MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Nicholas D. Houston,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent.

September 17, 2021

Court of Appeals Case No. 21A-PC-31

Appeal from the Marion Superior Court

The Honorable Anne M. Flannelly, Magistrate

Trial Court Cause No. 49G04-1611-PC-43701

Kirsch, Judge.

[1] Nicholas D. Houston ("Houston") appeals the denial of his petition for post-conviction relief, contending that the post-conviction court erred. On appeal,

he raises the following restated issue for our review: whether Houston received ineffective assistance of his trial counsel because he claims that trial counsel failed to move for severance of the counts involving separate victims.

[2] We affirm.

Facts and Procedural History

[3] The facts supporting Houston's convictions as set forth by this court in his direct appeal are as follows:

> The facts most favorable to the verdicts indicate that in 2013, Houston was employed as a corrections officer for a short-term offender program in Plainfield. As a corrections officer, Houston carried a badge. In early July 2013, sixteen-year-old J.H. was working as a prostitute on the corner of 23rd Street and College Avenue in Indianapolis. Houston pulled up in a Chrysler PT Cruiser and J.H. got in the car. J.H. introduced herself as "Dream" and told Houston that she charged $150 for a "blow job." *Tr.* at 20–21. She told him to drive to a nearby alley. Houston showed her a $100 bill, and she told him that she could accept only smaller bills. He then showed J.H. some $20 bills and a badge. Houston asked J.H. if she had ever been "solicited by a cop." *Id.* at 21. J.H. replied, "No," and Houston said, "Well, I just did." *Id.* J.H. was scared and told Houston that she wanted to get out of the car. Houston ignored her requests and kept driving. J.H. subsequently managed to escape by jumping out the car while it was still moving, injuring her hand, leg, and ankle.
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> Sometime after Independence Day that same month, J.H. was working as a prostitute on the corner of 22nd Street and College Avenue when Houston pulled up in a Kia Optima. At first, J.H. did not recognize Houston from the prior encounter. She got in

the car, introduced herself as Dream, and informed him that she charged $100 for oral sex. Houston agreed to that price and J.H. directed him to drive to the alley. Houston drove past the alley and asked J.H, "You don't remember me, do you?" *Id.* at 26. J.H. responded, "No." *Id.* Houston referred to himself as the "Night Lion" and told J.H, "I always stalk my prey. I told you I would see you again." *Id.* J.H. realized that Houston was the same man who had been driving the PT Cruiser, but this time dressed differently and wearing a cap. Houston showed J.H. his badge and she tried to jump out of his car. Houston grabbed J.H.'s ponytail, yanked her back into the car, and told her that she "wasn't going to get away from him [this] time." *Id.* at 27. Houston warned J.H. that if she tried to run, he would shoot her in the back. Because Houston had told J.H. that he was a police officer, she believed that he had a gun.

As he continued to drive, Houston asked J.H. for her real name and age. When J.H. informed him that she was sixteen years old, Houston replied, "I wish you were younger." *Id.* at 28. J.H. repeatedly asked Houston to take her home, but Houston refused. At one point they drove past a police station that Houston called "his office." *Id.* at 29. He eventually drove J.H. to his apartment located near 47th Street and Georgetown Road. Houston took J.H. inside his apartment and again threatened to shoot her if she tried to leave. When she asked him to take her home, he told her that she was going to jail. Houston then told J.H. that she "was lucky that he didn't feel like doing paperwork that night so in order for [her] not to go to jail" she had to perform oral sex. *Id.* at 32.

Houston pulled J.H. onto the couch close to him. He unzipped his pants, exposed his penis, and pushed her head down toward his penis. J.H. performed oral sex on Houston for "about forty-five minutes." *Id.* at 33. He slapped J.H. in the face and showed her his badge during this time. J.H. told Houston that he could not ejaculate in her mouth. He ejaculated on her chest and her

chin. J.H. felt upset, frustrated, and angry. Houston just laughed. Houston drove J.H. back to the area on College Avenue where he had originally picked her up. After the incident, J.H. did not call the police "because [she] thought [Houston] was the police." *Id.* at 42.

On July 31, 2013, M.H. was walking to a party when a four-door car with dark windows, which she thought belonged to her friend Keith, drove by her. The driver then turned the car around and pulled up next to M.H. She got into the car. However, after the car began moving, M.H. realized that the driver, Houston, was not her friend. She repeatedly asked Houston to let her out, but he kept driving. When they drove by a police station, Houston flashed his badge and told M.H. that she was going to jail for prostitution. M.H. wanted to get out of the car, but she was afraid that Houston would shoot her or arrest her for resisting law enforcement. Houston told M.H. that "it was [her] lucky day, that his wife was out of town and he didn't feel like doing paperwork." *Id.* at 97.

