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**IN THE
COURT OF APPEALS OF INDIANA**

MAURICE SMITH,)
)
Appellant-Petitioner,)
)
vs.) No. 64A03-0904-PC-169
)
STATE OF INDIANA,)
)
Appellee-Respondent.)

APPEAL FROM THE PORTER SUPERIOR COURT
The Honorable Roger V. Bradford, Judge
Cause No. 64D01-0210-FB-9017

April 26, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Maurice Smith appeals the denial of his petition for post-conviction relief. He alleges the court erroneously concluded his trial counsel and his appellate counsel provided effective assistance. We affirm.

FACTS AND PROCEDURAL HISTORY

On direct appeal, we summarized the underlying facts:

The facts most favorable to the jury's verdict indicate that on September 27, 2002, eighteen-year-old C.A. reported for her first night of work as a dancer at Andy's Gentleman's Club. At approximately 11:30 p.m., C.A. told the manager that she quit. She unsuccessfully attempted to contact a friend who was supposed to pick her up at 3:00 a.m. She then talked with the club's disc jockey and Smith, his uncle. Smith offered to drive C.A. to a bowling alley to look for her friend. After the disc jockey vouched for Smith, she took her two duffel bags and left with him.

Smith drove C.A. to the bowling alley, but her friend was not there. Smith exited the car and relieved himself. C.A. asked Smith to drive her to her brother's house in Valparaiso. Smith attempted to purchase beer at a drugstore, then drove into an apartment complex and relieved himself again. C.A. asked him to drive her back to the club to meet her friend. Smith drove toward the club, announced that he needed to relieve himself again, and suddenly pulled onto the shoulder of the road. Smith looked around as a vehicle passed by, then turned left and drove past two houses and a paving business. When C.A. told Smith to stop, he stated that he needed to relieve himself again. Smith drove to the end of the road and turned off the engine.

Smith exited the car, shut the door, and immediately got back in. He fully reclined his seat, exposed his penis, and said, "You're going to give me some of that head." Tr. at 271. C.A. asked Smith what he was talking about and reached for the door handle. He forcefully grabbed the back of her neck and compelled her to perform oral sex. *Id.* at 272. C.A. again reached for the door handle, whereupon Smith locked the doors. After a few minutes, he told her to take off her pants. When C.A. begged Smith to let her go, he grabbed her neck and choked her. She leaned back between the front seats and kicked the window, infuriating Smith. He grabbed her by the throat and slammed her into the backseat, yelling, "Don't you fuck up my car. Do not fuck up my car, bitch. You're fucking dead now." *Id.* at 275. Smith choked C.A. so hard that she saw white. She said, "I'm sorry, I'm sorry[,]” then mouthed the words, "I'm dying, I'm dying, I'm dying." *Id.*

Smith released his grip and ordered C.A. to take off her pants. She

removed her shoes and again attempted to unlock the door. He smacked her hand and grabbed her throat. Crying, C.A. removed her pants. Smith grabbed her underwear and pulled. C.A. rolled onto her stomach, opened the rear passenger door, and grasped the outside of the car. Smith scratched her neck and ripped her shirt, then grabbed her necklace and pulled it against her neck until the chain broke. C.A. fell onto the concrete and kicked at Smith as he grabbed at her legs. Eventually, Smith said, "Fine." *Id.* at 278. C.A. fled, clad only in a t-shirt and socks.

C.A. ran toward the houses up the road and twice hid from Smith's car as it drove past. The residents of one house responded to C.A.'s appeals for help and called 911 at her request. Officer Chad Crosby responded and interviewed C.A., who was crying hysterically. A search of the area revealed C.A.'s clothing and duffel bags, as well as a single silver chain link and Smith's wallet. C.A. identified Smith from his driver's license photo. She was later examined at Porter Memorial Hospital. C.A. had sustained abrasions to her neck and chest area, an abrasion to her right pinky finger, bruises around her neck, and fingerprint bruises on her right shoulder. She also complained of lower back pain.

Smith v. State, 804 N.E.2d 1246, 1247-48 (Ind. Ct. App. 2004), *trans. granted* 812 N.E.2d 808 (Ind. 2004), *aff'd in part and vacated in part* 825 N.E.2d 783 (Ind. 2005).

