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ATTORNEY FOR APPELLANT:

THEODORE J. MINCH
Sovich Minch LLP
McCordsville, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

MONIKA PREKOPA TALBOT
Deputy Attorney General
Indianapolis, Indiana

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IN THE
COURT OF APPEALS OF INDIANA

TYRONE A. SAUNDERS,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 35A05-0910-PC-607
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE HUNTINGTON CIRCUIT COURT
The Honorable Thomas M. Hakes, Judge
Cause Nos. 35C01-0204-FA-25 and 35C01-0606-PC-3

November 24, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Tyrone A. Saunders appeals the post-conviction court's denial of his petition for post-conviction relief. Saunders raises the following two issues for our review:

1. Whether he received ineffective assistance from his trial counsel.

2. Whether the trial court erred when it granted the State's motion to amend Count II of the information.

We affirm.

FACTS AND PROCEDURAL HISTORY

We discussed the facts relevant to Saunders' convictions in our memorandum decision on his direct appeal:

> On the afternoon of April 23, 2003, Dawn Howard (Howard) was driven by her mother to Saunders' mobile home in Andrews, Indiana, to retrieve some of her belongings. Howard and Saunders had been married for five years but had recently separated.
>
> Saunders answered the front door and let Howard enter the mobile home; Howard's mother waited outside in the car. After a brief discussion with Saunders, Howard went into the side bedroom, located to the right of the front door, where several of the items she had come to retrieve were stored. She pulled a comforter out of the bedroom closet and set it on the bed. She then began struggling to remove her "unicorn box," a small but heavy chest with a unicorn decoration that was filled with baseball and basketball cards, from the closet.
>
> As she was attempting to maneuver the unicorn box, Howard turned around and observed that Saunders, who was sitting on the bed, had placed his hand underneath the comforter; Howard also observed the handle of a hammer sticking out from underneath the comforter. The phone rang and Saunders answered it, leaving the bedroom. Howard then moved the hammer to a space between an armoire and the wall. Saunders returned to the bedroom and told Howard that he was going to help her push the unicorn box from behind.

Howard bent over to push the box and "felt this hit on the back of [her] head a couple times and then fell to the floor." Lying on her back, Howard observed that Saunders was holding the hammer. After a struggle over the hammer, Saunders let go of it, straddled Howard, and put his hands over her mouth and nose. Howard was able to turn and get on her hands and knees, but Saunders began to choke her from behind with his arm. Howard then felt a shock and realized that Saunders had applied a stun gun to her lower back. At this point, Howard became dizzy and stopped struggling with him; Saunders let go of her and told her to get up and go into the bathroom.

Once they were in the bathroom, Howard refused to sit on the toilet right next to the bathtub because the bathtub was full of water and she feared Saunders might push her into it. Believing it was the only way to survive, Howard then told Saunders that she would stay with him. She asked him to get the phone so she could call her mother waiting outside and tell her she was going to stay. When Saunders left to get the phone, Howard attempted to escape out the back door but could not get it unlocked.

Howard then told Saunders she was thirsty and needed to go to the kitchen. In the kitchen area, Howard again attempted to escape, this time through the front door. Saunders, however, grabbed her and pulled her back to the bathroom by her hair. He told her he would take her to the hospital but first wanted to wash the blood off her head; he suggested she place her head in the tub of water for this purpose. Balanced on the edge of the tub was [an] alarm clock/radio, plugged into the wall, with exposed wires sticking out of the power cord that appeared to have been freshly cut and rewired. After Howard refused to put her head in the tub, Saunders tried to clean off the blood with a towel. Howard told Saunders that she would tell anyone who asked that she fell.

As Howard and Saunders exited the mobile home together, Howard's mother got out of her car and asked what had happened. Howard got into her mother's car. Howard's mother told Saunders not to come to the hospital, and she called the police from her cell phone while driving Howard to the hospital. As a result of the attack, Howard suffered two head injuries, a broken knuckle, a scraped ankle, and burns on her back.

On April 25, 2002, the State filed an information charging Saunders with Count I, attempted murder, a Class A felony, I.C. §§ 35-41-5-1(a), 35-42-1-1; and Count II, criminal confinement, a Class B felony, I.C. § 35-42-3-3(b)(2)(A). On July 1 and 2, 2003, a jury trial was held. Immediately following the trial, the jury found Saunders guilty of both counts charged,

> and of Class B felony aggravated battery, a lesser-included offense of attempted murder. On August 4, 2003, the trial court held a sentencing hearing. Following the sentencing hearing, the trial court sentenced Saunders to fifty years for Count I, attempted murder, and twenty years for Count II, criminal confinement, to be served consecutively.

Saunders v. State, No. 35A04-0310-CR-503 (Ind. Ct. App. Dec. 28, 2004) (citations to the record omitted) ("Saunders I").

On direct appeal, Saunders, by counsel, raised the following allegations of error: (1) whether he received ineffective assistance of trial counsel; (2) whether the State presented sufficient evidence to support Saunders' conviction for attempted murder; (3) whether Saunders' convictions violated double jeopardy; (4) whether the trial court properly sentenced him; and (5) whether the court was biased against him. We affirmed on all grounds. Regarding his claim of ineffective trial counsel, we held:

> Essentially, Saunders asserts that his trial counsel's [preparation for and presentation of his defense] was deficient because [counsel] failed to call "key witnesses," including, most notably, Howard's treating physician, who "would likely have testified that Howard's injuries were not life threatening and would not result in permanent physical disfigurement." Saunders asserts that this testimony would have demonstrated a lack of specific intent to murder Howard. But life-threatening injuries and permanent physical disfigurement are not an element of the crime of attempted murder; in fact, this court has affirmed attempted murder convictions of defendants whose victims suffered no injury at all. Moreover, Saunders is merely speculating as to what Howard's treating physician might have said in testimony. Thus, Saunders has offered no evidence, let alone strong and convincing evidence, to overcome the presumption that his trial counsel's performance was effective. Because he has failed to satisfy either prong of the Strickland test, we find that Saunders' claim of ineffective assistance of trial counsel has no merit.

