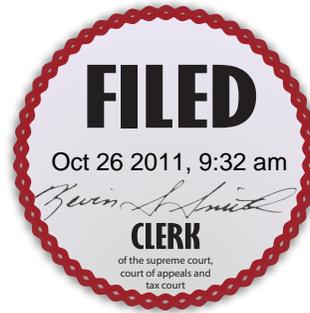


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

DANIEL J. HARVEY,)
)
Appellant-Petitioner,)
)
vs.) No. 45A03-1104-PC-150
)
STATE OF INDIANA,)
)
Appellee-Respondent.)

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Diane Ross Boswell, Judge
The Honorable Natalie Bokota, Magistrate
Cause No. 45G03-1003-PC-1

OCTOBER 26, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARTEAU, Senior Judge

STATEMENT OF THE CASE

Petitioner-Appellant Daniel J. Harvey appeals the denial of his petition for post-conviction relief. We affirm.

ISSUE

Harvey raises two issues, which we consolidate and restate as: whether the post-conviction court erred by denying Harvey's petition.

FACTS AND PROCEDURAL HISTORY

The State charged Harvey with two counts of child molesting, one as a Class A felony and one as a Class C felony. Ind. Code § 35-42-4-3 (1998). The State alleged in the charging information that Harvey had molested his girlfriend's child, T.W., on two occasions between January 1, 2004 and July 2, 2005. The case was tried to a jury, and the jury found Harvey guilty as charged. The trial court sentenced Harvey to an aggregate term of thirty years, with twenty years executed and ten years suspended to probation. Harvey appealed, and this Court affirmed the trial court's judgment in an unpublished Memorandum Decision. *See Harvey v. State*, Cause No. 45A03-0706-CR-270 (Ind. Ct. App. Apr. 16, 2008).

Subsequently, Harvey filed a petition for post-conviction relief. The post-conviction court denied Harvey's petition after a hearing, concluding, "[T]he petitioner was not denied effective representation." Appellant's App. p. 92.¹ Harvey now appeals.

¹ In addition to the Appellant's Appendix, we have been provided with the Appellant's Appendix from Harvey's direct appeal and the Trial Transcript. We will cite these documents as "Direct Appeal App." and "Trial Tr."

DISCUSSION AND DECISION

In reviewing the judgment of a post-conviction court, appellate courts consider only the evidence and reasonable inferences supporting its judgment. *Hall v. State*, 849 N.E.2d 466, 468 (Ind. 2006). To prevail on appeal from the denial of post-conviction relief, the petitioner must show that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite to that reached by the post-conviction court. *Id.* at 469. Where, as here, the post-conviction court enters findings and conclusions in accordance with Indiana Post-Conviction Rule (1)(6), we will reverse upon a showing of clear error—that which leaves us with a definite and firm conviction that a mistake has been made. *Id.*

Harvey argues that he received ineffective assistance of trial counsel. To establish ineffective assistance of counsel, a defendant must demonstrate that counsel performed deficiently and the deficiency resulted in prejudice. *Lee v. State*, 892 N.E.2d 1231, 1233 (Ind. 2008). To satisfy the first prong, the defendant must show that counsel’s representation fell below an objective standard of reasonableness, committing errors so serious that the defendant did not have the “counsel” guaranteed by the Sixth Amendment. *Henley v. State*, 881 N.E.2d 639, 644 (Ind. 2008). To satisfy the second prong, the defendant must show a reasonable probability (that is, a probability sufficient to undermine confidence in the outcome) that, but for counsel’s errors, the result of the proceeding would have been different. *Id.* Counsel’s performance is evaluated as a whole. *Heyen v. State*, 936 N.E.2d 294, 303 (Ind. Ct. App. 2010), *trans. denied*. Furthermore, counsel’s performance is presumed effective, and a defendant must offer

strong and convincing evidence to overcome this presumption. *Ritchie v. State*, 875 N.E.2d 706, 714 (Ind. 2007).

In this case, Harvey raises three challenges to the conduct of his trial counsel, Vicki Battle-Cashwell.² First, he contends that Battle-Cashwell rendered ineffective assistance with respect to the State’s Class A felony child molesting charge. Specifically, Harvey notes that in order to prevail on that charge as stated in the information, the State was required to prove that, among other elements of the offense, T.W. performed or submitted to deviate sexual conduct with him.³ Direct Appeal App. p. 13; Ind. Code § 35-42-4-3(a). Here, when cross-examining Child Protective Services (“CPS”) investigator Tina Kozlowski, Battle-Cashwell asked about T.W.’s statement to Kozlowski that Harvey had penetrated her vagina with his finger and his penis. Harvey notes that the State did not tender any evidence as to that specific allegation. Harvey argues that if Battle-Cashwell had not questioned Kozlowski about penetration, then the jury would not have learned of that specific event, which supported the State’s Class A felony child molesting charge.

