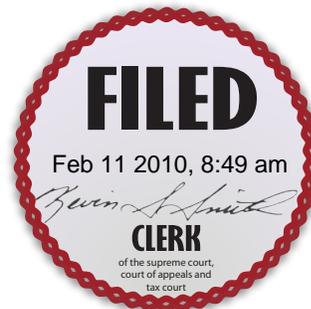


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

DELBERT LEWIS,)
)
Appellant-Petitioner,)
)
vs.) No. 71A04-0908-PC-440
)
STATE OF INDIANA,)
)
Appellee-Respondent.)

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Margot F. Reagan, Judge
Cause No. 71D04-0301-PC-4

February 11, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Delbert Lewis appeals the post-conviction court's denial of his petition for post-conviction relief arguing that his trial and appellate attorney rendered ineffective assistance of counsel. Finding that: (1) his convictions for Class A felony rape and Class B felony aggravated battery do not violate the prohibition against double jeopardy under the Indiana Constitution and (2) the State's charging information and the trial court's jury instructions required the State to establish that the serious bodily injury resulted from the rape and not necessarily the specific act of sexual intercourse, we conclude that Lewis's trial and appellate attorney did not provide ineffective assistance of counsel. We therefore affirm the post-conviction court.

Facts and Procedural History

The underlying facts of this case, taken from this Court's memorandum decision in Lewis's direct appeal, are as follows:

On July 10, 2000, A.P. heard Lewis, a former boyfriend, calling to her from the sidewalk outside her home. A.P. went to her front door and opened it to Lewis, who claimed to need to retrieve the title to his car. As Lewis entered the home, A.P. stepped outside. Apparently angered, Lewis grabbed A.P. and dragged her inside the home. Lewis then beat A.P. by punching, throwing, and hitting her with various items. A.P. escaped and ran upstairs. Lewis followed her and dragged her into the hallway. In the hallway, he wrapped the electric cord from a curling iron around her neck and choked her. As she lay on the floor, he placed his foot on her neck and alternated applying and releasing pressure, asking A.P. if she wanted to die. Eventually, Lewis threw A.P. into her bedroom, into a wall, and onto her bed, where after enduring further beating, she lost consciousness. When she awoke, she discovered that Lewis had put icepacks on her head wounds and was apologizing for beating her. He then climbed on top of her and had sexual intercourse with her while she lay crying. A.P. told Lewis that she had to get ready for work and crawled to the shower. Lewis left, and shortly thereafter, A.P.'s parents discovered her in the shower, called police, and took A.P. to the hospital.

Lewis v. State, No. 71A03-0203-CR-80, slip op. at 2-3 (Ind. Ct. App. June 25, 2002).

The State charged Lewis with Class A felony rape, Class B felony aggravated battery, Class C felony stalking, Class D felony possession of marijuana, and Class D felony attempted obstruction of justice. During jury deliberations, the foreperson sent the trial court a note saying, “[W]e do not have a form to find the defendant guilty of Rape, a class B felony. Can we return this verdict? If so, can we just cross out A and replace it with B on the form.” Tr. p. 756.¹ Defense counsel requested that the trial court inform the jury that it must decide the case on the verdict forms provided. The trial court did so over the State’s objection. The jury convicted Lewis on all counts. He was sentenced to fifty years for Class A felony rape, a consecutive twenty years for Class B felony aggravated battery, a consecutive eight years for Class C felony stalking, a concurrent three years for Class D felony possession of marijuana, and a consecutive three years for Class D felony attempted obstruction of justice, for an aggregate sentence of eighty-one years.

On direct appeal, Lewis challenged his convictions for Class A felony rape² and Class B felony aggravated battery.³ His appellate counsel, who represented him at trial, argued that there was insufficient evidence to sustain the convictions and that the trial

¹ Because we do not cite to the transcript of the post-conviction hearing nor Lewis’s appendix in this appeal, “Tr.” refers to the trial transcript and “Appellant’s App.” refers to Lewis’s appendix on direct appeal.

² Ind. Code § 35-42-4-1(b)(3).

³ Ind. Code § 35-42-2-1.5.

court committed fundamental error by failing to furnish the jury with a verdict form for Class B felony rape. We affirmed his convictions.

