MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Russell W. Brown, Jr.
The Region Lawyers, Inc.
Merrillville, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Indiana Attorney General

Jodi Kathryn Stein
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Thad Dale Stewart, Jr.,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent

June 20, 2023

Court of Appeals Case No. 22A-PC-2733

Appeal from the Lake Superior Court

The Honorable Natalie Bokota, Judge

The Honorable Mark Watson, Magistrate

Trial Court Cause No. 45G02-1704-PC-1

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

Crone, Judge.

Case Summary

[1] Thad Dale Stewart, Jr., appeals the denial of his petition for post-conviction relief (PCR). We affirm.

Facts and Procedural History

[2] Stewart and Amber Hardesty (Mother) are the parents of twin sons L.S. and C.S., who were born in May 2002. In May 2010, the State charged Stewart with two counts of class A felony child molesting, one as to each child, and two counts of class C felony child molesting, one as to each child. Before trial,

> the State filed a motion in limine to prohibit the defense from asking whether Mother had an older son. Defense counsel [James Thiros] responded that he did not intend to question Mother about custody of the child, but instead, wanted to inquire into whether, during the time the older son spent with L.S. and C.S., they might have discussed sex, which would provide another potential source of information of a sexual nature. The trial court asked if [Thiros] had a reasonable belief that the older brother had talked to the younger children about sex, to which [Thiros] responded yes. [Thiros] admitted such topic was not brought up in depositions, but relied on the fact that L.S. and C.S. had spent time with the older brother, so explicit sexual talk could have happened. At that time, the trial court decided to allow questions as to who resided in the home, but would only allow further questioning about whether they spoke to their older brother about sex if the boys "make mention" during their testimony that "they spoke to the other half-brother about these acts." The trial court made it clear that his rulings at that time were preliminary. However, during questioning of L.S. and C.S., [Thiros] did not pursue this topic in questioning the boys, and there was no ruling during the trial that excluded any testimony and no offer to prove.

Stewart v. State, No. 45A03-1506-CR-553, 2016 WL 915708, at *4 (Ind. Ct. App. Mar. 10, 2016) (transcript citations omitted), *trans. denied*.

[3] A jury trial began in March 2015. Both L.S. and C.S. provided extensive and detailed testimony that Stewart performed multiple acts of oral and anal penetration on them. Stewart did not testify on his own behalf; no discussion was had on the record about this. The jury found Stewart guilty as charged. The trial court entered judgment only on the class A felony convictions and imposed an aggregate sentence of ninety years executed.

[4] On direct appeal, Stewart challenged his convictions on several grounds, including that the trial court erred in restricting questioning of L.S. and C.S. "regarding possible exposure to sexual matters[.]" *Id*. at *1. Another panel of this Court found this issue waived due to the lack of an offer to prove and affirmed Stewart's convictions.

[5] In April 2017, Stewart filed a pro se PCR petition, which was later amended by counsel, raising several claims of ineffective assistance of trial counsel. In October 2022, after a hearing, the post-conviction court issued an order denying Stewart's petition. This appeal ensued.

Discussion and Decision

[6] A petitioner seeking post-conviction relief "bears the burden of establishing grounds for relief by a preponderance of the evidence." *Bautista v. State*, 163 N.E.3d 892, 896 (Ind. Ct. App. 2021) (quoting Ind. Post-Conviction Rule 1(5)).

Because Stewart is appealing from the denial of his petition, he is appealing from a negative judgment. *Id*. Thus, he

> 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.

Id. (quoting *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." *Baumholser v. State*, 186 N.E.3d 684, 688 (Ind. Ct. App. 2022), *trans. denied*.

[7] "The right to effective counsel is rooted in the Sixth Amendment of the United States Constitution." *Taylor v. State*, 840 N.E.2d 324, 331 (Ind. 2006). "A defendant claiming a violation of the right to effective assistance of counsel must establish the two components set forth in *Strickland v. Washington*, [466 U.S. 668 (1984)]." *Perez v. State*, 748 N.E.2d 853, 854 (Ind. 2001). "First, the defendant must show that counsel's performance was deficient." *Id*. "This requires a showing that counsel's representation fell below an objective standard of reasonableness, and that the errors were so serious that they resulted in a denial of the right to counsel guaranteed the defendant by the Sixth

Amendment." *Id*. (citations omitted). "There is a strong presumption that counsel rendered effective assistance and made all significant decisions in the exercise of reasonable professional judgment, and the burden falls on the defendant to overcome that presumption." *Peaver v. State*, 937 N.E.2d 896, 900 (Ind. Ct. App. 2010), *trans. denied* (2011). "Counsel is afforded considerable discretion in choosing strategy and tactics, and these decisions are entitled to deferential review." *Bradbury v. State*, 180 N.E.3d 249, 252 (Ind. 2022), *cert. denied*. "The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Id*. (quoting *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003)).

[8] "Second, the defendant must show that the deficient performance prejudiced the defense." *Perez*, 748 N.E.2d at 854. "To establish prejudice, a defendant 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." *Id*. "Although the two parts of the *Strickland* test are separate [inquiries], a claim may be disposed of on either prong." *Grinstead v. State*, 845 N.E.2d 1027, 1031 (Ind. 2006). "*Strickland* declared that the 'object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, … that course should be followed.'" *Id*. (quoting *Strickland*, 466 U.S. at 697).