Houston stopped his car and told M.H. to give him a "blow job." *Id.* at 98. M.H. "didn't want to" but she "didn't want to go to jail, either." *Id.* Houston unzipped his pants and forced M.H.'s head down to his penis. After she performed oral sex on Houston for what seemed like a long time, M.H. began crying because she was unable to breathe and could not continue. She stated, "Take me to jail. I can't do it no more." *Id.* at 100. After Houston zipped up his pants and continued talking, M.H. said, "I don't believe you are a cop." *Id.* at 101. Houston drove a little ways up the street before letting M.H. exit the car. As Houston drove away, M.H. memorized his license plate number and called 911.

Both J.H. and M.H. subsequently identified Houston from a photo array. On August 20, 2013, the State charged Houston

> with: count I, class A felony criminal deviate conduct; count II, class C felony criminal confinement; count III, class C felony sexual battery; count IV, class D felony intimidation; count V, class D felony impersonation of a public servant; count VI, class A misdemeanor battery; count VII, class A misdemeanor battery by body waste; count VIII, class A misdemeanor intimidation; count IX, class C felony criminal confinement; count X, class B felony criminal deviate conduct; count XI, class C felony criminal confinement; count XII, class D felony sexual battery; count XIII, class D felony impersonation of a public servant; and count XIV, class A misdemeanor intimidation. The State subsequently dismissed the sexual battery charges, counts III and XII.
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> A jury trial was held on December 2 and 3, 2013. The jury found Houston guilty as charged. Thereafter, the trial court entered judgment of conviction on six of the counts and sentenced Houston to an aggregate sentence of fifty years, with five years suspended to probation.

Houston v. State, No. 49A02-1402-CR-102, 2014 WL 4793430, *1-*3 (Ind. Ct. App. Sept. 26, 2014), *trans. denied*.

[4] Houston filed a direct appeal and was represented by counsel. *Id*. at *1. On appeal, Houston alleged that the evidence presented at trial was insufficient to support his convictions. *Id*. A panel of this court issued an unpublished memorandum decision in which it affirmed the trial court and found that there was sufficient evidence to support Houston's convictions. *Id*. Houston sought transfer to the Indiana Supreme Court, which was denied.

[5] On November 9, 2016, Houston filed a petition for post-conviction relief, in which he alleged that he received ineffective assistance of both trial counsel and appellate counsel. *Appellant's PCR App. Vol. 2* at 10-12. An evidentiary hearing was held on October 31, 2017. *PCR Tr*. at 2. At the evidentiary hearing, trial counsel Patrick E. Chavis III ("Chavis") testified that he had been an attorney since 1969, part of his practice included criminal defense, and he has done numerous jury trials. *Id*. at 5. Chavis testified that he did not move to sever the charges and that he believed he "would not have just ignored" the possibility of severing the charges, but he did not recall his thought process. *Id*. at 20-21. He "didn't see a basis for severance" "for some reason" and believed that reason "may have been that they were similar acts . . . under 404(b) or something." *Id*. at 21, 26. On appeal, Houston was represented by Corey Scott, who testified that he thought he would have raised or considered an issue regarding severance if that issue had been preserved at trial. *Id*. at 29. After the evidentiary hearing concluded, on November 13, 2017, Houston submitted into evidence the record from his direct appeal. *Appellant's PCR App. Vol. 2* at 33-34.

[6] On December 14, 2020, the post-conviction court issued findings of fact and conclusions denying Houston's petition. *Id*. at 92-106. The post-conviction court found that a motion to sever "would not have been successful" because the charges were not joined simply because they were of same or similar character but instead were linked together by their "distinctive nature, common modus operandi, and motive." *Id*. at 99-100. The post-conviction court enumerated the significant similarities between the crimes:

> The record reflects that the charged criminal acts against M.H. and J.H. occurred within 45-day time period and began in downtown Indianapolis; he picked each of them up while driving a dark colored car; Houston believed both victims to be prostitutes and admitted, during his trial testimony, to having contact with both J.H. and M.H. for the purpose of soliciting them; the State argued in closing that Houston "targeted them because of their perceived vulnerability . . . to force sex acts from a prostitute who is probably not going to go to the police because she knows she is doing something illegal . . ." [*Trial Tr.* at] 171; Houston showed a badge to both women and identified himself as law enforcement to scare and mislead them into complying with his demands for oral sex, telling them it was their lucky day that he did not feel like doing paperwork to take them to jail; Houston physically forced the sexual conduct with both victims; both M.H. and J.H. gave similar descriptions of the perpetrator to the police and identified Houston from photo arrays without hesitation.

