MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Lisa M. Johnson
Brownsburg, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Justin F. Roebel
Supervising Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Muhamed Dugonjic,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Plaintiff

January 27, 2021

Court of Appeals Case No. 20A-PC-1015

Appeal from the Hamilton Superior Court

The Honorable Michael A. Casati, Judge

Trial Court Cause No. 29D01-1806-PC-3861

May, Judge.

[1] Muhamed Dugonjic appeals following the denial of his petition for postconviction relief. He raises three issues, which we consolidate, revise, and restate as: (1) whether Dugonjic received ineffective assistance of trial counsel, and (2) whether Dugonjic received ineffective assistance of appellate counsel. We affirm.

Facts and Procedural History

[2] In our opinion on Dugonjic's direct appeal, we recited the facts surrounding his offenses as follows:

> In 2010, A.D. moved from Bosnia to Carmel, Indiana, to attend school and work as an au pair. The au pair program provided her with a host family. When her program ended, she worked as a live-in nanny for her host family.
>
> In December 2010, A.D. connected on Facebook with Dugonjic, a Bosnian immigrant who lived in Arizona and worked as a truck driver. The two began to communicate by phone and through text messages, and in the late summer of 2011, A.D. made her first of three trips to Arizona to visit Dugonjic. Dugonjic visited A.D. in Indiana many times. During the visits, the couple sometimes stayed at a hotel, where they engaged in various sexual acts short of sexual intercourse. A.D. testified that she intended to abstain from premarital sexual intercourse due to her religious beliefs, but she allowed Dugonjic to touch her breasts and vagina because he had assured her that they were going to stay together and she was "100 percent sure" that they would marry.
>
> In October 2012, a woman called A.D. and informed her that she was engaged to Dugonjic. This prompted A.D. to investigate

Dugonic's background, whereupon she discovered that he was married to a woman in Bosnia. When she confronted him, Dugonjic confessed that he was married, had a child, and was several years older than he had originally represented. The couple ended the romantic relationship but continued to visit each other intermittently.

In May 2013, A.D. informed Dugonjic that she was pursuing another relationship. A month later, Dugonjic texted A.D., told her that he was in Indiana, and asked to meet her one last time for five minutes at a previous rendezvous spot behind a discount store. A.D. declined a private meeting but agreed to meet him inside the store. The two walked and talked inside the store, and Dugonjic kissed her. A.D. agreed to drive him to his vehicle. When they got to his vehicle, which was parked behind the store, Dugonjic kissed A.D. and implored her to leave with him. A.D. refused and reminded him of his history of lying to her. An argument ensued. A.D. received a text message from her new boyfriend, and Dugonjic grabbed her purse and demanded to see her phone. She quickly powered it off, and Dugonjic grabbed it, causing it to break. He demanded her PIN code, and she gave him a false code. When he discovered that he was locked out of the phone, he removed its SIM card and exited the vehicle.

A.D. followed Dugonjic, seeking the return of her SIM card and explaining that Dugonjic would not be able to access its contents because her phone was under her host family's account. He approached her, said that he loved her, accused her of "cheat[ing]" on him, and kissed her in a "rough" and "aggressive manner." He then put his hand under her shirt and began kissing her breasts. She told him that she just wanted her SIM card and reminded him of his promise that their meeting would last only five minutes. He then put his hand inside her pants and "started pushing his fingers" "inside [her]," "[i]n [her] vagina," "deep inside and it was hurting." A.D. implored him to stop, but he refused. He turned her around with "his hand deep inside" her,

and she fell to the pavement and thought she was going to "pass out." She begged him to let go of her, and he refused. A truck appeared and shone its headlights on them, at which point A.D. told Dugonjic that she would leave with him if he would just let go of her. He grabbed her hand and attempted to pull her inside his truck. She broke away from his grip and ran across the street to an apartment complex. She entered an open garage and went inside the adjoining apartment to seek help. The residents phoned 911 on her behalf.

