MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Mark Dickinson,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

May 27, 2022

Court of Appeals Case No. 21A-CR-1615

Appeal from the Greene Circuit Court

The Honorable Eric C. Allen, Judge

Trial Court Cause No. 28C01-2012-F4-15

Riley, Judge.

STATEMENT OF THE CASE

[1] Appellant-Defendant, Mark Dickinson (Dickinson), appeals his convictions for criminal confinement, a Level 4 felony, Ind. Code § 35-42-3-3(b)(2); domestic battery, a Class A misdemeanor, I.C. § 35-42-2-1.3(a)(1); intimidation, a Level 6 felony, I.C. § 35-45-2-1(b)(1)(A); and strangulation, a Level 6 felony, I.C. § 35-42-2-9(c)(2).

[2] We affirm.

ISSUE

[3] Dickinson presents this court with one issue, which we restate as: Whether he received ineffective assistance of trial counsel, who did not object to certain questions posed by the State.

FACTS AND PROCEDURAL HISTORY

[4] In December 2020, Dickinson had been in a sexual relationship with H.K. for approximately two years, and he lived with H.K. and her five-year-old daughter in a home in the 80 block of West Second Street in Switz City, Indiana. H.K. and Dickinson had been fighting in the weeks preceding December 16, 2020, necessitating the involvement of law enforcement. Dickinson had moved out of the home he shared with H.K. a few days prior to the events at issue.

[5] During the morning of December 16, 2020, Dickinson texted H.K. and offered her a ride to work. H.K. had been at her friend Zach Brown's (Brown) house, where she had ingested methamphetamine. H.K. returned to her home around 7:15 a.m.

to prepare to go to work, but she did not respond to Dickinson's text. Shortly after she got home, Dickinson arrived. H.K. observed that Dickinson was extremely intoxicated on methamphetamine. Dickinson was angry and demanded to know the whereabouts of an air compressor and a welding tool he had left at H.K.'s home. H.K. told Dickinson that she had given the tools to someone else, when, in fact, the tools were in her car. H.K. told Dickinson to leave, but he did not. H.K. was afraid that her interaction with Dickinson could escalate, so she texted Brown to call the police, and she surreptitiously began audio recording Dickinson with her cell phone.

[6] During the approximately twenty-seven-minute recording made on H.K.'s cell phone, Dickinson is heard repeatedly threatening H.K. with bodily harm if she does not comply with his commands to divulge the whereabouts of his tools and to give him the personal identification number (PIN) to her cell phone. At several points in the recording one can hear impact sounds as though someone was being struck. During the recording, H.K. shouts such things as "Ow! Ow! Ow!. . . Stop dude, ow, you're hurting me really bad!", "Stop dude . . . my throat hurts so fucking bad", "My head!", and, as H.K. is whimpering and gagging, "You're hurting me bad . . . You're killing me . . . I can't breathe, I can't breathe, I can't breathe!" (Exh. 1 at 9:11-9:21; 14:47-14:53; 18:15; 23:47-25:15). At times, H.K.'s speech is muffled. In the recording, Dickinson makes statements such as "I'm going to fucking torture your ass, I swear to fucking God, I'll fuck you up", "I'm about to drive your nose through your fucking head", and "I'll let the

neighborhood hear you scream until you're bloody dead." (Exh. 1 at 9:45-9:48; 22:44-22:46; 23:16-23:22).

[7] The recording ends shortly after Deputy Jimmy Carpenter (Deputy Carpenter) of the Greene County Sheriff's Department responds to H.K.'s home. Deputy Carpenter separated H.K. and Dickinson and provided Dickinson with his *Miranda* advisements, after which Dickinson agreed to speak. Deputy Carpenter also spoke with H.K., who told him that her hand, head, and throat hurt. The deputy observed that H.K. had light red marks on her neck and that her hand was slightly discolored. Dickinson was arrested and held in jail. On December 16 and 17, 2020, Dickinson spoke to H.K. in recorded jailhouse telephone calls during which he repeatedly apologized to her for what he had done to her, acknowledged that what he had done was wrong, and asked her to have the case against him dropped.

[8] On December 18, 2020, the State filed an Information, which it amended on May 28, 2021, charging Dickinson with Level 4 felony criminal confinement resulting in moderate bodily injury, Class A misdemeanor domestic battery, Level 6 felony intimidation for threatening to kill H.K., and Level 6 felony strangulation for obstructing H.K.'s nose or mouth. On March 17, 2021, the State filed its request to have Dickinson sentenced as an habitual offender, alleging that he had been sentenced on December 18, 2008, for Class B felony dealing in methamphetamine and had been sentenced on August 8, 2016, for Level 6 felony domestic battery.

