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IN THE COURT OF APPEALS OF INDIANA

Adam Kristopher Baumholser,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent

April 8, 2022

Court of Appeals Case No. 21A-PC-2138

Appeal from the Vanderburgh Circuit Court

The Honorable Kelli E. Fink, Magistrate

Trial Court Cause No. 82C01-1802-PC-649

Crone, Judge.

Case Summary

[1] Adam Kristopher Baumholser was convicted of one count of class A felony child molesting and two counts of class C felony child molesting and petitioned for post-conviction relief (PCR). He now appeals the denial of his PCR petition,

claiming that the post-conviction court erred in determining that he had not met his burden to establish that he was denied effective assistance of trial counsel. Baumholser asserts that trial counsel provided ineffective assistance by failing to move to dismiss the two class C felony child molesting charges, failing to move for a mistrial, and failing to object to the prosecutor's allegedly improper questions during jury selection. We conclude that Baumholser met his burden to show that trial counsel provided ineffective assistance by failing to move to dismiss the class C felony charges, and thus he is entitled to post-conviction relief on this claim. However, we find no clear error regarding the post-conviction court's findings on Baumholser's other ineffectiveness claims. Accordingly, we affirm in part and reverse in part.

Facts and Procedural History

[2] In January 2006, Baumholser married A.L., who had a four-year-old daughter, K.C., from a previous relationship. In 2009, when K.C. was eight years old, Baumholser and A.L. divorced. In February 2013, K.C. told her mother and grandmother that Baumholser molested her on five separate occasions in 2007 when she was six years old.

[3] On May 13, 2013, the State charged Baumholser with four counts of child molesting: two class A felonies, one alleging that Baumholser put his finger in K.C.'s vagina and the other alleging that he put his mouth on her vagina; and two class C felonies, one alleging that he submitted to K.C.'s fondling of his penis and the other alleging that he fondled her vagina. All charges alleged that the crimes were committed between July 30, 2007, and December 31, 2009.

The probable cause affidavit included an allegation that Baumholser told K.C. not to tell her mother about the molestations.

[4] At trial, K.C. testified that all the acts of molestation occurred when she was six years old and that she turned six on July 30, 2007. Trial Tr. Vol. 1 at 81-82. She testified that the molestations stopped by Christmas of 2007 and no molestations occurred after that. *Id*. at 84, 88, 100. The prosecutor asked K.C. whether she told her mother about what happened, and K.C. said, "No." *Id*. at 63. The prosecutor then asked her why she did not tell her mother, and K.C. answered that she was afraid because she "didn't know how to tell her [mother] what had happened." *Id*. at 64. She testified that she was afraid of Baumholser because "[h]e was a lot bigger than me and my mom[,] and he drank a lot[,] and he had weapons in the house." *Id*.; *see also id*. at 67-71, 79 (K.C. testifying that she did not tell her mother or anyone what happened because she was afraid of Baumholser). K.C. testified that she remained afraid of Baumholser even after the divorce. *Id*. at 89. The jurors submitted questions to K.C., one of which asked whether Baumholser "ever ask[ed] her to keep it a secret?" *Id*. at 118. K.C. responded, "No." *Id*. The trial court asked both the prosecutor and defense counsel whether either had any follow-up questions to that, and they both indicated they did not. Baumholser testified that he did not commit any of the alleged acts.

[5] The jury found Baumholser guilty of the two class C felony charges and the class A felony charge for putting his mouth on K.C.'s vagina. The jury was unable to reach a verdict on the remaining class A felony charge, and the State

dismissed it. The trial court sentenced Baumholser to concurrent terms of thirty-two years executed on the class A felony and four years each on the class C felonies. Baumholser's convictions and aggregate sentence were affirmed on direct appeal. *Baumholser v. State*, 62 N.E.3d 411, 418 (Ind. Ct. App. 2016), *trans. denied* (2017).

[6] In February 2018, Baumholser, pro se, filed a PCR petition. In January 2021, following the appointment of a public defender, Baumholser filed an amended PCR petition, alleging that his trial counsel provided ineffective assistance by failing to move to dismiss the class C felony charges as time-barred by the statute of limitations when the State rested at trial, failing to move for a mistrial on the class A felony charges due to the grave peril to him resulting from the jury hearing evidence of the class C felony charges, and failing to object to allegedly improper and prejudicial questioning by the prosecutor during voir dire. Following a hearing at which trial counsel testified, the post-conviction court issued findings of fact and conclusions of law denying Baumholser's PCR petition. This appeal ensued. Additional facts will be provided as necessary.

