MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Phillip Hutchinson,
Appellant-Defendant

v.

State of Indiana,
Appellee-Plaintiff.

March 14, 2023

Court of Appeals Case No. 22A-PC-1150

Appeal from the Marion Superior Court

The Honorable Jeffrey L. Marchal, Magistrate

Trial Court Cause No. 49D32-2001-PC-133

Memorandum Decision by Judge Pyle

Judges Bradford and Kenworthy concur.

Pyle, Judge.

Statement of the Case

[1] Phillip Hutchinson ("Hutchinson") appeals the post-conviction court's denial of his petition for post-conviction relief. Hutchinson argues that the post-conviction court erred by denying him post-conviction relief on his claim of ineffective assistance of appellate counsel. Concluding that there was no error, we affirm the post-conviction court's judgment.

[2] We affirm.

Issue

> Whether the post-conviction court erred by denying post-conviction relief to Hutchinson.

Facts

[3] The relevant facts of Hutchinson's underlying offense, as set forth by this Court in Hutchinson's direct appeal, are as follows:

> In July 2017, then-ten-year-old K.M. was living with her grandmother and her grandmother's boyfriend, Hutchinson. K.M.'s parents slept in their vehicle outside the home. One night, K.M. awoke to find Hutchinson standing over her and moving his fingers around her genitals. K.M. ran outside, crying, and began pounding on the door of the vehicle where her parents were sleeping, awakening them to tell them what had happened. The family immediately called the police.
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> On August 7, 2017, the State charged Hutchinson with Level 4 felony child molesting and Level 1 felony child molesting, later adding an allegation that Hutchinson was an habitual offender.

Hutchinson v. State, No. 18A-CR-1207, 2019 WL 1371979 at *1 (Ind. Ct. App. Mar. 17, 2019), *trans. denied*. Prior to trial, Hutchinson filed a motion in limine to prohibit the State from introducing evidence relating to uncharged allegations that Hutchinson had inappropriately touched K.M. in 2012. Hutchinson also sought to prohibit any other uncharged child molest allegations involving other children. The trial court granted Hutchinson's motion in limine.

> Hutchinson's jury trial took place on April 2-3, 2018. K.M. testified at the trial.
>
> During closing arguments, Hutchinson's attorney argued that K.M.'s testimony was not credible, arguing that it could have been a dream, that it could have been K.M.'s brother sleeping on her, and that K.M. may have made the accusation to get attention. Tr. Vol. II p. 191-92. On rebuttal, the prosecutor responded, arguing that "[k]ids don't make this up for attention," *id.* at 195, and explaining the standard of review to the jury:
>
> > Ladies and Gentlemen, [in] a second I'm going to sit down and you are going to go back to that jury room and you are going to start to deliberate. And you are going to get to the point where you say, "I believe her but how do you know it's beyond a reasonable doubt?" Yesterday, you didn't know K[.]M[.], you didn't know the Defendant and you didn't know what he did to her on July 25th of 2017. When you got to believe her, that is proof beyond a reasonable doubt, that's a guilty. And do not come back here and tell that little girl she is lying. Because to be clear, that's what a not guilty is. That girl got on the stand, promised to tell you the truth and told you what he did to her. It's always easier when stuff like this is done at some other time, in some

> other place, by some other people. But now is the time, this is the place, you are the people. And give the child justice, find him guilty.
>
> *Id.* at 198-99. Hutchinson did not object to any of these statements. . . .

Id. The jury found Hutchinson guilty of Level 4 felony child molesting and not guilty of Level 1 felony child molesting. Hutchinson waived his right to a jury trial on the habitual offender allegation, and the trial court determined that Hutchinson was an habitual offender.

[4] During Hutchinson's sentencing hearing, the State questioned fifty-eight-year-old Hutchinson about the two prior child molest allegations. One allegation was from 2012 and involved an allegation that Hutchinson had inappropriately touched K.M.'s vagina while he was babysitting her. The other allegation was from 2014 and involved an allegation that Hutchinson had inappropriately touched the vagina of a twelve-year-old girl, M.W., while she was sleeping at Hutchinson's house. Hutchinson denied that he had ever talked to police about those allegations. However, a police detective who testified at the sentencing hearing stated that the police had previously interviewed Hutchinson about both of the allegations.

