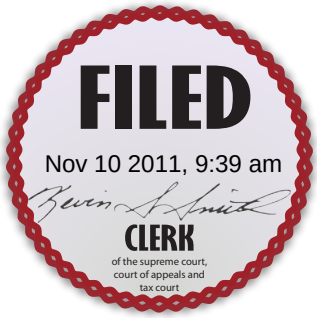

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IN THE
COURT OF APPEALS OF INDIANA

WILLIAM C. DAVIS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 65A01-1004-PC-208
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE POSEY SUPERIOR COURT
The Honorable James M. Redwine, Special Judge
Cause No. 65D01-0808-PC-382

November 10, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

William C. Davis appeals the post-conviction court's denial of his petition for post-conviction relief. Davis raises three issues, which we consolidate and restate as:

I. Whether Davis was deprived of a procedurally fair post-conviction hearing; and

II. Whether Davis was denied the effective assistance of trial counsel and appellate counsel.

We affirm and remand.

The relevant facts as discussed in Davis's direct appeal follow:

> Davis met J.C. and J.H. through their mother, Machelle Yott, and he met R.H. through R.H.'s uncle and mother.[1] J.C. and R.H. were born respectively February 17, 1992 and December 19, 1990.[2]
>
> Davis introduced R.H. to J.C. and J.H. The boys spent time with Davis and stayed overnight at his home. On various occasions, Davis penetrated J.C.'s anus with his penis and fingers, placed his mouth and hands on J.C.'s penis, and forced J.C. to place his mouth and hands on Davis's penis. Similarly, Davis placed his penis against R.H.'s buttocks, placed his mouth and hands on R.H.'s penis, and forced R.H. to place his mouth and hands on Davis's penis. J.C. witnessed Davis's acts against R.H, while R.H. witnessed at least some of Davis's acts against J.C. Further, Davis forced each victim to place his mouth on the other victim's penis.
>
> In July, 2004, Yott called 9-1-1 regarding a conversation she had had with J.C. about some of these events. Evansville Police Department Officer Jim Harpenau interviewed all three boys and spoke briefly with Davis by telephone. On September 16, 2004, the State charged Davis in Posey County with Failure to Register as a Sex Offender, a Class D felony,[3] and five counts of Child Molesting—two counts, Class A and C felonies, for acts against J.C., two counts, Class A and C felonies, for acts against J.H.,

[1] R.H. is not related to the brothers.

[2] The parties stipulated that Davis was born September 21, 1972, making him older than age 21 at the time of the alleged incidents.

[3] Ind. Code § 5-2-12-9. During the 2006 Session, that chapter was repealed and replaced with I.C. §§ 11-8-8-1 to -20.

> and one count as a Class C felony for acts against R.H. The next day, the trial court issued a warrant for Davis's arrest.
>
> Over six to eight months, Posey County Officer Dan Gaffney attempted to locate Davis, ultimately contacting the Federal Bureau of Investigation ("FBI") for assistance. FBI Agent Matthew Mohr ("Agent Mohr") compared a photograph in the arrest warrant with the photograph of a North Dakota driver's license for Mark Allen Davis. After comparing the photographs, Agent Mohr and two other FBI agents went to the Fargo residence listed for Mark Allen Davis. Davis opened the door to find the agents with their weapons drawn. Agent Mohr identified himself as "FBI." Transcript at 183. Upon recognizing Davis as the person they were seeking, Agent Mohr entered the residence. As the agents were detaining Davis, Agent Mohr said in an inquiring tone, "William." Tr. at 184. Davis responded, "I'm Mark. William is my brother. This happens all the time." Id. Despite Davis's statement, Agent Mohr remained convinced that the person detained was William Davis. Davis agreed to go to the local sheriff's office to be fingerprinted for identification purposes. Because Davis had a broken leg, the agents were assessing how to transport him. During that time, the agents told Davis that "it would be easier on all of us if he would tell us the truth." Tr. at 185. Shortly thereafter, Davis said, "I'm Bill. My life is over." Id.

Davis v. State, No. 65A01-0605-CR-212, slip op. at 2-4 (Ind. Ct. App. May 2, 2007).

On November 4, 2005, Davis moved to sever the six counts into four different trials, as follows: both counts related to J.C., both counts related to J.H., the sole count for acts against R.H., and the count for failing to register as a sex offender. Id. at 4. Subsequently, Davis filed his Amended Motion for Severance, seeking consideration of the six counts in three trials—a separate trial for the sex-offender-registry count and a separate trial for the count alleging acts against R.H. Id. The State stipulated to severance of the count for Failure to Register as a Sex Offender. Id. As to severance of the count for acts against R.H., the trial court denied Davis's motion, concluding that the five counts constituted a common modus operandi. Id. Meanwhile, Davis moved

unsuccessfully to suppress evidence of the statements he made to Agent Mohr in Fargo. Id. Davis renewed both objections during the trial. Id.

