No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

TYRUS D. COLEMAN – PETITIONER

VS.

RON NEAL – RESPONDENT

On Petition for a Writ of Certiorari to the

United States Court of Appeals for the Seventh Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

John A. Kindley
1626 Lincoln Way East
South Bend, IN 46613
(574) 400-5094
john@kindleylaw.com
Counsel of Record for Petitioner

In the

United States Court of Appeals

For the Seventh Circuit

No. 18-3264

TYRUS D. COLEMAN,

Petitioner-Appellant,

v.

RON NEAL, Warden, Indiana State Prison,

Respondent-Appellee.

Appeal from the United States District Court for the
Northern District of Indiana, South Bend Division.
No. 3:16-cv-301 PPS — **Philip P. Simon**, *Judge*.

ARGUED OCTOBER 1, 2020 — DECIDED MARCH 11, 2021

Before EASTERBROOK, MANION, and ROVNER, *Circuit Judges*.

PER CURIAM. Tyrus Coleman is serving a 45-year sentence for the attempted murder of Anthony Dye. He was tried twice. The jury in the first trial acquitted him of murdering Jermaine Jackson but could not reach a unanimous verdict on the charge of attempting to murder Dye. At the second trial, which was limited to the attempted-murder charge, the jury returned a guilty verdict. Coleman says that this se-

quence violates the Double Jeopardy Clause of the Fifth Amendment, applied to the states through the Due Process Clause of the Fourteenth. Coleman also accuses his lawyer of providing ineffective assistance at the second trial. State courts rejected both of these arguments, as did a federal district court. 2018 U.S. Dist. LEXIS 76497 (N.D. Ind. May 7, 2018), reconsideration denied, 2018 U.S. Dist. LEXIS 160799 (N.D. Ind. Sept. 20, 2018).

The events were captured on a surveillance camera. Both juries saw this video. The district court reviewed it and concluded that the Indiana Supreme Court had narrated the facts accurately:

> Tyrus Coleman shot his friends Anthony Dye and Dye's son Jermaine Jackson during a confrontation on Coleman's property, where Coleman operated a music recording studio. The confrontation stemmed from an event occurring approximately four months earlier in which Omar Sharpe, one of Coleman's musician clients, robbed Dye at gunpoint. Coleman retrieved part of the stolen property from Sharpe and returned it to Dye. [Jackson] was irritated when he later learned that Sharpe had robbed his father, but Dye asked him not to get involved. On the afternoon of the shootings, [Jackson] discovered that Sharpe was present at Coleman's studio and frantically phoned Dye to "[c]ome over here right now." Armed with a handgun Dye headed to Coleman's studio. In the meantime an armed and agitated [Jackson] pushed open the door to the studio and attempted to enter. Sharpe, who was present inside, prevented [Jackson's] entry and closed the door. Exiting the studio Coleman attempted to calm [Jackson] and to dissuade him from trying to enter. Coleman called a neighbor to come over to help calm [Jackson]; he also called his business partner to inform him of the situation. The neighbor testified that he tried to talk with [Jackson] by telling him what he [Jackson] was doing "wasn't worth it. Just go ahead and leave. There was kids around and people around that didn't have nothing to do with what they was angry about." According

> to the witness [Jackson] responded by saying, "F* *k that. He didn't think about that s* *t when he did the s* *t to my Daddy." Coleman armed himself and walked back and forth in front of the studio door holding his handgun at his side. As Coleman was making a phone call, Dye came into the yard through a front gate carrying a handgun which was pointed toward the ground. Dye strode toward his son [Jackson], who was standing next to Coleman on the patio in front of the studio. Within three seconds, the following occurred: Dye stepped onto the patio where [Jackson] and Coleman were standing. As Dye stepped in front of Coleman, Coleman raised his gun and fired at Dye, who immediately fell to the ground. Coleman then shot Dye a second time. At that point Coleman "turned to Jermaine [Jackson]." Coleman saw that [Jackson's] handgun, which before that time had been concealed under his shirt and in a holster, was "pointed at [Coleman]," and Coleman shot [Jackson]. [Jackson] fell to the ground and died at the scene as a result of his injuries. After the shooting, Coleman drove to Milwaukee disposing of his weapon along the way. Several days later he returned to Elkhart and surrendered to the police.

Coleman v. State, 946 N.E.2d 1160, 1163–64 (Ind. 2011).

Coleman contends that the first jury must have found that he acted in self-defense when killing Jackson and that this conclusion necessarily applies to Dye as well. He relies on *Ashe v. Swenson*, 397 U.S. 436 (1970), and its successors, which hold that principles of issue preclusion are part of the rule against double jeopardy. The parties have sparred over the extent to which 28 U.S.C. §2254(d)(1) applies to the Indiana Supreme Court's contrary conclusion. We need not resolve that debate, because it does not require even an ounce of deference to conclude that Coleman's acquittal on the murder charge does not establish that he acted in self-defense when shooting Dye.

Currier v. Virginia, 138 S. Ct. 2144, 2149–50 (2018), tells us to read acquittals for the least they must establish, not the most that they might represent. It is scarcely necessary to do more than reread the state court's summary of the facts to conclude that the jury in the first trial readily could have found that Coleman tried to defend himself against Jackson but had no such justification for shooting Dye. By the time Coleman shot Jackson, his father Dye was on the ground with two bullets in him, and Jackson had opened fire at Coleman. A jury might well have thought that Coleman returned Jackson's fire to defend himself. But that does not imply anything about Dye's earlier shooting. Dye had a gun but was not pointing it at Coleman and did not pull the trigger. Coleman nonetheless shot Dye *twice*, including once after he was on the ground.

We do not know why the first jury was unable to reach a unanimous verdict with respect to Coleman's shooting of Dye. Perhaps some jurors were impressed by Coleman's knowledge that Dye had a reputation for violence. That reputation may have left Coleman in fear of a gun-toting Dye—but the jury's acquittal on the charge that Coleman murdered Jackson does not establish in Coleman's favor any fact such as the possibility that Coleman shot Dye because of that fear. Dye and Jackson are different people who posed different threats (if Dye posed any at all). Coleman tries to tease a form of retroactive self-defense toward Dye from the jury instructions about crimes committed close in time, but we find the argument implausible—and it is at all events an argument based on state law that the state's highest court evidently found wanting. Given the rule of *Currier*, the Double Jeopardy Clause does not entitle Coleman to be acquitted on both charges.

This leaves Coleman's attack on the performance of his lawyer. The state's highest court applied the rule articulated in *Strickland v. Washington*, 466 U.S. 668 (1984), but in one respect it did so unreasonably: when deciding whether Coleman suffered prejudice, it viewed each of the asserted errors in isolation, rather than asking whether counsel's errors were prejudicial cumulatively. Coleman commits the opposite error: instead of asking whether the defense *as a whole* was constitutionally adequate, he supposes that any one mistake entitles him to collateral relief. *Strickland* says, however, that it is the full course of representation that matters. 466 U.S. at 690–96. There is a potential exception for a whopper of an error that nullifies all of the good things that counsel did, see *Williams v. Lemmon*, 557 F.3d 534, 538 (7th Cir. 2009), but none of the arguments that Coleman advances falls in that category.

The district judge covered Coleman's arguments thoroughly, 2018 U.S. Dist. LEXIS 76497 at *18–32, and supplied the all-things-considered evaluation of prejudice that the state court omitted, *id*. at *32–33. We need not repeat the district court's analysis, though we reproduce its handling of one issue to give a flavor of Coleman's contention and the district court's evaluation.

Dye testified for the prosecution at both trials. In two respects his testimony was subtly different, and Coleman's lawyer did not try to impeach Dye at the second trial on the basis of an asserted inconsistency. Here's what the district court wrote (*id*. at *23–25) (boldface and bracketed material in original; record citations omitted):

> Coleman argues that trial counsel was ineffective for failing to impeach Dye with inconsistent testimony from the first trial and

pending charges and failing to question Dye regarding his gun. The first inconsistency highlighted by Coleman is that, at the first trial, Dye testified that, prior to the shootings, he might have asked Jackson about Omar Sharpe's location, but, at the second trial, he testified that he did not say anything. Coleman also notes the following inconsistency in the testimony regarding Coleman's involvement in the prior robbery of Dye. At the first trial here's what Dye said:

> **Trial Counsel**: And you didn't — you knew that [Coleman] wasn't involved in this robbery?
>
> **Dye**: Well, I protected him to the end. Anytime somebody would ask me I would always say no. [Coleman] ain't have nothing to do with it. That was my take on it.

And then at the second trial, here's what he said:

> **Trial Counsel**: Okay. You knew Tyrus didn't have anything to do with the robbery, right, the — Omar's robbery of you?
>
> **Dye**: At first. I mean, when it first happened, you know, I gave him the benefit of the doubt, you know. Everybody else, though, kept putting him in it, but I protected him til the end.

In my view, these are trifling discrepancies in Dye's testimony. Trial counsel may have felt that pointing out such modest inconsistencies would have been silly and nitpicky. That's a judgment call.

The Court of Appeals determined that counsels' failure to impeach did not result in prejudice under *Strickland*; that decision was entirely reasonable. After reviewing the record, I find that the State court's determination regarding trial counsel's failure to impeach Dye was not objectively unreasonable. Coleman argues that the failure to impeach prejudiced him because the prosecution's case primarily relied on Dye's testimony and the video recording, which meant that Dye's credibility was pivotal to the jury's decision. Coleman does not further elaborate on this argument, and it is not clear that Dye's credibility was a material consideration by the jury. The entire episode was captured on

> video for the jury to review. In all likelihood, the video is what made the case. In any event, Coleman has not cited any portion of Dye's testimony that substantially undermined his defense.
>
> Coleman also argues that trial counsel was ineffective for failing to ask Dye whether his gun was loaded. The appellate court rejected this claim, reasoning that whether the gun was loaded was irrelevant because Coleman had no knowledge regarding this detail. In other words, whether the gun was loaded or not was neither here nor there because there was no way for Coleman to have known this, and that is the only person that matters. The court concluded that asking this question would not have changed the outcome of the proceedings, and therefore there is no prejudice under *Strickland*. This conclusion is entirely reasonable.

We agree with the district judge's analysis. And we add that the overall performance of counsel was admirable. The shootings were captured on video, yet counsel persuaded the first jury to acquit on one count and not reach a verdict on the other. That counsel could not do as well with the second jury does not demonstrate a violation of the Constitution.

AFFIRMED

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

TYRUS D. COLEMAN, Petitioner, v. SUPERINTENDENT, Respondent.	)	Cause No. 3:16-cv-301 PPS

OPINION AND ORDER

Tyrus D. Coleman seeks habeas corpus relief from his conviction for attempted murder. He was found guilty by a jury, and the Elkhart County Circuit Court sentenced him to forty-five years of incarceration. He seeks relief based on a slew of issues, but I find that none of them entitle him to relief.

Let's start with the facts as set forth by the state court which I must presume are correct unless they are rebutted with clear and convincing evidence. 28 U.S.C. § 2254(e)(1). Coleman does not dispute the Indiana Supreme Court's summary of the evidence presented at trial. Here are the facts as set forth by the Indiana Supreme Court:

> In a tragic incident occurring March 18, 2007, Tyrus Coleman shot his friends Anthony Dye and Dye's son Jermaine Jackson during a confrontation on Coleman's property, where Coleman operated a music recording studio. The confrontation stemmed from an event occurring approximately four months earlier in which Omar Sharpe, one of Coleman's musician clients, robbed Dye at gunpoint. Coleman retrieved part of the stolen property from Sharpe and returned it to Dye. Jermaine

Appendix B

> was irritated when he later learned that Sharpe had robbed his father, but Dye asked him not to get involved. On the afternoon of the shootings, Jermaine discovered that Sharpe was present at Coleman's studio and frantically phoned Dye to "[c]ome over here right now." Armed with a handgun Dye headed to Coleman's studio. In the meantime an armed and agitated Jermaine pushed open the door to the studio and attempted to enter. Sharpe, who was present inside, prevented Jermaine's entry and closed the door. Exiting the studio Coleman attempted to calm Jermaine and to dissuade him from trying to enter. Coleman called a neighbor to come over to help calm Jermaine; he also called his business partner to inform him of the situation. The neighbor testified that he tried to talk with Jermaine by telling him what he [Jermaine] was doing "wasn't worth it. Just go ahead and leave. There was kids around and people around that didn't have nothing to do with what they was angry about." According to the witness Jermaine responded by saying, "F* *k that. He didn't think about that s* *t when he did the s* *t to my Daddy." Coleman armed himself and walked back and forth in front of the studio door holding his handgun at his side. As Coleman was making a phone call, Dye came into the yard through a front gate carrying a handgun which was pointed toward the ground. Dye strode toward his son Jermaine, who was standing next to Coleman on the patio in front of the studio. Within three seconds, the following occurred: Dye stepped onto the patio where Jermaine and Coleman were standing. As Dye stepped in front of Coleman, Coleman raised his gun and fired at Dye, who immediately fell to the ground. Coleman then shot Dye a second time. At that point Coleman "turned to Jermaine." Coleman saw that Jermaine's handgun, which before that time had been concealed under his shirt and in a holster, was "pointed at [Coleman]," and Coleman shot Jermaine. Jermaine fell to the ground and died at the scene as a result of his injuries. After the shooting, Coleman drove to Milwaukee disposing of his weapon along the way. Several days later he returned to Elkhart and surrendered to the police.

Coleman v. State, 946 N.E.2d 1160, 1163-64 (Ind. 2011); ECF 7-11 at 2-3.

