

## VIRGINIA:

*In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 31st day of March, 2022.*

Present: Goodwyn, C.J., Mims, Powell and McCullough, JJ., and Russell, Koontz and Millette, S.JJ.

Wesley Adam Williams, Appellant,

against Record No. 210294  
Circuit Court No. CL17-002481

Harold W. Clarke, Director, Appellee.

Upon an appeal from a judgment rendered by the Circuit Court of Rockingham County.

Upon consideration of the record, briefs, and argument of counsel, the Court is of the opinion that there is no error in the judgment of the circuit court, which denied Wesley Adam Williams' ("Williams") petition for a writ of habeas corpus.

### I. BACKGROUND

Williams was tried upon indictments charging him with attempted capital murder of a law enforcement officer and use of a firearm in the commission of a felony. At trial, the Commonwealth presented evidence establishing that, on the evening of August 6, 2013, sixteen-year-old Isaac Dean ("Isaac") was driving home in his truck when he encountered Williams on horseback. According to Isaac, Williams was wearing jeans, but no shirt. He appeared "messed up" and was "swaying side to side." As Isaac drove by, Williams pointed a gun at Isaac through his open driver's side window. Isaac accelerated and, as he sped away, he heard a gunshot. He looked back and saw Williams shooting into the air. Isaac testified that Williams "shot a couple times."

Isaac drove to his home and told his mother, Kimberly Dean ("Kimberly"), what happened. After Isaac told Kimberly what happened, they both called the police. Before the police arrived, Isaac and Kimberly saw Williams riding his horse toward their house. At some point, he fired a couple more shots. According to Isaac, Williams approached the back door of

the house and stood at the door for two or three minutes. Eventually Williams got back on his horse and left.

Isaac further testified that, a few minutes after Williams left, he saw a marked police car come down the road. As the police car passed the driveway, Isaac and Kimberly saw Williams riding his horse toward the police car. Kimberly testified that after Williams charged the police car, he “roll[ed] the horse around” and went down the road, out of sight. At that point, an unmarked police car pulled into their driveway.

Deputy Jeremy Pultz (“Deputy Pultz”) was the first officer to arrive on the scene. Deputy Pultz testified that he initially saw Williams riding on a horse as he pulled up in his patrol car. According to Deputy Pultz, Williams was approximately 10 feet away from him in his patrol car. Although Deputy Pultz described Williams as not wearing a shirt, he claimed he did not “notice” any tattoos on Williams’ body. Photographs admitted at trial showed Williams had tattoos on his chest and arms, including a large tattoo of a bear claw on the left side of his chest and an even larger grim reaper tattoo on his upper left arm.

Deputy Pultz went on to testify that Williams turned and rode some distance away into the woods. Deputy Pultz exited his vehicle, and he and Williams yelled back and forth to each other. According to Deputy Pultz, Williams’ speech was slurred.

Williams subsequently went further into the woods and Deputy Pultz lost sight of him due, in part, to the fact that it was getting dark. Deputy Pultz testified that he could hear the horse walking around for a while, but then he could no longer hear the horse. At some point thereafter, Deputy Pultz heard some shots fired “in the distance.”

During this time, Investigator Shawn Morris (“Investigator Morris”) and Investigator Wes Campbell (“Investigator Campbell”) arrived in an unmarked police car. They were in radio contact with Deputy Pultz and could see and hear him near his patrol car. The investigators spoke with Isaac and Kimberly outside their house. They also heard shots fired approximately 250-300 yards away.

Approximately 15 minutes after he last saw Williams, Deputy Pultz moved up the road on foot. At some point thereafter, Investigator Morris noticed an individual approaching Deputy

Pultz on foot.<sup>1</sup> Investigator Morris admitted that he could not identify the individual approaching Deputy Pultz. Investigator Morris radioed Deputy Pultz stating, “he’s coming right at you.” Deputy Pultz testified that, after Investigator Morris radioed him, he saw “what looked like somebody running . . . or riding a horse or something and he was like swaying back and forth and he was in and out of the vegetation.” Deputy Pultz also admitted that he could not identify the individual he saw as Williams.

Deputy Pultz testified that, as soon as he saw the individual and realized how close he was, he identified himself as a police officer and yelled “let me see your hands.” Receiving no response, Deputy Pultz repeated the announcement and command. He then heard the same voice he had heard earlier respond with “get out of here.” Immediately thereafter, Deputy Pultz heard shots fired.

