MEMORANDUM DECISION

IN THE

Court of Appeals of Indiana

David Monsivais, IV,
Appellant-Petitioner

v.

State of Indiana,
Appellee-Respondent

May 6, 2024

Court of Appeals Case No.
23A-PC-2410

Appeal from the St. Joseph Superior Court

The Honorable Jeffrey L. Sanford, Judge

Trial Court Cause No.
71D03-2209-PC-24

Memorandum Decision by Judge Crone
Judges Bailey and Pyle concur.

Crone, Judge.

Case Summary

[1] David Monsivais, pro se, appeals the denial of his petition for post-conviction relief (PCR). We affirm.

Facts and Procedural History

[2] In the summer of 2019, Monsivais began a relationship with C.R. In October 2019, after C.R. gave Monsivais a key to her home and added him to the property title, their relationship deteriorated. Early one morning, Monsivais pounded on C.R.'s bedroom window, screamed at her, and pulled light fixtures off the back of the house, which prompted her to call 911. Later that month, Monsivais slapped a stack of dishes out of C.R.'s hands, knocked her down, and choked her unconscious.

[3] Between October 2019 and March 2020, Monsivais threatened to harm and kill C.R. multiple times, threatened to kill himself if she refused to see him, and threatened to send her son a partially nude photo of her. On February 24, 2020, Monsivais called C.R. forty times. Two days later, as she was leaving the house to go for a walk, he grabbed her arm and slammed her knees and elbow into the concrete steps. Later that night, he injured her again by pushing her to the floor. In early March, C.R. attempted to end the relationship because she no longer felt safe around Monsivais. To avoid a violent reaction, she texted him while he was working out of state, but he continued to come to her home uninvited.

[4] Ultimately, C.R. obtained a protective order against Monsivais that was valid until March 27, 2020. When Monsivais found out about the order, he got angry and texted her that she was going to ruin his life. He followed her to and from work every day, attempted to run her car off the road, and tried to block her in the driveway and enter the garage.

[5] On March 15, 2020, Monsivais called C.R. over ninety times and texted her around 100 times. C.R. responded to some of the calls and texts because she knew that otherwise he would come to her home. In one text, Monsivais told C.R. that he wanted to have sex with her, would not take no for an answer, and was going to do whatever he wanted to do. When Monsivais arrived at C.R.'s home later that night, she refused to let him enter and hid in the dining room. Monsivais kicked in the front door and went upstairs. C.R. ran out the front door.

> Chasing after C.R., [Monsivais] attempted to apologize to her and asked her to come back inside the house. Instead of re-entering the house, C.R. went to the garage to smoke. In the garage, Monsivais attempted to undress C.R. and started touching her sexually, while she tried to avoid his advances. They eventually went inside the house and upstairs to the bedroom.
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> In the bedroom, Monsivais ordered C.R. to bend over so he could lick her anus. He told C.R. to assume sexual positions that she was uncomfortable with and he made her perform oral sex on him. Monsivais had "complete control of the situation" and when they finished sexual intercourse, Monsivais did not allow C.R. to leave the bed to wash up. When C.R. finally was able to call 911, she stated that Monsivais wanted to have sex with her

> and that she had cooperated because she did not want to get killed. When officers arrived at the residence, they noticed that C.R. was "[v]ery scared, hysterical, [and was] crying[.]"

Monsivais v. State, No. 21A-CR-2506, 2022 WL 3586505, at *2 (Ind. Ct. App. Aug. 19, 2022) (transcript citations omitted).

[6] On May 21, 2020, the State filed an information charging Monsivais with level 3 felony rape and level 6 felony residential entry based on the events described in the previous paragraph. On September 30, 2020, before the matter was set for trial, the State amended the information by filing additional charges of level 6 felony stalking (committed between October 1, 2019, and July 15, 2020), level 6 felony strangulation (committed on or about October 27, 2019), and two counts of class A misdemeanor domestic battery (committed on or about October 27, 2019, and February 26, 2020). Direct Appeal App. Vol. 2 at 61-62. Monsivais's trial counsel, Mark Lenyo, did not object to the amendment.

[7] On August 9, 2021, Monsivais's jury trial commenced. The jury acquitted him of strangulation and found him guilty of the remaining offenses. The trial court sentenced him to an aggregate term of twenty years. On direct appeal, Monsivais challenged the sufficiency of the evidence supporting his rape and stalking convictions, which another panel of this Court affirmed.

[8] In September 2022, Monsivais filed a pro se petition for post-conviction relief, which he later amended. Monsivais alleged that Lenyo was ineffective in four respects: (1) failing to object to the amended charging information; (2) failing to object to allegedly inadmissible hearsay testimony regarding the domestic

batteries from two nurses who had treated C.R.; (3) failing to investigate allegedly exculpatory evidence that he and C.R. continued to have an intimate relationship after he raped her; and (4) failing to object to alleged prosecutorial misconduct that misled the jury about that relationship. The State did not file a response to the petition. In September 2023, after a hearing at which Lenyo testified, the post-conviction court issued an order denying Monsivais's petition. This appeal ensued.

