,” with the deadbolt lying on the floor. He found Gaines’ dead body and called for additional assistance.

Approximately two and a half hours after the shooting, Wilson went to the Gary Police Department. Wilson was advised of his Miranda rights and signed a written waiver thereof. Wilson then provided information for a statement that he signed, stating that “the events that occurred on the night of December 31, 2005,” were as follows:

I kicked open the back door and ran into the house. I chased Dove . . . into E.[.]’s bedroom[.] this is my son[’s] room. When I got to the door of the bedroom Dove was holding a black revolver with a white handle. She was pointing the gun at me[.] I grabbed the gun out of her hand[.] [A]s I was grabbing the gun Dove fell to the ground. I now shot Dove in the thigh[.] inside of her thigh. As she was still on the ground trying to get up I shot her in the head. I think I shot her on the right side of the head[.] I am not sure. I ran out of the room [and] dropped the gun in the hallway[.] I ran out the back door and got into my car and left. I then stopped at a liquor store in Hammond[.] bought four beers and drank them[.] I wanted to do the right thing so I turned myself in.

Also, according to the signed statement, when the detective specifically asked “how many times [Wilson] shot,” he answered,

Two shots[.] [T]he first shot was when she fell to the ground[.] I shot her in the thigh[.] [T]he second shot she was trying to get up[.] I shot her again it [sic] the head.

Wilson concluded with the statement that he and Gaines “had problems for a long time,” and he was “glad this whole thing [wa]s over.”

Police found no weapon at the Chase Street residence. However, two .38 Special bullets were recovered in a search of Wilson’s vehicle.

[At trial] [t]estimony of the foregoing facts was heard. In addition, the forensic pathologist testified that Gaines died from a gunshot wound to the head. The pathologist further testified that it was likely that a single bullet had traveled through Gaines’ wrist – fired from “very close,” two inches or less – “and then into [her] head.” According to the pathologist, Gaines also suffered gunshot wounds to her thighs – wounds that were likely inflicted by another single bullet. An expert in firearms testified that the two bullets recovered from Gaines’ body were .35 caliber, a size used as ammunition for a .38 Special.

Wilson v. State, No. 45A03-0705-CR-229, slip op. at 2-5 (Ind. Ct. App. Feb. 5, 2008) (citations and footnotes omitted).

The State charged Wilson with murder on January 1, 2006. Wilson’s first jury trial began on September 6, 2007 and ended in a hung jury. The trial court declared a mistrial, and Wilson was retried beginning on March 12, 2007. On March 16, 2007, the jury found Wilson guilty of the lesser-included offense of Class A felony voluntary manslaughter. At the April 12, 2007 sentencing hearing, the trial court imposed a sentence of forty-eight years. On direct appeal, Wilson claimed that the evidence was insufficient to support his convictions. We rejected that claim and affirmed. Id. at 7.

Wilson filed a pro se petition for post-conviction relief on February 5, 2009. The State Public Defender’s Office initially filed an appearance on Wilson’s behalf, but later filed a verified notice of withdrawal of appearance pursuant to Indiana Post-Conviction

Rule 1(9)(c).¹ The post-conviction court held hearings on Wilson’s petition on August 31, 2009, November 11, 2009, and February 16, 2010. On June 1, 2010, the post-conviction court entered findings of fact and conclusions of law denying Wilson’s petition. Wilson now appeals.

Standard of Review

A post-conviction petitioner 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). On appeal from 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, the 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. When the post-conviction court makes findings of fact and conclusions of law in accordance with Indiana Post-Conviction Rule 1(6), we do not defer to the court’s legal conclusions, but the “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. at 644.

We also note that the State has not filed an appellee’s brief in this case. The obligation of controverting arguments presented by the appellant properly remains with

¹ This rule provides in relevant part:

In the event that counsel determines the proceeding is not meritorious or in the interests of justice, before or after an evidentiary hearing is held, counsel shall file with the court counsel’s withdrawal of appearance, accompanied by counsel’s certification that 1) the petitioner has been consulted regarding grounds for relief in his pro se petition and any other possible grounds and 2) appropriate investigation, including but not limited to review of the guilty plea or trial and sentencing records, has been conducted.

the State. Mateyko v. State, 901 N.E.2d 554, 557 (Ind. Ct. App. 2009), trans. denied. When the appellee does not submit a brief, the appellant may prevail by making a *prima facie* case of error, i.e. an error at first sight or appearance. Id. We are nevertheless obligated to correctly apply the law to the facts of the record to determine if reversal is required. Id.