Davis moved for change of venue from Posey County, citing pre-trial publicity. The court denied Davis's motion, and the parties stipulated to bringing in jurors from Monroe County. Id. at 4 n.4. During closing argument, the prosecutor stated:

> Finally, I'd like to touch on, uh, Mr. Davis' leaving the jurisdiction. Detective Harpenau called a person – and he doesn't honestly know if he spoke to William Davis or not – but he spoke to someone who identified himself to be William Davis. He told him he would like to speak to him. That happened in either late July or early August. Now. My Exhibit Number 4 is the North Dakota driving record. By August 18th of 2004, Bill Davis had obtained a North Dakota driver's license in his brother's name with his brother's date of birth but his picture. So in less than eighteen (18) or twenty (20) days, he had gone to North Dakota and obtained a driver's license with a fake name. When he was arrested in October of 2005, he was still maintaining that he was Mark Davis. And when he finally realized that it's the FBI and they've got him, "My name is William Davis."
>
> This is another one (1) of those books.[4] This one is a Supreme Court opinion. "Flight and related conduct may be considered by a jury in determining a defendant's guilt." You can consider the fact that he left the jurisdiction, that he was living under an alias. That's his consciousness of guilt. That's why he ran. That's why he lived under a different name.

Trial Transcript at 227.

The jury acquitted Davis on the counts alleging acts against J.H., but found him guilty of Child Molesting as Class A and C felonies for acts against J.C. and Child Molesting as a Class C felony for acts against R.H. Slip op. at 4. The trial court entered judgment of conviction on the three verdicts and sentenced Davis to forty-five years

[4] Earlier in the prosecutor's closing argument, she stated: "These books are the ones you see in the law offices, you know, whenever the commercials are, and these are standing behind the guy at the personal injury (inaudible). They're opinions from the Court of Appeals and the Supreme Court of Indiana, uh, telling us basically what the law is. Every case that goes up on appeal there's a print-out, and they send it to us in big books." Trial Transcript at 225.

imprisonment for the Class A felony conviction, seven years imprisonment on the Class C felony conviction for acts against J.C., with those sentences running concurrently, and seven years imprisonment on the Class C felony conviction for acts against R.H., to run consecutive to the prior sentences. Id. at 4-5. Thus, Davis received an aggregate sentence of fifty-two years. Id. at 5.

On direct appeal, Davis argued that the trial court erred in denying his motion for severance and abused its discretion in admitting evidence of statements Davis made while identifying himself. Id. at 2. This court affirmed. Id.

On August 22, 2008, Davis filed a *pro se* petition for post-conviction relief which included eighty-five numbered claims with most of the claims alleging ineffective assistance of counsel. Davis also included an eighty-four page handwritten brief detailing the facts in support of his claims. On September 15, 2008, Davis filed a motion for change of judge. On September 22, 2008, a Deputy State Public Defender entered her appearance on behalf of Davis, but filed a motion to withdraw her appearance on January 12, 2009, because Davis requested that she withdraw her appearance and "remained firm in his intention to proceed *pro se* in this matter." Appellant's Appendix at 135. The court granted the motion to withdraw.

On April 7, 2009, the court granted Davis's motion for change of judge. On August 19, 2009, August 20, 2009, and August 21, 2009, the court held progress and evidentiary hearings on Davis's petition. At the beginning of the second day, the court informed Davis: "Mr. Davis, you have gone over the same point for about six straight hours, and I just want to tell you that courts do not have unlimited time," and that the

point Davis began the hearing with was "the very same point [Davis] made numerous times yesterday." Post-Conviction Transcript at 206. Throughout the hearing, Davis's trial counsel informed Davis that he should be represented.

On September 1, 2009, Davis filed a twenty-one page motion to amend his petition for post-conviction relief, which the court granted on September 9, 2009. The court also granted Davis's motion to supplement the record by affidavit. On April 8, 2010, the court denied Davis's petition for post-conviction relief.[5]

Before discussing Davis's allegations of error, we note the general standard under which we review a post-conviction court's denial of a petition for post-conviction relief. The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. Fisher v. State, 810 N.E.2d 674, 679 (Ind. 2004); Ind. Post-Conviction Rule 1(5). When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. Fisher, 810 N.E.2d at 679. 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. Further, the post-conviction court in this case entered findings of fact and conclusions thereon in accordance with Indiana Post-Conviction Rule 1(6) as to some of the issues raised by Davis. Id. "A post-conviction court's findings and judgment will be reversed only upon a showing of clear

[5] The trial court granted Davis's motion requesting the Indiana Public Defender to represent him on appeal. A Deputy Public Defender filed a motion for relief from appointment stating that "[i]t is the policy of the State Public Defender to not represent petitioners on appeal after they have chosen to waive representation and proceed *pro se* in the post-conviction court." Appellant's Appendix at 491. The court denied the Deputy Public Defender's Motion.

error – that which leaves us with a definite and firm conviction that a mistake has been made." Id. In this review, we accept findings of fact unless clearly erroneous, but we accord no deference to conclusions of law. Id. The post-conviction court is the sole judge of the weight of the evidence and the credibility of witnesses. Id.