The State charged Smith with criminal deviate conduct, attempted rape, criminal confinement, intimidation, and battery resulting in serious bodily injury. Prior to trial the State filed notice it would seek a sentence enhancement against Smith because he is an habitual sex offender.

A jury found Smith guilty of attempted rape, confinement, intimidation, and battery. The trial court entered convictions for all those crimes and, after a separate hearing, found Smith was a repeat sexual offender.

On direct appeal, Smith challenged a jury instruction and the constitutionality of the statute authorizing a sentence enhancement for repeat sexual offenders. Our Supreme Court held the enhancement statute did not violate the Indiana or United States constitutions. *Smith*, 825 N.E.2d at 786, 789-90. The alleged error in the jury instruction

was waived and any possible error was harmless. *See id.* at 785 n.1 (summarily affirming, as to this issue, *Smith*, 804 N.E.2d at 1249).

Smith filed a petition for post-conviction relief in which he alleged his trial and appellate counsel were ineffective for not challenging his convictions of confinement, intimidation, and battery under the continuing crime doctrine.¹ In addition, he alleged appellate counsel was ineffective for failing to argue Smith's right to confrontation was violated when the prosecutor intentionally stood between Smith and C.A. while C.A. was testifying.

At the hearing on his petition, Smith called only two witnesses, his trial counsel and his appellate counsel. The court denied Smith's petition as to those issues.

DISCUSSION AND DECISION

Smith bore the burden of establishing the grounds for post-conviction relief by a preponderance of the evidence. *See* Ind. Post-Conviction Rule 1(5); *Timberlake v. State*, 753 N.E.2d 591, 597 (Ind. 2001), *reh'g denied, cert. denied* 537 U.S. 839 (2002). Post-conviction procedures do not afford a petitioner a super-appeal, and not all issues are available. *Id.* Rather, subsequent collateral challenges to convictions must be based on grounds enumerated in the post-conviction rules. *Id.* If an issue was known and available, but not raised on direct appeal, it is waived. *Id.* If it was raised on appeal, but decided adversely, it is *res judicata*. *Id.*

In reviewing a judgment of a post-conviction court, we consider only the evidence

¹ Smith also alleged trial and appellate counsel should have challenged his sentence enhancement for being a repeat sexual offender because he was convicted of attempted rape, but the controlling statute, Ind. Code § 35-50-2-14, does not apply to attempted crimes. The post-conviction court vacated Smith's ten-year sentence enhancement for being a repeat sexual offender, and neither party alleges error therein on appeal.

and reasonable inferences supporting the judgment. *Hall v. State*, 849 N.E.2d 466, 468 (Ind. 2006). The post-conviction court is the sole judge of the evidence and the credibility of the witnesses. *Id.* at 468-69. Smith is appealing a negative judgment, so to the extent his appeal turns on factual issues, he must convince us the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court. *See Timberlake*, 753 N.E.2d at 597. We will disturb the decision only if the evidence is without conflict and leads only to a conclusion contrary to the result of the post-conviction court. *Id.*

1. Trial Counsel

Smith asserts his trial counsel should have challenged his convictions of confinement, intimidation, and battery based on the continuing crime doctrine, because those crimes occurred only “to give Smith the opportunity to attempt to sexually assault the victim.” (Appellant’s Br. at 26.)

To establish a violation of the Sixth Amendment right to effective assistance of counsel, a defendant must establish before the post-conviction court the two components set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), *reh’g denied* 467 U.S. 1267 (1984). *Overstreet v. State*, 877 N.E.2d 144, 151-52 (Ind. 2007), *reh’g denied, cert. denied* __ U.S. __, 129 S. Ct. 458 (2008).

