

DARDEN, Judge

STATEMENT OF THE CASE

Charles Durham appeals the denial of his petition for post-conviction relief.

We affirm.

ISSUE

Whether the post-conviction erred when it concluded that Durham had failed to establish his entitlement to post-conviction relief.

FACTS

On June 5, 2005, a jury found Durham guilty of rape, as a class B felony, and that he was an habitual offender. Specifically, the jury found that Durham had two prior unrelated felony convictions: an April 12, 1984, conviction of burglary, as a class B felony, and an April 12, 2001, conviction of attempted battery, as a class C felony. On July 6, 2005, the trial court sentenced him to twenty years for the rape conviction and thirty years for being an habitual offender.

On direct appeal, Durham's counsel argued that the evidence was insufficient to support his rape conviction. *See Durham v. State*, No. 49A02-0508-CR-747 (Ind. Ct. App. Feb. 16, 2006). We found that the evidence at trial had established the following:

On December 11, 2004, Durham knocked on the door of M.M.'s home and asked to use her telephone. M.M. had only met Durham, a friend of her sister, once before. She started to let him in, but remembered that she did not have a telephone. Durham had put his foot against the door and came inside anyway. Durham and M.M. then went to her living room and sat down on a couch. M.M.'s two sons were in the basement at the time. Durham started smoking crack and offered some to M.M., but she declined.

When Durham was done smoking, he put his hand over M.M.'s mouth, told her not to move, showed her a box cutter in his hand, and

threatened to hurt her if she did not comply. The force of Durham's grip on her face caused M.M. to bite down on her lip, which caused it to bleed. M.M. tried to get her sons' attention by kicking over a side table, but to no avail. Durham then pulled up M.M.'s nightgown and forced her to have sexual intercourse. Durham repeatedly threatened to hurt M.M. if she moved. Before he left, he told M.M. that she should not tell anyone about the rape or else he would send his "gang" after her. Transcript at 56.

M.M. was too scared to do anything that night. But she told her sister about the rape the next morning, and her sister called the police. After M.M. told the police officers what had happened, she went to a nearby hospital where a rape kit was performed. The nurse who conducted a physical examination of M.M. observed several lacerations around the external portion of her hymen and at the vaginal opening, as well as bruising on her cervix. The nurse opined that the lacerations and bruising had been caused by "blunt-force trauma" and that M.M. would have experienced extreme pain during the intercourse. *Id.* at 115. The sperm collected in the rape kit matched Durham's DNA.

Id. at *2-3. We concluded that sufficient evidence had supported Durham's conviction. As to his appellate argument of trial court sentencing error, we found that although the trial court's statement at the sentencing hearing appeared to indicate a separate sentence for the habitual offender count, the judgment of conviction properly reflected the latter to be a thirty-year enhancement of Durham's sentence for the rape. Hence, we affirmed.

On August 3, 2006, Durham filed a pro se petition for post-conviction relief. On January 11, 2010, Durham, by counsel, filed an amended petition for post-conviction relief that argued the ineffective assistance of appellate counsel.

The post-conviction court held an evidentiary hearing on February 17, 2010. Durham's appellate counsel, Julie Ann Slaughter, testified that she had "consider[ed] an argument that the Court's aggravating factors were in violation" of *Blakely v. Washington*; found *Pennington v. State*, 821 N.E.2d 899 (Ind. Ct. App. 2005) to be dispositive; and concluded that *Blakely* "was not implicated" in Durham's case. (PCR

Tr. 8, 10). Asked whether she “considered arguing that the trial court” erred in using Durham’s “prior convictions as aggravating factors,” Slaughter affirmed that she “did consider that,” but “based upon the case of *Elmore v. State*,” 657 N.E.2d 1216 (Ind. 1995), she had concluded that the trial court’s action was not inappropriate. *Id.* at 10.

