MEMORANDUM DECISION

ATTORNEYS FOR APPELLANT

Amy E. Karozos
Public Defender of Indiana

Jay M. Lee
Deputy Public Defender
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Megan M. Smith
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

John Edward Sims, Jr.,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent.

December 21, 2023

Court of Appeals Case No. 23A-PC-808

Appeal from the Marion Superior Court

The Honorable Cynthia L. Oetjen, Judge

The Honorable Anne Flannelly, Magistrate

Trial Court Cause No. 49D30-1709-PC-35871

Memorandum Decision by Judge Bradford
Judges Riley and Weissmann concur.

Bradford, Judge.

Case Summary

[1] In 2012, John Edward Sims, Jr., began babysitting his mother's neighbor's daughter, the then-nine-year-old K.W. While babysitting K.W., Sims touched her inappropriately. The State charged Sims with two counts of Class C felony child molesting. In exchange for his pleading guilty to count one, the State offered Sims a plea deal that fixed his sentence at five years of incarceration with three years suspended to probation, and required him to register as a sex offender, which he accepted. Five years later, Sims petitioned for post-conviction relief ("PCR"), alleging that the factual basis underpinning his plea established the *actus reus* of the offense, but not the *mens rea*. The post-conviction court denied Sims's petition. Sims argues that the post-conviction court erred when it concluded that he had entered a valid guilty plea and that Sims's counsel did not render ineffective assistance. We affirm.

Facts and Procedural History

[2] On September 22, 2012, Sims, who was twenty years old at the time, was babysitting K.W. and her younger brother. While K.W. was in her room, Sims "came up and put his hands under her shirt and was […] 'squeezing' […] her […] 'boobs.'" Appellant's App. Vol. II p. 112. Sims also "touched her butt" with his "thing […] over her clothes[.]" Appellant's App. Vol. II pp. 112–13. The State charged Sims with two counts of Class C felony child molesting. In

both counts, the State alleged that Sims had fondled or touched K.W. "with the intent to arouse or satisfy the sexual desires of K.W." or his own. Appellant's App. Vol. II p. 129.

[3] On May 28, 2013, the State and Sims entered into a plea agreement, under the terms of which Sims agreed to plead guilty to one count of Class C felony child molesting and to register as a sex offender, in exchange for the State fixing his sentence at five years of incarceration, with three suspended to probation. The plea agreement advised Sims of the constitutional rights and privileges he would waive by pleading guilty; however, it did not review the elements of the offense with Sims, nor did the plea agreement contain those elements. Sims initialed paragraph nine of the plea agreement, which stated that he "acknowledges that entry of a guilty plea pursuant to this agreement constitutes an admission of the truth of all facts alleged in the charge or counts to which the Defendant pleads guilty and that entry of the guilty plea will result in conviction on those charges or counts." Appellant's App. Vol. II p. 103.

[4] In June of 2013, the trial court held a guilty-plea hearing at which Sims confirmed that he had discussed the plea agreement with his attorney and understood what was happening. In pleading guilty to what was then Class C felony child molesting, Sims acknowledged that he had understood that he was "admitting to the truth of all of the elements of the charge[.]" Appellant's App. Vol. II p. 111. Sims also admitted that his plea had been knowing and voluntary, that he had been satisfied with his trial counsel's representation, that he had touched K.W.'s breasts under her shirt and touched her buttocks with

his penis over her clothes. The trial court accepted Sims's plea and the following factual basis for the charge, read into the record by the prosecutor:

> K.W. is a minor female child whose date of birth is April 25, 2003. […] K.W. reported that on Saturday, September 22, 2012, a man she described as John Sims who was approximately twenty years old, was at their house watching she and her younger brother while her mother was gone. She was in her bedroom and John came into her room. She was on her knees, the Defendant, John Sims came up and put his hands under her shirt and was […] "squeezing" […] her […] "boobs." She told him to "Get off of me." John Sims also touched her butt, with his […,] what she called "thing[.]"

Appellant's App. Vol. II p. 112. The trial court sentenced Sims in accordance with his plea agreement.

