

STATEMENT OF THE CASE

David Green appeals the denial of his petition for post-conviction relief.

We affirm.

ISSUES

1. Whether Green received ineffective assistance of trial counsel.
2. Whether the prosecutor committed misconduct.
3. Whether Green is entitled to post-conviction relief due to the cumulative effect of trial counsel's deficient performance and the prosecutor's misconduct.
4. Whether Green received ineffective assistance of appellate counsel.

FACTS

Some of the relevant facts are set forth in this court's decision in *Green v. State*, No. 29A05-0304-CR-199, slip op. at 2-3 (Ind. Ct. App. July 16, 2004), *aff'd on reh'g*, which reads as follows:

Between April 1, 1999 and September 17, 2000, Green engaged in several sexually inappropriate acts with his then nine-year-old daughter, E.G. Green was divorced from E.G.'s mother, and the acts primarily occurred during E.G.'s visits to Green's apartment and later to Green's new home. Some of the acts occurred at a house where Green was doing renovations as part of his construction business.

E.G. later told her mother about the incidents, and her mother reported them to the police. After an investigation led to evidence that corroborated E.G.'s version of the events, Green was arrested.

The State ultimately charged Green with Count I, class A felony child molesting; Count II, class B felony incest; Count III, class C felony child molesting; Count IV, class

C felony child molesting; Count V, class D felony disseminating matter harmful to minors; and Count VI, class D felony providing obscene performance harmful to minors. The trial court commenced a four-day jury trial on November 12, 2002.

The trial court admitted into evidence a letter written on November 21, 2000, by the then-nine-year-old E.G. to Green. E.G. gave the letter to her mother (hereinafter, “Mother”) and asked her to give the letter to Green. The letter, which Mother did not deliver to Green, stated as follows:

Dear Dad

Why don't you just tell the true (sic). You will [feel] much [better] on the inside. I would tell the truth so we don't have to go to [court] and you now (sic) get in berest (sic). Just tell the truth that you taught me[,] please do. You don't now (sic) how much I cryed (sic). And we won't need these [lawyers]. And I am fricken (sic) misting (sic) my family now tell the truth OK. You are [hurting] me and my family and [especially] you so tell the truth. Tell Dick, Syd, Dee, Jack the dog, Shadow the dog, and my [cousin] I said hi OK. And one more thing we are fighting like dog[s] and cats. I'm the cat and you are the dog. You are chasing me away from to (sic). I love you (OK).
Love, [E.G.]

During E.G.'s direct examination, the deputy prosecutor asked her whether she had written the letter. E.G. identified the letter as hers, and the letter was admitted and passed to the jury. The deputy prosecutor later read the letter as part of her closing argument. Green's trial counsel did not object to the admission of the letter or to its use in the closing argument.

No. 29A05-0304-CR-199, slip op. at 3 (citations to the record omitted).

In addition to testifying regarding the letter, E.G. testified to more than one incident where Green put his hand inside her pants, under her clothes, and rubbed her

“private part.” (Tr. 126).¹ She stated that on several occasions, Green “pulled down [her] pants and he licked” her “front private” with “[h]is tongue.” (Tr. 171). Green also “kissed [her] wrong,” when he “put his tongue inside [her] mouth.” (Tr. 154). He also touched and “squeezed” her “boobs” with his hands. (Tr. 160; 159).

E.G. testified that at least once, Green pulled down her pants, put “his front private part on [her] private part,” (Tr. 155), and “rubbed it around.” (Tr. 157). She explained that by “front private part,” she meant what he uses to “pee.” (Tr. 156).

E.G. further testified that Green had touched her “private” with a “buzzer,” which “vibrated.” (Tr. 166). She also testified that Green “would take his hand up and down with his front body part” until “[s]omething would come out.” (Tr. 173; 174). E.G. described the substance as “slimy and pale.” (Tr. 174).

E.G. testified that Green made her sit on a “copying machine,” (tr. 136), without any clothes, after which a “picture of [her] butt showed up on the computer.” (Tr. 137). The trial court admitted into evidence a copy of a picture made on a scanner. E.G.’s buttocks and genitalia are visible in the picture.

E.G. also testified that Green “opened up [a] magazine and he showed [her] something of a naked woman.” (Tr. 144). He also played a videotape of “a man shaving a woman’s private” and showed her both still photographs and movies on the computer. (Tr. 147). According to E.G., “[t]here were people on the computer,” but “[t]hey weren’t wearing clothes.” (Tr. 160). One of the movies depicted “a woman . . . eating . . .

¹ Citations to “(Tr. __)” are to the trial transcript. Citations to “(PCR Tr. __)” are to the post-conviction hearing transcript.

something that comes out of” where a man “pees.” (Tr. 161). The still photographs included a picture of E.G.’s stepmother, wearing “nothing,” (tr. 165), and a group of “little Chinese girls,” who “weren’t wearing any clothes.” (Tr. 166).

E.G. further testified that Green “showed [her] a picture of him.” (Tr. 162). E.G. testified that the photograph was of a naked Green and revealed “a tattoo on the right side of [Green’s] waist.” (Tr. 162). The trial court admitted into evidence the photograph. The photograph depicted a naked Green from the waist down to above the knees. A tattoo of a rose with Green’s wife’s name under it is visible in the picture.

The jury found Green guilty as charged. The trial court sentenced Green to an aggregate sentence of forty-one years.

Green appealed, arguing, *inter alia*, that the admission of E.G.’s letter constituted fundamental error; and that the trial court abused its discretion in admitting evidence of uncharged acts involving E.G. Specifically, Green argued that the trial court abused its discretion in admitting evidence of sexual conduct between him and E.G. in the form of the following exhibits: 1) the picture of E.G.’s buttocks and genitalia scanned into his computer; 2) the nude picture of Green; 3) a drawing made by E.G. of the “buzzer,” (tr. 166), used on her; and 4) various thumbnail images taken from one of Green’s computers. This court affirmed Green’s convictions.