[9] Stewart alleged that Thiros was ineffective in three respects: (1) failing to make an offer to prove that L.S. and C.S. learned about sexual activity from their

older brother; (2) failing to attack L.S.'s and C.S.'s credibility; and (3) failing to call Stewart as a witness. As for the first allegation, "[t]he purpose of an offer to prove is to preserve for appeal the trial court's allegedly erroneous exclusion of evidence." *Duso v. State*, 866 N.E.2d 321, 324 (Ind. Ct. App. 2007); *see* Ind. Evidence Rule 103(a)(2) (providing that party may claim error in ruling to exclude evidence only if error affects party's substantial right and "party informs the court of its substance by an offer of proof, unless the substance was apparent from the context"). "An offer of proof consists of three parts: (1) the substance of the evidence, (2) an explanation of its relevance, and (3) the proposed grounds for its admissibility." *Nelson v. State*, 792 N.E.2d 588, 594 (Ind. Ct. App. 2003), *trans. denied*. Here, the post-conviction court correctly found that Stewart failed to establish "that there was further information available to Attorney Thiros that should have been raised through an offer of proof" and that "no significant testimony was elicited from Attorney Thiros during the post-conviction hearing indicating what specific, potential testimony could have been tendered during an offer of proof." Appealed Order at 15.

[10] Stewart assumes that evidence exists that L.S. and C.S. learned about sexual activity from their older brother, and he asserts that Thiros should have obtained it via deposition or cross examination.[1] But, as the petitioner, it was Stewart's burden to prove that such evidence actually existed. *See Fugate v. State*,

[1] On cross examination at trial, L.S. testified "that he did not remember any occurrences of anyone talking to him about sexual things when he was seven or eight years old." *Stewart*, 2016 WL 915708, at *5.

608 N.E.2d 1370, 1373 (Ind. 1993) (stating that because petitioner failed to provide affidavit showing substance of testimony from potential surrebuttal witness whom trial counsel failed to subpoena, "we have no basis upon which to judge … trial counsel's performance"). Stewart failed to establish that Thiros had a valid basis for making an offer of proof, and thus he failed to establish that Thiros either performed deficiently or prejudiced him by failing to do so. *See Arhelger v. State*, 714 N.E.2d 659, 666 (Ind. Ct. App. 1999) ("Counsel must have a good-faith basis for the offer. If an offer is made with less than a good-faith basis, such as 'fishing' or speculation, it will serve only to confuse the issues and potentially place inadmissible evidence before the jury.").

[11] Regarding the second allegation, "it is well-settled that the nature and extent of cross-examination is a matter of trial strategy which we do not second-guess on appeal." *Williams v. State*, 160 N.E.3d 563, 579 (Ind. Ct. App. 2020), *trans. denied* (2021). A petitioner must demonstrate a reasonable probability that, but for counsel's deficient cross-examination, the outcome of the proceeding would have been different. *Johnson v. State*, 675 N.E.2d 678, 686 (Ind. 1996). The post-conviction court found that "it is clear that Attorney Thiros attacked the credibility of LS. and C.S. in multiple ways throughout the trial, and [Stewart] has failed to establish that Attorney Thiros's trial strategy regarding impeachment was unreasonable or that his representation of him was deficient in this regard." Appealed Order at 11. The court further found that Stewart had not "demonstrated that employing different methods of attacking the credibility of L.S. or C.S. would have changed the outcome of the trial." *Id*. at 12. Stewart

offers nothing substantive to rebut these determinations, so we decline to disturb them.

[12] Finally, concerning the third allegation, Article 1, Section 13 of the Indiana Constitution provides "that a defendant has a right to be heard by himself and counsel in all criminal prosecutions." *Phillips v. State*, 673 N.E.2d 1200, 1201-02 (Ind. 1996). "In furtherance of this right, our ethical rules provide that '[i]n a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to … whether the client will testify.'" *Id*. at 1202 (quoting Ind. Professional Conduct Rule 1.2(a) (1996)). "The right to testify is personal and may not be waived by counsel as a matter of trial strategy." *Moore v. State*, 655 N.E.2d 1251, 1254 (Ind. Ct. App. 1995). If a petitioner fails to demonstrate that his trial counsel "forbade his testifying" at trial, he cannot establish that he was prejudiced by counsel's action. *Correll v. State*, 639 N.E.2d 677, 682 (Ind. Ct. App. 1994). It is not enough for a defendant to merely assert after trial, even under oath, that he wanted to testify and his counsel would not allow him, because "[i]t is just too facile a tactic to be allowed to succeed." *Moore*, 655 N.E.2d at 1254 (quoting *Underwood v. Clark*, 939 F.2d 473, 476 (7th Cir. 1991)) "Some greater particularity is necessary—and also we think some substantiation is necessary, such as an affidavit from the lawyer who allegedly forbade his client to testify—to give the claim sufficient credibility to warrant a further investment of judicial resources in determining the truth of the claim" in a collateral attack on a conviction. *Id*. (quoting *Underwood*, 939 F.2d at 476).

[13] In this case, the post-conviction court found as follows:

> [Stewart] testified that Attorney Thiros did not give him the opportunity to testify, even though it had been discussed on multiple occasions before then. Thiros, however, testified that he did not have specific recollection as to why [Stewart] did not testify, but that he would have allowed him to do so. Besides the testimony of [Stewart], no other evidence was presented at the post-conviction hearing to substantiate this claim.

Appealed Order at 13. The court clearly found Thiros's testimony more credible than Stewart's unsubstantiated accusation, and we may not second-guess that determination on appeal. *Baumholser*, 186 N.E.3d at 688. In sum, Stewart failed to demonstrate that Thiros forbade his testifying at trial, and thus he failed to establish that he was prejudiced. Accordingly, we affirm the post-conviction court in all respects.

[14] Affirmed.

Kenworthy, J., and Robb, Sr.J., concur.