[5] On September 20, 2017, Sims filed a PCR petition. In November of 2021, Sims amended his petition, alleging that he had not knowingly, voluntarily, and intelligently pled guilty because he had not admitted to the requisite *mens rea* and his trial counsel had been ineffective for allowing him to be sentenced pursuant to a deficient plea. At his PCR hearing, Sims testified that he had known that he was pleading guilty, but that his trial counsel had never told him that he would have to admit to touching K.W. to satisfy his own or K.W.'s sexual desires. He further testified that he had not touched K.W. to gratify himself or her sexually.

[6] In March of 2023, the post-conviction court denied Sims's PCR petition. The post-conviction court concluded that there had been a sufficient factual basis for

the trial court to have accepted Sims's plea; Sims's plea had been knowing, voluntary, and intelligent; and Sims had failed to establish that he had received ineffective assistance of trial counsel.

Discussion and Decision

[7] Indiana Post-Conviction Rule 1(1) enables a petitioner who has exhausted his direct appeals to challenge the correctness of his conviction or sentence by filing a PCR petition. Our post-conviction rules "create a narrow remedy for subsequent collateral challenges to convictions." *Williams v. State*, 706 N.E.2d 149, 153 (Ind. 1999). A "petitioner who has been denied post-conviction relief appeals from a negative judgment and as a result, faces a rigorous standard of review on appeal." *Dewitt v. State*, 755 N.E.2d 167, 169 (Ind. 2001). "The petitioner has the burden of establishing his grounds for relief by a preponderance of the evidence." Ind. P-C.R. 1(5). We will reverse the post-conviction court's findings "only upon a showing of clear error […] which leaves [us] with a definite and firm conviction that a mistake has been made." *Hollowell v. State*, 19 N.E.3d 263, 269 (Ind. 2014) (citing *Ben-Yisrayl v. State*, 729 N.E.2d 102, 106 (Ind. 2000)). Further, we will "neither reweigh the evidence nor determine the credibility of witnesses"; rather, we "consider only the evidence that supports the judgment and the reasonable inference to be drawn from that evidence." *Ben-Yisrayl*, 729 N.E.2d at 106. Put simply, a petitioner must show that the evidence "leads unerringly and unmistakably to a

conclusion opposite that reached" by the post-conviction court. *Hollowell*, 19 N.E.3d at 269.

I. The Guilty Plea

[8] Under Indiana Code section 35-35-1-3(b), a "court shall not enter judgment upon a plea of guilty […] unless it is satisfied from its examination of the defendant or the evidence presented that there is a factual basis for the plea." "[A] factual basis exists when there is evidence about the elements of the crime from which a court could reasonably conclude that the defendant is guilty." *Butler v. State*, 658 N.E.2d 72, 77 (Ind. 1995). There are four ways to establish an adequate factual basis: (1) by the State's presentation of evidence regarding the elements of the charged offense; (2) by the defendant's testimony regarding the events underlying the charge; (3) by the defendant's admission of the truth of the allegations in the information read in court; or (4) by the defendant's acknowledgement that he understands the nature of the charge and that his plea is an admission to that charge. *Oliver v. State*, 843 N.E.2d 581, 587 (Ind. Ct. App. 2006), *trans. denied*. "The factual basis […] need not be established beyond a reasonable doubt"; instead, "relatively minimal evidence can be adequate." *Dewitt*, 755 N.E.2d at 172. Even if the factual basis is found to be inadequate, the defendant must show that he was prejudiced by it. *Id*. A trial court's determination of an adequate factual basis arrives on appeal "with a presumption of correctness[,]" and we review it for an abuse of discretion. *Butler*, 658 N.E.2d at 77. Notably, "claims about omissions in the factual basis

have been unavailing when the omissions do not seem to demonstrate doubt about actual guilt." *State v. Cooper*, 935 N.E.2d 146, 150 (Ind. 2010).

[9] At the time Sims committed the underlying offense, Indiana Code section 35-42-4-3(b) provided that:

> [a] person who, with a child under fourteen (14) years of age, performs or submits to any fondling or touching, of either the child or the older person, *with the intent to arouse or to satisfy the sexual desires of either the child or the older person*, commits child molesting, a Class C felony.

