MEMORANDUM DECISION

APPELLANT *PRO SE*

Marq Hall
Pendleton, Indiana

ATTORNEYS FOR APPELLEE

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IN THE COURT OF APPEALS OF INDIANA

Marq Hall,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent.

June 18, 2021

Court of Appeals Case No. 19A-PC-2919

Appeal from the Marion Superior Court

The Honorable Shatrese M. Flowers, Judge

The Honorable James K. Snyder, Commissioner

Trial Court Cause No. 49G02-1511-PC-40472

Bailey, Judge.

Case Summary

[1] After Marq Hall ("Hall") was accused of raping M.T., the twelve-year-old child of Hall's former girlfriend, A.D., Hall and A.D. participated in a recorded telephone conversation wherein A.D. acknowledged that M.T. had revealed being touched in a sexual manner by another minor and also alluded to the possibility that M.T. had access to a dildo. At her pre-trial deposition, A.D. declined to testify about the prior incident and the trial court refused to compel her to do so. At trial, A.D. denied having provided Hall with information and, notwithstanding the recording, Hall was not fully permitted to impeach that testimony; nor was evidence admitted supporting a defense theory that M.T.'s injuries could have been caused by a dildo rather than rape. On appeal of Hall's conviction for Child Molesting, counsel challenged evidentiary rulings and referred to a deprivation of due process but did not develop the due process issue to the extent she would later consider representative of effective assistance. The Indiana Court of Appeals reversed the conviction; the Indiana Supreme Court on transfer affirmed the conviction. The post-conviction court agreed with Hall that A.D.'s false testimony had stood uncorrected but ultimately, in light of the testimony and physical evidence (including DNA evidence), denied Hall relief because he failed to establish prejudice undermining confidence in the outcome of his trial. We affirm.

Issues

[2] Hall articulates seven issues for review. We address those issues that are not res judicata, waived, or procedurally defaulted,[1] specifically:

I. Whether the post-conviction court abused its discretion by quashing subpoenas directed to A.D. and M.T.;

II. Whether Hall was denied the effective assistance of trial counsel; and

III. Whether Hall was denied the effective assistance of appellate counsel.

Facts and Procedural History

[3] The underlying facts, and the procedural history up to and including appeal, were related by our Indiana Supreme Court as follows:

> In September of 2012, Marq Hall was living in an Indianapolis apartment with his girlfriend A.D. and her twelve-year-old daughter M.T. Hall and A.D. had very recently decided to end their relationship after a few months together. On September 19th, Hall and A.D. were in the process of splitting up, but Hall was still residing in A.D.'s apartment. That afternoon, he was

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[1] [1]Post-conviction procedures do not afford petitioners with a "super-appeal"; rather, the post-conviction rules contemplate a narrow remedy for subsequent collateral challenges to convictions. *Reed v. State*, 856 N.E.2d 1189, 1194 (Ind. 2006). The purpose of a petition for post-conviction relief is to provide petitioners the opportunity to raise issues not known or available at the time of the original trial or direct appeal *Stephenson v. State*, 864 N.E.2d 1022, 1028 (Ind. 2007). If an issue was known and available but not raised on direct appeal, the issue is procedurally foreclosed. *Id.* If an issue was raised and decided on direct appeal, it is res judicata. *Id.* Moreover, collateral challenges to convictions must be based upon grounds enumerated in the post-conviction rule. *Shanabarger v. State*, 846 N.E.2d 702, 707 (Ind. Ct. App. 2006), *trans. denied*; *see also* Post–Conviction Rule 1(1). To the extent that Hall attempts to raise free-standing issues with regard to the admission of evidence, they are not properly addressed through post-conviction proceedings. *Bunch v. State*, 778 N.E.2d 1285, 1289 (Ind. 2002).

home alone with M.T. Hall approached M.T. from behind and rubbed his penis on her buttocks, which were covered by her gym shorts, for a couple of minutes. He then pulled down her shorts and underwear, pinned her to a bed, and forced her to have sexual intercourse with him.

When the ordeal was over, M.T. felt a wet spot on her leg. She promptly wiped the spot with toilet paper.

Minutes after the rape, Hall took a shower. While he was in the shower, M.T. put the same clothes she had been wearing back on and fled the apartment. Feeling very emotional and unsure of what to do next, M.T. headed to the apartment complex's leasing office, where she asked property manager Sonja Cumberlander if she could use the phone. Cumberlander observed that the girl appeared "very excited" and nervous. (Tr. at 119.)

