MEMORANDUM DECISION

IN THE

Court of Appeals of Indiana

Robert W. Stevenson

Appellant-Defendant

v.

State of Indiana

Appellee-Plaintiff

March 11, 2024

Court of Appeals Case No.
23A-PC-1681

Appeal from the Porter Superior Court

The Honorable Mary DeBoer, Judge

Trial Court Cause No.
64D05-1703-PC-2766

Memorandum Decision by Judge Riley
Judges Brown and Foley concur.

Riley, Judge.

STATEMENT OF THE CASE

[1] Appellant-Petitioner, Robert Stevenson (Stevenson), appeals the post-conviction court's Order, denying his petition for post-conviction relief.

[2] We affirm.

ISSUES

[3] Stevenson presents this court with two issues, which we restate as:

> (1) Whether the post-conviction court's conclusion that Trial Counsel rendered effective assistance was clearly erroneous; and
>
> (2) Whether the post-conviction court's conclusion that Appellate Counsel rendered effective assistance was clearly erroneous.

FACTS AND PROCEDURAL HISTORY

[4] The facts underlying Stevenson's conviction for Class A felony child molesting are as follows:

> Roy Castro (Castro) and Amanda Boer (Boer) are the parents of two minor children: M.C. and J.C. . . . At the time of Stevenson's criminal trial, M.C. was six years old and J.C. was four years old. In early 2014, Boer's mother, Carolyn, would frequently babysit the Children. At all relevant times, Stevenson was Carolyn's boyfriend. Stevenson would frequently spend time with the Children while they were at Carolyn's house.

On January 30, 2014, Castro, Castro's mother, M.C., and J.C. were in a vehicle together driving home from the dentist. While in the vehicle together, the topic turned to "puppy chow," a snack made of Chex mix covered with powdered sugar. J.C. indicated that the powdered sugar looked like the baby powder that Boer put "on his butt and his hooey during normal [diaper] changing practices." The Children used the term "hooey" to refer to a penis. During this conversation, M.C. said that "Grandpa Rob has a hooey and he asks us to suck it all the time." After hearing M.C.'s statement about "Grandpa Rob," Castro dropped the Children off with his sister and notified the police. Valparaiso Police Sergeant Jerami Simpson took the report from Castro, Boer, and Castro's mother. While taking the report, Sergeant Simpson instructed Castro and Boer not to allow M.C. and J.C. to return to Carolyn's residence. After taking the report, Sergeant Simpson relayed the report to the Department of Child Services. . . . DCS case manager Rachel Gibson (Gibson) was assigned to the case. She soon thereafter arranged for the Children to be interviewed. On February 12, 2014, the Children were forensically interviewed by Angie Marsh (Marsh), a certified forensic interviewer. During her interview, M.C. disclosed that Stevenson had made her suck on his "hooey" while she was in the master bedroom of Carolyn's home. M.C. indicated that she had to suck on Stevenson's penis because he told her to, even though she did not want to. She indicated that he made her do so on numerous occasions. M.C. described Stevenson's penis as looking "hairy and brownish" and being "squishy." M.C. identified Stevenson's pubic hair as brown, silver and gray. M.C. indicated that one time Stevenson "peed" on the bed and that the "pee" was white. She also indicated that Stevenson wiggled his penis with his hand. M.C. further indicated that J.C. was present and watching television in the room when Stevenson forced her to suck on his penis. During his forensic interview with Marsh, J.C. indicated that he saw something happen but did not elaborate on what he saw.

> On February 13, 2014, Valparaiso Police Detective Brian Thurman (Detective Thurman) interviewed Stevenson. During this interview, Stevenson stated that he was forty-five years old; that he lived with his girlfriend, Carolyn; and that he considered M.C. and J.C. to be his grandchildren. Stevenson admitted that there would be times when he would be alone with M.C. and J.C. in the master bedroom of the home he shared with Carolyn. Stevenson denied sexually molesting either of the Children.

Stevenson v. State, No. 64A03-1511-CR-2038, slip op. at 1-2 (Ind. Ct. App. Sept. 26, 2016) (record citations omitted and name parentheticals added).

