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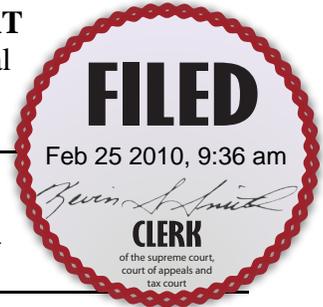
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COURT OF APPEALS OF INDIANA

ROBERT SPANN, JR.,
Appellant-Petitioner,
vs.
STATE OF INDIANA,
Appellee-Respondent.

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No. 71A03-0907-PC-351

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable John Marnocha, Judge
Cause No. 71D02-0607-PC-23

February 25, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-petitioner Robert Spann, Jr., appeals the denial of his petition for post-conviction relief. From what we can infer, Spann raises the following arguments: (1) his right to a fair trial was violated because one of the witnesses who testified against him allegedly committed perjury; (2) the prosecutor committed misconduct by making allegedly false statements during the opening statement and by allegedly failing to divulge exculpatory information to Spann; and (3) the charging information was defective.¹ Finding that these claims are not available on post-conviction review, we affirm.

FACTS

The underlying facts, as recounted by this court in Spann's direct appeal, are as follows:

Thirteen-year-old K.S. was a friend of a boy who lived with Spann, his uncle. K.S. spent much time at Spann's house doing chores and playing video and computer games and often spent the night at Spann's house during the summer. When K.S. would spend the night at Spann's house, he would take a shower before going to bed.

On one occasion in August of 2004, K.S. was waiting to take a shower at Spann's house when his friend came out of the bathroom and told K.S. that it was his turn. When K.S. went into the bathroom, Spann was already in the shower, naked, and Spann told K.S. to disrobe and get in the shower. K.S. did so. Spann then took a washcloth and soap and proceeded to wash K.S.'s back, buttocks, chest, and finally his penis. After washing K.S.'s penis, Spann asked, "Did it hurt?"

¹ Spann raises a fourth argument regarding an unidentified defense objection that the trial court overruled. Inasmuch as he fails to identify what objection he is discussing or raise a cogent argument relating thereto, he has waived this argument. See Groves v. State, 823 N.E.2d 1229, 1231 n.2 (Ind. Ct. App. 2005) (holding that the failure to put forth a cogent argument acts as a waiver of the issue on appeal).

A few days later, K.S. again was spending the night at Spann's house. Normally, when K.S. spent the night he would sleep in a one-person bed in Spann's bedroom while Spann slept in a separate king- or queen-size bed. On this occasion, however, Spann asked K.S. to get into the big bed with him. Before K.S. got into bed, Spann told him, "Don't wear no boxers, just wear your pajama pants and a shirt." K.S. got into the bed facing away from Spann. Shortly after K.S. got into the bed, Spann put one of his legs over K.S.'s legs, then put his hand down K.S.'s pants and touched K.S.'s penis. Spann did not immediately remove his hand from K.S.'s penis, but when he did, K.S. left the big bed and returned to the small bed.

Spann v. State, 850 N.E.2d 411, 413 (Ind. Ct. App. 2006). The State charged Spann with two counts of class C felony child molesting. At Spann's trial, K.S. testified extensively about the incidents of molestation. The State also presented the testimony of Charles Hartsell, who testified that he met Spann in the early 1990s and met him again in jail in 2005. Hartsell testified that Spann admitted to him that he had fondled a boy who had come over to spend the night with his nephew. The jury convicted Spann as charged, and Spann was sentenced to two consecutive eight-year terms. On appeal, Spann argued that there was insufficient evidence supporting the convictions and that the trial court gave erroneous jury instructions. This court affirmed. Id. at 416.

On July 19, 2006, Spann filed a pro se petition for post-conviction relief. The State Public Defender was appointed to represent Spann, but later moved to withdraw, and the post-conviction court granted the request. At the April 14, 2009, hearing on the petition, Spann called three witnesses—the prosecutor who tried his case, Hartsell, and Daniel Hollen, a fellow inmate who knew Spann and Hartsell. On June 23, 2009, the post-conviction court denied the petition, and Spann now appeals.

DISCUSSION AND DECISION

The purpose of a petition for post-conviction relief is to raise issues unknown or unavailable to a defendant at the time of the original trial and appeal. Emerson v. State, 812 N.E.2d 1090, 1095 (Ind. Ct. App. 2004). In other words, post-conviction relief is not a “super appeal” that permits the rehashing of prior proceedings regardless of the circumstances surrounding them. Id. Instead, post-conviction relief is a narrow remedy for subsequent collateral challenges to convictions that must be based upon grounds enumerated in the post-conviction rules. Perry v. State, 904 N.E.2d 302, 307 (Ind. Ct. App. 2009), trans. denied; see also Ind. Post-Conviction Rule 1(1).

The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. P-C.R. 1(5); Perry, 904 N.E.2d at 307. When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. Perry, 904 N.E.2d at 307. 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.

As noted above, from what we are able to glean from his appellant’s brief, Spann raises the following arguments on appeal: (1) his right to a fair trial was violated because one of the witnesses who testified against him allegedly committed perjury; (2) the prosecutor committed misconduct by making allegedly false statements during the opening statement and by allegedly failing to divulge exculpatory information to Spann;

and (3) the charging information was defective. The first two arguments are free-standing claims of fundamental error that should have been raised in his direct appeal and are not available on post-conviction review. See Taylor v. State, 882 N.E.2d 777, 781 (Ind. Ct. App. 2008) (holding that freestanding claims of fundamental error are not permitted in post-conviction proceedings). Likewise, the third and final argument regarding the charging information is merely a direct attack on his conviction via an issue that was available on direct appeal. Consequently, this claim is also unavailable in post-conviction proceedings. See Emerson, 812 N.E.2d at 1095 (explaining that “[w]hen the petitioner has already been afforded the benefit of a direct appeal, post-conviction relief contemplates a rather small window for further review”). Inasmuch as Spann raises no claims that are available in post-conviction proceedings, the post-conviction court properly denied his petition.

The judgment of the post-conviction court is affirmed.

BAILEY, J., and ROBB, J., concur.