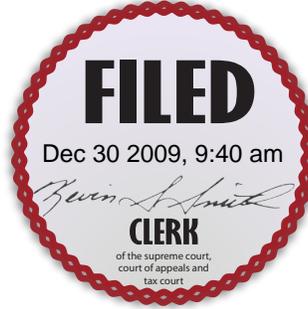


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

ALAN G. LOOSEMORE, JR.,)

Appellant-Defendant,)

vs.)

No. 82A01-0905-CR-230

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE VANDERBURGH CIRCUIT COURT
The Honorable Robert R. Aylsworth, Judge
Cause No. 82C01-0812-FC-1286

December 30, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Following a jury trial, Alan Loosemore was convicted of Forgery¹ as a class C felony and fourteen counts of Theft² as class D felonies. Loosemore presents three issues for our review:

1. Was Loosemore denied his Sixth Amendment right to cross-examine a witness?
2. Did the trial court abuse its discretion in permitting the State to inquire into the reasons for Loosemore's suspension from the practice of law during cross-examination of Loosemore?
3. Did Loosemore receive ineffective assistance of trial counsel?

We affirm.

The facts most favorable to the convictions reveal that Loosemore began working for Mannon Walters in 2004. Walters owned several companies, including F.E. Moran Oil Company, Inc. and Mannon L. Walters, Inc. During the course of Loosemore's employment, his duties ranged from general office work to drafting and reviewing documents to labor work associated with oil wells in the field to negotiating medical bills of an injured fellow employee.

On March 26, 2006, Loosemore forged the signature of the bookkeeper, Ivy Morris, on a company check for \$368.90. The following day while balancing the company books, Morris noticed a check that cleared the bank was out of sequence.³ Morris contacted the bank and requested a copy of the check. She then confronted Loosemore, who admitted he

¹ Ind. Code Ann. § 35-43-5-2(1) (West, PREMISE through 2009 1st Regular Sess.).

² I.C. § 35-43-4-2 (West, PREMISE through 2009 1st Regular Sess.).

³ Morris testified that the check number was from a series of checks kept in storage in a pole barn.

issued the check to himself and forged Morris's signature. Loosemore claimed he did so pursuant to Walters's authorization, but Walters denied giving Loosemore the authority to issue the check. When Morris inquired how he came up with the amount, Loosemore explained that he wanted the check to look like a paycheck. Loosemore was not terminated, but rather, was sent to work on the oil wells in the field.

In August 2007, Michael Pittman was seriously injured while working in the oil fields. Loosemore, who was an attorney until suspended from the practice of law in 2002, was brought back into the office to negotiate Pittman's medical bills. The company did not have worker's compensation insurance and decided to pay Pittman's medical bills and bi-weekly wages out of the company's account. The procedure for the payment of those expenses was that Morris would give Loosemore a check to deposit into an account at Old National Bank and then Loosemore was to have a cashier's check issued to a medical service provider or Pittman to cover his wages.

On August 13, 2008, Pittman informed the company that he had not received his paycheck. Morris called Old National and learned that Loosemore had issued the cashier's check intended for Pittman to himself. Morris investigated further, asking for records and copies of the other cashier's checks that had been purchased by Loosemore at her direction. Morris learned that Loosemore had, on an irregular basis, issued cashier's checks to himself, rather than the payee he was instructed to issue the check to. In some instances, Loosemore issued a check to himself for the full amount, and in others, he issued a check to himself in an amount less than the total and a check to the identified payee for the balance. From the

information obtained from the bank's records, Morris created a spreadsheet showing the date the check she provided Loosemore was deposited into the bank, the date the cashier's check was issued, the cashier's check number, the payee, and the amount of the check. In total, Loosemore issued checks to himself in the amount of \$33,448.91. Morris reported her findings to Walters. That same week, Walters reported the incidents to police. Both Walters and Morris denied Loosemore's claim that Loosemore was authorized to issue the cashier's checks to himself.

On December 1, 2008, Loosemore was charged with one count of forgery as a class C felony (referring to the 2006 incident when Loosemore forged Morris's signature) and fourteen counts of theft, all as class D felonies (relating to separate incidents when Loosemore issued cashier's checks to himself without authorization). During the discovery phase, Loosemore filed a subpoena duces tecum requesting Morris's deposition and seeking numerous documents. Morris, a non-party witness, filed a motion to squash the subpoena of the following items:

2. Copies of all documents including e-mails, faxes and other correspondence relating to any Private Placement Memoranda sold or published in 2005 and 2006 by Mannoil LLC, Mannon Walters, Inc., F.E. Moran Company and/or F.E. Moran Oil Company.
3. Records of all payments made to Alan G. Loosemore, Jr., from June, 2005 through August, 2008 by Mannon Walters, Inc., F.E. Moran Company and/or F.E. Moran Oil Company.

