

Appellant-petitioner James Gilman appeals the denial of his petition for post-conviction relief. We combine and restate Gilman's arguments as follows: (1) the post-conviction court erred by denying Gilman's motion for change of judge; (2) the order denying Gilman's petition is inadequate; (3) the post-conviction court was biased against Gilman; and (4) the post-conviction court erred by finding that Gilman did not receive the ineffective assistance of trial or appellate counsel. Declining to address Gilman's other, free-standing, claims of error and finding no reversible error, we affirm and remand with instructions.

FACTS

The underlying facts, as stated in Gilman's direct appeal, are as follows:

Gilman lived with his girlfriend, C.N. In March of 2000, C.N.'s fourteen-year-old daughter (the "victim") moved in with Gilman and C.N. Both C.N. and the victim trusted Gilman, and the victim considered Gilman to be a father figure. However, this changed in October of 2000.

On October 11, 2000, Gilman and the victim were at home while C.N. was at work. Gilman had smoked crack cocaine earlier in the day and was "pretty messed up." At approximately 4:00 p.m., Gilman began a nearly three hour attack upon the victim. Gilman first tied the victim's hands behind her back with shoelaces. When the victim began making noise, he held a knife to her throat and told her to "shut up." The shoelaces came untied, and Gilman restrained the victim with handcuffs. He then dragged the victim into the bedroom he shared with C.N., cut the victim's shirt off with a knife, and removed the rest of her clothes as well. After the handcuffs broke, Gilman restrained the victim with duct tape. Later, Gilman used "posy restraints," which are ropes fastened around the wrists with Velcro.

Gilman forced the victim to submit to various sexual activities. First, he placed his fingers inside her vagina. In doing so, he used a lubricant which the victim believed to be cocoa butter. Second, he

inserted his penis into the victim's vagina. Third, he used a vibrator on the victim and also placed it into her vagina. Fourth, he put his mouth to the victim's vagina and performed cunnilingus upon her. Fifth, he attempted to force the victim to perform fellatio upon him. Finally, he showed a pornographic video to the victim. During these acts, Gilman was also inhaling crack cocaine.

When C.N. returned home, the victim, who was crying uncontrollably, informed C.N. about Gilman's actions. C.N. informed the police and also took the victim to the hospital. A warrant was issued for Gilman's arrest, and he was subsequently apprehended in Kansas.

Gilman v. State, No. 48A02-0105-CR-340, slip op. p. 2-3 (Ind. Ct. App. Dec. 27, 2001).

On October 13, 2001, the State charged Gilman with the following counts:

- Count I: class A felony rape
- Count II: class A felony criminal deviate conduct
- Count III: class A felony criminal deviate conduct
- Count IV: class A felony sexual misconduct with a minor
- Count V: class B felony criminal confinement
- Count VI: class B felony criminal confinement
- Count VII: class B felony criminal confinement
- Count VIII: class B felony criminal confinement
- Count IX: class C felony intimidation
- Count X: class A felony criminal deviate conduct
- Count XI: class A felony attempted criminal deviate conduct

On February 2, 2001, Gilman pleaded guilty to Counts I, II, III, VI, IX, X, and XI. The plea agreement provided that the State would dismiss the remaining counts and that sentencing would be left to the trial court's discretion, with a cap of eighty years for the aggregate sentence. The trial court sentenced Gilman as follows:

- Count I: forty years
- Count II: forty years
- Count III: fifty years
- Count VII: twenty years
- Count IX: eight years

- Count X: forty years
- Count XI: forty years

The trial court ordered Counts I and II to run consecutively to each other but concurrently with all other counts, and Counts X and XI to run consecutively to each other but concurrently with all other counts, for an aggregate sentence of eighty years imprisonment.

Gilman filed a direct appeal on July 16, 2001, arguing that the trial court erroneously balanced aggravators and mitigators and that the sentence was manifestly unreasonable. This court affirmed. Gilman, slip op. p. 8.

On June 10, 2008, Gilman filed a pro se petition for post-conviction relief and a motion for change of judge. On September 26, 2008, the post-conviction court held a hearing on Gilman's petition. At the beginning of the hearing, the post-conviction court indicated that it was prepared to hold a hearing on Gilman's motion for change of judge, but Gilman withdrew the motion. PCR Tr. p. 4-5. During that hearing, the post-conviction court vacated Count IX based on a defect in the charging information.¹ No testimony was heard at this hearing and the trial court did not rule on Gilman's petition.