Green, pro se, filed a petition for post-conviction relief on August 10, 2005. He asserted in his petition that his trial counsel was ineffective for failing to: 1) object to “prejudicial hearsay statements from state’s witnesses”; 2) “investigate and interview

witnesses which could have substantiated [Green]’s side of the story”; and 3) “present exculpatory evidence which could have been discovered prior to trial.” (App. 22).

Green, by counsel, filed an amended petition for post-conviction relief on January 16, 2009, and second amended petition on August 10, 2009. Therein, he asserted that he received ineffective assistance of trial and appellate counsel.

The post-conviction court held a hearing on Green’s petition on May 20, August 6, and September 3, 2009. On December 31, 2009, the post-conviction court entered its findings of fact and conclusions of law, denying Green’s petition.

Additional facts will be provided as necessary.

DECISION

A post-conviction petitioner bears the burden of establishing his claims by a preponderance of the evidence. *Lindsey v. State*, 888 N.E.2d 319, 322 (Ind. Ct. App. 2008), *trans. denied*. An appeal from the denial of post-conviction relief constitutes an appeal from a negative judgment. *Id.* Thus, 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.* In the post-conviction setting, conclusions of law receive no deference on appeal. *Id.* As to factual matters, the reviewing court examines only the probative evidence and reasonable inferences that support the post-conviction court’s determination and does not reweigh the evidence or judge the credibility of the witnesses. *Id.*

1. Ineffective Assistance of Trial Counsel

Green contends that his trial counsel was ineffective. Specifically, he argues that trial counsel failed to do the following: 1) “object to evidence and argument regarding extrinsic bad acts”; 2) “adequately impeach E.G.’s mother”; 3) “adequately impeach E.G.”; 4) “use professional judgment in calling E.G.’s brother to testify”; 5) “object to admission of [the] letter written by E.G.”; 6) “object to testimony vouching for [the] truthfulness of E.G.’s allegations”; 7) “adequately object to grooming testimony”; and “present a consistent defense[.]” Green’s Br. at i-ii.

To establish a post-conviction claim alleging a violation of the Sixth Amendment right to effective assistance of counsel, a defendant must establish before the post-conviction court the two components set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). First, a defendant must show that counsel’s performance was deficient. This requires a showing that counsel’s representation fell below an objective standard of reasonableness and that counsel made errors so serious that counsel was not functioning as “counsel” guaranteed to the defendant by the Sixth Amendment. Second, a defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, meaning a trial whose result is reliable. 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. A reasonable probability is one that is sufficient to undermine confidence in the outcome. Further, counsel’s performance is presumed effective, and a defendant must offer strong and convincing evidence to overcome this presumption.

Overstreet v. State, 877 N.E.2d 144, 151-52 (Ind. 2007) (citations omitted), *cert. denied*, 129 S. Ct. 458 (2008). “[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of

the inquiry if the defendant makes an insufficient showing on one.” *Strickland*, 466 U.S. at 697.

a. *Failure to object to evidence and argument regarding extrinsic bad acts*

Green argues that his trial counsel rendered ineffective assistance of counsel by failing to object to Mother’s “testimony that when E.G. was four years old, she said [Green] had touched her between the legs”; and testimony that officers discovered child pornography on Green’s home computer. Green’s Br. at 8. Specifically, he contends that his counsel should have invoked Indiana Evidence Rule 404(b), which provides that

[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident

The purpose of this rule is “to prevent the jury from assessing the defendant’s guilt in the present case on the basis of his past propensities.” *Bryant v. State*, 802 N.E.2d 486, 498-99 (Ind. Ct. App. 2004), *trans. denied*. Thus, the State may not admit evidence of prior bad acts where it offers the evidence for the sole purpose of creating a forbidden inference that the defendant’s present charged conduct is in conformity with his prior bad conduct. *Id.* at 499.

When a defendant objects to the admission of evidence on the grounds that it violates Evidence Rule 404(b), we must: 1) determine whether the evidence is relevant to a matter at issue other than the defendant’s propensity to commit the charged act; and 2) balance the probative value of such evidence against its prejudicial effect. *Wertz v.*

State, 771 N.E.2d 677, 683-84 (Ind. Ct. App. 2002). We will affirm the trial court’s admission of evidence of prior bad acts or misconduct if it is sustainable on any basis in the record. *Bryant*, 802 N.E.2d at 499.

However, harmless errors in admitting evidence under Evidence Rule 404(b) do not require reversal. ““The improper admission of evidence is harmless error when the conviction is supported by substantial independent evidence of guilt sufficient to satisfy the reviewing court that there is no substantial likelihood that the questioned evidence contributed to the conviction.”” *Wertz*, 771 N.E.2d at 684 (quoting *Headlee v. State*, 678 N.E.2d 823, 826 (Ind. Ct. App. 1997), *trans. denied*).

When a petitioner brings an ineffective assistance of counsel claim based upon trial counsel’s failure to make an objection, the petitioner must demonstrate that the trial court would have sustained a proper objection. *Law v. State*, 797 N.E.2d 1157, 1164 (Ind. Ct. App. 2003). “To succeed on a claim that counsel was ineffective for failure to make an objection, the defendant must demonstrate that if such objection had been made, the court would have had no choice but to sustain it.” *Sanchez v. State*, 675 N.E.2d 306, 310 (Ind. 1996). Additionally, the petitioner must demonstrate that failure to object prejudiced the petitioner. *Law*, 797 N.E.2d at 1162.

i. Mother’s testimony

Green argues that trial counsel was ineffective for failing to object to Mother’s testimony that Green committed an uncharged offense prior to the present offenses. We disagree.

Mother testified that when E.G. was four years old, E.G. informed her that Green “had touched her between her legs.” (Tr. 67). Mother explained, “She told me that they had been wrestling and had been wrestling around and he touched her between her legs.”² (Tr. 67). She further testified that when she discussed the matter with Green, “[h]e said he remembered that happening. . . . [H]e remembers wrestling with her and that he had possibly accidentally touched [E.G.] between her legs. That he was very sorry, and that he would explain that to her and be more careful.” (Tr. 68). Green denied that this conversation took place.

