

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Santana J. Gray,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent

September 1, 2023

Court of Appeals Case No.
22A-PC-1992

Appeal from the Marion Superior
Court

The Honorable Mark D. Stoner,
Judge
The Honorable Jeffrey L. Marchal,
Magistrate

Trial Court Cause No.
49D32-1504-PC-13097

Memorandum Decision by Judge Weissmann
Judges Riley and Bradford concur.

Weissmann, Judge.

- [1] Anthony Jenkins caught 18-year-old Santana J. Gray in the act of burglarizing Jenkins's home. Rather than calling police, Jenkins made Gray undress and walk home naked. In retaliation, Gray found Jenkins later that day and fatally shot him. Gray also shot Jenkins's uncle, who survived. Police apprehended Gray near the scene of the shootings, and witnesses positively identified him as the shooter. Gray was charged with and convicted of murder and attempted murder.
- [2] Following his unsuccessful direct appeal, Gray petitioned for post-conviction relief, claiming he received ineffective assistance of counsel both at his jury trial and on appeal. Gray alleged, among other things, that his trial counsel erred in failing to challenge a "show-up" identification procedure near the murder scene during which Jenkins's relative identified Gray as the shooter. Gray also alleged his appellate counsel was deficient in failing to challenge Gray's 90-year sentence. The post-conviction court (PCR court) denied Gray's petition, and he appeals. Finding no error by the PCR court, we affirm.

Facts

- [3] In 2008, Gray broke into Jenkins's Indianapolis home. After Jenkins thwarted the burglary, one of Jenkins's neighbors watched as Jenkins pushed a naked Gray from Jenkins's home. Jenkins then went to the nearby home of his aunt, Keisha Journey. There, Jenkins told his uncles about the burglary but did not mention Gray's name.

- [4] Later that afternoon, when Journey and Jenkins were outside Journey's home and two of Jenkins's uncles were across the street, Gray ran up to Jenkins and fired several shots. One of Jenkins's uncles, Wayne Williams, ran to Gray and grappled with him. Williams broke away, and Gray shot him in the thigh before running away. Despite being shot in his femoral artery, Williams survived. Jenkins did not.
- [5] A bystander flagged down Officer Michael Leepper, who broadcast a description of the shooter. Soon after, Officer Matthew McDonald noticed a car nearby stopped three or four feet from the curb. When Gray approached the car, Officer McDonald called out to him. Gray entered the car without acknowledging Officer McDonald, who stopped the vehicle and handcuffed Gray. Officer McDonald noticed Gray had blood spatter on his arms and legs.
- [6] Jenkins's neighbor identified Gray as the person he saw Jenkins remove from Jenkins's home earlier that day. Police drove Journey a couple of blocks from her home to view Gray from a police vehicle. She identified him as the shooter. Blood on Gray's shoes matched Williams's DNA profile. A search of Jenkins's home revealed Gray's clothing, in which police found keys for Gray's blue Camaro parked behind Jenkins's home.
- [7] The State charged Gray with murder, attempted murder, and carrying a handgun without a license. A jury returned verdicts of guilty as charged, but the trial court did not enter judgment of conviction on the handgun count due to double jeopardy concerns. The court sentenced Gray to consecutive sentences

of 55 years imprisonment for murder and 35 years imprisonment for attempted murder. Gray appealed, and this Court affirmed his convictions. *Gray v. State*, No. 49A04-0909-CR-519, *slip op.* at 10 (Ind. Ct. App. May 28, 2010), *trans. denied*.

[8] Days before that decision, Gray filed a pro se petition for post-conviction relief that ultimately was voluntarily dismissed. Nearly a decade after that first filing, Gray, now represented by counsel, filed an amended petition. After an evidentiary hearing, the PCR court denied Gray’s petition, leading to this appeal by Gray.

Discussion and Decision

[9] Gray raises three claims on appeal. First, he challenges the PCR court’s ruling that trial counsel was not ineffective for failing to challenge Journey’s identification of him. Second, Gray claims the PCR court erred in finding that his trial counsel did not bar Gray from testifying. Lastly, Gray asserts, contrary to the PCR court’s finding, that his appellate counsel’s failure to challenge Gray’s 90-year sentence constitutes ineffective assistance of counsel.

[10] To prevail, Gray must establish clear error—“that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court.” *Benefield v. State*, 945 N.E.2d 791, 797 (Ind. Ct. App. 2011). “We accept the post-conviction court’s findings of fact unless they are clearly erroneous, but we do not defer to the post-conviction court’s conclusions of

law.” *Id.* We neither reweigh the evidence nor judge the credibility of witnesses. *Back v. State*, 162 N.E.3d 593, 600 (Ind. Ct. App. 2021), *trans. denied*.