I.

The first issue is whether Davis was deprived of a procedurally fair post-conviction hearing. Davis argues that the post-conviction court was biased. Indiana law presumes that a judge is unbiased and unprejudiced. Everling v. State, 929 N.E.2d 1281, 1287 (Ind. 2010); Ind. Judicial Conduct Canon 2.2 ("A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially."). To rebut this presumption, a defendant must establish from the judge's conduct actual bias or prejudice that places the defendant in jeopardy. Everling, 929 N.E.2d at 1287.

Davis argues that the court's "inclusion of documents, not in evidence, as part of its judgment, in light of the comments to Davis, represents a knowing encroachment of its role as fact-finder." Appellant's Brief at 44. Davis points to the court's comment at one point during the post-conviction hearings in which Davis referenced the trial transcript and certain depositions, and the court stated: "I'm not allowed to just go out and read stuff. They have to be offered into evidence."[6] Post-Conviction Transcript at 67. Davis

[6] The following exchange occurred at the post-conviction hearing:

MR. DAVIS: The question to the Court, does the Court have the transcript and the . . . I filed a few motions on this asking if the Court has the transcript, the trial transcript and the depositions, at least the depositions from Posey County?

argues that "[n]onetheless the judge did just that by attaching to his Order denying Davis' claims '[c]ertified copies of the Chronological Case Summary from Mr. Davis's 1991 Posey Circuit Court cause 65C01-9108-CF-00021 ("Cause No. 21"), and transcripts from Mr. Davis's Initial Hearing and Pleas of Guilty' in the same cause." Appellant's Brief at 44. Davis argues that the guilty plea transcript had no relevance to the issues litigated. Davis argues that "[i]n that the acts described were similar in nature to the acts alleged in the prosecution underlying the post-conviction litigation, it is possible, perhaps likely, that the post-conviction court considered the transcript of Davis' guilt in 1991 as evidence of guilt in the 2004 charges." Id. Lastly, Davis argues that the court's "reliance, to whatever extent, upon Davis' guilty plea in another case, not before the court, constituted a breach of the rules to which the judiciary are bound and calls into question his neutrality." Id. at 45.

Initially, we observe that Davis requested portions of the record from Cause No. 21. Specifically, Davis filed a Petition for Transcript of 1991 Arraignment Hearing for Cause No. 21 on October 1, 2008. Davis alleged that the transcript was "necessary to

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THE COURT:	I don't. None of that has been offered into evidence, and I don't have the transcript, of course, the Court of Appeals has the record. [The appellate counsel] had a transcript here in court when we were here before, that you used, but I don't have a transcript, and I don't have any depositions. And none have been offered into evidence.
MR. DAVIS:	Okay.
THE COURT:	I'm not allowed to just go out and read stuff. They have to be offered into evidence.

Post-Conviction Transcript at 66-67.

demonstrate the conflict-of-interest that existed at that time, and continued through the instant case, between [his trial counsel] and [him]." Appellant's Appendix at 131. A CCS entry dated April 15, 2009 states: "Davis has requested a transcript of the initial hearing held in the Posey Circuit Court Cause No. [21]. The transcript will have to be prepared, and will be provided to Mr. Davis . . . ." Id. at 6. The court granted this motion on July 27, 2009. At the April 15, 2009 hearing, Davis stated: "The 1992 case, I need the transcript for the preliminary hearing where the, where the public defender was assigned to me." Post-Conviction Transcript at 57. Davis also stated: "we do need that transcript because it will show that I stated that, that I had a conflict with [my trial counsel] regarding both political, and, and due to former prosecutions of my family, and that I actively, actively worked to make sure that he lost his job as prosecutor, that the other person won." Id. at 58.

We cannot say that the court's order reflects that it improperly relied upon the transcript from Cause No. 21. The court's order stated in pertinent part:

> Certified copies of the Chronological Case Summaries of the underlying criminal cause, 65D01-0409-FA-00442, and this PCR cause, 65D01-0808-PC-00382, are attached as Footnotes One and Two. Certified copies of the Chronological Case Summary from Mr. Davis's 1991 Posey Circuit Court cause, 65C01-9108-CF-00021, and transcripts from Mr. Davis's Initial Hearing and Pleas of Guilty in 65C01-9108-CF-000021 are attached as Footnotes Three, Four and Five.
>
> * * * * *
>
> During the hearing on April 15, 2009, Mr. Davis was attempting to address his allegations that [his trial counsel] had a conflict of interest dating back to before Mr. Davis's pleas of guilty to Child Molesting, a Class B Felony, and Child Molesting, a Class C Felony, in the Posey Circuit Court in January 1992. See the Chronological Case Summary for

65C01-9108-CF-00021 marked Footnote Three and a certified copy of the transcription of Mr. Davis's pleas of guilty to that charged marked as Footnote Five.

