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MEMORANDUM OPINION AND JUDGMENT (AUGUST 15, 2017)

DISTRICT OF COLUMBIA COURT OF APPEALS

WILLIAM BOBBITT,

Appellant,

v.

UNITED STATES,

Appellee.

No. 16-CO-798

Appeal from the Superior Court of the District of Columbia (CF1-7568-10)

(Hon. Russell F. Canan, Post-Trial Judge)

Before: FISHER, THOMPSON, and BECKWITH, Associate Judges.

PER CURIAM

Appellant William Bobbitt was convicted and sentenced for twenty-seven counts arising from his alleged sexual abuse of his three minor daughters. This court affirmed those convictions on direct appeal in Bobbitt v. United States, No. 11-CF-902, Mem. Op. & J. (D.C. Aug. 13, 2013). Mr. Bobbitt subsequently filed a D.C. Code § 23-110 (2012 Repl.) motion, alleging that his trial counsel was constitutionally ineffective. The trial court denied the motion without a hearing.

Mr. Bobbitt now appeals the denial of his § 23-110 motion. We affirm.

I. Procedural Default

The trial court denied Mr. Bobbitt's D.C. Code § 23-110 motion on several different grounds. The rust ground was that Mr. Bobbitt's claims are procedurally barred because he failed to raise them "during the pendency of his direct appeal" even though he "knew or should have known of their grounds at that time." The court ruled that Mr. Bobbitt had failed to make the requisite showing of cause and prejudice to overcome the procedural bar. In particular, the court stated that Mr. Bobbitt's § 23-110 "motion and supporting memorandum failed to present the Court with one objective factor or exceptional circumstance that caused his inability to bring his ineffective assistance of counsel claim on direct appeal."

Despite the dispositive nature of the trial court's procedural—default ruling—that is, despite the fact that the ruling defeats all of Mr. Bobbitt's claims—Mr. Bobbitt failed to contest the ruling in his initial brief on appeal and addresses the ruling only in his reply brief. The government thus argues that Mr. Bobbitt has forfeited any challenge of the ruling. Even if Mr. Bobbitt's challenge is not forfeited, it is meritless.

In *Shepard v. United States*, this court explained the procedural-default doctrine:

> [I]f an appellant does not raise a claim of ineffective assistance of counsel during the pendency of the direct appeal, when at that time appellant demonstrably knew or should have known of the grounds for alleging

> counsel's ineffectiveness, that procedural default will be a barrier to this court's consideration of appellant's claim.

533 A.2d 1278, 1280 (D.C. 1987). Mr. Bobbitt's direct-appeal counsel should have been aware of the grounds for Mr. Bobbitt's ineffective-assistance-of-counsel claims. First, Mr. Bobbitt's claim that his trial counsel was ineffective in failing to obtain a bill of particulars is directly related to his direct-appeal claim that the indictment was unconstitutionally vague. *Bobbitt*, Mem. Op. & J. at 3; *see Shepard*, 533 A.2d at 1280 ("[A]ppellant's knowledge [at the time of direct appeal] is demonstrable because the mistakes that appellant asserts his counsel made at trial related to the issues raised by appellant and his co-appellants in their direct appeals."). Second, Mr. Bobbitt's contentions that his trial counsel was ineffective because he did not use a peremptory strike against a police-officer juror, failed to obtain medical records for the complainants, and purportedly failed to effectively cross-examine certain witnesses rest almost exclusively on the trial-court record, which was available to Mr. Bobbitt and his counsel on direct appeal. *Cf. Doe v. United States*, 583 A.2d 670, 674-75 (D.C. 1990) ("[T]he duty of appellate counsel to investigate possible ineffective assistance of counsel claims is triggered. . . by what is reasonably noticeable from the trial court's records."). Lastly, Mr. Bobbitt was himself aware—or should have been aware—of his trial counsel's alleged failure to prepare him to testify, the basis of his final ineffectiveness claim.

