



Lonnie “Timmy” Bonds appeals the denial of his petition for post-conviction relief and presents the following restated issue for review: Did the post-conviction court err by denying Bonds’s petition for post-conviction relief?

We affirm.

At approximately 4:00 a.m. on May 5, 2001, B.R., a sixty-seven-year-old widow paralyzed throughout much of her body, was in bed watching television when she heard someone enter her home through the back door. When the intruder approached the bed, she recognized him as Bonds, a man B.R. had known for about fifteen years. B.R. asked: “Timmy, what are you doing here this time of night?” *State’s Exhibit 9*. As Bonds removed his shirt, he responded: “I’ve been wanting you for a long time.” *Id.* B.R. again inquired as to what Bonds was doing, but he did not respond. Bonds pulled B.R.’s blanket back and got into bed with her.

Bonds then removed B.R.’s undergarments and had sexual intercourse with B.R. without her consent. When Bonds attempted to kiss B.R., she moved her head to avoid it. After Bonds left, B.R. called a friend and then the police. B.R. was taken to the hospital where a vaginal exam revealed the presence of Bonds’s semen. Further examination also showed that Bonds left a scratch on B.R.’s thigh and a small tear close to the posterior forchette in B.R.’s genital area. When the police apprehended Bonds, he had a key to B.R.’s house, which B.R. had not given him.

The State charged Bonds with class B felony rape and class D felony residential entry and alleged him to be a habitual offender. On November 15, 2001, at the conclusion of a bench trial, Bonds was found guilty but mentally ill of both charged offenses. On direct

appeal, Bonds argued that the trial court erred in sentencing him by failing to give significant mitigating weight to his mental illness. *Bonds v. State*, Cause No. 49A02-0203-CR-000197 (Ind. Ct. App. Oct. 31, 2002). This court remanded the case to the trial court for a new sentencing order that more fully addressed Bonds's mental illness. The trial court imposed the same sentence of twenty years for rape, to run concurrently with the residential entry sentence and enhanced the rape sentence by fifteen years after he was found to be a habitual offender.

In 2009, Bonds amended his 2007 petition for post-conviction relief alleging that he received ineffective assistance of appellate counsel because counsel failed to raise the issue of insufficient evidence on direct appeal. The post-conviction court held an evidentiary hearing in March 2010. Bonds' appellate counsel testified that when preparing to file an appeal, she reviews the record to look for properly preserved issues and evidence that would support a given theory. Appellate counsel stated she did not believe the evidence supported raising the issue of insufficient evidence. In January 2011, the post-conviction court issued findings of fact and conclusions of law denying Bonds' petition for post-conviction relief.

On appeal, Bonds contends that the post-conviction court erred in denying his petition for post-conviction relief. The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. *Fisher v. State*, 810 N.E.2d 674 (Ind. 2004); Ind. Post-Conviction Rule 1(5). When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. *Fisher v. State*, 810 N.E.2d 674. 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.*

Bonds argues his appellate counsel was ineffective for failing to challenge the sufficiency of the evidence on his direct appeal. Specifically, Bonds argues that appellate counsel was ineffective for failing to challenge the sufficiency of the evidence of force necessary to sustain his conviction for rape.

In addressing this claim, we apply the same standard of review to claims of ineffective assistance of appellate counsel as we apply to claims of ineffective assistance of trial counsel. *Williams v. State*, 724 N.E.2d 1070 (Ind. 2000). In order to prevail on a claim of ineffective assistance of counsel, a petitioner must demonstrate both that his or her counsel's performance was deficient and that the petitioner was prejudiced by the deficient performance. *Ben-Yisrayl v. State*, 729 N.E.2d 102 (Ind. 2000) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). Counsel's performance is deficient if it falls below an objective standard of reasonableness based on prevailing professional norms. *French v. State*, 778 N.E.2d 816 (Ind. 2002). To establish prejudice, the petitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* Failure to satisfy either element will cause the claim to fail. *Id.*

Ineffective assistance claims at the appellate level generally fall into three basic categories: (1) denying access to an appeal; (2) waiver of issues; and (3) failure to present issues well. *Bieghler v. State*, 690 N.E.2d 188 (Ind. 1997). Bonds' claim of appellate counsel's ineffectiveness is based on the second category. Ineffective assistance is very

rarely found in cases where a defendant asserts that appellate counsel failed to raise an issue on direct appeal because the decision of what issues to raise is one of the most important strategic decisions to be made by appellate counsel. *Reed v. State*, 856 N.E.2d 1189 (Ind. 2006). We employ the following two-part test to evaluate waiver of issue claims: (1) are the unraised issues significant and obvious from the face of the record; and if so (2) are the unraised issues clearly stronger than the raised issues? *Bieghler v. State*, 690 N.E.2d 188.

Here, counsel determined that sentencing was the best issue to pursue on appeal and she succeeded with that issue as the case was remanded for further consideration of Bonds' mental illness and its impact on the sentences imposed. Moreover, counsel did not believe the evidence would support a sufficiency of the evidence argument and made a strategic decision not to raise the issue.

When reviewing the sufficiency of the evidence to support a conviction, we must consider only the probative evidence and reasonable inferences supporting the conviction. *Alkhalidi v. State*, 753 N.E.2d 625 (Ind. 2001). We consider conflicting evidence most favorably to the trial court's ruling. *Taylor v. State*, 689 N.E.2d 699 (Ind. 1997). We affirm the conviction unless "no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt." *Jenkins v. State*, 726 N.E.2d 268, 270 (Ind. 2000). The evidence is sufficient if an inference may reasonably be drawn from it to support the conviction. *Pickens v. State*, 751 N.E.2d 331 (Ind. Ct. App. 2001).

In order to convict Bonds of rape, the State had to prove Bonds knowingly had sexual intercourse with B.R. when B.R. was compelled by force or imminent threat of force. *See* Ind. Code Ann. § 35-42-4-1 (West, Westlaw through 2011 Pubs. Laws approved & effective

through 06/28/2011). The presence or absence of forceful compulsion is determined from the victim's perspective, not the assailant's. *Tobias v. State*, 666 N.E.2d 68 (Ind. 1996). "The force used to sustain a rape conviction need not be physical; it may be constructive or implied from the circumstances." *Jones v. State*, 589 N.E.2d 241, 242–243 (Ind. 1992). Force or the threat of force may be shown without evidence of the aggressor's oral statement of intent or willingness to cause injury. *Jones v. State*, 589 N.E.2d 241. Our Supreme Court has held that even though a victim was not physically harmed and submitted without offering physical resistance, non-consensual sexual intercourse may nevertheless be proven by the circumstances under which the victim felt compelled to either submit or suffer injury. *Gonzalez v. State*, 535 N.E.2d 551 (Ind. 1989).

Bonds relies on our Supreme Court's decision in *Jones v. State*, 589 N.E.2d 241, to support his insufficient evidence of force argument. In *Jones*, the victim lived in the same home as Jones and testified that after twice refusing Jones's advances she "just let him have it." *Id.* at 242. Jones had sexual intercourse with her, afterwards telling her not to tell anyone about it.

In the present case, Bonds had knowledge of B.R.'s physical state. He obtained a key to her house without her knowledge or permission and entered her home in the early morning hours. Without obtaining her consent, Bonds removed B.R.'s panties, moved her leg and penetrated her without her consent. The contention that the evidence was insufficient is not clearly stronger than the sentencing issue that was raised on direct appeal. Bonds failed to show that there is a reasonable probability that, but for appellate counsel's errors, the result of the proceeding would have been different.

Judgment affirmed.

DARDEN, J., and VAIDIK, J., concur.