APPELLANT PRO SE:

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IN THE
COURT OF APPEALS OF INDIANA

SAMUEL L. HOBBS, JR.,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 18A04-1101-PC-46
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE DELAWARE CIRCUIT COURT
The Honorable Marianne Vorhees, Judge
Cause No. 18C01-1007-FA-6

November 7, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Samuel L. Hobbs appeals the post-conviction court's denial of his petition for post-conviction relief. Hobbs raises ten issues for our review, which we consolidate and restate as whether he received ineffective assistance of trial counsel. We affirm.

FACTS AND PROCEDURAL HISTORY

The facts underlying Hobbs' convictions were stated by this court in his direct appeal:

> In the fall of 2003, Hobbs met L.M. at work. Early in 2004, they became romantically involved. Throughout their relationship Hobbs lived in various locations and, while he never lived with L.M., he occasionally spent the night with her. In the fall of 2004, as their relationship began to subside, Hobbs insisted he needed L.M.'s help in overcoming his drug addiction. Hobbs did not see L.M. between February of 2005 and June 19, 2005, although they wrote each other and spoke on the phone.
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> On June 19, 2005, Hobbs was released from prison. Hobbs and L.M. met at St. Francis church for the 9:00 a.m. service, after which L.M. drove Hobbs to cash a money order, then dropped him off at a Wendy's restaurant. From there, L.M. went to visit her parents. She did not see or speak with Hobbs the rest of the day. Upon returning home, L.M. had several messages from Hobbs on her answering machine that "started out nice and seemed to end up very violent, hateful." At 11:18 p.m., L.M. was awakened when she felt Hobbs crawling into bed with her. She told him to leave, but he refused and became physical, throwing her on her back, and eventually removing her pants and underwear, as well as his own clothing. Hobbs proceeded to put his finger in her vagina, followed by his penis. He later performed oral sex on her and penetrated her anally. L.M. fought Hobbs screaming and yelling for her neighbor, Lori Ford (Ford), all the while telling Hobbs to "stop, get off, leave me alone," and that it "hurt." Hobbs responded by telling her to shut up and covering her mouth with his hands. L.M. attempted to call 911, but Hobbs took the telephone from her and threw it. L.M. found the telephone under her bed the next day.
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> While L.M.'s encounter with Hobbs was happening, Ford was walking her dog underneath L.M.'s open bedroom window. Ford heard loud, piercing screams coming from the window. Ford called 911 to report

that her neighbor was being attacked, and stayed on the line with the 911 operator until the police arrived.

Officers Doug Narramore and Michael Shaffer (the Officers) responded to Ford's 911 call. The Officers heard cries for help coming from L.M.'s window. The Officers also saw a man later identified as Hobbs in the window and heard him advise L.M. to tell them to leave. L.M. refused and proceeded outside as instructed by the Officers. The Officers entered L.M.'s home, located Hobbs, handcuffed him, and removed him from the home. Officer Rodney Frasier photographed the scene and obtained hair and blood samples from Hobbs. L.M. was taken to Ball Memorial Hospital where she underwent a physical examination, including whether there was evidence of a sexual trauma.

That same evening between 11:00 and 11:30 p.m., Clark Tudor (Clark) was at home watching a basketball game when one of the two phone lines in his house rang; his wife Faye was asleep. He said hello, twice, but there was no response, so he just listened. He heard an unfamiliar female voice crying, "You're hurting me," and an equally unfamiliar male voice saying, "Shut up. Shut up. Be quiet." Then, he heard the woman scream, "unlike any other scream [he]'d ever heard in [his] life. It was a blood curdling scream."

Clark awoke his wife. He put the call on speakerphone in the kitchen where they both listened in on the call. Faye heard someone calling for Rory, or Lori as well as multiple screams, after which she went into the bedroom and called 911 on their other telephone line. She believed someone was "getting raped because it was really screaming." The phone call was traced by the 911 supervisor to L.M.'s house.

On June 22, 2005, the State filed an Information charging Hobbs with Count I, burglary resulting in bodily injury, a Class A felony, Count II, rape, a Class B felony, and Count III, criminal deviate conduct, a Class B felony. On January 10 through 12, 2006, a jury trial was held resulting in the following convictions: Count I, residential entry, a Class D felony; Count II, battery with bodily injury, a Class A misdemeanor; and Count III, criminal deviate conduct, a Class B felony. On February 7, 2006, Hobbs was sentenced to three years on Count I, residential entry, one year on Count II, battery with bodily injury, and twenty years on Count III, criminal deviate conduct, with Count I to run consecutive to Count III and Count II to run concurrent to Count III for an aggregate sentence of 23 years.

Hobbs v. State, No. 18A04-0602-CR-95, 2007 WL 166209 at *1-*2 (Ind. Ct. App. Jan. 24, 2007) (citations omitted). Hobbs' trial counsel argued that L.M. had consented to the sexual activity. Accordingly, he sought and received an instruction for battery, as a Class A misdemeanor, as a lesser included offense of rape, as a Class B felony. The jury found Hobbs guilty of the battery and acquitted him of rape.

In his direct appeal, Hobbs' appellate counsel challenged the admission of the Tudors' testimony and the testimony of an expert witness. Hobbs also challenged his sentence. We affirmed on all issues.

On July 19, 2007, Hobbs filed his petition for post-conviction relief, which he later amended in July of 2010. The State filed its response and, after a hearing in which Hobbs' trial counsel testified, the trial court denied Hobbs' petition on December 28, 2010. This appeal ensued.

