



## STATEMENT OF THE CASE

Santos Vasquez appeals his conviction for class D felony residential entry.<sup>1</sup>

We affirm.

### ISSUE

Whether Vasquez received ineffective assistance of counsel.

### FACTS

On August 15, 2010, Isaiah Tryon worked the closing shift at a fast food restaurant and arrived at his home in Indianapolis around 2:00 a.m. Around 3:00 a.m., Tryon was walking in the back part of his house when he saw a man wearing jeans and no shirt—later identified as Vasquez—walk into a junk room near the bathroom. At first, Tryon thought the man was one of his brother’s friends, and he kept walking toward the kitchen. Tryon, however, “started thinking something funny about it” and walked back toward the room where he had seen the man. (Tr. 25). At that same time, the man ran out of the bathroom area, “brushed by” Tryon, and ran out the front door. (Tr. 25). Tryon chased the man down the street but then returned to the house and called the police. Indianapolis Metropolitan Police Officer Robert Robinson was dispatched to investigate, and Tryon gave him a description of the intruder. Later that night, the police took Tryon to view a suspect who had been apprehended near his house. Upon seeing the

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<sup>1</sup> Vasquez was convicted of two counts of class D felony residential entry under two different cause numbers, 49F18-1008-FD-063993 and 49F18-1008-FD-064755. The trial court held separate bench trials on these cases on the same day and conducted a joint sentencing hearing. Vasquez’s appellate argument is directed only to his conviction under 49F18-1008-FD-063993.

suspect, Tryon told the police that the detained suspect was not the man who had been in his house.

The following evening, the police received a report that a five-foot, nine-inch Hispanic male with spiky hair was seen jumping off the roof of a house, putting on a shirt, and fleeing on a black mountain bike. Officer Robinson was dispatched to investigate the report and ultimately apprehended Vasquez on the street with a black mountain bike. Because the description was similar to the description that Tryon had given, the police compiled a photo array containing Vasquez's photograph and showed it to Tryon that same day. Tryon identified Vasquez as the man who had been in his house the previous night and then signed and dated the photo array.

The State charged Vasquez with class D felony residential entry. Approximately six months later, the trial court held a bench trial on February 10, 2011. During the trial, the photo array was entered into evidence after Officer Robinson made an in-court identification of Vasquez as the person he apprehended on August 16 and testified that Vasquez was the person identified by Tryon on the photo array. During Tryon's direct examination, when asked if he signed the photo array under Vasquez's photo because he was identifying the man who was in his home, Tryon testified, "I indicated that because yes that is the man out of all these men that definitely fit the description more than anyone else." (Tr. 27-28). The prosecutor, seeking to have Tryon provide an in-court identification of Vasquez, then asked Tryon, "And sitting here today you are sure that the man sitting at that table was the man that was in your house?" (Tr. 28). Tryon replied,

“Today I mean my memory has kinda faded since then. I[t] was dark at the time but based on the height, you know hair, I would say that that is him.” (Tr. 28).

On cross-examination, defense counsel asked Tryon, “On a scale of one to ten what would you say you think the Defendant was the one in your house that night?” (Tr. 28). Tryon responded, “Probably a six or seven you know.” (Tr. 28). On redirect, the prosecutor asked Tryon whether his memory was better on the day he signed the photo array than it was at trial, and Tryon replied, “It absolutely was. I had no doubt that that was him at the time when I saw the picture and today I looked at it and it’s like I can’t even hardly remember half the faces on that sheet so I was definitely more sure [sic] at that point.” (Tr. 28).

The trial court found Vasquez guilty of residential entry and sentenced him to 545 days in the Department of Correction.<sup>2</sup>

### DECISION

Vasquez argues that he received ineffective assistance of trial counsel.<sup>3</sup> We evaluate claims concerning denial of the Sixth Amendment right to effective assistance of

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<sup>2</sup> That same day, the trial court also found Vasquez guilty of residential entry, under cause number 49F18-1008-FD-064755, for breaking into a woman’s house on August 11, 2010. For this conviction, the trial court sentenced Vasquez to 545 days with 180 days suspended and ordered that it be served consecutive to his other residential entry sentence.

