MEMORANDUM DECISION

APPELLANT PRO SE

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ATTORNEYS FOR APPELLEE

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IN THE COURT OF APPEALS OF INDIANA

John Ludack,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent

October 27, 2021

Court of Appeals Case No. 21A-PC-552

Appeal from the Marion Superior Court

The Honorable Cynthia L. Oetjen, Judge

The Honorable Anne Flannelly, Magistrate

Trial Court Cause No. 49D30-1707-PC-026773

May, Judge.

[1] John Ludack appeals following the trial court's denial of his petition for post-conviction relief. He raises one issue on appeal, which we revise and restate as whether the post-conviction court erred in finding that his trial counsel was not ineffective. We affirm.

Facts and Procedural History

[2] We summarized the facts of Ludack's offense in our opinion deciding his direct appeal:

> In June 2008, Ludack lived in an Indianapolis apartment with his girlfriend T.E. and her children: ten-year-old M.E. and her older brothers, T.V. and A.V. Ludack had been living with them approximately eighteen months. T.E. worked full-time at a pharmacy and attended cosmetology school. While T.E. was working and attending classes, Ludack cared for the children, with whom he had a good relationship.
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> One day in early June while T.E. was at work, Ludack told M.E. to go into her mother's bedroom. Once there, Ludack told her to take off her clothes. M.E. tried to leave, but Ludack blocked the door. M.E. said that she was going to call her mother, but Ludack had the phone and would not give it to her. M.E. was scared. Ludack finally let M.E. out of the bedroom, but would not let her call her mother.
>
> Ludack then told M.E. to go to her bedroom. He followed her into her room and shut the door behind him. He told her to remove her pants and underwear and get on the bed. She complied and lay on her back. Ludack forcibly held M.E. down as he put his penis in her vagina. M.E. was frightened and in pain. She tried to make him stop and struggled to get up. He

violently held down her legs using a great deal of force. Afterward, M.E. continued to feel pain and noticed that she was bleeding a little bit. Ludack told M.E. that if she told anyone that he "would hurt [her] mom or [Ludack and her mom] would be gone for a long time, or he would hurt anyone [that M.E.] told." Tr. at 30.

During the first two weeks of June, Ludack forced M.E. to have sexual intercourse several times. Once, it occurred in her mother's bedroom. Another time, M.E. fought back and scratched Ludack. Another time, Ludack attempted to force her to have sexual intercourse in the living room, but he was interrupted when T.V. and A.V. knocked on the apartment door and wanted to come in.

On June 15, 2008, Ludack left the apartment and never returned. Sometime after Ludack left, M.E. tearfully explained to T.V., using hand gestures, that Ludack had put his penis in her vagina. She told T.V. not to tell anyone because Ludack had said that he would hurt someone. T.V. did not tell anyone until January 2011, when he broke down and told his father, who immediately called T.E. She in turn immediately called the police. A forensic child interviewer interviewed M.E., and a medical doctor physically examined her. The physical exam did not reveal any physical evidence of the sexual abuse that had occurred two and a half years earlier. Indianapolis police detective Chris Lawrence interviewed Ludack, T.E., T.V., and T.V.'s father.

Ludack v. State, 967 N.E.2d 41, 42-43 (Ind. Ct. App. 2012), *trans. denied*.

[3] The State charged Ludack with two counts of Class A felony child molesting[1] and two counts of Class C felony child molesting.[2] The State also alleged that Ludack was a habitual offender. The trial court held a two-day jury trial on August 29, 2011, and August 30, 2011, and the jury returned guilty verdicts on each of the child molestation charges. Ludack then pled guilty to being a habitual offender. Ludack indicated in the pre-sentence investigation report that he was satisfied with his counsel's performance, and the trial court held a sentencing hearing on September 16, 2011. The trial court sentenced Ludack to an aggregate term of one hundred thirty years in the Indiana Department of Correction, which was based upon consecutive fifty-year terms for each of the Class A felony child molesting convictions and an additional thirty years as a result of the habitual offender enhancement.

[4] Ludack filed a direct appeal in which he argued the State presented evidence in violation of his Fifth Amendment right against self-incrimination and his sentence was inappropriate. *Id*. at 42. We rejected both of Ludack's challenges and affirmed the trial court. *Id*. Ludack then filed a pro se petition for post-conviction relief on July 21, 2017. Ludack alleged: "During cross-examination of the victim, M.E., defense counsel, Kelly Bauder, brought to light prejudicial evidentiary testimony not covered by the State during direct examination causing irreparable harm to Petitioner in front of the jury." (App. Vol. II at 24.)

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[1] Ind. Code § 35-42-4-3(a) (2007).

[2] Ind. Code § 35-42-4-3(b) (2007).

