MEMORANDUM DECISION

ATTORNEYS FOR APPELLANT

Amy E. Karozos
Public Defender of Indiana

Victoria S. Christ
Deputy Public Defender
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Ian McLean
Supervising Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Michael P. Swygart,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent.

March 7, 2022

Court of Appeals Case No. 21A-PC-1104

Appeal from the Adams Circuit Court

The Honorable Chad E. Kukelhan, Judge

Trial Court Cause No. 01C01-1807-PC-3

Molter, Judge.

[1] A jury convicted Michael P. Swygart of committing sex crimes against his stepdaughter. During their deliberations, they asked the court for a definition

of "intent" and whether that term was a modifier for both the intent to arouse and the intent to satisfy sexual desires in the instruction providing the elements of child molesting. Swygart seeks post-conviction relief contending he was denied the effective assistance of counsel because his attorney (a) agreed to a supplemental instruction defining intent without insisting that the court also reread all the final instructions to the jury, and (b) did not insist that the court decline to answer the second question and instead direct the jury merely to reread the final instructions.

[2] Swygart's defense to the child molesting charge at issue was that he was merely checking to see if the victim was a virgin, and he had no intent to satisfy any sexual desire. His counsel therefore made a reasonable strategic decision that an emphasis on the intent element in the instructions was to his advantage and rereading all the instructions would distract the jury from that focus to Swygart's disadvantage. Regardless, even if counsel's performance was deficient, we cannot say there is a reasonable probability that the jury would have reached a different conclusion as to Swygart's intent regarding the child molesting charge because the jury also convicted Swygart of a subsequent sexual assault of his stepdaughter and heard evidence of his sexual advances towards her after that assault. Accordingly, we find no error in the post-conviction court's conclusion that counsel's performance was neither deficient nor prejudicial to Swygart, and we affirm.

Facts and Procedural History

[3] Between 2014 and 2015, when I.H. was thirteen and fourteen years old, she lived with her mother and stepfather, Swygart. One day, after I.H. had taken a shower and was wrapped in a towel, Swygart told I.H. that he needed to check to see if she was still a virgin. He then forcibly placed her on top of a washing machine and spread her vagina apart with his hands, informing I.H. that he concluded she was a virgin. While this was happening, I.H. was kicking and trying to escape. And when I.H. told her mother about this incident, her mother made her apologize to Swygart.

[4] Then, after I.H. turned fourteen years old, Swygart entered her room in the middle of the night wearing only his boxers. I.H. told Swygart she was having trouble falling asleep, and he told her to take one of her mother's pills for treating anxiety.[1] I.H. had already taken one pill to help fall asleep.

[5] Swygart then began touching I.H.'s vagina, and after she told him he was hurting her, he removed her pants, performed oral sex on her, and briefly inserted his penis in her. All the while, I.H. repeatedly told Swygart to stop touching her and that he was continuing to hurt her. Eventually, Swygart stopped and apologized to I.H. After I.H. told her mother about this incident,

[1] Klonopin is a medication used to treat anxiety. Trial Tr. Vol. 1 at 238.

her mother and Swygart got into a heated argument, and then her mother told I.H. that they decided not to discuss this with anyone outside the family.

[6] One month later, Swygart began "hit[ting] on" I.H., telling her that she was attractive and that they "could do it again if [she] wanted but [her] mom couldn't know." Trial Tr. Vol. 2 at 77. I.H. reported Swygart's comments to her mother, and her mother took I.H. to live with a relative. Eventually, I.H. spoke to her father about Swygart's actions, and then she decided to report the incidents to the police.

[7] In 2015, the State charged Swygart with: Count 1, Level 4 felony child molesting based on the incident in the bathroom; Count 2, Level 4 felony sexual misconduct based on the oral sex that occurred in I.H.'s bedroom; and Count 3, Level 4 felony sexual misconduct based on the vaginal sex that occurred in I.H.'s bedroom. In 2017, Swygart proceeded to a jury trial, and the jury's final instructions included Final Instruction No. 6, which stated:

> The crime of child molesting is defined by statute as follows: 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 Level 4 felony. Before you may convict the defendant, the State must have proved each of the following beyond a reasonable doubt: 1) the defendant; 2) with the intent to arouse or satisfy the sexual desires of [the] minor girl or Michael P. Swygart; 3) when [the] minor girl was a child under fourteen (14) years of age; 4) knowingly; 5) performed fondling or touching of [the] minor girl. If the State failed to prove each of these elements beyond a reasonable doubt, you must find the

> defendant not guilty of child molesting, a Level 4 felony charged in Count 1.

Id. at 174–75 (capitalization altered).