First, a defendant must show counsel’s performance was deficient. *Id.* at 152. This requires showing counsel’s representation fell below an objective standard of reasonableness and counsel made errors so serious he or she was not functioning as “counsel” guaranteed the defendant by the Sixth Amendment. *Id.* We presume counsel’s

performance was effective, and a defendant must offer strong and convincing evidence to overcome this presumption. *Id.*

Second, a defendant must show the deficient performance prejudiced the defense. *Id.* This requires showing counsel's errors were so serious they deprived the defendant of a fair trial, meaning a trial whose result is reliable. *Id.* To establish prejudice, a defendant must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* A reasonable probability is one that undermines confidence in the outcome. *Id.*

The continuing crime doctrine is that actions "sufficient in themselves to constitute separate criminal offenses may be so compressed in terms of time, place, singleness of purpose, and continuity of action as to constitute a single transaction." *Firestone v. State*, 838 N.E.2d 468, 471 (Ind. Ct. App. 2005). In such circumstances, the State may convict the defendant of only one crime based on "the same continuous offense." *Id.* at 472. It is not enough that two actions occurred closely together in the same place. *See id.* If the defendant's actions went "beyond that necessary to effectuate" the sexual assaults, then the additional convictions may stand. *Ingram v. State*, 718 N.E.2d 379, 381 (Ind. 1999) (holding confinement exceeded that necessary to commit criminal deviate conduct because defendant took victim's car keys and drove her to a number of places).

The post-conviction court, relying on *Eddy v. State*, 496 N.E.2d 24, 28 (Ind. 1986), concluded:

15. While the crimes of confinement, intimidation and battery occurred within a short time and at the same location, the crimes were not

committed for the same purpose as required by *Eddy* for the continuous crimes doctrine to be implicated. There [sic] unity of purpose in the crimes committed against the victim.

16. The Indiana Supreme Court ruled in *Bartlett v. State* that under the continuing crime doctrine a conviction for confinement could not stand where the act of confining the victim was no more than the act necessary to kidnap the victim. *See Bartlett v. State*, 711 N.E.2d 497 (1999). Review of the trial record reveals that the crimes complained of by Smith were more than the act necessary to commit attempted rape.

17. For example, the trial record reflects that the crime[s] of intimidation and battery were not related to furthering Smith's goal of raping the victim. Rather the purpose of the crime was punishing the victim for kicking the car window. After kicking the window then defendant yelled "Do not fuck up my car bitch. You're fucking dead now." He then began strangling the victim causing the victim to believe she was dying. Since the Court cannot find that these crimes shared a continuity of purpose as required in *Eddy*, the continuous crimes doctrine is not implicated by the multiple convictions.

18. The Court finds that neither trial nor appellate counsel was ineffective for failing to pursue this issue. The Court finds that trial counsel did argue the continuing crime doctrine at sentencing.^[2] The Court further finds that, since appeal of this issue would be unavailing, failing to pursue the issue on appeal did not prejudice Smith.

(Appendix to Brief of Petitioner-Appellant at 137-138) (italics modified) (footnote added).

Smith was not entitled to relief from his convictions of confinement, battery and intimidation. Smith intimidated and battered C.A. when she kicked his car window. At that point he became angry, told her not to damage his car, said he was going to kill her, and choked her until she saw "white." (Jury Trial Tr. at 275.) We cannot find clear error in the post-conviction court's determination that Smith's acts of intimidation and battery did not have a unity of purpose with Smith's attempted rape.

² We disagree that trial counsel "argue[d] the continuing crime doctrine at sentencing." (App. at 138.) Counsel mentioned the continuing crimes doctrine, but in the end he asserted the court should "merge" the sentences or give "concurrent sentences." (Sentencing Tr. at 45.) The continuing crime doctrine requires the convictions for the subsumed crimes not be entered. *See Taylor v. State*, 879 N.E.2d 1198, 1203 (Ind. Ct. App. 2008) (remanding for vacation of one count).

Nor was it error for the post-conviction court to find Smith's convictions of confinement and attempted rape did not violate the continuing crime doctrine. The State charged Smith confined C.A. by "locking all the [car] doors and not allowing her to leave." (Appellant's Direct Appeal App. at 25.) Smith alleges we must overturn his conviction for confinement because he confined her only during the time he was attempting to rape her. Our Supreme Court rejected a similar argument in *Gates v. State*, 759 N.E.2d 631 (Ind. 2001):

Certainly, one who commits rape or criminal deviate conduct necessarily "confines" the victim at least long enough to complete such a forcible crime. Without pausing to elaborate on the statutory or constitutional frameworks, Gates' entitlement to relief depends upon whether the confinement exceeded the bounds of the force used to commit the rape and criminal deviate conduct.