Emergency personnel arrived, and A.D. described the attack to a female medic. When she went to the restroom, she discovered that her genitals were bleeding. She was taken to a nearby hospital and examined by a sexual assault nurse, who observed injuries to A.D.'s clitoris and labia minor crease as well as bruising consistent with Dugonjic clutching her arm and injuries consistent with having fallen to the pavement. Police found A.D.'s vehicle behind the store, still running and unlocked. They also found her broken phone and SIM card.

The State charged Dugonjic with class B felony criminal deviate conduct,[1] class C felony battery resulting in serious bodily injury,[2] and class D felony sexual battery.[3] Seven months before trial, the State filed a motion in limine, seeking to limit the admission of evidence of A.D.'s prior sexual activity pursuant to Indiana's Rape Shield Rule. The trial court conducted hearings and granted the State's motion, limiting the admission to evidence relevant to Dugonjic's claim that A.D. had consented to the charged conduct. A jury found Dugonjic guilty of class B felony criminal deviate conduct and class D felony sexual

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[1] Ind. Code § 35-42-4-2 (1998).

[2] Ind. Code § 35-42-2-1(a)(3) (2012).

[3] Ind. Code § 35-42-4-8 (2012).

> battery. The trial court sentenced him to twelve years for criminal deviate conduct and a concurrent one and one-half years for sexual battery.

Dugonjic v. State, No. 29A02-1512-CR-2281, 2016 WL 6997978 at *1-*2 (Ind. Ct. App. Nov. 30, 2016) (internal citation omitted), *trans. denied*. In his direct appeal, Dugonjic argued the trial court improperly instructed the jury regarding the definitions of certain elements of his offenses; abused its discretion in admitting evidence of defense counsel's conduct and not admitting evidence of A.D.'s past sexual conduct; and abused its discretion in its treatment of aggravating factors during sentencing. *Id*. at *1. This court affirmed the trial court. *Id*. at *9.

[3] Dugonjic filed a postconviction relief petition on June 1, 2018, alleging both his trial counsel and his appellate counsel provided ineffective assistance. The postconviction court held an evidentiary hearing on Dugonjic's petition on February 13, 2020. Gregory Bowes, Dugonjic's trial counsel, testified at the evidentiary hearing. At the time of the postconviction hearing, Bowes had been an attorney for about thirty-five years and had tried approximately thirty jury trials in his career. Bowes explained that he met with Dugonjic early in his representation and reviewed emails and Facebook messages Dugonjic and A.D. had exchanged both before and after the incident. Many of these messages were written in Bosnian. Bowes and Dugonjic selected the messages they believed were most relevant, and Bowes had the messages translated into English by a certified translator.

[4] At trial, Bowes questioned A.D. about an email A.D. sent Dugonjic after the incident. Bowes showed A.D. a copy of the translated email that stated, "I let you touch me with your finger while we were together," and A.D. testified the translation was inaccurate. (Prior Case Tr. Vol. IV at 860.) Bowes explained during the postconviction hearing that he did not have the translator available at trial to lay the foundation for admission of the translated email and that, therefore, he did not enter the translated email into evidence. Bowes also stated while he reviewed A.D.'s pre-charge interview with police before taking A.D.'s deposition and before trial, he did not have the interview transcribed or arrange to be able to play video of the interview in front of the jury. Finally, Bowes testified that he believed Dugonjic's right to a fair trial was affected by the State's questions regarding an unannounced visit Bowes made to A.D.'s home and by comments the State made in response to Bowes' relevancy objection.

[5] At the postconviction hearing, the parties entered into evidence two proposed final jury instructions that Dugonjic had tendered at his criminal trial and the trial court had rejected. Dugonjic's appellate counsel did not testify during the postconviction hearing, but Dugonjic argued in his memorandum in support of postconviction relief that his appellate counsel was ineffective for failing to assert as an issue on direct appeal the trial court's denial of these tendered instructions.

