

Appellant/Petitioner Wayne Jewell challenges the post-conviction court's denial of his petition for post-conviction relief ("PCR"). Upon appeal, Jewell contends that the post-conviction court's "wholesale adoption" of the State's proposed findings of fact and conclusions thereon amounted to reversible error. Jewell also contends that he received ineffective assistance of trial counsel. Specifically, Jewell contends that his trial counsel rendered ineffective assistance at trial because counsel failed to: (1) file a Notice of Alibi relating to Count I; (2) object to the amendment to the charging information for Count I; (3) move for a directed verdict on Count II following the conclusion of the State's case-in-chief; (4) request a dismissal of Count IV prior to or during trial; and (5) conduct a basic investigation of the facts and circumstances relating to the instant matter. Concluding that the trial court's "wholesale adoption" of the State's proposed findings of fact and conclusions thereon did not amount to reversible error and that Jewell's trial counsel did not render ineffective assistance at trial, we affirm.

FACTS AND PROCEDURAL HISTORY

Our opinion in Jemison's direct appeal instructs us as to the underlying facts leading to this post-conviction appeal:

The record shows that in 1997, Jewell met eleven-year-old T.R. while working on a Habitat for Humanity project in Kokomo, Indiana. Jewell was then introduced to thirteen-year-old R.S., T.R.'s step-brother. Shortly thereafter, Jewell began babysitting for the boys in his home. In approximately 2004, T.R. was in rehabilitative therapy for drug addiction when he admitted during a group therapy session that Jewell had molested him and his stepbrother when they were children. An investigation into these allegations ensued.

On February 14, 2005, the State charged Jewell with Count I: Child Molesting as a Class A felony (1998 incident involving T.R.); Count II: Child

Molesting as a Class A felony (1999 incident involving T.R.); Count III: Child Molesting as a Class A felony (1997 incident involving R.S.); Count IV: Sexual Misconduct with a Minor as a Class D felony (1999 incident involving R.S.); and Count V: Sexual Misconduct with a Minor as a Class B felony (2000 incident involving R.S.). On December 22, 2005, the State added Count VI: Child Molesting as a Class C felony (alleging incidents between 1997 and 2000 involving both children).¹ On April 7, 2006, the State filed an amended information for Count III, reducing the charge from Child Molesting as a Class A felony to Sexual Misconduct with a Minor as a Class B felony. Then, on April 13, 2006, the State filed an amended information for Count I, changing only the location of the incident, and a seconded amended information for Count III, changing the year of the incident to 1999 and the location of the incident.

Jury trial began May 3, 2006. Following the State's presentation of the evidence, Jewell moved for judgment on the evidence with respect to Counts III, IV, and V, all involving R.S. The trial court granted the motion with respect to Count V but denied it for Counts III and IV. The defense rested. After over twelve hours of deliberation, the jury found Jewell guilty of Count IV: Sexual Misconduct with a Minor as a Class D felony (1999 incident involving R.S.) and not guilty of Count III: Sexual Misconduct with a Minor as a Class B felony (1999 incident involving R.S.). The jury was unable to reach a decision on Counts I and II, Child Molesting as a Class A felony, both of which involved T.R., and a mistrial was declared on those counts.

Retrial on Counts I and II began November 14, 2006. Following the State's presentation of the evidence, Jewell again moved for judgment on the evidence, but the trial court denied the motion. The defense rested. Thereafter, the jury found Jewell guilty of Count I: Child Molesting as a Class A felony (1998 incident involving T.R.) and Count II: Child Molesting as a Class A felony (1999 incident involving T.R.). The trial court sentenced Jewell to thirty years for Count I, thirty years for Count II, and three years for Count IV, of which he was convicted in the first trial. The court ordered Counts I and II to be served consecutively and Count IV to be served concurrent with Count I, for an aggregate sentence of sixty years.

