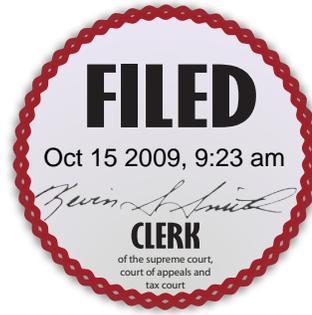


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

STEVEN CHRISTENER,

)

Appellant-Defendant,

)

vs.

)

No. 01A02-0905-PC-445

)

STATE OF INDIANA,

)

Appellee-Plaintiff.

)

)

APPEAL FROM THE ADAMS CIRCUIT COURT

The Honorable Everett E. Goshorn, Special Judge

Cause No. 01C01-0605-PC-5

October 15, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Steven Christener was convicted of Aiding, Inducing, or Causing Battery Resulting in Serious Bodily Injury to a Person Less Than Fourteen Years of Age, a Class B felony, and Battery, as a Class D felony, following a jury trial. On direct appeal, this court affirmed his B felony conviction¹ and his twenty-year sentence, but remanded to the trial court with instructions to explain its reasons for issuing a no-contact order against Christener or to vacate that order. See Christener v. State, No. 01A02-0507-CR-602 (Ind. Ct. App. February 21, 2006) (“Christener I”). Christener subsequently petitioned for post-conviction relief, which the post-conviction court denied. He now appeals, challenging the post-conviction court’s judgment, and he raises the following 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.

FACTS AND PROCEDURAL HISTORY

In Christener I, we set out the facts and procedural history as follows:

On March 8, 2004, D.C., the two-and-a-half-year-old son of nineteen-year-old Betty Parker, found his way into his mother’s makeup, as well as some fish tank chemicals. Parker put D.C. in the corner and in “time-out” but did not spank him. Instead she told D.C. that he would be in trouble when Christener, her thirty-eight-year-old boyfriend, arrived home from work. Parker and Christener lived together with their two children and D.C., her child from a previous relationship. D.C. called Christener “Dad.” Transcript at 366.

¹ Christener did not appeal his D felony conviction.

Christener arrived home at approximately 5:00 that evening, from which time he imposed and guided D.C.'s punishment. First, for the duration of one to two hours, Christener and Parker made D.C. run around the house wearing only his underwear, striking him with a flyswatter if he stopped. Both Christener and Parker struck D.C. with the flyswatter. Sometime later, Christener and Parker decided the flyswatter was ineffective. Christener expressed to Parker that it was "too bad [they] didn't have a paddle like . . . when [he] was in school." Tr. at 347. A wooden wall decoration was then used as an improvised paddle.

Between approximately 7 p.m. and midnight, D.C. was told to jump in place. When he stopped, Christener or Parker struck D.C. on the buttocks with the makeshift paddle. At one point Christener instructed Parker, demonstrating on D.C. how to properly deliver a blow. Christener eventually fell asleep while Parker continued the flagellation. When Christener awoke, he told D.C. to stand in the corner for approximately half an hour, where D.C. became tired and began falling asleep. After D.C. agreed to stop his bad behavior, he was allowed to rest. He told his mother that his buttocks hurt, and Parker saw that his buttocks were turning dark purple. She placed ice on them, and gave D.C. a cool bath. Afterwards, D.C. fell asleep, lying on his stomach.

The next morning Parker noticed bruising on D.C.'s body, and later that afternoon she discovered blood in D.C.'s urine. She eventually took him to the hospital in fear that she and Christener had struck him hard enough to cause internal bleeding. While in the waiting area, a police officer observed D.C.'s injuries. He explained that at first he thought the child was wearing a "large bulky diaper" under his sweatpants. Tr. at 212. Further inspection revealed no diaper, but that D.C.'s buttocks were "severely swollen, discolored purple/red, [and] looked . . . about the size of a cantaloupe." *Id.* D.C. also had a small cut on his penis, and marks on the front and back of his torso and arms.

D.C. was held overnight at the hospital due to fear that his kidneys might stop functioning, causing him to die of renal failure. A nurse and two doctors who treated D.C. later testified that D.C.'s injuries were the worst and most extensive they had seen inflicted on a child. The family case manager assigned by the Adams County Division of Family and Children explained that D.C.'s bruises were the worst she had witnessed. Five months after the incident, D.C. was diagnosed with two psychological ailments: reactive attachment disorder and post-traumatic stress disorder.

