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IN THE
COURT OF APPEALS OF INDIANA

KEVIN L. GOVAN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 02A05-0802-PC-42
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Frances C. Gull, Judge
Cause No. 02D04-0607-PC-72

June 26, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Kevin Govan appeals the denial of his petition for post-conviction relief ("PCR"), which challenged his convictions and sentence for two counts of Class B felony criminal confinement, one count of Class B felony possession of a firearm by a serious violent felon ("SVF"), and Class D felony theft. We affirm.

Issue

The sole issue we address in this appeal is whether the PCR court properly concluded that Govan received effective assistance of trial counsel.

Facts

In Govan's direct appeal, we recited the facts most favorable to his convictions as follows:

> On November 14, 2004, Myranetta Hines-White, (Myra), Andrew Beeks and Andrea Howe reported to work at a McDonald's restaurant in Wayendale. While the three were preparing to open the store for business, Myra went to open the doors and noticed that Govan—also a coworker at the restaurant—was standing outside. When Myra returned to the food preparation area, she heard Govan approach and say, "go to the back." Tr. p. 157-58. When she turned around, she saw Govan with a mask on his face holding a gun. Govan pointed the gun at Myra and again ordered her to the back of the restaurant. Beeks then approached and saw Govan holding the gun. Govan also ordered Beeks to the back of the store. The group then passed Howe, who was in the manager's office. Govan ordered her to leave the office, and he escorted all three of them to the walk-in cooler. Govan pushed Myra and Beeks into the cooler and ordered Howe to shut the door.

> Thereafter, Govan demanded that Howe give him money from the restaurant. In response, Howe handed him approximately $7,000, and Govan left the store. Howe then contacted the police and reported the incident. At some point, Fort Wayne Police Officer Gregory Woods noticed an individual who matched Howe's description of the perpetrator. This individual, who was subsequently identified as Govan, ran from Officer Woods. During a chase, Govan dropped his jacket. Govan then jumped into a river and swam to a nearby golf course.
>
> As the chase ensued, the police recovered the jacket that Govan had dropped. When the jacket was searched, $2,774.88 in loose cash was found along with two McDonald's bank deposit bags containing $4,371.82. The police also recovered a pair of pants on the golf course that bore a "Crest" manufacturer's label. Tr. p. 332-33, 355-56. The Crest Company was the McDonald's uniform supplier, and the pants recovered were of the same type that had been issued to Govan during his employment at the restaurant. The pants also matched the description of those that Govan had worn at the crime scene.
>
> It was determined that prior to the incident, Govan had told Howe that he was thinking about "hitting a lick," which meant that he wanted to rob a McDonald's restaurant. Tr. p. 382. Because Howe was afraid for her children, she did not tell anyone about that conversation. Also, after Govan was apprehended and incarcerated in the county jail, he telephoned Dawn Lothamer, another McDonald's employee. During this recorded conversation, Govan asked to speak with Myra, but Lothamer told him that Myra would not talk to him. Lothamer told Govan that she understood that Govan had held Myra at knifepoint at the McDonald's. In response, Govan told Lothamer that he had not used a gun during the incident, but that he had "only used his elbow." State's Ex. 2. Govan then asked Lothamer to tell Myra that he was sorry for what had occurred.

Govan v. State, No. 02A04-0510-CR-577, slip op. pp. 2-4 (Ind. Ct. App. Apr. 20, 2006), trans. denied.

The State charged Govan with two counts of Class B felony criminal confinement, one count of Class B felony possession of a firearm by a SVF, and one count of Class D felony theft. The State also sought to enhance Govan's sentences for the confinement counts under Indiana Code Section 35-50-2-11(b)(3) for his use of a firearm during the offense. On May 25, 2005, a jury found Govan guilty as charged. The trial court sentenced Govan to an aggregate term of forty years.

On direct appeal, Govan argued (1) the trial court erred in denying his motion for a mistrial, (2) certain evidence was improperly admitted, and (3) there was insufficient evidence that Govan was in possession of a firearm when the offenses were committed. We rejected these arguments and affirmed; our supreme court denied transfer.

On July 10, 2006, Govan filed a pro se PCR petition, and he has elected to continue proceeding pro se. The PCR court held a hearing on Govan's petition on August 31, 2007. Govan did not introduce a copy of his original trial record into evidence at the hearing. On November 28, 2007, before Govan was able to obtain a copy of the trial record, the PCR court denied his petition. Govan initiated an appeal from that ruling, and the State in its brief contended that Govan's ineffective assistance claims were waived for failing to introduce the trial record into evidence at the PCR hearing. After reviewing the circumstances regarding Govan's attempt to obtain a copy of the trial record, on October 3, 2008, we suspended consideration of this appeal and remanded for the PCR court to review the trial record and issue a ruling based on that record. On December 8, 2008, this court received the PCR court's new order, again denying Govan's

PCR petition after reviewing the trial record. We gave Govan and the State an opportunity to rebrief this case in light of the new order, which opportunity Govan declined but the State accepted. This case is now fully briefed and ready for decision.

