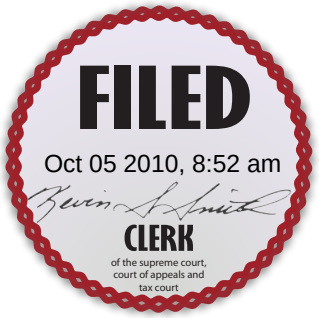

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IN THE
COURT OF APPEALS OF INDIANA

ANGEL L. HIGHBAUGH,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 20A03-0911-CR-547
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable Evan S. Roberts, Judge
Cause No. 20D01-0805-FD-105

October 5, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Angel Highbaugh appeals her conviction for Class D felony domestic battery. She contends that her trial counsel was ineffective for failing to call her and her grandmother as witnesses at trial and that the evidence is insufficient to support the elevation of her conviction from a Class A misdemeanor to a Class D felony for committing the offense in the physical presence of a child less than sixteen years of age. Finding that counsel was not ineffective and that the evidence is sufficient, we affirm.

Facts and Procedural History

The facts most favorable to the verdict are as follows. Angel and Bryan Caruthers have a daughter together, H.C. Angel lived with her grandmother, Carol Highbaugh. On March 25, 2008, when H.C. was seven months old, Angel was at Bryan's apartment with H.C. Angel, however, was not supposed to be there. When Carol knocked on Bryan's door looking for Angel, Angel instructed Bryan not to answer the door because she thought Carol would be mad at her for not coming home the night before. When Bryan went to answer the door, Angel scratched him on his chest, stomach, and arms, slapped his face and back, and punched him above his eye. H.C. was on the couch by the front door when Angel attacked Bryan.

After the attack, Bryan answered the front door. Carol asked for Angel, and Bryan said she was inside. When Carol started screaming, Bryan shut the door on her and walked out the back door of his apartment. He went to his mother's house and called 911. Corporal Dawn Raeder of the Elkhart City Police Department responded and took a report from Bryan. Bryan was "agitated" when Corporal Raeder arrived. Tr. p. 81.

Corporal Raeder observed a bruise above Bryan's eye, a red mark on the front of his rib cage, and a red mark on the back of his ribs. Another officer took photographs of Bryan's injuries.

The State charged Angel with Class D felony domestic battery for committing the offense in the physical presence of a child less than sixteen years of age. Ind. Code § 35-42-2-1.3(a), (b). Angel was represented by attorney Peter Todd at her jury trial.

The jury trial was held over the course of two days. During a break in Attorney Todd's cross-examination of Bryan on the first day of trial, it was brought to the trial court's attention that Carol and Angel may have violated the trial court's separation of witnesses order. The court conducted a *voir dire* of Carol, during which she revealed that she had spoken to an attorney (who had previously represented Angel in a civil matter) in the hallway outside of the courtroom. The attorney had watched a portion of Bryan's cross-examination testimony. Carol, however, denied discussing the substance of Bryan's testimony with that attorney. Carol also denied having any conversations with Angel. The trial court believed Carol had minimized her discussions with that attorney. As a sanction for violating the separation of witnesses order, the court prohibited Attorney Todd from questioning Carol on the stand about any information she gained from Bryan's in-court testimony. The trial court indicated, though, that the State could question Carol about her bias and credibility surrounding this incident if there was a really good reason to get into the issue. Tr. p. 165-66.

As this issue was wrapping up, the State informed the trial court that it had just learned that three people had seen Angel and Carol speaking to one other, despite Carol's

testimony to the court that she had not spoken to Angel. The trial court reiterated its earlier ruling, and the trial resumed with Attorney Todd finishing up Bryan's cross-examination.

Although Attorney Todd intended to present the testimony of both Angel and Carol on the morning of the second and final day of trial, he informed the trial court that he "changed [his] mind" and Angel and Carol were not going to testify after all. *Id.* at 231. The jury found Angel guilty as charged, and the trial court sentenced her to eighteen months, all suspended to probation.

Angel secured new counsel and filed a motion to correct error alleging that Attorney Todd rendered ineffective assistance of counsel in failing to call both Angel and Carol as witnesses at trial. The motion to correct error included affidavits from both women in which they averred that Bryan was the one who attacked Angel. Appellant's App. p. 49-53. At the hearing, Angel presented the testimony of expert witness Fred Franco, Jr., a former New Jersey prosecutor of thirty years and current private investigator licensed to practice law in Indiana. Franco believed that both Angel and Carol should have testified at trial. However, Franco based his decision on a partial trial transcript that did not include the violation of the separation of witnesses order.

