MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Melanie Ann Messer,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

July 20, 2023

Court of Appeals Case No. 22A-PC-2501

Appeal from the Hendricks Superior Court

The Honorable Stephenie LeMay-Luken, Judge

Trial Court Cause No. 32D05-2107-PC-5

Memorandum Decision by Judge Brown
Judge Crone and Senior Judge Robb concur.

Brown, Judge.

[1] Melanie Messer appeals the denial of her petition for post-conviction relief. We affirm.

Facts and Procedural History

[2] In 2016, the State charged Messer with aggravated battery of A.A., who was born in April 2015, as a level 1 felony under cause number 32D05-F1-2. In 2018, Messer pled guilty pursuant to a plea agreement to aggravated battery as a level 1 felony, which provided that she waived her right to appeal and would be sentenced to thirty years with ten years suspended to probation, ten years served executed in the Indiana Department of Correction ("DOC"), and ten years served in a placement "left open to the court." Supplemental Appendix Volume II at 89.

[3] At a guilty plea hearing, the prosecutor laid a factual basis and Messer agreed that, on August 8, 2016, she "did knowingly inflict injury on [A.A.] a child less than 14 years of age," and "the offense [had] been committed by a person at least 18 years of age." *Id.* at 106. The court sentenced Messer pursuant to the plea agreement to twenty years with ten years suspended to probation.

[4] On July 23, 2021, Messer filed a petition for post-conviction relief alleging that she did not knowingly and voluntarily plead guilty and that her trial counsel was ineffective.[1]

[1] The only issue Messer raises on appeal is ineffective assistance of trial counsel.

[5] On May 5, 2022, the post-conviction court held a hearing at which Messer testified that on Friday, August 5, 2016, A.A. fell and hit her head while walking outside on "hard" grass and cried, but was fine after that. Transcript Volume II at 78. She testified that A.A. was brought back to her house on August 8th, A.A. played some, she put A.A. down for a nap around 9A.M., when she came to wake her up A.A. was gasping for air, and Messer called 911. A.A. was taken off life support and died on August 11, 2016.

[6] Dr. George Nichols, a forensic pathologist, testified that he had been trained in the signs of shaken baby syndrome, also known as abusive head trauma ("SBS/AHT"), but later in his career learned about SBS/AHT in a way that challenged the traditional medical consensus. He indicated that one could not determine with medical certainty whether A.A. sustained the fatal injury on August 8th, from the fall on August 5th, or if the injury had occurred between August 5th or 8th, and he agreed "that blunt force injury was the cause of death," stated there was "a dispute or debate in the literature on this subject," and disagreed with portions of statements released by different organizations within the medical community on the subject. *Id.* at 25, 33. He stated that it was possible an injury to A.A. could have "occurred on Friday then a slow accumulation of blood . . . would've caused a traumatic incident[] o[n] Monday, or it could've been an acute injury on Monday." *Id.* at 26. The following exchange occurred during Dr. Nichols's cross-examination when asked if he was "aware of a consensus statement in the medical profession":

A There are a whole bunch of consensus statements in the medical profession about this particular topic. There was one that was offered by the national association of medical examiners back in the 80's and . . . that was not renewed. . . . [T]here was a consensus statement from the American Academy of Pediatrics at least one (1) if not more. And then the Society of Pediatric Radiologists . . . issued a consensus statement yes, I know the paper, I read the paper.

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Q And I believe this was published in 2018 the one we're talking about by the Pediatric Radiologist, is that right?

A Yes, that's correct.

* * * * *

Q Is it fair to say that you disagree with much of the . . . consensus statement that we're discussing?

A Uh, I disagree with several components of the consensus statement. But the one I really disagree about is how do they know the is [sic] abusive?

Q Well what else would you disagree with in the statement?

A There's a large attack about lucid intervals and saying it doesn't happen and indeed it does happen.

* * * * *

Q [O]ne of the things you disagree with is that the paper says that lucid intervals may not occur, and you disagree with that, is that true?

A That is correct. That doesn't say it may not occur it says it doesn't occur.

Id. at 31-33. Dr. Nichols had "no opinion" when asked about a study stating that "the review of the extensive literature informs us that mortality from short falls is extremely rare and the majority of these are benign occurrences with no significant neurological dysfunction . . . ." *Id.* at 34-35. When asked if there would be signs of injury during a lucid interval, Dr. Nichols testified "there will be a progression. Initially there are no symptoms. There may be confusion as opposed to . . . an actual system. There maybe [sic] confusion and there could be problems walking, talking, eating that progress on until there is . . . a collapse." *Id.* at 35. He acknowledged that an acute injury could result in no lucid interval occurring.