[5] On May 7, 2014, the State filed an Information, charging Stevenson with Class A felony child molesting. Trial Counsel was appointed to represent Stevenson. Trial Counsel had been a deputy prosecutor for six years and had been lead counsel on three jury trials, but Stevenson's case was his first jury trial as a public defender. To prepare to defend Stevenson, Trial Counsel consulted with at least three experienced defense attorneys about depositions, trial preparation, evidentiary issues common to child molesting cases, and defense strategies. Trial Counsel also performed legal research on evidentiary issues common to child molesting cases. Trial Counsel met with Stevenson more than thirty times to develop a defense strategy, which always included going to trial, as Stevenson was adamant that he would not plead guilty. Trial Counsel drafted an outline of the proposed defense strategy, which Steveson approved in writing. Prior to trial, Stevenson also executed an acknowledgement that he had been advised about his rights regarding his decision to testify at trial, that he waived those rights, and that he chose to testify.

[6] On August 24, 2015, the trial court convened Stevenson's three-day jury trial. The State called Gibson as its third witness, and she testified about the role that M.C.'s forensic interview by Marsh had played in her DCS investigation. During Gibson's testimony, Trial Counsel objected several times that Gibson's testimony regarding M.C.'s forensic interview comprised impermissible vouching for M.C., but the trial court overruled Trial Counsel's multiple objections. The deputy prosecutor asked Gibson if she had observed Marsh ask M.C. the same question several different ways during the forensic interview and whether M.C.'s answers remained consistent. Without objection from Trial Counsel, Gibson answered both questions affirmatively.

[7] At the beginning of the second day of trial, Trial Counsel filed a trial brief regarding the inadmissibility of vouching evidence; however, the trial court declined to revisit or reverse any of its previous evidentiary rulings. M.C. was the first witness that day for the State. M.C. testified repeatedly and consistently that Stevenson had "told [her] to suck his hooey." (Trial Tr. Vol. I, pp. 96, 99, 100). Following M.C.'s and Boer's testimony, Marsh took the stand and provided testimony about her credentials and training as a forensic interviewer, as well as general testimony regarding how forensic interviews of children are conducted so as to not suggest answers or lead the child, at one point explaining that she sometimes asks the same question different ways to see if the child's answers are consistent and that she looks for sensory details in a child's statements. Later in her testimony and without objection, Marsh affirmed that M.C. had provided sensory details and that the things M.C. said

during her interview made sense. The deputy prosecutor asked Marsh if M.C.'s statements during her interview raised any "red flags" for Marsh that things were not making sense or adding up, and Marsh replied that they did not. (Trial Tr. Vol. I, p. 166). Without objection from Trial Counsel, the deputy prosecutor asked Marsh whether she had asked M.C. the same question several ways and whether M.C.'s version of events remained consistent, and Marsh responded affirmatively to both questions, also without objection.

[8] At the conclusion of Marsh's testimony, the parties discussed matters pertaining to the presentation of Stevenson's defense case. J.C. had been listed as a defense witness; however, upon the State's objection, the trial court excluded J.C. as a witness based on his age at the time of the offense and the lack of relevancy of his testimony. After J.C. was excluded, Trial Counsel did not make an offer of proof regarding J.C.'s testimony. Trial Counsel and the State subsequently agreed that the videotape of J.C.'s forensic interview could be admitted if M.C.'s forensic interview was also admitted into evidence. Thereafter, the State presented the testimony of Detective Thurman, the sponsoring witness for the admission of Stevenson's videotaped interview. Prior to Stevenson's interview being admitted and published to the jury, the detective testified that Stevenson had told him that he had no contact with his three teen-aged biological children and that it was a difficult matter that he did not wish to discuss. However, Detective Thurman testified that when he asked Stevenson about it again later in the interview, Stevenson had explained that he and his ex-wife were "divorced, we worked that out[.]" (Trial Tr. Vol. I, p.