Discussion and Decision

[7] "Post-conviction proceedings are civil proceedings in which a defendant may present limited collateral challenges to a conviction and sentence." *Gibson v. State*, 133 N.E.3d 673, 681 (Ind. 2019) (citing Ind. Post-Conviction Rule 1(1)(b)), *cert. denied* (2020). "The scope of potential relief is limited to issues unknown at trial or unavailable on direct appeal." *Id*. A defendant who files a

petition for post-conviction relief "bears the burden of establishing grounds for relief by a preponderance of the evidence." Ind. Post-Conviction Rule 1(5); *Humphrey v. State*, 73 N.E.3d 677, 681 (Ind. 2017). Because the defendant is appealing from the denial of post-conviction relief, he is appealing from a negative judgment:

> Thus, the defendant must establish that the evidence, as a whole, unmistakably and unerringly points to a conclusion contrary to the post-conviction court's decision. In other words, the defendant must convince this Court that there is no way within the law that the court below could have reached the decision it did. We review the post-conviction court's factual findings for clear error, but do not defer to its conclusions of law.

Wilkes v. State, 984 N.E.2d 1236, 1240 (Ind. 2013) (citations and quotation marks omitted). We will not reweigh the evidence or judge the credibility of witnesses and will consider only the probative evidence and reasonable inferences flowing therefrom that support the post-conviction court's decision. *Hinesley v. State*, 999 N.E.2d 975, 981 (Ind. Ct. App. 2013), *trans. denied* (2014).

[8] Baumholser maintains that he is entitled to post-conviction relief because he was denied the right to effective assistance of trial counsel guaranteed by the Sixth Amendment to the United States Constitution. *See Strickland v. Washington*, 466 U.S. 668, 686 (1984) ("[T]he right to counsel is the right to effective assistance of counsel.") (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)). To succeed on an ineffective assistance of counsel claim, the defendant must satisfy the two-part test articulated in *Strickland*. *Humphrey*, 73

N.E.3d at 682. "To satisfy the first prong, 'the defendant must show deficient performance: representation that fell below an objective standard of reasonableness, committing errors so serious that the defendant did not have the 'counsel' guaranteed by the Sixth Amendment.'" *Id*. (quoting *McCary v. State*, 761 N.E.2d 389, 392 (Ind. 2002)). When considering a claim of ineffective assistance of counsel, we strongly presume "that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Hinesley*, 999 N.E.2d at 982 (citation omitted). We presume that counsel performed effectively, and a defendant must offer strong and convincing evidence to overcome this presumption. *Id*. Isolated poor strategy, inexperience, or bad tactics does not necessarily constitute ineffective assistance. *Id*.

[9] To satisfy the second prong of the *Strickland* test, the defendant must show prejudice. *Humphrey*, 73 N.E.3d at 682. To demonstrate prejudice from counsel's deficient performance, a petitioner need only show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Middleton v. State*, 72 N.E.3d 891, 891 (Ind. 2017) (emphasis and citation omitted). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. at 891-92.

[10] "Although the performance prong and the prejudice prong are separate inquiries, failure to satisfy either prong will cause the claim to fail." *Baer v. State*, 942 N.E.2d 80, 91 (Ind. 2011). "If we can easily dismiss an ineffective assistance claim based upon the prejudice prong, we may do so without

addressing whether counsel's performance was deficient." *Henley v. State*, 881 N.E.2d 639, 645 (Ind. 2008). "Most ineffective assistance of counsel claims can be resolved by a prejudice inquiry alone." *Id*.

Section 1 – Trial counsel provided ineffective assistance by failing to move to dismiss the class C felony charges.

[11] Baumholser first contends that trial counsel provided ineffective assistance by failing to move to dismiss the class C felony charges at trial when the State rested because the State's evidence proved that the statute of limitations had passed by the time the State charged him. We observe that an ineffective assistance of counsel claim based on failure to make a motion to dismiss requires the petitioner to "show a reasonable probability that the motion to dismiss would have been granted if made." *Garrett v. State*, 992 N.E.2d 710, 723 (Ind. 2013).