In sum, Mr. Bobbitt's claims are all subject to a procedural bar. Mr. Bobbitt can overcome the procedural bar only if he can show (1) "cause for his failure to" raise the barred claims earlier and (2) "prejudice as a result of his failure." *Shepard*, 533 A.2d at 1281 (quoting *Head v. United States*, 489 A.2d 450, 451 (D.C. 1985)). Mr. Bobbitt has failed to demonstrate cause. In his reply brief, Mr. Bobbitt notes, citing *Little v. United States*, 748 A.2d 920 (D.C. 2000), that "where a [d]efendant relied on his trial counsel to handle his appeal, the [procedural-default rule] in *Shepard* does not apply." But Mr. Bobbitt's appeal was not handled by his trial counsel. As Mr. Bobbitt admits, he "had outside counsel appointed for his appeal." Mr. Bobbitt points out that trial counsel continued to litigate a motion to reduce Mr. Bobbitt's sentence while his appeal was pending, but he does not cite any authority indicating that this fact has any legal significance. Indeed, regardless of whether trial counsel was still representing Mr. Bobbitt in some capacity during the direct appeal, Mr. Bobbitt's appellate counsel could and should have advised Mr. Bobbitt of any deficient performance on the part of trial counsel apparent from the record. *See Doe*, 583 A.2d at 674-75.

II. Ineffective Assistance of Counsel

Although the trial court's procedural-default ruling completely disposed of Mr. Bobbitt's D.C. Code § 23-110 motion, the trial court also addressed the merits of Mr. Bobbitt's ineffective-assistance-of-counsel claims. In the interest of being thorough in this serious case, we likewise address the merits of Mr. Bobbitt's claims. To prevail on his ineffectiveness claims under *Strickland v. Washington*, Mr. Bobbitt must show (1) deficient performance ("that counsel's representation fell below an objective standard of reasonableness"), and (2) prejudice ("that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different"). 466 U.S. 668, 687-138, 694 (1984). The performance and prejudice inquiries both present mixed questions of fact and law. *Casio v. United States*, 927 A.2d 1106, 1123 (D.C. 2007) (en banc). "[W]e accept the trial court's findings of fact unless they lack evidentiary support in the record. We review the trial court's legal determinations de novo." *Id.* (citation omitted).[1]

A. Jury Selection

Mr. Bobbitt first asserts that his trial counsel was ineffective in failing to use a peremptory strike to remove from the jury a detective who "works for the Metropolitan Police Department, the very jurisdiction of the offense." Mr. Bobbitt also alleges that his counsel failed to consult with him during the jury-selection process. We agree with the trial court that Mr. Bobbitt has failed to show that he was prejudiced by these purported errors on the part of counsel. Mr. Bobbitt contends that "the decision to allow the Detective to sit on the jury very likely had an effect on the jury and their perspective of the case" and that it is "reasonable to believe that the Detective"—who became the foreperson—"unduly swayed the rest of

[1] Our analysis below focuses on the prejudice prong of the *Strickland* test. *See Griffin v. United States*, 598 A.2d 1174, 1176 (D.C. 1991) ("[I]t is sometimes efficacious to address the prejudice prong first since without prejudice there can be no ineffective assistance."); *Watson v. United States*, 536 A.2d 1056, 1065 (D.C. 1987) (en banc) ("Unless it is apparent initially, however, that the required showing of prejudice can be made there is no point in proceeding to review the record for the purpose of assessing, constitutionally, the performance of counsel.")

the jury with his outside knowledge of the system, the witnesses involved, and his experience in law enforcement and his bias information of the U.S. Attorney's Office." But these contentions are completely speculative. As the trial court properly ruled, "[m]ere speculation regarding the bias of a jury member is insufficient to prove prejudice." *See Artis v. United States*, 802 A.2d 959, 973 (D.C. 2002).[2]

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[2] Mr. Bobbitt mentions an incident involving the detective who served as the jury foreperson. On an evening recess during the jury's deliberations, the foreperson attended a social event involving a number of other MPD officers and Assistant United States Attorneys. Following the event, an AUSA who had attended the event sent an email to one of the AUSAs representing the government in Mr. Bobbitt's case:

> Spent the evening drowning my sorrows with a familiar face. You will have the remainder of the verdict tomorrow. Congrats on the guilty verdicts. . . . Bobbitt is a sick man, and you have made sure he will never hurt those girls again. Congrats. You have done what you should and could do as prosecutors.