[6] The postconviction court issued an order with findings of fact and conclusions of law denying Dugonjic's petition for postconviction relief on April 24, 2020. The postconviction court concluded:

59. Even assuming arguendo that Mr. Bowes's performance somehow fell below an objective standard of reasonableness, the Court cannot find that any assumed deficiencies prejudiced the defense by establishing a reasonable probability that the assumed shortcoming undermined confidence in the outcome.

60. Having a certified copy of the translated emails—which Mr. Bowes testified he had available at trial—or the translator present to testify is only one evidentiary hurdle the Petitioner faced to actually have the emails admitted and published to the jury. The victim's statements contained within the emails are hearsay and inadmissible as substantive evidence. The only potential admissibility is for impeachment purposes and Mr. Bowes used the email statements to attempt to impeach the victim during her trial testimony. Further, pursuant to Mr. Bowes' testimony, he and the Petitioner selected the emails contained within Petitioner's Exhibits H and I to support the defense strategy and did not provide every email sent between the victim and the Petitioner. Even taken out of context, none of the emails contained within Petitioner's Exhibits H and I suggest the victim consented to any sexual conduct with the Petitioner on the date of the offenses, nor do they disprove the penetration element.

61. The Petitioner's claim of ineffective assistance of counsel therefore fails the second prong of the Strickland analysis.

* * * * *

68. The admission of evidence regarding trial counsel's pretrial discovery tactics did not prejudice the defendant. The Indiana Court of Appeals, in reviewing admission of the evidence purported to demonstrate trial counsel's intimidation of the victim, stated that, "[W]e do not believe that the admission of this evidence amounts to prejudicial error." [*Dugonjic v. State*, No. 29A02-1512-CR-2281, 2016 WL 6997978 at *6 (Ind. Ct.

App. Nov. 30, 2016), *trans. denied*.] The court elaborated, saying that

> the interchange on this matter is miniscule when placed in context with the nearly 1400 pages of transcript, and any attention drawn to the alleged intimidation is more likely attributable to defense counsel addressing it during closing argument. Tr. at 1209. More importantly, Dugonjic's conviction is supported by independent evidence, including: A.D. fleeing to a nearby apartment after the attack; the apartment residents' description of A.D. as pale and distraught; A.D. bleeding from her genitalia; medical evidence of injuries to A.D.'s genitalia; medical evidence of additional injuries corroborating A.D.'s account of struggling to get away from Dugonjic's grip and falling to the pavement; police finding A.D.'s vehicle still running and unlocked, along with her broken phone and SIM card; and Dugonjic having left the scene.

Id.

69. Similarly, the Petitioner has not and cannot establish that trial counsel was "rendered ineffective by the trial court" when he was criticized for his pretrial efforts in discovery. First, the trial court cannot render trial counsel ineffective and such an argument is non-sensical. Second, as stated above, the Court of Appeals stated that "we do not believe that the admission of this evidence amounts to prejudicial error." [*Id*.] The Court of Appeals has already determined that the Petitioner was not prejudiced by the admission of this evidence, thus there is no reasonable probability that the result of the proceeding would have been different were this evidence not admitted.

* * * * *

76. Even assuming arguendo that Mr. Bowes's performance [in not having A.D.'s pre-charge police interview transcribed] somehow fell below an objective standard of reasonableness, the Court cannot find that any assumed deficiencies prejudiced the defense by establishing a reasonable probability that the assumed shortcoming undermined confidence in the outcome.

77. Mr. Bowes cross examined the victim for approximately two hours regarding a wide range of topics. Despite not having a transcript of the interview, he asked several questions regarding perceived inconsistencies between her trial testimony and what she told police. The record reflects a series of purposeful, strategic trial decisions that were reasonable within the prevailing professional norms of a criminal defense attorney.

* * * * *

89. Both crimes the Petitioner was convicted of required the State to prove beyond a reasonable doubt the element of lack of consent. The trial court instructed the jury on the elements of each offense in Final Instructions 5 and 7, including that the State was required to prove beyond a reasonable doubt that the victim was compelled by force. To prove forceful compulsion the State would necessarily have to prove lack of consent. The jury was properly instructed regarding the elements of each crime and the instructions given covered the subject matter of Proposed Instruction No. 1.