[12] The primary purpose of a statute of limitations is to "protect defendants from the prejudice that a delay in prosecution could bring, such as fading memories and stale evidence." *Study v. State*, 24 N.E.3d 947, 953 (Ind. 2015) (quoting *Sloan v. State*, 947 N.E.2d 917, 920 (Ind. 2011)). "Statutes of limitations are also intended to 'strike a balance between an individual's interest in repose and the State's interest in having sufficient time to investigate and build its case.'" *Id*. (brackets omitted) (quoting *Sloan*, 947 N.E.2d at 920)).

[13] The statute of limitations for a class C felony is five years after the commission of the offense. Ind. Code § 35-41-4-2(a)(1). The State charged Baumholser on

May 13, 2013, alleging that the crimes were committed between July of 2007 and December 2009; some portion of this time period fell within the five-year-statute of limitations.[1] However, at trial, K.C. unequivocally testified that all of the acts of molestation occurred when she was six years old before Christmas of 2007 and no acts occurred after that. As such, the statute of limitations expired at Christmas of 2012. The post-conviction court found, and there is no dispute, that "[o]nce the evidence closed at trial, … *it was clear* that the allegations in [the class C felony charges] occurred more than five years prior to the date the charges were filed." Appealed Order at 25 (emphasis added). Nevertheless, the post-conviction court concluded that trial counsel did not provide ineffective assistance by failing to move to dismiss the charges because trial counsel could have reasonably believed that evidence of fraudulent concealment existed to toll the statute of limitations. *Id*. at 26.

[14] Indiana Code Section 35-41-4-2(h) provides that fraudulent concealment tolls the period within which to commence a prosecution for any period in which "the accused person conceals evidence of the offense, and evidence sufficient to charge the person with that offense is unknown to the prosecuting authority and could not have been discovered by that authority by exercise of due diligence." Our supreme court has declared that any exception to the limitation period, such as fraudulent concealment, "must be construed narrowly and in a light

[1] The State incorrectly claims that Baumholser is arguing that trial counsel was deficient by failing to move to dismiss the class C felony charges *when the charges were filed*. Appellee's Br. at 17.

most favorable to the accused." *Study*, 24 N.E.3d at 953 (quoting *State v. Lindsay*, 862 N.E.2d 314, 317 (Ind. Ct. App. 2007)). Thus, "[t]he application of the concealment-tolling provision under Indiana Code § 35-41-4-2(h)(2) requires *a positive act* by the defendant that is calculated to conceal the fact that a crime has been committed." *Id*. at 957 (emphasis added). "[T]he concealment, to avoid the running of the statute, must be of the crime itself." *Id*. (quoting *State v. Hoke*, 84 Ind. 137, 138 (1882)).

[15] Baumholser asserts that no evidence was admitted at trial that he took a positive act calculated to conceal the fact that a crime had been committed and that, in fact, K.C. testified that he never asked her to keep it a secret. The post-conviction court acknowledged K.C.'s testimony. Nevertheless, based on the probable cause affidavit allegation that Baumholser told K.C. not to tell her mother and K.C.'s trial testimony that she was afraid of Baumholser because he was bigger than she was, drank a lot, and had weapons in the house, the post-conviction court concluded: "It is reasonable to believe that the information available to trial counsel at the end of the State's case or the presentation of all the evidence would have led him to believe that a challenge to [the class C felony charges] would not have been successful." Appealed Order at 26. This conclusion is plainly inconsistent with the post-conviction court's conclusion that by the close of evidence at trial "*it was clear* that the allegations in [the class C felony charges] occurred more than five years prior to the date the charges were filed." *Id*. at 25 (emphasis added).