[5] When sentencing Hutchinson, the trial court found two mitigating circumstances and two aggravating circumstances. The trial court found that the fact that Hutchinson sometimes assisted his older sister who had had cancer to be a mitigating circumstance, but it stated that it was "not a substantial

mitigator though because she is an adult." (DA[1] Tr. Vol. 2 at 242). The trial court also found Hutchinson's history of "some mental health issues" and "a substantial alcohol problem" to be a mitigating circumstance. (DA Tr. Vol. 2 at 242). However, the trial court noted that this mitigator was "somewhat offset by the fact that [Hutchinson] ha[d] had multiple opportunities to deal with [his] alcohol problem" and had failed to do so. (DA Tr. Vol. 2 at 242). The trial court pointed out that Hutchinson had had four drunk driving convictions and that the presentence investigation report ("PSI") indicated that Hutchinson had been drinking on the day of the child molesting offense for which he was convicted.

[6] When setting forth the aggravating circumstances, the trial court cited Hutchinson's abuse of his "position of care and custody and trust" of K.M. and Hutchinson's criminal history. (DA Tr. Vol. 2 at 242). Hutchinson's criminal history spanned multiple decades. The trial court noted that Hutchinson's criminal history was "documented within the [PSI]" and noted that Hutchinson had four felony convictions, misdemeanor convictions, and "twenty-nine adult arrests[.]" (DA Tr. Vol. 2 at 243). The trial court specifically noted that Hutchinson's habitual offender adjudication was based on Hutchinson's 1986 felony burglary conviction and 2010 felony theft conviction. Additionally, Hutchinson had a felony conviction for operating a vehicle while intoxicated. Hutchinson's misdemeanor convictions included convictions for disorderly

[1] We will refer to Hutchinson's direct appeal transcript and appendix by using the initials "DA."

conduct, battery, theft, and auto theft; four convictions for operating a vehicle while intoxicated; two convictions for driving with a suspended license; and three convictions for resisting law enforcement. Moreover, Hutchinson had his probation revoked on multiple occasions.

[7] The trial court imposed an eight (8) year sentence for Hutchinson's Level 4 felony child molesting conviction and enhanced that sentence by ten (10) years for Hutchinson's habitual offender adjudication. The trial court ordered three (3) years of Hutchinson's aggregate eighteen (18) year sentence to be suspended to probation.

[8] Hutchinson filed a direct appeal and was represented by attorney Timothy O'Connor ("Appellate Counsel O'Connor"). On appeal, Hutchinson argued that, during closing argument, the prosecutor had engaged in prosecutorial misconduct that had resulted in fundamental error. Specifically, Hutchinson argued that the prosecutor had committed misconduct by improperly vouching for K.M., shifting the burden of proof, and requesting the jury to convict for a reason other than guilt. Our Court determined that there was no prosecutorial misconduct and no fundamental error, and we affirmed the trial court's judgment. *Hutchinson*, No. 18A-CR-1207, 2019 WL 1371979 at *3. Hutchinson filed a petition to transfer, which was denied by the Indiana Supreme Court.

[9] In January 2020, Hutchinson filed a post-conviction petition that he then amended in November 2021. In his amended petition, Hutchinson raised one

claim of ineffective assistance of appellate counsel. Specifically, he argued that Appellate Counsel O'Connor rendered ineffective assistance of counsel by failing to raise an appellate sentencing issue to challenge the trial court's determination that Hutchinson's violation of a position of trust was an improper aggravating circumstance.