Lewis filed a *pro se* petition for post-conviction relief, which was later amended by his public defender. Lewis's amended petition alleged that his trial and/or appellate counsel provided ineffective assistance by failing to: (1) tender a verdict form for Class B felony rape; (2) challenge the sufficiency of the evidence supporting the enhancement of the rape conviction to a Class A felony; (3) challenge the convictions for Class A felony rape and Class B aggravated battery as violating the prohibition against double jeopardy; and (4) challenge Lewis's maximum consecutive sentences. Following a hearing, the post-conviction court entered findings of fact and conclusions of law denying relief. Lewis now appeals.

Discussion and Decision

Lewis contends that the post-conviction court erred in denying his petition for post-conviction relief. Specifically, he contends that his trial and appellate counsel was ineffective for failing to argue that: (I) his convictions for Class A felony rape and Class B felony aggravated battery violate the prohibition against double jeopardy under the Indiana Constitution and (II) the evidence was insufficient to support his conviction for Class A felony rape, as charged and instructed, where serious bodily injury did not result from the sexual intercourse underlying the rape conviction. Although Lewis formulates his second issue as a sufficiency claim, because the sufficiency of the evidence was raised on direct appeal, we construe his argument as a challenge to the adequacy of his appellate counsel's presentation of the sufficiency claim.

In a post-conviction proceeding, the petitioner bears the burden of establishing grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); *Henley v. State*, 881 N.E.2d 639, 643 (Ind. 2008). When appealing the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. *Henley*, 881 N.E.2d at 643. The reviewing court will not reverse the judgment unless the petitioner shows that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. *Id.* at 643-44. Further, the post-conviction court in this case made 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. *Id.* at 644. Findings of fact are accepted unless clearly erroneous, but no deference is accorded to conclusions of law. *Fisher v. State*, 810 N.E.2d 674, 679 (Ind. 2004). The post-conviction court is the sole judge of the weight of the evidence and the credibility of the witnesses. *Id.*

We review ineffective assistance of counsel claims under the two-part test provided by *Strickland v. Washington*, 466 U.S. 668 (1984). *Ben-Yisrayl*, 729 N.E.2d 102, 106 (Ind. 2000), *reh'g denied*. To prevail, the petitioner must demonstrate both that his or her counsel's performance was deficient and that he or she was prejudiced by that deficient performance. *Id.* Failure to satisfy either prong will cause the claim to fail. *Grinstead v. State*, 845 N.E.2d 1027, 1031 (Ind. 2006).

I. Double Jeopardy

Lewis first contends that his trial and appellate counsel was ineffective for failing to argue that his convictions for Class A felony rape and Class B felony aggravated battery violate the prohibition against double jeopardy under the Indiana Constitution. Lewis contends that his trial and appellate counsel should have argued that there is a reasonable possibility that the jury used: (1) the same evidence to establish the essential elements of rape and battery and (2) the same evidence to establish the “serious bodily injury” element of Class A felony rape and the “substantial risk of death” element of Class B felony aggravated battery.⁴ Whether convictions violate the Double Jeopardy Clause under the Indiana Constitution is a question of law which we review *de novo*. *Goldsberry v. State*, 821 N.E.2d 447, 458 (Ind. Ct. App. 2005) (citing *Spears v. State*, 735 N.E.2d 1161, 1166 (Ind. 2000), *reh’g denied*).

Article 1, Section 14 of the Indiana Constitution provides, “No person shall be put in jeopardy twice for the same offense.” Two or more offenses are the “same offense” under Article 1, Section 14, if, with respect to either the statutory elements of the challenged crimes or the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense.

⁴ Specifically, Lewis contends that the State used the evidentiary facts of: (1) Lewis’s general beating of A.P. to establish battery and the “compelled by force” element of rape, Appellant’s Br. p. 10; (2) Lewis’s choking of A.P. with his foot to establish aggravated battery and the “compelled by force” element of rape, *id.* at 11; Appellant’s Reply Br. p. 3; and (3) Lewis’s hitting of A.P. and A.P.’s unconsciousness to establish the “serious bodily injury” element of Class A felony rape and the “substantial risk of death” element of Class B felony aggravated battery, Appellant’s Br. p. 12. His reply brief then argues that the State used A.P.’s unconsciousness to establish the “knowingly or intentionally inflicts injury” element of aggravated battery and the “serious bodily injury” element of Class A felony rape. Appellant’s Reply Br. p. 4-5.

Lee v. State, 892 N.E.2d 1231, 1233 (Ind. 2008). Lewis contends that his convictions fail the actual evidence test.

