

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Leobardo Mercado,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

September 21, 2022

Court of Appeals Case No.
21A-PC-2263

Appeal from the Elkhart Superior
Court

The Honorable Teresa L. Cataldo,
Judge

Trial Court Cause No.
20D03-1910-PC-49

Bailey, Judge.

Case Summary

- [1] Leobardo Mercado appeals the trial court’s denial of his petition for post-conviction relief. Mercado raises three issues, which we consolidate and restate as whether he was denied the effective assistance of trial counsel. We affirm.

Facts and Procedural History

- [2] In Mercado’s direct appeal, this Court stated the facts and procedural history as follows:

M.F., who was born in September of 2000, lived with her mother Laura (“Mother”), step-father Francisco (“Francisco”) (collectively “parents”), and her two younger siblings in Elkhart, Indiana and had lived there since she moved from Mexico at age six or seven. Mother’s sister Beatriz (“Beatriz”) lived in Chicago with her husband Mercado at this time, and M.F. referred to Mercado as “Uncle.” Over the years, Mercado, Beatriz, and their children would visit M.F. and her family in Elkhart. They would stay in Mother’s and Francisco’s apartment during holidays, summer vacations, and for M.F.’s birthdays. Sometimes, Mercado and Beatriz would pick up M.F. in Elkhart and bring her to Chicago to spend time with them.

Mercado began grooming M.F. at an early age. He and Beatriz treated M.F. differently than her siblings. They paid more attention to her, took her places that they did not take the other children, and bought her gifts that they would not buy the other children. When Mercado and his family visited M.F. and her family, Mercado would reach under M.F.’s underwear to touch her breasts and to digitally penetrate her vagina.

Mercado and his family visited M.F. and her family to celebrate M.F.'s fourteenth birthday. One evening, the family, including Mercado and M.F., were watching television in the living room. M.F. fell asleep on the couch, and she awoke to find Mercado kneeling beside her and touching her. M.F. tried to get up and Mercado asked where she was going. M.F. told him she wanted to go upstairs, but Mercado told her to not leave and held her down on the couch. As M.F. tried to push him away, Mercado put one hand under her shirt and started moving his hand toward her breasts and put his other hand down her pants, rubbed her vagina, and penetrated it with his fingers.

Mercado told M.F. not to tell anyone, saying no one would believe her because he was an adult, and she was just a child. Mercado also told M.F. that if she told others what Mercado had done, M.F. would never see Beatriz again, which M.F. interpreted as a threat to Beatriz.

After she turned fourteen, M.F. began first communion classes at her family's Catholic parish. Before M.F. could take her first communion, she was required to confess to her priest. During her confession, M.F. told the priest that she thought she was a bad daughter because her uncle had touched her inappropriately. The priest encouraged M.F. to tell her parents.

Later that week, M.F. was in the dining room with Mother talking about selecting godparents for her first communion, and her mother suggested Beatriz and Mercado; M.F. began to cry. M.F. explained that Mercado had been touching her inappropriately. Her parents took her to the police to make a report.

The State charged Mercado with two counts of child molesting under Indiana Code [S]ection 35-42-4-3(a)(1), one as a Class A felony for an offense that occurred before July 1, 2014, and one

as a Level 1 felony, for an offense that occurred after July 1, 2014.

The State later filed a motion in limine to prevent Mercado from asking the parents at trial about the family's immigration status, including whether they had consulted an immigration attorney before the allegations against Mercado came to light, and whether M.F. fabricated the allegations so that she and her family could obtain a "U-Visa," a type of visa that can prevent an undocumented person from being deported if they are a victim of certain crimes and if they help law enforcement investigate the crime. Mercado responded that he only intended to ask whether M.F. or her family consulted an immigration attorney either before or during the pendency of the charges—"it's that simple." The trial court decided to "preliminarily keep it out" and would re-address the issue if "the door is opened or I feel it is appropriate, then it will be addressed at that time."

* * *

Before Mercado took the stand, his lawyer notified the trial court that he had just received a copy of Mercado's bank statement, which listed bank transactions dating to the last half of September of 2014, around the time of M.F.'s fourteenth birthday. Although the trial court judge, the prosecutor, and Mercado's counsel discussed the bank records at length, the defense eventually declined to introduce the records as evidence.