After arriving at the office, M.T. immediately phoned a friend of her mother's and reported the rape and molestation. When A.D.'s friend told her that Hall had "[done] something to M.T.," (Tr. at 154), A.D. immediately left work and, as she drove to her apartment, called Hall. Hall denied having done anything to M.T. but told A.D. that he had been "asleep in the bed and he woke up and M.T. had her arm around him touching him." (Tr. at 155.) When A.D. arrived at the apartment complex, Hall saw A.D. but drove right past her and out of the complex without stopping. As M.T. observed Hall drive by the building, she exclaimed, "Oh my God, oh my God, there he is." (Tr. at 120.)

A.D. entered the office and observed her daughter, who appeared "hysterical" and was crying and unable to speak. (Tr. at 158.) She would later testify that "I've never seen her that upset." (Tr. at 159.) After M.T. told her that Hall had raped her, A.D. immediately took M.T. to the hospital, where sexual assault nurse Caroline Fisher observed three fresh lacerations to the girl's

vaginal area that were consistent with penetration. Though subsequent testing of samples from the examination did not reveal Hall's DNA on M.T.'s body or underwear, a trace amount of Hall's semen was found on the crotch of the shorts M.T. was wearing during the incident.

The State charged Hall with class A felony child molesting and class C felony child molesting. After charges were filed, Hall remained a fugitive for three months, at one point fleeing the state, before surrendering to authorities.

Once discovery began, Hall conducted a deposition of A.D. He asked A.D. to elaborate on a previous statement she had made about M.T., specifically about "what happened before." (App. at 113.) This was seemingly a reference to an incident that occurred when M.T. was nine years old and living in Kentucky with A.D. One of A.D.'s friends had asked M.T. if she had ever been touched, and M.T. responded that she had. The Kentucky equivalent of the Department of Child Services then interviewed the girl. During the interview, M.T. revealed that the touching had been consensual with a boy her age. Nothing more came of the incident.

In response to Hall's deposition question, A.D. stated, "Well, that really don't have anything to do with this, so I won't answer that question because that's already been handled. No charges were filed because nothing took place. That's really all you need to know on that." (App. at 113.) Hall then asked, "What had happened?" and A.D. repeated that "I just told you that that's really none of your business. That's something that happened prior with another child. There was no charges filed or anything, so that has nothing to do with this." (App. at 113.)

Hall then certified the question and filed a motion to compel discovery in which he asked the trial court to order A.D. to

answer the question, as he believed "the information requested relates to evidence that the alleged victim may have previously accused another and then recanted, which by itself is highly relevant in a case involving an accusation of improper sexual conduct." (App. at 109–110.) A few months later he renewed his motion, which the trial court denied.

The day Hall's jury trial began, the trial court granted the State's motion in limine as to, among other things, "[a]ny questions, testimony, evidence, argument, or comments regarding prior sexual conduct of any State's witnesses, including but not limited to [M.T.]," pursuant to Indiana Evidence Rule 412. (App. at 149–50.) Also known as the Rape Shield Rule, Rule 412 prohibits, subject to listed exceptions like a prior false accusation, the admission into evidence in a civil or criminal proceeding involving alleged sexual misconduct evidence offered to prove a victim's prior sexual behavior or sexual predisposition.

During trial and outside the presence of the jury, Hall made an offer of proof that he intended to inquire into what he characterized as a prior false accusation by M.T.—the Kentucky incident—as an exception to the Rape Shield Rule. Finding that M.T.'s report of consensual touching "wasn't a false allegation," the trial court excluded the proffered evidence. (Tr. at 477, 484–85.) Thus, during the testimony of M.T. and A.D., the Kentucky incident was off limits as inadmissible evidence, but the topic would soon return.

On the second day of Hall's trial, the State called A.D. to the stand. After having A.D. recount the events of September 19th, the prosecutor asked her about a phone call with Hall that occurred shortly after M.T.'s rape and molestation:

Q: [W]hat did Marq say to you?

A: He wanted to know information about M.T. that could clear his name.

Q: How do you mean?

A: He wanted to know about anything in M.T.'s past, medical records, anything that he could use to get out of his case.

(Tr. at 163–64.)

Then on cross examination of A.D., the following exchange occurred between A.D. and Hall's counsel:

Q: And when you were asked about a conversation you had with Mr. Hall when he wanted you to help clear his name, do you recall talking about that? Did you actually give him information?

A: Did I physically give him anything? No.

Q: No, did you—because you were having a conversation. Did you give him any information?

(Tr. at 196–97.) At this time, the prosecutor objected, contending among other things that A.D.'s answer would violate the motion in limine. The trial court then instructed A.D. to answer either yes or no, and Hall's counsel repeated the question. A.D. responded:

A: His request, no. I didn't give him any information.

• • •

Q: Is it your testimony here today that that conversation where he wanted to clear his name was one and done, he made a request and you gave him no information and that was the end of the conversation?

A: He asked me questions. He ... basically said give me information ...

(Tr. at 199.)