During the post-conviction hearing, trial counsel testified that her theory of defense was “factual innocence,” (PCR Tr. 43), and that the wrestling incident would “dispel the idea that [E.G.] was molested.” (PCR Tr. 44). She testified that she believed the purported conduct would refute that E.G. was being truthful regarding the charged conduct and show that E.G. “was manipulative and had been manipulative in the past.” (PCR Tr. 44).

We fail to see how Green accidentally touching E.G. between the legs while wrestling constitutes uncharged conduct or a prior bad act on the part of Green or portrays his character in order to show action in conformity therewith; there is no suggestion in Mother’s testimony that the contact between Green and E.G. was criminal or sexual. Mother’s testimony that E.G. told her that the touching occurred while wrestling suggests that the touching was accidental.

² It appears that Green’s brief omitted the portion of Mother’s testimony wherein she testified that E.G. explained that the touching occurred when she and Green were wrestling.

Given that the testimony did not violate Evidence Rule 404(b), Green has failed to meet his burden of establishing that had an objection been made, the trial court would have sustained the objection. He also has failed to demonstrate any prejudice due to trial counsel's failure to object to Mother's testimony. *See Piercefield v. State*, 877 N.E.2d 1213, 1216-17 (Ind. Ct. App. 2007) (finding that testimony regarding massages requested or demanded by the defendant were not so prejudicial as to constitute reversible error and that the testimony did not violate Evidence Rule 404(b) where the massages were not "per se inappropriate touching"), *trans. denied*. Even if the admission of the evidence did violate Evidence Rule 404(b), any error was harmless as the jury heard extensive testimony regarding Green's offenses against E.G.

ii. Officer's testimony

Green also argues that trial counsel was ineffective for failing to object to testimony that Detective William Howard of the Indianapolis Metropolitan Police Department found numerous depictions of pornography on Green's computers. He asserts that he was prejudiced by the suggestion that he "collected juvenile pornography." Green's Br. at 10.

During the trial, Detective Howard testified that he "was asked to find any graphical representation of a sexual nature dealing with juveniles" on the hard drives of Green's four computers. (Tr. 307). When asked by the State what he found, Detective Howard testified that "as far as the sexually explicit graphics that were contained on hard

drive #3, [he] found 4,520 graphics,” (tr. 319), that were “pornographic in nature” (Tr. 320).

Green’s trial counsel did not object to Detective Howard’s testimony. During the post-conviction hearing, she explained that while she “would not want the jury to think that there were thousands of juvenile pornographic graphics in the house,” (PCR Tr. 83), the testimony “does not reflect juvenile sexually explicit” graphics were discovered. (PCR Tr. 82-83).

Here, Detective Howard only testified that he found numerous pornographic images on Green’s hard drive; he did not testify that the images depicted children. We cannot say that possessing pornographic images of adults constitutes a bad act for purposes of Evidence Rule 404(b). *Cf. Williams v. State*, 690 N.E.2d 162, 174 (Ind. 1997) (“It is by no means clear that weapons possession, evidence of gun sales, and the like, are necessarily prior ‘bad acts’ for 404(b) purposes.”); *Rogers v. State*, 897 N.E.2d 955, 960 (Ind. Ct. App. 2008) (finding that possession of a common steak knife is not “the sort of evidence to which Rule 404(b) applies”), *trans. denied*.

Even if we were to assume that the admission of this evidence violated Evidence Rule 404(b), we would conclude that such error was harmless. As noted above, the jury heard E.G.’s extensive testimony regarding Green’s offenses. Therefore, any improper admission of evidence regarding pornographic materials was harmless and merely cumulative of other evidence properly admitted. *See Baber v. State*, 870 N.E.2d 486, 490

(Ind. Ct. App. 2007) (holding that a conviction of child molesting may rest solely upon the uncorroborated testimony of the alleged victim), *trans. denied*.

Given that Mother's and Detective Howard's testimony did not violate Evidence Rule 404(b), Green has failed to meet his burden of establishing that had objections been made, the trial court would have sustained the objections. He also has failed to demonstrate any prejudice due to trial counsel's failure to object to the testimony, as any error in admitting the testimony was harmless. Thus, we cannot say that Green's trial counsel was ineffective in this regard.

b. *Failure to impeach Mother*

Green asserts that trial counsel was ineffective for failure to impeach Mother's testimony. Specifically, he argues that his trial counsel was ineffective for failing to produce "meaningful impeachment" on cross-examination regarding Mother permitting E.G. to visit Green after E.G. first alleged that Green had touched her inappropriately. Green's Br. at 11.

Green also argues that "there were five other significant avenues of impeachment that counsel failed to explore[.]" Green's Br. at 13. Specifically, he maintains that trial counsel failed to impeach Mother with evidence of the following: 1) that Mother was retaliating against Green for his failure to pay child support; 2) Mother made inconsistent statements regarding the details of E.G.'s disclosure that Green had touched her inappropriately; 3) contrary to Mother's testimony that she reported E.G.'s allegations the next morning, she actually reported the allegations in the afternoon; 4) Mother made

inconsistent statements regarding E.G.'s performance at school; and 5) Mother made changes to E.G.'s deposition.

The nature and extent of cross-examination is a matter of strategy left to the trial counsel. *Waldon v. State*, 684 N.E.2d 206, 208 (Ind. Ct. App. 1997), *trans. denied*. “[A]lthough egregious errors may be grounds for reversal, we do not second-guess strategic decisions requiring reasonable professional judgment even if the strategy or tactic, in hindsight, did not best serve the defendant’s interests.” *State v. Moore*, 678 N.E.2d 1258, 1261 (Ind. 1997), *cert. denied*, 523 U.S. 1079 (1998). “Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective.” *Timberlake v. State*, 753 N.E.2d 591, 603 (Ind. 2001), *cert. denied*, 537 U.S. 839 (2002).