I. Waiver

Generally, a party waives an issue on appeal where the party fails to develop a cogent argument or provide adequate citation to authority and portions of the record. Smith v. State, 822 N.E.2d 193, 202-03 (Ind. Ct. App. 2005); see also Ind. Appellate Rule 46(A)(8)(a) (providing that argument section of appellant’s brief must “contain the contentions of the appellant on the issues presented, supported by cogent reasoning” and that “[e]ach contention must be supported by citations to the authorities, statutes, and the appendix or parts of the Record on Appeal relied on . . .”). That Wilson represents himself on appeal is immaterial, because pro se litigants are held to the same standard regarding rule compliance as are licensed attorneys and must comply with the appellate rules to have their appeal determined on the merits. Id. at 203.

Here, Wilson’s appellate brief is in many ways deficient, both as to form and substance. For instance, his statement of the facts is not in narrative form but instead consists of an account of the questions he asked the witnesses at the post-conviction hearing and their responses. See App. R. 46(A)(6)(c) (providing that the statement of facts in an appellant’s brief “shall be in narrative form and shall not be a witness by witness summary of the testimony”). Nor are the facts stated in accordance with the

appropriate standard of review. See App. R. 46(A)(6)(b). Although Appellate Rule 46(A)(6)(d) provides that, in an appeal from the denial of a post-conviction petition, “the statement may focus on facts from the post-conviction relief proceeding rather than on facts relating to the criminal conviction,” Wilson’s statement of facts entirely omits any reference to the facts relating to his criminal conviction, which has impeded our ability to understand the context of the post-conviction hearing.

His argument section is similarly lacking. Although he refers to the proper standard of review, his argument ignores this standard. His argument is highly disorganized and at times borders on being incoherent. His argument refers to each question and response listed in his statement of facts and explains why Wilson thinks the answer was wrong, false, or otherwise improper. There is no application of the law to the relevant facts of the case.

Based on these procedural and substantive shortcomings, we would be well within our discretion to consider Wilson’s entire appellate argument waived. See Smith, 822 N.E.2d at 202-03; App. R. 46(A)(8)(a). But because we prefer to address issues on their merits where possible, we will attempt to address Wilson’s arguments as we are able to discern them. See Armstrong v. State, 932 N.E.2d 1263, 1270 (Ind. Ct. App. 2010) (addressing appellant’s arguments on the merits even where appellant appeared not to preserve the issue for appeal).

II. Ineffective Assistance of Trial Counsel

Wilson first claims that he was denied the effective assistance of trial counsel. As explained by our supreme court in Timberlake v. State:

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 (1984). First, the defendant must show that counsel's performance was deficient. 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. Second, the defendant must show that the deficient performance prejudiced the defense. 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Counsel is afforded considerable discretion in choosing strategy and tactics, and we will accord those decisions deference. A strong presumption arises that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. 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. Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective. The two prongs of the Strickland test are separate and independent inquiries. 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.

753 N.E.2d 591, 603 (Ind. 2001) (citations and quotations omitted).

A. Cause of Death

Wilson makes several claims regarding the alleged ineffectiveness of his trial counsel for failure to point out inconsistencies in the victim's autopsy report and the failure to call the toxicologist as a witness. Apparently, Wilson is of the opinion that the pathologist relied on the toxicology report in determining that the victim's cause of death was a gunshot wound to the head. To be sure, the autopsy report lists among the "documents and evidence examined" an "ATI Laboratories Toxicology Report." Appellant's App. p. 2. However, there is no indication that the pathologist's conclusions

regarding the cause of death was based on this report.² Instead, his conclusions were based on the autopsy he performed on the victim, who indisputably had a gunshot wound in her head. Moreover, Wilson confessed to the police that he shot the victim in the head. Given this evidence, we fail to see how this alleged deficiency in his trial counsel's performance could have affected the jury's conclusion that the victim died of a gunshot wound to the head.

Wilson also cites Crawford v. Washington, 541 U.S. 36 (2004) and claims that his right to confront witnesses was violated by admission of the toxicology report without calling the toxicologist himself, whose very existence Wilson seems to question. Wilson, however, makes no attempt to explain how the toxicology report was "testimonial hearsay" to which Crawford would apply. See id. at 68-69 (explaining that "[w]ere testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation."). Moreover, even if the toxicology report were improperly admitted, there was sufficient evidence of the victim's cause of death that any error would have been harmless.