220). The detective further testified that he had asked Stevenson about his pornography consumption to determine if M.C. had inadvertently seen something that would explain her report of abuse. Although Stevenson admitted to consuming pornography, he denied watching any around M.C. or J.C. The detective related that he had told Stevenson during the interview that M.C. was "very consistent" in what she said in her initial report and her forensic interview, that the detective did not understand why M.C. would make this up at her age, and that he did not feel that M.C. had "the maturity, the age, [or] the education to know what these statements are if she hadn't experienced it." (Trial Tr. Vol. I, p. 222). Trial Counsel did not object to any of this testimony. J.C.'s, M.C.'s, and Stevenson's recorded interviews were published to the jury.

[9] After the State rested, Stevenson called an expert witness to testify about the proper manner of conducting child forensic interviews. Carolyn testified on behalf of Stevenson. The defense proffered a diagram of Carolyn's house with the room dimensions provided. After an objection by the State, the trial court ruled that the dimensions of the rooms were inadmissible because the exhibit had not been disclosed in ample time for the State to verify the measurements. The diagram was admitted without the dimensions, as were six photographs of Carolyn's home, including a view from the living room to the master bedroom and a view from the living room into the computer room. Carolyn testified that it was sixteen to eighteen feet from the position on the love seat where she would usually sit to the master bedroom and that it took five seconds to walk

the distance. Regarding Stevenson's lack of contact with his own children, Carolyn testified that this was because Stevenson's ex-wife's new husband had adopted them.

[10] Stevenson did not testify at trial. The jury found Stevenson guilty as charged. On October 22, 2015, the trial court sentenced Stevenson to forty years, with thirty years executed in the Department of Correction and ten years suspended to probation.

[11] Stevenson pursued a direct appeal. The same attorney who represented Stevenson at trial was appointed as Appellate Counsel. On appeal, Stevenson raised four issues: (1) a challenge to the sufficiency of the evidence attacking M.C.'s testimony as being incredibly dubious; (2) a claim that the trial court did not properly examine J.C. regarding his competency as a witness before excluding him; (3) a challenge to the admission of certain evidence relating to his drug and alcohol use as impermissible Rule 404(b) evidence; and (4) a claim that his sentence was an abuse of the trial court's discretion and was inappropriate given the nature of the offense and his character. On September 26, 2016, another panel of this court affirmed Stevenson's conviction and sentence. As to the issue of J.C.'s exclusion, the court held that Stevenson had waived his claim by failing to make an offer of proof.

[12] On March 14, 2017, Stevenson filed his petition for post-conviction relief, which he amended once. Stevenson alleged that Trial Counsel was ineffective for (1) failing to object to certain vouching testimony; (2) failing to call

Stevenson as a witness; (3) failing to make an offer of proof regarding J.C.'s testimony; (4) failing to keep his statements that he viewed pornography and had no contact with his biological children from the jury; and (5) failing to call Michael Miller (Miller), who employed Stevenson at his flooring business, as a witness to testify about the measurements he had made of Carolyn's home that had been excluded from trial. Stevenson also raised an ineffective assistance of Appellate Counsel claim for failing to raise the issue of the purportedly improper vouching testimony on direct appeal.

[13] On January 18, 2023, the post-conviction court held an evidentiary hearing on Stevenson's petition. Trial Counsel testified regarding various aspects of his representation of Stevenson. After his multiple objections had been overruled and the filing of a trial brief had failed to persuade the trial court, Trial Counsel had made a strategic decision to stop objecting to what he considered to be vouching testimony pertaining to M.C. because he feared that the jury would believe that "we as a defense didn't know what we were talking about. We didn't know the law; we weren't trustworthy." (PCR Tr. p. 27). Trial Counsel believed that through his previous objections and the filing of the trial brief, he had substantially preserved the issue for appeal. Regarding the fact that Stevenson did not testify, Trial Counsel related that he had planned the defense's strategy around Stevenson's decision to testify, but that the morning that he was to take the stand, Stevenson changed his mind about testifying. This change, which Trial Counsel testified was completely Stevenson's decision, "blindsided" Trial Counsel, who had planned to explain several issues