The court held a hearing on this matter, and the AUSA who sent the email admitted at the hearing that the "familiar face" with whom she "drowned [her] sorrows" was the foreperson. The AUSA testified that during her conversation with the foreperson, she "[a]t some point . . . told him, 'I hope . . . you're done tomorrow.'" The foreperson allegedly responded, "Well, I hope so, too." The AUSA claimed, however, that her prediction in the email that the government would "have the remainder of the verdict tomorrow" was unrelated to anything the foreperson had told her. The remark was supposedly based on "a discussion that [another AUSA] and [she] had earlier in the evening."

The foreperson also testified at this hearing. He initially denied that he had had "any discussions at all about this case" at the social event. He said that he had "intentionally stayed away from that subject completely." When further asked whether he had talked to the AUSA who sent the email about the fact "that

B. Bill of Particulars

Mr. Bobbitt next asserts that his trial counsel's failure to request a bill of particulars constituted ineffective assistance of counsel. Mr. Bobbitt notes that he faced thirty-seven counts and that both the initial and superseding indictments were generally worded, "with some charges appearing, to be functionally identical without any differentiating details which might have facilitated Mr. Bobbitt's defense." While we are sympathetic to Mr. Bobbitt's contention that "[t]here is no way for a defendant, and therefore his counsel, to know what sort of defenses might be appropriate or available without knowing more details," we agree with the trial court that this unparticularized assertion does not support a finding that there is a reasonable probability that a bill of particulars would have affected the outcome of the case. As the trial court explained, "a proffer as to the exculpatory nature of the bill of particulars . . . would demonstrate how th[is] document[] would have helped the defendant's case. Without such a showing, the claim[ ] fail[s] to rise above pore speculation.

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because of [his] service in (Mr. Bobbitt's] case . . . [he had] not been able to check in for . . . other police work," the foreperson testified that he had "said it was costing [him] a lot of money to be [on the jury]. That's basically it."

The trial court credited the AUSA's and the foreperson's testimony and found that "there's just simply no evidence at all that there w[ere] any discussions about . . . the merits of this case, [the foreperson's] role . . . in this case anything about the [partial] verdicts that the jury reached yesterday or the work they, were going to do today." Mr. Bobbitt did not challenge these factual findings on direct appeal and has not argued in the present appeal that they were clearly erroneous.

Furthermore, as this court noted on direct appeal, the government sent a letter to Mr. Bobbitt's counsel on September 20, 2010, which "proceeded count by count, specifying more about the location and the timing of the abuse, [and] providing other distinguishing details." *Bobbitt*, Mem. Op & J. at 2 (footnotes omitted). The court explained that "[i]n the rare instances where there is no discernible difference in the charging language of separate counts, the September 2010 letter further differentiated the charges according to activity or location within a residence." *Id.* at 6. The trial court noted the September 2010 letter in its order denying the D.C. Code § 23-110 motion, and the government raises the letter in its brief, asserting that the "letter was the functional equivalent of a bill of particulars." *See Davis v. United States*, 315 A.2d 157, 161 (D.C. 1974) ("The purpose of a bill of particulars is to inform the defendant such that he may prepare a proper defense and also avoid Surprise."); *accord United States v. Murray*, 297 F.2d 812, 819 (2d Cir. 1962). Mr. Bobbitt's only response is that "[w]hile the letter provided by the government gave some additional details to the indictment, it failed to include any more details on dates or times of the alleged abuse which might have been helpful to" trial counsel. Mr. Bobbitt does not cite any authority indicating that a request for a bill of particulars would have entitled him to more information than that revealed by the government in the letter, and he does not explain with any specificity what this additional information would have been or how it reasonably would have affected the outcome of the case. Thus, Mr. Bobbitt has failed to show prejudice.