In May of 2004, Christener was charged with battery resulting in serious bodily injury to a person less than fourteen years of age ("count

one”), a Class B felony. In February of 2005 the State amended the charges, adding the count of aiding, inducing, or causing battery resulting in serious bodily injury to a person less than fourteen years old. On April 28, 2005, a jury found Christener guilty in count one of the lesser-included offense of battery, a Class D felony, and guilty on count two. He was sentenced to three years on count one, to run concurrently with twenty years for count two. The trial court also ordered that Christener have no contact with D.C. during the twenty-year period of his incarceration.

Id. at 2-4. On appeal, this court affirmed Christener’s Class B felony battery conviction and twenty-year sentence, but remanded with instructions to the trial court “to explain if and why the order was issued under the Indiana Civil Protection Order Act . . . or to vacate the order.” Id. at 10. And the post-conviction court denied Christener’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), cert. denied, 529 U.S. 1088 (2000). To the extent the post-conviction court denied relief in the instant case, Christener 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 [] court.” See Williams v. State, 706 N.E.2d 149, 153 (Ind. 1999) (quoting Weatherford v. State, 619 N.E.2d 915, 917 (Ind. 1993)), cert. denied, 529 U.S. 1113 (2000). 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

Christener 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.

Deficient performance is representation that fell below an objective standard of reasonableness by the commission of errors so serious that the defendant did not have the "counsel" guaranteed by the Sixth Amendment. Roberts v. State, 894 N.E.2d 1018, 1030 (Ind. Ct. App. 2008), trans. denied. Consequently, our inquiry focuses on counsel's actions while mindful that isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render counsel's representation ineffective. Id. 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).

On appeal, Christener asserts three separate grounds for his claim that he was denied the effective assistance of trial counsel. We address each contention in turn.

Alleged Juror Bias

Christener first contends that his trial counsel should have stricken a juror who indicated bias against Christener during voir dire. In particular, the juror (“Mr. Currie”), stated the following during voir dire:

I just don’t think I could be fair about [Christener’s case]. I’ve got a 13-year-old daughter that pushes my buttons on a daily basis and I just don’t think there is any cause for taking into consideration the size, somebody that’s that small [referring to the victim in this case]. I don’t think I could be fair on the decision.

Appellant’s App. at 162. Subsequently, the prosecutor engaged in the following colloquy with Mr. Currie:

Q: Mr. Currie, you indicated at this point in time, you don’t like [the] crime that’s charged. Do you have an opinion as to this point in time as to whether the defendant is guilty or not guilty?

A: I just (inaudible) . . . Like I said I have a [13]-year-old daughter and I just don’t see any reason to (inaudible) requiring hospitalized or medical treatment (inaudible). . .

Q: What if the State . . .

A: There ain’t no sense in that.

Q: Ok. What if the State failed to prove to you that it was this defendant that did it?

A: Otherwise (inaudible) I would have a hard time finding a (inaudible).
..

Id. at 166.

During the post-conviction hearing, Christener, representing himself, engaged in the following colloquy with his trial counsel regarding his decision not to challenge Mr.

Currie:

Q: Can you tell the Court why you didn't challenge having Mr. Currie seated on this jury?

A: Well, if it was clear that he was prejudiced or biased, we probably would have used one of our preempts unless I already used them up, but my normal procedure would be to ask you how you feel about this individual being seated.

Q: So your answer is if it was obvious he was partial, can you, I don't think I could be fair about it, this is Mr. Currie's statement, I don't think I could be fair about it, . . . Is that a statement of impartiality and indifference?

PROSECUTOR: Judge, that's a question for you, I believe, it's a legal conclusion.

COURT: It's more of a question that's argumentative, too. I am interested in why, if Mr. Brown can answer the question, why he left Mr. Currie on the jury after that response.

A: I don't remember in context what all he said, other statements he made. Normally I would have preempted an individual like that, but normally I would have asked you too what do you think about this and I can't recall whether at the time you said "oh leave him on," or "it's alright, I don't know." I can't recall that.

Q: The trial record shows that you did have, why didn't you challenge this juror for cause?

A: I can't remember that.

Q: Okay.

A: There again, I might have talked to you and you said, "well, we'll go with him." I just don't remember.

Q: Okay.

A: But my normal procedure, obviously, if you said, “oh I don’t want that juror” or “you know, I really think this person is biased or prejudiced,” then I would try to get that person off, either preempt or with cause, but there again, it depends on all the questioning of a particular juror.