* * *

6. All title opinions from Craig Hedin for the following wells: Kenneth Short 11, Kenneth Short 12, John Short 1, KSA, Teresa Suc Roy, Fenkeyville 1-22, Feakeyville 2-22.

Appellant's Appendix at 73-74. At a hearing on the motion to quash, Morris argued that the items requested were irrelevant to the charges against Loosemore and the requests were overly broad. Loosemore argued that the documents pertained to worker's compensation insurance and that the evidence would show that Walters was withholding information from his investors. Loosemore asserted that such evidence was relevant to undermine Walters's credibility at trial. The trial court granted Morris's motion to quash regarding the items listed in numbers two and six, but denied the motion to quash with regard to payments to Loosemore as requested in number 3.

On March 25, 2009, a jury found Loosemore guilty as charged. The trial court subsequently sentenced Loosemore to a four-year sentence on the forgery conviction and one and one-half years for each theft conviction. The court ordered all of the sentences to run concurrently with one another (for an aggregate sentence of four years) and consecutively to the sentence imposed under cause number 82C01-0110-CF-916.

1.

Loosemore argues that the trial court erroneously granted part of Morris's motion to quash. Loosemore maintains that the denial of access to discovery, in effect, denied him the opportunity to cross-examine a State's witness on that subject matter in order to undermine the witness's credibility. The crux of his argument is thus that he was denied his Sixth Amendment right to confrontation when he was denied the ability to properly cross-examine Walters on Walters's financial interests in testifying.

The Sixth Amendment to the United States Constitution provides: “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him” The essential purpose of the Sixth Amendment right of confrontation is to ensure that the defendant has the opportunity to cross-examine the witnesses against him. *Howard v. State*, 853 N.E.2d 461 (Ind. 2006). As our Supreme Court has recognized, the right to adequate and effective cross-examination is fundamental and essential to a fair trial. *Id.* “It includes the right to ask pointed and relevant questions in an attempt to undermine the opposition’s case, as well as the opportunity to test a witness’ memory, perception, and truthfulness.” *Id.* at 465. This right, however, is subject to reasonable limitations placed at the discretion of the trial judge. *Smith v. State*, 721 N.E.2d 218 (Ind. 1999). “[T]rial judges retain wide latitude . . . to impose reasonable limits . . . based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness’ safety, or interrogation that is repetitive or only marginally relevant.” *Id.* at 219 (quoting *Thornton v. State*, 712 N.E.2d 960, 963 (Ind.1999)).

Loosemore asserts that the outcome of his trial came down to whether the jury believed him or Walters. Loosemore maintains that Walters agreed to pay him a percentage of Pittman’s medical provider bills that he negotiated and that Walters further gave him the authority to issue the cashier’s checks to himself to compensate him for his efforts. Walters denied that there was any agreement to compensate Loosemore additional sums for his efforts in negotiating Pittman’s medical bills or that he gave Loosemore authority to issue checks to himself.

Because Walters's credibility was crucial, Loosemore asserts he was entitled to discovery of information he claimed would show Walters had a financial interest in testifying against him. Specifically, Loosemore claimed that Walters defrauded investors by representing that the companies in which the investors were funding had worker's compensation insurance when in fact they did not. Loosemore asserts that this fact provided Walters with incentive to pursue these charges against him to discredit him in the eyes of the investors.

Here, Loosemore had the opportunity to fully cross-examine Walters. In his subpoena duces tecum, Loosemore sought evidence concerning the company's lack of worker's compensation insurance. On both direct and cross-examination, Walters testified that the company did not have worker's compensation insurance. Loosemore's right of confrontation was therefore not violated. Regarding Loosemore's claim that the excluded information would have allowed him to cross-examine Walters regarding a purported cover-up to defraud company investors, such information is immaterial to the charges pending against Loosemore. Moreover, the extensive questioning on the subject of the company's lack of worker's compensation insurance was only marginally relevant with regard to Walters's credibility in light of his ready admission that his companies did not have worker's compensation insurance. Under these circumstances, we conclude that the trial court did not abuse its discretion granting, in part, Morris's motion to quash and in effect precluding Loosemore from cross-examining a witness on a matter irrelevant to the charges at hand.

2.