B. Confession

Many of Wilson's other claims go to whether his trial counsel should have attacked inconsistencies in the testimony of the police detective to whom Wilson confessed that he shot the victim. For example, he claims that he talked to another detective before he talked to the detective to whom he confessed. He also claims that the

² We also note that the toxicology report indicates only that cotinine, a metabolite of nicotine, was found in the victim. See <http://dictionary.reference.com/browse/cotinine>.

detective was mistaken with regard to where he read Wilson his Miranda rights. But Wilson never claims that he was not read his rights nor does he claim that he did not give a statement to the police. Even if we assume that his trial counsel's performance was deficient in these regards, we fail to see how Wilson was prejudiced. The fact remains that he was read his rights and that he did confess. He now claims that his statement that he shot the victim did not really mean that he actually shot the victim. This, however, was an issue of credibility for the jury to decide. Wilson testified at his trial and was free to explain his version of the events surrounding the shooting.

Wilson also claims that his counsel's performance was deficient for failing to present to the jury an alleged video of the confession, which he claims would have more accurately shown what he told the police. His trial counsel, however, testified at the post-conviction hearing that there was no such video. The post-conviction court was well within its discretion to believe the testimony of Wilson's trial counsel, rather than Wilson's own testimony.

C. Victim's Past Behavior

Wilson also makes several claims regarding the failure of his trial counsel to present evidence that the victim owned a gun, which was illegal given her felony record, and that she co-owned the car in which bullets were found. He also claims that his trial counsel should have explained that during a prior incident, it was the victim, not him, who had a gun at the couple's home. Again, we fail to see how any of this would have altered the result of Wilson's trial in any way. His statement to the police adequately relayed his claim that the victim was in possession of a gun at the time of the shooting.

Even then, it was contradicted by the testimony of the victim's sister, who testified that Wilson was armed at the time he kicked in the door and entered the house.

In a somewhat related argument, Wilson also complains that his counsel was deficient for presenting a theory to the jury that Wilson and the victim had a volatile, sometimes violent relationship. Wilson claims that there was no evidence of this and that the victim had no history of mental illness. However, Wilson's trial counsel testified at the post-conviction hearing that Wilson himself told him that Wilson and his victim had a volatile, violent relationship and that his theory of the case was to show that the gun went off while Wilson was struggling with her, which would support a theory of reckless homicide. Unfortunately for Wilson, the jury did not accept this theory, but the jury also did not accept the State's theory of murder. Instead, the jury convicted Wilson of voluntary manslaughter as a lesser included offense of murder.

D. Lesser Included Offense Instructions

This brings us to Wilson's claims that his trial counsel's performance was deficient because he tendered instructions on the lesser included offenses of reckless homicide and voluntary manslaughter. According to Wilson, he never wanted the jury to be given the choice of convicting him of anything other than murder. Apparently, after Wilson's trial counsel tendered these instructions, Wilson informed him that he did not want the jury to be instructed on the lesser-included offenses. The trial court, however, indicated that, given the evidence adduced at trial, it would have given such instructions even if Wilson's trial counsel had not tendered them.

For this reason alone,³ we can say that Wilson was not prejudiced, even if his trial counsel's performance was deficient. See Washington v. State, 685 N.E.2d 724, 727-288 (Ind. Ct. App. 1997) (finding no error where trial court, acting *sua sponte* and over defendant's objection, instructed the jury on voluntary manslaughter as lesser included offense of murder); see also Garrett v. State, 756 N.E.2d 523, 527 (Ind. Ct. App. 2001) (noting that instructions upon lesser included offenses given over defendant's objection have been approved by both this court and our supreme court) (citing Wilkins v. State, 716 N.E.2d 955 (Ind. 1999); Porter v. State, 671 N.E.2d 152 (Ind. Ct. App. 1996), trans. denied)). Moreover, a defendant cannot preclude the trial court from giving lesser included offense instructions simply by presenting a defense that, if credited, would absolve defendant of any liability. Garrett, 756 N.E.2d at 530.

E. *Motion in Limine*

Wilson argues that his trial counsel was ineffective for failing to inform the jury that Wilson's testimony would not be the complete truth because the trial court's motion in limine prevented him from mentioning some of the victim's prior bad acts. Wilson seems especially upset that he was not allowed to tell the jury that the victim had previously been convicted in connection with a shooting that led to the tragic death of the couple's young daughter, who was being held by Wilson at the time of the shooting.

