MEMORANDUM DECISION

APPELLANT, PRO SE

Marvin Davis
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IN THE COURT OF APPEALS OF INDIANA

Marvin Davis,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent

August 17, 2022

Court of Appeals Case No.
21A-PC-2803

Appeal from the
Allen Superior Court

The Honorable
Frances C. Gull, Judge

Trial Court Cause No.
02D05-2101-PC-2

Vaidik, Judge.

Case Summary

[1] Following his convictions for rape and sexual battery, Marvin Davis sought post-conviction relief, arguing his trial and appellate counsel were ineffective on several grounds. The post-conviction court found counsel were ineffective for not challenging Davis's convictions on double-jeopardy grounds and vacated his sexual-battery conviction. In all other respects, the court denied relief. We affirm.

Facts and Procedural History

[2] In July 2018, Davis, a youth football coach and former semi-professional football player who was thirty-two years old, met sixteen-year-old P.H., the older sister of one of his players. Davis asked P.H. how old she was and expressed disbelief that she was only sixteen. When Davis learned that P.H. had been a cheerleader, he asked her if she was interested in becoming a peer coach for the youth-football-league cheerleaders. P.H. said yes, and a plan was made for Davis to pick up P.H. the next day and take her to meet someone in the cheerleading program.

[3] When Davis went to P.H.'s house the next day, he had already talked to someone and knew P.H. wasn't eligible to be a peer coach. But Davis picked up P.H. anyway. After they got in his car, Davis said he needed to stop by his house to get some papers he had forgotten. Davis invited P.H. inside for a glass

of water. P.H. texted her friend that she felt "uncomfortable." Trial Tr. Vol. II p. 152.

[4] What happened next was disputed at trial. P.H. testified that as they walked in the house, Davis asked her if she had ever been with an older man and told her he could show her how. Davis then closed the front door and pushed P.H. against it. Davis used his right arm to hold P.H.'s neck against the door and his other hand to pull down her pants. He proceeded to have sex with her. P.H. asked Davis to stop and tried to fight him off, but she couldn't because he was "a big ex-football player." *Id.* at 154. Davis told P.H. to shut up and put his hand over her mouth.

[5] Davis testified to a different version of events. He said that after walking in his house, they sat down on the couch and talked for about fifteen minutes. P.H. told Davis her shoulders hurt, and he started massaging her. Davis said one thing led to another, and they went to his bedroom, where they performed oral sex on each other and had sex on his bed. According to Davis, the sex was consensual, and he didn't use any force. Trial Tr. Vol. III p. 192.

[6] Afterward, Davis dropped off P.H. at her friend's house. P.H. then went home and told her mother what had happened. P.H.'s mother took her to the hospital and then to the Sexual Assault Treatment Center. At the hospital, a physician assistant observed a bruise on P.H.'s neck consistent with a pressure injury. Trial Tr. Vol. II p. 218. The physician assistant also conducted a pelvic exam and observed that P.H. had "moderate" to "significant" irritation of the

entrance to her vagina and vaginal walls. *Id.* at 220. At the Sexual Assault Treatment Center, the sexual-assault nurse examiner observed injuries to P.H. consistent with being "grabbed around the neck." Trial Tr. Vol. III p. 38. P.H. declined a pelvic exam because she was in pain, so the sexual-assault nurse examiner couldn't look for injuries there. Later that same day, P.H.'s mother took her to the Child Advocacy Center, where Lorrie Freiburger interviewed her.

[7] The State charged Davis with Level 3 felony rape and Level 6 felony sexual battery. At the jury trial, P.H. and Davis testified as detailed above. Freiburger testified about her interview of P.H., and the videotape of the interview (Exhibit 7) was admitted into evidence with no objection from defense counsel. During the interview, P.H. said Davis held her against the door when "he first did it" and that he then "grabbed" her by the arms and took her to his bedroom. Ex. 7 at 24:49. P.H. said that once Davis took her to his bed, he "climb[ed]" on top of her and penetrated her again. *Id.* at 40:53. After the video was played, the State asked Freiburger if she was surprised that when P.H. testified the day before, she didn't remember the incident in the bedroom. Freiburger said no, because she would expect P.H. to "remember the first event better, because that happened first and it was traumatic, and so usually people remember the onset of something and then details fade." Trial Tr. Vol. III p. 77.