[16] In addition, the post-conviction court's reliance on the probable cause affidavit was unjustified because the probable cause affidavit was not evidence of any matter for the jury's determination and contained hearsay. *See* Ind. Evidence Rule 801(c) (defining hearsay as an out-of-court statement used to prove the truth of the matter asserted); Ind. Evidence Rule 802 (prohibiting admission of hearsay unless rules of evidence or other law provides otherwise); *Guajardo v. State*, 496 N.E.2d 1300, 1303 (Ind. 1986) (probable cause affidavit and search warrants are relevant only regarding admissibility of evidence, which is a matter for the court, and "have no bearing on any issue before the jury"). Further, nothing in K.C.'s trial testimony supports the allegation in the probable cause affidavit that Baumholser told her not to tell her mother, and K.C.'s testimony that Baumholser did not ask her to keep it a secret contradicts that allegation. Our review of the record shows that the prosecutor repeatedly asked K.C. why she had not told her mother or anyone about the molestations, and in response to the first time the question was asked, she said that she was afraid because she "didn't know how to tell her [mother] what had happened." Trial Tr. Vol. 1 at 64. She also said that she was afraid of Baumholser because he was bigger than she was, drank a lot, and had weapons in the house, and thereafter she answered only that she was afraid of him. *Id*. at 64, 67-71, 79. The prosecutor did not continue this line of questioning or explore her reasons for not telling anyone. We also note that after K.C. testified that Baumholser never told her to keep it a secret, the trial court offered the prosecutor an opportunity to ask a follow-up question, and he declined to do so.

[17] As for the post-conviction court's reliance on K.C.'s testimony that she did not tell her mother or anyone about the molestations because she was afraid of Baumholser, that testimony does not show fraudulent concealment under our case law. Baumholser argues, and we agree, that this case is similar to *Umfleet v. State*, 556 N.E.2d 339 (Ind. Ct. App. 1990), *trans. denied, disapproved of on other grounds by Sloan*, 947 N.E.2d at 921 n.7.[2] We observe that in *Study*, our supreme court discussed with approval the *Umfleet* court's strict application of the fraudulent concealment exception to the statute of limitations.[3] 24 N.E.3d at 954. In *Umfleet*, the State filed two counts of class C felony child molesting outside the five-year statute of limitations. The trial court denied Umfleet's motion to dismiss the charges, and he appealed. On appeal, the State argued that Umfleet "intimidated [the victim] and manipulated her into keeping silent about the alleged molestations" and therefore fraudulent concealment tolled the statute of limitations. 556 N.E.2d at 341. The *Umfleet* court rejected the State's argument, explaining that "the record [did] not support the State's assertion that Umfleet engaged in positive acts of intimidation to induce [the victim] to keep silent." *Id*. Specifically, the court observed that there was "nothing in the record to indicate that Umfleet told [the victim] that the conduct was not wrong or that he told her not to tell anyone." *Id*. at 342. Further, the court noted that

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[2] *Sloan* disapproved of *Umfleet* to the extent it could be interpreted as contrary to the court's holding "that once concealment has been established, statutes of limitations for criminal offenses are tolled under Indiana Code section 35-41-4-2(h) (2008) until a prosecuting authority becomes aware or should have become aware of sufficient evidence to charge the defendant." 947 N.E.2d at 919, 921 n.7.

[3] The State does not respond to Baumholser's argument based on *Umfleet*.

"Umfleet did not threaten or induce [her] into believing that he would get in trouble if she revealed his actions." *Id*. The court also explained that Umfleet's denial that any abuse took place "was not a positive act to conceal the fact that an offense was committed." *Id*. Accordingly, the court concluded that the trial court erred by denying Umfleet's motion to dismiss and reversed his convictions. *Id*. at 343.

[18] We also find instructive *State v. Henry*, 834 S.W.2d 273, 275-76 (Tenn. 1992), another case discussed by our supreme court in *Study* as part of its analysis of the strict application of the fraudulent concealment statute. The *Study* court explained,

> In *Henry*, the defendant was charged with incest, and had told the victim that the abuse was their secret and not to tell anyone, but the victim testified that she was never threatened by the defendant. The Court determined that parental control over the victim alone was insufficient to constitute concealment, and held that the statute of limitations had not been tolled. …. Thus, the statute was construed in favor of the defendant, and the Tennessee Supreme Court recognized that the defendant must take more directed action before tolling is appropriate.

24 N.E.3d at 955-56 (citations and quotation marks omitted).

[19] We conclude that K.C.'s testimony that she was afraid of Baumholser is not evidence that Baumholser took a positive act calculated to conceal the fact that a crime had been committed and thus does not support the application of fraudulent concealment to toll the statute of limitations. Accordingly, given that "it was clear" when the State rested its case that the acts of molestation alleged

in the class C felony charges occurred more than five years before the charges were filed and there was no evidence of fraudulent concealment, a motion to dismiss the charges would have been granted. As such, Baumholser has carried his burden to show that his trial counsel provided deficient performance in failing to move to dismiss the class C felony charges. *See Garrett*, 992 N.E.2d at 723. Because the charges would have been dismissed, Baumholser was prejudiced by trial counsel's deficient performance because he was convicted of the two charges.[4] Accordingly, he is entitled to post-conviction relief on this claim.