¹ The post-conviction court also "corrected" an error that did not exist, making an inadvertent error in the process. It believed—incorrectly—that it had originally ordered Count VI to run consecutively with Count VII, and ordered that the two run concurrently instead. PCR Tr. p. 47-49. In fact, Gilman was not sentenced at all on Count VI because the State dismissed that charge pursuant to the plea agreement.

It is evident that the post-conviction court believed that VI was the attempted criminal deviate conduct charge; whereas in fact, that was Count XI, which the trial court had originally ordered to run consecutively to Count X, criminal deviate conduct. We remand, therefore, with instructions to clarify by entering a new, amended sentencing order. In addition to clarifying this issue, we also instruct the post-conviction court to note that Count IX has been vacated.

Although the proceedings are somewhat confusing, the end result does not change Gilman's aggregate sentence, inasmuch as Counts I and II still—and have always—run consecutively to one

On October 13, 2008, Gilman filed an amended petition for post-conviction relief, and on December 9, 2008, he filed a second motion for change of judge. The post-conviction court denied the motion for change of judge on December 10, 2008. On January 16, 2009, the post-conviction court held a second hearing on Gilman's petition, at which his trial and appellate attorneys both testified. On July 2, 2009, the post-conviction court issued findings of fact and conclusions of law, denying Gilman's requested relief. Gilman now appeals.

DISCUSSION AND DECISION

I. Standard of Review

The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); Perry v. State, 904 N.E.2d 302, 307 (Ind. Ct. App. 2009), trans. denied. 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. Post-conviction procedures do not afford petitioners with a "super appeal." Richardson v. State, 800 N.E.2d 639, 643 (Ind. Ct. App. 2003). Rather, they create a narrow remedy for subsequent collateral challenges to convictions that must be based upon grounds enumerated in the post-conviction rules. Perry, 904 N.E.2d at 307; see also P-C.R. 1(1).

another and concurrently with all other sentences, for an aggregate sentence of eighty years imprisonment. Thus, any error resulting from this exchange during the hearing is harmless.

II. Free-Standing Claims of Error

In addition to the arguments described and considered below, Gilman raises the following free-standing claims of error: (1) the State improperly charged Gilman; (2) Gilman's convictions violated Double Jeopardy; and (3) the trial court improperly enhanced Gilman's sentences. Gilman filed a direct appeal on July 16, 2001, and all of these issues were known at that time. Thus, they are unavailable in post-conviction proceedings. See Timberlake v. State, 753 N.E.2d 591, 597 (Ind. 2001) (holding that if an issue was known and available, but not raised, on direct appeal, it is waived). Furthermore, the first two arguments have never been available to Gilman, inasmuch as he pleaded guilty. See Neville v. State, 663 N.E.2d 169, 172 (Ind. Ct. App. 1996) (holding that by pleading guilty, a defendant waives the right to challenge the underlying convictions and may only challenge whether the guilty plea was knowing and voluntary). And as to the third argument, Gilman raised a sentencing claim in his direct appeal and it was decided adversely to him; thus, the issue is res judicata. Timberlake, 753 N.E.2d at 597. Therefore, we decline to address these arguments.

III. The Post-Conviction Court

Gilman makes several arguments related specifically to the post-conviction court: (1) the post-conviction court erroneously denied his second motion for change of judge; (2) the post-conviction court was biased against him; and (3) the order denying Gilman's petition is inadequate.

A. Motion for Change of Judge

Turning first to Gilman's motion for change of judge, we note that Post-Conviction Rule 1(4)(b) provides that "[w]ithin ten (10) days of filing a petition for post-conviction relief . . . , the petitioner may request a change of judge by filing an affidavit that the judge has a personal bias or prejudice against the petitioner. . . ." Here, Gilman's first motion for change of judge was timely filed with his first petition for post-conviction relief. At the first hearing, however, when the post-conviction court indicated that it was prepared to hold a hearing on that motion, Gilman withdrew it. Gilman filed a second petition for post-conviction relief on October 13, 2008, and did not file his second motion for change of judge until December 9, 2008. Inasmuch as this far exceeded the ten-day deadline provided in Post-Conviction Rule 1(4)(b), the post-conviction court properly denied the motion.

