

**FILED**

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*Kevin L. Smith*

**CLERK**

of the supreme court,  
court of appeals and  
tax court

**BAKER, Chief Judge**

Appellant-petitioner Edgar Mendizabal appeals the denial of his petition for post-conviction relief. He contends that the post-conviction court erroneously determined that he did not receive the ineffective assistance of trial and appellate counsel. Finding no error, we affirm.

### FACTS

The facts, as described by this court in Mendizabal's direct appeal, are as follows:

On January 14, 2001, Mendizabal was drinking at his mother's apartment with Yader Laguna ("Laguna"), Aldo Sang ("Sang"), and a man named Luis. Laguna was dating Mendizabal's mother. While at the apartment, Mendizabal and his friends drank twenty-four to thirty-six beers. When Luis fell asleep, Mendizabal, Laguna, and Sang took a few beers and went to a vacant apartment. After they finished those beers, they went to Sang's home to retrieve two twelve packs of beer. They then returned to the vacant apartment and drank those beers.

Once all the beer was consumed, Laguna drove the three men to Sang's apartment, where he backed into a parked car in Sang's parking lot. Mendizabal told Laguna that Laguna was too intoxicated to drive and suggested that he should drive. Laguna became upset and started verbally abusing Mendizabal. Laguna then stopped the car, and the three men exited. Laguna confronted Mendizabal and continued to insult him and his family. Laguna then pushed Mendizabal, and Mendizabal said that he did not want to fight. Laguna continued to taunt Mendizabal with comments about his mother and his sister. Mendizabal eventually declared, "I am going to kill you for what you said" or "Now I am really going to kill you." Tr. p. 58-59. Mendizabal then pulled a long object from his waistband, and in the ensuing melee, Laguna suffered a stab wound to his upper abdomen. He eventually bled to death.

Mendizabal v. State, No. 49A02-051-CR-1014, slip op. p. 2-3. (Ind. Ct. App. July 25, 2006). The State charged Mendizabal with murder, but Mendizabal fled the country and did not return until nearly four years later, in early 2005. Mendizabal's jury trial took

place in September 2005, and on September 13, at the conclusion of the trial, the jury found him guilty as charged. He was sentenced to fifty-five years imprisonment. In Mendizabal's direct appeal, he argued insufficient evidence, abuse of discretion in sentencing, and imposition of an inappropriate sentence. This court affirmed his conviction and sentence. Id.

On January 4, 2007, Mendizabal filed a pro se petition for post-conviction relief, which he subsequently amended on June 9, 2008. The petition alleged that trial counsel was ineffective for the following reasons: (1) failure to conduct an adequate investigation; (2) failure to interview Mendizabal's sister and mother; (3) failure to provide an interpreter before or during trial; (4) failure to object to the admission of alleged Rule 404(b) evidence or to alleged prosecutorial misconduct; and (5) failure to tender a jury instruction on the lesser-included offense of reckless homicide. The petition further alleged appellate counsel was ineffective for failing to raise several of those same issues in Mendizabal's direct appeal.

The post-conviction court held evidentiary hearings on Mendizabal's petition on March 3 and May 12, 2009, at which Mendizabal's trial counsel testified. Following the hearings, the post-conviction court denied the petition on August 18, 2009. Mendizabal now appeals.

## DISCUSSION AND DECISION

### I. Standard of Review

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

Perry v. State, 904 N.E.2d 302, 307 (Ind. Ct. App. 2009), trans. denied. When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. Perry, 904 N.E.2d at 307. 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. Post-conviction procedures do not afford petitioners with a “super appeal.” Richardson v. State, 800 N.E.2d 639, 643 (Ind. Ct. App. 2003). Rather, they create a narrow remedy for subsequent collateral challenges to convictions that must be based upon grounds enumerated in the post-conviction rules. Perry, 904 N.E.2d at 307; see also P-C.R. 1(1).