Discussion and Decision

[9] Initially, we note that Monsivais has chosen to proceed pro se. "It is well settled that pro se litigants are held to the same legal standards as licensed attorneys." *Lowrance v. State*, 64 N.E.3d 935, 938 (Ind. Ct. App. 2016), *trans. denied* (2017). This means that they must follow our established rules of procedure and be prepared to accept the consequences when they fail to do so. *Id*. "We will not become a party's advocate, nor will we address arguments that are inappropriate, improperly expressed, or too poorly developed to be understood." *Barrett v. State*, 837 N.E.2d 1022, 1030 (Ind. Ct. App. 2005), *trans. denied* (2006). "Failure to put forth a cogent argument acts as a waiver of the issue on appeal." *Id*.

[10] Our standard of review in post-conviction proceedings is well settled:

> Post-conviction proceedings are civil proceedings in which the defendant must establish his claims by a preponderance of the evidence. Post-conviction proceedings do not offer a super appeal, rather, subsequent collateral challenges to convictions

> must be based on grounds enumerated in the post-conviction rules. Those grounds are limited to issues that were not known at the time of the original trial or that were not available on direct appeal. Issues available but not raised on direct appeal are waived, while issues litigated adversely to the defendant are res judicata. Claims of ineffective assistance of counsel and juror misconduct may be proper grounds for post-conviction proceedings.
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> Because the defendant is appealing from the denial of post-conviction relief, he is appealing from a negative judgment and bears the burden of proof. Thus, the defendant must establish that the evidence, as a whole, unmistakably and unerringly points to a conclusion contrary to the post-conviction court's decision. In other words, the defendant must convince this Court that there is no way within the law that the court below could have reached the decision it did.

Wilkes v. State, 984 N.E.2d 1236, 1240 (Ind. 2013) (citations and quotation marks omitted). "We will not reweigh the evidence or judge the credibility of witnesses, and will consider only the probative evidence and reasonable inferences flowing therefrom that support the post-conviction court's decision." *Hinesley v. State*, 999 N.E.2d 975, 981 (Ind. Ct. App. 2013), *trans. denied* (2014).

[11] Monsivais asserts that he is entitled to post-conviction relief because he was denied the right to effective assistance of trial counsel guaranteed by the Sixth Amendment to the United States Constitution. *See Strickland v. Washington*, 466 U.S. 668, 686 (1984) ("[T]he right to counsel is the right to effective assistance of counsel.") (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)). To succeed on an ineffective assistance of counsel claim, the defendant must satisfy

the two-part standard articulated in *Strickland*. *Humphrey v. State*, 73 N.E.3d 677, 682 (Ind. 2017). This requires the defendant to show that "1) counsel's performance was deficient based on prevailing professional norms; and 2) that the deficient performance prejudiced the defense." *Weisheit v. State*, 109 N.E.3d 978, 983 (Ind. 2018), *cert. denied* (2019).

[12] To establish deficient performance, the defendant must show that counsel's representation "fell below an objective standard of reasonableness, committing errors so serious that the defendant did not have the 'counsel' guaranteed by the Sixth Amendment." *Humphrey*, 73 N.E.3d at 682 (quoting *McCary v. State*, 761 N.E.2d 389, 392 (Ind. 2002)). "Isolated poor strategy, inexperience, or bad tactics does not necessarily constitute ineffective assistance." *Hinesley*, 999 N.E.2d at 982. In reviewing counsel's performance, "[a] strong presumption arises that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Morgan v. State*, 755 N.E.2d 1070, 1073 (Ind. 2001). "[C]ounsel's performance is presumed effective, and a defendant must offer strong and convincing evidence to overcome this presumption." *Williams v. State*, 771 N.E.2d 70, 73 (Ind. 2002).

[13] "To demonstrate prejudice from counsel's deficient performance, a petitioner need only show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Baumholser v. State*, 186 N.E.3d 684, 689 (Ind. Ct. App. 2022) (citation and quotation marks omitted), *trans. denied*. "Although the two parts of

the *Strickland* test are separate [inquiries], a claim may be disposed of on either prong." *Grinstead v. State*, 845 N.E.2d 1027, 1031 (Ind. 2006). "*Strickland* declared that the 'object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, ... that course should be followed.'" *Id.* (quoting *Strickland*, 466 U.S. at 697).

[14] As for Monsivais's first ineffectiveness claim regarding Lenyo's failure to object to the amended charging information, we note that "[w]hen an ineffective assistance of counsel claim is based on trial counsel's failure to make an objection, the appellant must show that, had a proper objection been made, it would have been sustained." *Sauerheber v. State*, 698 N.E.2d 796, 807 (Ind. 1998). Indiana Code Section 35-34-1-5(b) provides in pertinent part that a charging information "may be amended in matters of substance … upon giving written notice to the defendant at any time … before the commencement of trial … if the amendment does not prejudice the substantial rights of the defendant." Monsivais argues that the additional charges constituted matters of substance for purposes of the statute and that the amendment prejudiced him because the new charges "foreclosed the original defense of consent" to the rape charge. Appellant's Br. at 16; *cf. Hobbs v. State*, 160 N.E.3d 543, 551 (Ind. Ct. App. 2020) (stating that amendment does not violate defendant's substantial rights if it "does not affect any particular defense"), *trans. denied* (2021).