During the trial, the State requested to amend Count I to attempted child molesting. The trial court granted the request. The jury returned guilty verdicts on both counts, attempted child molesting (Count I) and child molesting (Count II).

- [3] *Mercado v. State*, No. 18A-CR-1280, 2018 WL 6837776, at *1-3 (Ind. Ct. App. Dec. 31, 2018) (footnote and citations to the record omitted). The trial court entered judgment of conviction accordingly and sentenced Mercado forty years on each count, to run consecutively, with ten years suspended to probation.
- [4] On direct appeal, Mercado in relevant part alleged that the court had denied his right to present a defense when it did not allow him to question M.F.'s parents about their immigration status or present bank statements as evidence and that his sentence was inappropriate. As to the first issue, this Court held that Mercado's counsel had only argued for the admission of evidence regarding M.F.'s parent's immigration status during a hearing on a motion in limine but did not tender any evidence during trial and, thus, failed to preserve the issue for appeal. The Court also held that, while the parties discussed the bank records at length, Mercado eventually "declined" to introduce them as evidence. *Id.* at *4. Accordingly, this Court affirmed Mercado's convictions.¹ However, this Court agreed with Mercado that his sentence was inappropriate in light of his character and revised his sentence to concurrent terms of forty years. *Id.* at *8.
- [5] On October 28, 2018, Mercado filed a petition for post-conviction relief in which he asserted that he had received ineffective assistance from his trial

¹ Mercado also alleged that the court had erred when it allowed M.F.'s parents to testify about M.F.'s reputation for truthfulness. However, the court held that Mercado had waived any claim for failing to object. Wavier aside, the court held that any error was harmless as the testimonies were indirect and brief.

counsel. In particular, Mercado alleged that his trial counsel had “failed to perform adequate pretrial investigation and preparation,” “failed to interview potential defense witnesses[,]” failed to submit bank records as evidence, and failed to “introduce possible motive” related to the immigration status of M.F.’s parents. Appellant’s App. Vol. 2 at 5. Following a fact-finding hearing, the court entered findings of fact and conclusions thereon denying Mercado’s petition. This appeal ensued.

Discussion and Decision

[6] Mercado appeals the post-conviction court’s denial of his petition for post-conviction relief. Our standard of review in such appeals is clear:

“The petitioner in a post-conviction proceeding 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). “When appealing the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment.” *Id.* at 274. In order to prevail on an appeal from the denial of post-conviction relief, a petitioner must show that the evidence leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. *Weatherford v. State*, 619 N.E.2d 915, 917 (Ind. 1993). Further, the post-conviction court in this case entered findings of fact and conclusions of law in accordance with Indiana Post-Conviction Rule 1(6). Although we do not defer to the post-conviction court’s legal conclusions, “[a] post-conviction court’s findings and judgment will be reversed only upon a showing of clear error—that which leaves us with a definite and firm conviction that a mistake has been made.” *Ben-Yisrayl v. State*, 729 N.E.2d 102, 106 (Ind. 2000) (internal quotation omitted). . . .

When evaluating an ineffective assistance of counsel claim, we apply the two-part test articulated in *Strickland v. Washington*, 466 U.S. 668 (1984). See *Helton v. State*, 907 N.E.2d 1020, 1023 (Ind. 2009). 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.” *McCary v. State*, 761 N.E.2d 389, 392 (Ind. 2002) (citing *Strickland*, 466 U.S. at 687-88). To satisfy the second prong, “the defendant must show prejudice: a reasonable probability (i.e.,) a probability sufficient to undermine confidence in the outcome) that, but for counsel’s errors, the result of the proceeding would have been different.” *Id.* (citing *Strickland*, 466 U.S. at 694).