On May 6, 2010, the post-conviction court issued its findings of fact and conclusions of law. It found that in preparing Durham’s appeal, appellate counsel was “well aware of the appellate case law.” (Order p. 3). It further found that she “rejected pursuing” challenges to Durham’s sentence “in light of . . . *Elmore* . . . and *Pennington*.” *Id.* The post-conviction court concluded that Durham’s appellate counsel was not ineffective for failing to argue that his rape sentence was erroneously enhanced because his sentence did “not violate *Blakely*.” *Id.* at 8. With respect to his claim that appellate counsel was ineffective for having failed to argue that “his enhanced sentence was improper because it was based solely on his prior convictions that were also used to support the habitual offender enhancement,” the post-conviction court concluded that the trial court had “engaged in exactly the deliberative process encouraged by *Elmore* and its progeny.” *Id.* at 9. “Consequently,” the post-conviction court concluded, Durham had “failed to demonstrate” that he received ineffective assistance of appellate counsel, and Durham had “failed to carry” his post-conviction burden of proof. *Id.*

DECISION

In a post-conviction proceeding, the petitioner bears the burden of establishing the grounds for relief by a preponderance of the evidence. *Henley v. State*, 881 N.E.2d 639, 643 (Ind. 2008). When appealing the denial of post-conviction relief, the petitioner

stands in the position of one appealing from a negative judgment. *Id.* Therefore, in order to prevail on his appeal from the denial of post-conviction relief, the petitioner must show that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. *Id.*

Moreover, Durham contends that he was denied the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the Federal Constitution. Therefore, he

must show that (1) counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

Pruitt v. State, 903 N.E.2d 899, 905-6 (Ind. 2009) (internal citations omitted). Further, on a claim of ineffective assistance of appellate counsel, a defendant must show "that appellate counsel failed to present a significant and obvious issue and that this failure cannot be explained by any reasonable strategy." *Id.* at 928, n.2.

In the instant appeal, Durham presses only one of the ineffective assistance issues presented to the post-conviction court, to wit: "that Slaughter should have argued that the trial court erred in citing Durham's Burglary and Attempted Battery convictions as aggravating factors because they had already been used to support the Habitual Offender Enhancement." Durham's Br. at 7-8.

At sentencing, the trial court noted that Durham “had 18 arrests and four convictions,” or “three” if not counting the conviction disputed by Durham.¹ (Tr. 278). The trial court then expressly found “as aggravating circumstances” Durham’s “criminal history . . . and that’s the ’83 burglary, the ’92 resisting law enforcement, which was a misdemeanor,” and “the 2000 attempted battery, which was a C felony.” (Tr. 279).

As noted above, the prior convictions underlying Durham’s habitual offender adjudication were his April 12, 1984, conviction of burglary, as a class B felony, and his April 12, 2001, conviction of attempted battery, as a class C felony. The date of the burglary offense was 1983, and the date of the attempted battery offense was 2000.

Durham begins by stating that at the time of his appeal, “it was somewhat unclear whether convictions supporting” an habitual offender enhancement “could also be cited as aggravating factors.” *Id.* at 8. Durham cites to *McVey v. State*, 531 N.E.2d 458 (Ind. 1988), which preceded *Elmore*. In *McVey*, the “only aggravating circumstances” given by the trial court were that appellant “had twice previously been convicted of felonies and that a firearm was used in the perpetration of the robbery.” *Id.* at 261. *McVey* held that because “the use of the gun was what raised the robbery to a Class B felony and the two previous felonies are what supported the habitual findings, they cannot standing alone be the aggravating circumstances to justify the enhanced sentence for the robbery.” *Id.* As the post-conviction court concluded, *McVey* “stands for the principle that prior convictions supporting an habitual offender enhancement cannot, standing alone, be the

¹ At the sentencing hearing, the trial court asked Durham whether the PSI “speaks the truth about [him],” and Durham answered, “Yes.” (Tr. 271). Durham’s counsel then stated that Durham “doesn’t recall” the 1983 battery with injury conviction reflected in the PSI, and that Durham “does not believe that’s his.” (Tr. 272).

aggravating circumstance used to justify an enhanced sentence of the underlying offense.” (Order, p. 8) (emphasis in original). As noted above, the trial court did not enhance Durham’s rape sentence based only on the two previous felony convictions supporting his habitual offender adjudication.