Loosemore argues the trial court abused its discretion in permitting the State to inquire into the reasons for Loosemore's suspension from the practice of law during the State's cross-examination of him. On direct examination, Loosemore testified that he had been suspended from the practice of law after he pleaded guilty to forgery and theft in four different counties. Loosemore explained that the convictions stemmed from his mishandling of a client trust fund account. On cross-examination, the State questioned Loosemore about a recent visit to a gambling establishment. The State asked Loosemore if he had violated a term of his probation by visiting the gambling establishment, and Loosemore denied that he had. Loosemore testified that he was only precluded from gambling. As a rebuttal witness, the State called Loosemore's probation officer, who testified that Loosemore was not permitted to enter a gambling establishment. The State also inquired into the details of the convictions underlying his suspension. Loosemore objected to the State's entire line of questioning as irrelevant and unduly prejudicial. Over Loosemore's continuing objection, the trial court permitted the State to read the following excerpt from the dissent of Chief Justice Shepard in *In re Loosemore*, 771 N.E.2d 1154, 1156 (Ind. 2002):

Information available in the public domain, however, makes it apparent that today's charge is but a small piece of a lengthy story of massive financial misconduct involving hundreds of thousands of dollars. Respondent has apparently robbed Peter to pay Paul over a period of several years in order to feed a serious addiction to gambling.

Loosemore argues that the State's line of questioning on cross-examination violated Ind. Evidence Rule 404(b) prohibiting evidence of prior bad acts. Loosemore asserts that he

was prejudiced when the State was permitted to flood the jury with information that went beyond what was necessary to establish his status with the bar and his criminal history. Loosemore also asserts that such evidence was irrelevant other than for allowing the jury to decide his guilt based upon his past conduct, which is prohibited by Evid. R. 404(b). The State argues that Loosemore opened the door to the State's questioning by discussing his suspension on direct examination. The State maintains that it was permitted to explore the reason for the suspension.

It is not entirely clear from the record why the State inquired into gambling matters or the details of Loosemore's prior convictions. While we can speculate as to its relevance, e.g., whether it was intended to establish motive, such is unnecessary because even if we assume it was error for the trial court to admit this evidence, any such error was harmless. When the trial court has erroneously admitted evidence, we "must disregard any error or defect which does not affect the substantial rights of the parties." Ind. Trial Rule 61. The improper admission of evidence is harmless error when the conviction is supported by such substantial evidence of guilt as to satisfy the reviewing court that there is no substantial likelihood that the questioned evidence contributed to the conviction. *Simmons v. State*, 717 N.E.2d 635 (Ind. Ct. App. 1999). A reversal may be obtained only if the record as a whole discloses that the erroneously admitted evidence was likely to have had a prejudicial impact upon the mind of the average juror, thereby contributing to the verdict. *Hardin v. State*, 611 N.E.2d 123 (Ind. 1993).

There was overwhelming evidence of Loosemore's guilt. The State's evidence included the check on which Loosemore forged Morris's signature and issued to himself. The State's evidence also included the carbon copies of the cashier's checks Loosemore issued to himself. Both Walters and Morris, the only two with authority to issue checks out of the company accounts, testified that they did not authorize Loosemore to issue the checks to himself. In light of this evidence, we conclude that if there was any error in the admission of the challenged evidence, the error likely had little impact on the minds of the jurors. Having reviewed the record, there is no substantial likelihood that the questioned evidence contributed to the conviction.

3.

Finally, Loosemore argues that he received ineffective assistance of trial counsel. Loosemore presents this claim on direct appeal without presenting any evidence.⁴ As our Supreme Court has noted,

“When the only record on which a claim of ineffective assistance is based is the trial record, every indulgence will be given to the possibility that a seeming lapse or error by defense counsel was in fact a tactical move, flawed only in hindsight. It is no surprise that such claims almost always fail.”

Woods v. State, 701 N.E.2d at 1216 (quoting *United States v. Taglia*, 922 F.2d 413, 417-18 (7th Cir. 1991)). Our review starts with the strong presumption that counsel rendered

⁴ We note that a post-conviction hearing is normally the preferred forum to adjudicate a claim of ineffective assistance of counsel. *McIntire v. State*, 717 N.E.2d 96 (Ind. 1999); *Woods v. State*, 701 N.E.2d 1208 (Ind. 1998). This is so because presenting such a claim often requires the development of new facts not present in the trial record. *McIntire v. State*, 717 N.E.2d 96. Although a defendant may choose to raise a claim of ineffectiveness of counsel on direct appeal, if he does so the issue will be foreclosed from collateral review. *McIntire v. State*, 717 N.E.2d 96; *Woods v. State*, 701 N.E.2d 1208.

adequate assistance and made all decisions by exercising reasonable professional judgment. *Walker v. State*, 843 N.E.2d 50 (Ind. Ct. App. 2006).

