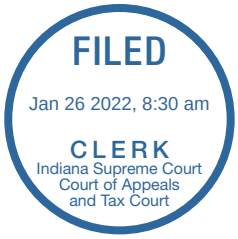
MEMORANDUM DECISION



APPELLANT PRO SE

Marcus T. Govan, Sr.
Bunker Hill, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General

Ian McLean
Supervising Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

Marcus T. Govan, Sr.,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

January 26, 2022

Court of Appeals Case No. 21A-PC-1271

Appeal from the Allen Superior Court

The Honorable David M. Zent, Judge

Trial Court Cause No. 02D06-2007-PC-24

Vaidik, Judge.

Case Summary

[1] Marcus T. Govan, Sr. appeals the denial of his petitions for post-conviction DNA testing and for post-conviction relief, arguing the court erred in finding he did not receive ineffective assistance of counsel and by failing to hold an evidentiary hearing. We affirm.

Facts and Procedural History

[2] In the early morning hours of August 30, 2018, C.B. and a friend, Harold Johnson, were at a strip club to celebrate Johnson's birthday. Govan and C.B. had been in a relationship many years prior and shared an eight-year-old son. Govan met up with C.B. and Johnson at the strip club and later at another bar. Around 3 a.m., C.B. and Johnson left. C.B. dropped Johnson off at his apartment, which was a few units down from C.B.'s. C.B. then went to her own apartment.

[3] A few minutes after C.B. returned to her apartment, Govan "aggressive[ly]" entered her unlocked apartment and began "manhandling" her, saying he wanted to have sex with her and trying to pull down her tights. Tr. Vol. II p. 51. C.B. told Govan no and "push[ed] his hands back." *Id.* at 52. Govan grabbed C.B. by the neck, pushed her against the wall, and inserted his penis into her vagina. C.B. attempted to fight him off, and after a few minutes Govan stopped. He then pinned C.B. to the couch and attempted to put first his finger, and then

his penis, in her anus. When he was unable to do so, he hit C.B. several times and left.

[4] After Govan left, C.B. put on a robe and ran to Johnson's apartment. She told Johnson's mother, Ednia, that Govan raped her and asked her to call 911. Officers from the Fort Wayne Police Department responded and interviewed C.B., who was "crying" and "bleeding" from the mouth. *Id.* at 145, 146. C.B. reported Govan attacked and raped her and smashed her cell phone so she could not call 911. Officers went to C.B.'s apartment to collect evidence and found "blood splattered on the floor [and] the couch." *Id.* at 147. Officers arrested Govan, who denied even seeing C.B. that night.

[5] Medical personnel transported C.B. to a local hospital, where she presented with face, chest, neck, and genital pain, facial and knee abrasions, and bruises to her arms. A "medical forensic exam" of C.B. was conducted and revealed "she had several multiple small linear tears throughout her perineum." *Id.* at 183, 192. During the examination, the forensic examiner collected internal and external genital swabs, as well as swabs of C.B.'s buttocks, neck, ears, and breasts. Later DNA testing of the internal genital swab revealed a DNA profile "at least one trillion times more likely [to have] originated from [C.B.] and Marcus Govan, than if it originated from [C.B.] and some unknown, unrelated individual." Tr. Vol. III p. 44. Each of the other swabs showed similar results, all indicating "very strong support for the proposition that Marcus Govan is a contributor to the DNA profile" found on the swabs. *Id.* at 47.

[6] The State charged Govan with two counts of Level 3 felony rape—one for forcibly having "sexual intercourse" with C.B. and the other for forcibly performing "other sexual conduct" with C.B.—Level 6 felony domestic battery, Level 6 felony strangulation, and Class A misdemeanor interference with the reporting of a crime. Appellant's Direct Appeal App. Vol. II pp. 19, 20.

[7] A jury trial was held in June 2019. Before trial, the State filed a motion in limine seeking to exclude evidence of a custody dispute between C.B. and Govan involving their son. Trial counsel argued evidence of the dispute went to "motive" and that C.B. "would do whatever she needed to [do] to get that child back." Tr. Vol. II p. 13. The trial court granted the State's motion.

[8] At trial, the defense argued C.B. and Govan engaged in consensual sex. To support this theory, Govan's trial counsel elicited testimony from C.B. that she and Govan used to engage in rough vaginal and anal sex. Trial counsel also attempted to elicit testimony from various witnesses—including C.B., Zelma Petrie, Morris Govan, and Virgil Smith—that C.B. and Govan had a contentious relationship and she had motive to fabricate her claims. However, each time the State objected and the trial court sustained, either because the evidence violated the limine order or because it was hearsay. The State also introduced a video of Govan's interview with law enforcement after his arrest, in which he repeatedly denied having sex with C.B. or even seeing her on August 30.