Section 2 – Trial counsel did not provide ineffective assistance by failing to move for a mistrial on the class A felony charges.

[20] Baumholser next contends that trial counsel provided ineffective assistance by failing to move for a mistrial at the close of the State's evidence because the evidence of the class C felony molestations was inadmissible pursuant to Indiana Evidence Rule 404(b) and its admission subjected him to grave peril in his defense of the class A felonies. A mistrial is an extreme remedy that is warranted only when no other curative action can be expected to remedy the situation. *Lucio v. State*, 907 N.E.2d 1008, 1010-11 (Ind. 2009). A mistrial is required only where the defendant was placed in a position of grave peril to which he should not have been subjected. *Owens v. State*, 937 N.E.2d 880, 895

[4] The post-conviction court did not make any findings as to whether Baumholser was prejudiced.

(Ind. Ct. App. 2010), *trans. denied*. The gravity of the peril is determined by the probable persuasive effect on the jury's decision. *Id*. Baumholser claims that if trial counsel had moved for mistrial, it would have been granted, and if it had not been granted, his conviction would have been reversed on appeal.

[21] We observe that relevant evidence is generally admissible unless the rules or other laws provide otherwise. Ind. Evidence Rule 402. Relevant evidence is any evidence that "has any tendency to make a fact more or less probable than it would be without the evidence" and "the fact is of consequence in determining the action." Ind. Evidence Rule 401. Indiana Evidence Rule 404(b) provides, "Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait." The purpose of the rule is to prevent the jury from making the "'forbidden inference' that a criminal defendant's 'prior wrongful conduct suggests present guilt.'" *Fairbanks v. State*, 119 N.E.3d 564, 568 (Ind. 2019) (quoting *Byers v. State*, 709 N.E.2d 1024, 1026-27 (Ind. 1999)), *cert. denied*. However, evidence of uncharged misconduct may be admissible for other purposes, such as proof of "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Ind. Evidence Rule 404(b).

[22] At trial, K.C. testified that five instances of molestation occurred between July 30, 2007, when she turned six, and Christmas 2007. K.C. testified that the first time, she and Baumholser were lying on the couch watching television, and he grabbed her hand and made her hold his penis. Trial Tr. Vol. 1 at 61-62. The

second time, they were lying on the bed in the master bedroom watching television, and Baumholser again grabbed her hand and made her hold his penis. *Id*. at 64-65. The third and fourth times were similar to the first two times except that after Baumholser made K.C. hold his penis, he put his hand down her pants and touched her vagina, and his fingers went "in between the lips of [her] vagina." *Id*. at 67-68. The fifth time, Baumholser and K.C. were wrestling, and he put her on his shoulders, swung her around so she faced him, and moved her underwear with his tongue and licked her vagina. *Id*. at 69-70.

[23] We reiterate that one of the class A felony charges against Baumholser alleged that he put his finger in K.C.'s vagina and the other alleged that he put his mouth on her vagina. The class C felony charges alleged that Baumholser submitted to K.C.'s fondling of his penis and that he fondled her vagina. K.C.'s testimony regarding the two instances when Baumholser touched her vagina and put his finger between the lips of her vagina was direct evidence of one of the class A felony charges as well as one of the class C felony charges. Her testimony relating the instance when he licked her vagina was direct evidence of the other class A felony charge. Thus, all this evidence would have been admissible even if the class C felony charges had been dismissed. The only evidence that the jury was improperly exposed to was the evidence that Baumholser made K.C. hold his penis.

[24] The parties expend great effort debating whether this evidence would have been admissible under any of the Rule 404(b) exceptions, but given the procedural posture of this case, that question is irrelevant. At the time that the evidence

was offered, it was not offered to show any of Rule 404(b)'s exceptions. It was offered as direct evidence of the class C felony charges, and there is no dispute that it was admissible for that purpose.[5] Because the jury had heard that evidence, the question is whether a mistrial was warranted on the class A felony charges. We note that the jury was unable to reach a verdict on the class A felony charge alleging that Baumholser put his finger in K.C.'s vagina, and it was dismissed. Therefore, we must examine the probable persuasive impact of the evidence on the jury's decision to find Baumholser guilty of the class A felony charge alleging that he put his mouth on K.C.'s vagina.