90. Similarly, Petitioner's Proposed Instruction No. 2 was also covered by the Court's instructions provided to the jury. The Court's final instructions clearly informed the jury that the State was required to prove beyond a reasonable doubt each element of the crimes charged before the jury could convict the Petitioner.

> 91. It was not error that [Dugonjic's appellate counsel] failed to raise this issue on appeal, and it is unlikely that it would have resulted in reversal or order for a new trial.

(App. Vol. II at 107-114.)

Discussion and Decision

[7] Our standard of review in postconviction relief proceedings is well-settled:

> The petitioner for postconviction relief must establish that he is entitled to relief by a preponderance of the evidence. Because he is now appealing a negative judgment, to the extent his appeal turns on factual issues, the petitioner must convince this Court that the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by a postconviction court. Where the postconviction court has entered findings of fact and conclusions of law, we accept the findings of fact unless clearly erroneous, but accord no deference to conclusions of law.

Warren v. State, 146 N.E.3d 972, 977 (Ind. Ct. App. 2020) (internal citations and quotation marks omitted), *trans. denied*, *cert. denied*, -- S. Ct. ---, 2020 WL 6701202 (Mem).

I. Ineffective Assistance of Trial Counsel

[8] The Sixth Amendment to the United States Constitution states that a defendant in a criminal prosecution is entitled "to have the assistance of counsel for his defense." U.S. Const., Am. VI. This right requires that counsel be effective. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052 (1984), *reh'g denied*. "Generally, to prevail on a claim of ineffective assistance of counsel a petitioner

must demonstrate both that his counsel's performance was deficient and that the petitioner was prejudiced by the deficient performance." *Davis v. State*, 139 N.E.3d 246, 261 (Ind. Ct. App. 2019), *trans. denied*. Counsel is deficient if his performance falls below the objective standard of reasonableness established by prevailing professional norms. *Id*. There is a strong presumption that trial counsel provided effective representation, and the petitioner must rebut that presumption with strong evidence. *Warren*, 146 N.E.3d at 977.

[9] "Isolated poor strategy, inexperience, or bad tactics does not necessarily constitute ineffective assistance of counsel." *McCullough v. State*, 973 N.E.2d 62, 74 (Ind. Ct. App. 2012), *trans. denied*. "To meet the appropriate test for prejudice, the petitioner must show 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." *Davis*, 139 N.E.3d at 261 (internal citation omitted). If we determine that the petitioner cannot succeed on the prejudice prong of his claim, we do not need to address whether counsel's performance was deficient. *Lee v. State*, 892 N.E.2d 1231, 1233 (Ind. 2008).

A. Translation of Emails

[10] Dugonjic argues his trial counsel was ineffective for not arranging for a certified translator to testify at trial. Dugonjic contends that had Bowes been able to enter the translated emails into evidence they "could have been used to discredit A.D.'s testimony that she was forced to submit to sexual touching and digital penetration." (Appellant's Br. at 36.) He alleges that entering the emails into

evidence would have been helpful to his case because "despite the numerous complaints expressed in the emails, A.D. did not say anything in the emails about Dugonjic sexually assaulting her, forcing her to participate in any sexual activity, or physically harming her in any way." (*Id.* at 38.)

[11] Even without entering the translated emails into evidence, Bowes questioned A.D. about the translations of several emails. A.D. did not challenge the translation of an email she sent Dugonjic on September 30, 2013, in which she said, "I'm most glad that I didn't sleep with you," (Prior Case Tr. Vol. IV at 863), nor did she contest the translation of an email Dugonjic sent her stating he wanted to have a baby with her. Given these translations were undisputed, a certified translator was not needed to attest to their accuracy.