Once more, the prosecutor voiced his concern that A.D. would run afoul of the order in limine. The trial court then dismissed the jury from the courtroom, and the parties further discussed the risk that A.D. would, in answering the question, violate the order in limine when discussing her conversation with Hall. Upon the trial court's request, a recording of the phone call was played. The approximately four-minute-long recording contained the following relevant excerpt:

Hall: I'm sittin' here talkin' to my peoples and stuff, and I'm tryin' to, like write everything down that you was sayin' to get my little portfolio strong. And I mean, so give me back all, all of the evidence for, against [M.T.] to make her little statements uncredible. All that s* *t that you was tellin' me about that happened in Kentucky, and all the other little s* *t. Talk to me, baby, so I can write this s* *t down.

A.D.: ... [An attorney] was sayin' that you know basically a rape case is ... word against word even if there's no evidence. So what you gotta do is like we had already talked about provin' somebody was [unintelligible] reliable. That's what we need to focus on. So gosh, I don't even know where to start.

...

Hall: Alright, so tell me about this stuff that happened in Kentucky?

A.D.: When she said some boys like touched her?

Hall: She said some boy did something to her.

A.D.: Yeah, and it came, found out that it was like a mutual thing. They were experimentin' on one another.

Hall: And she tried to get him locked up for like ...

A.D.: He was just a little kid. He was her age.

Hall: Oh. He was her age.

A.D.: It wasn't like [unintelligible] an adult or nothin' like that. But I mean still, it's the same f* * * *n' situation.

Hall: Yeah, but she lied and said the little boy did somethin' to her and come to find out, that s* *t wasn't even true.

A.D.: Right.

(Appellant's Ex. C.)

After the tape was played, Hall urged the trial court to play the recording for the jury in order for him to impeach A.D. on that fact that she had, contrary to her assertions, given him information to attack M.T.'s credibility. But reasoning that "whatever good comes out of that [recording] ... is completely outweighed by [Rule] 403 ... and ... because it goes tooth and nail

against every aspect of the motion in limine," the trial court ruled inadmissible the portion of the recording in which Hall and A.D. discuss the Kentucky incident. (Tr. at 218.)

As the jury returned to the courtroom, the trial court called counsel to the bench and warned the prosecutor to "keep in mind if you ask questions on redirect that expand on that, that does in a sense open the door to things that have not been opened at this point in time which would allow all that to be played." (Tr. at 221–22.) Accordingly, the prosecution did not inquire further about the phone call on re-direct. But on re-cross examination of Hall the following day, the prosecutor asked him about the phone call:

Q: You placed and recorded a phone call with A.D., is that right?

A: Yes, I did.

...

Q: [Y]ou told A.D. that you were attempting to get, quote, your little portfolio together, end quote, for your people, whoever they may be, I don't know, to get your things ready for this, is that right?

A: Yes.

...

Q: And then immediately thereafter you—paraphrasing your view, correct me if I'm wrong, you asked A.D. to give you anything in which you could attack the twelve year old's credibility with, is that right?

A: She had already told me—

Q: Hold on, Mr. Hall. I asked you a specific question, yes or no.

A: I asked her to give me what she gave me.

Q: I—you asked her—

A: Tell me what you told me, that's what I—

Q: You asked her to give you whatever you needed to attack the twelve year old's credibility, isn't that right, yes or no, Mr. Hall? Remember the court's order, yes or no.

A: Yes.

(Tr. at 592–93.)

On re-re-direct, Hall's counsel began to ask, "Mr. Hall, in reference to the question the State asked about that conversation with A.D., where you asked A.D. to give you back information...." (Tr. at 594.) But the prosecutor interrupted and objected to the question, and the trial court sustained the objection, finding Hall's question to be outside the scope of the State's question.

Hall also testified to his version of the events of September 19th. According to Hall, he was asleep in bed when he awoke to M.T. touching his penis. He stated that he immediately admonished the girl and phoned A.D. The call went straight to voicemail, he said, but he did not leave a message because he was arguing with M.T., who was purportedly pleading with him to allow her to call her mother. Hall also testified that he observed M.T. use his

phone to place a call to A.D. However, Hall neither subpoenaed A.D.'s phone records nor introduced his own into evidence, so there is no record of the supposed calls to A.D. from his phone.

During his testimony, Hall also admitted that he took a shower immediately after the alleged incident. Additionally, he admitted that M.T. was in bed with him and acknowledged that she was wearing the gym shorts upon which his DNA was found during the alleged incident. He also stated that he tried to act as a father figure to M.T. After Hall's testimony, the defense rested.

The jury found Hall guilty as charged. At a sentencing hearing, the trial court merged Hall's class C felony child molesting conviction with his class A felony child molesting conviction and sentenced him to an aggregate thirty-five-year sentence.