Id. at 100. The post-conviction court found the decision to allow severance in such a case is left to the trial court's discretion and denial of such a motion "would have been proper" here because, although there were twelve charges, "the evidence was not particularly complex" and "the jury could make a fair determination of Houston's guilt or innocence" based on the way the evidence was presented and the way the jurors were instructed. *Id*. at 101. Houston now appeals.

Discussion and Decision

[7] This is an appeal from the denial of a petition for post-conviction relief.

> We observe that post-conviction proceedings do not grant a petitioner a "super-appeal" but are limited to those issues available under the Indiana Post-Conviction Rules. [Ind. Post-Conviction Rule 1(1)]. Post-conviction proceedings are civil in nature, and petitioners bear the burden of proving their grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5). A petitioner who appeals the denial of [post-conviction relief] faces a rigorous standard of review, as the reviewing court may consider only the evidence and the reasonable inferences supporting the judgment of the post-conviction court. The appellate court must accept the post-conviction court's findings of fact and may reverse only if the findings are clearly erroneous. If a [post-conviction] petitioner was denied relief, he or she must show that the evidence as a whole leads unerringly and unmistakably to an opposite conclusion than that reached by the post-conviction court.

Massey v. State, 955 N.E.2d 247, 253 (Ind. Ct. App. 2011) (quoting *Shepherd v. State*, 924 N.E.2d 1274, 1280 (Ind. Ct. App. 2010) (citations omitted), *trans. denied*).

[8] Houston challenges the effectiveness of the representation of his trial counsel. "The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to counsel and mandates that the right to counsel is the right to the effective assistance of counsel." *Bobadilla v. State*, 117 N.E.3d 1272, 1279 (Ind. 2019). "We evaluate Sixth Amendment claims of ineffective assistance under the two-part test announced in *Strickland.*" *Rondeau v. State*, 48 N.E.3d 907, 916 (Ind. Ct. App. 2016) (citing *Strickland v. Washington*, 466 U.S. 668, 698 (1984)), *trans. denied*. To prevail on a claim of ineffective assistance of counsel, a petitioner must demonstrate that (1) counsel's representation fell

short of prevailing professional norms, and (2) counsel's deficient performance prejudiced the defendant such that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 687-88, 698. "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Rondeau*, 48 N.E.3d at 916 (quoting *Strickland*, 466 U.S. at 698). "The two prongs of the *Strickland* test are separate and independent inquiries." *Id*. (citing *Strickland*, 466 U.S. at 697). "Thus, '[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed.'" *Id*. (quoting *Strickland*, 466 U.S. at 697).

[9] Further, counsel's performance is presumed effective, and a defendant must offer strong and convincing evidence to overcome this presumption. *McCullough v. State*, 973 N.E.2d 62, 74 (Ind. Ct. App. 2012), *trans. denied*. We will not lightly speculate as to what may or may not have been an advantageous trial strategy, as counsel should be given deference in choosing a trial strategy that, at the time and under the circumstances, seems best. *Perry v. State*, 904 N.E.2d 302, 308 (Ind. Ct. App. 2009) (citing *Whitener v. State,* 696 N.E.2d 40, 42 (Ind. 1998)), *trans. denied*. Isolated omissions or errors, poor strategy, or bad tactics do not necessarily render representation ineffective. *McCullough*, 973 N.E.2d at 74.

[10] Houston argues that the post-conviction court erred when it denied his petition for post-conviction relief because he was denied the effective assistance of trial counsel. Specifically, Houston contends his trial counsel was ineffective for

failing to move for severance of the charges involving the two victims. He asserts that trial counsel's failure to request a severance constituted deficient performance because the charges were joined merely because they were of the same or similar character, and he was, therefore, entitled to severance as a matter of right. Houston further argues that, even if he was not entitled to severance as a matter of right, his trial counsel's performance was still deficient because the cumulative nature of the testimony of the victims unfairly bolstered the counts that should have been severed. Houston maintains that this failure to sever caused him prejudice because there was a reasonable probability that the outcome of the proceedings would have been different but for trial counsel's error, specifically because two separate trials would have prevented each victim's testimony from bolstering each other and resulted in a reasonable probability that he would have been acquitted in one or both trials.