Under the actual evidence test, the evidence presented at trial is examined to determine whether each challenged offense was established by separate and distinct facts. *Id.* at 1234. To show that two challenged offenses constitute the “same offense” in a claim of double jeopardy, a defendant must demonstrate a reasonable possibility that the evidentiary facts used by the jury to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense. *Id.* Application of this test requires us to identify the essential elements of each of the challenged crimes and to evaluate the evidence from the jury’s perspective. *Id.* We consider the charging information, evidence, final jury instructions, and arguments of counsel in determining the facts used by the jury to establish the elements of each offense. *Rutherford v. State*, 866 N.E.2d 867, 871 (Ind. Ct. App. 2007).

Lewis was charged with and convicted of Class A felony rape and Class B felony aggravated battery. The charging information alleged in pertinent part:

On or about the 10th day of July, 2000, in St. Joseph County, State of Indiana, DELBERT LEWIS did knowingly have sexual intercourse with [A.P.], a member of the opposite sex, by force, to-wit: by hitting her with his fists in the head and face all in order to compel [A.P.] to have sexual intercourse with him, and which resulted in serious bodily injury to a person other than a defendant, to-wit: extreme pain and/or unconsciousness to [A.P.].

* * * * *

On or about the 10th day of July, 2000, in St. Joseph County, State of Indiana, DELBERT LEWIS did knowingly inflict injury on [A.P.] by putting his foot on the front of her throat and jumping up and down thereby choking her which act created a substantial risk of death to [A.P.].

Appellant's App. p. 251-52. The charging information is clear that the facts establishing the force used to commit the rape was Lewis using his fists to hit A.P. in the head and face, and the facts establishing serious bodily injury was extreme pain and/or unconsciousness. The charging information is also clear that the facts establishing the injury creating a substantial risk of death for the aggravated battery was Lewis putting his foot on A.P.'s throat and choking her by jumping up and down.

The evidence presented at trial indicated that Lewis went to A.P.'s house purportedly to retrieve his car title. A.P. allowed Lewis in but stepped outside while he was inside the house because she did not want to be in the same room with him. When A.P. saw that this angered Lewis, she attempted to run to her neighbor's house. Lewis grabbed A.P. in the alley next to her house and dragged her inside. He beat her by punching her and hitting her with various items. He threw her across the dining room table and into different rooms in the house. Although A.P. was able to run upstairs to the bathroom, Lewis caught her, wrapped the electric cord from a curling iron around her neck, and choked her. As A.P. was lying on the ground, Lewis placed his foot on her throat and alternated applying and releasing pressure, asking her if she wanted to die. At some point, Lewis threw her against the wall so forcefully that the impact of her head made a hole in the wall. Lewis threw her onto her bed in the bedroom and relentlessly hit her across her face. A.P. lost consciousness. When she awoke, she discovered that Lewis had placed icepacks on her head wounds. He apologized to A.P. and asked "why

did [she] make him do that to [her].” Tr. p. 483. He then climbed on top of her and had sexual intercourse with her while she lay crying.⁵

A reasonable possibility that the jury used the same facts to reach two convictions requires substantially more than a logical possibility. *Lee*, 892 N.E.2d at 1236. Rather, reasonable possibility turns on a practical assessment of whether the jury may have latched on to exactly the same facts for both convictions. *Id.* Here, the evidence can properly support convictions for both rape and aggravated battery. It shows that Lewis put his foot on A.P.’s throat and applied pressure, and it also shows that he hit A.P. until she lost consciousness and then had sexual intercourse with her while she lay crying. However, we must determine whether there is a reasonable possibility that the jury latched on to the same facts for both convictions.

In its final instructions, the trial court read the charging information and instructed the jury on the statutory definitions of Class A felony rape and Class B felony aggravated battery. The trial court’s reading of the State’s charging information reiterated that the facts establishing the force used to commit the rape was Lewis using his fists to hit A.P. in the head and face, the facts establishing serious bodily injury for Class A felony rape was extreme pain and/or unconsciousness, and the facts establishing the injury creating a substantial risk of death for the aggravated battery was Lewis putting his foot on A.P.’s throat and choking her by jumping up and down.

During closing arguments, the State talked about the elements of Class A felony rape:

⁵ As the post-conviction court recited facts from the memorandum decision on direct appeal, and those facts comport with A.P.’s testimony at trial, the additional facts provided here are taken from A.P.’s testimony at trial.