[12] A.D. disputed the translation of only one email Bowes presented. The disputed translation was of an email A.D. sent Dugonjic on September 25, 2013. The translated email read:

> so little did I expect and ask of you, there's only one thing I regret, for the time spent with you that I ever let your finger touch me, only that I regret, I am even more humiliated. Wherever Satan comes to me, I will never have any regrets for waiting or forgive myself while I live, if I didn't wait for my man till the end! But it must have been meant to be this way, Allah has already determined it.

(Pet. Ex. I at 237.) A.D. testified the translation was not correct, and Bowes did not ask A.D. to explain how the translation was inaccurate.

[13] Dugonjic argues Bowes should have had a certified translator available to testify as to the accuracy of the translation. Dugonjic claims that, if Bowes had done so, he could have used the contradiction to cast doubt on A.D.'s credibility. However, the evidentiary value of the disputed email is limited because it is one of many messages A.D. and Dugonjic exchanged, and the text of the email does not indicate when A.D. is referring to letting Dugonjic touch her. As we explained in our opinion following Dugonjic's direct appeal, which the postconviction court quoted in conclusion of law 68, substantial independent evidence supports Dugonjic's convictions. (App. Vol. II at 109-110.) Consequently, there is no reasonable probability that, had Bowes arranged for a certified translator to testify regarding the accuracy of the disputed translation or entered the translated emails into evidence, the outcome of the trial would have been different. *See Black v. State*, 54 N.E.3d 414, 428 (Ind. Ct. App. 2016) (holding postconviction relief petitioner was not prejudiced by defense counsel's alleged error), *trans. denied*.

B. A.D.'s Interview with Police

[14] Dugonjic also maintains Bowes' failure to obtain a transcript of A.D.'s interview with the police or ensure that he could play a video of that interview at trial inhibited his ability to cross-examine and impeach A.D. He argues a transcript or a video of A.D.'s police interview would have raised a reasonable doubt in the jurors' minds because it would have more effectively shown to the jury inconsistencies between A.D.'s testimony at trial and what she said in the police interview. Dugonjic further contends the video would also show that

A.D. did not mention digital penetration during her police interview until an officer directly asked her about it.

[15] A.D.'s description at trial of consensual sexual activities between her and Dugonjic differed from what she said in her interview with police, and Bowes questioned A.D. about this inconsistency:

> [Bowes]: You didn't tell the police that the first time you visited him in person you kissed and allowed him to touch your breasts and allowed him to put his hand on your crotch?
>
> [A.D.]: I didn't tell who?
>
> [Bowes]: The police.
>
> [A.D.]: In the report?
>
> [Bowes]: Whenever you spoke to them.
>
> [A.D.]: I don't remember what was said.
>
> [Bowes]: In fact, you told them it was not a physical relationship?
>
> [A.D.]: I don't remember.
>
> [Bowes]: And you told them there was no sexual relationship . . . You told him there was no sexual activity between you and Muhamed?
>
> [A.D.]: I don't remember what I said.

(Prior Case Vol. IV at 803-04.) We cannot say that using a transcript or videotape to refresh A.D.'s memory or impeach her would have had any measurable impact on the verdict. As the State notes, "the jury heard counsel's memory of the statement through questioning and that memory of the statement was never disputed." (Appellee's Br. at 27.) A.D. testified on direct examination that she was initially reluctant to talk about the incident with a male officer in the room during her interview. Detective Gregory Marlow testified that he excused himself from the interview because he sensed A.D.'s unease. Thus, using a video or transcript of A.D.'s police interview to show A.D. only revealed details of the assault in response to police questioning was not necessary as it would have only served to reiterate her previous testimony. Like with the translated emails, we cannot say that, had Bowes used a transcript or video of the police interview at trial, there is a reasonable probability the jury would have reached a different verdict. *See Marsillett v. State*, 495 N.E.2d 699, 706 (Ind. 1986) (holding failure to present cumulative testimony did not constitute ineffective assistance).