[9] On June 15, 2021, the trial court convened Dickinson's two-day jury trial. During voir dire, the entire venire was present in the same room while the Prosecutor and

Dickinson's trial counsel (Trial Counsel) questioned the individual panels of potential jurors. In response to one juror's question if Dickinson would have Trial Counsel testify, Trial Counsel explained as follows:

> Well as his defense attorney I don't testify you know you probably see on TV yes attorneys, you know, ask questions so we will ask questions of witnesses and we will make arguments as to what our position is so it is not testifying and you will be instructed that whatever [Prosecutor] and I say is not evidence. That the evidence is what you see and hear from the witnesses and other exhibits that are offered at trial.

(Transcript Vol. II, p. 50). The trial court, in its preliminary instructions informed the jury that they were the exclusive judges of the evidence "which may be either witness testimony or exhibits." (Appellant's App. Vol. II, p. 120). The trial court also provided the jury with a preliminary instruction that its verdict must be based on the evidence and its instructions of the law.

[10] The recording of the December 16, 2020, incident was admitted into evidence during H.K.'s direct testimony for the State. The jury was furnished with a transcript of the recording which the trial court admonished the jury was not to be considered as evidence. The transcript was collected at the conclusion of the publishing of the recording. After the recording was played for the jury, the Prosecutor took H.K. through the recording, at times posing questions that included a characterization of the events or a paraphrasing or quote of a statement by Dickinson or H.K., as illustrated by the following:

> Prosecutor: At about the 14:45 mark, the defendant asks you, what's the fucking [PIN]. And you respond, my throat hurts so fucking bad, please stop – ow, Mark. And then your voice becomes muffled. What's happening to you at that point?
>
> * * *
>
> Prosecutor: At the 19:30 mark, you say [you're] hurting my arm bad, really bad and you ask him why it's getting tighter and he tells you it's getting tighter because you are moving and next he's going to tie one around your mother fucking throat. Tell the jury what's happening at that point.
>
> * * *
>
> Prosecutor: Now, at the twenty, 2:45 mark, the defendant tells you, you better tell me quick because I'm about to drive your nose through your fucking head. What was going on at that point?

(Tr. Vol. II, pp. 126, 131, 135).

[11] In response to the Prosecutor's line of questioning, H.K. testified to the following facts: Dickinson had shoved her into a chair which hit the wall, causing her to hit her head and giving her a knot on her head; he had tied her right hand to the chair with a purse strap which became so tight that it caused her hand to turn blue and go numb; one of the strike noises heard in the recording was Dickinson hitting her with the purse strap while another was Dickinson shoving her away when she tried to hug him; and that some of her muffled speech was the result of Dickinson throwing her to the ground and shoving socks into her mouth, which caused her to

have difficulty breathing. Trial Counsel did not object to the Prosecutor's questions. On cross-examination by Dickinson's counsel, H.K. confirmed that she and Dickinson were engaged to be married. H.K. testified that she was also intoxicated on methamphetamine during the December 16, 2020, events and that she had attempted to antagonize Dickinson by lying to him about his tools. H.K. told the jury that she took some of the blame for what had occurred.

[12] At the close of evidence, the trial court instructed the jury that its verdict must be based on the evidence, not speculation, sympathy, or bias and that the evidence was "either witness testimony or exhibits." (Appellant's App. Vol. II, p. 129). The trial court also instructed the jury that the transcript of the recording was not evidence. During deliberations, the jury asked to hear H.K.'s cell phone recording, "particularly the portion when she was having trouble breathing." (Tr. Vol. II, p. 214). In response to this query, the trial court played the entire recording again for the jury.

[13] The jury found Dickinson guilty as charged and, in a separate proceeding, found that he was an habitual offender. On September 14, 2021, the trial court sentenced Dickinson to twelve years for his underlying convictions. The trial court enhanced Dickinson's sentence by thirteen years for being an habitual offender, for an aggregate sentence of twenty-five years to be served with the Department of Correction.