[9] Before closing argument, the State asked the trial court to give an instruction on the lesser-included offense of Level 3 felony attempted rape under Count II, which the court gave. Other instructions provided that, to find Govan guilty of "Count I, Rape, a Level 3 felony" the jury must find, among other things, that Govan had "sexual intercourse" with C.B. *Final Instructions of The Court*, Cause No. 02D05-1809-F3-56, p. 5.[1] The instructions also provided that, to find Govan guilty of "Count II, Rape" or "Attempted Rape" the jury must find that he, among other things, engaged or took a substantial step to engage in "other sexual conduct" with C.B. *Id.* at 8, 9. The jury was instructed that "other sexual conduct" was defined as an act involving "a sex organ of one person and the mouth or anus of another person" or "the penetration of the sex organ or anus of a person by an object." *Id.* at 14.

[10] During its closing argument, the State explained "Count 1, is Rape. This involved forceful sexual intercourse . . . [h]ow he put his penis in her vagina" and "Count 2, involves Rape as well, but it involves other sexual conduct and you have that definition. It is the mouth or anus, and we know in this case we're talking about her anus. We're talking about him putting his penis and . . .finger in her anus." Tr. Vol. III pp. 98-99. In the defense's closing argument, trial counsel again argued C.B. consented to sex with Govan and highlighted

[1] Govan failed to provide the final jury instructions for our review. We therefore cite to the documents found in the Odyssey Case Management System.

several inconsistencies in C.B.'s testimony, including how many drinks she had that night, to show her "credibility issues." *Id.* at 101.

[11] The jury found Govan guilty of Level 3 felony rape, Level 3 felony attempted rape, Level 6 felony domestic battery, and Level 6 felony strangulation. The jury found Govan not guilty of Class A misdemeanor interference with the reporting of a crime. The trial court sentenced Govan to fifteen years each for the Level 3 felonies, to be served consecutively, and two years for the Level 6 felonies, to be served concurrent with the other sentences, for an aggregate sentence of thirty years.

[12] In February 2020, Govan filed his direct appeal, challenging the sufficiency of evidence. We affirmed, finding there was sufficient evidence to convict. A few months later, Govan, pro se, filed a petition for post-conviction DNA testing and a petition for post-conviction relief, asserting ineffective assistance of trial and appellate counsel. The post-conviction court ordered Govan to submit his case by affidavit, and Govan did so. In addition, Govan submitted affidavits from Petrie, Morris, and Smith. The post-conviction court denied Govan's petitions.

[13] Govan now appeals.

Discussion and Decision

[14] The petitioner in a post-conviction proceeding bears the burden of proving the grounds for relief by a preponderance of the evidence. *Henley v. State*, 881

N.E.2d 639, 643 (Ind. 2008). Govan is appealing a negative judgment; therefore, he must show that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. *Id*. at 643-44. "Although we do not defer to the [post-conviction] court's legal conclusions, a post-conviction court's findings and judgment will be reversed only upon a showing of clear error—that which leaves us with a definite and firm conviction that a mistake has been made." *State v. Damron*, 915 N.E.2d 189, 191 (Ind. Ct. App. 2009), *reh'g denied, trans. denied*.

I. Post-Conviction DNA Testing

[15] Govan first argues the post-conviction court erred in denying his petition for DNA testing of the "rape kit." Appellant's Br. p. 7. Indiana Post-Conviction Rule 1(d) states,

> A petition filed by a person who has been convicted or sentenced for a crime by a court of this state that seeks to require forensic DNA testing or analysis of any evidence, whether denominated as a petition filed pursuant to Ind. Code § 35-38-7-5 or not, is considered a Petition for Post-Conviction Relief.

Because a petitioner's request for DNA testing is considered a petition for post-conviction relief, he is subject to the same burden of proof as other post-conviction petitioners. *See* Ind. Post-Conviction Rule 1(5) (petitioner must establish grounds for relief by a preponderance of evidence). Likewise, he is subject to the same standard of appellate review. *See Massey v. State*, 955 N.E.2d 247, 253 (Ind. Ct. App. 2011).