- [11] In addressing ineffective assistance of counsel claims, we are guided by a two-part test. First, Gray must establish that his counsel’s performance was deficient. *Kubsch v. State*, 934 N.E.2d 1138, 1147 (Ind. 2010). “This requires a showing that counsel’s representation fell below an objective standard of reasonableness and that ‘counsel made errors so serious that counsel was not functioning as ‘counsel’ guaranteed to the defendant by the Sixth Amendment.’” *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).
- [12] Second, Gray must prove that counsel’s deficient performance prejudiced his defense. *Id.* Proof that counsel’s errors were so serious as to deprive him of a fair trial is required. *Id.* We presume that counsel’s performance is effective and require strong and convincing evidence from Gray to overcome this presumption. *Id.*
- [13] Applying this standard, we conclude that Gray has failed to prove that the performance of either his trial or appellate counsel was deficient.

I. Identification Testimony

- [14] Gray first claims that the “show-up” procedure—that is, a one-person line-up—through which Journey identified him violated his right to due process under the Fourteenth Amendment. Gray argues that his trial counsel therefore was ineffective for not moving to suppress it. We conclude the evidence establishes

the omission was a reasonable strategic decision by counsel and that the motion would not have succeeded.

[15] “As our [S]upreme [C]ourt has observed, ‘there is no one way to defend a particular defendant, and so a reviewing court must grant the trial attorney significant deference in choosing a strategy which, at the time and under the circumstances, [the attorney] deems best.’” *Heyen v. State*, 936 N.E.2d 294, 304 (Ind. Ct. App. 2010) (quoting *Potter v. State*, 684 N.E.2d 1127, 1133 (Ind. 1997)). Therefore, trial counsel’s decision not to move to suppress is a matter of trial strategy. *Id.*

[16] Trial strategy may not be successfully challenged through an ineffective assistance of counsel claim unless the strategy is so deficient or unreasonable as to fall outside the objective standard of reasonableness. *Pace v. State*, 981 N.E.2d 1253, 1258 (Ind. Ct. App. 2013). To meet that standard, Gray must show that the motion to suppress would have succeeded. *Id.*

[17] One of Gray’s trial counsel testified that they considered filing a separate motion to suppress the “show-up” identification but concluded the motion would fail. They decided instead to move to suppress the initial stop of Gray because they believed the granting of that motion would result in suppression of all evidence arising from the illegal stop, including the “show-up” identification. *See Heuring v. State*, 140 N.E.3d 270, 278 (Ind. 2020) (finding that where original search was illegal, evidence obtained in later related searches was “fruit of the poisonous tree” and must be suppressed). During trial, Gray’s

trial counsel objected several times to the “show-up” identification as an inadmissible product of the illegal stop.

[18] The PCR court ruled that Gray failed to show that a separate suppression motion aimed only at the “show-up” identification would have succeeded. We agree.

[19] Although both Indiana and federal courts have condemned the practice of conducting a one-on-one “show-up” based on its inherent suggestiveness, these courts have not gone so far as to rule that identifications obtained through “show-up” procedures are per se inadmissible. *Gordon v. State*, 981 N.E.2d 1215, 1218 (Ind. Ct. App. 2013). Instead, “the admissibility of a show-up identification turns on an evaluation of the totality of the circumstances and whether they lead to the conclusion that the confrontation was conducted in a manner that could guide a witness into making a mistaken identification.” *Id.* In other words, even if the “show-up” identification procedure were unduly suggestive, “due process permits the admission of such evidence if, under the totality of the circumstances, the identification is reliable.” *Hubbell v. State*, 754 N.E.2d 884, 892 (Ind. 2001).

[20] We consider these factors in evaluating the admissibility of a show-up identification:

- (1) the opportunity of the witness to view the criminal at the time of the crime;
- (2) the length of initial observation of the criminal;

- (3) lighting conditions;
- (4) distance between the witness and the criminal;
- (5) the witness's degree of attention;
- (6) the accuracy of the witness's prior description of the criminal;
- (7) the level of certainty demonstrated by the witness;
- (8) any identification of another person; and
- (9) the length of time between the commission of the crime and the show-up procedure.

Gordon, 981 N.E.2d at 1218.

[21] Gray argues that Journey's opportunity to identify the shooter is unclear from the record. She focused on the gun rather than the shooter's appearance, according to Gray, and her description of the shooter was not detailed. For instance, Gray notes that Journey described the shooter as wearing a white shirt, but Gray was wearing a red shirt when apprehended. Finally, Gray argues that Journey's conclusion, "I think that's him," when looking at Gray at the scene was equivocal and occurred at least 1½ hours after the shooting.