[14] Dickinson now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Strickland*

[15] Dickinson contends that he received ineffective assistance of Trial Counsel due to her failure to object to the Prosecutor's questions.[1] We evaluate ineffective assistance of trial counsel claims under the two-part test articulated in *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail on such a claim, a defendant must show that 1) his counsel's performance was deficient based on prevailing professional norms; and 2) that the deficient performance prejudiced the defense. *Weisheit v. State*, 109 N.E.3d 978, 983 (Ind. 2018) (citing *Strickland*, 466 U.S. at 687). Where the defendant's claim is based on his counsel's failure to object at trial, in order to establish the 'performance' prong, the defendant must show that, if the objection had been raised, there was a reasonable probability it would have been granted by the trial court. *Garrett v. State*, 992 N.E.2d 710, 723 (Ind. 2013). In order to demonstrate sufficient prejudice, the defendant must show that there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceeding would have been different. *Weisheit,* 109 N.E.3d at 983 (citing *Strickland*, 466 U.S. at 694). A reasonable probability is one that is sufficient to undermine confidence in the outcome. *Id*. A defendant's failure to satisfy either the 'performance' or the 'prejudice' prong of a *Strickland* analysis will cause an

[1] Ineffective assistance of counsel claims may be brought on direct appeal or through a post-conviction relief proceeding. *Jewell v. State*, 887 N.E.2d 939, 941 (Ind. 2008). Due to Dickinson's choice to bring this claim on direct appeal, he is precluded from raising an ineffective assistance of counsel claim in a subsequent post-conviction relief proceeding. *Id*. In addition, due to the procedural posture of this case, there are no findings of fact and conclusions thereon for us to review.

ineffective assistance of counsel claim to fail. *Taylor v. State*, 840 N.E.2d 324, 331 (Ind. 2006).

II. *Assistance of Trial Counsel*

A. *Performance*

[16] Dickinson contends that Trial Counsel should have lodged objections to twenty-nine questions posed by the Prosecutor on the basis that they were (1) cumulative, (2) leading, (3) unfairly highlighted certain pieces of evidence, and (4) contained conclusions about his guilt and the elements of the offenses. In support of his argument, Dickinson provides us with a list of page and line numbers where the twenty-nine challenged questions are located in the transcript, but he makes no effort to apply his proposed objections to each of the challenged questions. Therefore, while we will draw from his list of challenged questions to aid our analysis, we will not address each of his enumerated citations to the record and will analyze his claims in the generalized manner in which they have been presented to us.

i. *Cumulative*

[17] Dickinson argues that the Prosecutor's questions were cumulative because the Prosecutor restated, quoted, or characterized portions of the recording which had already been played for the jury. Citing *Stone v. State*, 536 N.E.2d 534 (Ind. Ct. App. 1989), *trans. denied*, Dickinson posits that "the evidence" he challenges impermissibly failed to "illustrate other evidence or present a different version of the facts" and that, therefore, his proposed objections would have been sustained. (Appellant's Br. pp. 12-13).

[18] We begin to address this argument by observing that our review of the record revealed that the Prosecutor restated, quoted, and/or characterized the recording in order to direct H.K. to specific moments in the recording which required further explanation to be fully understood. For example, when the Prosecutor asked H.K. what was happening "[a]t the 19:30 mark, [where] you say [you're] hurting my arm bad, really bad and you ask him why it's getting tighter", H.K. explained that Dickinson had tied her right arm to a chair with a purse strap, something which is not mentioned in the recording itself and would otherwise be indiscernible. (Tr. Vol. II, p. 131). Likewise, when the Prosecutor directed H.K. to moments in the recording where it sounds as though someone is being struck, H.K. explained that Dickinson had hit her with the purse strap and shoved her, which are also details that it would not have been possible for the jury to know simply from hearing the recording itself.

[19] Dickinson does not contend that the State mischaracterized the recording in its questioning, only that it characterized and quoted the recording in a manner that favored its case. Dickinson provides us with no authority holding that a trial court must sustain a cumulative objection to a question by the State pinpointing portions of a recording in the manner as did the Prosecutor in this case, and our own research uncovered none. *Stone* does not support Dickinson's position regarding the Prosecutor's questions because that case involved the admission of cumulative hearsay evidence consisting of retellings by multiple witnesses of a molestation victim's disclosure, not a scenario where the questions themselves which elicited the testimony were challenged as cumulative. *Stone*, 536 N.E.2d at 536. A

prosecutor's questions are not evidence. Inasmuch as Dickinson contends in this portion of his argument that Trial Counsel should have objected to H.K.'s responses as cumulative, *Stone* does not support that proposition either, as we have already concluded that H.K.'s responses did indeed illustrate other evidence, namely, the recording. Therefore, Dickinson has not met his burden of demonstrating a reasonable probability that any cumulative objection to the challenged questions or responses would have been sustained. *See Garrett*, 992 N.E.2d at 723.