* * *

A: Mr. Christener, I know we sat at that table and we talked about the various jurors. If you would have said, you know “I don’t feel good about this guy,” I definitely, get him off, we would have done it, either cause or preempt, but I can’t remember exactly. It seems to me there was a juror or two that I had some questions and I said “what do you think about this one?” and we talked a little bit, well this is a plus, this is a minus and that, that you went along with and said “that’s fine” but I can’t remember exactly. This was so long ago. I don’t remember exactly what we said about each witness or each prospective juror.

Id. at 70-73.

The post-conviction court found and concluded in relevant part as follows:

The record disclosed that Mr. Currie was empanelled as a juror and that, in voir dire, he stated that he didn’t think he could be fair and saw no justification for extreme punishment of a small child. Some of Mr. Currie’s responses are inaudible and under questioning by the prosecuting attorney he seemed to indicate that he would require the State to prove its case. Blair Brown testified at the hearing in this case that it is his practice to confer with his client during voir dire before deciding to strike or keep a juror and that he presumed that he had conferred with the Petitioner before deciding to not challenge Mr. Currie. Courts are reluctant to second-guess trial counsel on trial tactics. It is presumed that each juror took his or her oath seriously and followed the instructions of the Court. On his own initiative the trial judge could have excused Mr. Currie if the judge believed that Currie would not follow the juror’s oath and the Court’s instructions. No evidence has been presented by the Petitioner to the contrary. Also, the Indiana Supreme Court has declined to find ineffective assistance of counsel based upon defense counsel’s failure to strike or challenge jurors or other actions during voir dire. Further, the evidence at trial clearly pointed to the Petitioner’s guilt as an accessory.

Appellant’s App. at 12-13 (citations omitted).

On appeal, Christener insists that he was prejudiced by his trial counsel's failure to challenge Currie, and, in support of that contention, he cites to our Supreme Court's opinion in Campbell v. State, 547 N.E.2d 843 (Ind. 1999). In Campbell, during voir dire, a prospective juror "communicated strong and unyielding opinions regarding criminals." Id. at 843. For instance, the prospective juror stated that "when people [are] convicted of crimes they should be excommunicated and totally separated from society by being placed on an island with a fence around it in the middle of an ocean[.]" Id. Further, he stated that he had previously started a petition to expel all criminals from Lake County and that "his views were unyielding and represented his philosophical view on punishment." Id. at 844. Still, the defendant stated that he would listen to the evidence to determine the defendant's guilt or innocence.

The defendant moved to strike the juror for cause, but the trial court denied that motion. Accordingly, the defendant used one of his peremptory challenges to strike the juror. Thereafter, after defendant had used all of his peremptory strikes, he encountered another prospective juror he wished to strike, but the trial court denied his request for an additional peremptory challenge, and that juror was empaneled. On appeal, our Supreme Court held that the trial court should have dismissed the juror for cause on defendant's motion in light of the juror's "less than convincing" statement that he would listen to the evidence "considering his very strong personal feelings and philosophies on the subject." Id. The Court reversed Campbell's convictions and remanded for a new trial. Id.

We find Campbell inapposite here. Juror Currie did not espouse a deep-seated hatred of criminals, but merely indicated that he could not understand how someone

could hurt a small child in the manner that was alleged here and that he “didn’t think” he could be fair. The prosecutor followed up with Currie to clarify whether he could be impartial despite his initial opinion, but due to a faulty recording of Currie’s response, there is no record to support a determination either way. There is simply no basis for comparison between the clear bias indicated by the juror in Campbell and the single statement and ambiguous follow up statement made by Currie here.

Regardless, Christener did not present any evidence to contradict his trial counsel’s testimony that the decision to empanel Currie was part of his trial strategy after discussing the matter with Christener.² Indeed, the jury ultimately found Parker primarily responsible for the vast majority of harm suffered by D.C., which suggests that trial counsel’s strategy was largely successful. Christener has not demonstrated that the post-conviction court erred when it concluded that he was not denied the effective assistance of trial counsel on the issue of alleged juror bias.

Jury Instructions

Christener next contends that he was prejudiced by his trial counsel’s failure to object to the jury instruction regarding culpability. In particular, the final instruction on culpability stated:

A person engages in conduct “knowingly” if, when he engages in this conduct, he is aware of a high probability that he is doing so. A person engages in conduct “intentionally” if, when he engages in the conduct, it is his conscious objective to do so.

² In his brief on appeal, Christener refers to an “Affidavit/Memorandum” as support for his contentions on this issue. But the State points out, correctly, that neither the affidavit nor the memorandum was admitted into evidence at the post-conviction hearing. As such, it is not evidence, and we cannot consider it on appeal.