Analysis

Post-conviction proceedings provide defendants the opportunity to raise issues not known or available at the time of the original trial or direct appeal. Stephenson v. State, 864 N.E.2d 1022, 1028 (Ind. 2007), cert. denied. If an issue was known and available but not raised on direct appeal, the issue is procedurally foreclosed. Id. "If an issue was raised and decided on direct appeal, it is res judicata." Id. "In post-conviction proceedings, complaints that something went awry at trial are generally cognizable only when they show deprivation of the right to effective counsel or issues demonstrably unavailable at the time of trial or direct appeal." Sanders v. State, 765 N.E.2d 591, 592 (Ind. 2002). Freestanding fundamental error claims cannot be reviewed in a post-conviction proceeding.[1] Id.

"In post-conviction proceedings, the defendant bears the burden of proof by a preponderance of the evidence." Stephenson, 864 N.E.2d at 1028. We review factual findings of a post-conviction court under a "clearly erroneous" standard but do not defer to any legal conclusions. Id. We will not reweigh the evidence or judge the credibility of

[1] Govan cites cases pre-dating Sanders for the proposition that fundamental error claims are cognizable in PCR proceedings, even absent a claim of ineffective assistance of counsel. See, e.g., Propes v. State, 550 N.E.2d 755, 759 (Ind. 1990). Sanders must be understood as rejecting broad statements regarding the availability of fundamental error claims in PCR proceedings, such as appear in Propes. See Lindsey v. State, 888 N.E.2d 319, 325 (Ind. Ct. App. 2008), trans. denied.

the witnesses and will examine only the probative evidence and reasonable inferences therefrom that support the decision of the post-conviction court. Id. We additionally note that pro se litigants without legal training are held to the same standard as trained counsel. Evans v. State, 809 N.E.2d 338, 344 (Ind. Ct. App. 2004), trans. denied.

Govan raises issues that are not properly considered in this PCR proceeding because they are not framed as constituting ineffective assistance of counsel or matters that were not known or available at the time of his direct appeal.[2] He contends that the prosecutor intentionally presented perjured testimony, namely Howe's testimony; he also argues that he was improperly sentenced and that his two confinement convictions violate double jeopardy principles. We cannot now address these freestanding claims of error, regardless of whether they are framed as fundamental error. See Sanders, 765 N.E.2d at 592 (stating that it is "wrong" to address freestanding fundamental error claims in PCR proceedings).

Govan does also challenge his trial counsel's effectiveness. Claims of ineffective assistance of counsel are reviewed under the two-part test announced in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984). Grinstead v. State, 845 N.E.2d 1027, 1031 (Ind. 2006). A defendant must demonstrate both that counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms, and that the deficient performance resulted in prejudice. Id. Prejudice occurs when the

[2] Govan claims in the "summary of argument" section of his brief that the PCR court abused its discretion in refusing to issue certain subpoenas, but he never mentions that argument again or provides any analysis to support it, as required by Indiana Appellate Rule 46(A)(8). We will not address that claim.

defendant demonstrates that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. (quoting Strickland, 466 U.S. at 694, 104 S. Ct. at 2068). Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective, and there is a strong presumption that counsel rendered adequate assistance. State v. McManus, 868 N.E.2d 778, 790 (Ind. 2007), cert. denied. We afford great deference to counsel's discretion to choose strategy and tactics. McCary v. State, 761 N.E.2d 389, 392 (Ind. 2002).

Govan first contends trial counsel should have objected to the admission into evidence of State's Exhibit 11, which according to Govan's own description was an orange rubber fake gun that witness Andrew Beeks used during his testimony regarding the manner in which Govan used a gun during the incident. Govan's principal complaint regarding the fake gun is that it bore no direct connection to him or the offenses with which he was charged. Ordinarily, before a physical exhibit may be "formally" introduced against a defendant, the State must establish that the instrumentality is like the one associated with the crime, and that it is connected to the defendant and the crime. Springer v. State, 463 N.E.2d 243, 245-46 (Ind. 1984), overruled on other grounds by Scisney v. State, 701 N.E.2d 847 (Ind. 1998).

Here, however, the fake gun was used as demonstrative evidence, and it was never formally introduced into evidence or passed to the jury. Demonstrative evidence is evidence offered for purposes of illustration and clarification. See Myers v. State, 887

N.E.2d 170, 184 (Ind. Ct. App. 2008), trans. denied. "To be admissible, the evidence need only be sufficiently explanatory or illustrative of relevant testimony to be of potential help to the trier of fact." Id. at 185. The admissibility of demonstrative evidence is subject to the balancing of probative value against the danger of unfair prejudice under Indiana Evidence Rule 403. Id. Because the fake gun was not introduced into evidence, Springer's limitations were inapplicable here. Furthermore, any prejudicial impact that might have accompanied an alleged victim's use of the fake gun to demonstrate Govan's actions would have been significantly reduced by the plain fact that it in no way resembled a real gun, but was more like a toy. In short, we cannot say trial counsel's performance was deficient for not objecting to the use of the gun during Beeks' testimony.