[8] After deliberations began, the jury notified the court that they had a question regarding Final Instruction No. 6. They asked for the "legal definition of intent" and whether the word "intent" in Final Instruction No. 6 "go[es] with both the intent to arouse and/or the intent to satisfy sexual desires." *Id.* at 187. By agreement of the parties, the trial court instructed the jury: "intent means to have in mind a fixed purpose to reach a desired objective"; and the intent referenced in Final Instruction No. 6 "is the intent to arouse or satisfy the sexual desires." *Id.* at 189. The trial court added: "It's an 'or' not an 'and.'" *Id.*

[9] Roughly an hour later, and after two-and-one-half hours of deliberations, the jury convicted Swygart of all counts. Subsequently, the trial court, for Count 1, sentenced Swygart to twelve years with three years suspended and nine years executed. For Counts 2 and 3, the trial court sentenced Swygart to serve seven years in the Indiana Department of Correction for each count. The trial court ordered the three counts to be served consecutively.

[10] In 2018, Swygart filed a pro se petition for post-conviction relief, which he amended in 2020. He asserted trial counsel rendered ineffective assistance by failing to object to: (1) the sentences imposed for Counts 2 and 3 and (2) the trial court's supplemental instruction. The post-conviction court found in

Swygart's favor on the sentencing claim after the State conceded his sentences exceeded the consecutive sentencing limits in effect when the crimes occurred. But the court concluded Swygart failed to prove by a preponderance of the evidence that trial counsel was ineffective in failing to object to the court's response to the jury's questions. The court also concluded the "answer provided to the jury's question did not highlight one instruction or issue" or "point to a verdict." Appellant's App. Vol. 2 at 99. Instead, it "assisted the jury in their determination as to whether the evidence convinced them beyond a reasonable doubt that Swygart committed child molesting when he claimed he was merely checking [I.H's] virginity." *Id.* at 99–100. Swygart now appeals.

Discussion and Decision

I. Standard of Review

[11] Swygart appeals the post-conviction court's denial of his petition for post-conviction relief. A petitioner "bears the burden of establishing grounds for relief by a preponderance of the evidence." *Campbell v. State*, 19 N.E.3d 271, 273–74 (Ind. 2014). On appeal, the petitioner seeks review of a negative judgment, so they must show "that the evidence, as a whole, unmistakably and unerringly points to a conclusion contrary to the post-conviction court's decision." *Wilson v. State*, 157 N.E.3d 1163, 1170 (Ind. 2020). In other words, we cannot reverse unless "there is no way within the law that the court below could have reached the decision it did." *Stevens v. State*, 770 N.E.2d 739, 745 (Ind. 2002).

II. Effectiveness of Trial Counsel

[12] Swygart contends he was denied the effective assistance of trial counsel when his attorney (a) agreed to a supplemental instruction defining intent without insisting that the trial court also reread the final instructions to the jury, and (b) did not insist that the court decline to answer the second question and instead direct the jury merely to reread the final instructions. Effectiveness of counsel is a mixed question of law and fact. *Strickland v. Washington*, 466 U.S. 668, 698 (1984). We evaluate Sixth Amendment claims of ineffective assistance under the two-part test announced in *Strickland*. *Id.* To prevail on an ineffective assistance of counsel claim, a defendant must show both deficient performance and resulting prejudice. *Hollowell v. State*, 19 N.E.3d 263, 268–69 (Ind. 2014) (applying *Strickland* standard).

[13] Deficient performance is that which falls "below an objective standard of reasonableness, committing errors so serious that the defendant did not have the 'counsel' guaranteed by the Sixth Amendment." *Id.* at 269. Prejudice exists when a claimant shows that there is a reasonable probability that, but for counsel's errors, the outcome would have been different. *Id.* The two prongs of the *Strickland* test are separate and independent inquiries. *Strickland*, 466 U.S. at 697; *see also French v. State*, 778 N.E.2d 816, 824 (Ind. 2002) (stating that claims of ineffective assistance fail if either prong is unsatisfied).

[14] We must begin with a presumption that counsel provided adequate assistance and exercised reasonable professional judgment in all significant decisions.

Stevens, 770 N.E.2d at 746. Counsel is afforded considerable discretion in the choice of strategy and tactics. *Id.* at 746–47. Counsel's conduct is assessed based on the facts known at the time and not hindsight. *State v. Moore*, 678 N.E.2d 1258, 1261 (Ind. 1997); *see also Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight."). We do not "second-guess" strategic decisions requiring reasonable professional judgment even if the strategy in hindsight did not serve the defendant's interests. *Moore*, 678 N.E.2d at 1261. In sum, trial strategy is not subject to attack through an ineffective assistance of counsel claim, unless the strategy is so deficient or unreasonable as to fall outside the objective standard of reasonableness. *Autrey v. State*, 700 N.E.2d 1140, 1141 (Ind. 1998). And as our Supreme Court has stated, "[i]solated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective." *Stevens*, 770 N.E.2d at 747.

