MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Eriberto Quiroz,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent.

December 10, 2021

Court of Appeals Case No. 21A-PC-227

Appeal from the Marion Superior Court

The Honorable Sheila A. Carlisle, Judge
The Honorable Stanley E. Kroh, Magistrate

Trial Court Cause No. 49D29-1504-PC-13862

Weissmann, Judge.

[1] Eriberto Quiroz appeals the denial of post-conviction relief from his convictions for Class A felony child molesting and Class B felony criminal confinement. He claims that both his trial and appellate counsel rendered ineffective assistance, but because Quiroz fails to carry his burden, we affirm the trial court.

Facts

[2] Six-year-old S.H. spent the night at her adult half-brother's home on January 16, 2010. Her half-brother's friend, Quiroz, also stayed over. In the early hours of January 17,

> S.H. awoke to find that Quiroz was moving his finger in a circular motion in an effort to enlarge a hole that was already in the crotch of the child's sweatpants. S.H. tried to move away from Quiroz, but Quiroz kept trying to make the hole in her pants larger. Quiroz then pulled down S.H.'s pants and underwear and licked her vagina.

Quiroz v. State, 963 N.E.2d 37, 39 (Ind. Ct. App. 2012). Quiroz then threatened S.H. with a knife and told her to keep quiet about what he had done. But S.H. told her mother two days later. DNA testing indicated that Quiroz's saliva was on a pair of S.H.'s underwear, which police found in her father's home.

[3] The State charged Quiroz as follows:

- Count I: Class A felony child molesting;
- Count II: Class A felony child molesting;
- Count III: Class C felony child molesting;
- Count IV: Class C felony child molesting; and

- Count V: Class B felony criminal confinement.

Before trial, the parties agree that the State apparently filed a written motion to dismiss Counts II and III, which the trial court granted. Though this is not reflected in the chronological case summary, the record does show that the State also moved to dismiss these counts at the conclusion of its case-in-chief, and the trial court granted the motion.

[4] At trial, S.H. testified that "Eddie" touched her "private." Tr. Vol. I, pp. 47-48. Quiroz went by "Eddie," Tr. Vol. II, p. 282, but S.H. did not identify Quiroz in the courtroom.[1] Tr. Vol. I, pp. 49-50; 61-62. Due to this lack of identification, Quiroz's trial counsel moved for a directed verdict on the remaining counts. The trial court denied the motion, and the jury found Quiroz guilty on Counts

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[1] S.H. testified as follows:

> [State]: Do you see Eddie in the courtroom today?
>
> * * *
>
> [S.H.]: Yes.
>
> [State]: Can you point to [Eddie] and describe what he's wearing?
>
> [S.H.]: (Shakes head no.)
>
> [State]: Can you just tell me what color – color clothes he's wearing?
>
> [S.H.]: (Shakes head no.)
>
> * * *
>
> [State]: [C]an you tell me now what Eddie is wearing?
>
> [S.H.]: Huh-uh.
>
> [State]: Can you point to him for me?
>
> [S.H.]: Huh-uh.

Tr. Vol. I, pp. 49-50; 61-62.

I, IV, and V. The trial court then sentenced him to 40 years on Count I, 6 years on Count IV, and 6 years on Count V, to be served concurrently.

[5] On direct appeal, Quiroz successfully argued that Counts I and IV—the Class A felony child molesting and Class C felony child molesting counts—violated double jeopardy. *Quiroz*, 963 N.E. 2d at 41. We reversed Quiroz's Class C felony child molesting conviction and remanded with instructions that the trial court vacate the conviction and sentence on that count. Quiroz did not prevail on any of his other arguments, including his claim that the trial court committed fundamental error when it allowed the jury to see a copy of the charging information that included the dismissed counts. Our Supreme Court denied transfer.

[6] Several years later, Quiroz filed a petition for post-conviction relief, which was amended by counsel several years after that. In his amended petition, Quiroz alleged that he was denied effective assistance of counsel at trial and on appeal. The post-conviction court denied relief. Quiroz now appeals, arguing trial counsel was ineffective for:

I. Failing to properly review the jury instructions;
II. Failing to move to suppress the clothing evidence;
III. Failing to argue that because S.H. did not provide an in-court identification of Quiroz and more than one "Eddie" was present the night of the crime, the State failed to identify Quiroz as the perpetrator; and

IV. The cumulative effect of all of these errors.

He argues appellate counsel was insufficient for:

V. Failing to raise the directed verdict issue on direct appeal.

Discussion and Decision

I. Standard of Review

[7] A post-conviction proceeding is a civil proceeding in which a defendant may collaterally attack a conviction and sentence. *Wilson v. State*, 157 N.E.3d 1163, 1169 (Ind. 2020). It is not a "super-appeal." *Ben-Yisrayl v. State*, 729 N.E.2d 102, 105 (Ind. 2000). The defendant is limited to raising issues either unknown at trial or unavailable on direct appeal. *Wilson*, 157 N.E.3d at 1169 (citing *Ward v. State*, 969 N.E.2d 46, 51 (Ind. 2012)).