Ludack also asserted his trial counsel was ineffective for not objecting during the State's closing argument to assertions by the deputy prosecutor that M.E. was telling the truth. Ludack's final assertion of ineffective assistance was that his trial counsel failed to properly impeach the witnesses against him by not putting forth evidence of a monetary dispute between Ludack and M.E.'s mother or evidence of a Valentine's Day card from M.E. to Ludack.

[5] The post-conviction court held an evidentiary hearing on Ludack's petition for post-conviction relief on August 7, 2018. Kelly Bauder, Ludack's trial counsel, was the only witness who testified at the hearing. On March 8, 2021, the post-conviction court entered an order denying Ludack's petition. The post-conviction court concluded that Ludack's trial counsel's cross-examination of M.E. was part of a reasonable trial strategy because Ludack's trial counsel testified at the post-conviction hearing that she believed she asked questions about the forcefulness of Ludack's assaults and M.E.'s attempt to fight back in order to convey "to the jury that there should have been injuries to M.E. given that she was describing such a forceful act, yet there were no injuries, and that there was no evidence of a scratch to Ludack even though M.E. testified that she scratched him." (App. Vol. II at 16.) Further, the post-conviction court concluded that, in closing argument, the prosecutor connected her commentary regarding M.E.'s testimony with evidence in the record that supported the testimony, and therefore Ludack "failed to prove that the trial court would have been required to sustain an objection thereto." (*Id*. at 17-18.) The post-conviction court also found that Ludack could not put forth admissible

evidence to support his theories of impeachment and that none of Ludack's challenges to his trial counsel's performance presented a reasonable probability of a different outcome at trial.

Discussion and Decision

[6] The United States Constitution guarantees a criminal defendant the right "to have the assistance of counsel for his defense." U.S. Const., Am. VI. This right requires not only that counsel be present for the defendant but that the attorney provide effective assistance. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052 (1984), *reh'g denied*. We start our analysis of an ineffective assistance of counsel claim with the "strong presumption that trial counsel provided effective representation, and a petitioner must put forth strong evidence to rebut that presumption." *Warren v. State*, 146 N.E.3d 972, 977 (Ind. Ct. App. 2020), *trans. denied*, *cert. denied*, 141 S. Ct. 858 (2020). Isolated poor strategy, inexperience, and bad tactics do not in and of themselves amount to ineffective assistance of counsel. *Id*. Our standard of review for evaluating claims of ineffective assistance of counsel is well-settled:

> [W]e apply the well-established, two-part Strickland test. 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 the result of the proceeding would have been different.

Bobadilla v. State, 117 N.E.3d 1272, 1280 (Ind. 2019) (internal citation omitted). When the post-conviction court has entered findings of fact and conclusions of law, we will not disturb the post-conviction court's factual findings unless "the evidence as a whole 'leads unerringly and unmistakably to a conclusion opposite to that reached by the trial court.'" *Allen v. State*, 749 N.E.2d 1158, 1164 (Ind. 2001) (quoting *Weatherford v. State*, 619 N.E.2d 915, 917 (Ind. 1993), *reh'g denied*), *reh'g denied*, *cert. denied*, 535 U.S. 1061 (2002). However, we review the post-conviction court's conclusions of law de novo. *Warren*, 146 N.E.3d at 977.

[7] Like he did before the post-conviction court, Ludack proceeds on appeal pro se. "It is well settled that pro se litigants are held to the same legal standards as licensed attorneys. This means that pro se litigants are bound to follow the established rules of procedure and must be prepared to accept the consequences of their failure to do so." *Basic v. Amouri*, 58 N.E.3d 980, 983-84 (Ind. Ct. App. 2016) (internal citation omitted), *reh'g denied*.

I. Cross-Examination of M.E.

[8] Ludack believes his trial counsel's cross-examination of M.E. ultimately harmed his case, and he characterizes his attorney as "acting as a *de facto* prosecuting attorney instead of a defense attorney during trial." (Appellant's Reply Br. at 5.) However, "the nature and extent of cross-examination is a matter of strategy delegated to trial counsel." *Robles v. State*, 612 N.E.2d 196, 198 (Ind. Ct. App. 1993). We, therefore, afford due deference to counsel's

decisions, and "[w]e will not second-guess strategic or tactical decisions even though such choices may be subject to criticism or ultimately did not serve the defendant's interests." *Heyward v. State*, 769 N.E.2d 215, 219 (Ind. Ct. App. 2002).

