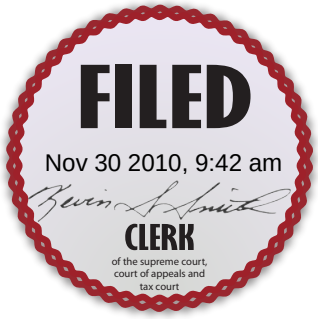

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IN THE
COURT OF APPEALS OF INDIANA

KEVIN WARE,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 69A01-1004-PC-204
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE RIPLEY CIRCUIT COURT
The Honorable Carl H. Taul, Judge
Cause No. 69C01-0512-PC-4

November 30, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-petitioner Kevin Ware appeals the denial of his petition for post-conviction relief. Ware contends that the post-conviction court erroneously found that he did not receive the ineffective assistance of trial and appellate counsel. Finding no error, and finding that his free-standing claim regarding a jury instruction is not available herein, we affirm.

FACTS

The underlying facts, as described in Ware's direct appeal, are as follows:

> S.H. was born in April 1985. In the fall of 1999, when S.H. was fourteen years old, he befriended Ware's adolescent son and, subsequently, began spending time at Ware's house. By the winter of 2000-2001, S.H. was spending the night at the Ware house at least every other weekend. S.H. also accompanied Ware and Ware's son on several vacations during this period. Specifically, Ware took his son and S.H. to Canada during Spring Break of 2000, to West Virginia in February 2001, and on a Caribbean Cruise during Spring Break of 2001.
>
> In September of 2000, Ware acquired a hot tub. Within one month of acquiring the hot tub and after S.H. had been in the hot tub a couple of times with Ware, Ware told S.H. that he did not need to wear swim trunks in the hot tub. After S.H. complied, Ware began to touch S.H.'s genitals with his foot while they were in the hot tub. Soon thereafter, Ware also began fondling S.H. with his hands, and S.H. began to touch Ware—these incidents occurred in the hot tub approximately two or three times a month. Moreover, every time S.H. was in the hot tub, he drank alcohol supplied by Ware. During a visit to Ware's house, a friend of S.H., J.M., observed Ware and S.H. sitting naked in the hot tub together and told S.H. that he found it "weird." Another friend of S.H., K.G., observed S.H. drinking alcohol while sitting in the hot tub and also noticed that S.H. and Ware did not wear swim trunks in the hot tub. While Ware and S.H. were in the hot tub, Ware's son was generally inside the house playing video games.
>
> At some point before the end of 2000, Ware lifted S.H. above the water of the hot tub and performed oral sex on him. Ware and S.H.

> then began going regularly to Ware's bedroom to watch pornographic movies while lying in bed. At the end of one of several parties Ware hosted in early 2001, S.H.'s older brother observed Ware and S.H. engaging in sexual conduct in Ware's bedroom, and he confronted S.H. the next day. Following this confrontation, S.H. and Ware continued their sexual relationship "the same as before." Within the time period of December 2000 to April 2001, Ware fondled S.H. between ten and twenty times and there were five episodes of oral sex. The sexual activity did not "slow down" until the summer of 2001.
>
> In August of 2002, Child Protective Services called the Batesville City Police Department to report Ware's sexual misconduct, which S.H. had disclosed in a counseling session. Shortly thereafter, Officer David Abel of the Batesville City Police Department formulated a plan involving S.H.'s father, who had befriended Ware when their sons began spending time together, and several officers from the Batesville City Police Department and the Indiana State Police Department. Specifically, the Batesville City Police Department outfitted S.H.'s father with an electronic listening device and sent him to confront Ware. Immediately following the confrontation, during which Ware admitted to S.H.'s father that he and S.H. had touched each other and had engaged in oral sex, several officers from both police departments served search and arrest warrants.
>
> On September 6, 2002, the State filed an information, charging Ware with Count I, sexual misconduct with a minor as a Class B felony; Count II, sexual misconduct with a minor as a Class C felony; and Count III, dissemination of matter harmful to minors, a Class D felony.
>
> On March 27, 2003, the State deposed S.H. On April 7, 2003, the State moved to file Count IV, sexual misconduct with a minor as a Class B felony; and Count V, sexual misconduct with a minor as a Class C felony.
>
> A jury trial commenced on September 2, 2003. Following the trial, on September 4, 2003, the jury found Ware guilt[y] of all counts.