On appeal, Hall argued that the trial court abused its discretion in denying his motion to compel A.D. to answer the deposition question about the Kentucky incident and in excluding from evidence the substance of the phone conversation with A.D., in violation of his Sixth Amendment right to confront witnesses against him, as well as in excluding his proffered testimony of M.T.'s alleged reputation for untruthfulness in her community. By split decision, the Court of Appeals concluded that the trial court abused its discretion in excluding the phone call from evidence. *Hall v. State*, 15 N.E.3d 1107, 1121 (Ind. Ct. App. 2014) (Vaidik, C.J., dissenting in part).

Hall v. State, 36 N.E.3d 459, 461-66 (Ind. 2015).[2] The Indiana Supreme Court affirmed Hall's conviction, concluding:

> Because the trial court's alleged errors in denying Hall's motion to compel discovery and in excluding from evidence the phone conversation between Hall and A.D., even if considered violations of Hall's Sixth Amendment right to confrontation, were harmless beyond a reasonable doubt, we affirm Hall's conviction for class A felony child molesting.

Id. at 474.

[4] On November 4, 2015, Hall filed a petition for post-conviction relief. With assistance of counsel, he filed an amended petition on August 9, 2018. Hall attempted to depose M.T. and A.D. but the post-conviction court granted the

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[2]We will, for the sake of brevity, at times refer to "the Kentucky incident." Although the jury did not hear the entire telephone call, attorneys for both sides were in possession of a recording, and some attempt was made to advise the trial court about the disposition of the accusation. At trial, a deputy prosecutor requested to provide, "as an officer of the court," an accounting of his "best and most honest understanding of the incident in Kentucky" and the trial court permitted the explanation for "purposes of clarif[ication]." (Trial Tr. at 478-79.) The recitation, derived from the deputy prosecutor's pre-trial interviews with A.D., is as follows: "That A.D. and M.T. shortly before the summer of 2012 were living in Kentucky for a couple of years in the interim which has been brought out at trial. When she was nine years old, I believe, in the third or fourth grade, maybe the fourth grade, M.T. was staying with a close friend of A.D. while A.D. was at work which we've heard goes on again. That friend, for a reason I'm not sure of, asked A.D. whether or not someone had touched her. A.D. – excuse me, asked M.T. whether or not someone had touched her. M.T. answered in the affirmative or said yes. That person, thinking it's serious enough, stopped questioning, did not ask any further questions but alerted her mother and the Department of Child Services. Department of Child Services, as the Court understands will do in this situation, brought her in for what I'm – what is in my assumption, a forensic interview or – but she was interviewed by the Department of Child Services or their equivalent in Kentucky about this incident. When she was formally and more completely interviewed during this situation, it was learned that this was another child of her same age and it was a – I'm using my quotes here – a playground-type situation where they experimented, where M.T. touched him, he touched her, it was mutual. She had not told about her involvement because she wasn't questioned and when she explained that, the situation, I believe, which [was] considered [by] both parents as I understand it was [sic] closed with – at that time." (*Id.* at 479-80.)

State's motion to quash the subpoenas. On March 26, 2019, the post-conviction court conducted an evidentiary hearing. On November 13, 2019, the post-conviction court entered its findings of fact, conclusions, and order denying Hall post-conviction relief. Hall now appeals.

Discussion and Decision

Standard of Review

[5] Post-conviction proceedings afford petitioners a limited opportunity to raise issues that were unavailable or unknown at trial and on direct appeal. *Wilkes v. State*, 984 N.E.2d 1236, 1240 (Ind. 2013). Post-conviction proceedings are civil in nature, and petitioners bear the burden of proving their grounds for relief by a preponderance of the evidence. *Id.* We accept the post-conviction court's findings of fact unless they are clearly erroneous, but we do not defer to its conclusions of law. *State v. Hollin*, 970 N.E.2d 147, 151 (Ind. 2012). We may not reweigh the evidence or assess the credibility of the witnesses. *Id.* at 150.

Post-Conviction Discovery

[6] Prior to his trial, Hall deposed both A.D. and M.T. Defense counsel asked M.T. whether she smoked, and M.T. was briefly dismissed from the room while Hall's counsel and a deputy prosecutor discussed relevancy concerns and rape shield rule applicability. As agreed, the sole question defense counsel then asked M.T. in relation to juvenile misconduct or sexual conduct was whether M.T. had sexual relations with anyone other than Hall on the date of the

reported rape; she responded in the negative. At A.D.'s deposition, defense counsel attempted to explore the circumstances surrounding the Kentucky incident and A.D. insisted that it was irrelevant, as it had involved children. The trial court denied Hall's motion to compel from A.D. additional testimony on the matter.