[8] Defense counsel's strategy throughout trial was to challenge P.H.'s version of events. For example, during defense counsel's cross-examination of P.H., he asked her if she told the police officer who responded to the hospital that Davis

had thrown her on his bed, but P.H. said she didn't remember telling him that. Defense counsel then asked P.H. if she told Freiburger that Davis had led her into his bedroom, but P.H. said she didn't remember telling her that either. When defense counsel asked P.H. if she was ever in Davis's bedroom, she said no. Trial Tr. Vol. II p. 169. During closing argument, defense counsel highlighted the inconsistencies between P.H.'s pretrial statements, in which she claimed she was raped at the front door and on the bed, and her testimony at trial, in which she claimed she was raped at the front door only. *See* Trial Tr. Vol. III pp. 232-33.

[9] The jury found Davis guilty as charged. The trial court sentenced him to fifteen years for rape and two years for sexual battery, to be served concurrently. Davis appealed, arguing his sentence was inappropriate, and we affirmed. *Davis v. State*, No. 19A-CR-2505, 2020 WL 2463083 (Ind. Ct. App. May 13, 2020).

[10] In 2021, Davis, pro se, petitioned for post-conviction relief alleging his trial and appellate counsel were ineffective on several grounds. At the State's request, the post-conviction court ordered the case to be submitted by affidavit under Indiana Post-Conviction Rule 1(9)(b). In support of his petition, Davis submitted an affidavit, a supplemental affidavit, the probable-cause affidavit, a portion of a Department of Child Services report, a letter from the Allen County chief public defender, a report from the public defender's investigator, and a transcript of P.H.'s deposition. The State submitted an affidavit from Davis's trial counsel. The post-conviction court found that trial and appellate counsel were ineffective for failing to challenge Davis's convictions on double-

jeopardy grounds and vacated his sexual-battery conviction. In all other respects, the court found that Davis failed to prove his trial and appellate counsel were ineffective.

[11] Davis, pro se, now appeals.

Discussion and Decision

[12] Davis appeals the denial of his petition for post-conviction relief. A defendant who petitions for post-conviction relief must establish the grounds for relief by a preponderance of the evidence. *Hollowell v. State*, 19 N.E.3d 263, 268-69 (Ind. 2014). If the post-conviction court denies relief, and the petitioner appeals, the petitioner must show the evidence leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. *Id.* at 269.

I. Evidentiary Hearing

[13] Davis first contends the post-conviction court erred in not holding an evidentiary hearing. He cites Post-Conviction Rule 1(9)(b):

> 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.

We review a post-conviction court's "decision to forego an evidentiary hearing when affidavits have been submitted under Rule 1(9)(b) under an abuse of discretion standard." *Smith v. State*, 822 N.E.2d 193, 201 (Ind. Ct. App.

2005), *trans. denied*. This is so even if the affidavits raise issues of fact. *See id.* (noting that requiring "a full evidentiary hearing any time affidavits submitted under Rule 1(9)(b) create issues of fact would defeat the purpose of Rule 1(9)(b), which is to allow for more flexibility in both the presentation of evidence and the review of post-conviction claims where the petitioner proceeds pro se").

[14] Although Davis notes he asked the post-conviction court for an evidentiary hearing, he doesn't identify any evidence that could have been presented to the court only through an evidentiary hearing. Davis submitted affidavits from himself and several exhibits. He doesn't allege he couldn't get affidavits from anyone else. The post-conviction court didn't abuse its discretion in deciding to forego an evidentiary hearing.