Thus, 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. *Id.* (citing *Strickland v. Washington*, 466 U.S. 668 (1984)), *trans. denied*. A counsel's performance is deficient if it falls below an objective standard of reasonableness based on prevailing professional norms. *Id.* 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.* Failure to satisfy either prong will cause the claim to fail. *Id.*

Loosemore's specific claim is that his trial counsel was ineffective for failing to object to State's Exhibits 1, 2, and 3 on grounds that the State failed to lay a proper foundation prior to their admission.⁵ We begin by noting that Loosemore's trial counsel did not object to the admission of State's Exhibits 1, 2, or 3. Under such circumstances, to establish ineffective assistance for counsel's failure to object, a defendant must establish that the trial court would have sustained the objection had one been made and that he or she was prejudiced by the failure to object. *Jones v. State*, 847 N.E.2d 190 (Ind. Ct. App. 2006). Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective. *Walker v. State*, 843 N.E.2d 50. Strategies are based on facts

⁵ Loosemore also lists several other alleged errors committed by his trial counsel, but fails to provide any argument thereon. Loosemore has therefore waived review as to these other purported deficiencies in his trial counsel's representation. *See* Ind. Appellate Rule 46A(8)(a).

known at the time and will not be second-guessed even if the strategy in hindsight did not serve the defendant's best interests. *See Curtis v. State*, 905 N.E.2d 410 (Ind. Ct. App. 2009).

Ind. Evidence Rule 803(6) provides that records of regularly conducted business activity are not excluded by the hearsay rule. The rule provides, in pertinent part:

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony or affidavit of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

Here, the State introduced its Exhibits 1 and 2 through the testimony of Morris. Morris explained that State's Exhibit 1 was a copy of a check she received from the bank; the check was made payable to Loosemore and Morris's signature had been forged. State's Exhibit 2 is a copy of the cashier's check that Morris testified was intended as a wage payment to Pittman, but was instead issued to and cashed by Loosemore. Loosemore argues that the copies of the checks admitted as State's Exhibits 1 and 2 are business records of the bank, and thus, as an employee of F.E. Moran Oil Co., Morris could not lay a proper foundation for their admission.

Here, if Loosemore's trial counsel had objected to the admission of State's Exhibits 1 and 2, the State could have established a proper foundation for their admission. Morris testified that she was responsible for the accounts payable for the company. As part of her duties, she was required to pay the bills and take care of "quickbooks." *Transcript* at 29.

Morris was also responsible for depositing checks when they came into the office, entering bills as they come into the office, paying those bills, and writing paychecks to the company employees. Morris would call the bank on a daily basis to check the bank balance and to record the checks that had cleared. The scope of Morris's job included maintaining the company accounts, including tracking checks written on those accounts. Loosemore has not shown that State's Exhibits 1 and 2 would not have been admitted if his trial counsel had objected.

With regard to State's Exhibit 3, a spreadsheet created by Morris showing the unauthorized cashier's checks to Loosemore,⁶ Loosemore argues that such is a business record created in anticipation of litigation and therefore, there is no assurance of reliability. Loosemore asserts that the document is self-serving. We first note that Loosemore's trial counsel relied upon and referred to such document during direct examination of Loosemore. Moreover, we observe that Loosemore's argument is nothing more than an attempt to change his defense strategy on appeal. During the trial, Loosemore's trial counsel's strategy was to affirmatively put forth evidence that Loosemore did issue the cashier's checks to himself (hence the reference to and reliance upon State's Exhibit 3) but argue that he was authorized to do so. Because Loosemore brought this claim on direct appeal, there is no evidence to counter Loosemore's trial counsel's strategy. As noted above, we will not second-guess

⁶ State's Exhibit 3 is a spreadsheet compiled by Morris identifying the date she directed Loosemore to deposit a company check into an account at Old National Bank and the cashier's checks that were subsequently issued. The actual recipients of the cashier's checks and the amounts received are also listed. Morris also identified the cashier's checks Loosemore issued to himself and the amounts thereof.

counsel's trial strategy even if the strategy in hindsight did not serve the defendant's best interests. *See Curtis v. State*, 905 N.E.2d 410. Thus, even if it was error to admit State's Exhibit 3, Loosemore has not shown how he was prejudiced. Loosemore has failed to demonstrate that his trial counsel was ineffective for failing to object to the admission of State's Exhibits 1, 2, or 3.

Judgment affirmed.

NAJAM, J., and BRADFORD, J., concur.