[7] Prior to the post-conviction hearing, Hall's counsel issued subpoenas to A.D. and M.T. for further depositions. Upon the motion of the State, and after a contested hearing, the post-conviction court quashed the subpoenas. Hall now argues that he was unfairly precluded from obtaining an admission from M.T. that she had used a vibrator on or near the date that she reported the rape and an admission from A.D. that she had knowledge of M.T. making a false accusation of sexual misconduct in the State of Kentucky. The State responds that the telephone conversation has been explored at some length and revealed no false accusation of sexual behavior and Hall has not elicited evidence from the investigating officer who searched the Hall/A.D. residence that any sexual aid was recovered therein. In short, the State maintains that Hall was merely attempting to conduct a fishing expedition.

[8] Our trial and post-conviction courts are vested with "broad discretion" in ruling on discovery issues, and we will reverse only upon a showing of an abuse of that discretion. *Hinkle v. State*, 97 N.E.3d 654, 664 (Ind. Ct. App. 2018). "Due to the fact-sensitive nature of discovery matters, the ruling of the trial court is cloaked in a strong presumption of correctness on appeal," and "[d]iscovery, like all matters of procedure, has ultimate and necessary boundaries." *Mut. Sec.*

Life Ins. Co. v. Fid. & Deposit Co., 659 N.E.2d 109, 1103 (Ind. Ct. App. 1995), *trans. denied*. The post-conviction relief process is not "a device for investigating possible claims, but [is] a means for vindicating actual claims" and there is no post-conviction "right to fish." *Hinkle*, 97 N.E.3d at 661.

[9] The post-conviction court was best positioned to assess the fact-sensitive nature of Hall's particular request. Although A.D. had, in a telephone conversation, made some oblique reference to a dildo, as if this would be helpful information to Hall, there is no reason to believe that a police search of the apartment yielded such an item, to which M.T., a minor, might have had access. And while A.D. had initially represented to Hall that the Kentucky incident was "the same s***" as the accusation against Hall, when placed under oath she insisted that it was an irrelevant incident between children. Two pre-trial interviews of A.D. by prosecutors had revealed nothing to challenge the characterization of the incident as consensual child exploration. Hall essentially speculates that, given the opportunity, M.T. would refute her trial testimony and admit that her lacerations were caused by an object as opposed to Hall's attack upon her, and that A.D. would revert to her out-of-court claim that her daughter had been untruthful. But the speculation lacks foundation. Under these circumstances, we cannot say that the post-conviction court abused its discretion by quashing the subpoenas.

Effectiveness of Trial Counsel

[10] Effectiveness of counsel is a mixed question of law and fact. *Strickland v. Washington*, 466 U.S. 668, 698 (1984). We evaluate Sixth Amendment claims of ineffective assistance under the two-part test announced in *Strickland*. *Id.* To prevail on an ineffective assistance of counsel claim, a defendant must demonstrate both deficient performance and resulting prejudice. *Dobbins v. State*, 721 N.E.2d 867, 873 (Ind. 1999) (citing *Strickland*, 466 U.S. at 687). Deficient performance is that which falls below an objective standard of reasonableness. *Strickland*, 466 U.S. at 687; *see also Douglas v. State*, 663 N.E.2d 1153, 1154 (Ind. 1996). Prejudice exists when a claimant demonstrates that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *see also Cook v. State*, 675 N.E.2d 687, 692 (Ind. 1996). The two prongs of the *Strickland* test are separate and independent inquiries. *Strickland*, 466 U.S. at 697. Thus, "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice ... that course should be followed." *Id*.

[11] We "strongly presume" that counsel provided adequate assistance and exercised reasonable professional judgment in all significant decisions. *McCary v. State*, 761 N.E.2d 389, 392 (Ind. 2002). Counsel is to be afforded considerable discretion in the choice of strategy and tactics. *Timberlake v. State*, 753 N.E.2d 591, 603 (Ind. 2001). Counsel's conduct is assessed based upon the

facts known at the time and not through hindsight. *State v. Moore*, 678 N.E.2d 1258, 1261 (Ind. 1997). We do not "second-guess" strategic decisions requiring reasonable professional judgment even if the strategy in hindsight did not serve the defendant's interests. *Id.* In sum, trial strategy is not subject to attack through an ineffective assistance of counsel claim, unless the strategy is so deficient or unreasonable as to fall outside the objective standard of reasonableness. *Autrey v. State*, 700 N.E.2d 1140, 1141 (Ind. 1998).