[22] The State counters by noting that Journey had the opportunity to view Gray clearly because he faced her during part of the mid-afternoon attack. Journey provided a physical description of the shooter to police, remained at the scene until she was driven to Gray's location nearby to identify him, and unequivocally identified Gray at trial as the shooter. Given the totality of the evidence, we cannot say the PCR court committed clear error when it ruled that

counsel was not deficient for failing to move to suppress Journey's identification of Gray.

[23] But even if Gray had established deficient performance, Gray would not be entitled to relief because he did not show prejudice. *See Kubsch*, 934 N.E.2d at 1147. The evidence showed Gray had blood spatter on his arms, legs, and shoes when he was arrested. Williams's blood matched that found on Gray's shoe. After Gray was apprehended, he rubbed his arms and legs against the sidewalk concrete in an apparent attempt to remove the blood. Moreover, Gray's clothing and car keys were found within Jenkins's home, and Gray's car was found parked behind it. Jenkins's neighbor identified Gray at trial as the man the neighbor saw Jenkins remove from Jenkins's home. Thus, even if Journey's identification evidence had been excluded, the other evidence reasonably established that Gray was the shooter.

II. Gray's Testimony

[24] Gray next claims the PCR court erroneously found that his trial counsel was not ineffective for allegedly failing to advise him regarding his right to testify and for not calling Gray as a witness. Gray fails to support his first claim, and we find no error on the second.

[25] A defendant's right to testify in his own defense—"essential to due process of law in a fair adversary process"—is rooted in the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. *Rock v. Arkansas*, 483 U.S. 44, 51-53 (1987) (quoting *Faretta v. California*, 422 U.S. 806, 819 n.15 (1975)).

Article 1, § 13 of the Indiana Constitution separately guarantees a criminal defendant the right to testify. Ind. Const. art. 1, § 13 (“In all criminal prosecutions, the accused shall have the right . . . to be heard by himself and counsel.”). The decision whether a defendant should exercise this constitutional right to testify is personal to the defendant and cannot be waived by counsel. *United States v. Curtis*, 742 F.2d 1070, 1076 (7th Cir. 1984) (interpreting federal constitutional right); Ind. Professional Conduct Rule 1.2(a) (“In a criminal case, the lawyer shall abide by the client’s decision, after consultation with the lawyer, as to . . . whether the client will testify.”).

[26] In his brief, Gray does not specifically acknowledge or challenge the trial court’s findings that:

- 1) “Gray was specifically advised of his right to testify.”
- 2) “Trial counsel did not prevent Gray from testifying.”
- 3) “Gray’s claim that he steadfastly voiced his desire to testify and trial counsel, nevertheless, refused to permit him to testify is not credible.”

PCR App. Vol. II, pp. 90-92. Instead, Gray simply assumes, without citations to the record, that he was never advised of either his right to testify or that the decision to testify was solely his. Gray also focuses on his own testimony that he repeatedly expressed his desire to testify but his counsel declined to implement his decision.

[27] The record supports the PCR court’s findings on this issue. One of Gray’s trial counsel testified that he advised Gray it was “his right to testify.” Whether

Gray would testify was discussed repeatedly between Gray and his counsel. Both counsel testified they advised Gray against testifying but did not force him to waive his right to testify. According to his counsel, Gray seemed to agree with his counsel that his testimony would not aid his defense. Gray's claims to the contrary are merely an unavailing request to reweigh the evidence.

III. Sentencing Claim

[28] Gray's final claim is that his appellate counsel was ineffective in his direct appeal for failing to raise two challenges to Gray's 90-year sentence: 1) the trial court erred in finding as aggravating circumstances Gray's history of misconduct and the nature and circumstances; and 2) Gray's 90-year sentence was inappropriate under Indiana Appellate Rule 7(B).

[29] We first note the significant hurdle Gray faces in raising these ineffective assistance of counsel claims. We rarely find appellate counsel ineffective for failing to raise a claim on direct appeal. *Brown v. State*, 880 N.E.2d 1226, 1230 (Ind. Ct. App. 2008). That is because the choice of issues to raise and arguments to make is among the most critical strategic decisions that appellate counsel make. *Ben-Yisrayl v. State*, 738 N.E.2d 253, 261 (Ind. 2000). Gray must "show from the information available in the trial record or otherwise known to appellate counsel that appellate counsel failed to present a significant and obvious issue and that this failure cannot be explained by any reasonable strategy." *Id.* at 261. He does not make this showing.