[9] On direct examination, M.E. testified Ludack repeatedly "raped" her over the course of the summer of 2008 and that "[i]t hurt." (D.A. Tr.[3] at 27 & 29.) On cross-examination, Ludack's counsel asked:

> Q. And he used a lot of force to hold you down, is that right?
>
> A. Yes.
>
> Q. And it was violent, wasn't it?
>
> A. Yes.
>
> Q. I mean, 'cause he was holding you.
>
> A. Yes.
>
> Q. Forcing himself on you, right?
>
> A. Uh-hmm.

[3] Citations to "D.A. Tr." and "D.A. App." refer respectively to the transcript and appendix Ludack filed as part of the record in his direct appeal.

Q. Okay. And you didn't want any of this to happen?

A. No.

Q. And it—fair to say very uncomfortable?

A. Yes.

Q. Okay. And was your body tense?

A. Yes.

Q. Because you were trying to fight back, weren't you?

A. Yes.

Q. You wanted out of there, didn't you?

A. Yes.

Q. And you described it as hurting.

A. Yes.

(*Id*. at 46-47.) M.E. also testified on cross-examination that these incidents always felt "awful" and "painful." (*Id*. at 50-51.)

[10] Ludack's counsel explained during her testimony at the evidentiary hearing on Ludack's petition for post-conviction relief that she always has a strategy for asking the questions she asks at trial. She explained that while she could not

remember her exact trial strategy, she believed she asked these questions to contrast M.E.'s testimony regarding the forcefulness of the assaults with the results of the physical exam, which did not reveal any injuries. In fact, in her closing argument, Ludack's trial counsel referenced M.E.'s physical exam:

> Let's talk about Dr. Hicks. He says it was normal. So what. There's instances when it's not normal. There's instances when you can find scars, tears. There are cases where you could see that kind of thing, cases where you would expect to see that kind of thing. So, that gets us to M.E. Where would you expect to see those kinds of things? In a forcible rape, that's where you would expect to see scars and tears that didn't exist in this case. There's nothing. She describes being held down. She describes him being on top of her and using force and it hurt. She was very specific about that, that there was forced used. If there is a case in which you think you would see this kind of injury this is it. Yet there's nothing. There's nothing to corroborate her story. Nothing on her body to tell that this happened.

(D.A. Tr. at 147-48.) Therefore, we hold that Ludack's trial counsel's method of cross-examining M.E. did not amount to ineffective assistance of counsel because it was part of a reasonable trial strategy to cast doubt on M.E.'s account of events. *See Benefield v. State*, 945 N.E.2d 791, 799-800 (Ind. Ct. App. 2011) (holding counsel did not provide ineffective assistance when his decision not to object was part of a reasonable trial strategy).

II. State's Closing Argument

[11] Ludack also argues his trial counsel was ineffective for not objecting during the State's closing argument. Ludack contends several of the deputy prosecutor's

statements---"This is not a child who is lying to you" (D.A. Tr. at 143); "She told you the truth" (*id*. at 142); and "M.E. came to court and she told you the truth about what happened to her" (*id*. at 145) ---amounted to impermissible vouching. "To prove ineffective assistance for failure to object to the State's closing argument, a defendant must prove that his objections would have been sustained, that the failure to object was unreasonable, and that he was prejudiced." *Potter v. State*, 684 N.E.2d 1127, 1134 (Ind. 1997). We evaluate the decision not to raise an objection according to the state of the law at the time of the trial and in the context of the facts of the case. *Wine v. State*, 147 N.E.3d 409, 417 (Ind. Ct. App. 2020), *trans. denied*.

[12] "It is well settled that vouching for witnesses is generally impermissible." *Neville v. State*, 976 N.E.2d 1252, 1260 (Ind. Ct. App. 2012) (citing *Lainhart v. State*, 916 N.E.2d 924, 938 (Ind. Ct. App. 2009)), *trans. denied*. "However, 'a prosecutor may comment on the credibility of the witnesses as long as the assertions are based on reasons which arise from the evidence.'" *Id*. (quoting *Cooper v. State*, 854 N.E.2d 831, 836 (Ind. 2006)). "In judging the propriety of the prosecutor's remarks, we consider the statement in the context of the argument as [a] whole." *Hand v. State*, 863 N.E.2d 386, 394 (Ind. Ct. App. 2007). A prosecutor is entitled "to argue both law and fact during final argument and propound conclusions based upon [the prosecutor's] analysis of the evidence." *Id*.