<sup>3</sup> We pause to note the procedural effect of Vasquez bringing his claim of ineffective assistance of trial counsel on direct appeal. While this practice is not prohibited, a post-conviction proceeding is generally the preferred forum for adjudicating claims of ineffective assistance of counsel because the presentation of such claims often requires the development of new facts not present in the trial record. *See McIntire v. State*, 717 N.E.2d 96, 101 (Ind. 1999); *Woods v. State*, 701 N.E.2d 1208, 1219 (Ind. 1998), *reh’g denied, cert. denied*, 528 U.S. 861 (1999). If a defendant chooses to raise a claim of ineffective assistance of counsel on direct appeal, “the issue will be foreclosed from collateral review.” *Woods*, 701 N.E.2d at 1220. This rule should “likely deter all but the most confident appellants from asserting any claim of ineffectiveness on direct appeal.” *Id.* When a claim of ineffective assistance of counsel is based solely on the trial record, as it is on direct appeal, “every indulgence will be given to the possibility that a seeming

counsel using the two-part test articulated in *Strickland v. Washington*, 466 U.S. 668 (1984). *Reed v. State*, 866 N.E.2d 767, 769 (Ind. 2007). A defendant must first show that his counsel’s performance fell below an objective standard of reasonableness, and, second, that the deficiencies in the counsel’s performance were prejudicial to the defense. *Id.* As to counsel’s performance, we presume that counsel provided adequate representation. *Sims v. State*, 771 N.E.2d 734, 741 (Ind. Ct. App. 2002), *trans. denied*. “Counsel is afforded considerable discretion in choosing strategy and tactics, and we will accord that decision deference.” *Id.* Furthermore, a defendant must show more than isolated poor strategy, bad tactics, a mistake, carelessness or inexperience. *Law v. State*, 797 N.E.2d 1157, 1162 (Ind. Ct. App. 2003). As to prejudice, a defendant must show that “‘there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” *Grinstead v. State*, 845 N.E.2d 1027, 1031 (Ind. 2006) (quoting *Strickland*, 466 U.S. at 694). “A reasonable probability arises when there is a ‘probability sufficient to undermine confidence in the outcome.’” *Id.* (quoting *Strickland*, 466 U.S. at 694).

Vasquez argues that his trial counsel was ineffective for cross-examining Tryon regarding his identification of Vazquez. He asserts that trial counsel’s questioning allowed the State to strengthen Tryon’s identification testimony on redirect. Vasquez contends that trial counsel should have refrained from cross-examining Tryon because Tryon’s direct examination testimony would have resulted in an acquittal.

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lapse or error by defense counsel was in fact a tactical move, flawed only in hindsight[,]” and “[i]t is no surprise that such claims almost always fail.” *Id.* at 1216 (internal quotes and citation omitted).

The nature and extent of cross-examination is a matter of strategy left to trial counsel. *Waldon v. State*, 684 N.E.2d 206, 208 (Ind. Ct. App. 1997), *trans. denied*. We assess counsel’s performance based on facts that are known at the time and not through hindsight. *Shanabarger v. State*, 846 N.E.2d 702, 709 (Ind. Ct. App. 2006), *trans. denied*. When considering whether counsel’s performance was deficient, “the question is not whether the attorney could—or even should—have done something more[.]” rather “the inquiry must focus on what the attorney actually did[.]” *Reed*, 866 N.E.2d at 769.

At the bench trial, Tryon—the only witness to provide identification testimony linking Vasquez to the crime—had just given ambiguous testimony regarding his photo array identification and had not provided an unequivocal in-court identification of Vasquez. From the record before us, it appears that defense counsel made a strategic decision to attack the certainty—or lack thereof—of Tryon’s identification. “Deliberate choices by some attorneys for some tactical or strategic reason do not establish ineffective assistance of counsel even though such choices may be subject to criticism or the choices ultimately prove to be detrimental to the defendant.” *Robles v. State*, 612 N.E.2d 196, 198 (Ind. Ct. App. 1993). Because counsel is afforded considerable discretion in choosing strategy and tactics, we conclude that Vasquez has failed to prove that counsel’s decision to cross-examine the witness constituted deficient performance. Accordingly, we affirm Vasquez’s conviction for class D felony residential entry.

Affirmed.

FRIEDLANDER, J., and VAIDIK, J., concur.