C. Trial Counsel's Discovery Tactics

[16] Finally, Dugonjic argues Bowes performed deficiently by failing to object on the ground that the State's questions and comments regarding Bowes' pre-deposition interview with A.D. constituted an evidentiary harpoon. Dugonjic also contends Bowes "was rendered ineffective by the trial court's admission of the evidence regarding his pre-trial discovery tactics." (Appellant's Br. at 56.) During A.D.'s direct examination, the following exchange occurred:

[State]: Did Mr. Bowes come to your door one day?

[A.D.]: Yes, he did.

[State]: Do you remember when that was?

[A.D.]: It was last year sometime.

[State]: And had he called you to see if it was okay if he came over?

[A.D.]: No, he didn't.

[Bowes]: Objection. Relevance, Your Honor.

[State]: Judge, I believe it's very relevant. He showed up on her doorstep unannounced with an investigator.

[Court[4]]: Why is that relevant?

[State]: To try to intimidate her.

[Court]: Objection overruled.

[State]: So did he call you ahead of time to try to make an appointment to see you?

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[4] The transcript lists the speaker as Bowes. However, in the argument regarding Dugonjic's motion for a mistrial, the State indicated that this comment was made by the court.

[A.D.]: No, he didn't.

* * * * *

[State]: And what did Mr. Bowes want you to do?

[A.D.]: He told me, he asked me if I know what with what was Muhamed charged, and I said I do now, and he told me to tell him the charges and they didn't know the terms that you are using. And he told me that if I know how bad those charges are and that they have some other solution like probation. And I told him I said you don't know what happened that night. My other prosecutor, Matt, he warned me about that he may come but I did not, I was prepared and I told him if he has to ask some other questions that he has to do a deposition. And also he asked me that I can go in some other room and we can talk alone, and I didn't want to.

(Prior Case Tr. Vol. IV at 760-61.) In a hearing outside the presence of the jury, Bowes denied trying to intimidate A.D. and moved for a mistrial. He argued the State's comments during this interchange violated a motion in limine prohibiting the parties from disparaging opposing counsel and amounted to prosecutorial misconduct. The trial court denied the motion for mistrial.

[17] The State contends that Dugonjic challenged this evidence on direct appeal and the doctrine of res judicata bars Dugonjic from challenging it again in his petition for postconviction relief.

> As a general rule, when this Court decides an issue on direct appeal, the doctrine of *res judicata* applies, thereby precluding its review in post-conviction proceedings. The doctrine of *res*

> *judicata* prevents the repetitious litigation of that which is essentially the same dispute. A petitioner for post-conviction relief cannot escape the effect of claim preclusion merely by using different language to phrase an issue and define an alleged error.

Ben-Yisrayl v. State, 738 N.E.2d 253, 258 (Ind. 2000) (internal citations omitted), *reh'g denied*, *cert. denied*, 534 U.S. 1164 (2002). On direct appeal, Dugonjic argued the trial court erred in admitting "evidence that defense counsel engaged in conduct that could be considered witness intimidation." *Dugonjic*, 2016 WL 6997978 at *5. We held that admission of the evidence did not amount to prejudicial error. *Id.* at *6.

[18] "An evidentiary harpoon is the placing of inadmissible evidence before the jury so as to prejudice the jurors against the defendant." *Perez v. State*, 728 N.E.2d 234, 237 (Ind. Ct. App. 2000), *trans. denied*. "In certain circumstances, the injection of an evidentiary harpoon by a prosecutor may constitute prosecutorial misconduct rising to the level of fundamental error and requiring a mistrial." *Roberts v. State*, 712 N.E.2d 23, 34 (Ind. Ct. App. 1999), *trans. denied*. Bowes challenged the introduction of evidence concerning his discovery tactics on the basis that the evidence was not relevant and impugned his integrity. While Bowes did not specifically object before the trial court on the ground that the State's tactics amounted to an evidentiary harpoon, his objection that the State violated a motion in limine to gain an advantage at trial touched on the same basic premise. Therefore, we will not revisit our holding on direct appeal that admission of the evidence did not prejudice Dugjonic. *See Seeley v. State*, 782 N.E.2d 1052, 1058 (Ind. Ct. App. 2003) (holding issue

presented on direct appeal was barred from being presented again in a postconviction relief petition), *trans. denied*, *cert. denied*, 540 U.S. 1020 (2003).