[15] The post-conviction court concluded counsel's performance was neither deficient nor prejudicial. Because we cannot say "there is no way within the law that the court below could have reached the decision it did," we must affirm. *Id.* at 745.

A. Deficiency

[16] Swygart claims his attorney's assistance was deficient in two respects. First, he claims that after agreeing to a supplemental instruction defining intent, he

should have insisted that the court reread all of the final instructions. The post-conviction court did not err in rejecting this argument.

[17] To begin with, it is unclear whether the trial court would be required to reread all the final instructions if counsel had objected. Indiana Code section 34-36-1-6 gives trial courts leeway to respond to jury questions:

> If, after the jury retires for deliberation . . . the jury desires to be informed as to any point of law arising in the case; the jury may request the officer to conduct them into court, where the information required shall be given in the presence of, or after notice to, the parties or the attorneys representing the parties.

The statute does not state that courts must reread the entire set of final instructions whenever it provides a supplemental instruction, as Swygart contends is the law, and our Supreme Court has seemed to suggest in the past that courts are *not* required to reread all the final instructions. *See Tincher v. Davidson*, 762 N.E.2d 1221, 1224 (Ind. 2002) (explaining that "[u]nder appropriate circumstances, and with advance consultation with the parties and an opportunity to voice objections, a trial court may, for example . . . directly answer the jury's question (either with or without directing the jury to reread the other instructions"); *Inman v. State*, 4 N.E.3d 190, 201 (Ind. 2014) (recognizing the same). The animating idea is that trial courts are encouraged to employ "creative approaches to assist and enable juries to resolve difficulties." *Tincher*, 762 N.E.2d at 1224.

[18] However, more recently, the Supreme Court has stated that "[w]hen giving a supplemental instruction, the trial court must reread the entire set of final instructions in the presence of the jury and parties." *Ramirez v. State*, 174 N.E.3d 181, 198 (Ind. 2021). This reflects a concern that "[g]iving a supplemental jury instruction can inadvertently overemphasize an issue, potentially telling the jury what it ought to do concerning the issue." *Id.* (quotations and brackets omitted). All of these statements are dicta, and neither party cites a Supreme Court case holding one way or the other whether current statutes and trial rules require trial courts to reread the entire set of final instructions whenever a court answers a jury question through a supplemental instruction.

[19] Regardless, the answer does not make a difference in this case, because even if the trial court might otherwise have been required to reread all the final instructions, Swygart's counsel was free to make the strategic decision to waive any such right, which is what appears happened here. In his affidavit to the post-conviction court, counsel stated that he saw the jury's questions as a positive sign that they were questioning Swygart's intent to commit child molesting. Pet'r's Ex. 2. Given that counsel's reasonable strategy was to focus the jury's attention on the intent element, it may have been counterproductive to risk losing that focus by having the jury listen again to all the other instructions which were unrelated to the intent element. Given that we afford counsel considerable discretion in the choice of strategy and tactics, *Stevens*, 770 N.E.2d at 746–47, and we assess counsel's conduct based on the facts known at

the time rather than hindsight, *Moore*, 678 N.E.2d at 1261, we cannot say this strategic decision rendered the assistance of Swygart's counsel ineffective.

[20] Swygart's second deficiency argument is that when the jury asked whether the word "intent" modified both the intent to arouse and the intent to satisfy sexual desires, his counsel should have insisted that the trial court simply instruct the jury to reread the final instructions. Appellant's Br. at 17, 19. Again, we cannot second guess this strategy in hindsight. Indiana Code section 34-36-1-6 gave the trial court leeway to respond to the jury's question, and it was reasonable for counsel to conclude it would work to his client's advantage for the jury to more closely focus on the fact that Swygart's subjective intent was a critical component of the State's burden of proof. As for Swygart's argument that the court's answer emphasized a portion of the final instructions, it was the jury's question that created any emphasis, not the answer.

B. Prejudice

[21] Even if trial counsel's performance fell below an objective standard of reasonableness, we cannot say the post-conviction court erred in concluding there is no reasonable probability that Swygart would have been acquitted had trial counsel objected to the trial court's supplemental instruction. *See French*, 778 N.E.2d at 824 (stating that claims of ineffective assistance fail if either prong is unsatisfied). Swygart's defense to the incident in the bathroom was that he was merely checking to confirm I.H.'s virginity rather than intending to satisfy his sexual desires. But the jury did not evaluate this incident in isolation, and it concluded beyond a reasonable doubt that he later committed additional

sex crimes against I.H., and they heard evidence that even after those crimes he continued to make sexual advances towards her. We therefore cannot say the post-conviction court erred in concluding there is no reasonable probability that the jury would have concluded that Swygart's intentions were different when he assaulted I.H. in the bathroom.

[22] Affirmed.

Robb, J., and Riley, J., concur.