to the jury through Stevenson's testimony. (PCR Tr. p. 52). Trial Counsel further testified on the issue of J.C.'s testimony that Stevenson had strongly felt that J.C.'s videotaped interview should be played for the jury, even before J.C. had been excluded as a witness. Trial Counsel did not make an offer of proof of J.C.'s testimony because of the agreement with the State that J.C.'s recorded interview would be admitted, along with M.C.'s recorded interview. Trial Counsel believed that this agreement was a good deal for Stevenson, as Trial Counsel had concluded that M.C.'s interview was admissible even in the absence of an agreement with the State. Regarding Stevenson's recorded interview, Trial Counsel believed that he had unsuccessfully requested that Stevenson's references to watching pornography and his lack of contact with his own children be redacted. Trial Counsel had planned to address the issue of Stevenson's lack of contact with his children when Stevenson testified. As far as developing the defense theory that Carolyn's home was too small for the offense to have occurred without her knowing, Trial Counsel believed that Carolyn was the best witness to describe the size of her home because she lived there. Trial Counsel also planned to have Stevenson, who worked in the flooring business and had expertise in estimating room sizes, testify about the size of the home. According to Trial Counsel, he was not aware that Miller had made measurements of the home, and Trial Counsel only received the diagram of Carolyn's home with the room measurements during trial. Pertaining to his choice not to raise the issue of the admission of purportedly improper vouching testimony on direct appeal, Trial Counsel/Appellate Counsel testified that the choice had been a strategic decision because he thought that the issues he had

raised were more likely to be successful, and he did not want to divert attention from those more meritorious issues.

[14] Stevenson testified at the post-conviction hearing that he never changed his mind about testifying. When asked whether he ever told Trial Counsel that he would not testify, Stevenson replied, "Not that I recall." (PCR Tr. p. 96). After his conviction, Stevenson had filed a disciplinary complaint against Trial Counsel detailing a number of purported faults in Trial Counsel's representation, but Stevenson did not mention the fact that Trial Counsel had failed to call him as a witness at trial. Miller testified that he had created the diagram of Carolyn's home months before trial and that, if he had been called as a witness, he would have testified that Carolyn's home was very small.

[15] On June 26, 2023, the post-conviction court entered its Order denying relief as to each of Stevenson's claims of Trial and Appellate Counsel ineffectiveness. The post-conviction court entered detailed findings of fact and conclusions thereon in support of its Order. Regarding Stevenson's claim that Trial Counsel had failed to call him as a witness at trial, the post-conviction court specifically found that Stevenson's testimony on the subject was "not credible." (Appellant's App. Vol. II, p. 132).

[16] Stevenson now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Standard of Review*

[17] Stevenson appeals following the post-conviction court's denial of his petition for post-conviction relief. To prevail on appeal from the denial of post-conviction relief, the petitioner must show "'that the evidence, as a whole, unmistakably and unerringly points to a conclusion contrary to the post-conviction court's decision.'" *Bradbury v. State,* 180 N.E.3d 249, 252 (Ind. 2022) (quoting *Wilson v. State*, 157 N.E.3d 1163, 1170 (Ind. 2020)). Put another way, an appellate court will not reverse the denial of post-conviction relief unless "'there is no way within the law that the court below could have reached the decision it did.'" *Id*. (quoting *Stevens v. State*, 770 N.E.2d 739, 745 (Ind. 2002)). In addition, where a post-conviction court enters findings of fact and conclusions of law in accordance with Indiana Post-Conviction Rule 1(6), we do not defer to its legal conclusions, but we will reverse its findings and judgment only upon a showing of clear error, meaning 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).

II. *Trial Counsel*

[18] Stevenson argues that Trial Counsel's performance was ineffective. We evaluate ineffective assistance of trial counsel claims under the two-part test articulated in *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail on such

a claim, a defendant must show that 1) his counsel's performance was deficient based on prevailing professional norms; and 2) that the deficient performance prejudiced the defense. *Weisheit v. State,* 109 N.E.3d 978, 983 (Ind. 2018) (citing *Strickland*, 466 U.S. at 687). To establish that counsel's performance was deficient, a petitioner must show that counsel's actions were unreasonable under prevailing professional norms. *Id*. In evaluating this element on appeal, we afford considerable deference to counsel's choice of tactics and strategy. *Id*. In order to demonstrate sufficient prejudice, the defendant must show that there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* A reasonable probability is one that is sufficient to undermine confidence in the outcome. *Id*. The 'performance' and 'prejudice' prongs of a *Strickland* analysis are separate, independent inquiries. *Timberlake v. State*, 753 N.E.2d 591, 603 (Ind. 2001). Therefore, if a claim of ineffective assistance of counsel may more easily be decided on the ground of lack of sufficient prejudice, it should be decided on that basis. *Id*. Stevenson raises six separate claims of ineffective assistance of Trial Counsel.