Humphrey v. State, 73 N.E.3d 677, 681-82 (Ind. 2017). Failure to satisfy either of the two prongs will cause the claim to fail. *French v. State*, 778 N.E.2d 816, 824 (Ind. 2002). Indeed, most ineffective assistance of counsel claims can be resolved by a prejudice inquiry alone. *Id.*

[7] “[C]ounsel’s performance is presumed effective, and a defendant must offer strong and convincing evidence to overcome this presumption.” *Williams v. State*, 771 N.E.2d 70, 73 (Ind. 2002). Counsel has wide latitude in selecting trial strategy and tactics, which we afford great deference. *Ward v. State*, 969 N.E.2d 46, 51 (Ind. 2012). We “will not speculate as to what may have been counsel’s most advantageous strategy, and isolated poor strategy, bad tactics, or inexperience does not necessarily amount to ineffective assistance.” *Sarwacinski v. State*, 564 N.E.2d 950, 951 (Ind. Ct. App. 1991) (citation omitted). “[T]he decision whether to utilize exculpatory evidence . . . is a matter of trial

strategy.” *Fisher v. State*, 878 N.E.2d 457, 464 (Ind. Ct. App. 2007) (quoting *Reynolds v. State*, 536 N.E.2d 541, 545 (Ind. Ct. App. 1989), *trans. denied*), *trans. denied*.

- [8] Here, Mercado alleges ineffective assistance from his trial counsel on three grounds, namely: (1) counsel failed to adequately investigate the case and to call certain witnesses; (2) counsel did not present evidence that would have supported his testimony that his last visit with M.F. occurred after her fourteenth birthday; and (3) counsel demonstrated a lack of understanding of basic Indiana law, which resulted in Mercado receiving an unfair trial. We address each argument in turn.

Failure to Investigate

- [9] Mercado first asserts that his trial counsel rendered ineffective assistance when he failed to fully investigate M.F.’s uncle, Jose Mercado (“Jose”), and M.F.’s cousin, Carol Marquez (“Carol”), and when he failed to call them and Beatriz as witnesses. 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). 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). 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). 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.* Further, in the context of an ineffective assistance of counsel claim, “the decision of what witnesses to call is a matter of trial strategy and appellate courts do not second-guess that decision.” *Reeves v. State*, 74 N.E.3d 1134, 1141 (Ind. Ct. App. 2021). “We will not find counsel ineffective for failure to call a particular witness absent a clear showing of prejudice.” *Id.*

[10] On this issue, Mercado first contends that his trial counsel was ineffective when he failed to adequately investigate and present the testimonies of Jose and Carol, who both would have testified that M.F.’s stepfather, Francisco, treated M.F. badly; that M.F. did not like to be around Francisco; and that M.F. “would always want to be with” Mercado and Beatriz. Appellant’s Br. at 12. In other words, according to Mercado, Jose and Carol would have provided information that M.F.’s relationship with Mercado was better than her relationship was with her stepfather.

[11] Mercado baldly asserts that the “family dynamics within M.F.’s home during the time frame encompassed by the charges was an important part of Mercado’s defense” and that “such dynamics could very well have influenced M.F.’s reporting of the sexual allegations and would have been important for the jury to hear[.]” *Id.* at 13. But Mercado does not provide any explanation as to how a poor relationship with her stepfather would cause M.F. to accuse Mercado of sexual abuse or otherwise explain how that testimony was relevant.

[12] To the extent Mercado contends that Jose’s and Carol’s testimonies would have contradicted M.F.’s testimony that she did not want to be around Mercado, the jury heard other testimony that tended to show that M.F. and Mercado had a positive relationship. In particular, Mother testified that M.F. never indicated to anyone that she did not want to be around Mercado and that there was nothing “strange” about M.F.’s behavior when Mercado was around. Trial Tr. Vol. 2 at 182-83.² And Mercado testified that M.F. would ask to come visit his family in Illinois and that M.F. would “invite” him to play soccer with her. Tr. Vol. 3 at 26. As such, the jury was able to hear evidence that conflicted with M.F.’s testimony. Mercado has not met his burden to demonstrate that there is a reasonable probability that the outcome of his trial would have been different had his counsel further investigated or presented the testimonies of Jose or Carol.

[13] Mercado also contends that his counsel should have called his wife, Beatriz, as a witness because Beatriz would have testified regarding the sleeping arrangements while she and Mercado stayed with M.F.’s family. And he contends that Beatriz would have explained why M.F. was given gifts, which would have rebutted the State’s “characterization that Mercado was ‘grooming’ M.F.” *Id.*

² Mercado submitted the trial transcript to the post-conviction court on a flash drive labeled as Exhibit 1. Exhibit 1 contains three volumes of the trial transcript. For ease of reference, we will simply refer to those transcripts as “Trial Tr.”