Jewell v. State, 877 N.E.2d 864, 867-68 (Ind. 2007), *affirmed in part, vacated in part*, 887 N.E.2d 939 (Ind. 2008) ("*Jewell I*"). Jewell subsequently appealed.

In Jewell's direct appeal, this court reversed Jewell's convictions for Counts II and IV,

¹ The State dismissed Count VI on April 11, 2006. (Citation to trial record omitted).

concluding that the evidence was insufficient to support Jewell's conviction for Count II and that State was barred from prosecuting him for Count IV because the State filed the information for Count IV after the expiration of the five-year statute of limitations. *Id.* at 870, 872. In addressing Jewell's fundamental error claims relating to Count I, this court determined that Jewell was effectively claiming that he received ineffective assistance of trial counsel, and in turn addressed the claims as such. *Id.* at 874-76. On transfer, the Indiana Supreme Court summarily affirmed this court's reversal of Jewell's convictions for Counts II and IV and held that this court improperly addressed Jewell's claims relating to Count I as a claim of ineffective assistance of trial counsel rather than considering Jewell's claims under a fundamental error analysis. *Jewell v. State*, 887 N.E.2d 939, 941-42 (Ind. 2008) ("*Jewell II*"). The Indiana Supreme Court further held that none of Jewell's remaining claims "satisfy the narrow criteria warranting their consideration under the fundamental error exception to procedural default." *Id.* at 942.

Jewell filed a petition for post-conviction relief on October 31, 2008. Following a hearing on Jewell's petition, the post-conviction court issued an order denying Jewell's request for post-conviction relief January 27, 2010. This appeal follows.

DISCUSSION AND DECISION

Post-conviction proceedings are civil in nature. *Stevens v. State*, 770 N.E.2d 739, 745 (Ind. 2002). Therefore, in order to prevail, a petitioner must establish his claims by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); *Stevens*, 770 N.E.2d at 745. When appealing from a denial of a petition for post-conviction relief, a petitioner must

convince this court that the evidence, taken as a whole, “leads unmistakably to a conclusion opposite that reached by the post-conviction court.” *Stevens*, 770 N.E.2d at 745. “It is only where the evidence is without conflict and leads to but one conclusion, and the post-conviction court has reached the opposite conclusion, that its decision will be disturbed as contrary to law.” *Godby v. State*, 809 N.E.2d 480, 482 (Ind. Ct. App. 2004), *trans. denied*. The post-conviction court is the sole judge of the weight of the evidence and the credibility of the witnesses. *Fisher v. State*, 810 N.E.2d 674, 679 (Ind. 2004). We therefore accept the post-conviction court’s findings of fact unless they are clearly erroneous but give no deference to its conclusions of law. *Id.*

Post-conviction proceedings do not afford a petitioner with a super-appeal, and not all issues are available. *Timberlake v. State*, 753 N.E.2d 591, 597 (Ind. 2001). A claim of ineffective assistance of trial counsel is properly presented in a post-conviction proceeding if such claim is not raised on direct appeal. *Id.* A claim of ineffective assistance of appellate counsel is an appropriate issue for post-conviction review. *Id.*

I. Whether the Trial Court’s “Wholesale Adoption” of the State’s Proposed Findings of Fact and Conclusions Thereon Amounted to Reversible Error

Initially, we note that Jewell challenges the post-conviction court’s order denying his request for PCR because the post-conviction court adopted the State’s proposed findings of fact and conclusions thereon in their entirety. In support of his challenge, Jewell relies on *Thompson v. State*, 796 N.E.2d 834, 840 (Ind. Ct. App. 2003), *trans. denied*, where a panel of this court held that it erodes one’s confidence when the post-conviction court adopts in

wholesale one party's findings. But this court's opinion in *Thompson* also acknowledges that the post-conviction court is not prohibited from adopting one party's findings in wholesale. 798 N.E.2d at 840.