What is not included in the Supreme Court's description of the evidence is the fact that the entire episode is captured on video which I have viewed in my consideration of Coleman's petition. State's Exhibit 25 is a DVD from a security video from the day in

Appendix B

question — March 18, 2007. The shootings occurred at approximately 3:34 pm. The Supreme Court's description of the events is accurate. But a picture is worth a thousand words, and I found viewing the video to be extremely helpful in bringing the case into focus.

The State charged Coleman with murder for the death of Jermaine Jackson and attempted murder for the shooting of Mr. Dye. In the first trial, Coleman testified and admitted the shootings, but contended that his actions against both victims were justified on the basis of self-defense. The jury acquitted Coleman on the murder of Jackson, but was hung on the charge of attempted murder of Mr. Dye. Recall that Dye was shot twice and survived, and Jackson was shot thereafter and died. The trial court thus declared a mistrial on the count of attempted murder of Mr. Dye and scheduled another trial. Prior to retrial Coleman filed a motion to dismiss contending a subsequent trial on the attempted murder of Dye was barred by collateral estoppel and the Double Jeopardy Clauses of both the United States and Indiana Constitutions. The trial court denied the motion, and a retrial ensued where Coleman was found guilty of the attempted murder of Dye. He was later sentenced to a term of forty-five years. *Id.* at 1164.

Coleman argues that he is entitled to habeas corpus relief because his second trial on the charge of attempted murder violated the Double Jeopardy Clause. He also argues that he was denied effective assistance of trial counsel when trial counsel: (1) failed to question the jurors regarding self defense during voir dire; (2) failed to properly cross-examine Dye's testimony; (3) failed to comply with a witness separation order and call

Appendix B

character witnesses; (4) failed to call Omar Sharpe and LaQuisha Hunt as witnesses; (5) failed to present an uncropped version of the video recording of the shooting; and (6) presented inconsistent defenses. Coleman has presented these claims to the Indiana Supreme Court and the Court of Appeals of Indiana. ECF 7-3 at 16-27; ECF 7-10; ECF 7-14; ECF 7-18. Therefore, Coleman has properly exhausted his State court remedies, and I will consider his claims on the merits. *See* 28 U.S.C. § 2254(b)(1)(A); *Lewis v. Sternes*, 390 F.3d 1019, 1025 (7th Cir. 2004).

Respondent argues that Coleman's petition is untimely because he missed the limitations deadline of May 10, 2016, by six days. Respondent concedes that the prison mailbox rule may apply but notes that Coleman did not corroborate his assertion that he timely submitted the petition to the prison mail system with an affidavit. *See Ray v. Clements*, 700 F.3d 993, 1008 (7th Cir. 2012). However, Coleman has since filed an affidavit attesting that he submitted the petition to the prison mail system on May 6, 2016. ECF 10-1. As a result, I find that Coleman's petition is timely.

Discussion

Federal habeas review serves as an important error-correction role in helping to ensure the proper functioning of the criminal justice system. But the available relief is very limited. "Federal habeas review . . . exists as a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal." *Woods v. Donald*, 135 S.Ct. 1372, 1376 (2015) (quotations and citation omitted). Habeas relief can only be granted in one of two ways: if it is shown that the adjudication

Appendix B

of the claim by the state court resulted "in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;" or if the state court decision was based "on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

This is a demanding standard that has been described by the Supreme Court as being "intentionally difficult to meet. We have explained that clearly established Federal law for purposes of §2254(d)(1) includes only the holdings . . . of this Court's decisions. And an unreasonable application of those holdings must be objectively unreasonable, not merely wrong; even clear error will not suffice." *Woods*, 135 S. Ct. at 1376 (quotation marks and citations omitted). What this means is that to succeed on a habeas claim the petitioner must show that the state court's ruling "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.*

Criminal defendants are entitled to a fair trial but not a perfect one. *Rose v. Clark*, 478 U.S. 570, 579 (1986). To warrant relief, a state court's decision must be more than incorrect or erroneous; it must be objectively unreasonable. *Wiggins v. Smith*, 539 U.S. 510, 520 (2003). "A state court's determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (quotation marks omitted).

Appendix B

With these standards in mind I will turn to the various claims for relief asserted by Mr. Coleman.

Issue Preclusion and Double Jeopardy

Coleman claims that the Indiana Supreme Court made an objectively unreasonable determination that his second trial on the charge of attempted murder did not violate the Double Jeopardy Clause. On direct appeal, Coleman argued that issue preclusion applied to the charge of attempted murder of Dye barring a retrial on that count. Coleman's theory is that because the jury acquitted him of the murder of Jackson, that amounted to a finding of fact that he acted in self-defense as to the other victim, Dye.

Let's start with some basics. The Double Jeopardy Clause of the Fifth Amendment "was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense." *Green v. United States*, 355 U.S. 184, 187 (1957). The doctrine of issue preclusion "is embodied in the Fifth Amendment guarantee against double jeopardy." *Ashe v. Swenson*, 397 U.S. 436, 445 (1970). This means that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Id.* at 443. "Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Id.* But

consideration of counts upon which the jury hung "has no place in the issue-preclusion analysis." *Yeager v. United States*, 557 U.S. 110, 122 (2009). "Because a jury speaks only through its verdict, its failure to reach a verdict cannot—by negative implication—yield a piece of information that helps put together the trial puzzle." *Id.* at 121.

At the first trial, the prosecution attempted to prove a charge of attempted murder for the shooting of Dye and a charge of murder for the shooting of Jackson. Direct Appeal App. 104. Recall that Coleman shot Dye twice, and then, immediately thereafter, Jackson pointed a gun at Coleman, and Coleman shot and killed Jackson. Coleman asserted self-defense, and the jury was instructed on this defense. *Id.* at 112. The jury acquitted Coleman on the charge of murder of Jackson, but it could not reach a verdict on the charge of attempted murder of Dye. *Id.* at 130. Coleman then filed a motion to dismiss the charge of attempted murder based on issue preclusion, which the trial court denied. *Id.* at 147-66, 184-88. At the second trial, the jury convicted Coleman on the charge of attempted murder. *Id.* at 317.

Here's how the jury was instructed on self-defense:

> A person is justified in using deadly force, and does not have a duty to retreat, only if he reasonably believes that deadly force is necessary to prevent serious bodily injury to himself or a third person or the commission of a forcible felony.
>
> However, a person may not use force if:
>
> He is committing a crime that is directly and immediately connected to the confrontation;

Appendix B

> He provokes a fight with another person with intent to cause bodily injury to that person; or
>
> He has willingly entered into a fight with another person or started the fight, unless he withdraws from the fight and communicates to the other person his intent to withdraw and the other person nevertheless continues or threatens to continue the fight.

Id. at 112.

On direct appeal, Coleman argued that the jury from the first trial acquitted him on the charge for the murder of Jackson based on the self-defense instruction, although this is rank speculation. ECF 7-3 at 18-22. He further argued that this means that this jury necessarily found that he did not commit a crime by shooting Dye, which took place before he shot Jackson. *Id.* To which I ask, why then did the jury not acquit him of the attempted murder? The respondent argued on direct appeal that the jury could have interpreted the two shootings as a single confrontation and then considered whether Coleman had committed a crime prior to this confrontation. ECF 7-4 at 23-27. The Court of Appeals of Indiana agreed with Coleman and reversed the trial court's ruling on the motion to dismiss. ECF 7-6.

Respondent petitioned the Indiana Supreme Court for transfer, which was granted. ECF 7-9. According to the Indiana Supreme Court, Coleman argued that if the jury found that he was reasonably in fear of Jackson, then the jury must have necessarily found that he was reasonably in fear of Dye. ECF 7-11 at 4-6. The Indiana Supreme Court rejected this argument, noting that the jury could have sensibly found that the second shooting was

Appendix B

justified but that the first shooting was not because Jackson, unlike Dye, was clearly agitated and had pointed and fired a gun at Coleman. *Id.*

Significantly, the Indiana Supreme Court's reasoning, though internally sound, wholly misconstrues Coleman's argument and omits any mention of the reasoning of the Court of Appeals of Indiana. Indeed, Coleman's argument regarding issue preclusion remained consistent at each relevant stage of litigation from his motion to dismiss to the instant habeas petition, and there is no apparent explanation as to why the Indiana Supreme Court declined to address it. This discrepancy raises the question of which standard of review I should apply to the Indiana Supreme Court's decision.

In *Harrington v. Richter*, 562 U.S. 86, 98 (2011), the Supreme Court held that, "Where a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief." In such cases, "a habeas court must determine what arguments or theories supported or, as here, could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme Court]." *Id.* at 102. The Supreme Court extended the *Harrington* standard of review to "when the state court addresses some of the claims raised by a defendant but not a claim that is later raised in a federal habeas proceeding." *Johnson v. Williams*, 568 U.S. 289, 293 (2013).

Similarly, the Seventh Circuit extended the *Harrington* standard of review to cases in which "the last state court to render a decision offers a bad reason for its decision." *Brady*

Appendix B

v. Pfister, 711 F.3d 818, 826 (7th Cir. 2013). In such cases, federal courts must "still apply AEDPA deference to the *judgment*." *Whatley v. Zatecky*, 833 F.3d 762, 775 (7th Cir. 2016). Stated otherwise, a federal habeas petitioner is not entitled "to de novo review simply because the state court's rationale is unsound." *Id.* Based on these cases, I conclude that I must apply the deferential standard of review described in *Harrington* to the judgment of the Indiana Supreme Court even if the opinion of the Court did not address the substance of Coleman's argument.

After reviewing the record, there is at least one theory that could have supported the Indiana Supreme Court's decision. The trial court denied Coleman's motion to dismiss because the jury did not necessarily rely on the self defense instruction to acquit Coleman; they could have acquitted Coleman of the Jackson murder by finding that the prosecution did not demonstrate the elements of the offense of murder. Direct Appeal App. 187. Coleman tells me that the fact that he knowingly killed Jackson was not in dispute, but the trial record suggests otherwise. The jury was instructed that to convict Coleman for murder, they were required to find that he knowingly killed Jackson and that knowingly was defined as follows: A person engages in conduct "knowingly" if, when he engages in the conduct, he is aware of a high probability that he is doing so. *Id.* at 105,109. Coleman did not concede this element at trial, but instead testified as follows:

> **Trial Counsel:** Now, you just have explained that you have this history with [Jackson]. You're–you're good friends. Long time. You know he's not that type of person. What's happening here?

Appendix B

> **Coleman:** I don't know what's happening. I don't–I don't know. Everything just went so fast. Every went so crazy fast. It went from being cool and everything calming down, to right back there in a split second. I just seen–and I didn't expect it from him at all. I never been in a situation like this before in my life.
>
> **Trial Counsel:** Why did you turn your gun to [Jackson]?
>
> **Coleman:** Because the gun was pointed at me.
>
> **Trial Counsel:** Did [Jackson] shoot first or did you shoot first?
>
> **Coleman:** I think–well, I would probably say he shot first at me 'cause as soon as I moved and started like I was going to turn towards him, that's when his gun started going off, and then I instantly returned fire.
>
> **Trial Counsel:** Did the whole thing–did the whole shooting started when you fired at [Dye]?
>
> **Coleman:** Yes, sir.
>
> **Trial Counsel:** Up till that point, [Jackson's] gun was actually in the holster?
>
> **Coleman:** Yeah. I–I–I believe when he seen me raise the gun at [Dye], I believe that's when he first started to pull his gun out; but, I mean, I'm not for sure of that because my focus was on [Dye]. I wasn't really too much worried about him until I looked over at him. But everything happened so fast. Everything–I mean, it was all over with within like three seconds.
>
> First Trial Tr. at 299-301.

What's more, using this testimony for support, trial counsel invited the jury to acquit Coleman of the murder charge based on the prosecution's failure to prove beyond a reasonable doubt that Coleman had formed the requisite *mens rea* when he fatally shot Jackson. Here's what trial counsel said on that subject during closing argument:

> Now, the prosecutor is going to go through each element, or did go through each element of, okay, what is murder and what is attempted murder and

Appendix B

> what does the prosecutor have to prove, and he has to prove each one of those things beyond a reasonable doubt. You have to be firmly convinced in the matter of the highest important to you that [Coleman] committed this crime. Think about the state of mind.
>
> The prosecutor talks a lot about how do we know, how do we know that's going on in a person's mind? We look at all the actions before, during, and after. We look at the whole context. We look at the totality of the circumstances. All the shooting lasted three seconds. It's clear that [Coleman] was afraid. It's clear that [Coleman] was irrational after the fact. So did he really know he was killing [Jackson]; did he really have the specific intent to kill [Dye]; or was it something else? Was it acting without thinking? Acting without thinking. Does that make any sense? Anybody ever done that?
>
> Let me give you an example. Somebody tries to punch you in the face and you duck. Do you think, well, I'm getting ready to get punched in the face I better duck, or do you just duck? You can act without thinking. Because of the situation he was in, because there were two armed men coming at him, one of them a scary guy, two armed men who made it known we're here to hurt somebody don't get in our way or you'll get it too, in an instant he reacted. In an instant he stopped [Dye]. [Dye] approaching aggressively, gun in hand, ready to be fired, and [Coleman] stopped him. That's what was in his mind. That was his intent. You can't say anything more than that. You can't be sure beyond a reasonable doubt of anything more than that.

Id. at 396-97. Following this line of argument, it is altogether possible that the jury could have based it acquittal of Coleman on the lack of proof beyond a reasonable doubt that Coleman acted "knowingly" and that the acquittal had nothing to do with self-defense.

