

Note: In the case title, an asterisk () indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

ENTRY ORDER

SUPREME COURT DOCKET NO. 2019-307

JUNE TERM, 2020

In re Jeffrey C. Davis*	}	APPEALED FROM:
	}	
	}	Superior Court, Chittenden Unit,
	}	Civil Division
	}	
	}	DOCKET NO. 397-5-18 Cncv
		Trial Judge: Helen M. Toor

In the above-entitled cause, the Clerk will enter:

Petitioner appeals the civil division’s summary judgment decision denying his petition for post-conviction relief (PCR). We affirm.

Petitioner was convicted by jury of financial exploitation of a vulnerable adult, in violation of 13 V.S.A. § 1380(a). This Court affirmed the conviction. *State v. Davis*, 2018 VT 33, 207 Vt. 346. Shortly after we issued our opinion, petitioner filed his PCR petition, which was later amended after he was assigned counsel. Petitioner asserted that his trial attorney was ineffective because he failed to argue, either in his motion for judgment of acquittal or in his objection to the jury instructions, that the word “willfully” in § 1380(a) applied to all the elements of the offense, particularly the element of acting “without or in excess of legal authority.” The parties filed cross-motions for summary judgment, each containing an affidavit from their respective experts. The civil division denied petitioner’s motion and granted the State’s motion, ruling that it was “quite clear” that the outcome of the hearing would have been the same even if petitioner’s trial counsel had done what petitioner alleged he should have done, and that nothing in petitioner’s statement of facts or affidavit supported a different conclusion.

On appeal, petitioner argues that the civil division erred by granting the State’s motion and denying his because he established both that his trial attorney’s performance fell below the standard of a reasonably competent attorney and that he was prejudiced by his attorney’s ineffective performance.

A petitioner alleging ineffective assistance of counsel must show: “first, that counsel’s performance fell below the standard of a reasonably competent attorney, and second, that counsel’s failures prejudiced defendant, i.e., that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *In re Kimmick*, 2013 VT 43, ¶ 16, 194 Vt. 53. “A trial court’s findings in this context will be upheld absent a showing of clear error, and its conclusions affirmed if reasonably supported by those findings.” *Id.* Our review of a summary judgment decision is nondeferential, but we apply the same standard as the trial court. *In re Gay*, 2019 VT 67, ¶ 7. “Summary judgment is appropriate when there are

no genuine issues of material fact, and a party is entitled to judgment as a matter of law.” *Id.* (citing V.R.C.P. 56(a)).

Some background information is helpful to understand petitioner’s argument. In relevant part, § 1380 makes it a crime to “willfully use, withhold, transfer, or dispose of funds or property of a vulnerable adult, without or in excess of legal authority, for wrongful profit or advantage.” Petitioner was charged under this section after Adult Protective Services reported to police that he had taken monies from his and his elderly mother’s joint account, which was funded solely by his mother’s Social Security benefits and his deceased father’s pension, and used the money for his own nonessential needs rather than pay his mother’s rent at the senior residential facility where she was living. After a two-day trial, a jury convicted petitioner of the charged offense. In a motion for judgment of acquittal, petitioner’s trial attorney argued, in part, that petitioner had lawful authority to take the money for his own benefit because he had a power of attorney or, alternatively, his mother’s consent. The court found no evidence of his mother’s consent. The court further concluded that petitioner may have had a valid power of attorney for at most only a thirty-day period, but that even a valid power of attorney would not have allowed him to withhold funds needed to pay his mother’s essential living expenses, including her rent at the senior residential facility. The court instructed the jury on the willful element of the offense, but it did not state that willfulness applied to each element of the offense.

On direct appeal from his conviction, this Court rejected petitioner’s argument that the State did not prove he acted without legal authority, concluding that there was sufficient evidence for the jury to conclude petitioner withheld his mother’s funds without legal authority to do so. *Davis*, 2018 VT 33, ¶¶ 14-15. We stated that there was sufficient evidence for the jury to have found the alleged power of attorney to be invalid and that even if petitioner had general authority to act under the alleged power of attorney, it “would not [have] confer[red] on him the authority to sequester his mother’s checkbooks while failing to pay her rent” because of his statutory fiduciary duty to act in the principal’s (his mother’s) interests. *Id.* ¶¶ 15-16 (citing 14 V.S.A. § 3505(a)). We declined to consider petitioner’s argument, which he failed to preserve at trial, that the willfulness intent element in § 1380 extends to all the elements of the offense and that the State failed to prove he willfully acted without legal authority. *Id.* ¶¶ 17-18.

On appeal from the denial of his PCR petition, petitioner now argues that his trial attorney provided ineffective assistance of counsel, which prejudiced him, by not challenging the sufficiency of the State’s evidence, and the court’s instruction, on his willfulness with respect to his acting without legal authority. In support of that argument, regarding both the ineffective-assistance and prejudice prongs of his petition, he asserts that the trial court found, based on the evidence at trial, that he believed he was acting lawfully when he used his mother’s funds for himself without paying her rent. That is not accurate. The trial court did not state that the evidence showed petitioner believed he was acting under lawful authority; rather, the court stated that petitioner “expressed . . . that he thought he had the right to control his mother’s funds.” (Emphasis added.) In short, the trial court did not conclude, as petitioner suggests, that the evidence at trial demonstrated petitioner believed he was acting under lawful authority when he appropriated his mother’s funds and failed to pay her rent. The jury was not compelled to believe petitioner on this point, and the State’s trial exhibits indicate that during the Adult Protective Services investigation, rather than profess his belief that he had authority to do what he did, he gave investigators many excuses for using the money for his own nonessential expenses while not paying his mother’s rent.

As the PCR court stated, neither petitioner’s statement of undisputed facts nor his expert’s affidavit asserted that there was a reasonable probability that the outcome of petitioner’s trial

would have been different if his attorney had done what petitioner says he should have done. In his affidavit accompanying petitioner's motion for summary judgment, petitioner's expert stated only that petitioner was prejudiced because the issue he raised in his PCR petition had not been raised at trial and therefore was not considered by this Court on direct appeal. For his part, the State's expert opined that if petitioner's attorney had pursued the theory of defense he proposed in this petition, he would have had to argue that petitioner believed he was allowed to use his mother's money for his own nonessential expenses while not paying her rent, nearly leading to her eviction. In the expert's view, had petitioner's attorney argued that petitioner believed he was allowed to misuse his mother's funds in this way, there was no reasonable likelihood that the jury would have accepted that defense. Further, the state's expert opined that if petitioner had pursued this defense, the trial court might have included an instruction on plaintiff's fiduciary duty, which could have done more harm than good. For these reasons, the state's expert opined that petitioner's trial attorney provided effective assistance of counsel and that, in any case, petitioner could not show a reasonable probability that the outcome of the trial would have been different if his trial attorney had pursued the defense raised in petitioner's PCR petition. Without addressing the first prong of the ineffective-assistance test, the PCR court concluded that petitioner was not prejudiced by the alleged ineffective assistance of his counsel because there was overwhelming evidence at trial that petitioner knew he did not have the right spend his mother's money on a BMW, golf clubs, and guns for himself instead of paying his elderly mother's rent at her residential living facility. We agree. Petitioner failed to assert, let alone produce evidence to support, that there was a reasonable probability that the outcome of his trial would have been different if his trial attorney had done what petitioner now says he should have done.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Beth Robinson, Associate Justice

William D. Cohen, Associate Justice