Pursuant to our precedent, we view Battle-Cashwell’s performance as a whole. We begin by noting a conference involving the trial court and the parties that occurred at the beginning of the trial outside the presence of the jury. The prosecutor informed the trial court that while preparing T.W. to testify, he observed her reaction to his questions

² Battle-Cashwell has moved out of Indiana and did not testify at the hearing on Harvey’s petition for post-conviction relief.

³ Deviate sexual conduct is defined as: “an act involving: (1) a sex organ of one person and the mouth or anus of another person; or (2) the penetration of the sex organ or anus of a person by an object.” Ind. Code § 35-41-1-9 (1984).

and initially “was concerned that she might be lying.” Trial Tr. p. 20. After further consideration, the prosecutor decided that T.W. was merely reacting to the trauma of testifying and told the trial court that T.W. would tell the truth. Nevertheless, at the same conference Battle-Cashwell informed the court that she had observed T.W.’s caregivers talking sharply to T.W. outside the courtroom and expressed concern that “[T.W.] was being forced in some way to proceed with this case.” *Id.* at 18. As a result of these reports, the trial court talked to T.W. in chambers and determined that she would testify truthfully. The trial court concluded, “[T]he inconsistencies in her statement are issues for the jury and they certainly would be brought up during the trial.” *Id.* at 19.

During opening arguments, Battle-Cashwell asked the jury to remember as the trial proceeded “what do you look for when someone is telling you the truth, an adult, a child” Trial Tr. pp. 45-46. Furthermore, she informed the jury that there would be inconsistencies between T.W.’s various statements. Battle-Cashwell further advised the jury that T.W.’s testimony would be a “story that [T.W.’s caregiver] and her mother comes up with.” *Id.* at 49.

Next, T.W. testified that on one occasion, Harvey had touched her on her “private parts.” *Id.* at 62. On another occasion, when they were living in a different location, Harvey touched her “private parts” again. *Id.* at 66. T.W. was taken to the hospital to be examined after each incident. During T.W.’s cross-examination, Battle-Cashwell questioned T.W. about different statements she had made to different people about what Harvey had done to her. She also questioned T.W. about inconsistencies in her deposition testimony.

Subsequently, the State called Kozlowski to testify. During cross-examination of Kozlowski, Battle-Cashwell asked her to review her information on T.W.'s two trips to the hospital, and Kozlowski testified that the hospital staff found no sign of physical trauma. On redirect examination, Kozlowski testified that a victim of molestation might not show any vaginal trauma, depending upon how long ago the molestation occurred.

On recross examination, the following discussion occurred:

Battle-Cashwell: Ms. Kozlowski, based on [T.W.'s] description of the abuse that she sustained or that she was subjected you [sic], would you have expected to find trauma to the vaginal area?

Kozlowski: Absolutely not. . . .

Battle-Cashwell: Previously you testified as to what you said the child told you, is that correct?

Kozlowski: That is correct.

Battle-Cashwell: And based on what she told you, you felt the [sic] maybe there was, that you wouldn't have expected to see anything wrong with her vaginal area is that correct?

Kozlowski: Correct.

Battle-Cashwell: But you didn't tell us everything that she said, you didn't tell us that she said he put his finger in her and he put his private in her --

Trial Court: Wait, we need another foundation because she didn't testify to that. Did she tell you that?

Kozlowski: Yes, your Honor, but she left part of it out.

Trial Court: Okay, did she tell you, what was your other statement.

Battle-Cashwell: Did she tell you that the finger was supposed to have penetrated her and the penis was supposed to have penetrated her?

Kozlowski: She did but she --

Battle-Cashwell: No, that's the question, did she tell you that?

Kozlowski: Yes.

Battle-Cashwell: Okay, now with that, when you went, the hospital report said her hymen was intact, is that correct?

Kozlowski: Correct.

Battle-Cashwell: So with her having said that she had something penetrated [sic] her vaginal area that was the purpose of the doctor taking, making this medical exam is that correct?

Kozlowski: Correct.

Battle-Cashwell: And when they examined her because of this alleged penetration, they found no evidence of that, did they?

Kozlowski: Full penetration, no.

Trial Tr. pp. 213, 215-16.

Next, when cross-examining a police officer who had investigated the case, Battle-Cashwell asked the officer about a medical report of an exam of T.W., and the officer agreed that the report did not find any evidence of penetration. Subsequently, during the defense's presentation of evidence, Battle-Cashwell called T.W.'s foster caregivers to the stand and asked them about their treatment of T.W. in the hall prior to the trial. In addition, Battle-Cashwell called a witness who testified that after jury selection, she saw T.W.'s foster caregivers talking to T.W. in the hall in an angry manner.