On April 15, 2009, Mr. Davis expressed dissatisfaction with the attorney he was appointed after Patricia Ann Davis, Mr. Davis's mother, objected to the Court's original appointment of [his trial counsel] in the 1991-92 case. Mr. Davis stated:

> "On a different date, do you remember me once saying to you with the way I got screwed around in my 1992 case, maybe it would have been better off if I had you for my attorney on that case. . . ."

> ["]Do you remember me once telling you that with the way that I got screwed around on my 1992 case with Bill Bender, that I wish I would have taken you as my lawyer instead. . . ."

Later in the hearing on April 15, 2009, Mr. Davis was complaining about the two Vanderburgh County attorneys who were representing him on child molesting charges in Evansville and stated:

> "Do you remember me saying that I want you to investigate, yourself, and not rely on them because I trusted you more than I trusted them."

Neither Mr. Davis, nor Patricia Ann Davis nor anyone else testified or asserted that any objection was made to [his trial counsel] serving as Mr. Davis's attorney in 65D01-0409-FA-00442 until after the jury rendered its verdicts.

Appellant's Appendix at 370-376 (footnotes omitted). Based upon the court's order and in light of Davis's requests for the record in Cause No. 21, we cannot say that Davis has established actual bias or prejudice that placed him in jeopardy.

II.

The next issue is whether Davis was denied the effective assistance of trial counsel and appellate counsel. We apply the same standard of review to claims of ineffective

assistance of appellate counsel as we apply to claims of ineffective assistance of trial counsel. Williams v. State, 724 N.E.2d 1070, 1078 (Ind. 2000), reh'g denied, cert. denied, 531 U.S. 1128, 121 S. Ct. 886 (2001). To prevail on a claim of ineffective assistance of counsel, a petitioner must demonstrate both that his counsel's performance was deficient and that the petitioner was prejudiced by the deficient performance. Ben-Yisrayl v. State, 729 N.E.2d 102, 106 (Ind. 2000) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984), reh'g denied), reh'g denied, cert. denied, 534 U.S. 830, 122 S. Ct. 73 (2001). A counsel's performance is deficient if it falls below an objective standard of reasonableness based on prevailing professional norms. French v. State, 778 N.E.2d 816, 824 (Ind. 2002). To meet the appropriate test for prejudice, the petitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Perez v. State, 748 N.E.2d 853, 854 (Ind. 2001). Failure to satisfy either prong will cause the claim to fail. French, 778 N.E.2d at 824. Most ineffective assistance of counsel claims can be resolved by a prejudice inquiry alone. Id.

When considering a claim of ineffective assistance of counsel, 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, 1072 (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). Evidence of isolated poor strategy,

inexperience, or bad tactics will not support a claim of ineffective assistance of counsel. Clark v. State, 668 N.E.2d 1206, 1211 (Ind. 1996), reh'g denied, cert. denied, 520 U.S. 1171, 117 S. Ct. 1438 (1997). "Reasonable strategy is not subject to judicial second guesses." Burr v. State, 492 N.E.2d 306, 309 (Ind. 1986).

Davis argues that he received ineffective assistance of trial counsel and appellate counsel on a number of grounds. Davis also argues that the post-conviction court's findings hinder appellate review and that "there are no specific findings of fact with regard to [trial counsel's] submission of inculpatory evidence, failure to investigate and/or subpoena exculpatory witnesses, failure to rebut the State's argument emphasizing flight, and more." Appellant's Brief at 13. Davis also argues that "the court's ruling regarding the effectiveness of appellate counsel does not address counsel's failure to raise prosecutorial misconduct as an issue or follow through on her request for a transcript of *voir dire*." Id.

We observe that the post-conviction court's order listed four issues including whether Davis's trial counsel "had a conflict of interest and was ineffective as Mr. Davis's trial attorney." Appellant's Appendix at 373. As to the issue of whether Davis's trial counsel was ineffective, the court stated:

> A review of the Chronological Case Summary of 65D01-0409-FA-00442 and [the trial counsel's] testimony during three days of the PCR hearing clearly show that [the trial counsel] prepared Mr. Davis's defense and presented a reasonable and coherent strategy.
>
> Mr. Davis might take issue with such strategy, but such a difference of opinion does not prove ineffectiveness of counsel. Mr. Davis failed to carry his burden of proof on this issue.