Further, in noting that it has never prohibited a post-conviction court from adopting the prevailing party's findings in wholesale, the Indiana Supreme Court explained as follows:

It is not uncommon for a trial court to enter findings that are verbatim reproductions of submissions by the prevailing party. The trial courts of this state are faced with an enormous volume of cases and few have the law clerks and other resources that would be available in a more perfect world to help craft more elegant trial court findings and legal reasoning. We recognize that the need to keep the docket moving is properly a high priority for our trial bench. For this reason, we do not prohibit the practice of adopting a party's proposed findings.

Pruitt v. State, 903 N.E.2d 899, 939-40 (Ind. 2009). While the Indiana Supreme Court does not "encourage post-conviction court judges to adopt wholesale the findings and conclusions of either party, [the Court] decline[']s to find bias solely on that basis." *Id.* at 940 (quoting *Saylor v. State*, 765 N.E.2d 535, 565 (Ind. 2002)). Thus, the post-conviction court did not commit reversible error merely by adopting the State's proposed findings of fact and conclusions thereon in wholesale.

II. Whether Jewell's Trial Counsel Rendered Ineffective Assistance

A. Standard of Review

The right to effective counsel is rooted in the Sixth Amendment to the United States Constitution. *Taylor v. State*, 840 N.E.2d 324, 331 (Ind. 2006). "The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role

that is critical to the ability of the adversarial system to produce just results.”” *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 685 (1984)). “The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper function of the adversarial process that the trial court cannot be relied on as having produced a just result.” *Strickland*, 466 U.S. at 686.

A successful claim for ineffective assistance of counsel must satisfy two components. *Reed v. State*, 866 N.E.2d 767, 769 (Ind. 2007). Under the first prong, the petitioner must establish that counsel’s performance was deficient by demonstrating that counsel’s representation “fell below an objective standard of reasonableness, committing errors so serious that the defendant did not have the ‘counsel’ guaranteed by the Sixth Amendment.” *Id.* We recognize that even the finest, most experienced criminal defense attorneys may not agree on the ideal strategy or most effective way to represent a client and therefore under this prong, we will assume that counsel performed adequately, and will defer to counsel’s strategic and tactical decisions. *Smith v. State*, 765 N.E.2d 578, 585 (Ind. 2002). Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective. *Id.* Under the second prong, the petitioner must show that the deficient performance resulted in prejudice. *Reed*, 866 N.E.2d at 769. A petitioner may show prejudice by demonstrating that there is “a reasonable probability (*i.e.* a probability sufficient to undermine confidence in the outcome) that, but for counsel’s errors, the result of the proceeding would have been different.” *Id.*

A petitioner’s failure to satisfy either prong will cause the ineffective assistance of

counsel claim to fail. *See Williams v. State*, 706 N.E.2d 149, 154 (Ind. 1999). Therefore, if we can resolve a claim of ineffective assistance of counsel based on lack of prejudice, we need not address the adequacy of counsel’s performance. *See Wentz v. State*, 766 N.E.2d 351, 360 (Ind. 2002). Further, the same standard applies to claims of ineffective assistance of trial counsel and claims of ineffective assistance of appellate counsel. *Burnside v. State*, 858 N.E.2d 232, 238 (Ind. Ct. App. 2006).

B. Ineffective Assistance of Trial Counsel

Jewell argues that his trial counsel was ineffective in several particulars. We will address each allegation in turn.