(Emphasis added). Citing statutory language, Sims argues that child molesting is not a strict-liability offense, but one which requires the conduct to be done intentionally—the highest degree of a culpability. *See State v. Lombardo*, 738 N.E.2d 653, 656 (Ind. 2000) (explaining that "intentional" is the highest degree of culpability). One acts "intentionally" when he has the "conscious objective to do so." Ind. Code § 35-41-2-2. Intent "may be established by circumstantial evidence and may be inferred from the actor's conduct and the natural and usual sequence to which such conduct usually points." *Bowles v. State*, 737 N.E.2d 1150, 1152 (Ind. 2000).

[10] As noted, Sims faces a rigorous standard of review. We conclude that he has failed to meet that standard. The post-conviction court found the totality of the facts enabled it "to reasonably conclude that Sims performed fondling or touching of K.W. with the intent to arouse the sexual desires of" either party. Appellant's App. Vol. II p. 152. For example, the charging information alleged

that Sims touched K.W. "with the intent to arouse or satisfy the sexual desires of K.W. and/or the sexual desires of […] Sims." Appellant's App. Vol. II p. 129. Moreover, Sims initialed paragraph nine of the plea agreement, which provided that he "acknowledge[d] that entry of a guilty plea pursuant to this agreement constitute[d] an admission of the truth of all facts alleged in the charge or counts to which the Defendant pleads guilty[.]" Appellant's App. Vol. II p. 103.

[11] Further, at his guilty-plea hearing, Sims stated that he understood that he was pleading guilty to child molesting as a Class C felony, he was "admitting to the truth of *all* of the elements of the charge," and he had discussed his plea agreement with his counsel. Appellant's App. Vol. II p. 111 (emphasis added). Because the post-conviction court found the totality of the facts sufficient to imply Sims's guilt, and a court's determination of an adequate factual basis carries "a presumption of correctness[,]" Sims has failed to convince us that the post-conviction court abused its discretion. *Butler*, 658 N.E.2d at 77; *see Dillehay v. State*, 672 N.E.2d 956, 961 (Ind. Ct. App. 1996) (concluding that the probable-cause affidavit, coupled with the defendant's acknowledgment that the allegations were true, implied that the defendant had delivered the cocaine even though the affidavit did not specify delivery).

II. Ineffective Assistance of Counsel

[12] To prevail on an ineffective-assistance-of-counsel claim, a defendant must demonstrate that (1) counsel's performance was deficient and (2) the deficient

performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Prejudice arises when a defendant shows 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. However, when analyzing an ineffective-assistance claim, we begin with the presumption that counsel rendered effective representation. *Autrey v. State*, 700 N.E.2d 1140, 1141 (Ind. 1998).

[13] Sims argues that his trial counsel was ineffective for allowing the court to sentence him without establishing his culpability for Class C felony child molesting. Specifically, Sims argues that, while he did not call his trial counsel to testify before the post-conviction court, the court improperly inferred that his trial counsel would not have corroborated his PCR allegations. Sims claims that such an inference is valid only in questions "of law or issues involving credibility[,]" which he alleges is not the case here. *McElroy v. State*, 864 N.E.2d 392, 396 (Ind. Ct. App. 2007), *trans. denied*. Sims also claims that the State's failure to obtain an affidavit from his trial counsel, after successfully having moved the post-conviction court for additional time to do so, or to have his trial counsel testify supports an inference that his trial counsel's testimony would not have supported the State's position. We are unconvinced.

[14] A defendant's failure to present evidence from counsel generally enables the post-conviction court to infer that counsel would not have corroborated the defendant's allegations. *Dickinson v. State*, 533 N.E.2d 586, 589 (Ind. 1989). Moreover, the post-conviction court was not required to believe Sims's self-

serving statements about his trial counsel's advisements or his own understanding of the plea agreement. *See Thompson v. State*, 804 N.E.2d 1146, 1149 (Ind. 2004) ("As a general rule, factfinders are not required to believe a witness's testimony even when it is uncontradicted.") Sims has failed to establish that he received ineffective assistance of trial counsel.

[15] The judgment of the post-conviction court is affirmed.

Riley, J., and Weissmann, J., concur.