Attorney Todd testified at the hearing that he met with Angel four or five times before trial and, based on what Angel told him, he could not in good faith argue self-defense. Rather, he was left with "a general denial" of the charges. Tr. p. 349. Attorney Todd testified that it was his intention to call Carol as a witness to describe the scene that she observed. Attorney Todd also testified that he prepared Angel to testify and

anticipated even at the end of the first day of trial that she would testify on the final day of trial. However, he changed his mind overnight. Attorney Todd then met with Angel and Carol in his office before trial resumed on the last day and told Angel that it was his opinion that she should not testify because it would not benefit her. *Id.* at 326. Attorney Todd explained:

> Because everything that we needed to get out, with the exception of her saying that she did not do that, we got out through Br[y]an Caruthers [who testified on the first day of trial]. And by putting her on the stand, I advised her that there was a higher risk of basically lessening her chances of success. . . . Well, based on the cross-examination of Br[y]an Caruthers and the fact that she and her grandmother and another attorney had violated the separation of witness order that was in place and that would have exposed her to cross-examination as to her violation of that order.

Id. at 326-27. Angel ultimately "made the decision not to testify." *Id.* at 318, 341. As to Carol, Attorney Todd explained:

> The alleged incident between Angel and Br[y]an was behind closed doors. Ms. Carol Highbaugh did not witness the events. And then we had the violation of the separation of witness situation, which meant that if I put Ms. Carol Highbaugh on the stand, after seeing her answering the questions to the judge about the separation of witnesses and the fact that she really wasn't going to add any additional substantive evidence, I made the decision not to call her because it would have opened up a whole can of worms with respect to her credibility. And I did not want to go down that path with – during the defense of this case.

Id. at 345. Todd said it was part of his trial strategy or tactics not to call Carol. *Id.* The trial court denied Angel's motion to correct errors. Angel now appeals.

Discussion and Decision

Angel raises two issues on appeal. First, she contends that Attorney Todd rendered ineffective assistance of counsel by failing to call Angel and Carol as witnesses at trial. Second, she contends that the evidence is insufficient to support her conviction.

I. Ineffective Assistance of Trial Counsel

A claim of ineffective assistance of counsel involves two components. First, the petitioner must establish that counsel's performance was deficient, in that counsel's representation fell below an objective standard of reasonableness. *Wrinkles v. State*, 915 N.E.2d 963, 965 (Ind. 2009) (citing *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)). Second, the petitioner must establish that the deficient performance prejudiced his defense. *Id.* In other words, the petitioner must show that but for counsel's errors, the result of the proceeding would have been different. *Id.* (citing *Strickland*, 466 U.S. at 694). Because Angel is raising ineffective assistance of counsel on direct appeal, she is foreclosed from raising it in post-conviction proceedings. *Caruthers v. State*, 926 N.E.2d 1016, 1023 (Ind. 2010).

Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective. *Reed v. State*, 866 N.E.2d 767, 769 (Ind. 2007). Moreover, because counsel is afforded considerable discretion in choosing strategy and tactics, a strong presumption arises that counsel rendered adequate assistance. *Id.*

Angel argues that Attorney Todd was ineffective in failing to call her and Carol as witnesses at trial. With regard to Angel's claim that Todd was ineffective for failing to call her as a witness on her own behalf, we note that the decision whether to testify is personal to the defendant. *Kimbrough v. State*, 911 N.E.2d 621, 640 (Ind. Ct. App. 2009). The decision is one that the defendant, and not counsel, controls. *Daniels v. State*, 741 N.E.2d 1177, 1187 (Ind. 2001); *Kimbrough*, 911 N.E.2d at 640.

Attorney Todd testified at the motion to correct errors hearing that it is always the defendant's decision whether to testify and it was no different with Angel. Before trial resumed on the second, and final, day, he spoke with Angel and Carol in his office. He told Angel that it was his opinion that "it would not be in her best interests to testify" after all. Tr. p. 350. Angel said that she still wanted to testify. Attorney Todd again told Angel the various reasons why she should not testify, including his successful cross-examination of Bryan and her violation of the separation of witnesses order. *Id.* at 326-27. Carol agreed with Todd. Angel eventually concluded that she would not testify. Attorney Todd stated that if Angel would have insisted on testifying, he would have put her on the stand. *Id.*

The record shows that Attorney Todd gave Angel his best strategic and tactical advice based on the way the trial was going. Todd was confident that he had made all the points necessary to win the case in his cross-examination of Bryan and believed that his examination of Angel had little, if anything, to add, especially considering that three people had seen Angel and Carol talking to one another during trial and Angel could be impeached for violating the separation of witnesses order. The decision was properly left to Angel, and she decided not to testify. *See id.* at 500 ("Q. You regret your decision not to testify now? A. Yes, I do.").

As for Angel's claim that Attorney Todd was ineffective for failing to call Carol as a witness, Todd also made a reasonable strategic decision not to call her. First, Attorney Todd pointed out that Carol did not witness the events between Angel and Bryan and came upon the scene only afterwards. Second, and most importantly, Todd was worried

about Carol's credibility because of the violation of the separation of witnesses order. Attorney Todd had already seen Carol testify before the judge about her conversation with the attorney in the hallway, after which the judge concluded that Carol had minimized the situation. In addition, although Carol testified that she had not spoken with Angel, it was brought to the court's attention that she had, in fact, spoken with Angel. Attorney Todd reasonably concluded that Carol could have suffered considerable damage to her credibility due to her violation of the separation of witnesses order had she taken the stand during trial.