Moreover, we need not “determine whether counsel performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.” *Strickland*, 466 U.S. at 697. “If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.” *Id.*

To show ineffective assistance, Green must show that trial counsel’s failure to impeach Mother rendered the result of his trial unfair or unreliable. *See Johnson v. State*, 675 N.E.2d 678, 686 (Ind. 1996) (finding that the defendant must demonstrate a reasonable probability that, but for counsel’s deficient cross-examination of witnesses, he would not have been found guilty). Green has failed to do so.

i. Visits with Green

During direct examination, Mother testified that when E.G. was in the second grade, she told Mother that Green “had touched her between her legs.” (Tr. 68). According to Mother, she spoke with Green the next day and informed him that “the kids would not be coming over this weekend.” (Tr. 70). Later that day, Mother agreed to “a family meeting” with E.G., Green, and Green’s wife. (Tr. 71). Mother testified that during the meeting, E.G. denied that Green had touched her. Mother therefore allowed E.G. and E.G.’s younger brother (“Brother”) to spend the night at Green’s residence. According to Mother, she allowed E.G. to go with Green because, at the time, she “was in denial” (Tr. 77).

During cross-examination, Green’s counsel elicited testimony from Mother that after the family meeting, “every two weeks on a regular basis visitation occurred,” and “the following summer visitation occurred on a 6 week basis” (Tr. 91). Mother also admitted that Green exercised six weeks of visitation in the summer of 2000 without “a peep from E.G.” (Tr. 92).

Contrary to Green’s assertion, his trial counsel did extensively cross-examine Mother regarding E.G.’s visits with Green. Green fails to demonstrate how a more “meaningful impeachment” could have been produced. Green’s Br. at 11. While he may have wished to pursue the cross-examination further, we will not second guess his counsel’s tactic or strategy.

As to the remaining “significant avenues of impeachment,” Green does not assert that eliciting additional testimony from Mother would have contradicted E.G.’s testimony or revealed inconsistencies in E.G.’s testimony regarding the criminal charges. Green’s Br. at 13. Given E.G.’s compelling testimony against Green, we are unable to conclude that, even if trial counsel had cross-examined Mother to a greater extent, the result of the proceeding would have been different. Thus, Green fails to show that any deficiency prejudiced him.

ii. Child support arrearage, E.G.’s initial disclosure, and E.G.’s behavior at school

Failure to show prejudice aside, we recognize that not drawing undue attention to Green’s child support arrearage; Mother’s initial report that E.G. speculated that the rash on her genitalia was caused by Green “licking her there”; and E.G.’s difficulties in school could have been a tactical decision. (Green’s Ex. G at 225). Green’s child support arrearage does not reflect favorably upon Green’s character. Furthermore, testimony regarding a rash on E.G. genitals and E.G.’s difficulties in school could bolster the State’s allegations that Green was behaving inappropriately with his daughter, which adversely affected her behavior. *See, e.g., Saylor v. State*, 765 N.E.2d 535, 551 (Ind. 2002) (finding that choosing not to object to the State’s argument was a legitimate strategy to avoid drawing attention to testimony or argument unfavorable to the defendant), *rev’d on other grounds on reh’g*, 808 N.E.2d 646 (Ind. 2004); *Maldonado v. State*, 908 N.E.2d 632, 638 (Ind. Ct. App. 2009) (concluding that trial counsel “could have made a reasonable

strategic decision to forego introducing . . . evidence because she wanted to avoid the risk of jurors viewing her client more negatively than they already did”), *trans. denied*.

iii. Reporting E.G.’s allegations

As to Green’s contention that trial counsel should have impeached Mother regarding when she first reported E.G.’s allegations to the authorities, we find it unavailing.

Mother testified that she “called the police” the morning after E.G. disclosed that Green had been touching her. (Tr. 62). Mother reiterated that “[i]t was the first thing [she] did in the morning.” (Tr. 63). She, however, also testified that she “didn’t really know where to start” and eventually was directed to the proper authorities. (Tr. 63). The record shows that Mother reported the incident to the Department of Child Services on September 19, 2000. The time on the report is “13:49,” or shortly before 2:00 p.m. (Green’s Ex. H at 248).

Given Mother’s testimony that she did not “really know where to start,” (tr. 63), when reporting the incident to authorities, we are unable to conclude that cross-examination on this issue would have resulted in a different proceeding; Green has not presented evidence that refutes Mother’s testimony. As to Green’s assertion that “calling in the middle of the afternoon is more indicative of a parent who is making certain all her ducks are in a row,” Green’s br. at 16, Green has failed to demonstrate that there is a reasonable probability that, but for trial counsel’s failure to cross-examine Mother

further, the result of the trial would have been different; Mother already testified that she waited several hours before reporting E.G.'s allegations to authorities.

iv. Changes to the deposition

Green contends that trial counsel was ineffective for “fail[ing] to inform the jury that after E.G.’s deposition was transcribed, a correction sheet was submitted making changes to some of her answers.” Green’s Br. at 18. Green again has not shown a reasonable probability that “but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *See Overstreet*, 877 N.E.2d at 152.

During the post-conviction hearing, Mother denied making any changes to E.G.’s deposition. Green therefore cannot show that he was prejudiced by counsel’s failure to cross-examine her on this matter.

Furthermore, deciding not to bring the changes to the jury’s attention could have been a strategic decision. The transcript of E.G.’s deposition shows that she denied that Green “put his penis inside [her] private part.” (Green’s Ex. T at 59; 60). Specifically, she answered “no” in response to this question. (Green’s Ex. T at 59; 60). These answers were changed to “yes” on a form provided pursuant to Indiana Trial Rule 30(E). (Green’s Ex. T). During trial, E.G. testified that Green put “his front private part on [her] private part,” (Tr. 155), and “rubbed it around.” (Tr. 157). She, however, did not testify that he placed his penis inside her vagina. We cannot say that Green’s counsel was deficient for excluding any examination regarding whether Green did in fact place his penis inside E.G.’s vagina.