Let's be honest about it: we really do not know why the first jury acquitted Coleman of the murder charge and ended up hung on the attempted murder count. But if one were to accept Coleman's argument, the Double Jeopardy Clause would preclude retrial on the hung count. I see no basis in law or fact why that would be the case. The simple fact of the matter is that the State of Indiana was free to retry Coleman on the attempted murder

Appendix B

count because the first jury was hung on that charge. This is because, as stated above, "a rational jury could have grounded its" acquittal of Coleman in the Jackson murder "on an issue other than that which the defendant seeks to foreclose from consideration." *Ashe*, 397 U.S. at 443. In other words, the jury could have grounded its acquittal of Coleman on something other than self-defense. So nothing about the retrial on the hung count offends the Double Jeopardy Clause.

Ineffective Assistance of Counsel

Coleman alleges that trial counsel from his second trial provided constitutionally ineffective assistance of counsel. To prevail on an ineffective assistance of counsel claim in the State courts, a petitioner must show that counsel's performance was deficient and that the deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668 (1984). The test for prejudice is whether there was 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*. at 693. In assessing prejudice under *Strickland* "[t]he likelihood of a different result must be substantial, not just conceivable." *Harrington*, 562 U.S. at 112. However, "[o]n habeas review, [the] inquiry is now whether the state court unreasonably applied *Strickland* . . . ." *McNary v. Lemke*, 708 F.3d 905, 914 (7th Cir. 2013). "Given this high standard, even 'egregious' failures of counsel do not always warrant relief." *Id.*

Coleman generally argues that the Court of the Appeals of Indiana was misguided on how to apply the prejudice prong of the *Strickland* analysis by the Indiana Supreme

Appendix B

Court's decision in *Helton v. State*, 907 N.E.2d 1020 (Ind. 2009). In a footnote in *Helton*, the Indiana Supreme Court cited an incorrect articulation of the *Strickland* prejudice test merely to reject it. *Id.* at 1023 n.1. Though the Court of Appeals of Indiana cited *Helton* as it set forth the *Strickland* analysis, there is no indication that the Court of Appeals of Indiana relied on this incorrect standard when deciding Coleman's case. Therefore, Coleman's argument that Court of Appeals of Indiana was misguided by *Helton* is not a basis for habeas relief.

Coleman has a number of specific claims of ineffective assistance of counsel which I will address below. But first, Coleman claims that the state habeas court's description of the video of the crime was an unreasonable determination of the facts in light of the evidence presented during the state court proceedings. I'll take that issue up first before moving on to the specific claims of ineffective assistance of counsel.

1. Summary of the Video Recording

At the post-conviction relief stage, the State courts considered the video recording of the shootings as they assessed Coleman's ineffective assistance of counsel claims. Coleman takes issue with the State courts' summary of the video recording:

> The video taped recording of the actual shooting herein . . . shows Dye entering the backyard until he is twice shot by Coleman; Dye has his gun to his side, and is walking in the direction of and looking at his son, [Jackson]. Coleman appears from the shadow and from the side and behind Dye, and as Dye walks past [Coleman] with his gun down, Coleman raised his own gun and shoots Dye in the back of his head behind his ear. As Dye falls to the ground, Coleman shoots him again. It is not until this separate and distinct crime occurs that Dye's son [Jackson] pulls his weapon and shoots at Coleman. The evidence presented at trial was also that after the shooting,

Appendix B

> [Coleman] paced in the backyard, had a cell phone but did not call emergency personnel or law enforcement, but rather fled with his weapon, later throwing the gun into a body of water and left the state.

ECF 7-17 at 7-8.

Coleman argues that this fact summary: (1) wrongfully implies that Coleman shot Dye for the second time after he fell to the ground but he fired this shot when Dye was standing; (2) wrongfully states that Coleman appeared from a shadow but Dye had full vision of Coleman from the moment he entered the backyard; and (3) wrongfully states that Coleman appeared from behind Dye and that he shot Dye in the back of the head as Dye walked past Coleman. I have reviewed the video recording. The first two statements accurately characterize the events even if they could have been more precise and, perhaps, more fairly phrased. I agree with Coleman that the third statement is inaccurate but not to an unreasonable degree when considering the perspective of the surveillance camera and that Dye seemingly intended to walk past Coleman and was only one or two steps from doing so. Accordingly, I cannot conclude that the Court of Appeals of Indiana based its decision on an unreasonable determination of the facts in light of the evidence presented during the State court proceedings.

Appendix B

2. Counsel's Performance During Voir Dire

Coleman argues that his trial counsel was ineffective when he failed to question the jurors in voir dire about their views on self defense. The Court of Appeals of Indiana found that Coleman did not show deficient performance because the prosecution asked the jurors about their ability to assess the self defense issue and trial counsel chose to focus on studying the jurors as they responded to the prosecution's questions. ECF 7-17 at 9-11. The appellate court also found that Coleman did not demonstrate that he was prejudiced by trial counsel's voir dire strategy. *Id.*

After reviewing the record, I find that the appellate court's determination regarding trial counsel's failure to question the jurors in voir dire was not objectively unreasonable. During voir dire, trial counsel stated that he had no questions for the jurors due to the prosecution's thorough line of questioning, which suggests a strategic decision. Voir Dire Tr. 72. Additionally, regarding the prejudice prong, Coleman offers no evidence to show that more voir dire questioning would have changed the outcome of the trial but merely speculates that the jurors may not have believed in self defense. Because the appellate court's determination was not unreasonable, the claim that trial counsel was ineffective for failing to question jurors regarding self defense is not a basis for habeas relief.

Appendix B

3. Cross Examination of Dye

Coleman argues that trial counsel was ineffective for failing to impeach Dye with inconsistent testimony from the first trial and pending charges and failing to question Dye regarding his gun. The first inconsistency highlighted by Coleman is that, at the first trial, Dye testified that, prior to the shootings, he might have asked Jackson about Omar Sharpe's location, but, at the second trial, he testified that he did not say anything. First Trial Tr.135-36; Second Trial Tr. 156. Coleman also notes the following inconsistency in the testimony regarding Coleman's involvement in the prior robbery of Dye. At the first trial here's what Dye said:

> **Trial Counsel:** And you didn't – you knew that [Coleman] wasn't involved in this robbery?
>
> **Dye:** Well, I protected him to the end. Anytime somebody would ask me I would always say no. [Coleman] ain't have nothing to do with it. That was my take on it.

And then at the second trial, here's what he said:

Trial Counsel: Okay. You knew Tyrus didn't have anything to do with the robbery, right, the – Omar's robbery of you?

Dye: At first. I mean, when it first happened, you know, I gave him the benefit of the doubt, you know. Everybody else, though, kept putting him in it, but I protected him til the end.

First Trial Tr. 151; Second Trial Tr. 160. In my view, these are trifling discrepancies in Dye's testimony. Trial counsel may have felt that pointing out such modest inconsistencies would have been silly and nitpicky. That's a judgment call.

Appendix B

The Court of Appeals' determined that counsels' failure to impeach did not result in prejudice under *Strickland*; that decision was entirely reasonable. After reviewing the record, I find that the State court's determination regarding trial counsel's failure to impeach Dye was not objectively unreasonable. Coleman argues that the failure to impeach prejudiced him because the prosecution's case primarily relied on Dye's testimony and the video recording, which meant that Dye's credibility was pivotal to the jury's decision. Coleman does not further elaborate on this argument, and it is not clear that Dye's credibility was a material consideration by the jury. The entire episode was captured on video for the jury to review. In all likelihood, the video is what made the case. In any event, Coleman has not cited any portion of Dye's testimony that substantially undermined his defense.

Coleman also argues that trial counsel was ineffective for failing to ask Dye whether his gun was loaded. The appellate court rejected this claim, reasoning that whether the gun was loaded was irrelevant because Coleman had no knowledge regarding this detail. ECF 7-17 at 13. In other words, whether the gun was loaded or not was neither here nor there because there was no way for Coleman to have known this, and that is the only person that matters. The court concluded that asking this question would not have changed the outcome of the proceedings, and therefore there is no prejudice under *Strickland*. This conclusion is entirely reasonable.

Appendix B

4. Counsel's Handling of Character Witnesses

Coleman argues that trial counsel was ineffective because trial counsel intended to call three character witnesses at trial who would have testified regarding Coleman's reputation for truthfulness but were excluded due to trial counsel's failure to advise them of a separation order. The appellate court rejected this claim based on lack of prejudice, citing Indiana Rule of Evidence 608 and reasoning that character testimony would not have been admissible because the prosecution did not attack Coleman's character for truthfulness. ECF 7-17 at 14-15.

Though Coleman argues that the prosecution did attack his character for truthfulness, I find that the appellate court's finding of no prejudice was not objectively unreasonable. As discussed by the appellate court, the trial transcript shows that trial counsel had decided to call only one character witness, Thomas Rogers. Second Trial Tr. 453-54. The trial court excluded Rogers' testimony because he violated the separation order but also because Rogers did not have sufficient knowledge regarding Coleman's reputation in the community. *Id.* at 470-76. Therefore, Rogers' testimony would have been excluded anyway, even if trial counsel had properly advised Rogers of the separation order. In any event, in the face of compelling video evidence of the shooting, it is difficult to see how character witnesses would have made any difference in this case. Because the appellate court's determination was not unreasonable, the claim regarding trial counsel's failure to introduce character testimony is not a basis for habeas relief.

Appendix B

5. Counsel's Failure to Call Witnesses Omar Sharpe and LaQuisha Hunt

Coleman argues that trial counsel was ineffective by failing to call Omar Sharpe and LaQuisha Hunt as witnesses. He argues that Sharpe's testimony would have established that Coleman was not involved in the robbery of Omar Sharpe four months prior to the incident for which Coleman was on trial. He further claims that Sharpe would have testified that Jackson was aggressive and enraged. The appellate court found that trial counsel did not perform deficiently because trial counsel had no reason to anticipate that the prosecution would suggest that Coleman was involved in the robbery. ECF 7-17 at 15-17.

Coleman takes issue with the State court's characterization of the decision not to call Sharpe as strategic, pointing to trial counsel's testimony during the post-conviction relief stage. There, trial counsel testified that, on the third day of the trial, he hastily had Sharpe returned to custody because he was discouraged by what had happened at trial. PCR Tr. 65-69. It is questionable whether trial counsel's handling of Sharpe was deficient performance or not. But there was no prejudice in any event. As the respondent argued on appeal at the post-conviction relief stage, (1) the value of Sharpe's testimony was to bolster Coleman's testimony that he did not participate in the robbery of Dye; (2) Sharpe's testimony could have prejudiced Coleman's case by contradicting Coleman's testimony and placing even more focus on the robbery instead of the shooting; and (3) in any event, the prosecution only briefly implied during closing argument that Coleman might have participated in the robbery. ECF 7-15 at 30-33. Considered together, and in the face of

Appendix B

strong evidence of Coleman's guilt in the form of video evidence, it is doubtful that Sharpe's testimony would have changed the outcome of the trial.

Coleman argues that LaQuisha Hunt's testimony would have corroborated his testimony about a threatening telephone call he received from Dye. The appellate court denied this claim based on lack of prejudice, describing Hunt's testimony during the post-conviction evidentiary hearing as fabricated and imprecise. ECF 7-17 at 15-17. Coleman responds that Hunt's credibility was not challenged when she testified at his first trial. On cross-examination at the evidentiary hearing, the respondent questioned Hunt on how she was able to identify Dye's voice, and she admitted that she had never met him or heard his voice before that telephone call. PCR Tr. 246-50. By contrast, at the first trial, the prosecution did not meaningfully challenge Hunt's testimony. Hunt Tr. 1-5. Though this contrast demonstrates that the prosecution could have chosen not to challenge Hunt's testimony, it does not demonstrate that the State court's assessment of the testimony or its determination regarding lack of prejudice was unreasonable. Therefore, the claim that trial counsel was ineffective by failing to call Omar Sharpe and LaQuisha Hunt as witnesses is not a basis for habeas relief.

6. Presentation of the Video Recording

Coleman argues that trial counsel was ineffective for showing at trial a cropped version of the video recording that did not show Jackson drawing and firing his gun. He argues that this prejudiced him by allowing the jury to infer that Coleman attacked Jackson without provocation. The Court of Appeals of Indiana found no prejudice because two

Appendix B

eyewitnesses testified that Jackson was armed. ECF 7-17 at 19. Coleman responds that an uncropped version of the video would have irrefutably demonstrated that his conduct toward Jackson was an act of self defense.

At trial, Coleman and another witness testified that Jackson had a gun and was acting erratically at the recording studio; a detective testified regarding the location of the bullet holes; and the video recording showed the relative positions of Coleman and Jackson. Second Trial Tr. 86, 310-11, 374-77. From this evidence, a jury could have deduced that Jackson drew and fired his gun. Moreover, though trial counsel presented the cropped version of the video recording as a result of a lack of familiarity with the courtroom technology, he later considered presenting additional evidence to show Jackson's conduct. *Id.* at 447-53. However, after discussing the potential negative consequences of focusing on Jackson's conduct with the trial court, trial counsel consulted with Coleman and declined the opportunity. *Id.* Therefore, trial counsel made a strategic decision not to present additional evidence, which suggests that he did not perform deficiently in that respect. The appellate court's decision was thus not unreasonable, and the claim that trial counsel was ineffective for showing at trial a cropped version of the video recording that did not show Jackson drawing and firing his gun is not a basis for habeas relief.

7. Inconsistent Defense Theories

Coleman argues that trial counsel was ineffective for arguing at closing that Coleman had no intent to kill *and* that he acted in self defense. He says these are inconsistent theories and arguing inconsistent theories to a jury is not a wise thing to do.