A. *Vouching*

[19] Stevenson claims that Trial Counsel was ineffective for failing to object to improper vouching testimony. Indiana Evidence Rule 704(b) provides that

> [w]itnesses may not testify to opinions concerning intent, guilt, or innocence in a criminal case; the truth or falsity of allegations; whether a witness has testified truthfully; or legal conclusions.

Vouching testimony "is an invasion of the province of the jurors in determining the weight they should place upon a witness's testimony." *Carter v. State*, 31 N.E.3d 17, 29 (Ind. Ct. App. 2015), *trans. denied*. A petitioner raising a claim of ineffectiveness based on a failure to object to improper vouching testimony in a child molesting trial must prove that the objection would have been sustained if made and that he was prejudiced. *Edgin v. State*, 657 N.E.2d 445, 447 (Ind. Ct. App. 1995), *trans. denied*.

[20] Stevenson's challenge on this issue is that Trial Counsel was ineffective for failing to object to Gibson's and Marsh's testimony as set forth above, as well as to Detective Thurman's testimony recounting what he told Stevenson about M.C.'s credibility. However, this testimony came after Trial Counsel's repeated objections to other evidence he considered to be improper vouching had been overruled by the trial court and after Trial Counsel had filed an in-trial brief on the issue of vouching which failed to persuade the trial court. Based on Trial Counsel's testimony at the post-conviction hearing, the post-conviction court found that Trial counsel's "decision to stop objecting to [the challenged testimony] was a strategic decision to maintain his credibility with the jury[.]" (Appellant's App. Vol. II, p. 135). Our supreme court has observed that "[f]ew points of law are as clearly established as the principle that '[t]actical or strategic decisions will not support a claim of ineffective assistance.'" *McCary v.*

State, 761 N.E.2d 389, 392 (Ind. 2002) (quoting *Sparks v. State*, 499 N.E.2d 738, 739 (Ind. 1986)).

[21] Nevertheless, Stevenson argues that Trial Counsel's choice of strategy was "unreasonable" because his case essentially boiled down to whether the jury found M.C. credible. (Appellant's Br. p. 15). However, one of Stevenson's defense strategies was to attack Marsh's qualifications and methods in order to make M.C.'s interview statements seem unreliable, and making objections which were consistently being overruled would not have assisted that strategy. What is more, on appeal, Stevenson does not develop any 'prejudice' argument that, if Trial Counsel had objected to these portions of Gibson's, Marsh's, and Detective Thurman's testimony, there was a reasonable probability that the outcome of his trial would have been different. *See Weisheit,* 109 N.E.3d at 983*; Edgin*, 657 N.E.2d at 447. We conclude that Stevenson has failed to establish that the evidence as a whole unerringly pointed away from the post-conviction court's determination on this issue. *See Bradbury,* 180 N.E.3d at 252.

B. *Failure to Call Stevenson as a Witness*

[22] Stevenson contends that Trial Counsel was ineffective for failing to call him as a witness. A defendant's right to testify at trial is guaranteed by both our federal and state Constitutions. *Baxter v. State*, 522 N.E.2d 362, 368 (Ind. 1988). The decision on whether to testify at trial belongs to the defendant, and counsel is bound by ethical rules to abide by the defendant's decision. *Phillips v. State*, 673 N.E.2d 1200, 1201-02 (Ind. 1996).