[25] The post-conviction court found that the jury did not reach a verdict on the class A felony involving Baumholser's finger and K.C.'s vagina, that the evidence regarding the class C felonies did not cause the jury to reach a guilty verdict on that charge, and that the jurors were able to consider each count separately and review the evidence for each count. Appealed Order at 27. Baumholser maintains that there is a substantial likelihood that the forbidden

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[5] The State argues that evidence of all the molestations would have been admissible as direct evidence of the class A felony charges, citing *Marshall v. State*, 893 N.E.2d 1170 (Ind. Ct. App. 2008). There, another panel of this Court concluded that the evidence of the defendant's uncharged acts of molesting the victims was admissible as direct evidence of the charged molestations because it was "intrinsic" to the crimes charged. *Id.* at 1175. However, our supreme court has held that res gestae–the common-law doctrine that made evidence admissible as part of a crime's story even if it concerned uncharged misconduct–"[i]s no longer a proper basis for admitting evidence; instead, admissibility is determined under Indiana's Rules of Evidence." *Snow v. State*, 77 N.E.3d 173, 176 (Ind. 2017) (citing *Swanson v. State*, 666 N.E.2d 397, 399 (Ind. 1996)). Thus, "the many flavors of res gestae–'inextricably bound up,' 'inextricably intertwined,' 'circumstances and context,' and 'part and parcel,' to name a few–are not proper grounds for admissibility." *Id.* (citing *Swanson*, 666 N.E.2d at 398). Although the supreme court did not specifically include "intrinsic" in its list of res gestae terms, that list was clearly not exclusive, and the *Snow* court explicitly abrogated a case that did. *Id.* (citing *Cowan v. State*, 783 N.E.2d 1270, 1275 (Ind. Ct. App. 2003) (stating that Rule 404(b) does not bar admission of uncharged criminal acts that are "intrinsic" to the charged offense)).

inference raised by the prior molestations contributed to the verdict because the evidence was highly prejudicial and the decision in this case depended on the relative credibility of him and K.C. In support, Baumholser relies on *Udarbe v. State*, 749 N.E.2d 562, 567 (Ind. Ct. App. 2001), in which the court concluded that the admission of prior sexual misconduct was not harmless error. There, Udarbe was charged with and convicted of class B felony criminal deviate conduct involving his coworker. At trial, another woman who had previously worked with Udarbe testified that he had sexually assaulted her. The *Udarbe* court concluded that the evidence was not admissible under the intent exception of Rule 404(b) because Udarbe had not affirmatively put his intent into issue. *Id.* at 565-66. The court then considered the prejudicial impact of the evidence. It reasoned that the only evidence of Udarbe's guilt came from the victim, and thus the evidence of Udarbe's sexual assault of his previous coworker "likely substantially swayed the jury so as to have contributed to the conviction." *Id*. at 567.

[26] Baumholser also cites *Werne v. State*, 750 N.E.2d 420, 424 (Ind. Ct. App. 2001), *trans. denied*, in which we also found that the admission of the defendant's prior molestation was not harmless error. In that case, Werne was charged with and convicted of class C felony child molesting of N.A. At trial, S.M. testified that Werne had molested her two and a half years before his alleged molestation of N.A. The *Werne* court concluded that the evidence was not admissible under Rule 404(b)'s intent exception and that the error in admitting the evidence was

not harmless, observing that the "case distill[ed] to whether or not the jury believed N.A." *Id*.

[27] We acknowledge that in this case the only evidence of Baumholser's guilt came from K.C. However, the prior wrongful acts in *Udarbe* and *Werne* were committed on someone other than the victim. That evidence provided an independent source of the defendant's wrongdoing in addition to the victim's testimony. As an independent source of the defendant's wrongdoing, the testimony of another person that the defendant committed the same or a largely similar act on that person substantially bolsters the victim's credibility. Here, K.C.'s testimony regarding two additional acts of molestation does not similarly bolster her credibility. In addition, we agree with the post-conviction court that the jury's inability to reach a verdict on one class A felony charge shows that it was able to evaluate the evidence of the separate counts independently. We conclude that Baumholser has failed to carry his burden to show that K.C.'s testimony of his prior molestations had a reasonable probability of swaying the jury's verdict on the class A felony charge. Therefore, he has failed to establish that trial counsel provided ineffective assistance by failing to move for a mistrial.