II. Ineffective Assistance of Appellate Counsel

[19] "We apply the same standard of review to claims of ineffective assistance of appellate counsel as we apply to claims of ineffective assistance of trial counsel." *Montgomery v. State*, 21 N.E.3d 846, 854 (Ind. Ct. App. 2014), *trans. denied*. The petitioner must prove his appellate counsel's performance fell below the prevailing standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the result of petitioner's appeal would have been different. *Id*. There are three categories of ineffective assistance of appellate counsel claims: "(1) denial of access to an appeal; (2) waiver of issues; and (3) failure to present issues well." *Id*. When a petitioner raises a claim of ineffective assistance of counsel for failure to raise an issue on appeal, we afford appellate counsel a high degree of deference "because the selection of issues for direct appeal 'is one of the most important strategic decisions of appellate counsel.'" *Hampton v. State*, 961 N.E.2d 480, 491 (Ind. 2012) (quoting *Bieghler v. State*, 690 N.E.2d 188, 193 (Ind. 1997), *reh'g denied*, *cert. denied*, 525 U.S. 1021 (1998)). "To evaluate the performance prong when counsel waived issues upon appeal, we apply the following test: (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." *Reed v. State*, 856 N.E.2d 1189, 1195 (Ind. 2006) (internal quotation marks omitted).

[20] Dugonjic argues his appellate counsel was ineffective because she did not raise the trial court's denial of two proposed jury instructions as an issue on appeal. At trial, Dugonjic tendered two proposed instructions. The first proposed instruction concerned consent:

> Proposed Instruction No. 1: The Defendant has raised the defense of consent. The consent of the complaining witness, [A.D.], constitutes an absolute defense.
>
> Where the defendant has raised the defense of consent, the State must prove beyond a reasonable doubt that consent was not given.
>
> If the State fails to prove beyond a reasonable doubt that consent was not given, you must find the defendant not guilty of the charges.

(Prior Case App. Vol. I at 229.) Dugonjic's second proposed jury instruction concerned consent and Dugonjic's mens rea:

> Proposed Instruction No. 2: Before you may return a conviction on Count 1, Criminal Deviate Conduct, and Count 3, Sexual Battery, you must be satisfied that the State has proved beyond a reasonable doubt that the Defendant knowingly forced the complaining witness to engage in deviate sexual touching, or the unwanted sexual touching. This means that the state must prove beyond a reasonable doubt that the alleged victim, [A.D.], did not consent and, in addition, that the Defendant did not reasonably believe that she had consented.

(*Id.*) The trial court declined to read the two proposed instructions to the jury except for the first sentence of Proposed Instruction No. 1 because the court

ruled the substance of the two proposed instructions was covered by the final instructions listing the offense elements.

[21] Final Instruction No. 5, regarding Count 1, stated:

> Before you may convict the Defendant, the State must have proved each of the following essential elements beyond a reasonable doubt:
>
> 1. The Defendant
>
> 2. knowingly
>
> 3. caused [A.D.] to submit to deviate sexual conduct when
>
> 4. [A.D.] was compelled by force.
>
> If the State failed to prove each of these essential elements beyond a reasonable doubt, you must find the Defendant not guilty of Criminal Deviate Conduct, a Class B felony.

(Prior Case App. Vol. II at 322.) Final Instruction No. 7, regarding Count 3, stated:

> Before you may convict the Defendant, the State must have proved each of the following essential elements beyond a reasonable doubt:
>
> 1. The Defendant
>
> 2. with the intent to arouse or satisfy his own sexual desires or the sexual desires of [A.D.]

3. knowingly

4. touched [A.D.] when [A.D.] was compelled to submit to the touching by force.