B. Judicial Bias

Gilman next contends that the post-conviction court was biased against him. We presume that a judge is not prejudiced against a party. Bahm v. State, 789 N.E.2d 50, 54 (Ind. Ct. App. 2003). Personal bias "stems from an extrajudicial source meaning a source separate from the evidence and argument presented at the proceedings." Id. To rebut the presumption of nonbias, a defendant must establish from the judge's conduct actual bias or prejudice that places him in jeopardy. Massey v. State, 803 N.E.2d 1133, 1138-39 (Ind. Ct. App. 2004).

Gilman first argues that Judge Spencer has "a history of being bias [sic] against all defendants in sexual cases involving minors" Appellant's Br. p. 24. A generic "history" that is unrelated to the instant case is not sufficient to establish judicial bias.

Gilman next directs our attention to the trial court's statement at the initial hearing on Gilman's petition that "I know [Gilman's trial attorneys]. Eleven days before trial they're gonna know almost everything." PCR Tr. p. 34. We do not find that this statement rebuts the presumption of nonbias.

Next, Gilman argues that Judge Spencer exhibited bias when he "took on the role of the State and verbally argued the issues with Gilman," appellant's br. p. 25, but he fails to direct our attention to specific exchanges and portions of the record. We find that Gilman has not met his burden of rebutting a presumption of nonbias with this argument.

Next, Gilman contends that Judge Spencer exhibited bias when he denied Gilman's request to present testimony at the initial hearing on Gilman's petition. The record reveals, however, that Judge Spencer asked at the initial hearing that Gilman amend his petition to clarify his arguments and indicated that another hearing would be held at a later date. And, in fact, the post-conviction court held a second hearing, at which time Gilman presented testimony. Thus, we do not find judicial bias on this basis.

Finally, Gilman argues that the post-conviction court's denial of his second motion for change of judge establishes bias. As noted above, however, the motion was untimely filed and was properly denied. Therefore, we find no bias in this regard.

C. Adequacy of Order

Gilman contends that the order denying his petition for post-conviction relief is inadequate, inasmuch as it fails to address all of the arguments in Gilman's petition. It is well established, however, that the failure to enter specific findings of fact and conclusions of law in post-conviction proceedings is not reversible error. Allen v. State,

749 N.E.2d 1158, 1170 (Ind. 2001). Instead, when the post-conviction court's findings are inadequate, we will review the petitioner's claims de novo. Id. Therefore, we do not find reversible error in this regard and, to the extent that the order does not address certain aspects of Gilman's petition, we will review the claims de novo.

IV. Assistance of Counsel

A. Standard of Review

When evaluating a claim of ineffective assistance of counsel, we apply the two-part test articulated in Strickland v. Washington, 466 U.S. 668 (1984). Pinkins v. State, 799 N.E.2d 1079, 1093 (Ind. Ct. App. 2003). First, the defendant must show that counsel's performance was deficient. Strickland, 466 U.S. at 687. This requires a showing that counsel's representation fell below an objective standard of reasonableness and that the errors were so serious that they resulted in a denial of the right to counsel guaranteed to the defendant by the Sixth and Fourteenth Amendments. Id. at 687-88. Second, the defendant must show that the deficient performance resulted in prejudice. Id. To establish 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. Id. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

Claims of ineffective assistance of appellate counsel are reviewed using the same standard applicable to claims of trial counsel ineffectiveness. Bieghler v. State, 690 N.E.2d 188, 193 (Ind. 1997). These claims generally fall into three categories: (1) denying access to the appeal, (2) waiver of issues, and (3) failure to present issues

well. Id. at 193-95. The decision of what issue or issues to raise on appeal is one of the most important strategic decisions made by appellate counsel. Id. at 193. Thus, ineffectiveness is rarely found when the issue is the failure to raise a claim on direct appeal. Id.

B. Trial Counsel

First, Gilman argues that trial counsel was ineffective for failing to challenge the charging information. The charging information indicates that both rape and criminal deviate conduct were being charged as class A felonies, but lists violations of Indiana Code sections 35-42-4-1(a)(1) and -2(a)(1), which are class B felonies. Though the State acknowledges that it made a mistake in the charging information and that trial counsel missed the error, had trial counsel objected to the charges, the State would merely have amended the information to cite the proper subsection. See I.C. §§ 35-42-2-1(b)(2), -2(b)(2) (elevating rape and criminal deviate conduct, respectively, to class A felonies when committed while armed with a deadly weapon—here, a knife). Thus, Gilman has failed to establish that he was prejudiced as a result of this error.