[10] The post-conviction court held a hearing in December 2021. Hutchinson presented Appellate Counsel O'Connor as a witness. Appellate Counsel O'Connor testified that he had reviewed the entire trial and sentencing record, including Hutchinson's PSI, when he represented Hutchinson in his direct appeal. Counsel stated that he had considered raising the position-of-trust aggravator as a potential appellate issue and that he had "reviewed the case law and statutory law to determine if the issue ha[d] merit and if it ha[d] viability." (Tr. Vol. 2 at 10). Appellate Counsel O'Connor ultimately "concluded that the issue wouldn't be successful if it were raised," especially "in light of the other factors that [had been] mentioned by the [trial] [c]ourt at sentencing[.]" (Tr. Vol. 2 at 10). Counsel further stated that even if he had raised the issue and if it would have been determined to be an improper aggravating circumstance, "it still wouldn't [have] provide[d] any kind of relief" to Hutchinson. (Tr. Vol. 2 at 10). Specifically, Appellate Counsel O'Connor explained that the Court of Appeals could have been "firmly convinced" and said "with confidence" that Hutchinson's sentence would have remained the same given the criminal history aggravating circumstance. (Tr. Vol. 2 at 14).

[11] Thereafter, the post-conviction court issued an order denying Hutchinson's petition for post-conviction relief. The post-conviction court concluded, in part, that Hutchinson had "failed to carry his burden of proof" on his ineffective assistance of appellate counsel claim. (Tr. Vol. 2 at 93).

[12] Hutchinson now appeals.

Decision

[13] Hutchinson argues that the post-conviction court erred by denying him post-conviction relief. Our standard of review in post-conviction proceedings is well settled.

> We observe that post-conviction proceedings do not grant a petitioner a "super-appeal" but are limited to those issues available under the Indiana Post-Conviction Rules. Post-conviction proceedings are civil in nature, and petitioners bear the burden of proving their grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5). A petitioner who appeals the denial of PCR faces a rigorous standard of review, as the reviewing court may consider only the evidence and the reasonable inferences supporting the judgment of the post-conviction court. The appellate court must accept the post-conviction court's findings of fact and may reverse only if the findings are clearly erroneous. If a PCR petitioner was denied relief, he or she must show that the evidence as a whole leads unerringly and unmistakably to an opposite conclusion than that reached by the post-conviction court.

Shepherd v. State, 924 N.E.2d 1274, 1280 (Ind. Ct. App. 2010) (cleaned up), *trans. denied.* "We review the post-conviction court's factual findings under a 'clearly erroneous' standard but do not defer to the post-conviction court's legal

conclusions." *Stephenson v. State*, 864 N.E.2d 1022, 1028 (Ind. 2007), *reh'g denied*, *cert. denied*. Additionally, "[w]e will not reweigh the evidence or judge the credibility of the witnesses; we examine only the probative evidence and reasonable inferences that support the decision of the post-conviction court." *Id.*

[14] Hutchinson contends that the post-conviction court erred by denying him post-conviction relief on his claim of ineffective assistance of appellate counsel. Specifically, he argues that his appellate counsel rendered ineffective assistance by failing to raise an appellate sentencing issue to challenge the trial court's determination that Hutchinson's violation of a position of trust was an improper aggravating circumstance.

[15] We apply the same standard of review to a claim of ineffective assistance of appellate counsel as we do to an ineffective assistance of trial counsel claim. *Garrett v. State*, 992 N.E.2d 710, 724 (Ind. 2013). Thus, a petitioner alleging a claim of ineffective assistance of appellate counsel is required to show that: (1) counsel's performance was deficient by falling below an objective standard of reasonableness based on prevailing professional norms; and (2) counsel's performance prejudiced the defendant such that "'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Davidson v. State*, 763 N.E.2d 441, 444 (Ind. 2002) (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)), *reh'g denied*. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Isom v. State*, 170 N.E.3d 623, 633 (Ind. 2021)

(cleaned up), *reh'g denied*. "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). "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). Indeed, "[m]ost ineffective assistance of counsel claims can be resolved by a prejudice inquiry alone." *Id.*