Finally, during closing arguments, Battle-Cashwell characterized T.W.'s testimony about the molestations as false. She pointed out inconsistencies in T.W.'s statements and argued that T.W. made up the allegations because she wanted to live with her foster caregivers, who Battle-Cashwell asserted were encouraging T.W. to lie. Battle-Cashwell reminded the jury of the inconsistency between T.W. telling Kozlowski that Harvey penetrated her with his finger and his penis and the medical examination results showing no sign of penetration.

We determine from the foregoing evidence that Battle-Cashwell was carrying out a strategy of convincing the jury that T.W. was lying about the molestations on behalf of her foster caregivers. This strategy was reasonable due to the prosecutor's statement to the trial court before trial that he was initially concerned that T.W. might not be telling the truth. In light of Battle-Cashwell's strategy, it was reasonable for her to ask Kozlowski about the inconsistency between what T.W. told her and what the medical examination showed regarding the possibility of Harvey penetrating T.W.'s vagina with his finger or his penis. The inconsistencies could have further weakened T.W.'s credibility and the impact of her testimony. We decline to second-guess Battle-Cashwell's strategy. *See Kubsch v. State*, 934 N.E.2d 1138, 1152-53 (Ind. 2010) (determining that a defendant's trial counsel rendered effective assistance despite eliciting prejudicial testimony from a witness because counsel was attempting to use the witness's testimony to discredit another witness).

Harvey's second allegation of ineffective assistance is that during the trial, Battle-Cashwell failed to object to a hearsay statement during the testimony of Ethel Robinson,

who was one of T.W.'s foster caregivers. Specifically, Battle-Cashwell did not object when Robinson testified that T.W. had told her that Harvey had "gone down" on her.⁴ Trial Tr. p. 154. Harvey contends that if Battle-Cashwell had objected to Robinson's hearsay statement, then the objection would have been sustained, and this evidence of criminal deviate conduct would not have been available to support the State's Class A felony child molesting charge.

Robinson's statement regarding oral sex was made in passing and is the only reference to oral sex in the transcript. The State did not present any other evidence regarding this allegation and did not present argument on this allegation to the jury. Battle-Cashwell could have determined it was better to avoid drawing the jury's attention to this isolated statement. We cannot conclude that it was objectively unreasonable for her to refrain from objecting to Robinson's statement. *See Pennycuff v. State*, 745 N.E.2d 804, 815 (Ind. 2001) (determining that trial counsel did not provide ineffective assistance by failing to object to a therapist's hearsay testimony because trial counsel could have reasonably decided "to let the brief statement pass unremarked rather than to highlight it with even a sustainable objection").

Harvey's third and final allegation of ineffective assistance is that Battle-Cashwell should have objected to certain testimony by Kozlowski. Harvey contends this testimony inappropriately vouched for the accuracy of T.W.'s testimony. Harvey cites *Rose v. State*, 846 N.E.2d 363 (Ind. Ct. App. 2006), in support of his allegation. In that case, A.G., a six-year-old, alleged that Rose had molested her. At trial, the State presented the

⁴ Harvey asserts that Robinson's statement was a reference to oral sex. Appellant's Br. p. 15 n.3.

testimony of a doctor who had examined A.G. The doctor testified “at least eight times during his testimony” about how convinced he was by A.G.’s statements. *Id.* at 367. This Court concluded that the doctor’s testimony as to A.G.’s truthfulness was improper because it invaded the province of the jury, and Rose’s counsel was ineffective for failing to object to such testimony.

In the current case, Kozlowski testified that in July 2005, she received a report from a hospital regarding an allegation of child molestation involving T.W.’s family. She further stated that before going to the hospital, she stopped by her office to see if CPS had any prior contact with the family. When the prosecutor asked her to describe what she learned from her review of the records, Kozlowski stated,

The prior history on the family, I believe it was November, ’04, so it would have been the Fall or Winter preceding the day I got this call. We had substantiated on Mr. Harvey for child molesting in our computer and [T.W. was] already the victim one time. So when I questioned mother about that investigation, she stated yes that a worker, she was aware of that and a worker had told her to keep [T.W.] away from Mr. Harvey.

Trial Tr. p. 201.

We conclude that this case is distinguishable from *Rose*. Unlike the doctor in *Rose*, in this case Kozlowski was not testifying as to her belief in T.W.’s truthfulness. Instead, she was explaining how she became involved in and investigated the case. Furthermore, in *Rose*, the doctor repeatedly stated that A.G. was believable and explained why he was convinced of the truth of A.G.’s claims. In this case, Kozlowski simply noted that an allegation of child molestation had been “substantiated,” without explaining what the term meant. Consequently, *Rose* is not controlling, and Kozlowski’s testimony

was not improper. Therefore, Battle-Cashwell did not render ineffective assistance by failing to object to Kozlowski's testimony on this point.

CONCLUSION

For the reasons stated above, we affirm the judgment of the trial court.

Affirmed.

NAJAM, J., and KIRSCH, J., concur.