[23] Stevenson's argument on this issue is premised on his factual assertion that he "never wavered or changed his mind about testifying." (Appellant's Br. p. 16). However, at the post-conviction hearing, Trial Counsel testified that on the morning that he was set to take the stand, Stevenson, who up to that point had been adamant about testifying, "flipped to a hundred percent adamant that he was not going to testify." (PCR Tr. p. 52). Trial Counsel further testified that it was "[o]ne hundred percent" Stevenson's decision not to testify at trial. (PCR Tr. p. 53). During his own post-conviction hearing testimony, Stevenson maintained that he did not change his mind about testifying. Thus, the post-conviction court was faced with a credibility assessment that it resolved in favor of Trial Counsel. In order to credit Stevenson's appellate argument, it would be necessary for us to accept Stevenson's testimony as true and to reassess Trial Counsel's credibility, which is contrary to our standard of review. *See Hall v. State*, 849 N.E.2d 466, 468-69 (Ind. 2006) (observing that in reviewing the denial of post-conviction relief, the appellate courts consider only the evidence that supports the judgment and that "the post-conviction court is the sole judge of the evidence and the credibility of the witnesses"). Given the faulty premise of Stevenson's argument, he has failed to meet his burden of persuasion on appeal to establish that the evidence pointed unmistakenly and unerringly away from the post-conviction court's determination. *Bradbury,* 180 N.E.3d at 252.

C. *Failure to Make Offer of Proof*

[24] Stevenson next argues that Trial Counsel was ineffective for failing to make an offer of proof of J.C.'s testimony after the trial court excluded J.C. as a witness. Trial Counsel testified at the post-conviction hearing that he did not make an offer of proof because he had succeeded in having J.C.'s forensic interview admitted into evidence in which J.C., who was three years old at the time of the offense, stated that he saw "something" but did not elaborate on what that "something" was. (Trial Tr. Vol. I, p. 76). The reasonable inference from this evidence is that Trial Counsel did not believe that J.C.'s trial testimony was necessary because Trial Counsel was successful in placing evidence before the jury that a person who M.C. had reported being in the same room at the time of the offense did not specifically corroborate her report. The post-conviction court found that Stevenson was not prejudiced by Trial Counsel's failure to make an offer of proof because

> the jury was permitted to see and hear J.C.'s testimony by way of his forensic interview–and the fact that the interview was much closer in time to the allegations of molestation mak[e] J.C.'s recollection (even as a child of three) much more accurate than months later at trial[.]

(Appellant's App. Vol. II, p. 123). We conclude that the trial court's determination was not clearly erroneous because it is supported by the evidence and, because, given that J.C. was not called as a witness at the post-conviction hearing to testify about what his trial testimony would have been, Stevenson has not demonstrated how he was prejudiced by Trial Counsel's purportedly

deficient performance. Contrary to Stevenson's assertion on appeal, Trial Counsel's simple failure to preserve the issue of J.C.'s exclusion as a witness for appeal by making an offer of proof does not demonstrate prejudice under *Strickland*, wherein a petitioner must establish that "counsel's errors were so serious as to deprive the defendant of a *fair trial*, *a trial* whose result is reliable." *Strickland*, 466 U.S. at 687 (emphasis added). Accordingly, we conclude that Stevenson has failed to establish clear error on the part of the post-conviction court. *Bradbury,* 180 N.E.3d at 252.

D. *Failure to Object to Stevenson's Interrogation*

[25] Stevenson next argues that Trial Counsel rendered ineffective assistance by failing to redact and/or object to evidence that, during his police interrogation, he had admitted to watching pornography and to having no contact with his own biological children. A petitioner alleging that counsel was ineffective for failing to object must establish that the objection would have been sustained if made and that the petitioner was prejudiced by his counsel's failure to object. *Middleton v. State*, 64 N.E.3d 895, 901 (Ind. Ct. App. 2016) (citing *Timberlake v. State*, 690 N.E.2d 243, 259 (Ind. 1997)).