Ware v. State, 816 N.E.2d 1167, 1172-73 (Ind. Ct. App. 2004) (internal citations omitted). The trial court imposed an aggregate twenty-year sentence, with five years

suspended to probation. It also ordered Ware to pay for any counseling S.H. received as a result of the crimes. On appeal, this court affirmed Ware's convictions and the aggregate length of his sentence. Id. at 1174, 1176, 1178, 1179. This court also, however, reversed the portion of Ware's sentence requiring him to pay restitution for S.H.'s counseling and remanded for a recalculation of the cost of counseling. Id. at 1179-80.

On March 13, 2009, Ware filed an amended petition for post-conviction relief, arguing a number of issues, including ineffective assistance of trial and appellate counsel.[1] On March 9, 2010, the post-conviction court issued its findings and conclusions in an order denying Ware's petition. Ware now appeals.

DISCUSSION AND DECISION

I. Standard of Review

The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); Perry v. State, 904 N.E.2d 302, 307 (Ind. Ct. App. 2009), trans. denied. When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. Perry, 904 N.E.2d at 307. On review, we will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. Id. Post-conviction procedures do not afford petitioners with a "super appeal." Richardson v. State, 800

[1] His initial petition was filed on December 13, 2005.

N.E.2d 639, 643 (Ind. Ct. App. 2003). Rather, they create a narrow remedy for subsequent collateral challenges to convictions that must be based upon grounds enumerated in the post-conviction rules. Perry, 904 N.E.2d at 307; see also P-C.R. 1(1).

II. Assistance of Counsel

Ware argues that the post-conviction court erroneously found that he did not receive the ineffective assistance of trial and appellate counsel. When making a claim of ineffective assistance of counsel, the defendant must first show that counsel's performance was deficient. Strickland v. Washington, 466 U.S. 668, 687 (1984); Pinkins v. State, 799 N.E.2d 1079, 1093 (Ind. Ct. App. 2003). This requires a showing that counsel's representation fell below an objective standard of reasonableness and that the errors were so serious that they resulted in a denial of the right to counsel guaranteed to the defendant by the Sixth and Fourteenth Amendments. Id. at 687-88. Second, the defendant must show that the deficient performance resulted in prejudice—in other words, that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. at 694. If a claim of ineffective assistance can be disposed of by analyzing the prejudice prong alone, we will do so. Wentz v. State, 766 N.E.2d 351, 360 (Ind. 2002).

Claims of ineffective assistance of appellate counsel are reviewed using the same standard applicable to claims of trial counsel ineffectiveness. Bieghler v. State, 690 N.E.2d 188, 193 (Ind. 1997). Ineffectiveness is rarely found when the issue is the failure to raise a claim on direct appeal. Id.

A. Trial Counsel

1. Motion to Suppress

Ware first argues that his trial counsel was ineffective for failing to move to suppress the tape-recorded statement that was obtained by the police using S.H.'s father as an informant. Specifically, Ware argues that the conversation, before which he was not advised of his Miranda[2] rights and which took place without counsel present, violated his rights under the Fifth and Sixth Amendments to the United States Constitution.

On September 6, 2002, the State filed the first group of charges against Ware. The next day, on September 7, police officers placed a wire on S.H.'s father before sending him to Ware's home, proceeding to record the conversation that took place between the two men thereafter.

Initially, we note that the Fifth Amendment requires police officers to advise a person of his Miranda rights—including the right to counsel—only if the person is both in police custody and subjected to interrogation. Campos v. State, 885 N.E.2d 590, 602 (Ind. 2008). Here, although S.H.'s father was acting at the behest of the police department, it certainly cannot be said that Ware was in police custody at the time the conversation occurred. Consequently, this conversation did not violate Ware's Fifth Amendment rights and trial counsel was not ineffective for failing to seek to suppress the recording on this basis.

[2] Miranda v. Arizona, 384 U.S. 436, 444 (1966).

A defendant's right to counsel under the Sixth Amendment attaches with the initiation of adversary criminal proceedings against the defendant. Davis v. U.S., 512 U.S. 452, 456-57 (1994). In Indiana, adversarial criminal proceedings are initiated with the filing of the information or indictment. Sweeney v. State, 704 N.E.2d 86, 106 (Ind. 1998). Therefore, once charges are filed, the police cannot initiate an interrogation of the defendant if the defendant asserts his right to counsel. Finney v. State, 786 N.E.2d 764, 767 (Ind. Ct. App. 2003).