[7] One of Messer's trial attorneys, Grace Atwater, testified about the experts she and her co-counsel contacted in connection with Messer's case, stating they found the first expert, Dr. Leigh Hlavaty, through a recommendation from a familiar criminal defense attorney. According to Attorney Atwater, they sent her the autopsy report and everything they had in discovery, but not the histology slides which were not yet ready, and Dr. Hlavaty told them she could not help because "the assessment that the doctors made was firm and correct and that she didn't want to be involved with the case." *Id.* at 45. Attorney Atwater stated that Dr. Hlavaty "had . . . familiarity with . . . cases involving abusive head trauma . . . ." *Id.* The second expert, Dr. Arden, was a forensic pathologist found by way of an internet search who made similar conclusions

after he examined "slides of the brain matter from Riley and also the brain imaging studies."[2] *Id.* at 46.

[8] Attorney Atwater testified that she and Joshua Moudy worked as co-counsel for Messer. She stated that, on January 25, 2018, Messer's counsel deposed Dr. Laurie Ackerman, the neurosurgeon who operated on A.A., and Dr. Tara Harris, the child abuse pediatrician who found that A.A. had suffered abusive head trauma. In her deposition, Dr. Ackerman stated that A.A. could not have inflicted her injuries on herself because "you typically would not fall from your own height and have this degree of bleeding and brain injury in that age group," "you need force to obtain those types of injuries," and a lucid interval typically does not occur in subdural hematomas such as A.A. experienced. Exhibits Volume IV at 68. In her deposition, Dr. Harris testified that was a "very characteristic pattern of injury" that indicated abusive head trauma, "only trauma" could explain her pattern of injury, and "[h]er pattern of injuries would be incredibly uncommon, maybe impossible for most accidental mechanisms." *Id.* at 94-95.

[9] Todd Sallee, a criminal defense attorney and former deputy prosecutor, testified that, for cases in which he receives an expert opinion contrary to his client's best interest, his process is to "find somebody who . . . will give us . . . a different opinion on . . . the issue at hand," and stated "if I had two or three

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[2] The record does not reveal Dr. Arden's first name.

opinions at that point were confirming what was in the medical reports, and what Riley [Hospital] saying [sic] that's maybe a different story. But one person off the cuff that you select from the internet is . . . not time to quit defending the case in my opinion." Transcript Volume II at 61-62. With respect to finding an expert "through a general internet search," he stated, "that is not an approach that I would ever take. [T]hat [sic] a tough question to answer . . . I don't know if would say it's incompetent, I would say, it's not the way that . . . a seasoned practitioner should be trying to find an expert in our field in our industry." *Id.* at 60. The court denied Messer's petition.

Discussion

[10] Messer argues she received ineffective assistance of counsel because her trial counsel did not properly investigate and prepare a defense, and the experts which her counsel had contacted were not appropriate for her defense.

[11] To prevail on a claim of ineffective assistance of counsel a petitioner must demonstrate both that his or her counsel's performance was deficient and that the petitioner was prejudiced by the deficient performance. *French v. State*, 778 N.E.2d 816, 824 (Ind. 2002) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984), *reh'g denied*). A counsel's performance is deficient if it falls below an objective standard of reasonableness based on prevailing professional norms. *Id.* To meet the appropriate test for prejudice, the petitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* A reasonable probability is a probability sufficient to undermine confidence in the

outcome. *Perez v. State*, 748 N.E.2d 853, 854 (Ind. 2001). Failure to satisfy either prong will cause the claim to fail. *French*, 778 N.E.2d at 824.

[12] The *Strickland* two-part analysis also governs "claims arising out of the plea process." *Hill v. Lockhart*, 474 U.S. 52, 57, 106 S. Ct. 366, 370 (1985). With respect to the deficient-performance component, there is a strong presumption that counsel rendered adequate assistance and used reasonable professional judgment. *See Gibson v. State*, 133 N.E.3d 673, 682 (Ind. 2019), *reh'g denied*, *cert. denied*, 141 S. Ct. 553 (2020). Messer must rebut this presumption by proving that her attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy. *See Kimmelman v. Morrison*, 477 U.S. 365, 384, 106 S. Ct. 2574 (1986). We evaluate reasonableness from counsel's perspective at the time of the alleged error and in light of all the relevant circumstances. *Pennycuff v. State*, 745 N.E.2d 804, 811-812 (Ind. 2001).