Appendix B

This argument is a bit perplexing because it is not at all clear that the two arguments are even inconsistent. It is plausible that an individual could shoot at another individual with the intent of defending himself without the intent to kill. Indeed, Coleman testified that this is precisely what happened:

> **Trial Counsel:** [Coleman], was your intent when you fired at [Dye] to end his life?
>
> **Coleman:** No. No. 'Cause if I wanted him dead I could have shot–
>
> **Prosecution:** Objection. Calls for narrative.
>
> **The Court:** I'm sorry.
>
> **Prosecution:** I said objection. Call for narrative.
>
> **The Court:** Rephrase your question.
>
> **Trial Counsel:** Was your intent when you fired at [Dye] to end his life?
>
> **The Court:** That's the same question. Rephrase it.
>
> **Trial Counsel:** What was your intent, [Coleman], when you fired at [Dye]?
>
> **Coleman:** To get the gun out of his hands.
>
> **Trial Counsel:** What was your belief as far as the threat that [Dye] post at the time you fired your gun at [Dye]?
>
> **Coleman:** I felt he was coming to shoot Omar, me too.

Second Trial Tr. 401-02.

Additionally, it is plausible that an individual reacted in self defense without enough time for any intent to develop. This theory is reflected in trial counsel's closing arguments. *Id.* at 525-26. Further, during the first stage of closing arguments, the

Appendix B

prosecution focused solely on the elements of murder, which further suggests that trial counsel's decision to respond to the prosecution was sound even assuming that the self-defense theory was more likely to succeed than arguing lack of intent to kill. *Id.* at 497-515. The Court of Appeals of Indiana found that trial counsel made a strategic decision to make these arguments and did not perform deficiently. ECF 7-17 at 19-20. Based on the foregoing, that decision was not an unreasonable one.

8. Cumulative Errors

Coleman argues that even if no individual error was sufficiently prejudicial to merit habeas corpus relief, the court should grant him relief based on the cumulative prejudice of all of the errors combined. The Court of Appeals of Indiana found that the cumulative effect of trial counsel's errors did not deprive Coleman of his right to effective assistance of counsel. ECF 7-17 at 24. "[P]rejudice may be based on the cumulative effect of multiple errors. Although a specific error, standing alone, may be insufficient to undermine the court's confidence in the outcome, multiple errors together may be sufficient." *Malone v. Walls*, 538 F.3d 744 (7th Cir. 2008).

After reviewing the record and considering Coleman's claims of ineffective assistance claims, I cannot find that the State court's determination regarding cumulative error was objectively unreasonable. Trial counsel arguably performed deficiently and Coleman arguably suffered some prejudice from the cross-examination of Dye, the failure to call Sharpe and Hunt, and the presentation of the cropped version of the video recording. However, at trial, the parties presented a substantial amount of evidence

Appendix B

consisting of testimony from eight prosecution witnesses, including Dye; testimony from seven defense witnesses, including Coleman; photographs; and a video recording, which shows Coleman shooting Dye. After weighing the evidence presented at trial against the cumulative effect of these errors, I cannot conclude that these errors are sufficient to undermine the outcome of the trial. Based on the foregoing, the claim regarding cumulative error is not basis for habeas relief.

* * *

Pursuant to Section 2254 Habeas Corpus Rule 11, I must grant or deny a certificate of appealability. To obtain a certificate of appealability under 28 U.S.C. § 2253(c), the petitioner must make a substantial showing of the denial of a constitutional right by establishing "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). For the reasons explained in this opinion for denying habeas corpus relief, there is no basis for encouraging Coleman to proceed further. For the same reasons, he may not appeal *in forma pauperis* because an appeal could not be taken in good faith.

Accordingly, the court **DENIES** the habeas corpus petition; **DENIES** a certificate of appealability pursuant to Section 2254 Habeas Corpus Rule 11; **DENIES** leave to appeal *in forma pauperis* pursuant to 28 U.S.C. § 1915(a)(3); and **DIRECTS** the clerk to enter judgment in favor of the Respondent and against the Petitioner.

SO ORDERED.

Appendix B

ENTERED: May 7, 2018.

/s/ Philip P. Simon
Judge
United States District Court

Appendix B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

TYRUS D. COLEMAN,

Petitioner,

v.

SUPERINTENDENT,

Respondent.

CAUSE NO.: 3:16-CV-301-PPS-MGG

OPINION AND ORDER

Tyrus D. Coleman, by counsel, filed a motion to reconsider the order denying his petition for habeas relief under Fed. R. Civ. P. 59(e). "A court may grant a Rule 59(e) motion to alter or amend the judgment if the movant presents newly discovered evidence that was not available at the time of trial or if the movant points to evidence in the record that clearly establishes a manifest error of law or fact." *Matter of Prince*, 85 F.3d 314, 324 (7th Cir. 1996); *Deutsch v. Burlington N. R.R. Co.*, 983 F.2d 741, 744 (7th Cir. 1992).

Though Coleman petitioned for habeas relief on numerous grounds, the instant motion focuses on his claim under the Double Jeopardy Clause. Specifically, he claims that issue preclusion barred his second trial on the charge for the attempted murder of Anthony Dye because the jury acquitted him on the charge for the murder of Jermaine Jackson at his first trial.

Though I provide a more detailed account in the order denying the petition (ECF 23), I will briefly summarize the relevant events. Coleman was convicted based on an

incident that occurred in his backyard where he first shot Dye and then turned and shot Jackson in quick succession. Dye, who was Jackson's father, survived the shooting. Jackson did not. The entire incident was captured on videotape.

Coleman was charged with murdering Jackson and attempting to murder Dye. At the first trial, the court gave a self-defense instruction to the jury. The jury acquitted Coleman on the murder charge but was unable to unanimously agree on the attempted murder charge. A mistrial was called on the attempted murder count and that charge was set for a retrial. Between trials, Coleman moved for dismissal of the attempted murder count on double jeopardy grounds, arguing that the jury, through the acquittal of Coleman of the Jackson murder, had necessarily credited his self-defense argument and thus, based on the language of the self-defense instruction, necessarily found that he did not commit a crime by shooting Dye. The court disagreed and a second trial ensued. At that retrial, the jury convicted Coleman on the attempted murder charge. On direct appeal, the Court of Appeals of Indiana reversed the conviction based on Coleman's double jeopardy argument. But the Indiana Supreme Court overturned the intermediate appellate court's decision and affirmed the conviction.

In the petition, Coleman claimed that the Indiana Supreme Court made an objectively unreasonable determination by finding that issue preclusion did not apply to the second trial. The Double Jeopardy Clause of the Fifth Amendment "was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense." *Green v. United States*, 355 U.S. 184, 187 (1957). The doctrine of issue preclusion "is embodied in the Fifth Amendment

guarantee against double jeopardy." *Ashe v. Swenson*, 397 U.S. 436, 445 (1970). This means that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Id.* at 443. "Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Id.*

Upon review of the Indiana Supreme Court decision, I observed a disparity between Coleman's arguments and the Indiana Supreme Court's reasoning. Here's what Coleman argued:

> (1) The jury acquitted Coleman of the Jackson murder charge on the basis of self-defense;
>
> (2) For such an acquittal, according to the jury instructions, the jury was required to find, beyond a reasonable doubt, that Coleman did not commit any crime that was "directly and immediately connected to the confrontation";
>
> (3) When considering the charge of murder, the jury interpreted "the confrontation" as the shooting of Jackson -- as opposed to interpreting "the confrontation" as encompassing both the shooting of Dye and the shooting of Jackson.
>
> (4) The shooting of Dye was directly and immediately connected to the shooting of Jackson; and
>
> (5) Therefore, the jury determined that the shooting of Dye was not a crime.

The Indiana Supreme Court construed Coleman's brief as contending that "because of the brief interval between the two shootings, they necessarily amounted to a single transaction" and as arguing that "Coleman's general fear of death or great bodily harm applied equally to [Jackson] and Dye." ECF 7-11 at 5. The court reasoned that the jury could have reasonably found that Coleman acted in self-defense only with respect Jackson. Though the Indiana Supreme Court's reasoning was internally sound, the court misconstrued Coleman's argument; Coleman's argument requires the assumption the two shootings were each separate transactions (or confrontations) and focuses on the language of the self-defense jury instruction. The court did not discuss the jury instruction and thus did not meaningfully address Coleman's argument or the reasoning of the lower appellate court.

Faced with this unusual straw-man situation, I found that this was a case in which "the last state court to render a decision offers a bad reason for its decision" and applied the deferential standard of review set forth in *Brady v. Pfister*, 711 F.3d 818 (7th Cir. 2013), and *Whatley v. Zatecky*, 833 F.3d 762, 775 (7th Cir. 2016), to the judgment of the Indiana Supreme Court.

In accordance with *Ashe*, I examined the record for a possible alternative bases to explain the acquittal. In that process, I considered that one of the things the jury was required to decide was whether Coleman "knowingly" killed Jackson. I noted that, during Coleman's testimony, he did not expressly admit that he had knowingly killed Jackson and testified that "everything went so crazy fast." Trial counsel used this testimony to invite the jury to acquit Coleman based on the "knowingly" element. In

making that argument, Coleman's counsel relied on Coleman's testimony as well as the short, three-second duration of the shootings as reflected in the videotape. Ultimately, I concluded that a rational jury could have acquitted Coleman on the grounds that the prosecution had failed to prove beyond a reasonable doubt that Coleman had knowingly killed Jackson. I therefore denied Coleman habeas relief.

Coleman now argues that I should have applied a de novo standard of review. Under this standard, "[i]f the record as a whole supports the state court's outcome . . . the correct result would be to deny the petition for a writ of habeas corpus." *Brady*, 711 F.3d at 827. Even assuming that de novo is the proper standard of review, it would not have changed the decision on the issue preclusion claim. This is not a case in which I disagreed with the State court's judgment but stopped short of finding it unreasonable. Rather, I agree with the judgment of the Indiana Supreme Court and, for the reasons I have stated, would not have granted habeas relief based on the issue preclusion claim even if I had applied the de novo standard of review.

Coleman also argues that the respondent, through counsel, conceded that the jury necessarily acquitted him based on self-defense during oral arguments before the Indiana Supreme Court. "Judicial admissions are formal concessions in the pleadings, or stipulations by a party or its counsel, that are binding upon the party making them. They may not be controverted at trial or on appeal." *Keller v. United States*, 58 F.3d 1194, 1199 (7th Cir. 1995). "[A] verbal admission at . . . oral argument is a binding judicial admission, the same as any other formal concession made during the course of proceedings." *McCaskill v. SCI Mgmt. Corp.*, 298 F.3d 677, 680 (7th Cir. 2002).

Appendix C

Nevertheless, whether to treat an allegation as a judicial admission is discretionary, and the court may allow a judicial admission to be withdrawn. *Cooper v. Carl A. Nelson & Co.*, 211 F.3d 1008, 1014 (7th Cir. 2000); *Solon v. Gary Cmty. Sch. Corp.*, 180 F.3d 844, 858 (7th Cir. 1999).

It is true that the respondent's counsel made a statement during oral argument that could have been deemed a judicial admission. But the Indiana Supreme Court did not consider the statement to be binding but instead merely assumed that it was true for the sake of argument. ECF 7-11 at 5. Moreover, the record flatly contradicts the oral argument statement; as I have explained, the record contains at least one alternative rationale for acquitting Coleman. Therefore, I also decline to consider this statement to be a binding judicial admission.

Furthermore, the respondent suggested yet another alternative rationale for the acquittal of Coleman. Recall that Coleman's issue preclusion argument requires the assumption that the jury interpreted the self-defense instruction's reference to "the confrontation" as the shooting of Jackson separate and apart from the shooting of Dye. The respondent argued that the jury may have rationally interpreted "the confrontation" as encompassing the events from the time Jackson arrived at Coleman's recording studio until the shooting of Jackson. ECF 7 at 12-13. This would also include the shooting of Dye. Under this interpretation, the jury could have found that Coleman did not commit any crime that was "directly and immediately connected to the confrontation" without consideration of whether the shooting of Dye was a crime. Significantly, the jury was presented with a single self-defense instruction for both

charges; the jury instructions did not define "confrontation"; and the two shootings occurred over the course of three seconds. Considering the foregoing, the jury could have rationally interpreted "the confrontation" as encompassing both shootings and then rationally acquitted Coleman based on this broader interpretation.

Coleman further argues that I improperly considered the hung count as part of the issue preclusion analysis, relying on *Yeager v. United States*, 557 U.S. 110 (2009), which holds that "the consideration of hung counts has no place in the issue-preclusion analysis." In the opinion denying the habeas petition, I outlined Coleman's argument that, by acquitting Coleman of murdering Jackson, the jury determined that Coleman did not commit a crime by shooting Dye. I then posited, "why then did the jury not acquit him of the attempted murder?" This was a rhetorical question meant to highlight the paradoxical nature of Coleman's argument: taking Coleman's argument at face value means that the jury unanimously decided that Coleman's shooting of Dye was not a crime while simultaneously declining to acquit Coleman for attempting to murder Dye.

In generally prohibiting the consideration of hung counts, the primary concern of the United States Supreme Court was to prevent courts from speculating about a jury's reasoning for what amounts to a legal nullity. *Yeager*, 557 U.S. at 122 (2009). The rhetorical question was not speculation; it was a simple observation that, as the Supreme Court has recognized, a hung count represents "a jury's failure to reach a decision." *Bravo-Fernandez v. United States*, 137 S. Ct. 352, 360 (2016).

Appendix C

Coleman next argues that I should have issued a certificate of appealability on the issue preclusion claim. To obtain a certificate of appealability under 28 U.S.C. § 2253(c), the petitioner must make a substantial showing of the denial of a constitutional right by establishing "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). After considering the arguments presented in the instant motion, I find that a reasonable jurist could agree that this petition should have been resolved in a different manner. Therefore, I grant a certificate of appealability on the issues of the proper standard of review for the issue preclusion claim and whether, under that standard, the issue preclusion claim entitles Coleman to habeas relief.