Here, as noted above, the State had filed charges against Ware on the day before the recorded conversation took place. Consequently, Ware's Sixth Amendment right to counsel had, in fact, attached at the time he spoke to S.H.'s father. But at the time S.H.'s father spoke with Ware, Ware had not yet retained counsel. This court has explained that "when a defendant, whose Sixth Amendment right to counsel has attached, has retained an attorney and that attorney has made his representation of the defendant known to the State, the Sixth Amendment right to counsel has been invoked." Id.; see also Massiah v. United State, 377 U.S. 201 (1964) (holding that where defendant had retained a lawyer, his Sixth Amendment right to counsel was violated when police used his cooperating co-defendant to obtain a wired recorded incriminating statement without the defendant's knowledge or any consultation with defendant's attorney). Here, because Ware had not yet retained counsel, he did not invoke his Sixth Amendment right in that fashion. He also failed to invoke his right to counsel in any other way. Under these circumstances, it

is unlikely that a motion to suppress the recorded statement on the basis of the Sixth Amendment would have been granted.

Furthermore, we note that the content of Ware's statements in the recording did not contradict his theory of the case. Ware has always admitted that he engaged in sexual activity with S.H.; he merely denies that the conduct occurred before S.H.'s sixteenth birthday. In the recording, Ware admits to S.H.'s father that he and S.H. had engaged in certain sexual activities, but did not refer to any dates or other information that would suggest that he admitted to doing so before S.H. had turned sixteen. Consequently, the presence of this evidence in the record was not overly prejudicial to Ware, and we cannot conclude that its absence would have led to a different result. Therefore, we find that trial counsel was not ineffective for failing to move to suppress this recording based on the Sixth Amendment and, in any event, that Ware was not prejudiced as a result of counsel's decision not to do so.

2. Grooming Evidence

Next, Ware argues that trial counsel was ineffective for failing to object to certain evidence that Ware contends was irrelevant and prohibited by Evidence Rule 404(b). Specifically, Ware argues that his attorney should have objected to evidence that he allowed S.H. to drink alcohol and view pornographic movies, provided S.H. with gifts, took S.H. on trips, and wrote letters to S.H. containing inappropriate sexual innuendos. The State introduced this evidence to establish that Ware "groomed" S.H. to be amenable to his sexual advances.

Evidence Rule 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Here, that Ware provided S.H. with gifts and took him on trips did not constitute evidence of any crime or misconduct. Furthermore, the letters that he wrote to S.H. included inappropriate sexual innuendos but did not concern other crimes or misconduct. Consequently, any objection to this evidence based on Rule 404(b) would have been overruled.

As for the evidence that Ware allowed S.H. to drink alcohol and watch pornographic movies, we note that these acts occurred in conjunction with some of the sexual misconduct. Rule 404(b) does not bar evidence of uncharged misconduct that is inextricably bound with or intrinsic to the charged offense. Wages v. State, 863 N.E.2d 408, 411 (Ind. Ct. App. 2007); Willingham v. State, 794 N.E.2d 1110, 1116 (Ind. Ct. App. 2003). Other acts are intrinsic

> "if they occur at the same time and under the same circumstances as the crime charged." By contrast, the paradigm of inadmissible evidence under Rule 404(b) is a crime committed on another day in another place, evidence whose only apparent purpose is to prove the defendant is a person who commits crimes.

Wages, 863 N.E.2d at 411 (quoting Holden v. State, 815 N.E.2d 1049, 1054 (Ind. Ct. App. 2004)). Here, Ware's acts of providing S.H. with alcohol and permitting him to watch pornographic movies were inextricably bound with and intrinsic to the sexual misconduct charges. Consequently, any objection to this evidence based on Rule 404(b) would have been overruled.

Ware also contends that evidence relating to his alleged "grooming" of S.H. was irrelevant because he admitted engaging in sexual activity with S.H., arguing instead that the sexual activity occurred after S.H.'s sixteenth birthday. Initially, we note that evidence that Ware permitted S.H. to watch pornographic movies was relevant to the dissemination of matters harmful to a minor charge. As for the other "grooming" evidence, we find that this evidence was relevant to the sexual misconduct charges inasmuch as it established the ongoing, long-standing relationship between Ware and S.H. and shed light on Ware's motive and intent to commit the charged offenses. Furthermore, the relevancy of this evidence would have outweighed any prejudicial effects. Consequently, any objection to this evidence on relevancy grounds would not have been granted and we decline to find trial counsel ineffective on this basis.

