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IN THE
COURT OF APPEALS OF INDIANA

MARVIN W. BROWN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 18A02-0902-CR-106
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE DELAWARE CIRCUIT COURT
The Honorable Robert L Barnet, Judge
Cause No. 18C03-0802-FA-03

August 19, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Marvin W. Brown appeals his convictions for six counts of rape -- five as class A felonies and one as a class B felony.

We affirm.

ISSUE

Whether Brown received ineffective assistance of defense counsel during the sentencing phase.

FACTS

Between March and December of 1992, Brown raped six women in Delaware County, having broken into at least one victim's home to commit the crime. He was armed with a knife during at least one of the attacks, and had threatened to kill five of the victims. Police performed forensic DNA testing on the six victims and recovered seminal material from each. Brown, however, was not identified as the rapist until 2001, when he was convicted of an unrelated rape. Following his arrest in 2001, police took a blood sample from Brown and entered his DNA into the Combined DNA Index System (CODIS). Brown's DNA was compared to the biological samples taken from the six 1992 rape victims, and DNA testing revealed Brown to be the rapist in each instance.

On February 20, 2008, the State charged Brown with twenty counts, including burglary, criminal deviate conduct, and rape. At his initial hearing on February 21, 2008, Brown entered a plea of not guilty to all counts. On October 20, 2008, Brown and the State tendered to the trial court a plea agreement wherein Brown agreed to plead guilty to counts 1, 3, 6, 14, and 17 (five counts of class A felony rape) and count 11 (one count of

class B felony rape). Under the plea agreement, the State agreed to dismiss the remaining charges in exchange for Brown's plea of guilty. The plea agreement left sentencing discretion to the trial court with the exception of the following:

> 1. The executed sentence imposed would be capped at ninety (90) years.
> 2. The parties agree that the Court will have the discretion to determine whether or not Counts 1, 3, and 6 will be served consecutively or concurrently.
> 3. That the parties agree that Counts 11, 14 and 17 would be served concurrently to the sentences in Count[s] 1, 3, and 6.

(App. 92).

The trial court conducted a change of plea hearing on October 30, 2008, and continued the remainder of the hearing to November 3, 2008. On that date, Brown entered his guilty plea, and the trial court took the matter under advisement and ordered the preparation of a pre-sentence investigation report. The trial court conducted a sentencing hearing on December 3, 2008. Rape victim, L.H., was the sole witness for the State. During direct examination of L.H., the prosecutor employed the use of leading questions. Defense counsel raised no objection. The defense called no witnesses; however, Brown made a statement to the trial court, and defense counsel argued for mitigation and a reduced sentence on Brown's behalf. The trial court subsequently accepted the plea agreement and identified the following mitigating and aggravating circumstances prior to imposing its sentence:

> Mitigating Circumstances:
>
> 1. [Brown] did enter guilty pleas in this matter and has accepted responsibility for his actions.
> 2. In the past, [Brown] has maintained gainful employment and attempted to meet his family responsibilities.

3. [Brown] still has some family support which should aid in rehabilitation.
4. This Court is aware of the effect of long-term incarceration on [Brown]'s family.
5. [Brown] has demonstrated some remorse.

Aggravating Circumstances:

1. [Brown] has a history of contact with the criminal justice system dating back to 1979, with two (2) prior convictions before 1992.
2. Now [Brown] has four (4) felony convictions and eight (8) misdemeanor convictions, including a Rape conviction in 2001.
3. The Court notes the heinous and disturbing nature of these crimes.
4. Prior attempts at correctional treatment and probation have not been successful.
5. In the past, [Brown] has demonstrated a total lack of regard for the rights of others; no respect for human dignity.
6. Certain amount of planning [was] involved in these offenses.

(App. 166-67). The trial court then imposed sentence as follows: on counts 1, 3, and 6 (three counts of class A felony rape), three consecutive thirty-year sentences; count 11 (one count of class B felony rape), ten years; and on counts 14 and 17 (two counts of class A felony rape), two thirty-year sentences. The trial court ordered the sentences on count 11, 14, and 17 served concurrently to one another and concurrently to the sentences on counts 1, 3, and 6, for an aggregate sentence of ninety years. Brown now appeals.