[16] Indiana Code section 35-38-7-5 states in pertinent part that "[a] person who was convicted of and sentenced for an offense may file a written petition with the court that sentenced the petitioner for the offense to require the forensic DNA testing and analysis" of evidence. The petitioner must present prima facie proof of the following:

> (1) That the evidence sought to be tested is material to identifying the petitioner as:
>
> > (A) the perpetrator of; or
> >
> > (B) an accomplice to;
>
> the offense that resulted in the petitioner's conviction.
>
> (2) That a sample of the evidence that the petitioner seeks to subject to DNA testing and analysis is in the possession or control of either:
>
> > (A) the state or a court; or
> >
> > (B) another person, and, if this clause applies, that a sufficient chain of custody for the evidence exists to suggest that the evidence has not been substituted, tampered with, replaced, contaminated, or degraded in any material aspect.
>
> (3) The evidence sought to be tested:
>
> > (A) was not previously tested; or

(B) was tested, but the requested DNA testing and analysis will:

(i) provide results that are reasonably more discriminating and probative of the identity of the perpetrator or accomplice; or

(ii) have a reasonable probability of contradicting prior test results.

(4) A reasonable probability exists that the petitioner would not have:

(A) been:

(i) prosecuted for; or

(ii) convicted of;

the offense; or

(B) received as severe a sentence for the offense;

if exculpatory results had been obtained through the requested DNA testing and analysis.

Ind. Code § 35-38-7-8.

[17] Govan does not present evidence on several of these required elements. Govan provides no evidence as to whose control the "rape kit" is in. Furthermore, the kit was previously tested and found to be consistent with his DNA, and Govan

does not provide any reason to believe that retesting this evidence would contradict the prior results.

[18] The post-conviction court did not err in denying Govan's petition for post-conviction DNA testing.

II. Evidentiary Hearing

[19] Govan claims the post-conviction court erred in denying his petition without an evidentiary hearing because his petition "raises an issue of possible merit." Appellant's Br. p. 11. To support this argument, Govan cites Indiana Post-Conviction Rule 1(4)(f), which provides in part, "If the pleadings conclusively show that petitioner is entitled to no relief, the court may deny the petition without further proceedings." Under this rule, if the facts pled raise an issue of possible merit, then the petition should not be disposed of. *Binkley v. State*, 993 N.E.2d 645, 650 (Ind. Ct. App. 2013).

[20] But Govan's argument is based on a false premise. Govan's petition was not summarily denied under Rule 1(4)(f). Instead, the post-conviction court heard Govan's petition on the merits but without an evidentiary hearing pursuant to Indiana Post-Conviction Rule 1(9)(b), which provides in part,

> In the event petitioner elects to proceed pro se, the court at its discretion may order the cause submitted upon affidavit. It need not order the personal presence of the petitioner unless his presence is required for a full and fair determination of the issues raised at an evidentiary hearing.

[21] We review a post-conviction court's decision to forego an evidentiary hearing under Rule 1(9)(b) for an abuse of discretion. *Smith v. State*, 822 N.E.2d 193, 201 (Ind. Ct. App. 2005), *trans. denied*. Govan does not argue the post-conviction court's denial without an evidentiary hearing constitutes an abuse of discretion. Nor does he allege, let alone show, that a hearing would have aided him. *See id.* (finding no abuse of discretion where petitioner failed to show how evidentiary hearing would have aided him beyond "general assertions").

[22] The post-conviction court did not err in denying Govan's petition without an evidentiary hearing under Rule 1(9)(b).

III. Ineffective Assistance of Trial Counsel

[23] Govan also asserts the post-conviction court erred in finding his trial counsel was not ineffective. When evaluating a defendant's ineffective-assistance-of-counsel claim, we apply the well-established, two-part test articulated in *Strickland v. Washington*, 466 U.S. 668 (1984). *Humphrey v. State*, 73 N.E.3d 677, 682 (Ind. 2017). The defendant must prove: (1) counsel rendered deficient performance, meaning counsel's representation fell below an objective standard of reasonableness as gauged by prevailing professional norms and (2) counsel's deficient performance prejudiced the defendant, i.e., there is a reasonable probability the result of the proceeding would have been different. *Id.*

A. Theory of Defense

[24] Govan first argues his trial counsel was ineffective for arguing a defense based on consent. Counsel is afforded considerable discretion in choosing strategy and

tactics. *Timberlake v. State*, 753 N.E.2d 591, 603 (Ind. 2001). This is because even the best and brightest criminal defense attorneys may disagree on ideal strategy or the most effective way to represent a defendant. *Id.* Accordingly, we do not "second-guess" strategic decisions requiring reasonable professional judgment even if the strategy in hindsight did not serve the defendant's interests. *State v. Moore*, 678 N.E.2d 1258, 1261 (Ind. 1997). And rather than focusing on isolated instances of poor tactics or strategy in the management of a case, the effectiveness of representation is determined based on the whole course of attorney conduct. *Id.* In fact, "[f]ew points of law are as clearly established as the principle that tactical or strategic decisions will not support a claim of ineffective assistance." *Conder v. State*, 953 N.E.2d 1197, 1204 (Ind. Ct. App. 2011).