When the first shot was fired, Deputy Pultz felt something hit his thigh. As Deputy Pultz backed away, moving from the middle of the road to the cover of the dense vegetation on the roadside, he heard four or five more shots coming from the same area. When he was asked if he could tell where the shots were going, Deputy Pultz responded that “when the initial one went off it sounded like somebody had just taken rocks and just whizzed them past my head up in the trees.” Deputy Pultz described the first shot as “kind of just a fluttering sound smacking the leaves” in the tree canopy above his head. Deputy Pultz did not testify regarding the trajectory of the remaining four or five shots. After he was able to get to cover behind a tree, Deputy Pultz was able to determine that he had not been shot, but he had been hit by a ricocheted rock.

After the incident, investigators searched for Williams but did not locate him until the next day. They found his horse loose on his great aunt’s property. The investigators subsequently learned from Williams’ great aunt that she had seen him the night of the shooting with a pistol in his hand. She testified as such at Williams’ trial.

At the conclusion of the Commonwealth’s case, Williams moved to strike, arguing the evidence was insufficient to prove he had the requisite intent to kill the deputy. Williams’ trial counsel argued that, at best, the Commonwealth proved only reckless behavior based on the “potential ricochet and something going through the trees above the officer’s head.” The trial

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<sup>1</sup> At trial, Investigator Morris testified that the individual was not wearing a shirt, but he admitted that, when he was interviewed the day after these events, he believed the individual was wearing a red shirt.

court denied the motion to strike.

Williams then presented evidence demonstrating that the police searched the area but failed to find any shell casings or bullets related to the shooting. After presenting this evidence, Williams rested. He subsequently renewed his motion to strike, which was denied.

Prior to closing arguments, the parties agreed to the jury instructions. Notably, Williams' trial counsel did not seek an instruction on voluntary intoxication. During closing arguments, Williams' trial counsel emphasized that the Commonwealth had failed to find Williams' gun, find any bullets or shell casings related to the shooting, obtain gunshot residue testing, or provide a certain identification of Williams as the shooter. Williams' trial counsel did not argue to the jury that the Commonwealth failed to prove intent, nor did he claim that Williams was too intoxicated to form the requisite intent.

During their deliberations, the jury sent two questions to the trial court. In the first question, the jury stated "we want clarification on [instruction] 11, section #3. We don't understand what it means. The language is confusing." Instruction 11 stated, in relevant part:

The defendant is charged with the crime of attempted capital murder. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(3) That the defendant did a direct act toward the commission of the capital murder of Deputy J. W. Pultz which amounted to the beginning of the actual commission of the capital murder of Deputy J. W. Pultz.

After consulting with counsel, the trial court instructed the jury to "refer to the instructions provided to you. You may review all instructions, including instruction #14, for further guidance."<sup>2</sup> The trial court then sent the jury to continue deliberations.

In the second question, the jury asked, "[i]f an officer tells a suspect to put down his weapon and [the] suspect pulls [a] gun and fires in the air, not in direction of the officer can he still be charged with attempted murder[?]" In response, William' trial counsel stated, "at that

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<sup>2</sup> Instruction 14 stated:

The direct act required to be proved in an attempted crime is an act which shows a present intention to commit the crime. The act need not be the last act prior to the actual commission of the crime, but it must be more than mere preparation.

point it's, I mean, clearly it would be no malice, no intent, nothing more than just to frighten so clearly they, you would not, could not be charged.” The trial court noted that the jury was “asking for a factual determination which is in their province” and that its “ability to give them legal guidance” was therefore limited. The trial court went on to state that “the answer has to be I must ask you to apply your findings of fact to the instructions as provided to you.” Both counsel agreed and the jury was instructed to “apply your findings of fact to the instructions as provided to you.”

The jury subsequently found Williams guilty on both counts and fixed his sentence at 23 years. Williams moved to set aside the verdict, arguing that the evidence was insufficient to prove identity or intent. The trial court denied the motion.

Williams appealed the matter to the Court of Appeals, arguing that the trial court erred in denying his motions to strike, as the evidence was insufficient to prove Williams was the shooter or that he had the requisite intent. In an unpublished opinion, the Court of Appeals affirmed Williams' convictions, holding the evidence was sufficient to prove he shot at a law enforcement officer with the specific intent to kill and to support his convictions. *Williams v. Commonwealth*, Record No. 1700-14-3 (Nov. 10, 2015).

On August 15, 2017, Williams filed a habeas petition in the Circuit Court of Rockingham County. In his petition, he contended that his trial counsel was ineffective for (1) failing to argue during closing arguments that the evidence did not prove premeditation or intent to kill Deputy Pultz because it showed the shooter fired into the air, and firing into the air cannot support a finding of premeditation or intent to kill; (2) failing to request an instruction on voluntary intoxication and failing to argue to the jury that Williams' voluntary intoxication rendered him incapable of deliberating or premeditating; and (3) failing to ask the court to respond to the jury's second question by instructing the jury that, as a matter of law, firing into the air is not sufficient to prove intent to kill.