3. DVD Receipt

Next, Ware argues that trial counsel was ineffective for failing to obtain the receipt for a pornographic DVD that Ware purchased and then showed to S.H. At trial, S.H. testified that Ware had showed him the pornographic movies in the winter of 2000, when he was fifteen years old, and that their sexual activity commenced after that time. After Ware's trial, a receipt for one of the three movies was found, establishing that the DVD had been purchased after S.H. turned sixteen.

Ware first argues that trial counsel was ineffective for failing to conduct an adequate investigation before trial, contending that had an adequate investigation been conducted, the receipt would have been found and introduced into evidence at trial. The

record reveals, however, that trial counsel was aware of the DVDs before trial but Ware could not remember where he had purchased them. Thus, the fact that the receipt was not found until after the trial was the result of Ware's faulty memory rather than counsel's investigation.

Additionally, Ware contends that this DVD receipt constitutes newly discovered evidence mandating a new trial. New evidence mandates a new trial only when a defendant demonstrates that:

> (1) the evidence has been discovered since trial; (2) it is material and relevant; (3) it is not cumulative; (4) it is not merely impeaching; (5) it is not privileged or incompetent; (6) due diligence was used to discover it in time for trial; (7) it is worthy of credit; (8) it can be produced upon retrial of the case; and (9) it will probably produce a different result at trial.

Taylor v. State, 840 N.E.2d 324, 329-30 (Ind. 2006). Here, the sole purpose of this DVD receipt would be to impeach S.H.'s testimony regarding the date on which he and Ware watched the pornographic videos. Furthermore, there were two other DVDs for which no receipts have been found, so it cannot be said that this receipt, on its own, would probably produce a different result at a retrial. Consequently, this evidence fails the fourth and ninth prongs of the test and does not mandate a new trial.

4. S.H.'s Treatment Records

At the time of Ware's trial, his attorney was aware that S.H. had been adjudicated delinquent for molesting his four-year-old sister and that S.H. had also participated in a sexual relationship with his older brother from a very young age. Following the

delinquency finding, S.H. attended White's Residential Sex Offender Treatment Program. Ware argues that trial counsel was ineffective for failing to obtain S.H.'s records from the facility and introduce them into evidence at trial.

Before trial, however, the trial court granted the State's motion in limine and prohibited the introduction of any evidence of S.H.'s past sexual misconduct, including his stay at White's. See Evid. R. 412 (prohibiting, with limited exceptions, the introduction of the past sexual conduct of a victim of a sex crime at the trial of the alleged perpetrator). Consequently, trial counsel was barred from introducing these records into evidence and any attempt he made to do so would have been overruled. We decline to find ineffective assistance on this basis.

Ware also argues that evidence that S.H. was "away," "in counseling," or "unavailable" opened the door to evidence of S.H.'s past sexual misconduct and that counsel was ineffective for failing to seek to introduce it at that point. Even if the door had been opened, it would have been for the extremely limited purpose of establishing why S.H. was in counseling. We simply cannot conclude that sufficient evidence would have been produced to change the outcome of the trial; consequently, Ware has failed to establish prejudice and we do not find ineffective assistance on this basis.

Next, Ware contends that the State committed a Brady[3] violation by failing to provide the defense with all of S.H.'s records from White's. This is a free-standing claim

[3] Brady v. Maryland, 373 U.S. 83 (1963).

of error that could have been raised in Ware's direct appeal but was not. Consequently, it is not available in post-conviction proceedings.

5. Hearsay

Ware next returns to the recorded conversation between S.H.'s father and Ware that was played for the jury. Ware contends that there were a number of statements in the recording that constituted inadmissible hearsay and that trial counsel was ineffective for failing to object to those statements. Specifically, Ware points to several statements made by S.H.'s father about things S.H.'s brother had said about his observations of inappropriate activity between S.H. and Ware.

Initially, we note that hearsay is a statement made by someone other than the declarant that is offered in evidence to prove the truth of the matter asserted. Evid. R. 801(c). Here, the tape recording was offered to establish Ware's admission to S.H.'s father that he had engaged in sexual activity with S.H. S.H.'s father's statements about his other son's observations were not offered to prove the truth of the matter asserted; consequently, they were not hearsay and an objection to that effect would not have been sustained.

Furthermore, trial counsel explained that he decided not to object to the hearsay statements because he wanted to have Ware's statement before the jury to establish his honesty, given Ware's decision not to testify at trial. We will not second-guess counsel for this reasonable trial strategy, and decline to find ineffective assistance on this basis.