[25] Trial counsel's defense theory was that Govan and C.B. engaged in consensual rough sex. This theory explains C.B.'s injuries and Govan's DNA on her body. To support this theory, trial counsel elicited testimony from C.B. that she and Govan had previously engaged in rough sex and highlighted inconsistencies in C.B.'s account of the evening to undermine her credibility.

[26] Yet Govan asserts his trial counsel was deficient in asserting this theory because it conceded that Govan had sex with C.B. that night and "weakened" Govan's claims to law enforcement that C.B. made the entire incident up. Appellant's Br. p. 19. We cannot agree. All evidence refuted Govan's claim that he was not with C.B. that night. Johnson testified Govan and C.B. were together that night, and C.B. consistently gave the same account of Govan raping her to

Ednia, law enforcement, and medical personnel. Most importantly, Govan's DNA was found all over C.B. Given this evidence, we will not second guess trial counsel's sound decision to abandon Govan's argument that he was not with C.B. that evening and instead argue the two engaged in consensual sex.

[27] As such, we conclude Govan has failed to show trial counsel was deficient in asserting a defense theory based on consent.

B. Impeachment Evidence

[28] Govan next argues trial counsel was ineffective for failing to impeach C.B. with "prior inconsistent statements showing she sought revenge against Govan." Appellant's Br. p. 21. Govan presented three witness affidavits, which he claims provide evidence of the alleged "prior inconsistent statements" by C.B. However, only one of these affidavits actually includes an alleged prior statement by C.B. In his affidavit, Morris states, "At a CHINS case involving [Govan] and [C.B.], I witnessed C.B. state that she was going to get even with [Govan] for being given custody of" their shared child. Appellant's App. Vol. III p. 4.

[29] Indiana Evidence Rule 613 allows the use of a prior inconsistent statement to impeach a witness. *Jackson v. State*, 925 N.E.2d 369 (Ind. 2010). When the prior inconsistent statement is being used to impeach a witness, and not to prove the truth of the matter asserted, the statement is not hearsay. *Id.* But here, although Govan claims the prior inconsistent statement would be used to impeach C.B., he does not identify any in-court statement the alleged prior statements would

impeach. Instead, he contends this evidence shows "[C.B.] sought revenge against Govan." This is not relevant to impeachment and instead goes toward the truth of the matter asserted—that C.B. wanted to "get even" with Govan. Trial counsel cannot be deficient in failing to present inadmissible evidence, and Govan does not allege how this evidence could have been admitted.

[30] Govan has failed to show trial counsel was ineffective in failing to impeach C.B. with prior inconsistent statements.

IV. Ineffective Assistance of Appellate Counsel

[31] Govan also argues the post-conviction court erred in finding his appellate counsel was not ineffective. Specifically, Govan contends appellate counsel "fail[ed] to raise the issues of the trial court's abuse of discretion for the exclusion of evidence critical to Govan's defense and fail[ed] to raise the double jeopardy violation for the conviction and sentencing for Counts 1 and 2." Appellant's Br. p. 11.

[32] The standard for a claim of ineffective assistance of appellate counsel is the same as for trial counsel in that the defendant must show appellate counsel was deficient in his performance and that the deficiency resulted in prejudice. *Timberlake v. State*, 753 N.E.2d 591, 603 (Ind. 2001). Our Supreme Court has recognized three types of ineffective assistance of appellate counsel: (1) denial of access to appeal; (2) failure to raise issues that should have been raised; and (3) failure to present issues well. *Wrinkles v. State*, 749 N.E.2d 1179, 1203 (Ind. 2001). Govan's claims fall into the second category: failure to raise an issue. In

evaluating such claims, we must consider (1) whether the unraised issues are significant and obvious from the face of the record and (2) whether the unraised issues are clearly stronger than the raised issues. *Gray v. State*, 841 N.E.2d 1210, 1214 (Ind. Ct. App. 2006), *trans. denied*.

A. Exclusion of Evidence

[33] Govan first asserts appellate counsel failed to challenge the exclusion of the following evidence during Govan's trial: testimony from C.B., Petrie, Morris, and Smith regarding the custody dispute, which Govan asserts would have established C.B. had a motive to fabricate allegations against Govan.