[16] Ineffective assistance of appellate counsel claims "'generally fall into three basic categories: (1) denial of access to an appeal[;] (2) waiver of issues[;] and (3) failure to present issues well.'" *Garrett*, 992 N.E.2d at 724 (quoting *Reed v. State*, 856 N.E.2d 1189, 1195 (Ind. 2006)). *See also Isom*, 170 N.E.3d at 650. Hutchinson's ineffective assistance of appellate counsel claim is based upon category (2), waiver of issues. To evaluate the performance prong in a waiver-of-issues appellate counsel claim, our Court applies the following test: "(1) whether the unraised issues are significant and obvious from the face of the record[;] and (2) whether the unraised issues are 'clearly stronger' than the raised issues." *Garrett*, 992 N.E.2d at 724 (quoting *Timberlake v. State*, 753 N.E.2d 591, 605-06 (Ind. 2001), *reh'g denied*, *cert. denied*). *See also Isom*, 170 N.E.3d at 650. The prejudice prong for the waiver-of-issues category of an ineffective assistance of appellate counsel claim requires a petitioner to "demonstrate a reasonable probability that the outcome of the direct appeal would have been different." *Stevens v. State*, 770 N.E.2d 739, 760 (Ind. 2002), *reh'g denied*, *cert. denied*. *See also Isom*, 170 N.E.3d at 650 (explaining that the

showing of prejudice for a petitioner who raises an ineffective assistance of appellate counsel claim relating to the failure to raise a sentencing issue requires the petitioner to show a reasonable probability that the result of his appeal would have been different or that the appeal of the issue would have led to resentencing).

[17] "For such waiver-of-issues claims, [i]neffectiveness is very rarely found because deciding which issues to raise is one of the most important strategic decisions to be made by appellate counsel." *Isom*, 170 N.E.3d at 650 (cleaned up). "'Accordingly, when assessing these types of ineffectiveness claims, reviewing courts should be particularly deferential to counsel's strategic decision to exclude certain issues in favor of others, unless such a decision was unquestionably unreasonable.'" *Conner v. State*, 711 N.E.2d 1238, 1252 (Ind. 1999) (quoting *Bieghler v. State*, 690 N.E.2d 188, 194 (Ind. 1997), *reh'g denied*, *cert. denied*), *reh'g denied*, *cert. denied*. To show that appellate counsel was ineffective for failing to raise an issue on appeal, a petitioner "must overcome the strongest presumption of adequate assistance, and judicial scrutiny is highly deferential." *Garrett*, 992 N.E.2d at 724 (cleaned up).

[18] Here, the record on appeal reveals that Appellate Counsel O'Connor made a strategic decision to not raise an appellate sentencing issue. However, we need not determine whether appellate counsel's failure to raise the position-of-trust aggravator as an appellate issue constituted deficient performance because our review of this ineffective assistance of counsel claim can be resolved by addressing only the prejudice prong. *See Henley*, 881 N.E.2d at 645 (explaining

that if our Court can dismiss an ineffective assistance claim on the prejudice prong, we need not address whether counsel's performance was deficient).

[19] Hutchinson has failed to meet his burden of showing the prejudice prong of his ineffective assistance of appellate counsel claim. Specifically, he has failed to show that, even if Appellate Counsel O'Connor had successfully raised an appellate challenge to the position-of-trust aggravator, there was a reasonable probability that the result of his direct appeal would have been different. Our Indiana Supreme Court has explained that "[e]ven when a trial court improperly applies an aggravator, a sentence enhancement may be upheld if other valid aggravators exist." *McCain v. State*, 148 N.E.3d 977, 984 (Ind. 2020) (cleaned up). "When an improper aggravator is used, we remand for resentencing only if we cannot say with confidence that the trial court would have imposed the same sentence if it considered the proper aggravating and mitigating circumstances." *Id.* (cleaned up). Even if Appellate Counsel O'Connor had successfully challenged the position-of-trust aggravator, there was still a valid aggravating circumstance, Hutchinson's criminal history, that we can say with confidence would have supported the trial court's imposition of the same sentence. Because Hutchinson has failed to demonstrate that appellate counsel rendered ineffective assistance, we affirm the post-conviction court's denial of post-conviction relief on this claim.

[20] Affirmed.

Bradford, J., and Kenworthy, J., concur.