Next, Gilman argues that trial counsel was ineffective for failing to advise him that the charges were improperly enhanced, in violation of double jeopardy, due to the use of a deadly weapon. Here, Gilman was charged with using a knife during the commission of his crimes, and he contends that the enhancement of multiple counts to class A felonies based on that same deadly weapon violated the actual evidence test that we apply when conducting double jeopardy analysis.

Our Supreme Court has held that the Indiana double jeopardy clause is not violated when the evidentiary facts establishing the essential elements of one offense also establish only one, or even several, but not all, of the essential elements of another offense. Spivey v. State, 761 N.E.2d 831, 833 (Ind. 2002). Thus, a defendant's use of the same weapon in the commission of separate and distinct offenses does not preclude separate enhancement for both counts, for double jeopardy purposes, so long as each conviction is supported by proof of at least one unique evidentiary fact that is not required to prove the other convictions. Rodriquez v. State, 795 N.E.2d 1054, 1058 (Ind. Ct. App. 2003); see also Miller v. State, 790 N.E.2d 437, 439 (Ind. 2003) (holding that the use of a "single deadly weapon during the commission of separate offenses may enhance the level of each offense"). Here, each of Gilman's convictions is supported by proof of at least one evidentiary fact that is unique and not required to prove the other convictions. Therefore, the multiple enhancements based on the knife did not violate double jeopardy and trial counsel was not ineffective for failing to advise Gilman in this regard.

Next, Gilman argues that trial counsel was ineffective for failing to object to the trial court's consideration of aggravators without first having a jury find those aggravators beyond a reasonable doubt. He suggests that Apprendi v. New Jersey, 530 U.S. 466 (2000), should have provided the authority for the would-be objection. Before Blakely v. Washington, 542 U.S. 296 (2004), however, courts in this state considered Apprendi only in the context of our capital sentencing scheme. E.g., Helsley v. State, 809 N.E.2d 292 (Ind. 2004). Before the Blakely, and subsequently, Smylie v. State, 823

N.E.2d 679 (Ind. 2005), decisions were announced, there was no reason for attorneys to suspect that Indiana's sentencing scheme and the way it was applied at the time were unconstitutional. Here, Gilman was sentenced in 2001, two and one-half years before Blakely was decided. Therefore, we decline to find that trial counsel was ineffective in this regard.

Finally, Gilman contends that trial counsel was ineffective for failing to challenge the rape and criminal deviate conduct charges and arguing that he should have been charged, instead, with sexual misconduct with a minor. Our Supreme Court has held that when two criminal statutes overlap such that either may cover a given set of facts, the prosecutor has the discretion to charge under either statute. Skinner v. State, 736 N.E.2d 1222, 1222 (Ind. 2000). Here, therefore, the prosecutor had the discretion to charge Gilman either with rape and criminal deviate conduct or sexual misconduct with a minor, and even if Gilman's attorney had objected, the objection would have been overruled. Therefore, we do not find that Gilman received ineffective assistance on this basis.²

C. Appellate Counsel

Gilman contends that appellate counsel was ineffective for failing to raise any of the issues for which he alleges his trial counsel was ineffective. We have already found herein, however, that trial counsel was not ineffective.

² To the extent that Gilman makes ineffective assistance arguments related to Count IX, we again note that the post-conviction court vacated this conviction and we remand with instructions to include that fact in the amended sentencing order. Additionally, to the extent that Gilman makes arguments related to Count V, we note that he was not convicted of this charge and therefore decline to address these arguments.

Furthermore, we note again that Gilman pleaded guilty. In his direct appeal, therefore, he could have challenged only the sentence—which appellate counsel did³—and would not have been permitted to raise any challenges to the convictions themselves. Collins v. State, 817 N.E.2d 230, 231 (Ind. 2004). Therefore, we decline to find ineffective assistance of appellate counsel.

The judgment of the post-conviction court is affirmed and remanded with instructions to enter an amended sentencing order that (1) reflects the vacation of Count IX; and (2) clarifies the intent of the post-conviction court with respect to the sentences imposed for Counts X and XI.

DARDEN, J., and CRONE, J., concur.

³ We also find that appellate counsel was not ineffective for failing to challenge the sentence based upon Appendi for the reasons described above.