DECISION

Brown argues that he received ineffective assistance of defense counsel at the sentencing hearing. Specifically, he argues that he suffered prejudice from defense counsel's failure to (1) call his pastor and jail psychologist to testify; and (2) to object to the State's leading questions. We disagree.

There is a strong presumption that counsel rendered effective assistance and made all significant decisions in the exercise of reasonable professional judgment, and the burden falls on the defendant to overcome that presumption. *Johnson v. State*, 901 N.E.2d 1168, 1173 (Ind. Ct. App. 2009).

> To make a successful ineffective assistance claim, a defendant must show that: (1) his attorney's performance fell below an objective standard of reasonableness as determined by prevailing professional norms; and (2) the lack of reasonable representation prejudiced him. Even if a defendant establishes that his attorney's acts or omissions were outside the wide range of competent professional assistance, he must also establish that but for counsel's errors, there is a reasonable probability that the result of the proceeding would have been different.

Id. (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984)) (internal citations omitted).

> Deficient performance is representation that fell below an objective standard of reasonableness by the commission of errors so serious that the defendant did not have the 'counsel' guaranteed by the Sixth Amendment. Consequently, our inquiry focuses on counsel's actions while mindful that isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render counsel's representation ineffective. Indeed, there is a strong presumption that counsel rendered adequate assistance. 'To satisfy the second prong, the defendant must show prejudice: a reasonable probability (i.e. a probability sufficient to undermine confidence in the outcome) that, but for counsel's errors, the result of the proceeding would have been different.'

Roberts v. State, 894 N.E.2d 1018, 1030 (Ind. Ct. App. 2008) (quoting *Henley v. State*, 881 N.E.2d 639, 644 (Ind. 2008)).

Brown argues that trial counsel rendered ineffective assistance when counsel did not call his pastor to testify that he had undergone spiritual counseling; or the jail psychologist to testify and/or introduce documentation regarding his enrollment in

enrichment classes. He asserts that he suffered prejudice from these omissions as evidenced by the trial court's failure to find these to be mitigating circumstances.

Although counsel's decision "regarding what witnesses to call is a matter of trial strategy which an appellate court will not second-guess," failure to call an important witness may constitute deficiency. *Brown v. State*, 691 N.E.2d 438, 447 (Ind. 1998); see *Clark v. State*, 561 N.E.2d 759, 763-64 (Ind. 1990). That said, however, a defense counsel's poor strategy or bad tactics do not necessarily amount to ineffective assistance of counsel. *Crain v. State*, 736 N.E.2d 1223, 1239 (Ind. 2000).

Our review of the record establishes that trial counsel rendered adequate assistance during the sentencing hearing, such that a tactical decision not to call Brown's pastor and jail psychologist to testify did not rise to the level of ineffective assistance of counsel. Brown has not presented evidence indicating what his pastor and jail psychologist's testimony would have been -- save that he attended counseling and enrolled in enrichment classes. The record reveals that defense counsel proffered both factors as mitigating circumstances during his closing argument. In his brief, Brown acknowledges that during his closing remarks before the court, defense counsel "referred to [Brown's] counseling with his local pastor" and "to numerous classes that the Defendant had completed, such as the Psalms Program and Thinking for a Change." Brown's Br. at 9.

Nor are we persuaded by Brown's contention that the trial court's failure to find his religious counseling and enrollment in enrichment classes to be mitigating circumstances automatically constitutes proof that he suffered prejudice from defense counsel's decision not to call his pastor and jail psychologist to testify at the sentencing

hearing. This contention, standing alone, is not sufficient to establish that Brown suffered prejudice to his substantial rights. It is well-settled that the finding of mitigating circumstance is within the discretion of the trial court. *Hackett v. State*, 716 N.E.2d 1273, 1277 (Ind. 1999). The trial court is not obligated to place the same value on a mitigating circumstance as does the defendant. *Beason v. State*, 690 N.E.2d 277, 283-84 (Ind. 1998). Nor does a trial court abuse its discretion by refusing to find a circumstance mitigating merely because it is offered by the defendant. *Felder v. State*, 870 N.E.2d 554, 558 (Ind. Ct. App. 2007) (citing *Spears v. State*, 735 N.E.2d 1161, 1167 (Ind. 2000)).