DISCUSSION AND DECISION

Hobbs appeals the post-conviction court's denial of his petition for post-conviction relief. Our standard of review is well established:

> 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). When appealing the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment, Fisher v. State, 810 N.E.2d 674, 679 (Ind. 2004), and we will not reverse the judgment unless the evidence unerringly and unmistakably leads to the opposite conclusion, Patton v. State, 810 N.E.2d 690, 697 (Ind. 2004). We also note that the post-conviction court in this case entered findings of fact and conclusions of law in accordance with Indiana Post-Conviction Rule 1(6). We will reverse a post-conviction court's findings and judgment only upon a showing of clear error, which is that which leaves us with a definite and firm conviction that a mistake has been made. Hall v. State, 849 N.E.2d 466, 468 (Ind. 2006). Such deference is not given

> to conclusions of law, which we review de novo. Chism v. State, 807 N.E.2d 798, 801 (Ind. Ct. App. 2004).

Taylor v. State, 882 N.E.2d 777, 779-84 (Ind. Ct. App. 2008).

Although Hobbs styles his complaint in a manner that suggests he raises ten issues for review, in substance Hobbs raises a single issue, namely, whether he received ineffective assistance from his trial counsel, Joseph Hunter. A claim of ineffective assistance of counsel must satisfy two components. Strickland v. Washington, 466 U.S. 668 (1984). First, the defendant must show deficient performance: representation that fell below an objective standard of reasonableness, committing errors so serious that the defendant did not have the "counsel" guaranteed by the Sixth Amendment. Id. at 687-88. Second, the defendant must show prejudice: a reasonable probability (i.e., a probability sufficient to undermine confidence in the outcome) that, but for counsel's errors, the result of the proceeding would have been different. Id. at 694.

Hobbs contends that Hunter rendered ineffective assistance when he failed to tender an instruction on criminal confinement as a lesser included offense for criminal deviate conduct. To prevail on an ineffective assistance of counsel claim based upon a failure to tender a jury instruction to the trial court, the petitioner must demonstrate that tendering the proffered instruction would have been successful. See, e.g., Danks v. State, 733 N.E.2d 474, 489 (Ind. Ct. App. 2000), trans. denied. Further, as our supreme court has held:

> When a defendant requests an instruction covering a lesser-included offense, a trial court applies the three-part analysis set forth in Wright v. State, 658 N.E.2d 563, 566-67 (Ind. 1995). The first two parts require the trial court to determine whether the offense is either inherently or factually included in the charged offense. Id. If so, the trial court must determine

> whether there is a serious evidentiary dispute regarding any element that distinguishes the two offenses. Id. at 567; see also Brown v. State, 703 N.E.2d 1010, 1019 (Ind. 1998). Wright held that "if, in view of this dispute, a jury could conclude that the lesser offense was committed but not the greater, then it is reversible error for a trial court not to give an instruction, when requested, on the inherently or factually included lesser offense." Wright, 658 N.E.2d at 567.

Wilson v. State, 765 N.E.2d 1265, 1271 (Ind. 2002).

Indiana Code Section 35-42-4-2(a) provides that, "a person who knowingly or intentionally causes another person to perform or submit to deviate sexual conduct when: (1) the other person is compelled by force or imminent threat of force" commits criminal deviate conduct, as a Class B felony. On these facts, "deviate sexual conduct" refers to "a sex organ of one person and the mouth or anus of another person." Ind. Code § 35-41-1-9. One commits criminal confinement, as a Class C felony, when he "knowingly or intentionally: (1) confines another person without the other person's consent" and such confinement "results in bodily injury" to another. I.C. § 35-42-3-3 (emphasis added). The State concedes that Class C criminal confinement is, on these facts, a lesser included offense of Class B criminal deviate conduct. For our purposes, then, the only distinguishing element between criminal deviate conduct and criminal confinement was the occurrence of the deviate sexual conduct.

There was no dispute at Hobbs' trial that he engaged L.M. in deviate sexual conduct. In a letter he wrote to her, which was later admitted into evidence, Hobbs stated, "I . . . gave you oral," and, "I tried to penetrate your anus, you said it hurt. I did continue to try. . . ." Appellee's Br. at 11 (quoting State's Exh. 11). Accordingly, Hobbs' admissions nullified any evidentiary dispute between the alleged crime of

criminal deviate conduct and Hobbs' proffered lesser included offense of criminal confinement. Stated another way, a jury could not have concluded that the lesser offense was committed but not the greater. See Wilson, 765 N.E.2d at 1271. Thus, the trial court would have been within its discretion to deny Hobbs' proffered instruction, and Hobbs cannot demonstrate that the proffered instruction would have been successful if tendered. Hobbs' claim of ineffective assistance cannot prevail under these circumstances. See, e.g., Danks, 733 N.E.2d at 489.

In sum, the post-conviction court's denial of Hobbs' petition for post-conviction relief is not clearly erroneous. There was no serious evidentiary dispute regarding the only element that distinguishes criminal deviate conduct from criminal confinement in this case. As such, the trial court would have acted within its discretion to deny a tendered instruction for criminal confinement, and Hobbs cannot prevail on his claim of ineffective assistance. Accordingly, we affirm the post-conviction court's judgment.

Affirmed.

RILEY, J., and MAY, J., concur.