As a final matter, I note that attorneys Branka Cimesa and Jennifer H. Berman entered their appearance on behalf of Coleman, who had filed and litigated this case, except for the instant motion, as a pro se litigant. Regardless of whether I agree with their arguments, I commend Ms. Cimesa and Ms. Berman for their excellent representation of Coleman and their vigorous advocacy towards that end.

For these reasons, the court:

(1) GRANTS the motion to alter judgment (ECF 27) with respect to the certificate of appealability but DENIES the motion in all other respects; and

(2) GRANTS a certificate of appealability pursuant to 28 U.S.C. § 2253(c).

SO ORDERED on September 20, 2018.

Appendix C

s/ Philip P. Simon
JUDGE
UNITED STATES DISTRICT COURT

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

April 23, 2021

Before

FRANK H. EASTERBROOK, *Circuit Judge*

DANIEL A. MANION, *Circuit Judge*

ILANA DIAMOND ROVNER, *Circuit Judge*

No. 18-3264

TYRUS D. COLEMAN,
Petitioner-Appellant,

v.

RON NEAL, Warden, Indiana State Prison,
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.

No. 3:16-cv-301 PPS
Philip P. Simon, *Judge*.

Order

Petitioner-Appellant filed a petition for rehearing and rehearing en banc on April 8, 2021. No judge in regular active service has requested a vote on the petition for rehearing en banc,[*] and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

[*] Judge Scudder did not participate in the consideration of this petition.

ATTORNEY FOR APPELLANT
Cara Schaefer Wieneke
Wieneke Law Office, LLC
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE
Gregory F. Zoeller
Attorney General of Indiana

Ian McLean
Deputy Attorney General
Indianapolis, Indiana

In the
Indiana Supreme Court

No. 20S03-1008-CR-458

TYRUS D. COLEMAN,

Appellant (Defendant below),

v.

STATE OF INDIANA,

Appellee (Plaintiff below).

Appeal from the Elkhart Circuit Court, No. 20C01-0703-MR-1
The Honorable Terry C. Shewmaker, Judge

On Petition To Transfer from the Indiana Court of Appeals, No. 20A03-0904-CR-185

May 18, 2011

Rucker, Justice.

Appendix E

In this opinion we discuss among other things whether the Double Jeopardy Clause of the United States Constitution precludes the State from retrying a defendant where in the first trial the jury acquitted the defendant of murder with respect to one victim but failed to return a verdict on a charge of attempted murder with respect to another victim. We conclude it does not.

Facts and Procedural History

In a tragic incident occurring March 18, 2007, Tyrus Coleman shot his friends Anthony Dye and Dye's son Jermaine Jackson during a confrontation on Coleman's property, where Coleman operated a music recording studio. The confrontation stemmed from an event occurring approximately four months earlier in which Omar Sharpe, one of Coleman's musician clients, robbed Dye at gunpoint. Coleman retrieved part of the stolen property from Sharpe and returned it to Dye. Jermaine[1] was irritated when he later learned that Sharpe had robbed his father, but Dye asked him not to get involved. On the afternoon of the shootings, Jermaine discovered that Sharpe was present at Coleman's studio and frantically phoned Dye to "[c]ome over here right now." Tr. 1 at 131.[2] Armed with a handgun Dye headed to Coleman's studio. In the meantime an armed and agitated Jermaine pushed open the door to the studio and attempted to enter. Sharpe, who was present inside, prevented Jermaine's entry and closed the door. Exiting the studio Coleman attempted to calm Jermaine and to dissuade him from trying to enter. Coleman called a neighbor to come over to help calm Jermaine; he also called his business partner to inform him of the situation. The neighbor testified that he tried to talk with Jermaine by telling him what he [Jermaine] was doing "wasn't worth it. Just go ahead and leave. There was kids around and people around that didn't have nothing to do with what they was angry about." Tr. 1 at 220-21. According to the witness Jermaine responded by saying, "F**k that. He didn't think about that s**t when he did the s**t to my Daddy." Tr. 1 at 221. Coleman armed himself, Tr. 1 at 286, and walked back and forth in front of the studio door holding his

[1] For the sake of consistency with the parties' briefs, we refer to Jermaine Jackson by first name and the other actors by last name.

[2] We cite the transcript from Coleman's first trial as "Tr. 1" and the transcript from his second trial as "Tr. 2."

handgun at his side. State's Ex. 25 at 03:32:20.[3] As Coleman was making a phone call, Dye came into the yard through a front gate carrying a handgun which was pointed toward the ground. Dye strode toward his son Jermaine, who was standing next to Coleman on the patio in front of the studio. Within three seconds, the following occurred: Dye stepped onto the patio where Jermaine and Coleman were standing. As Dye stepped in front of Coleman, Coleman raised his gun and fired at Dye, who immediately fell to the ground. Coleman then shot Dye a second time. At that point Coleman "turned to Jermaine." Tr. 1 at 330. Coleman saw that Jermaine's handgun, which before that time had been concealed under his shirt and in a holster, was "pointed at [Coleman]," Tr. 1 at 330; and Coleman shot Jermaine. Jermaine fell to the ground, State's Ex. 25 at 03:35:33-03:35:36, and died at the scene as a result of his injuries. After the shooting, Coleman drove to Milwaukee disposing of his weapon along the way. Several days later he returned to Elkhart and surrendered to the police.

The State charged Coleman with murder, a felony, for the death of Jermaine and attempted murder, a Class A felony, for shooting Dye. During a jury trial conducted in February 2008 Coleman testified and admitted the shootings, but contended that his actions against both Jermaine and Dye were justified on the basis of self-defense. The jury returned a verdict of not guilty on the murder charge, but was unable to reach a verdict on the attempted murder charge. The trial court thus declared a mistrial on that count and scheduled another trial. Prior to retrial Coleman filed a motion to dismiss contending a subsequent trial on attempted murder was barred by collateral estoppel and would therefore violate the Double Jeopardy Clauses of both the United States and Indiana Constitutions. See Appellant's App. at 147. After a hearing, the trial court denied the motion. A retrial ensued, at the conclusion of which the jury found Coleman guilty as charged. Thereafter the trial court sentenced him to a term of forty-five years. Coleman appealed raising several issues for review. In a divided opinion the Court of Appeals reversed Coleman's conviction on grounds of collateral estoppel. Coleman v. State, 924 N.E.2d 659 (Ind. Ct. App. 2010). Having previously granted transfer thereby vacating the opinion of the

[3] As part of the recording studio's security system, video cameras were present in the vicinity of the studio. Tr. 1 at 187. The security system recorded the events of the day onto DVDs, which were admitted into evidence as State's Exhibits 25 and 34. We reference State's Exhibit 25 in hours, minutes, and seconds as time-stamped on the video recording.

Appendix E

Court of Appeals, see Ind. Appellate Rule 58(A), we now affirm Coleman's conviction. Additional facts are set forth below where necessary.

Discussion

I.

Collateral Estoppel

The Double Jeopardy Clause contained in the Fifth Amendment to the United States Constitution provides, "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb."[4] Collateral estoppel (also referred to as issue preclusion) has been characterized as an "awkward phrase" however "it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." Ashe v. Swenson, 397 U.S. 436, 443 (1970). Collateral estoppel is not the same as double jeopardy, but rather it is embodied within the protection against double jeopardy. "'[T]he traditional bar of jeopardy prohibits the prosecution of the crime itself, whereas collateral estoppel, in a more modest fashion, simply forbids the government from relitigating certain facts in order to establish the fact of the crime.'" Little v. State, 501 N.E.2d 412, 414 (Ind. 1986) (quoting United States v. Mock, 604 F.2d 341, 343-44 (5th Cir. 1979)). In essence the doctrine of collateral estoppel "precludes the Government from relitigating any issue that was necessarily decided by a jury's acquittal in a prior trial." Yeager v. United States, ___U.S.___, ___, 129 S. Ct. 2360, 2366 (2009). To decipher what a jury necessarily decided in a prior trial, courts should "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." Id. at 2367 (quoting Ashe, 397 U.S. at 444).

[4] A similarly worded provision of the Indiana Constitution provides, "No person shall be put in jeopardy twice for the same offense." Ind. Const. art. 1, § 14. Although Coleman cites Article 1 section 14, he advances no argument concerning the Indiana Constitution. We thus address the Double Jeopardy claim under the Federal Constitution only.

Coleman contends the trial court erred in denying his motion to dismiss the attempted murder charge following the first trial. He argues the second trial violated his protection against double jeopardy by allowing the State to relitigate an issue already definitively decided in the first trial, namely, that he acted in self-defense when shooting Dye. According to Coleman, "the jury's acquittal of Coleman on the murder charge could only have been based on its determination that Coleman acted in defense of himself and/or another person." Br. of Appellant at 16.

A valid claim of self-defense is legal justification for an otherwise criminal act. Randolph v. State, 755 N.E.2d 572, 575 (Ind. 2001). In order to prevail on a claim of self-defense a defendant must show: (1) he was in a place where he had a right to be; (2) he acted without fault; and (3) he had a reasonable fear of death or great bodily harm. Id. at 576; see also Ind. Code § 35-41-3-2. Here, Coleman seems to contend that because of the brief interval between the two shootings, they necessarily amounted to a single transaction. Thus, the conclusion is that Coleman's general fear of death or great bodily harm applied equally to Jermaine and Dye. This argument is unavailing. To begin, Coleman was charged separately with the murder of Jermaine and the attempted murder of Dye. See Appellant's App. at 17. It is true that in the first trial, the trial court did not instruct the jury on the elements of self-defense separately with respect to each victim. See Appellant's App. at 112. However, during summation Coleman's counsel specifically addressed the separate shootings and argued each was justified by Coleman's reasonable imminent fear of death or serious bodily injury from Dye, and then from Jermaine. See Tr. 1 at 378, 382-83, 388, 390-94.

Further, for the sake of argument we accept as true that the jury's acquittal of Coleman on the murder charge in the first trial was based on its belief that Coleman acted in self-defense. But, the jury could have rationally concluded that the act of self-defense was in response to the conduct of Jermaine only. The jury was not bound to believe that Coleman likewise acted in self-defense with respect to Dye. Stated differently, the jury could very well have determined that Jermaine so threatened Coleman and others on the property that he was justified in using deadly force to protect himself and others from Jermaine. The record shows for example that an armed and agitated Jermaine had attempted to gain access to the studio in pursuit of Sharpe, and

Appendix E

that although Coleman fired his weapon first at Dye, it was only Jermaine and not Dye who actually pointed his own weapon at Coleman. And there was testimony that Jermaine fired his weapon in Coleman's direction. Tr. 1 at 208, 300-02. Coleman responded by firing at Jermaine resulting in fatal injury. In essence the acquittal relating to the murder of Jermaine even if based on self-defense did not amount to the jury determining that Coleman acted in self-defense with respect to the attempted murder of Dye. Thus, in retrying Coleman the State did not relitigate an issue that was necessarily decided by the jury in the first trial. Instead, the jury was asked to make the determination of whether Coleman acted in self-defense when he shot Dye. This issue was not decided during the first trial. Thus, collateral estoppel did not bar relitigation. And the trial court correctly denied Coleman's motion to dismiss. Because the Court of Appeals reversed the judgment of the trial court on this issue, it did not address Coleman's remaining claims. We do so now.

II.
Prosecutorial Misconduct

Coleman contends the State engaged in prosecutorial misconduct by (i) presenting false testimony that the State knew to be false, and (ii) further using the false testimony to the State's advantage during closing argument. The essential facts are these. During the first trial, Dye testified that upon entering Coleman's backyard he "asked [Jermaine] where [Sharpe] was at" and he "might" have done so using foul and offensive language, specifically "where that n****r at[?]" Tr. 1 at 135. During the second trial, Dye responded "No" when the prosecutor asked, "Did you say anything to [Coleman]?" Tr. 2 at 146. On cross-examination Coleman's counsel asked Dye if he had said "anything to anybody" [including Jermaine] as he walked into the backyard, to which Dye responded "No." Tr. 2 at 156. Coleman's counsel made no effort to confront Dye with his inconsistent statement from the first trial, and the prosecutor did not point out the inconsistency. In his closing argument the prosecutor highlighted Coleman's own statement given to police in which he said that "[Dye] didn't say anything" when he entered the yard, as well as Dye's trial testimony to that effect. Tr. 2 at 535-36.

Coleman does not identify any objection presented at trial to the asserted prosecutorial misconduct and concedes "[u]nfortunately, the claim has not been properly preserved in this case . . . ." Br. of Appellant at 24. See Johnson v. State, 725 N.E.2d 864, 867 (Ind. 2000) (declaring that a party's failure to present a contemporaneous trial objection asserting prosecutorial misconduct results in waiver of appellate review).

If a defendant properly raises and preserves the issue of prosecutorial misconduct, then the reviewing court determines (1) whether the prosecutor engaged in misconduct, and if so, (2) whether the misconduct, under all of the circumstances, placed the defendant in a position of grave peril to which he or she would not have been subjected. Baer v. State, 866 N.E.2d 752, 756 (Ind. 2007). Where a claim of prosecutorial misconduct has not been properly preserved, our standard for review is different from that of a properly preserved claim. More specifically, the defendant must establish not only the grounds for the misconduct but also the additional grounds for fundamental error. Cooper v. State, 854 N.E.2d 831, 835 (Ind. 2006). Fundamental error is an extremely narrow exception that allows a defendant to avoid waiver of an issue. It is error that makes "a fair trial impossible or constitute[s] clearly blatant violations of basic and elementary principles of due process . . . present[ing] an undeniable and substantial potential for harm." Benson v. State, 762 N.E.2d 748, 756 (Ind. 2002).