[34] But appellate counsel cannot be deficient for failing to raise an issue that was not properly preserved for review. *Williams v. State*, 160 N.E.3d 563, 582 (Ind. Ct. App. 2020), *trans. denied*. And it is well settled that an offer of proof is required to preserve an error in the exclusion of a witness's testimony. *Heckard v. State*, 118 N.E.3d 823, 828 (Ind. Ct. App. 2019), *trans. denied*. "An offer of proof allows the trial and appellate courts to determine the admissibility of the testimony, as well as the potential for prejudice if it is excluded." *Id.* To the extent the trial court excluded this evidence, no offer of proof was made. Thus, the claimed error was waived.

[35] Appellate counsel was not ineffective for failing to raise a waived issue.

B. Double Jeopardy

[36] Finally, Govan asserts appellate counsel failed to challenge his rape conviction and attempted-rape conviction as a violation of double jeopardy. Specifically, Govan argues these convictions violate the actual-evidence test articulated in *Richardson v. State*, 717 N.E.2d 32 (Ind. 1999).[2]

[37] In *Richardson*, our Supreme Court held that "two or more offenses are the 'same offense' in violation of Article I, Section 14 of the Indiana Constitution, if, with respect to either the statutory elements of the challenged crimes or the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense." *Richardson*, 717 N.E.2d at 49. Under the *Richardson* actual-evidence test, the evidence presented at trial is examined to determine whether each challenged offense was established by separate and distinct facts. *Lee v. State*, 892 N.E.2d 1231, 1234 (Ind. 2008). To show that two challenged offenses constitute the "same offense" in a claim of double jeopardy, a defendant must demonstrate a reasonable possibility that the evidentiary facts used by the fact finder to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense. *Id.* In determining the facts

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[2] Govan also cites *Wadle v. State*, 151 N.E.3d 227 (Ind. 2020), which overruled *Richardson* in part and set forth a new test for substantive double-jeopardy claims. However, *Wadle* was decided after Govan's direct appeal, so there is no question appellate counsel was not deficient in failing to present an argument under a test that did not yet exist. *See Walker v. State*, 843 N.E.2d 50, 60 (Ind. Ct. App. 2006) (noting counsel cannot be held ineffective for failing to anticipate a change in the existing law). And in any event, beyond the single citation, Govan makes no analysis under *Wadle.*

used by the fact finder to establish the elements of each offense, it is appropriate to consider the charging information, jury instructions, and arguments of counsel. *Id.*; *Spivey v. State*, 761 N.E.2d 831, 832 (Ind. 2002).

[38] Govan argues his convictions for rape and attempted rape do "not represent two separate incident[s], but rather one incident occurring simultaneously." Appellant's Br. p. 16. The post-conviction court found no double-jeopardy violation under *Richardson* as the "evidence supporting [Govan's] conviction on Count 1 was that he compelled the victim to engage in sexual intercourse with him" and "the evidence supporting his conviction on Count 2 was that, after completing the sexual intercourse, he tried to insert his finger into the victim's anus by force." Appellant's P-C App. Vol. II p. 63.

[39] This conclusion is supported by the record. C.B. testified that when Govan attacked her at her home, he first penetrated her vaginally with his penis. She testified that she tried to fight him off, and Govan then removed his penis from her vagina and attempted to anally penetrate her with his finger and penis. The charging information and jury instructions differentiate between the two counts: describing Count I as Govan forcing C.B. into "sexual intercourse" and Count II as Govan forcing C.B. into "other sexual conduct." The State also differentiated between the acts in its closing argument, stating Count I involved Govan's act of "put[ting] his penis in her vagina" and Count II involved "putting his penis and . . . finger in her anus." Tr. Vol. III pp. 98-99. All this shows separate and distinct evidentiary facts were used to establish the acts for both convictions. *Collins v. State*, 717 N.E.2d 108, 111 (Ind. 1999) (finding two

convictions for criminal-deviate conduct did not violate the actual-evidence test where there was separate evidence to show both "compelled oral intercourse" and "compelled anal intercourse"). And the jury found Govan guilty of rape in Count I but found him guilty only of the lesser-included offense of attempted rape in Count II, which further supports that the jury was using separate evidence to support each conviction.

[40] Therefore, it is not reasonably possible that the jury used the same evidence to establish the essential elements of both offenses, and the convictions do not constitute double jeopardy under *Richardson.* Govan has failed to show the post-conviction court erred in concluding appellate counsel was not ineffective for failing to challenge Govan's convictions as double jeopardy.

[41] Affirmed.

Najam, J., and Weissmann, J., concur.