Id. at 376. With regard to Davis's claims of ineffectiveness of appellate counsel, the court's order states:

> Mr. Davis called [his appellate counsel] as a witness but he failed to elicit any evidence she had not effectively represented him on appeal. Mr. Davis did allege [his appellate counsel] lied about promising to keep Mr. Davis and his family informed about the progress of the appeal. (See page 20 of Mr. Davis's Affidavit filed October 22, 2009) However, he failed to offer any evidence during [the appellate counsel's] testimony or from his family or any other source as to how such alleged lying harmed him.
>
> Mr. Davis offered no evidence from any source other than his conclusionary and speculative statements on the issue of [the appellate counsel's] alleged ineffectiveness. Mr. Davis has failed to carry his burden of proof on this issue.

Id. at 377.

The post-conviction court did not enter specific findings as to the following allegations of ineffective assistance of trial counsel raised by Davis: (1) trial counsel's introduction and the admission of Defense Exhibits 1 and 2, which were J.C.'s depictions of the length and circumference of Davis's penis; (2) trial counsel's failure to interview the examining physician or consult a medical expert; (3) trial counsel's failure to adequately investigate Cathy Scott as a witness; (4) trial counsel's failure to object to the prosecutor's argument regarding an internal exam; (5) trial counsel's failure to protect Davis from an untrue inference of guilt based upon medical reports; (6) trial counsel's failure to object to, as alleged by Davis, "a statement that could be construed as a comment upon Davis' right not to testify," Appellant's Brief at 36; and (7) trial counsel's failure to object to the prosecutor calling Davis a sex predator.[7] The court also did not

[7] The post-conviction court's order appears to address one claim of ineffectiveness of counsel

address Davis's claim that his appellate counsel was ineffective for: (1) failing to raise issues of prosecutorial misconduct as fundamental error; and (2) failing to ensure that the *voir dire* was transcribed.

Ind. Post-Conviction Rule 1(6) provides that "[t]he court shall make specific findings of fact, and conclusions of law on all issues presented, whether or not a hearing is held." The principal purpose of findings of fact is to have the record show the basis of the trial court's decision so that on review the appellate court may more readily understand the former's view of the controversy. Dowdell v. State, 720 N.E.2d 1146, 1152 (Ind. 1999) (citing Love v. State, 257 Ind. 57, 59, 272 N.E.2d 456, 458 (1971), reh'g denied). "Findings of fact must be 'sufficient to enable this Court to dispose of the issues upon appeal.'" Id. (quoting Taylor v. State, 472 N.E.2d 891, 892 (Ind. 1985)). Because the post-conviction court did not enter specific findings of fact and conclusions of law on the issues mentioned above, we remand this case to the post-conviction court to do so as to these issues. See id. at 1151-1152 (observing that the State's argument presented one plausible view of the evidence but that the post-conviction court made no such finding and remanding the case to the post-conviction court to enter findings of fact and conclusions of law). To the extent that the trial court entered specific findings as to

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based upon prosecutorial misconduct. Specifically, the court addressed the prosecutor's statement regarding Davis's flight, and we address that issue below. The post-conviction court's order also stated that Davis argued that the prosecutor committed misconduct "during her Final Argument by arguing that . . . the Prosecuting Attorney discussed the content of medical records concerning examination of the victims." Appellant's Appendix at 374. To the extent that the court mentioned that the prosecutor "discussed the content of medical records concerning examination of the victims," we observe that the court did not enter specific findings as to this issue.

the remaining allegations of ineffective assistance of trial counsel raised by Davis on appeal, we will address the merits.

A. Trial Counsel's Failure to Object to Prosecutor's Closing Argument

Davis argues that "[g]iven its importance, ignoring the State's emphasis of flight as an indicator of guilt was an unreasonable choice of available responses, evidencing a dismal level of advocacy." Appellant's Brief at 24. The post-conviction court touched on this issue when it addressed the issue of "Prosecutorial Misconduct" as follows:

> Mr. Davis asserts that [the prosecutor] committed Prosecutorial Misconduct during her Final Argument by arguing that Mr. Davis's flight could be considered by the jury on the issue of guilty knowledge . . . .
>
> However, Indiana law allows trial attorneys to characterize evidence and to attempt to persuade jurors to particular verdicts. That includes arguing the significance of Mr. Davis's fleeing Indiana and hiding his identity soon after he was contacted by a police officer, Officer Jim Harpenau of the Evansville Police Department, who spoke with him about Mr. Davis's contact with the victims.
>
> [The prosecutor] was not called as a witness by Mr. Davis and Mr. Davis produced no evidence as to how the Prosecuting Attorney's legally permissible Final Argument unfairly prejudiced him.
>
> Although Mr. Davis repeatedly called [the prosecutor] a liar, such as exhibited on page six of his post-hearing affidavit filed October 22, 2009, he failed to offer any evidence that any statements or alleged misstatements by [the prosecutor] in Final Argument or elsewhere unfairly prejudiced him.