Appellant's App. at 425. That instruction is a correct statement of the law. See Ind. Code § 35-41-2-2. But Indiana Pattern Jury Instruction 9.05 includes alternative language in brackets, which Christener contends should have been included in the instruction given at his trial. That pattern jury instruction reads:

A person engages in conduct "knowingly" if, when he engages in this conduct, he is aware of a high probability that he is doing so. [If a person is charged with intentionally causing a result by his conduct, it must have been his conscious objective not only to engage in the conduct but also to cause the result.] A person engages in conduct "intentionally" if, when he engages in the conduct, it is his conscious objective to do so. [If a person is charged with knowingly causing a result by his conduct, he must have been aware of a high probability that his conduct would cause the result.]

Christener's trial counsel testified during the post-conviction hearing that he did not object to the final instruction on culpability because he thought it was the pattern jury instruction. On appeal, Christener maintains that the omitted bracketed language should have been included in the final instruction because it was applicable to the crimes charged. While that may be true, Christener has not shown that the outcome of the trial would have been different had the alternative instruction been given.

Christener's defense theory at trial was that Parker was primarily responsible for D.C.'s serious bodily injuries. And the jury convicted Christener for aiding and abetting Parker in causing D.C.'s serious bodily injuries, which does not require evidence that Christener personally participated in each of the elements of the primary offense. See Hodge v. State, 688 N.E.2d 1246, 1248 (Ind. 1997). Thus, the bracketed language regarding an intention to cause a result was irrelevant to the aiding and abetting conviction and inconsistent with Christener's defense. There is no evidence that Christener's trial counsel's failure to object to the final instruction on culpability was not

part of his overall trial strategy. And “because we assume competence on the part of a lawyer at trial, an action or omission that is within the range of reasonable attorney behavior can only support a claim of ineffective assistance if that presumption is overcome by specific evidence as to the performance of the particular lawyer.” Morgan v. State, 755 N.E.2d 1070, 1076 (Ind. 2001). Again, Christener has not demonstrated that he was denied the effective assistance of trial counsel on this issue.³

Failure to Object to Prosecutor’s Characterization of Evidence

Finally, Christener contends that his trial counsel was ineffective when he did not object to the following statement made by the Prosecutor during closing remarks regarding the extent of D.C.’s injuries: “there is no dispute [that D.C. suffered serious bodily injuries and] there is no evidence to contradict the nurse who testified that these injuries had to be extremely painful when they were inflicted. There is nothing to controvert that.” Appellant’s App. at 412. On appeal, Christener maintains that two nurses testified regarding D.C.’s injuries and that neither testified that his injuries “had to be extremely painful when they were inflicted.” Brief of Appellant at 27. Accordingly, Christener asserts that the Prosecutor’s remarks were improper in that they referred to matters not in evidence. We cannot agree.

Final argument need not consist of a bland recitation of the evidence devoid of thought-provoking illustration. Warren v. State, 725 N.E.2d 828, 834 (Ind. 2000). “A

³ Christener also contends that his trial counsel was ineffective when he failed to argue in support of giving a jury instruction on proximate cause. In particular, Christener maintains that part of his defense theory was that Parker’s conduct was an “intervening and superseding cause” of D.C.’s injuries. Brief of Appellant at 26. But, again, because Christener was convicted of aiding and abetting Parker, he cannot show that a jury instruction on proximate cause would have changed the outcome of his trial. Christener cannot show ineffective assistance of trial counsel on that issue.

prosecutor's final argument may 'state and discuss the evidence and reasonable inferences derivable therefrom so long as there is no implication of personal knowledge that is independent of the evidence.'" Id. (quoting Hobson v. State, 675 N.E.2d 1090, 1096 (Ind. 1996)).

Here, two nurses testified, and while neither one expressly testified that D.C.'s injuries "had to be extremely painful," the Prosecutor's characterization of the nurses' testimony was appropriately based upon reasonable inferences taken from that testimony. In particular, Ann Beer, a nurse who treated D.C. in the emergency room, testified that D.C. had "extensive bruising with swelling redness," and "excessive markings" on the backs of his legs and genitalia. Appellant's App. at 226. Beer testified that D.C.'s injuries were "probably the worst [she had] seen" in her long career as an emergency room nurse. Id. Further, Wava Lichtle, another nurse who treated D.C. in the emergency room, testified that D.C.'s buttocks were so swollen that she thought he was wearing a diaper before they removed his pants. But D.C. was only wearing underwear. She described his buttocks as "very [swollen], purple, hard to [the] touch[.]" Id. at 236. The Prosecutor's remarks were not improper, and Christener cannot show that his trial counsel was ineffective when he did not make an objection thereto.