II. Ineffective Assistance of Counsel

[15] Davis next contends his trial and appellate counsel were ineffective. When evaluating a defendant's ineffective-assistance-of-counsel claim, we apply the well-established, two-part test from *Strickland v. Washington*, 466 U.S. 668 (1984). *Bobadilla v. State*, 117 N.E.3d 1272, 1280 (Ind. 2019). 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., but for counsel's errors, there is a reasonable probability the result of the proceeding would have been different. *Id.*

A. Trial Counsel

[16] Davis argues trial counsel was ineffective for not challenging the admission of P.H.'s interview with Freiburger at the Child Advocacy Center on two grounds. First, he claims trial counsel should have objected to the interview because it constitutes inadmissible hearsay. The State doesn't dispute the interview constitutes inadmissible hearsay. Instead, the State argues trial counsel didn't object for strategic reasons. In support, the State cites trial counsel's affidavit:

> Mr. Davis and I agreed that we wanted the video to be played at trial because, in the video, the alleged victim made statements that were inconsistent with her later statements. As it turned out, the victim did make statements at trial that were inconsistent with those in the video. Specifically, in the video, the alleged victim had stated that Mr. Davis raped her on his bed after raping her at his front door, but at trial she said she did not remember the incident on the bed, and in fact denied that it had occurred. I endeavored to impeach the victim's testimony at trial by means of her prior inconsistent statements in the video.

Appellant's P-C App. Vol. II p. 167. Given trial counsel's strategy was to attack P.H.'s credibility, including highlighting her changing story, trial counsel wasn't ineffective for not objecting to the interview. *See Humphrey v. State*, 73 N.E.3d 677, 683 (Ind. 2017) ("There is no dispute that tactical or strategic decisions will not support a claim of ineffective assistance." (quotation omitted)).

[17] Second, Davis argues that even if trial counsel didn't object to the interview for strategic reasons, he should have asked the trial court for a limiting instruction that the jury could consider the interview for impeachment purposes only.

"[E]vidence admitted only for impeachment may not be used as substantive evidence." *Lawrence v. State*, 959 N.E.2d 385, 389 (Ind. Ct. App. 2012), *trans. denied*. When evidence is admitted for impeachment purposes only, the defendant is entitled to an instruction telling the jury that it may only consider the evidence in determining credibility. *See Humphrey*, 73 N.E.3d at 685 ("Even in instances where otherwise impermissible hearsay is admitted for the limited purpose of impeachment, if a defendant believes there is a danger that a jury could use a statement as substantive evidence, then it is incumbent upon the defendant to request that the jury be admonished that the statement be used to judge the witness's credibility only." (quotation omitted)).

[18] But even assuming trial counsel was deficient for not requesting a limiting instruction, Davis cannot show prejudice. The evidence shows Davis lured sixteen-year-old P.H. to his house under the guise of helping her get involved in cheerleading. P.H. felt something was amiss and texted her friend. Once inside Davis's house, P.H. said Davis forced her to have sex by holding her neck against the front door while Davis said they had consensual sex on the bed. Shortly after Davis dropped off P.H., she reported the rape to her mother. That same day, P.H. went to the hospital, the Sexual Assault Treatment Center, and the Child Advocacy Center. A physician assistant and a sexual-assault nurse examiner observed injuries to P.H.'s neck consistent with being grabbed. P.H. also had moderate to significant irritation to her vagina. Given this evidence, Davis has failed to prove there is a reasonable probability the result of the proceeding would have been different had the jury been instructed that P.H.'s

interview was to be considered for impeachment purposes only. *See McCullough v. State*, 973 N.E.2d 62, 78-79 (Ind. Ct. App. 2012) (holding that the absence of a limiting instruction didn't rise to the level of prejudice necessary to constitute ineffective assistance), *trans. denied*.