Next, Govan contends trial counsel was ineffective for not moving before trial to "suppress" the SVF charge. Appellant's Br. p. 35. We assume Govan means to say that trial counsel ought to have moved to dismiss this charge, which he claims was not supported by any evidence that he possessed a firearm during the incident at the McDonald's. It is well-settled, however, that "[a] pretrial motion to dismiss directed to the insufficiency of the evidence is improper, and a trial court errs when it grants such a motion." State v. Helton, 837 N.E.2d 1040, 1041 (Ind. Ct. App. 2005). Thus, if trial counsel had filed a pretrial motion to dismiss the SVF charge on the basis that there was

insufficient evidence to support it, the trial court would have been required to deny such a motion. Counsel was not ineffective for not filing a motion to dismiss the SVF charge.[3]

Govan's final contention is that trial counsel should have objected to alleged prosecutorial misconduct during closing argument. When reviewing a claim of prosecutorial misconduct, we must determine (1) whether the prosecutor engaged in misconduct, and if so, (2) whether the misconduct, under all of the circumstances, placed the defendant in a position of grave peril to which he or she should not have been subjected. Cooper v. State, 854 N.E.2d 831, 835 (Ind. 2006). "The gravity of peril is measured by the probable persuasive effect of the misconduct on the jury's decision rather than the degree of impropriety of the conduct." Id. In addition to this general standard regarding prosecutorial misconduct, Govan must further establish that trial counsel was ineffective for not objecting to any of the prosecutor's closing argument.

The first closing argument statements Govan complains about concerned keys found in the pants found on the golf course when police were pursing Govan. Specifically, during his closing argument trial counsel alluded to the fact that police made no effort to determine what those keys went to. The prosecutor responded:

> Why didn't they take those keys and go to doors? Well, let's see. Let's take some keys—and how would you feel if you were at home, and all of a sudden, some officer came to your door with a set of keys and was trying a bunch of keys in your door? People have rights and there are things that you do and you—or you don't do . . . .

[3] We also note that on direct appeal, Govan challenged the sufficiency of the evidence that he possessed a firearm and we rejected that claim. Govan, slip op. at 9. That holding now is res judicata. See Stephenson, 864 N.E.2d at 1028.

Trial Tr. pp. 507-08. A prosecutor is entitled to respond to statements made in the defense's closing argument, even if the response otherwise would be objectionable. Dumas v. State, 803 N.E.2d 1113, 1118 (Ind. 2004). Here, the prosecutor's attempt to explain why the police did not make more effort to determine what the keys went to was appropriate and non-objectionable.

Govan also contends the prosecutor engaged in improper argument when she stated:

> Both Andrew and Myra, the next time they saw the man that confined them, both of them had to go home. Why did they have to go home? Because they both got—felt sick and uneasy about having to be in the same establishment as the person that had done that horrible thing to them, the person that had done that crime. How would you feel, whether it was a friend or someone that you didn't know, the feeling that you would get with someone sticking a gun to you and locking you in a cooler? That's what he did to them, and that's why the next time they saw him, they both had to leave work.

Trial Tr. pp. 512-13. Govan takes particular exception to the prosecutor asking the jurors how they "would . . . feel" being the victim of a crime such as Govan was alleged to have committed. Strictly in isolation, this may have crossed the line into an improper argument designed to inflame the passions or prejudices of the jury. See Remsen v. State, 428 N.E.2d 241, 244-45 (Ind. 1981) (disapproving of argument asking whether "You would like to have your little daughter or little loved one of yours view a forced rape?").

In context, however, the prosecutor was trying to explain the testimony of two witnesses, Hines-White and Beeks, and their reaction upon seeing Govan again after the incident. Moreover, the arguably improper comment by the prosecutor was fleeting and objecting to it could have had the effect of unduly emphasizing it. It is a reasonable strategic choice for defense counsel not to object to a comment made during closing argument in order to avoid drawing undue attention to the comment. Lambert v. State, 743 N.E.2d 719, 737 (Ind. 2001), cert. denied. We cannot say trial counsel's performance fell below an objective standard of reasonableness for failing to object to any of the prosecutor's closing argument.

Conclusion

Govan has failed to establish that his trial counsel was ineffective, and his other freestanding claims of error are not cognizable in a PCR proceeding. The PCR court correctly denied Govan's PCR petition. We affirm.

Affirmed.

FRIEDLANDER, J., and DARDEN, J., concur.