[T]he State must prove that the defendant, Delbert Lewis, knowingly had sexual intercourse with [A.P.]. All of that the defendant admitted, so there's no question about that. When [A.P.] was compelled by force or imminent threat of force and the offense resulted in serious bodily injury to [A.P.] in the form of extreme pain and/or unconsciousness.

Let's talk about item number four. Let's talk about force or imminent threat of force. One thing that you will see on this, was there force used in this situation? Obviously, there was. She was beaten. Beaten unconscious, and as she awoke, the defendant perpetrated the final humiliation on her.

Tr. p. 711-12. Regarding Class B aggravated battery, the State stated:

[The State must prove] that the defendant, Delbert Lewis, knowingly touched in a rude, insolent, or angry manner, [A.P.], and the touching created -- now, we know he did all these things. He knowingly touched her in a rude, insolent, or angry manner, and the touching created a substantial risk of death to [A.P.]. That's the only element there that the defendant, I think, might challenge.

And the only testimony there . . . is the testimony of Ms. Simeri, that a man his size, standing on the throat of [A.P.], would cause a substantial risk of death by crushing -- possibly crushing her larynx. If he crushed it, this might be a murder case.

Id. at 721. The State's closing argument clearly delineated Lewis beating A.P. unconscious to effectuate the rape from Lewis standing on A.P.'s throat for the aggravated battery.

Lewis emphasizes other parts of the State's closing argument in an attempt to show a reasonable possibility that the jury used the same facts to support both convictions. Regarding rape, the State stated:

What did [A.P.] say the reason was that she didn't resist? Because *she had just had the hell beaten out of her*. And she was afraid that if she resisted, he would kill her.

* * * * *

Would any woman -- would any woman under the circumstances that existed here consent to having sex with that man? Somebody who had just *beaten her senseless, choked her, stood on her neck*. Of course not.

Id. at 712, 713 (emphases added). Regarding battery, the State stated:

[H]is statement that her injuries were caused by this and by being slapped once is ludicrous. That -- it simply can't happen for someone to be beaten up the way she was. This doesn't happen from sticking your hand up and hitting her once. The marks on the neck, other marks on the body, *her blacking out*, the blurred vision for months afterwards.

Id. at 716 (emphasis added). While we acknowledge that the State should have delineated the facts used to establish each crime in these particular statements, the State specifically charged and argued that the evidence of force for the Class A felony rape was Lewis hitting A.P. in the head and the evidence for the infliction of injury creating a substantial risk of death for the Class B felony aggravated battery was Lewis putting his foot on A.P.'s throat and applying pressure. We thus conclude that there is no reasonable possibility that the jury used the same evidence to establish the essential elements of rape and battery. Because the State specifically charged and argued that the serious bodily injury required for Class A felony rape was extreme pain and/or unconsciousness and the substantial risk of death required for Class B felony aggravated battery was Lewis putting his foot on A.P.'s throat and applying pressure, we further conclude that there is no reasonable possibility that the jury used the same evidence to establish the "serious bodily injury" element of Class A felony rape and the "substantial risk of death" element of Class B felony aggravated battery. We thus find that although Lewis's convictions for Class A felony rape and Class B felony aggravated battery logically could have been based on the same facts, in light of the evidence, charges, instructions, and arguments of

counsel, there is no reasonable possibility that the jury actually used the same set of facts to establish both convictions. *See Lee*, 892 N.E.2d at 1232.⁶

Because we find that Lewis's convictions do not violate Indiana's Double Jeopardy Clause, the performance of Lewis's trial and appellate counsel was not deficient for failing to raise the issue.

II. Inadequate Presentation of the Sufficiency Claim

Our restatement of Lewis's next contention is that his appellate counsel's presentation of the sufficiency claim was inadequate. An ineffectiveness challenge resting on counsel's presentation of a claim must overcome the strongest presumption of adequate assistance. *Bieghler v. State*, 690 N.E.2d 188, 196 (Ind. 1997), *reh'g denied*. Judicial scrutiny of counsel's performance, already highly deferential, is properly at its highest. *Id.* We will grant relief only when we are confident that we would have ruled differently. *Id.*

Specifically, Lewis contends that his appellate counsel should have argued that the evidence was insufficient to show that serious bodily injury resulted from the sexual