[19] Davis next argues trial counsel was ineffective for not challenging a variance "between the [charging] information and proof at trial." Appellant's Br. p. 30. Davis points out the probable-cause affidavit alleges P.H. was raped against the bedroom door while the evidence at trial shows she was raped against the front door. A variance, however, is an essential difference between the charging information (not the probable-cause affidavit) and proof at trial. *See Blount v. State*, 22 N.E.3d 559, 569 (Ind. 2014). Davis has identified no variance between the charging information and proof at trial.

[20] But even if there were a variance, it is not fatal. "Relief is required only if the variance (1) misled the defendant in preparing a defense, resulting in prejudice, or (2) leaves the defendant vulnerable to future prosecution under the same evidence." *Id.* The evidence shows Davis didn't have a door to his bedroom. Thus, Davis couldn't have been misled in preparing his defense, especially since he acknowledged the two had sex. *See* Appellant's P-C App. Vol. II pp. 167-68 (trial counsel stating he didn't challenge the probable-cause affidavit's mention of a bedroom door since Davis didn't have a bedroom door, and he assumed the probable-cause affidavit was a mistake given P.H.'s claim that Davis raped her against the front door). Thus, any variance is not fatal, and trial counsel wasn't ineffective for not making this argument.

[21] Although Davis's next argument is hard to follow, he appears to assert trial counsel was ineffective for allowing the State to introduce into evidence a redacted portion of the probable-cause affidavit and DCS report and not asking the trial court to admit the rest of the documents under the doctrine of completeness. *See Sweeney v. State*, 704 N.E.2d 86, 110 (Ind. 1998) ("When one party introduces part of a conversation or document, [the] opposing party is generally entitled to have the entire conversation or entire instrument placed into evidence." (quotation omitted)). But neither document was admitted into evidence at trial. *See* Trial Exs. 1-13. Davis's argument that trial counsel was ineffective for not seeking the admission of the rest of the documents necessarily fails.

[22] Finally, Davis argues trial counsel was ineffective for not objecting to alleged prosecutorial misconduct. This argument is also hard to follow, but Davis appears to assert the prosecutor committed misconduct by arguing two rapes occurred (at the front door and on the bed) when P.H. testified at trial that only one rape occurred (at the front door). As the State points out, although Davis claims this occurred during closing argument, he doesn't provide any citations to the record. At any rate, despite P.H.'s trial testimony that she was only raped at the front door, her interview—which was admitted as substantive evidence—contains P.H.'s description of a second rape on the bed (as explained above, defense counsel didn't object to the admission of the interview or request a limiting instruction). Freiburger said it wasn't surprising that P.H. didn't remember the rape on the bed at trial because people often remember what

happens first and suppress the rest. Given this evidence, and the fact that Davis admitted having sex with P.H. on the bed, there was no misconduct by the prosecutor. Trial counsel therefore wasn't ineffective for not objecting.[1]

B. Appellate Counsel

[23] Davis argues appellate counsel was ineffective for not arguing sufficiency of the evidence on direct appeal.[2] There are 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). Davis's claim falls into the second category: failure to raise an issue. Ineffective assistance is rarely found in these cases because the decision of what issues to raise is one of the most important strategic decisions to be made by appellate counsel. *Reed v. State*, 856 N.E.2d 1189, 1196 (Ind. 2006).

[24] This is a classic he-said/she-said case. The jury heard P.H.'s version and Davis's version and believed P.H. Davis's own evidence supports this. *See* Appellant's P-C App. Vol. II p. 150 (letter from the Allen County chief public defender to Davis that he sat through most of the trial and the jury convicted him because it believed P.H.). Because appellate courts do not judge the

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[1] To the extent Davis argues trial counsel was ineffective on other grounds, his arguments aren't cogent and are therefore waived. *See* Ind. Appellate Rule 46(A)(8)(a).

[2] Davis also argues trial counsel was ineffective for not arguing sufficiency of the evidence. But he cites the appellate standard of review. *See* Appellant's Br. p. 29.

credibility of witnesses on appeal, appellate counsel wasn't ineffective for not raising this dead-on-arrival argument on direct appeal.

[25] Affirmed.

Crone, J., and Altice, J., concur.