A. Aggravating Circumstances

- [30] The trial court treated Gray's difficult childhood and youth as mitigating circumstances. Gray suggests his history of misconduct stemmed from his difficult childhood. Therefore, he argues, the trial court abused its discretion in considering his prior misconduct to be aggravating when it was so closely linked to a mitigating circumstance. Gray also asserts that the nature and circumstances of the attempted murder were unremarkable and, thus, not a valid aggravating circumstance for that offense.
- [31] The State does not address this claim, meaning that Gray need only establish prima facie error to prevail. *See Posso v. State*, 180 N.E.3d 326, 336 (Ind. Ct. App. 2021). Prima facie error means error "at first sight, on first appearance, or on the face of it." *Id.* (quoting *Vukovich v. Coleman*, 789 N.E.2d 520, 524 n.4 (Ind. Ct. App. 2003)). Application of this lower standard based on the State's silence, however, does not relieve us of our duty to correctly apply the law to the facts of the case. *Id.*
- [32] Gray has not established any error in the trial court's findings of aggravating circumstances. As to Gray's history of misconduct, Gray offers no evidence connecting his childhood to his juvenile and criminal record. His juvenile record dates back to age 11 and became progressively more violent as he aged. At 14, Gray was detained for possessing a loaded handgun while walking down a street.

- [33] Gray also was convicted of resisting law enforcement and was on probation when he burglarized Jenkins’s home and then shot Jenkins and Williams. Additionally, Gray was facing a cocaine possession charge filed after his aunt called police and alleged that he was dealing drugs out of her home. In the presentence investigation report, Gray also admitted marijuana and underage alcohol use.
- [34] A juvenile history detailed in a presentence investigation report, as occurred here, alone may be evidence of a history of misconduct constituting an aggravating circumstance. *Taylor v. State*, 840 N.E.2d 324, 341 (Ind. 2006). Gray had not only a serious juvenile history but also an adult criminal record, arrests for serious offenses, and probationary status at the time of the offense.
- [35] As to the nature and circumstances of the attempted murder, Gray offers only a two-sentence argument unsupported by citations to the record or authority. He therefore has waived this claim. *Pierce v. State*, 29 N.E.3d 1258, 1267 (Ind. 2015) (“A litigant who fails to support his arguments with appropriate citations to legal authority and record evidence waives those arguments for our review.”). Waiver notwithstanding, we disagree with Gray’s classification of the shooting of Williams as unremarkable.
- [36] Gray shot an unarmed Williams simply because Williams wrapped his arms around Gray to stop him from shooting Williams’s family. Gray had already shot Williams’s nephew—Jenkins—and was continuing to shoot. This violence seemingly was prompted only by Gray’s embarrassment. Gray has not shown

that his counsel's performance was deficient for failing to challenge two of the aggravating circumstances, given that Gray has not shown such a claim would have succeeded.

B. Appellate Rule 7(B)

[37] Because Gray was 18 years old when arrested and 19 when sentenced, Gray claims his attorney should have challenged his 90-year sentence under Appellate Rule 7(B). Under this rule, an appellate court “may revise a sentence authorized by statute 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. R. 7(B).

[38] We agree with the State that Gray did not meet his burden of showing that counsel was ineffective for omitting a Rule 7(B) claim. For example, Gray did not present the testimony of his appellate counsel. Therefore, the PCR court could infer from that omission that appellate counsel would not have corroborated Gray’s claims. *Mays v. State*, 790 N.E.2d 1019, 1021-22 (Ind. Ct. App. 2003). The PCR court specifically found, “upon the limited record admitted,” that appellate counsel “subjected the State’s case to meaningful adversarial testing upon direct appeal and performed well within the objective standards of reasonable performance based upon prevailing professional norms.” PCR App. Vol. II, p. 99.

[39] Disputing that conclusion, Gray claims that his age and difficult childhood made his Rule 7(B) claim imperative. Gray minimizes his juvenile history and

ignores that his misconduct continued into adulthood. As to the nature of the offense, Gray contends only that the nature of the offense did not support a sentence above the advisory level for attempted murder. But as we have conveyed, Gray's history of misconduct and the nature and circumstances of the offense were valid aggravating circumstances.

[40] Given Gray's juvenile and criminal history, the premeditated nature of Gray's instant crimes, and the petty reason underlying them reasonably, Gray has failed to show that a Rule 7(B) challenge to his sentence would have succeeded.

[41] We affirm the PCR court's judgment.

Riley, J., and Bradford, J., concur.