⁶ Lewis cites to *Bradley v. State*, 867 N.E.2d 1282 (Ind. 2007), to support his contention that there is a reasonable possibility that the jury used the same set of facts to establish both of his convictions. In that case, the defendant was convicted of Class B felony criminal confinement and Class B felony aggravated battery. The charging information for criminal confinement alleged that the defendant knowingly or intentionally confined the victim without her consent "while armed with a deadly weapon, a hammer, or which resulted in serious bodily injury . . . , to-wit: open head wound requiring staples." *Id.* at 1284 (quoting the appellant's appendix). The charging information for aggravated battery alleged that the defendant knowingly or intentionally inflicted injury on the victim "that created a substantial risk of death or caused serious permanent disfigurement or protracted loss or impairment of the function of a bodily member or organ, to-wit: open head wound and a knife wound to the back." *Id.* (quoting the appellant's appendix). Our Supreme Court found that the defendant's convictions violated double jeopardy because there was a reasonable possibility that the jury used the open head wound to support both convictions. *Id.* at 1285. Lewis's citation to *Bradley* is unpersuasive. Here, unlike in *Bradley*, the State's charging information alleged separate facts supporting each count: Lewis's hitting of A.P. in the head and face and A.P.'s extreme pain and/or unconsciousness were the evidentiary facts used to support the Class A felony rape, and Lewis's placement of his foot on A.P.'s throat and jumping up and down were the evidentiary facts used to support the Class B felony aggravated battery.

intercourse since the manner in which the State charged and the trial court instructed on Class A felony rape required the State to prove that serious bodily injury resulted from the sexual intercourse underlying the rape conviction.

The statutory definition of rape provides:

(a) Except as provided in subsection (b), a person who knowingly or intentionally has sexual intercourse with a member of the opposite sex when:

- (1) the other person is compelled by force or imminent threat of force;*
- (2) the other person is unaware that the sexual intercourse is occurring; or*
- (3) the other person is so mentally disabled or deficient that consent to sexual intercourse cannot be given;*

commits rape, a Class B felony.

(b) An offense described in subsection (a) is a Class A felony if:

- (1) it is committed by using or threatening the use of deadly force;*
- (2) it is committed while armed with a deadly weapon;*
- (3) it results in serious bodily injury to a person other than a defendant; or*
- (4) the commission of the offense is facilitated by furnishing the victim, without the victim's knowledge, with a drug . . . or a controlled substance . . . or knowing that the victim was furnished with the drug or controlled substance without the victim's knowledge.*

Ind. Code § 35-42-4-1 (emphases added). The statute clearly requires the serious bodily injury to result from the offense of rape and not necessarily the specific act of sexual intercourse.

The State charged Lewis with Class A felony rape as follows:

On or about the 10th day of July, 2000, in St. Joseph County, State of Indiana, DELBERT LEWIS did knowingly have sexual intercourse with [A.P.], a member of the opposite sex, by force, to-wit: by hitting her with his fists in the head and face all in order to compel [A.P.] to have sexual intercourse with him, and which resulted in serious bodily injury to a person other than a defendant, to-wit: extreme pain and/or unconsciousness to [A.P.].

Appellant's App. p. 251. The trial court instructed the jury on the definition of Class A felony rape as follows:

A person who knowingly or intentionally has sexual intercourse with a member of the opposite sex, when the other person is compelled by force or the threat of force, and it results in serious bodily injury to a person other than a defendant, commits Rape, a class A felony.

Tr. p. 232-33, 740. Because both the State's charging information and the trial court's instructions track the language of Indiana's rape statute, we conclude that both similarly required the State to establish that the serious bodily injury resulted from the rape and not necessarily the specific act of sexual intercourse.

If Lewis's appellate counsel had set forth his sufficiency claim as Lewis contends he should have, we would not have ruled differently from the panel of this Court that issued the memorandum decision on direct appeal. Because we find that the State's charging information and the trial court's instructions required the State to establish that the serious bodily injury resulted from the rape and not necessarily the specific act of sexual intercourse, Lewis was not prejudiced by his appellate counsel's presentation of his sufficiency claim.⁷ Lewis has not shown that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court.

⁷ To the extent that Lewis contends that his trial counsel was ineffective for failing to argue to the trial court and jury that the State had to establish that the serious bodily injury resulted from the specific act of sexual intercourse underlying the rape, we use the same reasoning to find such a claim meritless; that is, because the State's charging information and the trial court's instructions track the language of Indiana's rape statute, the State was required to establish that the serious bodily injury resulted from the rape and not necessarily the specific act of sexual intercourse. Lewis was therefore not prejudiced by his trial counsel's failure to make such an argument to the trial court and jury.

Affirmed.

RILEY, J., and CRONE, J., concur.