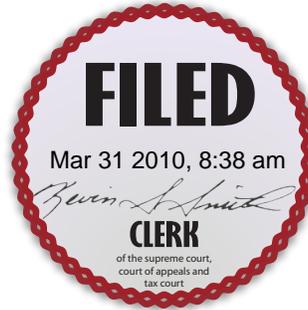


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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TIMOTHY MICHAEL,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 20A05-0908-PC-473

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APPEAL FROM THE ELKHART SUPERIOR COURT

The Honorable George W. Biddlecome, Judge

Cause No. 20D03-0005-CF-54

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**March 31, 2010**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BROWN, Judge**

Timothy Michael appeals the post-conviction court's denial of his petition for post-conviction relief. Michael raises one issue, which we revise and restate as whether Michael was denied effective assistance of trial counsel. We affirm.<sup>1</sup>

The relevant facts follow. On May 11, 2000, the State charged Michael with child molesting as a class C felony.<sup>2</sup> After a jury trial, Michael was convicted as charged.<sup>3</sup> The trial court sentenced Michael to eight years in the Department of Correction.

Michael filed a petition for post-conviction relief on April 9, 2002, and an amended petition for post-conviction relief on April 5, 2004. Michael alleged that he received ineffective assistance of trial counsel. In November 2008, the court held a hearing on Michael's petition for post-conviction relief, and the court denied Michael's petition in March 2009.

Before discussing Michael's allegations of error, we note the general standard under which we review a post-conviction court's denial of a petition for post-conviction relief. The petitioner in a post-conviction proceeding bears the burden of establishing

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<sup>1</sup> We remind Michael that Ind. Appellate Rule 46(A)(6) provides that the facts in a Statement of Facts "shall be supported by page references to the Record on Appeal or Appendix in accordance with Rule 22(C)."

<sup>2</sup> The record does not contain a copy of the charging information.

<sup>3</sup> The record does not contain a copy of the transcript from the jury trial. During the post-conviction hearing, the parties disagreed as to the admissibility of the trial transcript and whether the trial court could take judicial notice of the transcript. The court took the matter under advisement. The post-conviction court's order denying Michael's petition stated: "Although this court is of the opinion that the resolution of Petitioner's AMENDED VERIFIED PETITION FOR POST CONVICTION RELIEF may be reached based upon the other evidence presented at the November 12, 2008, hearing, the court also finds that, under the specific circumstances of this case, taking of judicial notice of the subject transcript will promote judicial economy." Appellant's Appendix at 71.

grounds for relief by a preponderance of the evidence. Fisher v. State, 810 N.E.2d 674, 679 (Ind. 2004); Ind. Post-Conviction Rule 1(5). When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. 810 N.E.2d at 679. On review, we will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. Id. Further, the post-conviction court in this case entered findings of fact and conclusions thereon in accordance with Indiana Post-Conviction Rule 1(6). Id. “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.” Id. In this review, we accept findings of fact unless clearly erroneous, but we accord no deference to conclusions of law. Id. The post-conviction court is the sole judge of the weight of the evidence and the credibility of witnesses. Id.

The issue is whether Michael was denied effective assistance of trial counsel. To prevail on a claim of ineffective assistance of counsel, a petitioner must demonstrate both that his counsel’s performance was deficient and that the petitioner was prejudiced by the deficient performance. Ben-Yisrayl v. State, 729 N.E.2d 102, 106 (Ind. 2000) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984), reh’g denied), reh’g denied, cert. denied, 534 U.S. 830, 122 S. Ct. 73 (2001). A counsel’s performance is deficient if it falls below an objective standard of reasonableness based on prevailing professional norms. French v. State, 778 N.E.2d 816, 824 (Ind. 2002). 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. Most ineffective assistance of counsel claims can be resolved by a prejudice inquiry alone. Id.

Michael argues that he received ineffective assistance of trial counsel because his trial counsel failed to obtain and use the victim's mental health and counseling records.<sup>4</sup> Michael argues that "[t]he records at issue showed that [the victim] had a propensity to lie, that she disliked [Michael] and wanted to harm him, and that she was likely to falsely accuse [Michael] of wrongdoing." Appellant's Brief at 10. However, Michael does not cite to the record in support of this statement. See Ind. Appellate Rule 46(A)(8) ("Each contention must be supported by citations to the authorities, statutes, and the Appendix or parts of the Record on Appeal relied on, in accordance with Rule 22.").

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<sup>4</sup> In Michael's statement of facts, he states that his trial counsel failed to call any witnesses other than Michael, subpoena Sharon Simmons of the Department of Child Services, request a "re-reading [sic] of the instructions or to poll all the jury" when the jury reached an impasse, investigate Michael's prior record, file a motion in limine, and present certain evidence. Michael does not mention these alleged failures in the argument section of his brief or develop a cogent argument regarding these alleged failures. Consequently, any argument relating to these allegations is waived. See, e.g., Cooper v. State, 854 N.E.2d 831, 834 n.1 (Ind. 2006) (holding that the defendant's contention was waived because it was "supported neither by cogent argument nor citation to authority"); Shane v. State, 716 N.E.2d 391, 398 n.3 (Ind. 1999) (holding that the defendant waived argument on appeal by failing to develop a cogent argument).

Our review of the record reveals that Michael's trial counsel testified at the post-conviction hearing that he did not recall whether Michael told him about the victim's psychiatric records. Michael's trial counsel also testified that he did not recall whether he had any information to suggest that the victim had any psychiatric disorder. Further, no mental health or counseling records were admitted as exhibits at the post-conviction hearing. We conclude that Michael has not demonstrated what the records contained or that he was prejudiced by his trial counsel's failure to obtain and introduce them at trial. Accordingly, his claim of ineffective assistance fails.

For the foregoing reasons, we affirm the post-conviction court's denial of Michael's petition for post-conviction relief.

Affirmed.

NAJAM, J., and VAIDIK, J., concur.