In this case we do not reach the question of fundamental error because we conclude Coleman has not carried his burden of demonstrating misconduct. It is of course true that "[t]he prosecution may not stand mute while testimony known to be false is received into evidence. False evidence, when it appears, must not go uncorrected." Sigler v. State, 700 N.E.2d 809, 813 (Ind. Ct. App. 1998) (internal citation omitted). But the fact of contradictory or inconsistent testimony does not mean the testimony is false. See Timberlake v. State, 690 N.E.2d 243, 253 (Ind. 1997) ("While the knowing use of perjured testimony may constitute prosecutorial misconduct, contradictory or inconsistent testimony by a witness does not constitute perjury."). Dye's testimony during retrial that he said nothing when entering Coleman's yard is at most inconsistent with his testimony during the first trial. To refer to the statement as false is mere hyperbole. The contradictory statement was elicited by Coleman's counsel on cross-examination. However, for reasons not clear from the record before us Coleman's counsel did

Appendix E

not capitalize on this opportunity by confronting Dye with this apparent inconsistency. When the State then referred to Dye's testimony in its closing argument, it first highlighted Coleman's own statement to police that Dye had said nothing. This was fair comment on the evidence. These acts do not rise to the level of prosecutorial misconduct. Coleman's claim on this issue therefore fails.

III.

Exclusion of Evidence

Coleman next contends the trial court erred by excluding the introduction of certain evidence. According to Coleman not only was most of the evidence admitted during the first trial, but also the evidence was presented by the State in its case-in-chief during the first trial. He argues, "[o]n retrial, however, the State chose not to present the evidence and even objected to its use by the defense." Br. of Appellant at 28.[5] Specifically Coleman refers to statements made by Dye during the first trial and statements attributable to Jermaine that were introduced into evidence during the first trial. Coleman also asserts error in the trial court's refusal to allow evidence that he was acquitted of Jermaine's murder.

A. Statements made by Dye

As discussed in Part II above, during the first trial Dye testified that upon entering Coleman's backyard he "asked [Jermaine] where [Sharpe] was at" and he "might" have done so using offensive language. Tr. 1 at 135. On retrial, the trial court permitted Coleman to testify to the exact words Dye uttered. However, sustaining the State's hearsay objection, the trial court prohibited three defense witnesses from so testifying. Instead, the trial court allowed the witnesses to testify that Dye said "something" as he entered the yard. Coleman claims error.

[5] Other than complaining that "[t]he retrial jury was presented with a very different case than the first jury," Br. of Appellant at 27, Coleman makes no claim of error in this regard and we find none. The fact of the matter is that the second trial was necessarily different. In the first trial Coleman was faced with two separate charges against two separate alleged victims. And the evidence concerning these charges was overlapping. By contrast, in the second trial there was only one charge against one alleged victim. The State thus structured its presentation of the evidence to reflect this reality.

Hearsay is an out-of-court statement offered in court to prove the truth of the matter asserted. Ind. Evidence Rule 801(c); Garner v. State, 777 N.E.2d 721, 724 (Ind. 2002). Coleman contends the witnesses' statements were not hearsay because they were not offered for their truthfulness. Instead, according to Coleman, the statements were offered to show that he was in fear of his life or the lives of others on his property and thus the statements supported his claim of self-defense.

This Court has held "[w]hen a claim of self-defense is interposed, any fact which reasonably would place a person in fear or apprehension of death or great bodily injury is admissible." Hirsch v. State, 697 N.E.2d 37, 40 (Ind. 1998) (internal quotation marks omitted). Thus if Dye's words could reasonably be interpreted as placing Coleman in fear or apprehension of death or great bodily harm, then they were relevant and admissible without regard to their truthfulness. The problem here however is nowhere does Coleman contend that the words uttered by Dye placed Coleman in such fear or apprehension. Although Coleman testified to the precise language used, he did not elaborate on or express any particular concern about the utterances. Instead the focus of Coleman's self-defense claim was on Dye's overall demeanor, and the fact that Dye was armed. Coleman testified for example that he believed "[Dye] was going to come kill us." Tr. 2 at 399. He also testified, "I thought [Dye] was shooting back at me," Tr. 2 at 399, and that "I felt [Dye] was coming to shoot Omar, me too." Tr. 2 at 402. There was testimony from other witnesses that Dye spoke "loudly" and he appeared as if he was "on a mission" and was "angry." Tr. 2 at 348, 457. There is simply nothing in the record before us indicating that the proffered statements Dye made were of any particular concern to Coleman or others. Thus, even if Dye's exact words were not offered for their truthfulness and thus were not hearsay, they were not relevant or admissible, at least through the testimony of third party witnesses. And this is so because Coleman failed to demonstrate the words placed him or others in fear or apprehension of great bodily harm. Accordingly, although the trial court erred in excluding the evidence on grounds of hearsay, the error was harmless because the evidence was excludable on grounds of relevance. See Lashbrook v. State, 762 N.E.2d 756, 758 (Ind. 2002) ("[A]ppellate review of the exclusion of evidence is not limited to the grounds stated at trial, but rather the ruling will be upheld if supported by any valid basis.").

Appendix E

B. Statements attributable to Jermaine

Coleman complains that during trial he "attempted to present testimony from Yarrum Murray, Willie Williams, and Otis Jackson about statements that Jermaine made that day [the day of the shootings] in the backyard, but the trial court excluded the evidence." Br. of Appellant at 31. Essentially, the purported testimony would have shown that on the day of the shootings Jermaine made statements demonstrating that he was angry, agitated, and upset. The trial court excluded the testimony on grounds of hearsay and noted that Jermaine was no longer available for cross-examination to test the validity of the witnesses' accounts. Similar to his claim concerning Dye's excluded statement, Coleman contends that Jermaine's statements were not hearsay because they were not offered for their truthfulness. Instead, according to Coleman, the statements were offered to show that he was in fear for his life or the lives of others on his property and thus the statements supported his claim of self-defense. In the alternative Coleman argues that even if hearsay the statements were nonetheless admissible under Indiana Evidence Rule 803(3) to show Jermaine's then existing state of mind. We have a much different view.

Coleman's fear for his life or the lives of others on the basis of Jermaine's statements has no relevance to his self-defense claim with respect to Dye. Stated differently, even if it is true that Jermaine's statements placed Coleman in fear of death and great bodily harm, at most that fact may have supported Coleman's justification for fatally shooting Jermaine. Coleman does not explain, nor can we discern, how his fear of Jermaine transferred to a fear of Dye. Coleman contends for example that Yarrum Murray planned to testify that he drove Jermaine to the studio on the day of the shooting and that Jermaine was upset and repeatedly yelled for Sharpe to come out of the studio. Br. of Appellant at 31. According to Coleman, Willie Williams intended to testify that Jermaine called him on the day of the shooting and asked Williams to come to the studio, and that when he arrived, Williams asked Jermaine what was going on and Jermaine replied that Sharpe was inside the studio. Br. of Appellant at 32. Finally, according to Coleman, Otis Jackson intended to testify that he spoke to Jermaine in the backyard on the day of the shooting and told Jermaine "it wasn't worth it," that children were in the area, and that an agitated Jermaine responded "f**k that. [Sharpe] didn't think about that s**t when he did this s**t" to Dye. Br. of Appellant at 32 (quoting Tr. 1 at 220-21).

Appendix E

Assuming for the sake of argument the foregoing statements placed Coleman in fear of Jermaine, there is simply nothing contained in the statements suggesting they placed Coleman in fear of Dye.[6] The trial court did not err by excluding the testimony.

C. Evidence of Acquittal

Coleman contends the trial court erred by not permitting him to introduce evidence that he was acquitted in the shooting death of Jermaine. Coleman insists, "[t]he portion of the surveillance video played for the jury showed Coleman turn and shoot several times at Jermaine, for no apparent reason, after shooting Dye. The trial court refused to allow Coleman to tell the jury about his prior acquittal." Reply Br. of Appellant at 7 (internal citation omitted).

To support his claim of error Coleman cites Hare v. State, 467 N.E.2d 7 (Ind. 1984). In that case the defendant Hare was accused of robbing a Shelbyville pharmacy. Over the defendant's objection the trial court admitted the testimony of a pharmacist who said the defendant had robbed his Terre Haute store within a week of the Shelbyville robbery. The two robberies were similar in several respects, but the defendant had been acquitted of the Terre Haute robbery. Although acknowledging the rule that evidence of criminal conduct other than that charged generally is inadmissible, we declared "[e]vidence of a crime other than that charged is . . . admissible to show intent, motive, purpose, identity, or common scheme or plan" and that the defendant's acquittal of the charge was also admissible as it affected the weight of the evidence and not its admissibility. Id. at 18.

Hare provides Coleman no refuge. The essential facts in this case are these. The State intended to show the video of the entire shooting incident that included the shooting of both Dye and Jermaine. Coleman had no objection but argued that he should be allowed to present evidence that he was previously charged and acquitted in the shooting death of Jermaine. The trial court rejected his argument. However, for reasons not entirely clear from the record before

[6] Though it is not the case here, we note that in some circumstances third party threats directed at a defendant might well be admissible in order to support a claim of self-defense. See Andre M. Solé, Annotation, Admissibility of Threats to Defendant Made by Third Parties to Support Claim of Self-Defense in Criminal Prosecution for Assault or Homicide, 55 A.L.R.5th 449 (1998).

Appendix E

us, the shooting of Jermaine was not visible when the video was played to the jury.[7] In fact the trial court asked counsel for Coleman, "Do you want to put on evidence that your client shot Mr. Dye and then turned towards Mr. Jermaine Jackson and started shooting him? Is that what you want to do?" Tr. 2 at 450. To which counsel responded, "I don't want to put on evidence that my client shot Jermaine. I want to put on evidence as to why my client turned towards him, and also because this is very relevant to our theory of the case that Tyrus Coleman was facing two armed men, both of whom were dangerous." Tr. 2 at 450.

Here, despite Coleman's claim to the contrary the video did not reveal that Coleman shot Jermaine. And counsel declined the trial court's invitation to introduce such evidence. In the absence of any evidence revealing a crime against Jermaine, Coleman was not entitled to introduce evidence of his acquittal of a crime. The trial court thus committed no error on this issue.

IV.
Review of Sentence

For his final claim Coleman seeks revision of his sentence. Article 7, section 4 of the Indiana Constitution provides "[t]he Supreme Court shall have, in all appeals of criminal cases, the power to . . . review and revise the sentence imposed." Our rules authorize revision of a sentence "if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." App. Rule 7(B).

Although citing Rule 7(B), Coleman tells us nothing about the nature of the offense other than to press his argument that he acted in self-defense. As for his character Coleman points to the numerous letters sent to the trial court attesting to his good character and his willingness to

[7] Indeed on at least two occasions during the course of trial, responding to Coleman's persistent argument that the video showed Coleman shooting Jermaine, the trial court observed: "The part that was shown to the jury did not show him shooting Jermaine in spite of what you say. It did not show that." Tr. 2 at 382. "Well, now, you keep saying that, but that does not appear in the video. The evidence speaks for itself." Tr. 2 at 449. There was speculation that the failure of the video to show Jermaine's shooting was the result of the compression ratio of the courtroom video screen. Tr. 2 at 262-63.

Appendix E

help others. "[A] defendant must persuade the appellate court that his or her sentence has met [the] inappropriateness standard of review." Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006). Coleman has failed in this effort.

Concerning the nature of the offense, the advisory sentence is the starting point the Legislature has selected as an appropriate sentence for the crime committed. The advisory sentence for a Class A felony is thirty years. See I.C. § 35-50-2-4. Here the trial court imposed a sentence of forty-five years. Although the nature of the offense may justify a revised sentence under some circumstances, we are not persuaded those circumstances are present in this case. The record shows that Coleman fired at Dye twice at close range with a .45 caliber handgun. The first shot struck Dye in the head. After Dye was immobilized and fell to the ground, Coleman fired again striking Dye in the chest. Further, although Coleman had the opportunity to do so, he never used his cell phone to contact the police and inform them that two armed and dangerous men were on his property. In addition, there were a number of other adults in the immediate area as well as small children, including Coleman's own son, whose safety was put in jeopardy by Coleman firing his weapon. Regarding the character of the offender, the record shows that Coleman has amassed a criminal record that includes six misdemeanor offenses and one felony offense. Coleman was also on probation at the time of the instant offense. We have not been persuaded that Coleman's character or the nature of his offense requires a revision of Coleman's sentence.

Conclusion

We affirm the judgment of the trial court.

Shepard, C.J., and Dickson, Sullivan and David, JJ., concur.

Appendix E

FOR PUBLICATION

ATTORNEY FOR APPELLANT:

CARA SCHAEFER WIENEKE
Wieneke Law Office, LLC
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

IAN MCLEAN
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

TYRUS D. COLEMAN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 20A03-0904-CR-185
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ELKHART CIRCUIT COURT
The Honorable Terry C. Shewmaker, Judge
Cause No. 20C01-0703-MR-1

March 31, 2010

OPINION - FOR PUBLICATION

KIRSCH, Judge

Tyrus D. Coleman ("Coleman") was convicted of attempted murder,[1] a Class A felony, after a jury trial. He appeals, raising several issues, of which we find the following dispositive: whether the doctrines of double jeopardy and collateral estoppel barred Coleman's retrial for attempted murder.

We reverse.