## II. Assistance of Counsel

### A. Analytical Framework

When evaluating a claim of ineffective assistance of counsel, we apply the two-part test articulated in Strickland v. Washington, 466 U.S. 668 (1984). Pinkins v. State, 799 N.E.2d 1079, 1093 (Ind. Ct. App. 2003). First, the defendant must show that counsel’s performance was deficient. Strickland, 466 U.S. at 687. This requires a showing that counsel’s representation fell below an objective standard of reasonableness and that the errors were so serious that they resulted in a denial of the right to counsel guaranteed to the defendant by the Sixth and Fourteenth Amendments. Id. at 687-88. Second, the defendant must show that the deficient performance resulted in prejudice. Id. To establish prejudice, a defendant 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. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

Claims of ineffective assistance of appellate counsel are reviewed using the same standard applicable to claims of trial counsel ineffectiveness. Bieghler v. State, 690 N.E.2d 188, 193 (Ind. 1997). These claims generally fall into three categories: (1) denying access to the appeal, (2) waiver of issues, and (3) failure to present issues well. Id. at 193-95. The decision of what issue or issues to raise on appeal is one of the most important strategic decisions made by appellate counsel. Id. at 193. Thus, ineffectiveness is rarely found when the issue is the failure to raise a claim on direct appeal. Id.

#### B. Trial Counsel

At the hearings on Mendizabal's petition, trial counsel testified that he prepared extensively for Mendizabal's trial. Specifically, he reviewed all discovery provided by the State, prepared Mendizabal to testify at trial, took witness statements, filed pretrial motions, requested pretrial discovery, and filed motions in limine. He had concerns about the accuracy of the statements made to the police by certain Spanish-speaking witnesses, so he had the Public Defender's Agency Hispanic Coordinator review the taped statements and transcripts to check for accuracy. He made several non-trivial attempts, with the assistance of the Hispanic Coordinator and an investigator, to locate Mendizabal's sister.

### 1. Adequacy of Investigation

Mendizabal first contends that trial counsel conducted inadequate investigation, focusing on counsel's alleged failure to investigate the victim's criminal history. Mendizabal argues that if counsel had investigated adequately, he would have realized that Laguna—the victim—had several weapons-related convictions and an alleged penchant for carrying a knife and being violent when he drank. Had such evidence been uncovered, Mendizabal contends that it would have bolstered his self-defense argument at trial.

The record reveals, however, that the State provided counsel with Laguna's criminal history as part of pretrial discovery. Furthermore, Mendizabal testified at trial that Laguna habitually carried a knife, that he had a knife on him the night of the murder, that he had a bad reputation for fighting when he was drunk, and that on the night of the murder Laguna had struck Mendizabal's mother and attempted to rape his sister by threatening her with a knife.

At the post-conviction hearing, Mendizabal failed to offer any additional evidence that further investigation would have unearthed regarding Laguna's criminal history. Trial counsel testified that he examined Laguna's criminal history, sought evidence to support the self-defense argument, and presented what evidence he was able to find. Under these circumstances, the post-conviction court did not err by finding that trial

counsel was not ineffective based on pretrial investigation of the victim and his background.<sup>1</sup>

## 2. Witness Interviews

Next, Mendizabal argues that trial counsel was ineffective for failing to conduct timely interviews of Mendizabal's sister, Melissa Ardon, and mother, Maria Villanueva. Mendizabal contends that Ardon and Villanueva could have testified regarding Laguna's alleged attempted rape of Ardon and battery of Villanueva on the night of the murder.

Mendizabal fled the country following the murder and did not return for approximately four years. Thus, when trial counsel began investigating the facts of the case, four years had passed, witnesses had moved, and the investigation was far more difficult as a result.

Counsel attempted to contact Ardon and Villanueva. Counsel, the Hispanic Coordinator for the Public Defender's Agency, and an investigator went to the last known address of Ardon and Villanueva but discovered that they had moved. Counsel spoke to the apartment manager and former neighbors and learned that the women had moved to another apartment complex. Trial counsel then went to that apartment complex and spoke to several people there, but those people did not know where Ardon and Villanueva were living.

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<sup>1</sup> Mendizabal also argues that had trial counsel properly investigated, he would have learned that Mendizabal never carried any weapons and had never been arrested for a weapons violation. Inasmuch as he asserted self-defense at trial, however, and admitted that he stabbed the victim, any evidence regarding Mendizabal's penchant for carrying weapons would have been irrelevant and inconsistent with his primary defense.

Trial counsel eventually acquired a telephone number for Ardon and contacted her by telephone. She initially said that Mendizabal had killed Laguna for no good reason. When trial counsel mentioned self-defense, she said, “Oh yeah, it was self-defense.” PCR Tr. p. 57. She continued to waver between the two versions of events and counsel determined that her testimony would not help Mendizabal. Ardon did not mention Laguna’s alleged attempted rape or battery. She refused to give counsel an address or any other way to contact her, and refused to come to court. Trial counsel attempted to serve subpoenas on Ardon and Villanueva for depositions, but was not able to serve them successfully. Mendizabal never supplied counsel with contact information for Ardon or Villanueva, other to inform him that Villanueva was living outside the United States.