[8] At trial, Quiroz bore the burden of establishing his claims by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5). To prevail on appeal, he must show that "the evidence, taken as a whole, 'leads unerringly and unmistakably to a conclusion opposite to that reached by the trial court.'" *Ben-Yisrayl*, 729 N.E.2d at 106 (quoting *Weatherford v. State*, 619 N.E.2d 915, 917 (Ind. 1993)). Where, as here, there are findings of fact and conclusions of law, we must ask if "there is any way the trial court could have reached its decision." *Ben-Yisrayl*, 729 N.E.2d at 106 (quoting *State v. Moore*, 678 N.E.2d 1258, 1261 (Ind. 1997), *cert. denied*, 523 U.S. 1079 (1998)).

II. Trial Counsel

[9] To succeed on a claim of ineffective assistance of counsel, Quiroz must show: (1) counsel was deficient, meaning counsel's performance fell below an objective standard of reasonableness; *and* (2) Quiroz was prejudiced by counsel's deficient performance, meaning there is a reasonable probability that but for counsel's errors, the result of the proceeding would have been different. *Hollowell v. State*, 19 N.E.3d 263, 269 (Ind. 2014) (citing *Strickland v. Washington*, 466 U.S. 668*,* 694 (1984)).

A. Preliminary Jury Instructions

[10] Quiroz claims trial counsel was ineffective when he failed to object to and was generally careless with preliminary jury instructions that included instructions on the two dismissed charges. Quiroz argues that the jury never should have known about the dismissed charges. Instead, they were permitted to consider these charges for days before they were instructed to ignore them. And because counsel did not object at trial, the issue of the jury instructions was not properly preserved. As a result, Quiroz bore the burden of showing fundamental error on appeal. Fundamental error is a high bar—to clear it, Quiroz was required to show that the error was so prejudicial it made a fair trial impossible. *Quiroz*, 963 N.E.2d at 42.

[11] In Quiroz's prior appeal, this Court already determined that Quiroz did not establish fundamental error for several reasons. "First, one of the dismissed counts, Count III, was identically worded to Count IV, for which Quiroz was

convicted. We therefore cannot see how Quiroz was prejudiced by this duplicative language." *Id.* Second, it is unclear if the charges in question were dismissed during or after trial. *See supra* ¶ 3. It is unavoidable that juries know about charges dismissed mid-trial. *Quiroz*, 963 N.E.2d at 42. Third, even if the charges were dismissed pre-trial, the jury instructions must be considered as a whole. *Id.* at 41, 42. The jury instructions repeatedly advised jurors that Counts II and III were withdrawn and not to be considered, the trial court judge advised the jury of the same, and neither count was included on the verdict forms. *Id.* at 42-43. We found ourselves in accord with other jurisdictions in concluding, "there is no error in permitting the jury to have access to an information or indictment which contains counts that have been dismissed where the jury is also instructed that the dismissed counts are not to be considered or that the charging instrument is not evidence." *Id.* at 43.

[12] For similar reasons, Quiroz has failed to show the prejudice *Strickland* requires. The jury instructions as a whole encouraged jurors not to consider the dismissed counts. *See Benefield v. State*, 945 N.E.2d 791, 805 (Ind. 2011). When instructions are proper, we presume the jury follows them. *Weisheit v. State*, 26 N.E.3d 3, 20 (Ind. 2015). And the verdict the jury rendered was only as to the remaining counts. Quiroz also fails to show that preserving this error would have helped him on appeal beyond attesting that "appellate counsel could have raised this issue on appeal as a preserved error." Appellant's Br., p. 13. In light of these factors, Quiroz has not shown a reasonable probability that but for trial counsel's failure to object, there would have been a different result.

B. Directed Verdict

[13] Trial counsel moved for a directed verdict after the State's case-in-chief when S.H. failed to identify him in court. Tr. Vol. II, pp. 261-62. Quiroz argues that counsel was ineffective in failing to add that the "Eddie" implicated in S.H.'s testimony could have been her father, whose first name is Edward. Quiroz argues that identifying a defendant by name is only sufficient when no one else with that name was present, citing *O'Brien v. State*, 422 N.E.2d 1266, 1271 (Ind. Ct. App. 1981) and *Broecker v. State*, 168 Ind. App. 231, 342 N.E.2d 886 (Ind. Ct. App. 1976).

