

STATEMENT OF THE CASE

Charles S. Muncy was convicted of two counts of Child Molesting, as a Class A felony and as a Class C felony, and two counts of Intimidation, as a Class C felony and as a Class D felony, following a jury trial. On direct appeal, we affirmed his convictions and sentence. See Muncy v. State, No. 48A04-9712-CR-534 (Ind. Ct. App. June 16, 1998) (“Muncy I”). Muncy subsequently petitioned for post-conviction relief, which was denied. He now appeals from the denial of his petition and raises two issues for our review:

1. Whether he was denied the effective assistance of trial counsel.
2. Whether he was denied the effective assistance of appellate counsel.

We affirm in part and reverse and remand in part.

FACTS AND PROCEDURAL HISTORY

The facts and procedural history as stated in our prior unpublished decision are as follows:

Muncy’s sister, Ontarina Muncy, had an eleven-year-old son, T.K. Sometime during 1996, while at Muncy’s apartment, Muncy grabbed T.K.’s hand and placed it on Muncy’s penis over his clothes. After T.K. moved his hand away, Muncy placed his hand on T.K.’s penis over T.K.’s pants. Later, Muncy held a knife to T.K.’s throat and stated, “If you ever tell, I’ll cut you.” Muncy later moved in with Ontarina and her fiancé. While living there, Muncy and T.K. were [lying] on a bed in the basement. Muncy made T.K. touch Muncy’s bare penis. Muncy then touched T.K.’s bare penis.

Muncy was subsequently arrested and charged with four counts of child molesting, two involving the incidents described above with T.K., and two involving T.K.’s sister, K.K., who was ten years old at the time. He was also charged with two counts of intimidation, pertaining to T.K. and K.K., respectively. Muncy was found not guilty of the molesting charges pertaining to K.K., but was found guilty of the other four counts.

Id. (citation omitted).

To prove intimidation as a Class D felony, the State was required to prove that Muncy communicated a threat, a forcible felony, to K.K. with the intent that K.K. engage in conduct against her will. See Ind. Code § 35-45-2-1. At the trial on the charge of intimidation of K.K., K.K. testified that Muncy told her he would “get me in trouble” if she ever mentioned the alleged molestation to anyone, but K.K. denied that Muncy threatened to kill her. Appellant’s App. at 202-203. The State also called Ronnie Ward as a witness. Ward testified, over the objection of Muncy’s trial counsel, to the substance of statements made to him by K.K., including that Muncy “threatened to kill [K.K.’s] mom” if K.K. told anyone about the molestation. Id. at 225. Finally, the State called Anderson Police Officer David Reed as a witness. Officer Reed testified that K.K. told him that Muncy was having sex with her and that Muncy told her that he would kill her and her mom if she told anyone.

On direct appeal, Muncy’s appellate counsel argued that the charge of intimidation of K.K. was based on insufficient evidence, noting only K.K.’s testimony. Appellate counsel did not challenge the other hearsay testimony, and we affirmed Muncy’s conviction and sentence based on the testimony of Ronnie Ward. The post-conviction court denied Muncy’s petition for post-conviction relief following a hearing. This appeal ensued.

DISCUSSION AND DECISION

The petitioner bears the burden of establishing his grounds for post-conviction relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); Harrison v.

State, 707 N.E.2d 767, 773 (Ind. 1999). To the extent the post-conviction court denied relief in the instant case, Muncy appeals from a negative judgment and faces the rigorous burden of showing that the evidence as a whole “leads unerringly and unmistakably to a conclusion opposite to that reached by the trial court.” Williams v. State, 706 N.E.2d 149, 154 (Ind. 1999) (quoting Weatherford v. State, 619 N.E.2d 915, 917 (Ind. 1993)). It is only where the evidence is without conflict and leads to but one conclusion, and the post-conviction court has reached the opposite conclusion, that its decision will be disturbed as contrary to law. Bivins v. State, 735 N.E.2d 1116, 1121 (Ind. 2000).

Issue One: Trial Counsel

Muncy first contends that he was denied the effective assistance of trial counsel. 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. Gibson v. State, 709 N.E.2d 11, 13 (Ind. Ct. App. 1999), trans. denied. To make a successful ineffective assistance claim, a defendant must show that: (1) his attorney’s performance fell below an objective standard of reasonableness as determined by prevailing professional norms; and (2) the lack of reasonable representation prejudiced him. Mays v. State, 719 N.E.2d 1263, 1265 (Ind. Ct. App. 1999) (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)), trans. denied. Even if a defendant establishes that his attorney’s acts or omissions were outside the wide range of competent professional assistance, he must also establish that but for counsel’s errors, there is a reasonable probability that the result of the proceeding would have been different. See Steele v. State, 536 N.E.2d 292, 293 (Ind. 1989).

Muncy asserts that his trial counsel was ineffective for failing to preserve the hearsay issues for appeal. In order to prove ineffective assistance of counsel due to the failure to object, a defendant must prove that an objection would have been sustained if made and that he was prejudiced by the failure. Wrinkles v. State, 749 N.E.2d 1179, 1192 (Ind. 2001). Here, Muncy's trial counsel repeatedly objected to the challenged statements made by Ronnie Ward and Officer Reed at trial, preserving the hearsay issues for review on appeal. Further, the trial court overruled each of the objections with one exception regarding the date of the offense during Ronnie Ward's testimony that was partly sustained. As such, Muncy has not shown that his trial counsel was ineffective for failing to object to hearsay, and he has not shown any prejudice thereby. The post-conviction court did not err when it found that Muncy was not denied the effective assistance of trial counsel.

Issue Two: Appellate Counsel

Muncy contends that his appellate counsel was ineffective for failing to present an issue on appeal. Specifically, Muncy maintains that his appellate counsel did not properly challenge the use of hearsay evidence to enhance his conviction for intimidation of K.K. from a Class A misdemeanor to a Class D felony. The State concedes this issue, stating:

The State acknowledges that Ronnie Ward's testimony regarding K.K.'s out-of-court statements were not properly admitted as substantive evidence. K.K. testified at trial that Petitioner told her not to tell anyone or he would "get [her] in trouble." Ronnie Ward testified that K.K. told him that Petitioner threatened to kill her mom if she told anyone. Officer Reed testified that K.K. stated that Petitioner threatened to kill her and her mother. Although both statements are similar in that they both communicate a threat to K.K. if she told anyone, the content of these

statements are not consistent such that these statements could be admitted as substantive evidence under Indiana Rule of Evidence 801(d)(1)(A). Furthermore, K.K.'s statements do not fall under any recognized exceptions to the hearsay rule.

Appellee's Brief at 11-12 (citations omitted).

However, the State argues that the appropriate remedy is to remand for a new trial on the Class D felony charge, whereas Muncy requests that his sentence be vacated and entered as a Class A misdemeanor. We agree with the State. While not admissible as substantive evidence, the evidence at issue may be admissible to impeach K.K. Accordingly, the trial court is in the best position to determine the weight that should be given K.K.'s testimony.

Further, "[r]etrial following reversal for improperly admitted evidence does not subject a defendant to double jeopardy so long as all the evidence, even that erroneously admitted, is sufficient to support the jury verdict." Storey v. State, 830 N.E.2d 1011, 1021-22 (Ind. Ct. App. 2005). Here, as we held on direct appeal, the evidence was sufficient to support the jury verdict. See Muncy I. As such, double jeopardy does not bar retrial. Thus, we remand for a new trial on the Class D felony intimidation count against K.K.

Affirmed in part and reversed and remanded in part.

FRIEDLANDER, J., and DARDEN, J., concur.