Gates' specific contention is that the confinement was a means used to commit the rape and criminal deviate conduct because F.T. was bound only during the commission of the charged offenses. He relies on *Griffin v. State*, 583 N.E.2d 191 (Ind. Ct. App. 1991), and *Harvey v. State*, 719 N.E.2d 406 (Ind. Ct. App. 1999).

In both *Griffin* and *Harvey*, the court found the confinement charge to be a lesser included offense because it was confinement by force. In *Griffin*, the defendant confined the victim by holding her on the ground while he attempted to rape her, and that act was also charged as evidence of the attempted rape. *Griffin*, 583 N.E.2d at 195. In *Harvey*, the defendant was charged with confinement by detaining the clerk while he robbed a liquor store. *Harvey*, 719 N.E.2d at 408, 412. In neither case did the perpetrator attempt to confine the victim through any means or actions beyond those inherent in the commission of the crime. In each of these cases, neither the crime nor the attempt could have been accomplished without employing the restrictive force charged.

In the instant case, despite a similar duration, Gates' confinement of F.T. was distinct and elevated from the restraint necessary to commit the other charged crimes. The State charged that Gates tied F.T.'s hands with twine while armed with a knife. The elements of confinement and use of force were distinct in this case. *See Harvey*, 719 N.E.2d at 411. Gates threatened F.T. with the knife during the commission of each crime with which he was charged. The tying of F.T.'s hands was not an essential element of the rape or criminal deviate conduct.

The State provided evidence that Gates approached F.T. while armed with a knife and tied her hands behind her back with twine. There was also testimony and photographic evidence showing marks on F.T.'s wrists made by the twine, and showing that twine was found in a trash can in F.T.'s home after the rape. Such evidence portrays the confinement as an independent crime. The tying of F.T.'s hands was not a necessary part of the rape and criminal deviate conduct. Such restriction is not integral to the force or limitations inherent in those charges.

Because Gates used additional methods to restrict F.T.'s freedom, the trial court properly sentenced him on the criminal confinement count.

Id. at 632-33 (footnote and record citations omitted).

Smith's locking the car doors was not an essential element of attempted rape -- the State did not mention that fact in the charge therefor, (*see* Appellant's Direct Appeal App. at 24 ("compelled by force or the imminent threat of force, to-wit: attempted to force . . .")), and the statutes do not contain any such requirement. *Cf.* Ind. Code §§ 35-42-4-1, 35-41-5-1. Smith locked the doors when C.A. reached for a door handle while performing oral sex, such that Smith could have locked the door to confine C.A. without taking the further step of attempting to rape her. Then, after locking the doors, Smith held onto C.A.'s neck, smacked her hands as she reached for the door handle, pulled on her underwear, and held onto her choker chain and legs to pull her back into the car. Like Gates, Smith used additional methods to confine C.A. during his attempt to rape her. Therefore, we find no error in his convictions of attempted rape and confinement based on his locking the car doors. *See Gates*, 759 N.E.2d at 632-33.

Because Smith's convictions of battery, intimidation, and confinement did not violate the continuing crime doctrine, Smith was not prejudiced by his trial counsel's failure to argue that issue.

2. Appellate Counsel

Smith posits two reasons appellate counsel was ineffective: counsel did not assert the continuing crime doctrine or argue the prosecutor violated Smith's right to confrontation during C.A.'s testimony. The standard for gauging appellate counsel's performance is the same as that for trial counsel. *Pruitt v. State*, 903 N.E.2d 899, 927-28 (Ind. 2009), *reh'g denied*.

We recognize three categories of ineffective appellate counsel claims: "(1) denying access to appeal; (2) failing to raise issues; and (3) failing to present issues competently." *Shaw v. State*, 898 N.E.2d 465, 469 (Ind. Ct. App. 2008), *trans. denied*. When a petitioner claims counsel failed to raise issues, "we evaluate whether the unraised issues are significant and obvious from the face of the record and whether they are clearly stronger than the raised issues." *Id.* An unraised issue was not obvious "if the interpretation of the legal authority that might have supported the issue was not obvious when appellate counsel filed the brief." *Id.*

A. Continuing Crime Doctrine

Because the continuing crime doctrine does not entitle Smith to avoid his convictions of intimidation, battery, and confinement, we cannot find appellate counsel ineffective for failing to argue that issue on appeal. *See Pruitt*, 903 N.E.2d at 930 ("As discussed earlier in this opinion, we affirmed the PC court's finding of no ineffective assistance of trial counsel regarding this claim and for essentially the same reasons affirm its finding of no ineffective assistance of appellate counsel.").