[14] *O'Brien* relies on *State v. Schroeppel*, in which our Supreme Court stated, "It is well settled that a defendant may be identified by name. No mention is made during the trial of any person other than the defendant bearing the same name." 240 Ind. 185, 162 N.E.2d 683, 684 (Ind. 1959). We further clarified this position in *Broecker*, where we stated, "There is no claim that the defendant is not the same person as [Broecker] . . . . Absent such a claim, there is no basis for an allegation of error in the identification procedure." 342 N.E.2d at 890.

[15] Here, the only evidence Quiroz supplied to support his other "Eddie" theory is that S.H.'s father's name is Edward. Though both Quiroz and S.H.'s father could have gone by "Eddie," the evidence presented at trial shows that only one of them did. Tr. Vol. I, pp. 48, 110, 223; Tr. Vol. II, pp. 242, 282. More importantly, S.H. only called one of these men "Eddie." The other she called "dad." Tr. Vol. I, pp. 49, 58, 59. When asked her dad's name, S.H. called him

"Ed." *Id.* at 42. S.H. only accused "Eddie" of having touched her inappropriately. *Id.* at 48, 52-61. S.H. also testified that she had never met Eddie before the day he touched her. *Id.* at 62-63. This is certainly not true of her father. *Id.* at 42-43. Additionally, S.H.'s half-brother testified that no one else named "Eddie" was at the trailer that night. *Id.* at 224. Accordingly, Quiroz has not convinced us that the trial court made a mistake in denying his motion. *Ben-Yisrael*, 729 N.E.2d at 106.

C. Motion to Suppress

[16] Quiroz next claims that his counsel was ineffective for failing to move to suppress S.H.'s clothing from evidence. Quiroz argues that there were several issues with the chain of custody of this clothing, on which his DNA was found. First, he points to the movement of S.H.'s clothing from the crime scene to S.H.'s father's house. Second, Quiroz alleges there was no record of the clothing's location for about two months after it was collected. Third, he argues that police broke the seal on the bag holding this evidence shortly before trial, raising the specter of evidence tampering. He argues that these issues justified suppression of the evidence, which would have severely hampered the State's case.

[17] Quiroz's concerns about the chain of custody are misguided. The State need not establish a perfect chain of custody, and gaps in the chain go to the weight the evidence should be accorded, not its admissibility. *Speers v. State*, 999 N.E.2d 850, 855 (Ind. 2013). The burden on the State differs based on whether the

evidence in question is "fungible" or "nonfungible." *See Mateo v. State*, 981 N.E.2d 59, 66 (Ind. Ct. App. 2012). The State must show the whereabouts of fungible evidence—evidence indistinguishable to the naked eye, like blood, hair, or drugs—from the time it comes into the possession of police. *Id.*; *Troxell v. State*, 778 N.E.2d 811, 814 (Ind. 2002). The State must only show that nonfungible evidence—evidence like knives, guns, and cars—is what it is purported to be and that it is in a substantially unchanged state. *Mateo*, 981 N.E.2d at 67. The clothing evidence in question is nonfungible, despite the presence of DNA on the clothing. *See, e.g.*, *id.* (analyzing the chain of custody for knives tested for DNA evidence under the nonfungible standard); *Lucas v. State*, 274 Ind. 635, 413 N.E.2d 578, 582 (Ind. 1980) (refusing to "remove the blood spots from the clothing" and analyzing clothing with blood stains on it as nonfungible evidence).

[18] Addressing Quiroz's concerns in order, we first note that the State is not required to account for the evidence's location *before* it comes into police possession. *See Mateo*, 981 N.E.2d at 67 (holding that concerns about where knives allegedly used in the aggravated battery were prior to police collection "are irrelevant as to whether the police maintained a proper chain of custody. . . ."). Quiroz's concerns about the evidence being moved from one place to another before the police collected it is therefore irrelevant to our chain of custody requirements.

[19] Next, Quiroz's concerns about a two-month gap in custody are not borne out by the evidence. A crime scene specialist testified to collecting two pairs of

underwear, one pair of purple sweatpants, one bed sheet, one blanket, and one comforter from S.H.'s father's home on January 19, 2010. Tr. Vol. I, p. 84, 87. She testified that she photographed these items at the scene. *Id.* at 87. She then put these items in a paper bag that she then marked with her agency number, initials, the date, and a short description. *Id.* at 88. She sealed the bag with evidence tape she initialed. *Id.* at 89. She was then presented with a pile of clothing at trial that she identified as the same clothing she collected. *Id.*at 88, 91-92. The State therefore met the requirements of showing a proper chain of custody for nonfungible evidence.