[12] The defense theory was that M.T. lacked credibility, lacerations observed by the nurse who examined M.T. had been caused by something other than penetration, and Hall's sperm (in a small amount) had been detected on M.T.'s clothing only because of secondary transfer (occurring after Hall and A.D. had intercourse in their bed, and M.T. sat or laid down on the bed).[3] Because Hall was being prosecuted for a sex offense, Indiana Rule of Evidence 412(a) ("the Rape Shield Rule") was implicated, in general excluding "evidence offered to prove that a victim or witness engaged in other sexual behavior or evidence offered to prove a victim's or witness's sexual predisposition." Exceptions to the general rule permit, in a criminal case, the admission of evidence of the following:

> (A) evidence of specific instances of a victim's or witness's sexual behavior, if offered to prove that someone other than the

[3] There were three profiles in DNA material recovered from M.T.'s clothing; one profile was present only in a trace amount and thus the contributor is unidentified.

> defendant was the source of semen, injury, or other physical evidence;
>
> (B) evidence of specific instances of a victim's or witness's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor; and
>
> (C) evidence whose exclusion would violate the defendant's constitutional rights.

Ind. Evidence Rule 412(b). The trial court made pretrial and trial evidentiary rulings relative to the Rape Shield Rule, some of which were challenged by trial counsel,[4] and some of which, according to Hall, were inadequately challenged.

[13] In particular, Hall faults trial counsel for failing to argue to the trial court that allowing to stand A.D.'s known false testimony about providing information to Hall was a violation of his due process right to a fair trial. Before A.D. testified, the trial court advised the parties that the State might, on direct examination, open the door to having the recording admitted into evidence. Then, despite her having relayed to Hall her suggestions with which to potentially challenge

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[4]Hall did not specifically articulate a separate issue on judicial impartiality, but he argues in his brief that the trial judge "did not ensure Hall received a fundamentally fair trial, by making evidentiary decisions, namely, denying Hall's motion to compel and by denying the phone call between Hall and A.D. into evidence" and thus, "this conviction must be set aside and heard by an impartial Judge." Appellant's Brief at 21-22. Yet an adverse ruling is not sufficient to show bias or prejudice. *Flowers v. State*, 738 N.E.2d 1051, 1060 n. 4 (Ind. 2000). Instead, a party "must show that the trial judge's action or demeanor crossed the barrier of impartiality and prejudiced" his case. *Id.* Hall did not attempt, in post-conviction proceedings, to make this showing; he did not raise bias or impartiality of the trial court as an issue in his amended petition for post-conviction relief.

M.T.'s accusation, A.D. testified: "I didn't give him any information." (Trial Tr. at 199.) A lengthy bench conference ensued, and the trial court ultimately ruled that no more than thirty-nine seconds of the recording could be played for the jury, if defense counsel so desired. Defense counsel appeared acquiescent; he declined to further cross-examine A.D., and the recording was not admitted into evidence. Hall now argues that his counsel should have persisted in efforts to get the telephone conversation into evidence and should have directed the trial court's attention to *Napue v. Illinois*, 360 U.S. 264 (1959).

[14] With reference to *Napue* and its progeny, it is well established that "a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment. The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Id.* at 269. A defendant's Fourteenth Amendment due process rights are violated when the prosecution knowingly uses false testimony without disclosing its falsity or attempting to correct the false testimony. *Smith v. State*, 34 N.E.3d 1211, 1219 (Ind. 2015), (citing *Alcorta v. Texas*, 355 U.S. 28, 31-32 (1957) (where the defendant's defense would have been corroborated had the witness testified truthfully, but the prosecutor knowingly allowed false testimony to go uncorrected); *Miller v. Pate*, 386 U.S. 1, 6-7 (1967) (where the Court found that the prosecutor had deliberately misrepresented the truth)).

> The main thrust of the case law in this area focuses on whether the jury's ability to assess all of the facts and the credibility of the

> witnesses supplying those facts has been impeded to the unfair disadvantage of the defendant. Active or passive behavior by the State that hinders the jury's ability to effectively act as the fact-finder is impermissible and may violate a defendant's due process rights."

Id. at 1220.

[15] At first blush, it would appear that a *Napue* argument could have been made within the bounds of reasonable professional norms. That is not to say that the argument was required, however, because the reasoning of *Napue* is not divorced from the materiality of the false evidence.

> A finding of materiality is required. In the case of perjured testimony, the conviction must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the fact finder. In a case characterized by a pretrial request for specific information, the test of materiality is whether the suppressed evidence might have affected the outcome of the trial.

Deatrick v. State, 392 N.E.2d 498, 501 (Ind. Ct. App. 1979).

[16] Here, had trial counsel specifically directed the trial court's attention to *Napue* or its progeny, the trial court may have reconsidered playing the telephone recording in its entirety. Had the jury heard the entire recording, A.D.'s credibility would likely have been undermined.[5] But A.D. was not a witness

[5] Due to lengthy, somewhat confusing bench conferences, A.D.'s initial responses focusing on physical evidence, and witness instruction attempting to narrow A.D.'s responses, it is also possible that the jury

whose credibility was central to Hall's conviction. A.D. did not witness the alleged conduct and did not provide testimony as to any element necessary to establish the charged crime. She provided a timeline, acknowledged that M.T. was alone with Hall on the day in question, and related that M.T. seemed very upset when making the accusation against Hall. Her testimony, albeit useful, was cumulative, that is, Hall also testified to the timeline and testified that he was alone with M.T., and the apartment manager provided demeanor testimony.