ii. *Leading*

[20] Dickinson also contends that the challenged questions were leading, and that, therefore, an objection on that basis would have been sustained. A leading question is one that suggests the desired answer to the witness. *Stinson v. State*, 126 N.E.3d 915, 923 (Ind. Ct. App. 2019). Indiana Evidence Rule 611(c) provides that "[l]eading questions should not be used on direct examination except as necessary to develop the witness's testimony." The use of leading questions on direct examination is limited in order to prevent the substitution of the attorney's language for the thoughts of the witness as to material facts in dispute. *Stinson*, 126 N.E.3d at 923. A trial court has great latitude in allowing leading questions. *Id*.

[21] Dickinson's claim is that the Prosecutor improperly restated, quoted, or characterized portions of the recording of his offenses in his questions to H.K. However, we fail to understand how merely pinpointing a portion of the recording and then asking the witness open-ended questions such as, "What's happening to you at that point?", "Tell the jury what's happening at that point", and "What was

going on at that point?" suggested an answer to H.K. (Tr. Vol. II, pp. 126, 131, 135). If the Prosecutor did pose any leading questions, Dickinson has not specifically identified them to us from among the host of transcript portions he designated in one long list in his brief. He has also failed to explain how the Prosecutor's use of any leading questions was not in furtherance of developing H.K.'s testimony, as permitted by Rule 611(c).

[22] Quoting *Williams v. State*, 733 N.E.2d 919, 925 (Ind. 2000), Dickinson argues that "where the led witness ([H.K.]) is apprehensive and emotionally vulnerable, it is even more important to avoid leading questions because, '. . . the apprehensive and emotionally vulnerable state of a witness may well increase his or her susceptibility to suggestive questions and impair the accuracy of the resulting responses.'" (Appellant's Br. p. 13). However, even if we had concluded that the Prosecutor had posed leading questions, there was no greater probability here that the trial court would have sustained any objection to leading based upon protecting H.K. from undue influence from the Prosecutor. After Dickinson's arrest, he and H.K. had apparently reconciled, as prior to trial H.K. wrote three letters to the trial court attempting to have the charges against him dropped. H.K. testified at trial that she and Dickinson were engaged to be married. Our review of the transcript leads us to conclude that H.K. was not an apprehensive or emotionally vulnerable witness. To the contrary, although she was not overtly hostile to the State, she frequently offered testimony in response to the Prosecutor's questions that tended to mitigate or downplay Dickinson's conduct. Dickinson has failed to establish that any

leading objection to the Prosecutor's questions would have been sustained. *See Garrett*, 992 N.E.2d at 723.

iii. *Highlighting the Evidence*

[23] Next, Dickinson asserts that the manner of the Prosecutor's questioning "unfairly highlight[ed] single pieces of evidence out of context with the entire exhibit and the remainder of [H.K.'s] testimony." (Appellant's Br. p. 14). Citing *Modesitt v. State*, 578 N.E.2d 649 (Ind. 1991), Dickinson argues that a "prejudicial drumbeat repetition of otherwise admissible evidence does provide an adequate basis for the reversal of a conviction." (Appellant's Br. p. 14). However, as we have previously observed, the questions of a prosecutor are not, themselves, evidence. Dickinson does not provide us with any authority for his apparent proposition that a prosecutor is not permitted to ask questions about evidence that favors the State's case, and we are unaware of any.

[24] Inasmuch as Dickinson argues here that Trial Counsel should have objected to the admission of H.K.'s testimony in response to the Prosecutor's questions, *Modesitt* is not persuasive. That case involved Modesitt's trial on child molestation charges where the prosecutor had the victim's mother, a welfare caseworker, and a psychologist testify regarding what the victim had told each of them about the offenses, all before calling the victim to testify. *Id*. at 650. Our supreme court held that, by allowing the "drumbeat repetition" of the victim's out-of-court charges against Modesitt via her mother, the welfare worker, and the psychologist prior to the victim's testimony, the State had precluded Modesitt from effective cross-examination and had impermissibly vouchsafed the victim's veracity by permitting

the three witnesses to repeat the victim's accusations. *Id*. at 651-52. Here, the jury heard the recording with the transcript, and then H.K. was examined about certain portions of that recording. Therefore, the repetition at issue here differed in quantity and quality from that at issue in *Modesitt*. We conclude that any objection Trial Counsel would have lodged on this basis would not have been sustained.