Section 3 – Trial counsel did not provide ineffective assistance by failing to object to the prosecutor's allegedly improper questions during jury selection.

[28] Last, Baumholser argues that trial counsel provided ineffective assistance by failing to object to the prosecutor's allegedly improper questions during jury

selection. During voir dire, the prosecutor asked two people in the first group of prospective jurors whether each thought "it's important for … the government and the jury system to protect children." Petitioner's Ex. Vol. 3 at 32. Each answered affirmatively. *Id*. Later, the prosecutor also asked two other potential jurors whether each thought that "the system has a duty to protect children," and each answered yes. *Id*. at 71. Ten prospective jurors who were present when these questions were asked, including one of those who was asked, served on the jury. At the post-conviction hearing, trial counsel testified that he had no specific recollection of the questions, but he did not think they were inappropriate because they related to "the burden of proof … and many things along those lines." PCR Tr. Vol. 2 at 19.

[29] Baumholser asserts that the questions improperly conditioned the potential jurors to favor the child witness over him and trial counsel should have objected. Appellant's Br. at 19-20 (citing *Perryman v. State*, 830 N.E.2d 1005, 1008 (Ind. Ct. App. 2005) (stating that function of voir dire "is to ascertain whether jurors can render a fair and impartial verdict in accordance with the law and the evidence.") and *Robinson v. State*, 260 Ind. 517, 521, 297 N.E.2d 409, 411-12 (1973) (stating that it is improper for attorneys to attempt to cultivate and condition potential jurors to be receptive to the examiner's cause)). The post-conviction court concluded that the questions were not improper and that "[c]onsidering the entirety of the jury selection process and the questions asked by the prosecutor in context, this Court finds that even if

the questions were objectionable, [Baumholser] has failed to prove that he was prejudiced by the questions." Appealed Order at 22.

[30] We agree with the post-conviction court that Baumholser has failed to carry his burden to show prejudice and elect to resolve this claim on that basis. We observe that the prosecutor made the following statements to the prospective jurors:

> I do believe that both sides are looking for a jury that can just be fair and impartial, listen to the evidence, and, and, come to conclusion one way or the other. Um, I'm not necessarily looking for a juror that I think is just automatically going to vote guilty or automatically vote not guilty. Um, but just people with common sense, logic, who can come and listen to the evidence, pay attention and then determine what I, I really believe this system is about, is just that very basic question … "Did he do it? Did he do it?" Um, and if he did do it we would certainly expect that you would come back with a guilty verdict. Uh, and if you weren't firmly convinced of that, certainly would expect that you came back with a not guilty verdict. Do you feel comfortable with that, ma'am?

Petitioner's Ex. Vol. 3 at 24-25. These statements clearly indicate that the jurors should not favor one side over the other.

[31] In addition, trial counsel made several comments indicating that the point of jury selection was to find people who can be fair to his client and the State. *Id.* at 33. Trial counsel also explained that the jurors would be instructed that the defendant is presumed innocent and that the burden of proof is always on the State and asked whether that would be a problem. *Id.* at 42, 44-45, 75, 76, 79.

These comments and questions clearly indicate that the jury should not favor the child over the defendant and demonstrate that trial counsel was able to weed out potential jurors who could not be fair to the accused. The jury instructions also informed the jurors that their decision must be based only on the evidence presented during trial, that the defendant is presumed innocent, and that the burden of proof is on the State. Trial Tr. Vol. 5 at 4, 8-9. Therefore, even if the four complained-of questions were improper, we conclude that in light of all the questions and comments during jury selection, Baumholser has not met his burden to show prejudice.

Conclusion

[32] Based on the foregoing, we conclude that trial counsel provided ineffective assistance by failing to move to dismiss the class C felony charges and that Baumholser is entitled to relief on this claim. We affirm the post-conviction court in all other respects.

[33] Affirmed in part and reversed in part.

Bradford, C.J., and Tavitas, J., concur.