Id. (citations and footnote omitted). We also noted that Saunders waived his additional claims that his trial counsel was ineffective "for failing to inform [Saunders] that [his counsel] was on probation for a disciplinary violation at the time of Saunders' trial" and

"for failing to call a medical expert to testify[, which] would have bolstered Saunders' self-defense theory." Id. at nn. 1, 2. On both of those alternative arguments, we concluded that Saunders did not present admissible evidence from the record in support of his claims.

Saunders petitioned our Supreme Court for transfer. In May of 2005, the court accepted his petition and revised his sentence to an aggregate term of forty years. However, the court summarily affirmed Saunders' convictions. See Saunders v. State, No. 35S04-0505-CR-226 (Ind. May 17, 2005) (docket).

On June 29, 2006, Saunders filed his petition for post-conviction relief. The court held an evidentiary hearing on March 6, 2008, and, on June 1, 2009, the court denied Saunders' petition for relief. This appeal ensued.

DISCUSSION AND DECISION

Standard of Review

Saunders appeals the post-conviction court's denial of his petition for relief. As we have often stated:

> Post-conviction procedures do not afford a petitioner with a super-appeal, and not all issues are available. Timberlake[v. State], 753 N.E.2d [591, 597 (Ind. 2001)]. Rather, subsequent collateral challenges to convictions must be based on grounds enumerated in the post-conviction rules. Id. If an issue was known and available, but not raised on direct appeal, it is waived. Id. If it was raised on appeal, but decided adversely, it is res judicata. Id.
>
> In reviewing the judgment of a post-conviction court, appellate courts consider only the evidence and reasonable inferences supporting the post-conviction court's judgment. Hall v. State, 849 N.E.2d 466, 468 (Ind. 2006). The post-conviction court is the sole judge of the evidence and the credibility of the witnesses. Id. at 468-69. Because he is now appealing from a negative judgment, to the extent his appeal turns on factual issues

> [the petitioner-appellant] must convince this court that the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court. See Timberlake, 753 N.E.2d at 597. We will disturb the decision only if the evidence is without conflict and leads only to a conclusion contrary to the result of the post-conviction court. Id.

Lindsey v. State, 888 N.E.2d 319, 322 (Ind. Ct. App. 2008), trans. denied; see also Sawyer v. State, 679 N.E.2d 1328, 1328 (Ind. 1998) ("having once litigated his Sixth Amendment claim concerning ineffective assistance of counsel, [the petitioner-appellant] is not entitled to litigate it again[] by alleging different grounds.").

Issue One: Ineffective Assistance of Trial Counsel

Saunders first argues that the post-conviction court erred when it denied his petition for relief because he received ineffective assistance of trial counsel. Specifically, Saunders asserts that his trial counsel rendered ineffective assistance for the following four reasons: (1) counsel was on probation from the practice of law prior to and during Saunders' trial; (2) counsel failed to introduce evidence and/or testimony regarding "the almost total lack of serious injury" by Howard, which purportedly would have shown that "Howard's injuries were not life threatening and would not result in permanent physical disfigurement," Appellant's Br. at 13-14; (3) counsel failed to introduce evidence that the alarm clock/radio was incapable of causing electrocution because it was plugged into a ground fault interrupter; and (4) counsel failed to object to the State's references to Howard as a "victim."

All of Saunders' claims of ineffective trial counsel are precluded by the doctrine of res judicata. Saunders' counsel on direct appeal (who is also Saunders' post-conviction counsel) raised the first two grounds previously, and they were decided

adversely to Saunders. And while Saunders' counsel did not raise the third and fourth rationales in the direct appeal, he may not relitigate the issue of trial counsel's effectiveness simply by alleging different grounds in the post-conviction proceedings. Sawyer, 679 N.E.2d at 1328. Post-conviction procedures are not a super appeal and they do not afford Saunders the opportunity to relitigate his claims or to reconsider his prior strategy in how to best present those claims. See Lindsey, 888 N.E.2d at 322.

Still, in his reply brief, Saunders suggests that we invited him to raise these issues to the post-conviction court in Saunders I. Saunders misreads our decision. In holding that he waived some claims for failing to present supporting evidence, we noted that ineffective counsel claims are normally raised in post-conviction proceedings precisely because those proceedings allow for the discovery of such evidence. Saunders I, slip op. at n.1. That commentary was a critique of Saunders' decision to raise his issues on direct appeal. It was not an invitation to raise them again on post-conviction, which, as discussed above, would be contrary to Indiana law. Accordingly, the post-conviction court properly denied Saunders' petition on these claims.

Issue Two: Amendment to the Charging Information

Saunders also argues that the trial court erroneously permitted the State to amend the charging information after the omnibus date had passed. This issue was available to Saunders on his direct appeal, but he did not raise it. And Saunders did not raise this purported error to the post-conviction court. As such, he may not raise it for the first time in this appeal. See Allen v. State, 749 N.E.2d 1158, 1171 (Ind. 2001), cert. denied, 535

U.S. 1061 (2002); Lindsey, 888 N.E.2d at 322. This issue is waived, and the judgment of the post-conviction court is affirmed.

Affirmed.

BAKER, C.J., and MATHIAS, J., concur.