[15] Monsivais's prejudice claim is a nonstarter. The strangulation (of which Monsivais was acquitted) and the domestic batteries occurred either weeks or

months before the rape, and, as demonstrated by Lenyo's closing argument at trial, the stalking charge[1] did not foreclose a consent defense to the rape charge.[2] *See* Trial Tr. Vol. 3 at 139 ("C.R. never said that [Monsivais] forced her to have sex with him."), 144 ("It was a relationship that no doubt had problems. It had problems, but it wasn't stalking."). Moreover, Lenyo had plenty of time—more than ten months—to prepare for and defend against the new charges. *See Hobbs*, 160 N.E.3d at 551 (stating that, ultimately, question of whether defendant's substantial rights were violated by amendment of charging information is whether defendant had reasonable opportunity to prepare for and defend against new charges, and that two or more months is commonly deemed sufficient). In sum, Monsivais has failed to establish that an objection to the amended charging information would have been sustained.

[16] Regarding the claim that Lenyo was ineffective in failing to object to allegedly inadmissible hearsay testimony about the domestic batteries,[3] Monsivais has

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[1] The amended charging information simply alleged that Monsivais stalked C.R. between October 1, 2019, and July 15, 2020, in violation of Indiana Code Section 35-45-10-5(a), which makes the offense a level 6 felony. Indiana Code Section 35-45-10-1 defines "stalk" in pertinent part as "a knowing or an intentional course of conduct involving repeated or continuing harassment of another person that would cause a reasonable person to feel terrorized, frightened, intimidated, or threatened and that actually causes the victim to feel terrorized, frightened, intimidated, or threatened." In closing argument, the prosecutor stated, "For the harassing behavior, there's a whole slew of things. Showing up, physical violence, screaming at her, blowing up her phone.… [Monsivais] was threatening to kill himself if she didn't respond to calls. That alone would cause someone to feel threatened and harassed." Trial Tr. Vol. 3 at 131-32.

[2] The consent defense was tenuous from the outset. As Lenyo told Monsivais at the post-conviction hearing, "it was difficult to get out of the rape case with a consent when you kicked in and forced your way into [C.R.'s] residence and came in and had some type of sexual activity with her." PCR Tr. Vol. 2 at 18.

[3] Monsivais argues that the State defaulted this claim by failing to file a response to his PCR petition, but he cites no authority for this assertion.

failed to develop a cogent argument establishing that, even if hearsay objections would have been proper and would have been sustained, Lenyo's failure to object constituted deficient performance and that, but for this unprofessional error, there is a reasonable probability that the result of the trial would have been different. Accordingly, this issue is waived. *Barrett*, 837 N.E.2d at 1030.

[17] Monsivais's third ineffectiveness claim is also waived. When cross-examining C.R. at trial, Lenyo got her to admit that on March 30, 2020, "two weeks after [she] had supposedly been sexually assaulted by [Monsivais, she] sent him a screenshot from [a sex] video that [she] had made with him[,]" apparently consensually, in 2019. Trial Tr. Vol. 2 at 163. Lenyo also got C.R. to admit that she "wanted [Monsivais] to share other videos with [her,]" which she described as "[t]he ones [she] never gave consent to[.]" *Id*. at 164. Monsivais asserts that if Lenyo had investigated further, he would have discovered that C.R. had also sent him some romantic texts and a "streaming live sex video screenshot" of her taken by Monsivais on April 1, 2020, all of which should have been presented to the jury as what Monsivais characterizes as "exculpatory evidence." Appellant's Br. at 26, 20.

[18] We first observe that C.R.'s actions in late March and April 2020 are not dispositive of whether she consented to Monsivais's sexual assault on the night of March 15. We further observe that the evidence to which Monsivais refers is essentially cumulative of C.R.'s admission that she sent a sexually arousing image to Monsivais after the assault and wanted to receive some in return. And ultimately, we conclude that Monsivais has failed to develop a cogent argument

establishing that Lenyo performed deficiently in this respect and that, but for this unprofessional error, there is a reasonable probability that the result of his trial would have been different.

[19] Finally, Monsivais argues that Lenyo was ineffective in failing to object to alleged prosecutorial misconduct, which consisted of "deliberately mislead[ing] the jury regarding [C.R.'s] perjury of a continuous romantic relationship." *Id*. at 29. This argument appears to be based on C.R.'s testimony on direct examination that she "didn't ever want to have contact with [Monsivais] again" after the assault. Trial Tr. Vol. 2 at 102. To the extent that this testimony conflicts with her testimony on cross examination, Monsivais has failed to establish that the prosecutor deliberately sought to mislead the jury on this point, and we note that Lenyo effectively exposed this conflict, as discussed above. Moreover, we reiterate that C.R.'s post-assault actions are not dispositive of whether she consented to the assault. Once again, Monsivais has failed to establish either deficient performance or resulting prejudice, so we affirm the post-conviction court in all respects.

[20] Affirmed.

Bailey, J., and Pyle, J., concur.

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