Issue Two: Appellate Counsel

Christener also contends that he was denied the effective assistance of appellate counsel. The standard of review for a claim of ineffective assistance of appellate counsel is essentially the same as for trial counsel in that the defendant must show that appellate

counsel was deficient in his performance and that the deficiency resulted in prejudice. Hooker v. State, 799 N.E.2d 561, 570 (Ind. Ct. App. 2003), trans. denied.

Here, Christener's sole contention is that his appellate counsel was deficient when he did not assert a Doyle error on appeal. In particular, Christener maintains that the Prosecutor improperly referred to Christener's post-arrest silence during cross-examination of him and during the State's closing argument, in violation of Doyle v. Ohio, 426 U.S. 610 (1976) (holding prosecutor may not use defendant's post-arrest silence to impeach defendant). Christener directs us to the following excerpts of the trial transcript to support his contention:

Q: Ok. Why is it that today is the first time that we're hearing this version of your events, that you actually didn't participate in the beating of [D.C.]?

* * *

Q: But you didn't come forward with this before?

* * *

Q: So you knew you'd gone too far, so you immediately went to the authorities and said what happened?

* * *

Q: So when was the first time that you told anybody with any authority to do anything about it that Betty Parker was the one that did all of this?

* * *

Q: Was it today?

* * *

Q: Well it came out later that Betty Parker actually talked to Sylvia Bleeke and then to Detective Meyer and then testified several times that

you were involved in the beating of [D.C.] and you didn't bother to tell anyone that could do anything about it until today. That you actually weren't involved, correct?

Appellant's App. at 368-73. And during his closing argument, the Prosecutor stated:

[T]he defendant didn't come forward until today to say that he didn't think he hurt [D.C.] and that he only hit him twice. But he knew since last May that he'd been implicated and he didn't bother to tell anybody that that was wrong.

* * *

The defendant didn't come forward before today to tell anyone that he had hit [D.C.] only twice.

Id. at 385-87. Again, Christener contends that those statements constitute Doyle violations and that his appellate counsel should have raised that issue on appeal.

However, as the post-conviction court found, Christener did not present any evidence in support of his post-conviction petition that he was Mirandized. Doyle applies only to post-arrest silence, after a defendant has been read his Miranda rights. “Doyle does not apply to cross-examination that merely inquires into prior inconsistent statements.” Anderson v. Charles, 447 U.S. 404, 408 (1980). Here, within two hours of D.C.'s admission to the emergency room, Christener spoke with Sylvia Bleeke, the family case manager for the Adams County Division of Family and Children. During that conversation, Christener lied to Bleeke, telling her that he was at work when the injuries occurred and that he “knew nothing about the bruises until he got home from work on March 9th about 4:30[.]” Appellant's App. at 221. But Christener changed his story at trial. The State was permitted to cross-examine Christener regarding the

inconsistencies in his testimony. And, absent evidence that Christener was Mirandized, he cannot show that a Doyle error occurred.

Regardless, even assuming that the Prosecutor's questions and comments violated Doyle, any error was harmless. Our Supreme Court has set out five factors to consider in determining whether a Doyle violation has occurred, namely: the use to which the prosecution puts the post-arrest silence; who elected to pursue the line of questioning; the quantum of other evidence indicative of guilt; the intensity and frequency of the reference; and the availability to the trial judge of an opportunity to grant a motion for mistrial or to give curative instructions. Henson v. State, 514 N.E.2d 1064, 1067 (Ind. 1987). Here, the challenged questions on cross-examination of Christener comprise only twelve lines out of seven pages of cross-examination, and the closing remarks comprise only four lines out of eight and one-half pages of closing argument. Thus, the intensity and frequency of the references are minimal. And the overwhelming evidence, including Christener's own testimony, supported the guilty verdicts in this case. Any error in the Prosecutor's questions and remarks was harmless. See id. at 1068. And we agree with the post-conviction court that Christener cannot show ineffective assistance of appellate counsel for failure to assert a Doyle violation on direct appeal.

Conclusion

In sum, Christener has failed to satisfy his rigorous burden on appeal from a negative judgment to show that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite to that reached by the post-conviction court. Christener did not prove that but for his trial counsel's alleged errors, there is a

reasonable probability that the result of the proceeding would have been different. Neither has Christener established that he was denied the effective assistance of appellate counsel. The post-conviction court did not err when it denied his petition for post-conviction relief.

Affirmed.

KIRSCH, J., and BARNES, J., concur.