The Director moved to dismiss the petition, arguing Williams' claims failed to satisfy the “performance” and the “prejudice” prongs of the two-part test enunciated in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Williams responded, contending summary dismissal of his petition was inappropriate and that he had met his burden under *Strickland*. He further requested an evidentiary hearing “[d]ue to the complexity of the circumstances of this case, as well as the legal issues involved.”

After hearing argument on the matter, the circuit court granted the Director's motion to dismiss. The circuit court explained that it was reasonable for trial counsel to focus on the issue of identity during closing argument. It noted that there were "interesting evidentiary inconsistencies" regarding the identity of the shooter. The circuit court also pointed out that the evidence did not show the shooter only fired into the air and, therefore, intent to kill could be inferred. With regard to the intoxication instruction, the circuit court determined that there was significant evidence in the record to show Williams was intoxicated, but not intoxicated "to the level needed to negate an intent to kill." Thus, it was unlikely that such an instruction would have been granted. The circuit court also stated that, once trial counsel made the decision to focus on identity, "arguing intoxication to the jury may have seemed inconsistent or contradictory to the identity defense." As to the jury questions, the circuit court concluded that it was proper for the trial court to refer the jury back to the original instructions. As there was no assertion that the instructions were deficient, the circuit court found that it was reasonable for trial counsel to not request the trial court answer the jury's question. Additionally, the circuit court denied Williams' request for an evidentiary hearing because the petition could be resolved on the basis of the record.

Williams appeals.

## II. ANALYSIS

On appeal, Williams argues that the circuit court erred in dismissing his petition because his trial counsel was ineffective and, as a result, he was prejudiced. Williams specifically points to the fact that his trial counsel failed to argue lack of intent to the jury, did not request an intoxication instruction and failed to request that the trial court answer the jury's question about whether firing into the air can support a charge of attempted murder. Additionally, Williams contends that the circuit court erred in failing to hold an evidentiary hearing on the matter.

In addressing claims for ineffective counsel, the Court applies a two-prong test. *Zemene v. Clarke*, 289 Va. 303, 313 (2015). Under the performance prong, a defendant must show deficient performance by establishing that trial counsel's representation fell below an objective standard of reasonableness. *Fuentes v. Clarke*, 290 Va. 432, 439 (2015). Trial counsel is afforded a "strong presumption" that the "representation was within the wide range of reasonable professional assistance," and it is the defendant's burden to overcome that presumption. *Id.* (quoting *Premo v. Moore*, 562 U.S. 115, 121–22 (2011)). Under the prejudice prong, "the

defendant must show that the deficient performance prejudiced the defense.” *Strickland v. Washington*, 466 U.S. 668, 687 (1984). This requires that the defendant establish “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 defendant’s ineffective assistance claim fails if he fails to make a sufficient showing on either prong. *Dominguez v. Pruett*, 287 Va. 434, 440 (2014).

#### A. Failure to Argue Intent.

In his first claim, Williams asserts that his trial counsel was constitutionally ineffective for basing his defense on whether the Commonwealth sufficiently proved that he was the shooter. According to Williams, the evidence was “overwhelming” that he was the person who was shooting at Deputy Pultz and, therefore, trial counsel should have focused on whether the Commonwealth proved that he acted with the requisite intent, i.e., that his actions were premeditated or with the specific intent to kill Deputy Pultz, instead. It is worth noting that a defense based on the Commonwealth’s failure to prove premeditation or lack of specific intent would essentially require Williams to admit that he was, in fact, the shooter. In other words, Williams is directly challenging the trial strategy of his trial counsel, as the two strategies are effectively mutually exclusive.

A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action “might be considered sound trial strategy.”

*Strickland*, 466 U.S. at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)).

Under the applicable standard, the question of whether Williams has met his burden to prove that his trial counsel’s performance was deficient under the Strickland test begins by looking at whether a mistaken identity defense was reasonable under the circumstances of this case. A review of the record in this case establishes that the evidence identifying Williams as the shooter was not as overwhelming as he claims. Notably, Deputy Pultz’ initial identification of Williams as the person he initially encountered was significantly impeached by his failure to

notice any of the eight fairly large tattoos on Williams' chest, back and arms, even though the two men were only about 10 feet away from each other. Investigator Morris' testimony about seeing an individual approaching Deputy Pultz was similarly impeached, as he initially stated that the individual was wearing a red shirt, but he later testified that the individual was not wearing a shirt.