C. Medical Records

Mr. Bobbitt claims that his trial counsel was ineffective in failing to "request and/or follow up to obtain access to any of the alleged victims['] medical records, or in any way investigate the identities of the girl's [sic] doctors thorough pre-trial investigation." We agree with Mr. Bobbitt that in a sexual abuse case such as this one, defense counsel should obtain the complainants medical records, to the extent that it is lawful to do so. *See Curry v. United States*, 498 A.2d 534, 541 (D.C. 1985); *see also Casio*, 927 A.2d at 1123. ("[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." (quoting *Strickland*, 466 U.S. at 691)). But as with his other claims of ineffective assistance of counsel, Mr. Bobbitt has failed to make an adequate proffer that he was prejudiced by his trial counsel's performance. As the trial court explained, citing *Curry*, 498 A.2d at 542, "the failure to discover non-helpful medical records does not constitute ineffective assistance of counsel." Mr. Bobbitt has not indicated what helpful information the medical records would have revealed, other than vaguely speculating that "[t]he records should . . . have provided evidence concerning what [two complainants] had told their doctor[s] about the alleged abuse and their sexual activity" and that the records "may also have provided evidence that there was no proof of sexual activity during the time period in which the alleged abuse occurred."

In his reply brief, Mr. Bobbitt only faintly responds to the government's argument (and the trial court's determination) that his failure to make a non-speculative, reasonably specific proffer of what the medical records would show defeats his claim. He contends that "[a] defendant . . . should not be left arguing a negative inference based solely on the failure of his counsel to vigorously research viable avenues of defense." But Mr. Bobbitt is represented by counsel in this post-conviction matter, and he thus cannot blame his inability to proffer any evidence in support of his claim on trial counsel's alleged failure to conduct a proper investigation. Post-conviction counsel has the ability to investigate the matter or use the discovery process to obtain evidence. *See* D.C. Code § 23-110 R. 6; *see also* D.C. Code § 14-307 (b)(1) (2014 Supp.); Super. Ct. Crim. R. 17; *Bellinger v. United States*, 127 A.3d 505, 522 (D.C. 2015); *Nelson v. United States*, 649 A.2d 301, 309 (D.C. 1994). Counsel has not represented that he has conducted such an investigation and been unsuccessful or that such an investigation is not possible. We note that in the case relied upon by Mr. Bobbitt, *Johnson v. United States*, 413 A.2d 499 (D.C. 1980), the defendant attached an affidavit to his D.C. Code § 23-110 motion specifically detailing the medical evidence that his ineffective counsel failed to present at trial—namely, testimony by a physician indicating that there was no sign of trauma on the complainant's body. *Id.* at 502; *Johnson v. United States*, 385 A.2d 742, 742 (D.C. 1978).

D. Rape-Shield Law

Mr. Bobbitt argues that his trial counsel rendered ineffective a he failed "to give the statutorily required notice" under the rape-shield law D.C. Code § 22-3022 (b)(1)(2001), to "introduce evidence that one of the complainants may have used some of the sex toys that were central to the government's case with" a person other than Mr. Bobbitt. Like the trial court, we reject this ineffectiveness claim because Mr. Bobbitt has failed to show prejudice. The trial court determined that counsel's failure to comply with the rape-shield law did not prejudice Mr. Bobbitt because the evidence was independently excluded on the ground that its probative value was substantially outweighed by a danger of unfair prejudice. Mr. Bobbitt has not contested this determination. Further, based on the record before us, there is no reason to believe that the complainant would have admitted using the sex toys with another individual. Trial counsel candidly told the court that he "ha[d] no information on whether" the complainant had used the sex toys with another person, and no further information has been adduced in this post-conviction matter.