6. Closing Argument

Next, Ware argues that trial counsel should have objected to a statement made by the prosecution during closing argument. Specifically, the prosecutor told the jury that S.H. "told you that [S.H. and Ware] had another sexual interlude after that ski trip." Tr. p. 511. S.H., however, had testified that no sexual activity had occurred after the ski trip. We simply cannot conclude that this brief, isolated misstatement made by the prosecution in any way affected the outcome of Ware's trial. In other words, even if trial counsel had objected and the trial court had granted the objection, Ware would still have been convicted. Consequently, he has failed to establish prejudice.

7. Jury Instructions

Ware next turns to the jury instructions, arguing that trial counsel should have objected to final jury instructions 13A and 15.

Final Instruction 13A states that the jurors "are instructed that evidence of alleged crimes or bad acts occurring outside the jurisdiction of the State of Indiana and Ripley County may only be considered by you as evidence of knowledge on the part of the Defendant and not as evidence of guilt." Appellant's App. on Direct Appeal p. 276. In Ware's direct appeal, this court found that Final Instruction 13A was a proper limiting instruction. Ware, 816 N.E.2d at 1176. Consequently, any objection to this instruction would have been overruled and we decline to find ineffective assistance on this basis.

Final Instruction 15 states that "[t]he sole and uncorroborated testimony of the alleged victim, if believed beyond a reasonable doubt, is sufficient to sustain a

conviction." Appellant's App. on Direct Appeal p. 278. A similar instruction was found to be improper in Ludy v. State, 784 N.E.2d 459, 460-62 (Ind. 2003), and Bayes v. State, 791 N.E.2d 263, 264-65 (Ind. Ct. App. 2003). Although Final Instruction 15 was likely improper, the jury was informed that it should consider all of the instructions, that the State had to prove each element beyond a reasonable doubt, and that the jurors were the exclusive judges of witness credibility. The jurors were also instructed on all of the elements of the charged offenses.

Under these circumstances, we cannot say that the instruction affected Ware's substantial rights or constituted fundamental error. See Sanders v. State, 764 N.E.2d 705, 715 (Ind. Ct. App. 2002) (holding that "[i]f an instruction is not fundamentally erroneous, then counsel is not ineffective for failing to object at trial"). Consequently, Ware has failed to establish prejudice and we decline to find ineffective assistance on this basis.

B. Appellate Counsel

Ware next argues that appellate counsel was ineffective for failing to appeal the admissibility of a redacted letter from Ware to S.H. The relevant portion of the letter, plus the redacted content, reads as follows:

> Recently there has [sic] been all kinds of things in the news about [C]atholic priests touching kids and some other dudes that improperly touched a minor. These guys are going to jail for a long time. ~~I know you're dealing with what you did, but you were under 18 or you would have dealt with adult charges. I just can't imagine spending 20-40 years of my life in jail.~~ That's scary!

Trial Ex. p. 47. Trial counsel objected to the admission of this letter, arguing that the redaction substantively changed the meaning of this passage.

Ware argues that appellate counsel should have raised the admissibility of this letter on appeal, contending either that the letter should have been admitted in its entirety or that the letter was wholly inadmissible. In considering whether counsel should have argued that the letter should have been admitted in its entirety, we note that the redacted portion of this letter refers to S.H.'s prior sexual misconduct. As noted above, it is likely that Evidence Rule 412 would have prohibited the admission of the redacted content; consequently, appellate counsel was not ineffective for failing to raise the issue because it was not clearly stronger than the issues that were raised on appeal.

In the alternative, Ware contends that appellate counsel should have argued that the letter should not have been admitted at all because the redacted version was so misleading. Even if we assume solely for argument's sake that it was erroneous to admit the letter into evidence, we would have found the error to be harmless given the evidence—including, most importantly, S.H.'s testimony—supporting Ware's conviction. In other words, we would not have found the admission of this arguably misleading redacted letter to have contributed in a meaningful way to Ware's conviction. Consequently, Ware has failed to establish prejudice as a result of appellate counsel's decision not to raise this issue in his direct appeal, and we decline to find ineffective assistance on this basis.

III. Jury Instruction Number 13

Finally, Ware argues that it was fundamental error for the trial court to give Final Instruction 13, which related to the time requirement of the sexual misconduct charges. It is well established that free-standing claims of fundamental error are not available in a post-conviction proceeding. State v. Hernandez, 910 N.E.2d 213, 216 (Ind. 2009). Consequently, we decline to review this argument.

The judgment of the post-conviction court is affirmed.

VAIDIK, J., and BARNES, J., concur.