[17] At bottom, the result that Hall ultimately desired – getting in evidence of a false accusation and the existence of a dildo to which M.T. had access – was not achievable by correcting A.D.'s testimony that she had not provided information. The recorded telephone conversation simply did not disclose a description of a historical false accusation or reveal that M.T. had access to a sex toy of any type. Trial counsel put forth a defense theory relative to these things; he was not necessarily obliged to pursue a defense to the extent that the defendant deems desirable in hindsight. Counsel's omission of a *Napue* argument falls within the bounds of reasonable professional norms.

[18] Hall also asserts that his trial counsel made cumulative errors relative to the exclusion of evidence such that Hall was denied a fair trial. Alleged "[t]rial irregularities which standing alone do not amount to error do not gain the

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would have considered A.D. a credible witness who was confused or focused only upon whether she provided physical evidence.

stature of reversible error when taken together." *Reaves v. State*, 586 N.E.2d 847, 858 (Ind. 1992). "[I]n the context of ineffective assistance of counsel, a reviewing court also assesses whether the cumulative prejudice accruing to the accused as a result of counsel's errors has rendered the result unreliable, necessitating reversal under *Strickland's* second prong. *Weisheit v. State*, 109 N.E.3d 978, 992 (Ind. 2018).

[19] Hall's primary concern is with the exclusion of the telephone call between himself and A.D. He appears to believe that the information A.D. relayed in the telephone call would have been admissible as an exception to the Rape Shield Rule. However, at bottom, A.D. revealed only that M.T. had disclosed prior touching and A.D. made some oblique references to a dildo. Based upon what A.D. relayed to deputy prosecutors, at some time in the past, M.T. was directly asked whether she had been "touched" and she responded affirmatively. The surrounding circumstances known to A.D. were that M.T. and another child engaged in consensual exploration; no juvenile accusations or criminal charges were lodged in the State of Kentucky, where the encounter occurred. This does not amount to having made a false accusation as contemplated by Rule 412.

[20] Moreover, while A.D. made some reference to a dildo,[6] it lacks context, even now. Hall asserts that M.T. had recently used a dildo. This is supposition, not

[6] A.D. directed Hall to "write down about the f****n dildo, vibrator. Write that down." (App. at 28.)

evidence. He seems to believe or suspect that an investigating officer recovered a sex toy from A.D.'s residence or M.T.'s room. However, he has not presented in the post-conviction proceedings any testimony or physical evidence to support this assertion. An undeveloped bald assertion will not support post-conviction relief. Trial counsel's efforts and strategy, although they did not ultimately achieve the result desired by Hall, were not so unreasonable as to constitute ineffective assistance of counsel. *See Badelle v. State*, 754 N.E.2d 510, 539 (Ind. Ct. App. 2001) (deciding in relevant part that, when trial counsel's efforts were "more than adequate" to support a chosen defense, counsel's decision not to seek out additional witnesses was a judgment call within the wide range of reasonable assistance), *trans. denied*.

Effectiveness of Appellate Counsel

[21] A defendant is entitled to the effective assistance of appellate counsel. *Stevens v. State*, 770 N.E.2d 739, 760 (Ind. 2002). The two-pronged standard for evaluating the assistance of trial counsel first enunciated in *Strickland* is applicable to appellate counsel ineffective assistance claims. *Bieghler v. State*, 690 N.E.2d 188, 192 (Ind. 1997). There are three basic categories of alleged appellate ineffectiveness: (1) denying access to an appeal, (2) waiver of issues, and (3) failure to present issues well. *Id.* at 193–95. Here, the third category is implicated. At the post-conviction hearing, Hall's appellate counsel expressed her opinion that "I don't believe at that time I was experienced enough to appreciate how important the *Napue* issue would be for potentially federal habeus review." (P-C.R. Tr. at 15.) Hall acknowledges that his appellate

counsel directed the appellate court's attention to *Napue* but contends that she should have made a more comprehensive argument as to denial of due process in allowing false testimony to stand unchallenged.