[20] Quiroz counters that the evidence was missing for two months between when the crime scene specialist collected it and when she turned it into the police evidence room. But the crime scene specialist testified that the clothing was stored in a locker at the crime lab where she worked during that time. PCR Tr., pp. 33-34. Quiroz's argument that there is no paper trail of the evidence during this time goes to the weight that should be accorded the evidence, not its admissibility. *Speers*, 999 N.E.2d at 855. The crime scene specialist's testimony helps to fill this gap, especially given that nonfungible evidence is involved. PCR Tr., p. 34; *See Graham v. State*, 253 Ind. 525, 255 N.E.2d 652, 655 (Ind. 1970) (finding chain of custody lacking where fungible exhibit's whereabouts or disposition during 6-day period "was neither ascertainable from police records nor explained by any state's witnesses.").

[21] Finally, Quiroz argues that the investigating detective corrupted the chain of custody when he broke the seal on the clothing evidence after DNA testing but

before trial. Quiroz then speculates that perhaps the detective actually broke the seal prior to DNA testing and tampered with the evidence. Appellant Reply Br., p. 7. With his unsupported suggestion of impropriety alone, however, Quiroz has failed to prove that "the evidence, taken as a whole, 'leads unerringly and unmistakably to a conclusion opposite to that reached by the trial court.'" *Ben-Yisrayl*, 729 N.E.2d at 106. The trial court found that Quiroz had not shown that a motion to suppress would have been successful, and he has not convinced us that the trial court was wrong.

D. Cumulative Error

[22] Quiroz argues that the total effect of these errors requires reversal. Cumulative prejudice due to counsel's errors may render the result so unreliable as to necessitate reversal, but that is not the case here. *Weisheit*, 109 N.E.3d 978, 992 (Ind. 2018). "Generally, trial errors that do not justify reversal when taken separately also do not justify reversal when taken together." *Id.* (citing *Smith v. State*, 547 N.E.2d 817, 819 (Ind. 1989)). The trial errors Quiroz alleges are:

- dismissed counts perhaps infecting the jurors' thinking—despite instructions not to consider those counts, which we presume the jury followed;
- the failure to argue for a directed verdict based on the presence of another "Eddie" at trial—even though there is no evidence in the record to indicate anyone present besides Quiroz was actually called Eddie; and
- a broken chain of custody—which, upon closer examination, was not broken at all.

The aggregate weight of these concerns amounts to the mere suggestion of error. Quiroz has not shown that he received ineffective assistance of counsel at trial.

III. Appellate Counsel

[23] Quiroz also challenges the performance of his appellate counsel, whom he believes should have raised the issue of the second "Eddie," *see supra,* Part I.B, on direct appeal. Generally, claims of ineffective assistance of appellate counsel are analogous to claims that trial counsel was ineffective. *Ben-Yisrayl*, 738 N.E.2d at 261. Quiroz must show both that (1) appellate counsel's performance was deficient and (2) that he was prejudiced by that performance. *Id.* at 260. We review appellate counsel's performance in light of the information available to them in the trial record or otherwise known. *Id.* at 261. Where appellate counsel fails to present a significant and obvious issue for reasons that cannot be explained by any strategic decision, their performance may be deficient. *Id.*

[24] Quiroz argues his appellate counsel made such an error when she did not raise the possibility that Quiroz was not the only "Eddie" present the night of the crime. He points to his appellate counsel's testimony at the PCR hearing, where she said, "I didn't notice from the record that the victim's father's name was Edward. . . . I don't know how I missed that, but that would have been significant, I think, in my decision on that issue, and so I just missed it." Tr. Vol. II, p. 12.

[25] But, as we established in Part I.B, *supra*, there is no evidence in the record, either at the original trial or the post-conviction trial, that anyone called S.H.'s father "Eddie." In particular, S.H., who identified "Eddie" as the man who hurt her, never referred to her father as "Eddie." Based on the record available to appellate counsel, this issue was not significant. She did not err in neglecting to pursue it.

[26] Quiroz has failed to show both that his counsel was ineffective and that he was prejudiced by that ineffective performance. Accordingly, we affirm the trial court's order denying Quiroz's request for post-conviction relief.

[27] Affirmed.

Mathias, J., and Tavitas, J., concur.