³ We also note that our supreme court has held that the decision not to tender a lesser included offense instruction is a tactical decision and does not constitute ineffective assistance of counsel. Autrey v. State, 700 N.E.2d 1140, 1141 (Ind. 1998). The converse would also appear to be true, i.e., that the decision to tender a lesser included offense instruction is a tactical decision that does not constitute ineffective assistance of trial counsel.

Wilson, however, never develops a cogent argument as to why the trial court's ruling on the motion in limine was erroneous. As such, we cannot fault his trial counsel for choosing to not to violate the trial court's ruling on the motion in limine or telling the jury that the ruling prevented Wilson from testifying truthfully.

F. *Miscellaneous*

The remainder of Wilson's discernable arguments involve the alleged failure of his trial counsel to impeach the credibility of various witnesses regarding what are very minor inconsistencies in their testimony. Wilson's arguments all seemed to be premised on the assumption that if any part of these witnesses' testimony was wrong, then their entire testimony was also wrong. This, of course, is nonsense.

In light of Wilson's claims, we feel compelled to acknowledge that the evidence of Wilson's guilt was exceptionally strong, if not overwhelming. The victim's sister witnessed Wilson break into the house carrying a gun, chase her sister to a bedroom, heard a gunshot, and saw her sister fall to the floor. As she ran out of the house, she heard her sister beg Wilson for her life, only to hear another gunshot. The police found the victim's lifeless body in the bedroom. Wilson later admitted to the police that he shot the victim twice, first when she fell to the floor and again in the head as she was trying to get up. And despite Wilson's protestations to the contrary, there was ample evidence that the victim died as a result of this gunshot wound to the head. In the face of this compelling evidence, Wilson's trial counsel was successful in avoiding a murder conviction and was able to convince the jury that, given the volatile nature of the couple's relationship, Wilson was acting under sudden heat and was therefore guilty only of

voluntary manslaughter. Under these facts and circumstances, the post-conviction court did not err in concluding that Wilson's trial counsel was not ineffective.

III. Ineffective Assistance of Appellate Counsel

Wilson also claims that his appellate counsel was ineffective. Ineffective assistance of appellate counsel claims are reviewed using the same standard applicable to claims of trial counsel ineffectiveness. Bieghler v. State, 690 N.E.2d 188, 193 (Ind. 1997). One of the most important strategic decisions made by appellate counsel is the decision of what issue or issues to raise on appeal. Id. at 193. Therefore, ineffectiveness is rarely found when the issue is the failure to raise a claim on direct appeal. Id. The defendant must overcome the strongest presumption of adequate assistance to show that counsel was deficient for failing to raise an issue on direct appeal, and judicial scrutiny is highly deferential. Ben-Yisrayl v. State, 738 N.E.2d 253, 261 (Ind. 2000). Even if our analysis demonstrates deficient performance by appellate counsel, we must still determine whether the issues that appellate counsel failed to raise would have been clearly more likely to result in reversal or an order for a new trial. Bieghler, 690 N.E.2d at 194. After all, "the ultimate issue under the prejudice prong is whether, but for counsel's errors, there is a reasonable probability that the outcome of the proceeding [i.e., the direct appeal], would have been different." Id. (quotations omitted).

Wilson's entire argument on appeal regarding the alleged ineffectiveness of his appellate counsel reads, "Appellate counsel was ineffective for not raising the issue of the toxicology report[.] [H]ad appellate counsel raised the issue the direct appear results would have been different." Although Wilson cites Fisher v. State, 810 N.E.2d 674 (Ind.

2004), he does not explain the holding in that case or how it applies here. His argument is therefore waived. See Smith, 822 N.E.2d at 202-03; App. R. 46(A)(8)(a).

Waiver notwithstanding, as explained above, we do not see how the result of Wilson's trial would have been any different if the toxicology report had not been admitted or if the toxicologist would have been called to testify. The victim's cause of death was adequately established by the evidence that Wilson shot her in the head and the pathologist's opinion that this wound was the cause of death. Even if Wilson's appellate counsel had presented this issue on direct appeal, Wilson's conviction would still have been affirmed.

Conclusion

Although we would be within our discretion to consider all of Wilson's appellate arguments waived, we have attempted to address on the merits the issues he presents, as we are able to discern them. Even though the State did not file an appellee's brief, we are unable to say that Wilson has established even *prima facie* error in the post-conviction court's conclusion that Wilson was not denied the effective assistance of trial or appellate counsel.

Affirmed.

FRIEDLANDER, J., and MAY, J., concur.