Even if Mr. Bobbitt could have elicited the desired testimony from the complainant, Mr. Bobbitt has not adequately explained how it could have made a difference. At trial, Mr. Bobbitt testified that he had used the sex toys with his wife, and the complainant testified that she had used at least some of the sex toys on her own. Trial counsel used this testimony to argue that DNA evidence extracted from the sex toys did not necessarily support the government's theory that Mr. Bobbitt used the sex toys with the complainant. Mr. Bobbitt has not explained how further testimony that the complainant had used the sex toys with another male would have made this theory more persuasive.[3]

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[3] Moreover, during closing argument, counsel used the evidence that there were "unknown" "male sperm fractions" on the sex toys to support theory that Mr. Bobbitt's wife had had an extramarital affair and had "put the girls up" to falsely testifying against him. This argument would probably have been weakened

Mr. Bobbitt further contends that his counsel's alleged "lack of preparation in relation to the rape shield law cut off another avenue of impeachment when he was precluded from bringing in evidence that (two) of the complainants had admitted to prior sexual activity to family member[s] at a family event." The trial court rejected this ineffectiveness claim on the ground that at trial the court had in fact "admitted evidence of one of the victims' prior sexual activity" and had excluded evidence relating to the other complainant on the ground that the "evidence was irrelevant." The trial court's characterization of the trial record is accurate, and Mr. Bobbitt does not seriously dispute it. Instead, he vaguely suggests that constitutionally effective counsel would have been able—through proper investigation and preparation, as well as compliance with the rape-shield law—to elicit additional testimony. This speculative assertion is an inadequate basis for a finding of prejudice.

E. Impeachment of Complainants

Mr. Bobbitt contends that his trial counsel was ineffective in failing to cross-examine one of the complainants about a false accusation of abuse that she had allegedly made against Mr. Bobbitt and his wife. Trial counsel had sought to elicit such testimony, but the trial court had precluded it on the ground that counsel had failed to make an adequate showing—had failed to establish "a strong factual predicate"—that the prior accusation was in fact false (or, indeed, that the complainant "even made the [allegedly false] state-

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by testimony that the DNA could have come from a boyfriend of the complainant.

ments").[4] *See Roundtree v. United States*, 581 A.2d 315, 321-22 (D.C. 1990). Mr. Bobbitt has again failed to establish that he was prejudiced by his trial counsel's allegedly deficient performance because Mr. Bobbitt has not offered (1) any evidence that trial counsel could have made a better proffer than he in fact did, (2) any indication of what the contents of this better proffer would have been, or (3) evidence that cross-examination on the alleged false accusation would have reasonably generated an adverse credibility inference against the complainant.[5]

Mr. Bobbitt also argues that his trial counsel was ineffective because he purportedly did not adequately question one of the complainants about comments that she had allegedly made about wanting to live with Mr. Bobbitt while he was separated from his wife. As the government outlines in its brief, trial counsel did elicit testimony from the complainant to the effect that she "was going back and forth" on the issue of whom she wanted to live with. The complainant also admitted that dating this period, she did not "ever tell [her] father

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[4] It was proffered (by the government) that a classmate of the complainant reported to the Child and Family Services Agency that the complainant had "told her that [Mr. Bobbitt had] punched her in the stomach, slapped her; pulled her hair; twisted her ear, and that her mother . . . punches and hits her when she messes up in cheerleading." According to the proffer, "CFSA went out and investigated and determined that [the allegations were] unfounded." We need not decide whether the court correctly found this proffer to be inadequate because that was something that could have been raised on direct appeal, and in any case Mr. Bobbitt has not raised this issue in the post-conviction matter.