[11] Pursuant to Indiana Code section 35-34-1-9(a):

> Two (2) or more offenses may be joined in the same indictment or information, with each offense stated in a separate count, when the offenses:
>
> (1) are of the same or similar character, even if not part of a single scheme or plan; or
>
> (2) are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.

If the offenses are joined for a trial in the same indictment or information solely upon the ground that they are of the same or similar character, the defendant shall have a right to a severance of the offenses. Ind. Code § 35-34-1-11(a); *Pierce v. State*, 29 N.E.3d 1258, 1265 (Ind. 2015).

[12] Charges may be sufficiently connected as a "single scheme or plan" to justify joinder under Indiana Code section 35-34-1-9(a)(2) if the State can establish they are connected by a distinctive nature, a common modus operandi linked the crimes, and the same motive induced the criminal behavior. *Heinzman v. State*, 895 N.E.2d 716, 720 (Ind. Ct. App. 2008), *trans. denied*. Modus operandi means method of working and refers to a pattern of criminal behavior so distinctive that separate crimes may be recognized as the work of the same wrongdoer. *Id*. (quotations omitted). "Mere repetition of similar crimes does not by itself warrant admission of the evidence of those crimes under the modus operandi rule; the inquiry must be whether the crimes are 'so strikingly similar that one can say with reasonable certainty that one and the same person committed them.'" *Id.*

[13] When offenses are joined under Indiana Code section 35-34-1-9(a)(2), the court shall grant a severance of offenses whenever the court determines that severance is appropriate to promote a fair determination of the defendant's guilt or innocence of each offense considering:

(1) the number of offenses charged;

(2) the complexity of the evidence to be offered; and

> (3) whether the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense.

Ind. Code § 35-34-1-11(a).

[14] Here, the post-conviction court found that a motion to sever "would not have been successful" because the charges were not joined simply because they were of same or similar character but instead were linked together by their "distinctive nature, common modus operandi, and motive." *Appellant's PCR App. Vol. 2* at 99-100. Over the course of about a month, Houston approached M.H. and J.H on three occasions on the near north side of Indianapolis and pretended to be a police officer soliciting prostitutes. *Houston*, 2014 WL 4793430 at *2-*4. He showed a badge to both victims and told them that they were "lucky" because "he didn't feel like doing paperwork" and would not take them to jail if they performed oral sex on him. *Id*. With both victims, he then unzipped his pants and forced the victim's head toward his penis, at which time both women were subjected to lengthy forced acts of oral sex with J.H. describing it as lasting "about forty-five minutes," and M.H. describing the act as lasting such a long time that she was unable to continue and asked to be taken to jail instead of continuing. *Id*. Both victims identified Houston in photo arrays and identified the same dark-colored Kia Optima that Houston drove during the second incident with J.H. and the incident with M.H. *Trial Tr*. at 104, 127-29, 140-43.

[15] Based on the evidence, these charged offenses consisted of similar sex crimes committed under similar circumstances using the same ploy of flashing a badge

and telling the victims that they could avoid jail by performing oral sex on the Houston and by abusing his same position of trust as a corrections officer, and Houston was not entitled to severed charges as a matter of right. Indiana courts have found no right to sever sex crimes that occur in a series -- even when multiple victims are involved -- where the acts are connected by similar motives and means. *See Heinzman*, 895 N.E.2d at 721 (no error in not severing offenses where CPS caseworker used position as caseworker to molest two victims, sent letters or cards to both victims while they were in residential facilities, molested both by fondling them while taking them on drives, and took both victims to same video store where he bought them both movies or video games); *Ennik v. State*, 40 N.E.3d 868, 877 (Ind. Ct. App. 2015) (no severance of right where defendant exploited his position as a babysitter to molest multiple victims under similar circumstances), *trans. denied*. Similarly, Houston used his position of authority to target and sexually assault multiple victims and perpetrated each crime under similar circumstances by targeting apparent prostitutes and pretending to be a police officer who did not want to complete the paperwork involved in arresting the victim and therefore forcing the women to perform oral sex instead of going to jail. We find that these circumstances showed that a common modus operandi linked the crimes and that the same motive induced the criminal behavior. We, therefore, conclude that the post-conviction court did not err when it found that a pretrial motion to sever, if filed by trial counsel, would not have been successful because the charges were not joined solely because they were of the same or similar character, and Houston was not entitled to severance as a matter of right.