[14] As for the sleeping arrangements, Beatriz testified at the post-conviction hearing that, on one night, M.F. slept in a room with her sister and, on the second night, M.F. slept in a room with Beatriz and Beatriz' daughter. Mercado contends that his counsel should have presented that testimony at his trial because it would have "directly contradicted M.F.'s testimony regarding where she slept during the last visit[.]" Appellant's Br. at 14. We cannot agree. While Beatriz testified that she slept in the same room as M.F. on the second night, she only testified that M.F. slept in a room with her sister on the first night because that is "typically" where M.F. sleeps while Mercado's family was visiting. Tr. at 127.³ In other words, Beatriz would have only testified to where M.F. typically slept, not where she actually slept. Nothing about that testimony would have contradicted M.F.'s testimony that she fell asleep on the couch while watching T.V. and awoke to Mercado touching her inappropriately.

[15] In regard to the gifts, Mercado contends that his counsel should have presented Beatriz's testimony that the gifts M.F. received were not from Mercado to groom M.F. but were, instead, from both Beatriz and Mercado because Beatriz is M.F.'s godmother. But, again, that testimony would have been cumulative of other evidence the jury heard. Mother acknowledged that the gifts were from "both of them," meaning both Beatriz and Mercado. Trial Tr. Vol 2. at 180. Mercado testified that Beatriz is M.F.'s godmother, which is why he and Beatriz treated M.F. differently than her siblings. And he testified that the gifts

³ We will refer to the transcript of the petition for post-conviction relief as "Tr."

M.F. received were from both him and Beatriz, that they were generally items of little value, and they were because of M.F.'s relationship with Beatriz.

Because the jury already heard evidence that he claims Beatriz would have provided, Mercado has not demonstrated that the outcome of his trial would have been different had his counsel called Beatriz as a witness.

Failure to Present Evidence

[16] Mercado next contends that his counsel rendered ineffective assistance when he failed to present bank statements that he contends would have demonstrated that his last visit with M.F. occurred after M.F. had turned fourteen years old. Here, there is no dispute that, to convict Mercado of child molesting, either as a Class A felony or a Level 1 felony, the State was required to show that he had engaged in sexual conduct with M.F. prior to M.F. turning fourteen years old. *See* Trial Tr. Vol. 2 at 32-33.

[17] Mercado contends that M.F.'s testimony about the timing of his last visit in relationship to her fourteenth birthday was "equivocal at best" and that his counsel "had at his disposal text messages, digital photographs, and a video" of the birthday party that Mercado attended that were "clearly date[-]stamped after M.F.'s fourteenth birthday." Appellant's Br. at 17. Mercado maintains that his counsel was ineffective for failing to admit those as evidence because they would have supported his testimony that his last visit with M.F. was after she had turned fourteen. However, Mercado's attorney testified at the post-conviction hearing that he "never received" any such photographs or videos. Tr. at 14. And he testified that he did not recall having received copies of any

text messages that would have shown that Mercado did not visit M.F. until after her birthday. Based on his counsel's testimony that he never received copies of the text messages, photographs, or videos, Mercado has not demonstrated that his counsel was ineffective for failing to submit them to the trial court.

[18] Still, Mercado also contends that his attorney was ineffective for failing to admit copies of a bank statement that, according to him, would have demonstrated that he was in town to visit M.F. after the date of her fourteenth birthday. Mercado is correct that his counsel did not attempt to admit his bank statement as evidence. But Mercado has not demonstrated that he was prejudiced by his counsel's decision.

[19] The bank statement Mercado claims his attorney should have submitted is dated the day of M.F.'s birthday and only contains transactions that are dated after her birthday. Thus, at best, the statement only demonstrates that he was in M.F.'s town after she had turned fourteen. Is it not dispositive of whether he was in town prior to her birthday. Mercado has not shown that the bank statement was relevant or that his counsel's admission of that record would have changed the outcome of his trial. Mercado was not denied effective assistance of counsel on this issue.