[5] On the third point, we note that the person who actually made the purportedly false report with CFSA was not the complainant's classmate. *See supra* note 4.

that [she] didn't want to live with him." Later, defense counsel sought to elicit testimony from Mr. Bobbitt that the complainant had "called him and told him that she wanted to move in and . . . stay with him." The government objected, and the trial court appeared disinclined to allow the testimony, apparently reasoning that because defense counsel had not specifically asked the complainant whether she had called Mr. Bobbitt and asked to move in with him, Mr. Bobbitt's testimony on the matter would not have been proper impeachment evidence. The trial court did not actually rule on the admissibility of Mr. Bobbitt's testimony, however, and counsel proceeded on another line of questioning.

Even if counsel had elicited testimony from the complainant that she had (or had not) told Mr. Bobbitt that she wanted to live with him or had elicited testimony from Mr. Bobbitt to the same effect, there is not a reasonable probability that such testimony would have affected the outcome of the trial. Based on the testimony elicited at trial, counsel was able to point out to the jury during closing that the complainant had been "considering moving in with Mr. Bobbitt" and was able to ask the rhetorical question, "Is that consistent with somebody who has had all these allegedly horrible things happening to her over a period of years?" Testimony by the complainant that she had told Mr. Bobbitt she wanted to live with him would not have given materially more force to this argument. And if the complainant had instead denied asking to move in with Mr. Bobbitt, and if Mr. Bobbitt had then contradicted her testimony, the impeachment value of Mr. Bobbitt's testimony would have been minimal. It is clear from the jury's verdict that the jury believed little of what Mr. Bobbitt said, and it is thus highly unlikely that the jury would have accepted Mr. Bobbitt's word over that of the complainant

F. Mr. Bobbitt's Testimony

Finally, Mr. Bobbitt complains that his trial counsel did not adequately prepare him to testify at trial. Mr. Bobbitt argues that he was prejudiced because "[r]ather than appearing intelligent, reasonable and composed . . . They look all confused and vague[,] leading the jury to question his reliability and believability. He also contends that he was prejudiced because he failed to testify fully and clearly about "false accusations [his wife] made about whether he was a child abuser during a family gathering." We agree with the trial court that Mr. Bobbitt has failed to make an adequate showing "that additional preparation would have made his testimony more believable."[6] Thus, Mr. Bobbitt has not demonstrated that he was prejudiced. *See Mozee v. United States*, 963 A.2d 151, 165-66 (D.C. 2009).

G. Cumulative Error

We reject Mr. Bobbitt's contention that the cumulative prejudice resulting from all of trial counsel's purported errors violated his constitutional right to the effective assistance of counsel. As explained above, Mr.

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[6] We need not decide whether Mr. Bobbitt should have been afforded an opportunity to demonstrate at an evidentiary hearing how he would have testified had he been adequately prepared. Mr. Bobbitt has not contested in this appeal the trial court's denial of an evidentiary hearing, *see infra*, and his claim is procedurally barred, *see supra*.

Bobbitt has not made a plausible showing of prejudice for any of the alleged errors.

III. Evidentiary Hearing

Finally, we note that the trial court, finding Mr. Bobbitt's claims "vague and conclusory or refuted by the record," denied Mr. Bobbitt an evidentiary hearing. Mr. Bobbitt has not directly contested this ruling in this appeal and has primarily supported his ineffective-assistance-of-counsel arguments with evidence from the trial record. We thus decline to review the court's ruling. *See Rose v. United States*, 629 A.2d 526, 535 (D.C. 1993) (explaining that "points not urged on appeal are deemed to be waived" and that "[c]ourts generally decline to consider" such points).

IV. Conclusion

Because Mr. Bobbitt's claims are procedurally defaulted and meritless, we affirm the trial court's denial of his D.C. Code § 23-110 motion without a bearing.

ENTERED BY DIRECTION OF THE COURT:

/s/ Julio A. Castello
Clerk of the Court

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