[26] Stevenson argues that Trial Counsel should have objected to the pornography evidence because it was irrelevant, citing *Cutshall v. State*, 166 N.E.3d 373 (Ind. Ct. App. 2021), and *Remy v. State*, 17 N.E.3d 396 (Ind. Ct. App. 2014)*, trans. denied*. In *Cutshall*, this court held that evidence that a child molesting defendant's internet search history indicated that he had accessed a large

amount of adult pornography on the day of the charged offense was inadmissible under Rule 404(b), where the pornography at issue had no strong parallel to one of the charged acts. *Cutshall*, 166 N.E.3d at 378-80. The *Cutshall* court relied on our previous decision in *Remy*, wherein we concluded that an image that had a strong visual parallel to one of the charged acts of molestation was admissible but that at least ten other overtly pornographic images had been admitted in error at Remy's child molesting trial "for no perceivable reason other than to inflame the jury and to encourage the 'forbidden inference'." *Remy*, 17 N.E.3d at 400-01.

[27] *Cutshall* and *Remy* are not dispositive of our inquiry because even if the evidence at issue was irrelevant, Stevenson has not established that he was prejudiced by his counsel's failure to object. The short dialogue about pornography that took place during Stevenson's interview did not involve the discussion of any explicit pornographic imagery, and the conversation, during which Stevenson denied ever watching pornography in the presence of M.C. or J.C., was part of an interview that lasted over an hour. Detective Thurman's testimony at trial was of a similar cursory nature among his trial testimony on a variety of topics. As such, although Stevenson contends that this evidence was extremely prejudicial, we are not convinced that the post-conviction court's conclusion that "the evidence was not so prejudicial as to conclude that had that evidence been kept from the jury , the outcome of [Stevenson's] trial would have been different" was clearly erroneous. (Appellant's App. Vol. II, p. 128).

[28] We reach a similar conclusion regarding Stevenson's contention that Trial Counsel rendered ineffective assistance for failing to keep evidence that he had no contact with his biological children from the jury. Trial Counsel testified at the post-conviction hearing that at least part of the reason he did not object to this evidence was because he planned to address it through the defense's case-in-chief when Stevenson took the stand. That plan was scuttled through no fault of Trial Counsel's. Even so, the prejudicial effect of this evidence was lessened by Stevenson's explanation in his interview that he had "worked that out" with his ex-wife and through Carolyn's explanation that Stevenson's ex-wife's new husband had adopted Stevenson's biological children. (Trial Tr. Vol. I, p. 220). On appeal, Stevenson draws our attention to the fact that, in closing argument, the deputy prosecutor told the jury that "parental rights are not terminated easily" in arguing that he was prejudiced by Trial Counsel's performance. (Trial Tr. Vol. II, p. 91). However, the deputy prosecutor went on to argue that Stevenson "has no contact with his children because someone else is now their father[,]" which was a parroting of Carolyn's testimony. Given the explanations provided to the jury for Stevenson's lack of contact with his children, like the post-conviction court, we conclude that this evidence was "not so prejudicial that, had the jury not heard it, the outcome of the trial would have been different." (Appellant's App. Vol. II, p. 129).

E. *Failure to Call Miller as a Witness*

[29] Stevenson's final individual claim of ineffective assistance of counsel is that Trial Counsel was deficient for not calling Miller as a witness to testify at trial about the dimensions of Carolyn's home and the home's small size. The decision of what witnesses to call at trial is a matter of strategy which we, as an appellate court, will not second-guess. *Malloch v. State*, 223 N.E.3d 683, 697 (Ind. Ct. App. 2023), *trans. denied*. It is rare, given the wide latitude counsel must have to make tactical decisions, that we will find that counsel was limited to any one particular technique or approach. *Id*.

[30] Trial Counsel explained at the post-conviction hearing that he thought that Carolyn was the best witness to testify about the size of her home since she lived there and that he planned to have Stevenson, who, like Miller, was a flooring professional skilled at estimating the size of rooms, testify about the dimensions of Carolyn's home. Miller did not measure the home at Trial Counsel's request, Trial Counsel was not informed prior to trial that Miller had measured the rooms in Carolyn's home, and Trial Counsel did not receive the diagram from Carolyn until after trial had begun. We conclude that Trial Counsel's performance on this point was not deficient and that the selection of Carolyn and Stevenson as the best witnesses to put this information before the jury was a strategic decision which we will not re-evaluate on appeal. *Id*.