Further, Durham acknowledges *Elmore*’s holding that the citation of convictions which support the habitual offender enhancement as aggravating factors did not violate double jeopardy. 657 N.E.2d at 1220. Specifically, *Elmore* held that such was proper “consideration of past convictions as relevant episodes in the defendant’s personal background, which as a whole ends up constituting an aggravator of the basic sentence,” while the “felonies from the background” were used “to support an habitual offender enhancement.” *Id.*

Durham notes opinions of the Court of Appeals subsequent to *Elmore* that recognized inconsistencies on the issue of whether convictions supporting an habitual offender enhancement could also be cited as aggravating factors and the “overall uncertainty” in this regard. Durham’s Br. at 11. Similarly, in his reply brief, he repeatedly argues “the uncertainty that existed” in that regard at the time of Dunham’s appeal.² Reply at 5. However, Durham’s burden was to demonstrate that appellate counsel’s performance fell below an objective standard of reasonableness and “a reasonable probability” that if appellate counsel had argued as he now urges, “the result

² Any uncertainty has been resolved by statutory changes. Subsequent to “2005 statutory changes, trial courts do not ‘enhance’ sentences upon finding aggravators. Consequently, . . . when a trial court uses the same criminal history as an aggravator and as support for a habitual offender finding, it does not constitute impermissible double enhancement of the offender’s sentence.” *Pedraza v. State*, 887 N.E.2d 77, 80 (Ind. 2008).

of the proceeding would have been different.” *Pruitt*, 903 N.E.2d at 906. Specifically, if appellate counsel had argued on direct appeal that the trial court erred when it found his criminal history to be an aggravating factor, with the two felonies that it had specifically noted therein being the convictions that underlay the habitual offender enhancement, we would have reversed and remanded for resentencing.³

In *Elmore*, our Supreme Court held that the trial court did not err in using the defendant’s “prior offenses to both enhance his sentence for the current conviction and support an additional charge as an habitual offender.” 657 N.E.2d at 1220. Counsel testified that she was aware of *Elmore*, as well as other cases in that regard, when she prepared the appeal. Hence, her decision was “explained by a[] reasonable strategy.” *Pruitt*, 903 N.E.2d at 928, n.2. Moreover, pursuant to *Elmore*, “as relevant episodes in the defendant’s personal background,” past convictions may be expressly considered by the trial court, inasmuch as that background may properly constitute “an aggravator of the basic sentence.” *Id.* Thus, according to *Elmore*, the trial court properly found Durham’s criminal history of three past convictions to be an aggravating factor, which outweighed any mitigating factors, and consequently supported the enhanced sentence imposed for the rape.

In light of our Supreme Court’s holding in *Elmore*, and appellate counsel’s reasonable strategy based on her consideration of that opinion and other cases in that

³ Durham argues that “the prevailing professional norm for an Indiana appellate attorney is to raise an issue that is the subject of a split in authority when one line supports her client’s position.” Durham’s Br. at 12. For this proposition, he cites solely to *Fisher v. State*, 810 N.E.2d 674 (Ind. 2004). In *Fisher*, however, our Supreme Court expressly noted appellate counsel’s testimony that he “had no strategic reason for not raising” the issue argued as constituting his ineffective assistance, and that he did not “recall seeing” the issue in his review of the record. *Id.* at 678, n1. In other words, appellate counsel had not even considered raising the issue.

regard, we agree with the post-conviction court that Durham did not show that he was denied the effective assistance of appellate counsel. Therefore, Durham did not carry his post-conviction relief burden of proof.

Affirmed.

BAILEY, J., and NAJAM, J., concur.