1. Failure to File Notice of Alibi

Jewell claims that his trial counsel rendered ineffective assistance because counsel failed to file a notice of alibi at trial. Indiana Code section 35-36-4-1 (1997) provides that “[w]hen a defendant in a criminal case intends to offer in his defense evidence of alibi, the defendant shall, no later than ... twenty (20) days prior to the omnibus date ... file with the court and serve upon the prosecuting attorney a written statement of his intention to offer such a defense.” “The notice must include specific information concerning the exact place where the defendant claims to have been on the date stated in the indictment or information.” *Id.*

Generally, time becomes the essence of a crime after the invocation of an alibi defense. *Quillen v. State*, 271 Ind. 251, 253, 391 N.E.2d 817, 819 (1979). However, the Indiana Supreme Court has specifically held that “time is not of the essence in the crime of

child molesting.” *Carter v. State*, 754 N.E.2d 877, 880 (Ind. 2001) (quoting *Barger v. State*, 587 N.E.2d 1304, 1307 (Ind. 1992)). The Supreme Court explained that time is not of the essence in child molesting cases because “children often forget specific dates, particularly in the common situation where the crime is not reported immediately.” *Id.* The Supreme Court further held that “[a]n exact date is important only in situations such as those where a victim’s age at the time of the crime occurred falls near the dividing line between classes of offenses.” *Id.*

Time was not of the essence in the instant matter because nothing in the record suggests that the victim’s age fell near the dividing line between the classes of the offense during that year. *See id.* The charging information alleged that Jewell committed the offense of Class A felony child molesting “during 1998.” Appellant’s App. p. 134. The charging information does not allege that Jewell committed the offense at issue on any particular date, but rather at some point during 1998. Therefore, in order to file a notice of alibi, defense counsel would have been required to include Jewell’s claimed whereabouts for all of 1998, not just a particular date during that year. Jewell did not present any evidence relating to his alleged alibi defense during the post-conviction hearing or explain how a notice of alibi would have helped his defense at trial. Jewell, therefore, cannot establish prejudice on this ground.

2. Failure to Object to Amendment to Charging Information

Jewell also claims that his trial counsel rendered ineffective assistance because counsel failed to object to the State’s amendment to the charging information for Count I

approximately eleven months after the omnibus date. In order to establish that counsel's failure to object to the State's amendment to the charging information constituted ineffective assistance, Jewell had to prove that a proper objection would have been sustained. *Potter v. State*, 684 N.E.2d 1127, 1132 (Ind. 1997). Furthermore, Jewell also had to prove that his counsel's failure to object was unreasonable and resulted in sufficient prejudice such that there exists a reasonable probability that the outcome would have been different had counsel raised a proper objection. *Id.* Jewell has failed to do so.

The original charging information alleged that Jewell committed the offense of Class A felony child molesting "during 1998 at or near 917 E. North in Howard County." Appellant's App. p. 134. The amended charging information alleged that Jewell committed the offense of Class A felony child molesting during 1998 at or near 923 Elm, Kokomo, in Howard County." Appellant's App. p. 135. It is undisputed that 917 E. North and 923 Elm are very close to each another. Moreover, the State was not required to include a specific address and could have merely alleged that the molestation occurred in Howard County. *See Vail v. State*, 536 N.E.2d 302, 303 (Ind. Ct. App. 1989) (providing that an allegation that the offense of child molesting occurred within a particular county is adequate). In light of the close proximity of the addresses in question and the allegation that Jewell committed the charged offense "at or near" the address, and precedent establishing that the State was not required to allege that the child molestation occurred at a specific address, only the county in which the charged offense allegedly occurred, we conclude that it is unlikely that any objection would have been sustained or that the outcome of Jewell's trial would have been

different had his trial counsel objected to the amendment.²

3. Failure to Move for a Directed Verdict on Count II

Jewell next claims that his trial counsel rendered ineffective assistance because counsel failed to move for a directed verdict on Count II at the conclusion of the State's case-in-chief. It is undisputed that this court reversed Jewell's conviction on Count II on direct appeal because the evidence presented at trial was insufficient to prove that Jewell committed Class A felony child molesting. *Jewell I*, 877 N.E.2d at 871-72. It is also undisputed that the Indiana Supreme Court subsequently summarily affirmed this court's reversal of Jewell's conviction on Count II. *Jewell II*, 887 N.E.2d at 941. Jewell, therefore, has previously received relief on his claim relating to Count II, and as a result, is unable to prove that he suffered any prejudice as a result of trial counsel's alleged error.