[31] In addition, Carolyn testified at trial about the size of her home and the short distance between the living room and the master bedroom where the offense was alleged to have occurred, which she described in a relatable manner to the

jury in terms of how many seconds it took to walk the distance. Carolyn was also the sponsoring witness for an array of photographs of her home which included views between the rooms. Thus, the jury could judge the relative size of the home for themselves. In light of this evidence, Miller's testimony would have been largely cumulative, and, therefore, any failure to call Miller as a witness could not be the basis for finding ineffectiveness. *See Moredock v. State*, 540 N.E.2d 1230, 1232 (Ind. 1989) (The "failure to call a witness whose testimony would be cumulative is not ineffective assistance."). The post-conviction court concluded that "the admission of this testimony by Miller . . . would not have resulted in a different outcome in Stevenson's trial." (Appellant's App. Vol. II, p. 127). Stevenson has failed to meet his burden to establish that this conclusion was clearly erroneous. *Bradbury,* 180 N.E.3d at 252.

F. *Cumulative Error*

[32] Stevenson argues that the cumulative effect of the prejudice flowing from the errors he alleges on appeal rendered the result of his trial unreliable. However, "'[a]lleged [t]rial irregularities which standing alone do not amount to error do not gain the stature of reversible error when taken together.'" *Kubsch v. State*, 934 N.E.2d 1138, 1154 (Ind. 2010) (quoting *Reaves v. State*, 586 N.E.2d 847, 858 (Ind. 1992)). Having found no prejudice resulting to Stevenson on any of his individual claims of Trial Counsel ineffectiveness, we find no cumulative prejudice either. *Id*.

III. *Appellate Counsel*

[33] Stevenson argues that Appellate Counsel was ineffective for failing to raise the issue of the trial court's admission of what he contends was vouching testimony. The standard of review for ineffective assistance of appellate counsel claims is the same as that for trial counsel: the petitioner must show deficient performance and that the deficiency resulted in prejudice to him. *Hollowell,* 19 N.E.3d at 269. Ineffective assistance of appellate counsel claims generally fall into three categories, namely (1) denial of access to an appeal; (2) waiver of issues; and (3) failure to present issues well. *Id*. at 270. In order to show that appellate counsel was ineffective for failing to raise an issue on appeal, thus resulting in waiver for collateral review, a defendant must overcome the "strongest presumption of adequate assistance, and judicial scrutiny is highly deferential." *Reed v. State*, 856 N.E.2d 1189, 1195 (Ind. 2006). In evaluating the performance prong of the *Strickland* standard, we determine whether the unraised issues are significant and obvious from the face of the record and whether the unraised issues are clearly stronger than the raised issues. *Id*. In evaluating the prejudice prong of the *Strickland* standard, we determine whether the issues that appellate counsel failed to raise would have been clearly more likely to result in reversal or an order for a new trial. *Id*. It is very rare that we find appellate counsel to be ineffective for failing to raise an issue on appeal, as the decision of what issues to raise is one of the most important strategic decisions made by appellate counsel. *Id*.

[34] In his appellate argument, Stevenson notes that Trial Counsel "did object to the improper vouching that occurred during [] Gibson's testimony; however, said objections were overruled."[1] (Appellant's Br. p. 22). In contravention of Appellate Rule 46(A)(8)(a), Stevenson does not provide us with citations to the record identifying the portions of Gibson's testimony that form the basis of his appellate argument, and he provides us with no legal authority specific to the content of her testimony establishing that it comprised impermissible vouching for M.C. Therefore, he has failed to meet his burden on appeal to establish that his proposed issue was "clearly stronger" than the issues chosen by Appellate Counsel, or that his proposed issue was more likely to merit a reversal or a new trial. *See Reed*, 856 N.E.2d at 1195.

CONCLUSION

[35] Based on the foregoing, we hold that the post-conviction court's conclusions that Stevenson received effective assistance of Trial Counsel and Appellate Counsel were not clearly erroneous.

[36] Affirmed.

[37] Brown, J. and Foley, J. concur

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[1] This is the only testimony that Stevenson references in this section of his argument.

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