Accordingly, we find no error in denying Green post-conviction relief on these grounds. Green has shown neither deficient performance nor prejudice.

c. Failure to impeach E.G.

Green also asserts that trial counsel was ineffective for failing to impeach E.G. In addition to arguing that counsel “could have impeached E.G. more adequately” on several points, he argues that “there were four other significant avenues of impeachment that counsel failed to explore[.]” Green’s Br. at 22. Specifically, he argues that trial counsel should have impeached E.G. on statements made by either E.G. or Mother during the initial investigation regarding: 1) where E.G. and Green were sitting when Green touched E.G.; 2) whether Green had sexual intercourse with E.G.; 3) whether Green or Mother told E.G. that Green may go to jail for his conduct; and 4) what E.G. specifically said when she disclosed Green’s conduct to Mother.

Again, “the nature and extent of cross-examination is a matter of strategy delegated trial counsel.” *Osborne v. State*, 481 N.E.2d 376, 380 (Ind. 1985). The record shows that Green’s trial counsel vigorously cross-examined E.G. and Mother. The fact that trial counsel did not engage in more aggressive cross-examination could have been a strategic decision, particularly if the jury viewed E.G. as a sympathetic witness; and Green has failed to show that it was not a strategic decision on counsel’s part.

Furthermore, “[w]ith the benefit of hindsight, a defendant can always point to some rock left unturned to argue counsel should have investigated further.” *Ritchie v. State*, 875 N.E.2d 706, 719 (Ind. 2007), *reh’g denied*. “The benchmark for judging any

claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that it deprived the defendant of a fair trial." *Id.*

Here, Green maintains that trial counsel should have turned over many so-called rocks. He, however, has failed to establish that trial counsel's failure to do so prejudiced him or that the results of the trial would have been different, where E.G. testified in great length to Green's conduct; E.G. provided consistent accounts in her deposition and testimony regarding the charged conduct; E.G. admitted to denying her initial accusations; E.G. admitted that she had wanted to live with Green and his wife; and Green's counsel cross-examined her on these points.

d. *Direct examination of Brother*

Green maintains that his trial counsel failed to use professional judgment in calling Brother to testify. He argues that trial counsel's attempt to impeach E.G.'s reliability with Brother's testimony that he did not see any improper conduct and that he and E.G. wanted to live with Green, opened the door to damaging testimony.

"A decision regarding what witnesses to call is a matter of trial strategy which an appellate court will not second-guess" *Brown v. State*, 691 N.E.2d 438, 447 (Ind. 1998).

During trial, Green's counsel elicited the following testimony from the then-nine-year-old Brother:

Q Did you ever see your dad touch [E.G.] . . . ?

A No.

Q Okay. Did you ever see him touch her in a bad way?

A No.

Q Did [E.G.] ever tell you, when you were visiting your dad, that he was touching her?

A No.

(Tr. 555).

On cross-examination, the State elicited the following testimony:

Q . . . [D]o you remember sleeping in bunk beds at dad's?

A Yes.

....

Q And when you say you had to sleep on the bottom bunk in [E.G.]'s room, where did [E.G.] sleep?

A Top.

Q Okay. And do you remember anything happening or a time when your dad came in and your dad was tucking you guys in one night. Do you remember anything about that?

A Yes.

Q Tell the jury about that. What did you hear?

A Well, what I heard was . . . does that feel good and I though[t] he was rubbing her shoulder though, but . . .

....

Q Were you able to see what was going on?

A No, only his pants.

....

Q . . . And do you remember a time where your dad took your sister in [his] bedroom and told you not to come in?

A Yes.

Q Okay. What do you remember about that?

A He said not to come in the room. And I forgot what else he said

....

Q And did you see him take [E.G.] in there by herself?

A Yes.

Q Was there a door to the bedroom?

A Yes.

Q Did the door shut or do you remember?

A It shut.

Q And do you remember where you went?

A Mostly I would just go up to my room and play with something.

(Tr. 558-62).

On redirect, Brother testified that Green “would come and tuck [him and E.G.] in,” and would ask E.G., “does that feel good?” (Tr. 564). Brother further testified that he had told Mother that Green had taken E.G. into the bedroom.

A review of the record shows that on October 30, 2000, Brother reported to Detective Marc Cruea that on September 16, 2000, as Green “was tucking [E.G.] in,

[Brother] heard his dad ask [E.G.], ‘does that feel good?’” (Green’s Ex. G at 232). Brother also reported that the next morning, “dad told [Brother] to go downstairs because he (dad) and [E.G.] wanted to have a private talk.” (Green’s Ex. G at 232).

During the post-conviction hearing, Green’s trial counsel testified that she called Brother as a witness to “make [E.G.]’s testimony seem to be unbelievable or . . . incredible.” (PCR Tr. 72). She testified that the fact that “he didn’t see anything happening,” (PCR Tr. 72), particularly when Brother and E.G. visited Green in his studio apartment; and “that [E.G.] didn’t tell him anything,” would negate E.G.’s testimony. (PCR Tr. 72-73). Regarding Brother’s testimony about Green taking E.G. into his bedroom, she believed it to be “benign” because Brother “didn’t think much about it and went and played with toys.” (PCR Tr. 75).

Here, we cannot say that calling Brother as a witness in an attempt to discredit E.G. was an egregious error, falling below an objective standard of reasonableness. Again, “we do not second-guess strategic decisions requiring reasonable professional judgment even if the strategy or tactic, in hindsight, did not best serve the defendant’s interests.” *Moore*, 678 N.E.2d at 1261. Furthermore, we cannot say that Brother’s testimony was particularly compelling given his young age at the time of the offenses.³ Thus, Green has failed to show that his counsel’s conduct prejudiced him.

³ Brother would have been approximately seven years old when he reported the incidents.

e. *Failure to object to the admission of E.G.'s letter to Green*

Green argues that his trial counsel was ineffective for failing to object to the admission of E.G.'s letter to Green. "In analyzing ineffective assistance claims, counsel's performance does not prejudice a defendant if the underlying error to which counsel failed to object is not fundamental." *Smith v. State*, 792 N.E.2d 940, 944 (Ind. Ct. App. 2003), *trans. denied*.