[16] As Houston was not entitled to severance as a matter of right, whether to sever the multiple charges was within the trial court's discretion, and we will reverse its decision only on a showing of clear error. *Heinzman*, 895 N.E.2d at 720. The trial court must determine whether severance is appropriate to promote a fair determination of a defendant's guilt or innocence of each offense. *Id*. In making such a determination, the trial court must consider the number of offenses charged, the complexity of the evidence to be offered, and whether the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense. *Id.*

[17] Here, the post-conviction court concluded that the decision to allow severance in Houston's case would have been a matter within the trial court's discretion and denial of such a motion "would have been proper" because, although there were twelve charges, "the evidence was not particularly complex" and "the jury could make a fair determination of Houston's guilt or innocence" based on the way the evidence was presented and the way the jurors were instructed. *Appellant's PCR App. Vol. 2* at 101. While Houston was charged with twelve crimes, the focus of the evidence was only on three events and two incidents of forced sexual conduct. The evidence presented as to these incidents was not complex in nature, and much of the relevant evidence of Houston's crimes came directly from the victims, which made the evidence regarding each victim easily distinguishable at trial and allowed the jury to easily differentiate the evidence that supported the charges involving each victim. *See Philson v. State*, 899 N.E.2d 14, 17-18 (Ind. Ct. App. 2008) (upholding denial of discretionary

severance because the "evidence regarding each victim was easily distinguishable at trial and was largely based upon each victim's testimony"), *trans. denied*. Thus, if Houston's trial counsel had moved to sever the charges, the trial court would have been within its discretion to deny such a motion. We conclude that the post-conviction court did not err in finding that Houston failed to make a showing that his trial counsel's performance was deficient for not moving for a severance of the charges.

[18] Houston also argues that he suffered prejudice from his trial counsel not moving to sever the charges because he asserts that there was a reasonable probability that he would have been acquitted in one or both of the trials. We disagree. Houston seems to allege that if there had been two separate trials, both victims would not have testified and been able to bolster each other. However, evidence of each crime would still have been admissible if the crimes had been tried in separate trials under Evidence Rule 404(b)(2). Under Indiana Evidence Rule 404(b), "[e]vidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Ind. Evidence Rule 404(b)(1). However, the evidence "may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Evid. R. 404(b)(2).

[19] Here, evidence of the crimes against the other victim would have been admissible under Evidence Rule 404(b)(2) for non-propensity reasons including

motive, plan, identity, and intent. The post-conviction court found that the crimes were linked together "by a distinctive nature, common modus operandi, and motive." *Appellant's PCR App. Vol. 2* at 100. Evidence of the crimes against the other victim would have been admissible to prove intent because Houston put his intent at issue during trial. Our Supreme Court has explained that the intent exception in Evidence Rule 404(b) is to be narrowly construed and "will be available when a defendant goes beyond merely denying the charged culpability and affirmatively presents a claim of particular contrary intent." *Wickizer v. State*, 626 N.E.2d 795, 799 (Ind. 1993). When determining whether a defendant has raised a contrary intent, we have considered a defendant's pretrial statement to police, opening statement, cross-examination of the State's witnesses, or evidence in the defendant's case-in-chief. *Id.* The State may respond to the defendant's contrary intent "by offering evidence of prior crimes, wrongs, or acts to the extent genuinely relevant to prove the defendant's intent at the time of the charged offense." *Id*.

[20] At trial, Houston testified on his own behalf and admitted to picking up both victims because he believed that they were prostitutes but claimed no sexual acts occurred with either woman because they could not come to an agreement on a price. *Trial Tr*. 155-61. This testimony was an attempt by Houston to paint his intent as merely attempting to solicit prostitutes that did not come to fruition instead of what it was, his intent to pick up vulnerable women to force them to perform sexual acts under threat of arrest and the ruse that he did not want to do the paperwork involved in taking the women to jail. Additionally,

Houston testified that the presence of his badge at both crimes was not intended to abuse his authority or to impersonate a police officer but was merely inadvertent "[be]cause I always leave my badge there" and "I always keep" "my work ID . . . hanging up on my rearview mirror" and the "badge was on the [car] floor." *Id*. at 157, 160. This testimony by Houston would have allowed the State to present evidence of his other acts to show his intent to use his badge to intimidate women into performing sexual acts and to commit sex crimes against women he believed to be prostitutes. We, therefore, conclude that Houston has not shown he was prejudiced by his trial counsel not moving to sever the offenses. Because Houston has failed to prove that his trial counsel was ineffective, the post-conviction court did not err in denying his petition for post-conviction relief.

[21] Affirmed.

May, J., and Vaidik, J., concur.