Appellant's Appendix at 374-375.

Davis points to Dill v. State, 741 N.E.2d 1230, 1233 (Ind. 2001), in which the Indiana Supreme Court held that the giving of a specific flight instruction was erroneous because it was confusing, misleading, and unduly emphasized specific evidence. The

Court also held that "although evidence of flight may, under appropriate circumstances, be relevant, admissible, and a proper subject for counsel's closing argument, it does not follow that a trial court should give a discrete instruction highlighting such evidence." 741 N.E.2d at 1232. Davis "questions . . . whether *Dill* intended to condone an argument that purports to speak for the State's highest court in correlating flight with consciousness of guilt." Appellant's Brief at 23. The State points out that the jury was instructed that "[s]tatements made by the attorneys are not evidence" and that "[y]ou are the exclusive judges of the evidence, which may be either witness testimony or exhibits." Direct Appeal Appellant's Appendix at 566, 569.

Given that the prosecutor mentioned flight, that the trial court did not emphasize Davis's flight in its instructions, the remaining instructions, and in light of Dill, we cannot say that the decision of Davis's trial counsel not to object constituted ineffective assistance.

B. Relationship Between Davis & His Trial Counsel

Davis argues that "[t]here was a negative history between" himself and his trial counsel prior to the trial. Appellant's Brief at 28. Davis argues that his trial counsel "had been elected prosecutor when Davis was charged with a juvenile offense years earlier, had prosecuted the Davis family for a property violation when Davis was eighteen, and had been removed as Davis' public defender at the Davis family request when Davis was charged with a crime in 1991," and that Davis "participated in efforts to defeat [his trial counsel's] run for prosecutor." Id. Davis argues that his trial counsel's representation constituted a "conflict of interest," that his relationship with trial counsel was toxic and

resulted in an undeniable irreconcilable breakdown," and that he wanted to pursue an "innocence defense." Id. at 28, 33.[8] Davis cites to his own testimony and argues that he "wanted a defense of innocence, questioning the presence of blood and explaining the inconsistent false allegations as coached by-products of J.C.'s mother's dissatisfaction with the relationship." Id. at 29. Davis also argues that there was a disproportionate allocation of power between himself and his attorney. Specifically, Davis argues that he "tried to make his voice heard before and during the trial but was shut down by an attorney who would not hear anything his client had to say, and even threatened his former client with bodily harm." Id. at 33.

The post-conviction court's order addressed these issues as follows:

> **A.**
> **Collusion**
>
> Mr. Davis swore in the "Grounds" section of his original PCR petition filed August 22, 2008:
>
> > "I can articulate several (emphasis in the original) ways that the lack of bench conference recording (sic) the fairness of my trial, starting with the way it enabled the prosecutor, judge and defense attorney (sic) collude against the defendant." P.31.

[8] To the extent that Davis suggests that a "conflict of interest" existed, we observe that the Indiana Supreme Court recently observed that claims of ineffective assistance of counsel can occur where counsel is burdened by a conflict of interest, in which case special rules apply, and that the only cases in which the United States Supreme Court has applied the "conflict of interest" rules are those where counsel was conflicted because he or she was actively representing multiple parties with conflicting interests. Johnson v. State, 948 N.E.2d 331, 334-335 (Ind. 2011), reh'g denied. Davis does not argue that his attorney was actively representing multiple parties with conflicting interests. Thus, Davis has failed to establish that his trial counsel was burdened by a conflict of interest sufficient to trigger the Sixth Amendment duty of inquiry under Holloway v. Arkansas, 435 U.S. 475, 98 S. Ct. 1173 (1978); or Cuyler v. Sullivan, 446 U.S. 335, 100 S. Ct. 1708 (1980). See Johnson, 948 N.E.2d at 335 (noting that the petitioner had not alleged that his trial counsel loyalties were divided between the petitioner and another client and holding that the petitioner failed to establish that his trial counsel was burdened by a conflict of interest sufficient to trigger the Sixth Amendment duty of inquiry under Holloway or Cuyler).

And at pages 25-26, Mr. Davis swore:

> "It is an obvious conflict of interest when an attorney makes an illicit contract with the prosecutor against the wishes of the person he is supposed to be representing; Especially (sic) when that contract is detrimental to the interests of the defendant."

Mr. Davis's PCR petition alleges that collusion occurred at unrecorded bench conferences among Judge Almon, [the trial counsel] and [the prosecutor]. At no time during the four days of trial did Mr. Davis ask to call Judge Almon or [the prosecutor] as witnesses. Mr. Davis did not ask [his trial counsel] any question about any such collusion. Mr. Davis made no argument in support of his collusion theory nor did he offer any evidence or argument as to how the content of any bench conference harmed him.