On direct appeal, Green argued that admission of the letter rose to the level of fundamental error. This court found as follows:

It was certainly no surprise to the jury that E.G., the alleged victim and the State's primary witness, did not believe that her father was telling the truth. We cannot say that Green was denied a fair trial by this "revelation" to the jury. While portions of the case against Green turned upon E.G.'s credibility, we conclude that the combination of the physical evidence and the detailed testimony, coupled with the negligible impact of the letter's "repeated exhortations to tell the truth," militates against a finding of fundamental error.

No. 29A05-0304-CR-199, slip op. at 5.

We agree that there was no fundamental error. As Green has failed to demonstrate any prejudice arising from counsel's failure to object to the letter, he has failed to demonstrate that he was denied effective assistance of counsel.

f. *Failure to object to vouching testimony*

Green next asserts that his trial counsel was ineffective for failing to object to Mother's testimony regarding E.G.'s truthfulness pursuant to Evidence Rule 704(b). Evidence Rule 704(b) provides, in relevant part, that a witness may not testify to the

“truth or falsity of allegations; [or] whether a witness has testified truthfully[.]” Evid. R. 704(b). “Such testimony is an invasion of the province of the jurors in determining what weight they should place upon a witness’s testimony.” *Rose v. State*, 846 N.E.2d 363, 367 (Ind. Ct. App. 2006).

In response to the State’s query about why Mother finally reported E.G.’s allegations, Mother testified as follows: “Just because I knew. I just knew that it was the truth.” (Tr. 81). During the post-conviction hearing, trial counsel testified that she could not remember whether she considered objecting to Mother’s testimony but agreed it to be “vouching for the truth of somebody’s else’s testimony.” (PCR Tr. 91-92).

The post-conviction court determined that

Here, the State did not specifically ask the witness whether she believed the victim’s allegations. The State did not emphasize or even address this witness’s testimony again in any way. And, finally, the statement was not offered to vouch for the victim, but to explain why the witness called the police to report a crime. The Court fails to see how this testimony prejudiced the Defendant.

(App. 302) (emphasis added).

Here, Mother gave a one-sentence answer in response to the State’s examination regarding why Mother, after having failed to report a prior allegation of abuse, finally reported E.G.’s allegations to authorities. When placed in the context of a four-day trial, which included extensive testimony from both E.G. and Green, we find no error in the post-conviction court’s conclusion that Green was not prejudiced by Mother’s “isolated vouching statement.” *See Curtis v. State*, 905 N.E.2d 410, 416 (Ind. Ct. App. 2009)

(finding no prejudice due to counsel's failure to object to the expert witness's brief testimony that the child victims did not give "false positives"), *trans. denied*.

g. Failure to object to grooming testimony

Green asserts that his trial counsel was ineffective for failing to make the proper objection to a child therapist's testimony regarding "the grooming process that sexual molesters or predators employ on their victims[.]" (Tr. 254-255).

Counsel is not rendered inadequate for failing to make a futile objection. Failure to object to admissible evidence does not constitute deficient performance by counsel; rather, a defendant must show that had a proper objection been made the court would have had no choice but to sustain it.

Curtis, 905 N.E.2d at 418.

Green maintains that "[c]ounsel failed to properly object to the grooming testimony because she did not recognize that the State misled the trial court as to the holding in *Haycraft* [*v. State*, 760 N.E.2d 203 (Ind. Ct. App. 2001) (Kirsch, J. and Bailey, J., concurring), *trans. denied*.]" Green's Br. at 32. He argues that the failure to use *Haycraft* to prevent testimony regarding grooming amounted to deficient performance.

In *Haycraft*, the detective testified "that in his experience child molesters groom their victims to prepare them for sex by gradually introducing them to sexually explicit materials and sexual contact before actually engaging in sex with them." 760 N.E.2d at 210. *Haycraft* objected, asserting, *inter alia*, that the detective was not qualified as an expert witness under Indiana Evidence Rule 702. The trial court admitted the testimony pursuant to Indiana Evidence Rule 701, which provides:

If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.

On appeal, Haycraft argued that the trial court abused its discretion in allowing a detective "to offer expert testimony as to the 'grooming' techniques of child molesters." 760 N.E.2d at 210. Finding that "the State developed an extensive foundation to establish [the detective]'s qualifications to testify about the grooming techniques of child molesters," Judge Brook concluded that the detective "was sufficiently qualified to testify as a skilled witness" under Evidence Rule 701. *Id.* at 211. Judge Brook further found no abuse of discretion in admitting the testimony because the detective "testified that his opinions and inferences were based on his personal experience as an investigator; thus, his testimony was rationally based on his perception." *Id.*

Although Judge Brook found no abuse of discretion in admitting the detective's testimony, Judges Kirsch and Bailey concurred only in result, finding that the trial court abused its discretion in admitting the testimony pursuant to Evidence Rule 701. Nevertheless, they found that the admission of the testimony was harmless error.

Here, the State questioned Natalie Lance, E.G.'s therapist, regarding the term "grooming and how someone who is intent on molesting a child will be priming them for that by showing them videos, movies" (Tr. 255). Green's counsel objected to the therapist's testimony, arguing that the State was "asking her to give an opinion or give a definition to the jury that goes beyond her scope of knowledge." (Tr. 256).

Citing to Evidence Rule 701 and *Haycraft*, the State argued that it was “not offering Lance as an expert, [but] as a skilled witness.” (Tr. 256). The trial court overruled the objection.

Lance then explained that the term “grooming refers to . . . setting the stage for sexual activity . . . in order not to create heightened emotion or heightened trauma.” (Tr. 258). She further testified that in grooming their victims, perpetrators often introduce children to pornography; do not wear “adequate clothing”; and pay attention to the children. (Tr. 258).