[13] The State made the comments Ludack now believes were objectionable in the context of discussing the relationship between M.E.'s testimony and Final Jury

Instruction 8.[4] The State argued it is difficult and uncomfortable for most people to discuss sexual encounters in public and, therefore, the fact M.E. chose to go through that ordeal makes her testimony reliable. (*See* D.A. Tr. at 142 ("I challenge any one of you to get up on the witness stand and talk about your last consensual sexual experience, much less your last non-consensual sexual experience. It is not an easy job to do. But a witness who goes through that, you can rely on their testimony.").) The State also spoke to M.E.'s physical demeanor while testifying. (*Id*. ("These events made her sad and she cried. She was nervous to be here but she told you what happened and she told you the truth.").) The State noted that M.E. did not have a strained or acrimonious relationship with Ludack before the sexual assaults and that M.E. did not have a reason to want to get Ludack in trouble when she revealed to T.V. that Ludack had molested her. The deputy prosecutor did not use her closing argument to personally vouch for M.E. *See Ryan v. State*, 9 N.E.3d 663, 671 (Ind. 2014) ("The defendant is correct that a prosecutor may not personally

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[4] Final Jury Instruction 8 stated:

In determining the significance of a witness's testimony, some factors you may consider are:

- The witness's ability and opportunity to observe
- The behavior of the witness while testifying
- Any interest, bias or prejudice the witness may have
- Any relationship with people involved in the case
- The reasonableness of the testimony considering the other evidence
- Your knowledge, common sense, and life experiences.

(D.A. App. at 67.)

vouch for a witness."), *reh'g denied*. Rather, the deputy prosecutor made the comments Ludack now contests in the context of discussing the conclusions she believed the jury should draw from the evidence. Therefore, Ludack has not shown that, had his trial counsel objected to the State's closing argument, the objections would have been sustained. *See Lambert v. State*, 743 N.E.2d 719, 735-36 (Ind. 2001) (holding trial counsel was not ineffective for failing to object to comments made by prosecutor during closing argument because trial court would have been justified in overruling the objections), *reh'g denied*, *cert. denied*, 534 U.S. 1136 (2002).

III. Impeachment

[14] Lastly, Ludack asserts on appeal that his trial counsel was ineffective because she did not attempt to impeach the witnesses against him with evidence of a financial dispute between Ludack and M.E.'s mother or with evidence of alleged greeting cards purportedly sent to Ludack from M.E. and T.V. after the dates M.E. testified that Ludack had molested her. Ludack believes these methods of impeachment would have shown the jury that M.E. had a motive to falsely accuse him of molesting her and that M.E. and her brother were not afraid of him. However, Ludack's trial counsel testified at the hearing on Ludack's petition for post-conviction relief that she did not remember Ludack mentioning to her while she was preparing for trial any monetary dispute between Ludack and M.E.'s mother. Ludack did show his trial counsel a Valentine's Day card at the evidentiary hearing on his petition for post-conviction relief, and he attempted to have the card admitted into evidence.

The State objected on the basis that Ludack had not laid an adequate foundation to demonstrate that M.E. had sent the card to him, and the post-conviction court sustained the State's objection. The post-conviction court subsequently found:

> Simply, Ludack presented no admissible evidence of a money dispute or of valentine or father's day cards written by M.E. or her brother after the allegations but prior to trial. Ms. Bauder does not have any memory of Ludack telling her about these issues, and Ludack chose not to testify during his post-conviction hearing.

(App. Vol. II at 18.)

[15] As a pro se litigant, Ludack was required to adhere to the same standards as a trained attorney. *Zavodnik v. Harper*, 17 N.E.3d 259, 266 (Ind. 2014). Therefore, he must live with the consequences of his failures to provide testimony on his own behalf at the post-conviction hearing and to overcome the State's objection to his propounded evidence. *See Rose v. State*, 120 N.E.3d 262, 268 (Ind. Ct. App. 2019) (holding pro se post-conviction relief petitioner was required to accept the consequences of his failure to call as a witness an individual he had subpoenaed to appear and who was present in the courtroom during his evidentiary hearing), *trans. denied*. Consequently, the post-conviction court did not err in finding Ludack failed to meet his burden of proof because he did not put forth any admissible evidence that his trial counsel failed to adequately pursue known theories of impeachment. *See id*. at 269 (affirming

post-conviction court's findings that petitioner failed to put forth sufficient evidence to support his claim for relief).

Conclusion

[16] Ludack did not demonstrate that his trial counsel provided ineffective assistance. Her cross-examination of M.E. was part of a reasonable strategy to contrast M.E.'s testimony about the forcefulness of Ludack's assaults with the lack of physical evidence from M.E.'s exam. Ludack's proposed objections to the State's closing argument at trial would likely have been overruled, and therefore, Ludack's trial counsel was not ineffective for choosing not to raise such objections. Similarly, we cannot say that Ludack's trial counsel was ineffective in failing to impeach the witnesses against him because Ludack did not put forth any evidence that his trial counsel was aware at the time of his trial of the theories he now advances for impeachment. Therefore, we affirm the post-conviction court's denial of his petition for post-conviction relief.

[17] Affirmed.

Vaidik, J., and Molter, J., concur.