Mr. Davis has waived any issue of collusion and has failed in his burden of proof on that issue.

* * * * *

C.
[Trial Counsel]

Mr. Davis presented a great deal of evidence that proved, as [trial counsel] freely acknowledged, [trial counsel] and Mr. Davis had a difficult relationship. Mr. Davis repeatedly stated [his trial counsel] was a liar, incompetent as an attorney, colluded with the trial judge and the State and that [his trial counsel] "threw the case."

Yet in the hearing held April 19, 2009, Mr. Davis stated: "I believe you are one of the best attorneys on the planet and you are very good at getting the result you want." Mr. Davis made this statement during his examination of [his trial counsel] on Mr. Davis's theory that [his trial counsel] wanted him convicted. Mr. Davis had just previously said: "I state you intentionally wanted William Davis found guilty."

During the hearing on April 15, 2009, Mr. Davis was attempting to address his allegation that [his trial counsel] had a conflict of interest dating back to before Mr. Davis's pleas of guilty to Child Molesting, a Class B Felony, and Child Molesting, a Class C Felony, in the Posey Circuit Court

in January 1992. See the Chronological Case Summary for 65C01-9108-CF-00021 marked in Footnote Three and a certified copy of the transcription of Mr. Davis's pleas of guilty to that charge marked as Footnote Five.

On April 15, 2009, Mr. Davis expressed dissatisfaction with the attorney he was appointed after Patricia Ann Davis, Mr. Davis's mother, objected to the Court's original appointment of [his trial counsel] in the 1991-92 case. Mr. Davis stated:

> "On a different date, do you remember me once saying to you with the way I got screwed around in my 1992 case, maybe it would have been better off if I had you for my attorney on that case . . . ."
>
> Do you remember me once telling you that with the way that I got screwed around on my 1992 case with Bill Bender, that I wish I would have taken you as my lawyer instead . . . ."

Later in the hearing on April 15, 2009, Mr. Davis was complaining about the two Vanderburgh County attorneys who were representing him on child molesting charges in Evansville and stated:

> "Do you remember me saying that I want you to investigate, yourself, and not rely on them because I trusted you more than I trusted them."

Neither Mr. Davis, nor Patricia Ann Davis nor anyone else testified or asserted that any objection was made to [the trial counsel] serving as Mr. Davis's attorney in 65D01-0409-FA-00442 until after the jury rendered its verdicts.

Mr. Davis has failed to prove [his trial counsel] had any conflict in representing Mr. Davis.

Appellant's Appendix at 373-376.

Initially, to the extent that Davis argues that he wanted to present an "innocence defense," Appellant's Brief at 28, 33, we observe that Davis's trial counsel told the jury that to conclude that they had no reasonable doubt regarding the truth of the victims'

statements they would have to ignore the medical evidence, inconsistent statements, and the testimony of witnesses and that they should find Davis not guilty. Further, the choice of defense theory is a matter of trial strategy. Overstreet v. State, 877 N.E.2d 144, 154 (Ind. 2007), reh'g denied, cert. denied, ___ U.S. ___, 129 S. Ct. 458 (2008). Counsel is given "significant deference in choosing a strategy which, at the time and under the circumstances, he or she deems best." Potter v. State, 684 N.E.2d 1127, 1133 (Ind. 1997). "A reviewing court will not second-guess the propriety of trial counsel's tactics." Davidson v. State, 763 N.E.2d 441, 446 (Ind. 2002), reh'g denied, cert. denied, 537 U.S. 1122, 123 S. Ct. 857 (2003) (citation and quotation marks omitted). "[T]rial strategy is not subject to attack through an ineffective assistance of counsel claim, unless the strategy is so deficient or unreasonable as to fall outside of the objective standard of reasonableness." Autrey v. State, 700 N.E.2d 1140, 1141 (Ind. 1998). "This is so even when such choices may be subject to criticism or the choice ultimately prove[s] detrimental to the defendant." Id. (citation and quotation marks omitted).

As to Davis's allegations that his trial counsel was the prosecutor when Davis was charged with a juvenile offense and had dealings with his family, Davis's trial counsel testified that when he was prosecutor he sent a letter to a Mr. Davis, who he assumed was Davis's father, concerning a junk yard violation. When asked whether he remembered prosecuting Davis "for writing on a house with a laundry pen" when Davis was a teenager, trial counsel answered: "I don't recall having told you that, and I do not recall the prosecution. But if that was a juvenile case, I generally did not handle the juvenile cases when I was the prosecutor." Post-Conviction Transcript at 10.