[20] Mercado also contends that, in general, his counsel's performance was "clearly objectively unreasonable" because his counsel did not understand, adequately argue, or present evidence that the time frame surrounding the offenses was

“critical.” Appellant’s Br. at 18-19. But Mercado’s counsel thoroughly argued about the time frame regarding the offenses. Indeed, his counsel elicited testimony from M.F. that she did not remember the date Mercado arrived at her house or the day he left and that she “didn’t know” if it was possible that Mercado arrived after her birthday. Trial Tr. Vol. 2 at 136. In addition, the jury heard testimony from Francesco that he did not remember the date Mercado and his family came to visit, and, similarly, Mother testified that Mercado had visited “[d]uring” M.F.’s birthday but that she was “not sure about the dates.” *Id.* at 171. Mercado’s counsel also questioned Mercado about the dates he had visited M.F. and whether it was before or after M.F.’s fourteenth birthday. *See* Trial Tr. Vol. 3 at 27-28. And Mercado’s counsel argued in his closing statement that M.F. and her family could not provide specific dates and that Mercado has testified that “he came here after [M.F.’s] birthday.” *Id.* at 83. Thus, contrary to Mercado’s assertions, it is clear that his counsel understood that it was important to demonstrate when Mercado had visited M.F. in relation to her fourteenth birthday.

Lack of Understanding

[21] Finally, Mercado asserts that his trial counsel demonstrated a “lack of understanding” of basic Indiana law. First, he asserts that his counsel failed to understand the effect of an order on a motion in limine. Appellant’s Br. at 19. Prior to trial, the State filed a motion in limine to prevent Mercado’s counsel from discussing or admitting evidence regarding the immigration status of M.F.’s family. The trial court “preliminarily” granted that motion and

indicated that it would address it at a later time if needed. Trial Tr. Vol. 2 at 13. During the trial, Mercado's counsel did not attempt to admit any evidence regarding M.F.'s parent's immigration status. Now, Mercado contends that his counsel was ineffective in that regard because that evidence would have bolstered his defense that M.F.'s parents had "coached" M.F. to make the allegations against Mercado in order to obtain a visa and stay in the United States. Appellant's Br. at 19.

[22] At the post-conviction hearing, Mercado's counsel testified he "would have liked" to have admitted evidence that M.F.'s family "did not have immigration papers," that they had "met with an immigration lawyer," and that they were "concocting these allegations in order to get a U visa." Tr. at 29. However, he testified that he had been "unable to corroborate anything." *Id.* at 30. In other words, Mercado's counsel only had Mercado's suspicions and nothing more to submit to the jury. That testimony suggests that Mercado's counsel declined to raise the issue of M.F.'s family's immigration status because he did not have anything to support that allegation, not because he wrongfully believed a ruling on a motion in limine to be a final ruling. Mercado has not shown that his counsel failed to understand motions in limine.

[23] Mercado also briefly contends that his counsel demonstrated a misunderstanding of Indiana law when he was "unable to testify at the [post-conviction] hearing as to what 'time [is] of the essence' meant in the parlance of Indiana criminal practice." Appellant's Br. at 21. And he contends that his counsel's failure to understand that concept resulted in his counsel's failure to

“pursue with vigor the issue of M.F.’s age and when the last visit of Mercado occurred.” *Id.* But, as discussed above, even if Mercado’s counsel was unable to describe what “time is of the essence” means, Mercado’s counsel clearly understood that M.F.’s age and the date of Mercado’s visit were important. Again, Mercado’s counsel cross-examined M.F., Mother, and Francesco regarding the dates that Mercado visited and elicited testimony that they could not recall specific dates, and he presented Mercado’s testimony that he was at M.F.’s house after M.F. had turned fourteen. Mercado has not shown that his counsel did not understand Indiana law.⁴

Conclusion

[24] In sum, Mercado has not demonstrated that he received ineffective assistance from his trial counsel. We therefore affirm the post-conviction court’s denial of Mercado’s petition for post-conviction relief.

[25] Affirmed.

Riley, J., and Vaidik, J., concur.

⁴ Because Mercado has not shown any error by his trial counsel, we need not address his argument that the “accumulation of errors” established that his counsel was ineffective. Appellant’s Br. at 21.