iv. *Conclusions on Guilt and Elements of Offenses*

[25] Dickinson's last claim is that Trial Counsel's performance was deficient for failing to object to the Prosecutor's questions "because they contained conclusions about his guilt and about the existence of elements of each of the offenses[.]" (Appellant's Br. p. 14). Dickinson claims that the Prosecutor's questions contained impermissible conclusions that H.K.'s movement was restricted and she was confined, she had been touched and felt pain, H.K. had been threatened and intimidated, and that her breathing had been restricted or impaired. In support of this argument, Dickinson draws our attention to three specific questions by the Prosecutor, which we reproduce, along with H.K.'s responses, more fully as follows:

> Deputy Prosecutor: About 9 minutes in you tell the defendant, stop Mark, my phone is fucking dead – ow, ow, you're hurting me really bad. What is the defendant doing to you at this point to hurt you?
>
> H.K.: I can't remember. I think he was just trying to get me off the bed. Like, I was laying on my bed with my phone, I don't really remember what was happening right there. Like, I, it's kind of scattered to me. I think that was before I walked, I left

my bedroom. I really couldn't, I can't remember exactly what was happening right then and there.

* * *

Deputy Prosecutor: Right after that, the defendant tells you, you don't give a fuck about being tortured, do you? And tells you to put the phone down. Where were you when he told you, when he told you that?

H.K.: I was walking down the hallway and walking into my living room and I put it on the charger by my, on my table.

* * *

Deputy Prosecutor: In fact, he directed you to the chair, correct?

H.K.: Yes.

(Tr. Vol. II, pp. 125-26, 129).

[26] Indiana Rule of Evidence 704(b) prohibits a witness in a criminal case from testifying to "opinions concerning intent, guilt, or innocence" or to "legal conclusions." We can discern no opinion on Dickinson's guilt or any legal conclusions in these cited portions of the transcript, either in the Prosecutor's questions or H.K.'s responses. At most, the Prosecutor elicits testimony regarding the facts surrounding the offenses. We find no merit in Dickinson's argument that any objection would have been sustained on this basis. Accordingly, we conclude

that Dickinson has failed to establish that Trial Counsel's performance was ineffective due to her failure to object.

B. *Prejudice*

[27] Dickinson's failure to establish that Trial Counsel's performance was defective is fatal to his claim of ineffective assistance. *See Taylor*, 840 N.E.2d at 331. Nevertheless, we will briefly address Dickinson's claim that, had Trial Counsel posed his proffered objections, there was a reasonable probability that the result of his trial would have been different. The gravamen of Dickinson's claim of prejudice is that the unchallenged questions, accompanied by the playing of the recording and the jury's access to a transcript of the recording while it was played in open court, created a *Modesitt*-level drumbeat of prejudicial evidence sufficient to reverse, especially since the jury asked to review a portion of the recording during deliberation.

[28] We cannot credit Dickinson's argument for several reasons, the first of which is that, as we have already observed, the repetition at issue here differs markedly from that involved in *Modesitt*. Furthermore, because this is a direct appeal, no evidentiary hearing has been held on Dickinson's claims. Therefore, we have nothing before us illuminating what use, if any, the jury made of the transcript of the recording. More importantly, the jury was instructed in the trial court's preliminary and final instructions that its verdict must be based on the evidence, which was defined for the jury as the testimony of the witnesses and any exhibits. The jury was also instructed that the transcript of the recording was not to be considered as evidence. A jury is presumed to have obeyed the trial court's

instructions. *Gibson v. State*, 133 N.E.3d 673, 695 (Ind. 2019). In addition, Trial Counsel related to the jury during voir dire that the Prosecutor's questions were not evidence. Dickinson does not explain how he was prejudiced by any repetition inherent in the Prosecutor's questions or the transcript which the jury was instructed was not evidence. As such, Dickinson has also failed to establish that he was prejudiced by Trial Counsel's performance.

CONCLUSION

[29] Based on the foregoing, we conclude that Trial Counsel did not render ineffective assistance to Dickinson by failing to object to the Prosecutor's questions.

[30] Affirmed.

[31] May, J. and Tavitas, J. concur