Lance also testified that she has a Masters degree in social work and a Bachelor of Science degree in psychology. She testified that she is a “licensed clinical social worker” and received accreditation in 1985; for the past ten years, she has practiced as a child therapist at the Adult and Child Mental Health Center. (Tr. 229). She further testified that as a “foster parent trainer,” she has “trained in the area” of “sexually abused” children “quite a bit.” (Tr. 232).

As in *Haycraft*, the State laid a foundation for the therapist’s testimony; her testimony was limited to defining the term “grooming” and what it entails; and she did not express or offer an opinion as to whether E.G. had been groomed. We therefore cannot say that had an additional objection been made, the trial court would have sustained it. Moreover, given the evidence, Green has failed to show any prejudice due to his counsel’s failure to object as the admission of the testimony was harmless.

h. *Failure to present a consistent defense*

Green contends that his trial counsel was ineffective for failing to “expose[] any motive for either E.G. or [Mother] to lie” as a defense. Green’s Br. at 34-35. He maintains that counsel was deficient for only offering as a defense that no one ever witnessed Green “behaving improperly toward E.G.” or that he never engaged in the charged conduct. Green’s Br. at 33.

“The choice of defenses for trial is a matter of trial strategy.” *Overstreet*, 877 N.E.2d at 154. We find no deficiency in Green’s trial counsel’s defense.

Green’s counsel extensively cross-examined both E.G. and Mother. The jury heard testimony regarding Green’s child support arrearage and Green’s desire to gain custody of E.G. and Brother. The jury also heard testimony that E.G. wished to live with Green. In addition, Green testified on his behalf; namely, he testified that the allegations were made because he was “almost \$8000 behind in child support and . . . [had] discussed taking and getting and fighting for custody of” the children. (Tr. 760). In closing, trial counsel raised for the jury’s consideration the issue of Green’s “substantial” child support arrearage and the possible change in custody as possible motives for E.G.’s and Mother’s allegations and testimony against him.⁴ (Tr. 864). Green has failed to demonstrate that counsel’s strategic decisions fell below an objective standard of reasonableness.

⁴ Green asserts that trial counsel’s “only mention of the child support arrearage was to specifically disclaim that it had anything to do with the case.” Green’s Br. at 34. We cannot agree that trial counsel’s statement disclaimed Green’s belief that child support arrearage could have been a motive for the allegations against him. Trial counsel stated, “I’m not saying that the arrearage is the reason we’re here today, but it’s substantial.” (Tr. 864). Trial counsel’s statement could be read as explaining that Green was not on trial for a nonsupport of a dependent child charge.

2. Prosecutorial Misconduct

Green asserts that the post-conviction court erroneously denied his petition because the prosecutor committed misconduct by failing to disclose “an audio-recorded interview on January 23, 2001, in which E.G. referred to her [letter to Green] as ‘that story’ and said ‘Dad’s wastin’ [sic] all the money on just a lie.’” Green’s Br. at 37 (citing App. 182, 183). Green contends that disclosure would have revealed that the contents of the letter were false and that “E.G. had been told by her mother that [Green] was wasting her child support money on a lawyer.” Green’s Br. at 38. We reject Green’s claim.

“In post-conviction proceedings, a petitioner may assert prosecutorial misconduct only in the context of ineffective assistance of counsel.” *Allen v. State*, 791 N.E.2d 748, 755 (Ind. Ct. App. 2003), *trans. denied*; *see also Williams v. State*, 808 N.E.2d 652, 665 (Ind. 2004) (stating that the claim that the State withheld exculpatory evidence is “procedurally defaulted” for not having been raised on direct appeal). Here, Green asserts prosecutorial misconduct as a freestanding claim. The claim therefore is waived.⁵

3. Cumulative Prejudice

Green argues that he is entitled to post-conviction relief due to the alleged cumulative prejudicial effects of his trial counsel’s deficient performance and the State’s alleged misconduct. We disagree.

⁵ Waiver notwithstanding, there is nothing to suggest that the State withheld exculpatory evidence. During the post-conviction hearing, Green’s trial counsel testified that her “memory was that [she] thought [she] had” received audio-recorded interviews from the State. (PCR Tr. 131).

Errors that are not individually sufficient to prove ineffective assistance of counsel may add up to ineffective assistance when viewed cumulatively. *French v. State*, 778 N.E.2d 816, 826 (Ind. 2002). Given the evidence in this case, there is no reasonable probability that the alleged errors made by counsel, even if considered with the purported prosecutorial misconduct, made a difference.

4. Ineffective Assistance of Appellate Counsel

Green further asserts that he “was denied his right to the effective assistance of appellate counsel in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article One, Sections Twelve and Thirteen of the Indiana Constitution.” Green’s Br. at 41. We cannot agree.

The Sixth Amendment entitles a criminal defendant to the effective assistance of counsel not only at trial, but also during his first appeal as of right. *Seeley v. State*, 782 N.E.2d 1052, 1059 (Ind. Ct. App. 2003), *trans. denied*, 792 N.E.2d 43 (Ind. 2003), *cert. denied*, 540 U.S. 1020 (2003). Our Supreme Court has recognized three categories of alleged appellate counsel ineffectiveness: (1) denying access to an appeal; (2) failing to raise issues; and (3) failing to present issues well. *See Carter v. State*, No. 49S04-0903-PC-102, slip op. at 4 (Ind. July 1, 2010).

Green’s claim of ineffective assistance of counsel is based on the second category. Specifically, he argues that his appellate counsel failed to appeal his conviction on the basis that the jury verdict was not unanimous as to which act supported his conviction for disseminating matter harmful to minors.

When reviewing a claim of ineffective assistance of appellate counsel regarding the selection and presentation of issues, the defendant must “show from the information available in the trial record or otherwise known to appellate counsel that appellate counsel failed to present a significant and obvious issue and that this failure cannot be explained by any reasonable strategy.” *Id.* “We ‘consider the totality of an attorney’s performance to determine whether the client received constitutionally adequate assistance.’” *Id.* (quoting *Bieghler v. State*, 690 N.E.2d 188, 194 (Ind. 1997), *cert. denied*, 525 U.S. 1021 (1998)).