[22] Claims of inadequate presentation of issues are almost always unsuccessful, for the reasons explained by our Indiana Supreme Court in *Bieghler*:

> First, these claims essentially require the reviewing tribunal to review specific issues it has already adjudicated to determine whether the new record citations, case references, or arguments would have had any marginal effect on their previous decision. Thus, this kind of ineffectiveness claim, as compared to the others mentioned, most implicates concerns of finality, judicial economy, and repose while least affecting assurance of a valid conviction.
>
> Second, an Indiana appellate court is not limited in its review of issues to the facts and cases cited and arguments made by the appellant's counsel. We commonly review relevant portions of the record, perform separate legal research, and often decide cases based on legal arguments and reasoning not advanced by either party. *See, e.g., Gregory–Bey v. State*, 669 N.E.2d 154, 158 (Ind. 1996) (finding potential double jeopardy issue not addressed by either party and ordering a remand). While impressive appellate advocacy can influence the decisions appellate judges make and does make our task easier, a less than top notch performance does not necessarily prevent us from appreciating the full measure of an appellant's claim, *see, e.g., Ingram v. State*, 508 N.E.2d 805, 808 (Ind. 1987) (while brief was not "of the highest quality," it "sufficiently enabled the court to reach the issues"), or amount to a "breakdown in the adversarial process that our system counts on to produce just results," *Strickland*, 466 U.S. at 696, 104 S. Ct. at 2069.

690 N.E.2d at 195. Appellate counsel claimed that Hall had been denied due process and she directed the Court's attention to *Napue*. We think it reasonable to conclude that the Indiana Supreme Court fully examined that case. And with the benefit of hindsight at the post-conviction hearing, counsel did not articulate what she would have included in more exhaustive briefing. A.D. denied providing information to Hall, and this is arguably demonstrably false; however, that denial is not material to his conviction. We are not persuaded that the Indiana Supreme Court would have granted Hall a new trial had more extensive argument with reference to *Napue* been presented.

[23] Indeed, the Court acknowledged some trial error but found any error harmless beyond a reasonable doubt. *Hall*, 36 N.E.3d at 474. *See Chapman v. California*, 386 U.S. 18 (1967) (federal constitutional error may be held harmless beyond a reasonable doubt). In the present context of post-conviction relief, a petitioner must establish, in addition to deficient performance by counsel, "a reasonable likelihood of a different outcome." *Weisheit*, 109 N.E.3d at 987.

[24] The Indiana Supreme Court set forth an itemization of "uncontroverted facts" indicative of the strength of the State's case against Hall:

> • Hall and A.D. (M.T.'s mother) decided, just days before the incident, to end their relationship;
>
> • Hall continued to reside at A.D.'s apartment despite their break up;

• Hall was home alone with M.T. on the afternoon of the incident;

• M.T. testified that Hall molested and raped her;

• M.T. has not wavered in her account of her molestation and rape;

• Hall admitted to immediately taking a shower after the alleged incident;

• Both Hall and M.T. recalled M.T. putting on the same gym shorts after the alleged incident that she was wearing before;

• Hall's semen was present on the crotch area of the gym shorts M.T. was wearing at the time of the incident;

• M.T. fled the apartment after the molestation and rape;

• M.T. arrived at the apartment complex's leasing office in search of a phone;

• Leasing office employee Sonja Cumberlander observed that M.T. appeared "very excited" and nervous when she asked to use the phone in the leasing office (Tr. at 119.);

• M.T. immediately reported the molestation and rape to a trusted adult;

• After M.T. reported the molestation and rape and A.D. had been contacted, A.D. phoned Hall. Not knowing the purpose of her call, Hall gave an unprompted statement to A.D., when she

asked Hall what had happened to M.T., that he awoke in bed to find M.T. touching his penis;

• By his own admission, Hall stated that M.T. was in his bed;

• Hall drove right past A.D. without stopping when A.D. returned home to find out what had happened between Hall and M.T.;

• M.T. cried out "Oh my God, oh my God, there he is" when Hall drove by the building (Tr. at 120);

• A.D. found her daughter "hysterical," crying, and unable to speak when she met her at the apartment complex's office (Tr. at 158);

• A.D. testified that she had never seen her daughter as upset as she was in the office after the incident;

• M.T. told her mother that Hall had just raped her;

• Nurse Fisher testified that M.T.'s same-day vaginal examination revealed three fresh lacerations consistent with her description of the rape;

• There is no record of the phone calls that Hall claims M.T. and he made after he supposedly awoke in bed to find her touching his penis;

• Hall attempted to learn information from A.D. to smear M.T.'s credibility; and

• Hall spent three months hiding from authorities after charges were filed.

Hall, 36 N.E.3d at 469-70.

Hall fails to show a reasonable likelihood of a different outcome had appellate counsel more thoroughly briefed and argued a due process issue.

Conclusion

[25] Hall has not demonstrated that the post-conviction court abused its discretion in its decision to quash subpoenas. Nor has Hall established the ineffectiveness of trial or appellate counsel.

[26] Affirmed.

May, J., and Robb, J., concur.