[13] It is undisputed that effective representation requires adequate pretrial investigation and preparation. *Badelle v. State*, 754 N.E.2d 510, 538 (Ind. Ct. App. 2001), *trans. denied*. However, it is well-settled that we should resist judging an attorney's performance with the benefit of hindsight. *Id.* "When deciding a claim of ineffective assistance of counsel for failure to investigate, we apply a great deal of deference to counsel's judgments." *Boesch v. State*, 778 N.E.2d 1276, 1283 (Ind. 2002), *reh'g denied*. With the benefit of hindsight, a defendant can always point to some rock left unturned to argue counsel should have investigated further. *Ritchie v. State*, 875 N.E.2d 706, 719 (Ind. 2007), *reh'g*

denied. The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that it deprived the defendant of a fair trial. *Id.* (citing *Strickland*, 466 U.S. at 686, 104 S. Ct. 2052). "The question is what additional information may have been gained from further investigation and how the absence of that information prejudiced his case." *Williams v. State*, 771 N.E.2d 70, 74 (Ind. 2002).

[14] The record reveals that Messer presented the testimony of Attorney Atwater but did not present the testimony of Attorney Moudy. Messer presented limited information about the qualifications of the two experts her trial attorneys consulted, and she did not present the testimony of either Dr. Hlavaty or Dr. Arden at the post-conviction hearing. Dr. Hlavaty's curriculum vitae was admitted,[3] and Attorney Atwater stated that trial counsel had identified Dr. Hlavaty through a recommendation of a colleague, Dr. Hlavaty had "familiarity" with cases involving abusive head trauma, they sent her all relevant and available information they possessed about the case, and she agreed with the analyses of Dr. Harris and Dr. Ackerman. Transcript Volume II at 45. Attorney Atwater stated that Dr. Arden had testified in other trials "on both sides," he "had a lot of experience . . . as an expert witness," trial counsel asked him "specifically about lucid intervals and other possible explanations . . .

[3] The admitted curriculum vitae included in the Exhibits Volume is mostly illegible. *See* Exhibits Volume V at 212-216.

for the incident," he examined material including "slides of the brain matter from Riley [Hospital] and also the brain imaging studies," "he looked through all of that stuff," Attorney Moudy traveled to Washington, D.C., to meet with him, and trial counsel did not ask Dr. Arden to prepare a report because his opinion "was adverse." *Id.* at 46-47. Attorney Atwater stated that, after deposing Dr. Ackerman and Dr. Harris, trial counsel "felt like it would be a hard sell to a jury given the nature of the case, without an expert of our own." *Id.* at 48. Messer's trial counsel, in addition to deposing two of the medical professionals who examined A.A., consulted two experts with experience evaluating SBS/AHT cases, had relevant professional experience, and who evaluated the evidence according to standards recognized by the medical community. We further note that Messer does not cite authority demonstrating a specific percentage of the medical community that disagrees with the traditional SBS/AHT analysis. Further, Dr. Nichols, the forensic pathologist who testified at the post-conviction hearing, stated that he disagreed with the "consensus statements" released by the medical community over the years, which suggests Dr. Nichols's view represented a minority of the medical

community.[4] We cannot say Messer has demonstrated that her trial counsel performed deficiently.[5]

[15] For the foregoing reasons, we affirm.

[16] Affirmed.

Crone, J., and Robb, Sr.J., concur.

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[4] To the extent Messer cites *People v. Ackley*, 870 N.W.2d 858 (Mich. 2015), and *Commonwealth v. Millien*, 50 N.E.3d 808 (Mass. 2016), we find those cases distinguishable. In *Ackley*, defense counsel contacted one expert, the expert agreed with the prosecution's theory of the case and their experts' views of SBS/AHT, the expert said he did not believe he could help, and he recommended another forensic pathologist who had studied short falls extensively and was "a qualified expert better suited to support the defendant's theory," but counsel did not contact the better qualified forensic pathologist and exclusively relied on the first expert's testimony. *Ackley*, 870 N.W.2d at 864. In *Millien*, defense counsel failed to consult with any experts and counsel was ineffective "not because he failed to understand that he needed an expert witness to advise him regarding the medical evidence and to offer opinion testimony, but because he failed to seek funds from the court to retain an expert witness for his indigent client." 50 N.E.3d at 818.

[5] Because we cannot say Messer has demonstrated deficient performance, we need not address the prejudice prong.