With regard to the nature of the relationship between Davis and his trial counsel, the record reveals the following exchange which occurred during the direct examination of Davis's trial counsel by Davis:

> Q. If I show that you . . . twenty-five of your claims have been lies, or wrongs . . .
>
> * * * * *
>
> A. What have I lied about, Mr. Davis?
>
> Q. The record will show it. That's for the Judge . . . .
>
> A. What have I lied about? Tell me what I've lied about . . . .
>
> Q. . . . She is, the Prosecutor is absolutely right. That's . . . you'll find out. The Judge will find out. I don't have to convince you.
>
> A. Mr. Davis, you're getting very close to me coming down there and kicking your ass.
>
> Q. Really?
>
> A. Tell me what I lied about.
>
> Q. Did you act like this in 2006?
>
> A. I act like that when someone accuses me . . . .
>
> Q. Did you get that angry and intimidate me like this in 2006?
>
> A. Yes, I did.
>
> Q. I thought so.
>
> A. On at least one occasion.
>
> Q. I thought you did.
>
> A. And it's because you were interfering with me defending you. Do you want to talk about that incident?

Q. Yes.

A. We were having a hearing on a Motion in Limine, on relief from a Motion in Limine on the Rape Shield Law. It was a legal argument. It was based on evidence rules. The Prosecutor and I were going back and forth on that. Mr. Davis, I want you to listen. The Prosecutor and I were going back and forth on that. You were continually whispering in my ear. "That's a lie." "That's not true." "He didn't say that." I kept telling you, Mr. Davis, this is a legal argument, it's not a factual argument. You kept doing that, interfering with me hearing the Prosecutor's argument. I finally turned to you, and pardon my language but I said to you directly, "Shut the fuck up!"

Q. With the same kind of attitude . . .

A. The judge then . . . .

Q. . . . right?

A. . . . Let me finish . . . asked if we wanted a recess. I said, "No". You said, "We did." We took a recess. I asked you, "Can you tell me what trial, Evidence Rule 803 says?" "No." "Can you tell me what Evidence Rule 401 says?" "No." "Can you tell me what the Rape Shield Law says?" "No." Then I said, "Shut the fuck up, because you can't help me on this! This is a legal argument." That's the one, altercation, verbal altercation that you and I had. And I was steamed because you were interfering with me hearing what the Prosecutor was saying, and you had nothing to contribute to that argument, nothing, because it was a legal argument. And you know what, we won that argument too.

Q. We won that argument, how?

A. The Judge ruled in our favor, and that's what led to the stipulation.

Q. Okay, and how did he rule in our favor? In what way? What was it about?

A. He allowed us to present to the jury, and we've gone over this time, and time, and time again. He allowed us to present to the jury, and

we did it by way of a stipulation, that these boys had been familiar with this type of conduct before they knew you.

Q. Okay. He allowed the stipulation. That's what we wanted. Okay.

A. Yeah, well. That's what I wanted.

Q. You said, we won. That what I . . . .

A. If I let you run this case, Mr. Davis, it would have been an absolute abortion. You can smile all you want, but it's the truth.

Post-Conviction Transcript at 192-195.[9] The following exchange occurred during the direct examination of trial counsel which occurred on the third day of the evidentiary hearing:

Q. Did I piss you off so much in 2006 that you decided consciously, or subconsciously to tank the case?

A. Mr. Davis, I worked awfully . . . .

Q. . . . Yes or no . . . .

A. I worked . . . no.

Q. Of course, if it wasn't subconscious, you wouldn't necessarily know about it, correct?

A. Well, yes I would because I . . . I worked awfully darn hard, and I argued awfully darn hard to keep evidence out in this case, in fact, we got not guilty verdicts on two of the five counts.

* * * * *

Q. Did you decide to teach this arrogant boy what happens whenever he disrespects and doubts you? Did you?

[9] At the beginning of the hearing the following day, Davis's trial counsel stated: "And, Your Honor, if I may, I wanted to apologize to the Court for the intemperate and unprofessional language I used yesterday while on the stand. And I want to assure Mr. Davis that any area you want to pursue, feel free to pursue that without any repercussions." Post-Conviction Transcript at 201.

A. No.

Id. at 348-349.

Davis's trial counsel conceded that he "had trouble understanding the points [Davis was] trying to make" when he was representing him. Id. at 244. Davis's trial counsel also testified that he "tried to understand" Davis's points, that he "listened to everything" Davis told him, and read all of Davis's letters. Id. at 244, 250. While the relationship between Davis and his trial counsel certainly had some tension, we cannot say that the relationship resulted in ineffective assistance.

Conclusion

For the foregoing reasons, we affirm the post-conviction court's denial of Davis's petition for post-conviction relief on these issues on which specific findings were made and discussed herein, and remand for specific findings as to the remaining issues as to which no specific findings were made.

Affirmed in part and remanded.

FRIEDLANDER, J., and BAILEY, J., concur.