If the State failed to prove each of these essential elements beyond a reasonable doubt, you must find the Defendant not guilty of Sexual Battery, a Class D felony.

(*Id*. at 324.)

[22] Dugonjic argues the proposed instructions were not covered by the other instructions given to the jury. Instructing the jury is generally left to the sound discretion of the trial court. *Brakie v. State*, 999 N.E.2d 989, 993 (Ind. Ct. App. 2013), *trans. denied*. "When reviewing the refusal to give a proposed instruction, this court considers: (1) whether the proposed instruction correctly states the law; (2) whether the evidence supports giving the instruction; and (3) whether other instructions already given cover the substance of the proposed instruction." *Id*. The trial court abuses its discretion in instructing the jury if the instruction given is erroneous, and the instructions taken as a whole misstate the law or otherwise mislead the jury. *Id*. We will reverse a conviction because of an instruction error only if the error prejudices the defendant's substantial rights. *Hernandez v. State*, 45 N.E.3d 373, 376 (Ind. 2015).

[23] Dugonjic argued before the trial court that his tendered jury instructions were necessary because the State needed to prove A.D. did not consent to the sexual conduct. Dugonjic's Proposed Instruction No. 1 was substantially similar to

the defendant's proposed jury instruction in *Warren v. State*, 470 N.E.2d 342 (Ind. 1984), and Dugonjic's Proposed Instruction No. 2 was substantially similar to the defendant's proposed instruction in *Tyson v. State*, 619 N.E.2d 276 (Ind. Ct. App. 1993), *trans. denied*. In *Warren*, our Indiana Supreme Court held that use of force or lack of consent was an element of the charged offenses and, therefore, the trial court did not error in refusing the proposed instruction. 470 N.E.2d at 344. In *Tyson*, we held that the trial court did not err in refusing the defendant's tendered instruction because the final instructions given to the jury regarding the elements of the charged offenses

> properly instructed the jury regarding the culpability required for the offenses with which [the defendant] was charged, and properly focused the jury on the task of determining whether the State proved beyond a reasonable doubt that [the defendant] knowingly or intentionally used force to have sexual conduct with [the victim] when [the victim] was compelled by force.

619 N.E.2d at 298.

[24] Like in *Warren* and *Tyson*, Dugonjic's proposed final instructions were duplicative of the instructions given to the jury listing the elements of the charged offenses, and the trial court did not err in rejecting them. Final Instruction No. 5 and Final Instruction No. 7 addressed the defendant's required mens rea and the victim's lack of consent. They informed the jury that the State was required to prove that Dugonjic acted knowingly and compelled A.D. to submit to the sexual conduct by force. Therefore, had Dugonjic challenged the denial of his two tendered jury instructions in his direct appeal,

his challenge would have been unsuccessful. Consequently, Dugonjic's appellate counsel was not ineffective for choosing not to raise the issue. *See Trueblood v. State*, 715 N.E.2d 1242, 1259 (Ind. 1999) (holding appellate counsel was not ineffective for not raising issue unlikely to succeed on appeal), *reh'g denied*, *cert. denied*, 531 U.S. 858 (2000).

Conclusion

[25] Dugonjic was not prejudiced by his trial counsel's failure to secure a certified translator to testify at trial because Bowes was able cross-examine A.D. regarding the emails she exchanged with Dugonjic. Also, Dugonjic was not prejudiced by his counsel's failure to obtain a transcript or a playable video of A.D.'s police interview because Dugonjic's counsel impeached A.D. with his own recollection of the interview. Dugonjic's counsel also was not ineffective for failing to raise an evidentiary harpoon objection to evidence of his attempt to interview A.D. at A.D.'s home because such objection would have been unlikely to succeed. Dugonjic's appellate counsel was not ineffective for failing to challenge the denial of his tendered jury instructions because such challenge would not have been successful. Therefore, we affirm the trial court's denial of Dugonjic's petition for postconviction relief.

[26] Affirmed.

Riley, J., and Altice, J., concur.