FACTS AND PROCEDURAL HISTORY

Sometime in November 2006, Anthony Dye ("Dye") was robbed by Omar Sharpe ("Sharpe") and another man. During the robbery, the men took money and Dye's gold chain. Because Dye knew that the two men were associated with a recording studio owned by Coleman, he went to Coleman's studio, armed with a handgun for protection, to talk to Coleman about the robbery. Although Coleman did not know about the robbery, he apologized to Dye and offered to find out what he could. Coleman was able to recover Dye's gold chain from Sharpe and called to arrange a time to return it in December. At some point after retrieving the gold chain from Coleman, Dye found out that Coleman had bonded Sharpe out of jail. Dye called Coleman to express his displeasure with this and to tell him that if Dye found out that Coleman had anything to do with the robbery, "there would be problems for [Coleman]," which Coleman understood as a threat to his life. *2008 Tr.*[2] at 274.

---

[1] *See* Ind. Code §§ 35-42-1-1, 35-41-5-1.

[2] The record on appeal contains both a two-volume transcript of Coleman's first jury trial, held in February 2008, and a three-volume transcript of the second jury trial, held in March 2009. We will refer to the transcript from the first trial as *2008 Tr.* and the transcript from the second trial as *2009 Tr.*

In February 2007, Dye's son, Jermaine Jackson ("Jermaine"), heard about the robbery and called Dye to inquire as to why Dye had not told him about it. Dye told Jermaine that he had not mentioned it because he did not want Jermaine to get in any trouble. *Id.* at 128. On March 18, 2007, Dye received a call from Jermaine, who told Dye that Sharpe was located at an apartment complex in Elkhart. Dye told Jermaine, "Don't do nothing. I'm on my way." *Id.* at 130. When Dye was on his way to the apartment complex, Jermaine called back to let Dye know that Sharpe had already left. After going to the shooting range with a friend, Jermaine had the friend drive him to Coleman's recording studio because he said he had "to do something for his dad." *Id.* at 162. When they arrived at the studio, Jermaine saw another friend and asked this friend to go get Sharpe. The friend went inside the studio and told Sharpe that Jermaine wanted to see him. During this time, Jermaine had walked around to the entrance of the studio.

Coleman stepped outside and asked Jermaine what was going on, to which Jermaine replied, "You already know." *Id.* at 280. While Coleman was talking to Jermaine, Sharpe walked outside to see what Jermaine wanted. Within seconds, Jermaine pulled a handgun out of his waistband and pointed it at Sharpe, who ran back into the studio. Jermaine chased Sharpe and a struggle occurred between Jermaine, who was trying to push the studio door open, Sharpe, who was closing the door to prevent Jermaine from entering, and Coleman, who was trying to keep Jermaine from raising the gun at anyone. Eventually, Sharpe and Coleman were able to get the studio closed, leaving Jermaine and Coleman outside. Jermaine returned the handgun to the waistband of his pants.

Coleman continued to attempt to calm Jermaine down and to ask him to leave. Jermaine then began calling people on his cell phone and asking them to come to the studio, despite Coleman's requests not to do so. Jermaine called Dye, who was riding around with his girlfriend, and told Dye to come over to the studio immediately. Although Jermaine did not tell him so, Dye had a "gut feeling" that Sharpe was at the studio. *Id.* at 132. Dye retrieved a handgun from the engine of his car, where he stored it, and had his girlfriend drive him over to Coleman's recording studio. At some point during this time, Coleman retrieved a handgun from inside of the studio, which he held in his hand for the remainder of the confrontation. Coleman also called Jermaine's cousin and friend, Otis Jackson ("Otis"), and asked him to come over to try to calm Jermaine down.

During this time, Coleman's son had been playing basketball in the front of the house. Coleman told his son to go inside of the studio. The son attempted to leave the studio, and Coleman, motioning with his handgun, ordered the boy back in the studio. When Otis arrived, he tried to get Jermaine to calm down by telling him it "wasn't worth it," that there were kids around, and that he should just leave. *Id.* at 220-21. Coleman also stated that his son was inside of the studio and that Jermaine should respect that. Jermaine replied, "F**k that. [Sharpe] didn't think about that sh*t when he did this sh*t to my Daddy." *Id.* at 221. Jermaine also stated that he was going to "beat [Sharpe's] ass" and "pop him." *Id.* at 294.

Shortly thereafter, Dye arrived and entered the backyard area near the studio. Dye held a handgun in his right hand, down at his side, and pointed at the ground. Otis testified that Dye appeared "pretty aggressive" when he walked into the backyard and looked "like he

was there to take care of some business." *Id.* at 225-26. When Dye walked toward Jermaine, he saw that Coleman had a gun in his hand and was standing near the studio door. Dye then stated, "F**k all that sh*t. Where the n**ger at," referring to Sharpe. *Id.* at 135, 223, 295. As Dye came within feet of him, Coleman raised his gun and shot Dye twice. Jermaine then pulled out his handgun and began shooting at Coleman; Coleman turned and shot at Jermaine. The entire exchange of gunfire lasted three seconds. Jermaine died as a result of his injuries. After the shooting, Coleman went back in the studio and had a friend take his son to his grandmother's house. Coleman drove to Milwaukee, disposing of his gun on the way, and stayed for several days before returning and surrendering to the police.

The State charged Coleman with murder for killing Jermaine and attempted murder, a Class A felony, for shooting Dye, who survived his injuries. On February 11-13, 2008, a jury trial was held, at which Coleman argued that he acted in self-defense when he shot Jermaine and Dye. At the conclusion of the trial, the jury found Coleman not guilty as to murder but was unable to reach a verdict as to attempted murder. The trial court set Coleman's attempted murder charge for another trial. On November 10, 2008, Coleman filed a motion to dismiss the attempted murder charge by reason of collateral estoppel. After a hearing, the trial court denied the motion. Coleman was retried on the attempted murder charge on March16-18, 2009, and the jury found him guilty. He was sentenced to an aggregate sentence of forty-five years. Coleman now appeals.

Appendix F

DISCUSSION AND DECISION

"Collateral estoppel, or in modern usage, issue preclusion, 'means simply that when an ultimate issue of fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.'" *Davis v. State*, 691 N.E.2d 1285, 1288 (Ind. Ct. App. 1998) (quoting *Ashe v. Swenson*, 397 U.S. 436, 443, 90 S. Ct. 1189, 1194, 25 L. Ed. 2d 469 (1970)). In criminal trials, collateral estoppel is an integral part of the protection against double jeopardy guaranteed by the Fifth and Fourteenth Amendments. *Id.* (citing *Townsend v. State*, 632 N.E.2d 727, 731 (Ind. 1994)). It is not the same as double jeopardy, but rather it is embodied within the protection against double jeopardy. *Segovia v. State*, 666 N.E.2d 105, 107 (Ind. Ct. App. 1996). "'The traditional bar of jeopardy prohibits the prosecution of the crime itself, whereas collateral estoppel, in a more modest fashion, simply forbids the government from relitigating certain facts in order to establish the fact of the crime.'" *Davis*, 691 N.E.2d at 1288 (quoting *Segovia*, 666 N.E.2d at 107) (internal quotation omitted). Thus, collateral estoppel requires that when the State has received an adverse decision of a critical issue of fact in a trial, that adverse decision prevents later re-litigation of the same issue in a later prosecution. *Id.*

Coleman argues that the doctrine of issue preclusion barred the State from re-litigating the issue of whether his use of force against Dye was criminal. He contends that the jury's acquittal for the murder of Jermaine in his first trial "could not have been for any other reason than a finding that Coleman acted in self-defense and/or defense of another" because, during the trial, he did not deny shooting Jermaine but only argued that he was justified in

doing so. *Appellant's Br.* at 12. Therefore, Coleman asserts that the jury's determination meant that the jury also necessarily decided that his use of force against Dye, which immediately preceded his use of force against Jermaine, was not criminal.

"In order to apply the doctrine of collateral estoppel, the court must engage in a two-step analysis: '(1) determine what the first judgment decided; and (2) examine how that determination bears on the second case.'" *Segovia*, 666 N.E.2d at 107 (quoting *Webb v. State*, 453 N.E.2d 180, 183 (Ind. 1983) (citations omitted)). In order to determine what the first judgment decided, the court must examine the record of the prior proceedings including the pleadings, evidence, charge, and any other relevant matter. *Id.* The court must then decide whether a reasonable jury could have based its verdict upon any factor other than the factor of which the defendant seeks to foreclose consideration. *Id.* If the jury could have based its decision on another factor, then collateral estoppel does not bar re-litigation. *Id.*

In the present case, Coleman was initially charged with murder for killing Jermaine and attempted murder for shooting Dye. In the first trial, the jury found Coleman not guilty as to the murder of Jermaine, determining that Coleman acted in self-defense when he shot Jermaine. The jury was unable to reach a verdict as to the attempted murder charge concerning the shooting of Dye. "A person is justified in using reasonable force against another person to protect the person or a third person from what the person reasonably believes to be the imminent use of unlawful force." Ind. Code § 35-41-3-2. In order to prevail on such a claim, the defendant must show that he: (1) was in a place where he had a right to be; (2) did not provoke, instigate, or participate willingly in the violence; and (3) had

a reasonable fear of death or great bodily harm. *Kimbrough v. State*, 911 N.E.2d 621, 635 (Ind. Ct. App. 2009). Here, the jury was instructed as follows as to the justification of self-defense:

> It is an issue whether the Defendant acted in self-defense.
>
> A person may use 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.
>
> A person is justified in using deadly force, and does not have a duty to retreat, only if he reasonably believes that deadly force is necessary to prevent serious bodily injury to himself or a third person or the commission of a forcible felony.
>
> However, a person may not use force if:
>
> He is committing a crime that is directly and immediately connected to the confrontation;
>
> He provokes a fight with another person with intent to cause bodily injury to that person; or
>
> He has willingly entered into a fight with another person or started the fight, unless he withdraws from the fight and communicates to the other person his intent to withdraw and the other person nevertheless continues or threatens to continue the fight.
>
> The State has the burden of proving beyond a reasonable doubt that the defendant did not act in self-defense.

Appellant's App. at 112.

In order to acquit Coleman of murder based upon self-defense, the jury must have determined that Coleman reasonably believed that deadly force was necessary to prevent serious bodily injury to himself or third persons or the commission of a forcible felony. Because of this determination, the jury necessarily had to find that, when he shot Jermaine,

Appendix F

Coleman was not committing a crime that was directly and immediately connected to the confrontation, that he did not provoke a fight with another person with the intent to cause bodily injury to that person, and that he had not willingly entered into a fight with another person. As the shootings of Dye and Jermaine happened within three seconds of each other, the jury's determination must have meant that Coleman had not willingly entered into a fight with Dye, that he had not provoked a fight with Dye with the intent to cause bodily injury to Dye, and that he was not committing a crime that was directly and immediately connected to the confrontation. Stated another way, the jury must have believed that Coleman was in a place that he had a right to be; that he did not provoke, instigate, or participate willingly in the violence; and that he had a reasonable fear of death or great bodily harm. *See Kimbrough*, 911 N.E.2d at 635. Therefore, in acquitting Coleman of murdering Jermaine based upon self-defense in the first trial, the jury must have necessarily decided that Coleman's use of force against Dye was also not a crime. If Coleman's use of force against Dye was a crime, then the jury could not have reasonably determined, pursuant to the final instructions given, that Coleman's use of force against Jermaine was justified. Thus, the doctrine of issue preclusion barred the State from re-litigating the issue of whether Coleman's actions against Dye constituted attempted murder. The trial court should not have denied Coleman's motion to dismiss.

Reversed.

MAY, J., concurs.

DARDEN, J., dissents with separate opinion.

Appendix F

IN THE
COURT OF APPEALS OF INDIANA

TYRUS D. COLEMAN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 20A03-0904-CR-185
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

DARDEN, Judge, dissenting

I would respectfully dissent from the majority.

The facts, as recounted by the majority, arguably could support their conclusion that the jury could not have reasonably disbelieved that Coleman's use of deadly force was necessary. On the other hand, however, I believe that the totality of the evidence and circumstances surrounding this case support the reasonable conclusion that the jury just could not reach a unanimous verdict as to whether Coleman was justified in using deadly force

against Dye at the time of the incident. As a result, I believe the majority's conclusion impermissibly impinges upon the jury's role as the trier of fact.

This case represents a relatively rare moment where the entire incident was preserved for the trier of fact, *i.e.*, the jury, to decide what happened. Specifically, the activity in the yard next to the studio before the shooting and during the shooting of Dye by Coleman was captured on video by a surveillance camera. This video was shown to the jury. The area shown may be described as an upside-down "L" -- with the horizontal leg parallel to the back of a house; the vertical leg on the right, parallel to the studio.

For at least five minutes before Dye's arrival, Coleman is pacing alongside the studio with a handgun in one hand and a cell phone in his other, apparently talking on the cell phone.[3] Jermaine is in the area primarily beyond the view of the camera, but at the end of the vertical leg past the studio. From the opposite end of this "L" (at the left end of the horizontal leg), Dye is seen coming around the corner of the house; he has a gun in his hand but it is pointed downward toward the ground. Dye walks on the diagonal directly toward his son, with his eyes fixed upon his son. Dye is not walking toward the door of the studio; nor does he appear to be looking at Coleman. At this point in time, Coleman is near the right angle corner of the "L."[4] As Dye moves diagonally past him, Coleman appears to step toward Dye, raise his gun, and shoot Dye, who immediately begins to fall to the ground.

---

[3] Coleman testified that he had placed calls to several people during this time.

[4] It seems undisputed that Jermaine's gun is holstered at this time.

Appendix F

Coleman shoots Dye a second time.[5] It is at this point that Coleman "turned to Jermaine." (Tr. 330). Coleman sees that Jermaine's gun, which had been under his long athletic-type shirt and in its holster, is "pointed at [Coleman]"; and Coleman shoots Jermaine. (Tr. 330).