B. Right to Confrontation

Smith alleges appellate counsel was ineffective for failing to raise a Confrontation

Clause issue on direct appeal because the prosecutor intentionally stood between him and A.C. when A.C. was testifying. Smith did not carry his burden to prove appellate counsel was ineffective.

At the sentencing hearing Smith alleged he was denied his right to confront C.A. because the prosecutor stood between him and the witness stand. During her sentencing argument, the deputy prosecuting attorney stated:

Your Honor, I don't deny for one second the location of myself or the location of the podium at the time of the trial. I'm aware of the defendant's right to face his accuser and he had that right satisfied. He brings that issue before the court and I think it shows exactly what type of a person he is. He wanted to use that opportunity to intimidate [C.A.] and I did not give him that opportunity. I think that shows what kind of person stands before the court today.

(Sent. Tr. at 39.)

We disagree with Smith's premise that the Prosecutor's statement is conclusive proof that she obstructed his view to such an extent that his constitutional right was violated. While the prosecutor's statement *suggests* she blocked his view, she also asserts his right to face his accuser was satisfied. The only other information in the trial transcript that would have supported Smith's allegation at the time of his direct appeal was his own unsworn statement during the sentencing hearing. Thus, the trial record contained no evidence regarding whether, how long, or to what extent the prosecutor blocked Smith's view of C.A. during her testimony, and Smith was unlikely to achieve reversal on this issue on direct appeal. *See Wilder v. State*, 716 N.E.2d 403, 406 (Ind. 1999) (after the prosecuting attorney admitted in his closing statement that he had intentionally attempted to block his witness's view of the defendant, Supreme Court held

that “blameworthy conduct” did not require reversal because the “intermittent obstruction of his view” was not a problem for a “significant portion of the direct examination” and “there is no evidence in the record that the defense counsel was . . . unable to effectively cross-examine the witness”).

At the post-conviction hearing, appellate counsel was asked whether he remembered the discussion about the violation of Smith’s right to confrontation:

I do. And he actually had, we were considering about [sic] what issues to raise and he wanted to raise that issue and I specifically told him that I wasn’t going to because his trial counsel had not objected to it at trial. The only evidence of it in the record was his comment and I think the prosecutor’s response at the sentencing hearing.

(PCR Tr. at 12.) When asked whether he considered raising the issue as fundamental error, appellate counsel said: “I did not. I thought it would be better to be raised in post conviction as opposed to direct appeal.” (*Id.*)

We cannot find fault in that strategic decision by appellate counsel:

A criminal defendant claiming ineffective assistance of trial counsel is at liberty to elect whether to raise this claim on direct appeal or in post-conviction proceedings. But if raised on direct appeal, the appellate resolution of the issue acts as *res judicata* and precludes its relitigation in subsequent post-conviction proceedings.

In contrast to a direct appeal, which addresses claims of error established in the record of proceedings through trial and judgment, a post-conviction relief proceeding may receive new evidence not previously presented at trial. . . . To support such a claim of ineffective assistance of counsel, it is often necessary to develop facts beyond those contained in the trial record.

Jewell v. State, 887 N.E.2d 939, 941-42 (Ind. 2008).

Similarly, Smith’s allegation that his right to confrontation was violated might have more likely been successful if presented in post-conviction proceedings where

testimony from Smith and the prosecutor could be presented. There was no objection by trial counsel during C.A.'s testimony, there was no evidence Smith's view had, in fact, been obstructed, and trial counsel did not request an opportunity at sentencing to create an adequate record for review on direct appeal. Therefore, there were strategic reasons to raise the issue in a post-conviction proceeding. *See id.* We find no error in the trial court's determination that appellate counsel was not ineffective when he made the strategic decision to leave this issue for post-conviction proceedings.

Because Smith has demonstrated no error in the denial of post-conviction relief, we affirm.

Affirmed.

CRONE, J., and BROWN, J., concur.