In *Bieghler*, the Indiana Supreme Court approved a two-part test to evaluate these claims: “(1) whether the unraised issues are significant and obvious from the face of the record and (2) whether the unraised issues are ‘clearly stronger’ than the raised issues.” *Id.*

We have also said that “to prevail on a claim of ineffective assistance of appellate counsel, ‘a defendant must show from the information available in the trial record or otherwise known to appellate counsel that appellate counsel failed to present a significant and obvious issue and that this failure cannot be explained by any reasonable strategy.’”

Id. (quoting *Timberlake*, 738 N.E.2d at 260-61).

Green cites *Castillo v. State*, 734 N.E.2d 299 (Ind. Ct. App. 2000), *summarily aff’d on trans.*, 741 N.E.2d 1196 (Ind. 2001), and *Scuro v. State*, 849 N.E.2d 682 (Ind. Ct. App. 2006), *trans. denied*, in support of his contention that appellate counsel was ineffective. Namely, he contends that his appellate counsel failed to assert that the trial court abused its discretion in allowing the jury to hear evidence of separate episodes of

disseminating matter harmful to minors when he was charged with only one act; and in failing to instruct the jury that they were required to unanimously agree upon which act supported the conviction for disseminating matter harmful to minors.

In *Castillo*, the State charged Castillo with one act of dealing in cocaine even though there was evidence that Castillo committed two separate acts of dealing in cocaine. The dealing charge was unspecific and only charged that, on a particular date, Castillo knowingly delivered cocaine within one thousand (1000) feet of school property. 734 N.E.2d at 304.

Over Castillo's objection, the State presented evidence of separate acts of dealing in cocaine.

Furthermore, in closing argument, the prosecutor told the jury they had "a choice" in convicting Castillo of dealing in cocaine. He told them he had proved it twice but that they only had to find it either happened at Garcia's home or later at Castillo's home.

The trial court did not instruct the jurors that they were required to render a unanimous verdict regarding which dealing crime Castillo committed. In fact, the trial court, in ruling on Castillo's continuing objection to the evidence of the earlier dealing crime, stated that because there was no specificity as to either of the dealing counts, the prosecution "could prove it as to one or the other . . . [o]r both."

Id. (internal citations omitted).

Finding that, given the facts, some jurors could have believed that Castillo committed the earlier dealing crime at Garcia's home while other jurors believed that he committed the later dealing violation at his own home later that same day, this court concluded that it was "possible that the jury's verdict of guilty regarding the charge of

dealing in cocaine was not unanimous.”⁶ *Id.* at 305. Accordingly, the *Castillo*-court vacated Castillo’s conviction for dealing in cocaine and remanded to the trial court for further proceedings.

In *Scuro*, the State charged Scuro with three counts of class D felony dissemination of matter harmful to minors; the State filed a count for each of three boys who viewed pornographic movies shown to them by Scuro. The jury found Scuro guilty as charged.

This court, however, reversed Scuro’s conviction as to D.D., one of the minors. Specifically, the *Scuro*-court held:

Because the State did not charge Scuro separately for the incidents involving only D.D., we simply do not know whether the jury convicted Scuro for dissemination to D.D. based on the incidents involving only him or the incident involving all three victims. Had the State been more specific in the charging information, this would not be an issue. But given that Scuro was charged with only one count of dissemination to D.D. based on an unspecified incident, and given that the State presented evidence of three instances of dissemination to D.D., it is possible that the jury’s verdict on Count V[, which involved dissemination to D.D.,] was not unanimous.

849 N.E.2d at 688-89.

In this case, the State charged Green as follows: “on or between April 1, 1999 and September 17, 2000, [Green] did knowingly or intentionally disseminate matter harmful to [E.G.], a minor, to-wit: showed her photographs, magazine, and/or video tapes of nude people[.]” (Green’s Ex. G at 133). The State presented evidence that Green

⁶ Thus, “the jury was required to agree unanimously on which of the two crimes the defendant was guilty in order for the defendant to be convicted.” *Taylor v. State*, 840 N.E.2d 324, 333 (Ind. 2006).

disseminated harmful material to E.G. on more than one occasion. Although trial court instructed the jury that the “[v]erdicts must be unanimous,” the trial court did not instruct the jurors that they were required to render a unanimous verdict regarding which act constituted the conviction for dissemination of matter harmful to E.G. (Green’s Ex. G at 182).

Green, however, did not object to either the verdict forms or the verdict at trial. He therefore did not preserve this issue for appeal. *See Scuro*, 849 N.E.2d at 687-88. Therefore, to overcome this waiver, his appellate counsel would have been required to show fundamental error.

The fundamental error exception to the waiver rule is extremely narrow. *Glotzbach v. State*, 783 N.E.2d 1221, 1225-26 (Ind. Ct. App. 2003). “To rise to the level of fundamental error, the error must be so prejudicial to the rights of the defendant as to make a fair trial impossible.” *Id.* at 1226. A defendant asserting fundamental error must show greater prejudice than ordinary reversible error because no objection has been made. *Purifoy v. State*, 821 N.E.2d 409, 412 (Ind. Ct. App. 2005), *trans. denied*.

Here, the State presented compelling evidence to support a conviction based on any one of several acts of disseminating matter harmful to E.G. Moreover, it is apparent that the jury rendered a unanimous verdict as to guilt. Given the difficulty in establishing fundamental error in this case, we cannot say that declining to raise the jury’s verdict as an issue was an unreasonable strategy.

In conclusion, Green has asserted that he is entitled to post-conviction relief due to several purported incidents of ineffective trial counsel; prosecutorial misconduct; and ineffective appellate counsel. Green, however, has failed to meet his burden of establishing his claims by a preponderance of the evidence. *See Lindsey*, 888 N.E.2d at 322.

Affirmed.

BAKER, C.J., and CRONE, J., concur.