Consistent with the video, Dye testified that as he walked across the yard, his "focus" was on "[his] son," and that he was going "towards [his] son." (Tr. 135). He further testified that he "asked" his son, "where that n**ger at or where Omar at." *Id.* Coleman also testified that when Dye walked into the yard, he was "looking at" his son, and "was not looking at [Coleman]" when he said, "'F**k that. Where the n**ger at?'" (Tr. 327).

A defendant who raises the claim of self-defense must show three facts: (1) he was in a place where he had a right to be; (2) he acted without fault; and (3) he had a reasonable fear of death or great bodily harm." *Wallace v. State*, 725 N.E.2d 837, 840 (Ind. 2000). It is the State's burden to negate "at least one of the elements of the defendant's self-defense claim." *Id.*

I believe that the evidence must be considered sequentially and separately as to each count -- first, the evidence as to shooting of Dye, and then the separate evidence as to the shooting of Jermaine. After reviewing the video that the jury saw, I am of the opinion that the testimony at trial and the video evidence could support the reasonable inference that Coleman was not in fear for his life as Dye was walking past him, while also supporting the reasonable inference that Coleman was in fear for his life when facing Jermaine's drawn

[5] Coleman admitted that he fired the second shot at Dye "as he was going to the ground." (Tr. 308, 329).

Appendix F

weapon. Such analysis supports my conclusion that we simply cannot know what determination the jury reached, or failed to reach.

Because a "jury's deliberations are secret and not subject to outside examination," *Yeager v. United States*, __ U.S. __, 129 S. Ct. 2360, 2368 (2009), we cannot know why the first jury was unable to reach a unanimous verdict on the attempted murder of Dye. It may be that one of the twelve jurors believed that the State had failed to negate Coleman's claim of self-defense as to Dye; but it may also be that there were eleven jurors who believed that the State had negated Coleman's claim of self-defense; and, as a result, the jury could not arrive at a unanimous verdict for conviction, as required by law. In other words, the jury hung as to the charge of attempted murder, requiring a mistrial and resulting retrial on that count. Accordingly, I cannot agree with the majority's conclusion that issue preclusion applies here, and I would conclude that the trial court did not abuse its discretion when it allowed Coleman to be re-tried for the attempted murder of Dye.

Appendix F

KINDLEY LAW OFFICE
502 W. Washington Street, South Bend, Indiana 46601
(574) 968-8602; john@kindleylaw.com

January 20, 2009

Hon. Terry C. Shewmaker
Elkhart County Circuit Court
101 N. Main Street
Goshen, Indiana 46526

RE: State v. Tyrus Coleman; Cause No. 20C01-0703-MR-1
Additional Authorities

Dear Judge Shewmaker:

I am submitting this letter, which is being mailed this same date to the state, to provide the court with additional authorities on the question which appeared to be your principal concern at last Thursday's hearing on defendant's Motion to Dismiss By Reason of Collateral Estoppel: i.e., Couldn't the jury, in acquitting the defendant Tyrus Coleman on the murder charge, simply have believed that the state had failed to prove its case on the murder charge, independently of the self-defense issue?

Because the surveillance tapes which were shown to the jury at trial unequivocally demonstrated that Tyrus caused the death of Jermaine Jackson, and Tyrus admitted at trial that he caused the death of Jermaine, the only conceivable element of the murder charge that the jury could have based its acquittal upon apart from self-defense would have been the "knowingly" element. Additional authorities bearing on this issue which have come to my attention since the hearing are *McCann v. State*, 854 N.E.2d 905, 911 (Ind.Ct.App. 2006) (firing two shots during encounter militates against finding that shooting was accidental rather than intentional); *Mann v. State,* 895 N.E.2d 119, 121 (Ind.Ct.App. 2008) ("We think it goes without saying that if a person is kicking a victim while the victim is lying on the floor, the person is aware of a high probability that he is inflicting injury on the victim."); *Book v. State,* 880 N.E.2d 1240, 1252 (Ind.Ct.App. 2008) ("It is generally presumed that a person intends the natural, necessary, and probable consequences of his acts."). In this case, Tyrus admitted to firing multiple shots at Jermaine, and did not dispute the state's evidence that he fired at least six shots at Jermaine. Tyrus' own testimony at trial relating his recollection of this incident demonstrated that he was aware of what was happening and of what he was doing. No evidence was presented at trial to rebut the general presumption that Tyrus knew what he was doing.

The following additional authorities (as well as *De La Rosa v. Lynaugh,* 817 F.2d 259, 263-66 (5th Cir. 1987), already cited at page 6 of the defendant's Reply to State's Response) demonstrate the irrational and irreconcilable inconsistency that would inhere in a subsequent jury's finding that Tyrus shot Anthony Dye with the "specific intent" and "conscious objective"

to cause his death (and is therefore guilty of attempted murder) if we were simultaneously to suppose that the jury at the first trial found that Tyrus did not even act "knowingly" when he shot Jermaine six times immediately after he shot Anthony: *Green v. Estelle*, 601 F.2d 877, 879 (5th Cir. 1979) (rejecting as "patently unreasonable" state's contention that defendant might have acted with malice as to one child but not the other, when the record showed that the two children were killed almost simultaneously; finding no evidence indicating a change in defendant's state of mind; and holding that state was therefore collaterally estopped from relitigating issue of defendant's state of mind in second trial); *Garcia v. State*, 718 S.W.2d 785, 789 (Tex.Ct.App. 1986) (holding that, because the factual context of the two offenses were so intertwined, the jury in the first trial necessarily determined the defendant's mental state at the time he shot at one police officer when it made its determination of his mental state when he shot another police officer, where the two shots were fired within seconds of each other, and therefore collateral estoppel barred relitigation of defendant's mental state).

In other words, *if* the jury's acquittal of Tyrus *were* based on the belief that the state had not proved the "knowingly" element of murder, then such a determination would itself also collaterally estop the state from relitigating Tyrus' mental state and attempting to prove that a split second before Tyrus *unknowingly* shot Jermaine he shot Anthony with the *intentional* and *conscious objective* to end his life.

(In the defendant's original Motion to Dismiss at page 16, the defendant acknowledged that defendant's trial counsel seemed in closing arguments to raise in passing a question about the "knowingly" element of the murder charge. But this question was raised, and conflated by trial counsel in literally the same breath, with the question of whether Tyrus' "conscious objective" was to kill Anthony and with the issue of self-defense: "So did he really know he was killing Jermaine; did he really have the specific intent to kill Anthony; or was it something else? Was it acting without thinking? . . . [I]n an instant he reacted. In an instant he stopped Anthony." Trial Transcript at page 373-74. In any event, the court's collateral estoppel inquiry is not controlled by a quick remark made by counsel in the course of delivering closing arguments, but rather by what a *rational* jury could have based its verdict upon in light of the actual jury instructions given to it by the court and the actual evidence presented at trial.)

There was discussion at the hearing on Tyrus' Motion about whether the fact that the jury might have simply chosen to disregard the law and the facts and to exercise mercy renders it impossible for the court to determine what issues the jury "necessarily decided" by its acquittal of Tyrus on the murder charge. In response I represented to the court that several cases have addressed this point, and for the convenience of the court now cite here two such authorities: *Green v. Estelle*, 601 F.2d at 878-79 ("The state proposes a different explanation of the jury verdict. It claims that the jury convicted Green of murder Without malice, instead of murder With malice, simply because it wished to be merciful. Therefore, the state argues, we should not treat the verdict as conclusively deciding the issue of malice. But this claim could be made about any ultimate issue of fact decided by a jury. If we adopted the state's position, we could never apply the principle of collateral estoppel. Clearly, this is not what the Supreme Court intended when it held that the principle collateral estoppel is a part of the Double Jeopardy Clause. We must take the jury at its word, and in this case, its word shows that in the first murder trial it decided the issue of malice in Green's favor.") (citations and footnotes omitted); *Segovia v. State*,

Appendix G

666 N.E.2d 105, 108 (Ind.Ct.App. 1996) ("[T]he State argues that other extraneous factors, such as Segovia's age, could have influenced the jury's verdict. In addition, because the jury is the judge of both the law and the facts, it could have decided that it did not agree with the concept of felony murder and chose to ignore the law. It is true that in Indiana the jury determines both the law and the facts in criminal trials. IND. CONST., Art. I, § 19. However, if that could be a basis for avoiding the application of collateral estoppel, the doctrine would never be applied because every criminal acquittal includes the risk of a jury deciding simply not to follow the law.").

Because I almost exclusively discussed *Segovia* at the hearing on defendant's Motion to Dismiss (and answered affirmatively to the court's asking if I wanted the court to review *Segovia*), and because *Davis v. State*, 691 N.E.2d 1285 (Ind.Ct.App. 1998) was the one case cited by the state at the hearing that it specifically asked the court to look at as being favorable to the state's position, the court may have gotten the erroneous impression that these two cases are the "big" cases for the defendant and for the state respectively. Of course, all of the cases cited in defendant's Motion to Dismiss and defendant's Reply to State's Response are important to the defendant's position. In particular, I would like to point out to the court that *Davis* was first discussed at length by the defendant in his original Motion to Dismiss at pages 17-19, and that it constitutes important authority for Tyrus Coleman's position in that it provides an example of an Indiana court recognizing in a murder case that self-defense must have been the basis of the jury's acquittal (presumably because no other basis would have made rational sense).

Sincerely,

John A. Kindley

cc: Don Pitzer, II; Deputy Prosecuting Attorney

Appendix G

the jury.)

BY MR. WILLIAMS:

Q Doctor VanRyan, what do we see in State's Exhibit 27?

A This is a picture of Mr. Dye again in trauma room T1 in the emergency department at Elkhart General Hospital.

Q And with respect to State's Exhibit 28?

(State's Exhibit 28 was published to the jury.)

A This is a picture of the left side of his head. And, again, this is right where the ear hooks onto the side of the scalp and represents what appears to have been an entry wound that came in at this point.

Q What was the direction of travel for that projectile as we would see in State's Exhibit 28?

A Well, it -- again, given the relatively concentric and clean nature of this versus the much more ragged nature of the one in the back of the head, it would be my opinion that the projectile came from the front of the patient, through this area, tracked immediately along the skull underneath the skin here, and exited at the back of the head.

Q Dr. VanRyan, what do we see with respect to State's

chest and abdomen injuries, do you have an opinion as to whether they were life threatening?

A They were.

Q And what's the basis for that opinion?

A The presence of lung damage, bleeding in the chest, as well as intraabdominal bleeding, both are all present life threats.

Q How long did you treat Anthony Dye in the ER on March 18, 2007?

A I think it was in the order of an hour and a half. In that vicinity.

Q And after he was transferred to South Bend Memorial, did that end your involvement in his care?

A It did.

MR. WILLIAMS: No further questions.

THE COURT: Mr. Kindley.

CROSS-EXAMINATION

BY MR. KINDLEY:

Q Dr. VanRyn, just a couple of -- I just want to clarify one thing. You testified that the wound on the chest was more regular than the wound on the back. Is that correct?

A Well, I don't specifically remember; but from the appearance of the photograph, that's what it

appeared.

Q Did it appear more uniform on the chest than the wound on the back?

A Again, judging from the photographs, yes.

Q Okay. So again, judging by the photographs, that would suggest to you that the entrance wound was on the chest and the exit wound is on the back. Is that correct?

A Based upon that, yes.

Q All right. Thank you, Doctor.

THE COURT: Any other questions, Mr. Williams?

REDIRECT EXAMINATION

BY MR. WILLIAMS:

Q Doctor VanRyn, you can't hold -- you don't hold that opinion to a reasonable degree of certainty in your field as far as it was a exit wound or an entrance wound on his chest. Is that correct?

A I don't.

Q And you don't have any specific expertise in evaluating exit and entrance wounds as far as irregularities or regularities. Is that correct?

A That's correct.

MR. WILLIAMS: No further questions, your Honor.

THE COURT: Mr. Kindley, any other questions?

self-defense. It's consciousness of guilt. That's why the after effects matter.

We've talked a bit about objective belief, and subjectively do you believe it? No. Objectively. Would an objective reasonable person believe? How would they act? Based on everything you know because you've stepped out and you look in, call 911, leave. Certainly not put your son in the studio where allegedly Jermaine is now wanting to kill Omar and is waiting for his dad to reek Armageddon.

Let me take Kam and put him in -- with waving my gun, you know, into the studio. That shows you what his mental state was. He wasn't afraid of Anthony Dye, or that it was going to be going down. That's not what was going on.

He could have just said go next door. That's what a reasonable objective person does. Go next door to the neighbors. Okay. Not put him in with Omar, and certainly not shoot someone in the head as they're passing you, and then shoot them again as they fall.

Finally, ladies and gentlemen, eminent use of unlawful force. When it comes to eminent, the word is used for a purpose. Okay. Eminent means now, at hand. The defendant knows what's at hand. He knows who's coming. He knows what the situation is. He knows in the

case?

MR. HOSINKSI: Well, your Honor, I know the Court is more familiar with this case possibly than it would normally appreciate --

THE COURT: I'm sorry to interrupt you, but yesterday we received this in the mail. Do you want to look at it either one of you?

MR. HOSINSKI: What is it?

THE COURT: It's a -- it relates to Mr. Dye. It's a victim impact statement. It's the only one I have so you'll have to look at it together.

All right. The record should reflect the Court has displayed the victim impact statement to counsel for the parties. Go ahead, Mr. Hosinski.

MR. HOSINKSI: Thank, Judge. Again, we're in a -- one of the more unique situations I've ever seen from a sentencing standpoint in my 20 years of practice. We're sitting here with a gentleman who given the outcome of his first trial, as the Court is aware, could have been home a year ago had he accepted the offer at the time following the hung jury on this case.

His conviction obviously -- I mean, his personal conviction not his conviction in this cause. His personal conviction has been one from the beginning of legitimate exercise of self-defense, which was his