Given that defense counsel did advise the trial court of the very facts that Brown insists are mitigating factors, the strength of the State's evidence, and absent a showing that a reasonable probability existed that the introduction of the pastor and psychologist's testimony would have brought about a different result, Brown has not demonstrated that trial counsel's apparent strategic decision against calling Brown's desired witnesses constituted ineffective assistance of defense counsel.

Next, Brown argues that defense counsel's failure to object to the prosecutor's "inflammatory language" and "objectionable" leading questions during direct examination of rape victim, L.H. "was deficient and resulted in prejudice" to him. Brown's Br. at 6.

Indiana Evidence Rule 611(c) provides that

> [l]eading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness's testimony. Ordinarily, leading questions should be permitted on cross-examination.

> Whenever a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

Indiana case law has, however, permitted use of leading questions on direct examination "to develop the testimony of certain kinds of witnesses – for example, children witnesses; young, inexperienced, and *frightened witnesses*; special education student witnesses; and weak-minded adult witnesses." *Williams v. State*, 733 N.E.2d 919, 922 (Ind. 2000) (emphasis added). Such is the case here.

Brown cites the following as examples of the prosecutor's leading questions:

> Q: Whenever you hear the date of August 20th, 1992, it causes, it causes you some fear and anxiety, doesn't it?
> A: Yes.
>
> * * *
>
> Q: He broke into your house that night, didn't he?
> A: Yeah.
> Q: Raped you and threatened to kill you, correct?
> A: Yes, he did.
> Q: It's hard to describe the impact this has had on your life for the last sixteen (16) years, isn't it?
> A: Yes.
> Q: In fact, until just recently, you didn't know necessarily [that] Marvin Brown was the one that raped you, did you?
> A: No, I didn't.
> Q: DNA came through, through actually what is called a cold hit and it revealed him as the person who supplied the DNA and raped you, is that correct?
> A: Yes.
>
> * * *
>
> Q: Putting you through a trial, putting you through everything else as well, would that make you relive the actions and the brutalization that he did that night, correct?
> A: Yes.

(Tr. 44, 45, 46).

Here, pursuant to his plea, Brown admitted that he committed six counts of rape and acknowledged the brutal attendant circumstances surrounding his sexual crimes against the six victims, selected at random, during a nine-month period. Given the psychological trauma associated with rape, and Brown's threats to kill five of the victims, it is reasonable to believe that L.H. was extremely frightened in his presence. Because Indiana law contemplates and permits the use of leading questions during direct examination of such frightened witnesses, we cannot find that defense counsel's decision not to object to the prosecutor's leading questions on direct examination of victim, L.H., "fell below an objective standard of reasonableness as determined by prevailing professional norms." *Johnson*, 901 N.E.2d at 1173 (citing *Strickland*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

Moreover, defense counsel's decision to refrain from objecting strenuously during the prosecutor's examination of rape victim, L.H., was likely a matter of strategy, as counsel might not have wanted to appear to be unduly confrontational with a frightened victim/ witness. *See Warner v. State*, 577 N.E.2d 267, 270 (Ind. Ct. App. 1991) (great deference is given to discretion afforded counsel in making tactical and strategic decisions in representing his or her client).

We are not persuaded by Brown's contention that the trial court's description of his rapes of six women in a nine-month period as "heinous and disturbing" constitutes proof-positive that he suffered prejudice from defense counsel's decision not to object to the prosecutor's leading questions. Brown's Br. at 10. We agree with the State that Brown's "bald assertion" is insufficient to establish that he suffered prejudice to his

substantial rights, especially given that he has already acknowledged the viciousness of his crimes, "there is no question but that the crimes were heinous." State's Br. at 5, 6.

Brown has not overcome the strong presumption that trial counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment; therefore, he has not established that he received ineffective assistance of defense counsel.

Affirmed.

ROBB, J., and MATHIAS, J., concur.