4. Failure to Request a Dismissal of Count IV

Jewell also claims that his trial counsel rendered ineffective assistance because counsel failed to request the dismissal of Count IV either before or during trial. It is undisputed that this court reversed Jewell's conviction on Count IV on direct appeal because

² To the extent that Jewell argues that any objection to the amendment would have been sustained because the change was a change of substance in violation of the Indiana Supreme Court's opinion in *Fajardo v. State*, 859 N.E.2d 1201 (Ind. 2007), we note that *Fajardo* was not decided until approximately nine months after the trial court permitted the State to amend the charging information. Even assuming, without deciding, that the amendment in question amounted to a change in substance, we observe that the precedent in effect at the time of the amendment provided that untimely changes of substance were permitted so long as the change did not affect the defendant's substantial rights. *See Fajardo*, 859 N.E.2d at 1206. Jewell does not allege, nor does he prove, that the amendment in question affected his substantial rights. Furthermore, even if Jewell would be entitled to relief under the new standard set forth by the Supreme Court in *Fajardo*, Jewell's trial counsel cannot be said to have rendered ineffective assistance for failing to anticipate a change in the law, particularly one, like *Fajardo*, that changes the law and runs contrary to prior authority. *See Trueblood v. State*, 715 N.E.2d 1242, 1258 (Ind. 1999).

the State filed the information for Count IV after the expiration of the five-year statute of limitations. *Jewell I*, 877 N.E.2d at 870, 872. It is also undisputed that the Indiana Supreme Court subsequently summarily affirmed this court's reversal of Jewell's conviction on Count IV. *Jewell II*, 887 N.E.2d at 941. Jewell, therefore, has previously received relief on his claim relating to Count IV, and as a result, is unable to prove that he suffered any prejudice as a result of trial counsel's alleged error.

5. Failure to Conduct an Investigation of Facts and Circumstances Relating to Instant Matter

Jewell also claims that his trial counsel rendered ineffective assistance by failing to investigate the facts and circumstances relating to the instant matter. Specifically, Jewell argues that counsel failed to conduct a "meaningful" investigation because he did not: (1) meet several witnesses, including T.R., until the first day of trial; (2) request the employment records of potential witnesses; (3) record the deposition of Jewell's ex-wife; (4) obtain or use transcripts from the first trial to impeach witnesses during the second trial; and (5) communicate with Jewell about certain facts relating to the instant matter. "When deciding a claim of ineffective assistance of counsel for failure to investigate, we apply a great deal of deference to counsel's judgments." *Boesch v. State*, 778 N.E.2d 1276, 1283 (Ind. 2002). Quoting the United States Supreme Court's decision in *Strickland*, the Indiana Supreme Court observed as follows:

Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitation on investigation. In other words, counsel has a duty to make reasonable investigations or to make a

reasonable decision that makes particular investigations unnecessary.

Id. at 1283-84 (quoting *Strickland*, 466 U.S. at 690-91).

Upon review, we see no evidence that Jewell’s trial counsel’s investigation fell below objective standards of reasonableness. Jewell did not present any evidence during the post-conviction hearing as to what a “meaningful” investigation might have uncovered. In addition, Jewell did not show what effect any potential evidence that might have been discovered during a “meaningful” investigation would have had on the outcome of his trial. Jewell is unable to prove that he was prejudiced in this regard.

In sum, we conclude that Jewell has failed to show that he was prejudiced by any of his trial counsel’s alleged errors. As such, Jewell failed to prove that he suffered ineffective assistance of trial counsel. *See Williams*, 706 N.E.2d at 154 (providing that failure to satisfy either prong will cause the petitioner’s ineffective assistance claim to fail).

The judgment of the post-conviction court is affirmed.

DARDEN, J., and BROWN, J., concur.