Given this record, we find that trial counsel made significant efforts to locate Ardon and Villanueva under difficult circumstances. We do not find that he was ineffective in this regard. Furthermore, we decline to second-guess his determination that Ardon would have been an unhelpful witness even if he had been able to secure her presence at trial. Thus, we do not find that the post-conviction court erred by declining to find ineffective assistance on this basis.

### 3. Interpreter

Mendizabal next contends that trial counsel was ineffective for failing to use a Spanish-English interpreter during his pretrial discussions with Mendizabal and for failing to secure an interpreter during Mendizabal’s trial. Mendizabal claims that he did not fully understand English.



Regarding the pretrial interactions between attorney and client, trial counsel testified that he and Mendizabal had no problem communicating in English. Mendizabal never told counsel that he did not understand him or what he was saying, and he never requested an interpreter. The first indication that Mendizabal had this alleged problem was his own self-serving statements in his petition for post-conviction relief.

Furthermore, during trial proceedings, trial counsel filed a motion requesting the appointment of two interpreters. The trial court granted the request for only one interpreter and, indeed, an interpreter was sworn in and present during all trial proceedings. Mendizabal testified in English but indicated to the trial court that he occasionally needed the interpreter. The trial court reassured Mendizabal that the interpreter was there if he needed her. Again, the first indication that Mendizabal struggled with language comprehension was when he filed his petition for post-conviction relief. Under these circumstances, we find that the post-conviction court did not err by declining to find ineffective assistance for this reason.

#### 4. Failure to Object

Mendizabal next argues that trial counsel was ineffective for failing to object to alleged Rule 404(b) evidence and alleged prosecutorial misconduct. When an ineffective assistance claim is based on counsel's failure to object, the petitioner must establish that the trial court would have had no choice but to sustain the objection had it been made. Oglesby v. State, 515 N.E.2d 1082, 1084 (Ind. 1987).

As for the alleged Rule 404(b) evidence, Mendizabal has never specified or cited to this allegedly improperly admitted evidence. Thus, he has waived this argument and has failed to establish that trial counsel was ineffective for this reason.

As for the alleged prosecutorial misconduct, he makes a general claim that the prosecutor vouched for the credibility of a State's witness. He fails, however, to detail the alleged instance of misconduct and similarly fails to cite to the portion of the transcript in which the exchange occurred. Therefore, Mendizabal has also waived this argument.

#### 5. Failure to Tender Jury Instruction on Reckless Homicide

Finally, Mendizabal argues that trial counsel was ineffective for failing to tender a jury instruction on the lesser-included offense of reckless homicide. At the hearing on Mendizabal's petition, trial counsel testified that he discussed tendering jury instructions on lesser-included offenses with Mendizabal. Mendizabal rejected any such instructions, however, favoring an all-or-nothing strategy. Moreover, Mendizabal has offered no argument that the evidence presented at trial would have supported an instruction on reckless homicide. Under these circumstances, the post-conviction court did not err by declining to find ineffective assistance on this basis.

#### C. Appellate Counsel

Mendizabal next argues that appellate counsel was ineffective for failing to raise the following arguments on direct appeal: (1) lack of an interpreter at all times during the pretrial and trial proceedings; (2) admission of allegedly improper Rule 404(b) evidence; and (3) alleged prosecutorial misconduct.

Mendizabal did not call his appellate counsel to testify at the post-conviction hearing, nor did he seek an affidavit from counsel. Under these circumstances, the post-conviction court may infer that counsel would not have corroborated the allegations of ineffective assistance. Dickson v. State, 533 N.E.2d 586, 589 (Ind. 1989). Furthermore, Mendizabal does not make a cogent argument that these issues were significant, obvious, and clearly stronger than the issues raised by appellate counsel. Finally, Mendizabal fails to demonstrate any reasonable probability that the outcome of the direct appeal would have been different had appellate counsel raised any of these issues. Therefore, we find that the post-conviction court did not err by declining to find ineffective assistance of appellate counsel.

The judgment of the post-conviction court is affirmed.

DARDEN, J., and CRONE, J., concur.