It is further worth noting that Deputy Pultz stated that he lost sight of Williams for approximately 15 minutes before he saw the individual who he believes shot at him. Further, he candidly admitted that he could not definitively identify the individual who shot at him due to the darkness and the thickness of the vegetation. His view was so obscured that he could not even tell if the individual was on foot or on horseback.

Taken as a whole, the record establishes that the identification of Williams as the shooter was entirely based on circumstantial evidence. The only concrete evidence that establishes that Williams had a firearm occurred well before the events that resulted in his conviction. Thus, it cannot be said that it was unreasonable for trial counsel to focus on the identity of the shooter. Accordingly, Williams has failed to prove the performance prong of the *Strickland* test on this claim.<sup>3</sup>

#### B. Failure to Request Intoxication Instruction

In his second claim, Williams asserts that his trial counsel was constitutionally ineffective because he failed to request an intoxication instruction. However, as with his first claim, the Court's analysis of this issue begins by looking at whether the failure to seek an intoxication instruction was reasonable under the circumstances of the case. Once trial counsel made the decision to focus on identity, arguing intoxication to the jury would have seemed inconsistent or contradictory to the identity defense. Thus, it was entirely reasonable for trial counsel to avoid a defense based on intoxication and the corresponding instruction, as such a defense necessarily implies that Williams was, in fact, the shooter. Having already determined that the identification defense was reasonable under these circumstances, it cannot be said that trial counsel's failure to

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<sup>3</sup> It is further worth noting that the alternative strategy of focusing on whether the Commonwealth proved the requisite intent is not as strong as Williams claims. Notably, there was actual evidence that the shooter was specifically targeting Deputy Pultz. Specifically, it is undisputed that Deputy Pultz was struck by a ricocheted rock. Logically, the only way a rock could ricochet into Deputy Pultz is if the corresponding shot hit the ground in an area somewhat close to where the deputy was standing.

pursue a contradictory defense is unreasonable. Accordingly, Williams has failed to prove the performance prong on this claim.

#### C. Failure to Request an Answer to the Jury Question

In his third claim, Williams argues that his trial counsel was constitutionally ineffective because he failed to request that the trial court answer the second jury question and instruct the jury that firing into the air was not sufficient to establish an intent to kill as a matter of law. It is important to note, however, that Williams does not argue that his trial counsel's initial response to the second jury question was incorrect; nor does he argue that the trial court's eventual answer was incorrect. Rather, Williams takes issue with the fact that his trial counsel failed to push the matter further once the trial court rejected his initial response.

The record demonstrates that trial counsel implicitly requested that the trial court instruct the jury that firing into the air was insufficient to prove intent as a matter of law. In response, the trial court correctly noted that the jury's question involved a factual determination and, therefore, its response was limited to telling the jury to make a factual determination and apply it to the law as described in the jury instructions. *See United States v. Barsanti*, 943 F.2d 428, 438 (4th Cir. 1991) ("It is entirely proper for the court to refer the jury back to the court's original charge."). Under these circumstances, it cannot be said that trial counsel's actions were deficient, as it was reasonable for trial counsel to accept the trial court's ruling. Accordingly, Williams has failed to prove the performance prong on this claim.

#### D. Evidentiary Hearing

Williams next argues that the circuit court abused its discretion in refusing to grant an evidentiary hearing, so that he could question his trial counsel regarding the decisions made at trial. This Court has explained that "[w]hen a trial record provides a sufficient basis to determine the merits of a habeas corpus petition, a circuit court may refuse either party's request for an evidentiary hearing." *Friedline v. Commonwealth*, 265 Va. 273, 277 (2003); *see also* Code § 8.01-654(B)(4) ("In the event the allegations of illegality of the petitioner's detention can be fully determined on the basis of recorded matters, the court may make its determination whether such writ should issue on the basis of the record."). Here, it was unnecessary for the circuit court to hold an evidentiary hearing for the purpose of allowing trial counsel to explain his actions. Notably, such a hearing would not have provided any additional information relevant to the determination of whether Williams' trial counsel was ineffective. Indeed, allowing trial counsel

to explain his actions at trial would only inform the circuit court as to whether his actions were *subjectively* reasonable, whereas the relevant inquiry is whether his actions were *objectively* reasonable. *See Fuentes*, 290 Va. at 439. As Williams has failed to demonstrate that the record is otherwise insufficient to permit the circuit court to determine the merits of his habeas petition, the circuit court did not abuse its discretion by refusing his request for an evidentiary hearing.

### III. CONCLUSION

For the foregoing reasons, the Court affirms the judgment of the circuit court.

This order shall be certified to the Circuit Court of Rockingham County.

A Copy,

Teste:

A handwritten signature in blue ink, appearing to read "M. M. [unclear] [unclear]".

Clerk