Although Angel presented the expert testimony of Franco in support of her ineffective assistance of counsel claim, the trial court was entitled to reject the expert's opinion, which it obviously did. This is especially so since Franco was given the benefit of 20/20 hindsight and was not aware of the violation of the separation of witnesses order, upon which Attorney Todd placed great emphasis in deciding not to call both Angel and Carol as witnesses at trial.

Finally, this case is unlike *Montgomery v. State*, 804 N.E.2d 1217 (Ind. Ct. App. 2004), *trans. denied*, upon which Angel relies heavily on appeal. In that case, defense counsel failed to subpoena two of the State's expert witnesses at trial. These experts would have partially corroborated the defendant's own expert. When the State failed to call these witnesses at trial, defense counsel was unable to serve subpoenas on them in time to have them testify at trial. In addition, defense counsel did not move to continue the trial. We found that defense counsel's failure to subpoena the State's experts was

"more than a minor omission," concluded that counsel was ineffective, and remanded for a new trial. *Id.* at 1221.

Unlike defense counsel in *Montgomery,* Attorney Todd made a calculated and strategic decision not to call Carol.[1] It was not an omission. In addition, he advised Angel not to testify, and she ultimately made the decision not to testify. Although Angel claims that this is the classic "he said/she said" case, there are photographs of Bryan's injuries, and Corporal Raeder testified that Bryan was "agitated" when she arrived to take a report and that she observed injuries to his body. Trial counsel was not ineffective for not calling Angel and Carol as witnesses at trial.

II. Sufficiency of the Evidence

Angel contends that the evidence is insufficient to support the elevation of her domestic battery conviction from a Class A misdemeanor to a Class D felony. When reviewing the sufficiency of the evidence, appellate courts must only consider the probative evidence and reasonable inferences supporting the verdict. *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007). It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient. *Id.* To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider it "most favorably to the trial court's ruling." *Id.* Appellate courts affirm the conviction unless "no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt." *Id.* at 146-47 (quotation omitted). It is therefore not necessary that the evidence "overcome every reasonable hypothesis of

[1] Although Angel argues that *Malone v. Walls*, 538 F.3d 744, 759 (7th Cir. 2008), is similar to this case, the Seventh Circuit found that the record did not suggest a "concrete reason" why defense counsel did not call the witness at issue. This fact alone distinguishes *Malone* from this case.

innocence." *Id.* at 147 (quotation omitted). "[T]he evidence is sufficient if an inference may reasonably be drawn from it to support the verdict." *Id.* (quotation omitted).

Angel was convicted of Class D felony domestic battery because she "committed the offense in the physical presence of a child less than sixteen (16) years of age, knowing that the child was present and might be able to see or hear the offense." Ind. Code § 35-42-2-1.3(b)(2); *see also* Appellant's App. p. 13. Angel first argues that while the "statute sets a maximum age of sixteen (16) years, it does not set a minimum age." Appellant's Br. p. 10.

> [T]he minimum threshold under the law should be a child who could at least speak and talk and understand before a defendant can be convicted of Domestic Battery as a class D felony as a matter of law. H.C. was seven months old at the time of this incident. Seven months is too young for a child to be able to see or hear an offense as a matter of law. Furthermore, there is no proof in the record that H.C. could talk, hear, comprehend or even understand that an offense even took place.

Id.

We implicitly addressed Angel's argument in *Boyd v. State*, 889 N.E.2d 321 (Ind. Ct. App. 2008), *trans. denied*. In *Boyd*, the State charged the defendant with domestic battery as a Class D felony for committing the battery while the couple's fifteen-month-old baby was asleep six feet away. The defendant argued that the domestic battery statute was unconstitutionally vague as applied to him because the statute's use of the words "presence" and "present" required the child to "sense" the battery. *Id.* at 324-25. We held that the statute does not require a child to see or hear the offense. *Id.* at 325. Rather, the statute requires that the touching occur in the physical presence of the child, that the defendant know that the child is present, and that the child "might be able to see or hear

the offense." *Id.* That is, the statute does not require the child to sense the battery. *Id.* We therefore affirmed the defendant's conviction. *Id.* at 326.

Boyd disposes of Angel's argument that a child must be of a certain minimum age in order for a Class D felony conviction to stand because a child of a very young age cannot, as a matter of law, see or hear an offense. The statute sets forth only a maximum age. Accordingly, the legislature's intent is that there is no minimum age. Therefore, a child can be one day old in order to elevate a defendant's domestic battery conviction to a Class D felony because that child "might be able to see or hear the offense." *Id.* at 325. Because this Court has already determined that the statute does not require the child to sense the battery, it does not matter that H.C. was seven months old.

In the alternative, Angel argues that the evidence is insufficient to support her conviction because she did not know that H.C. was present at the time of the offense. The facts most favorable to the verdict show that H.C. was on the couch when Angel attacked Bryan. Tr. p. 120. The couch was by the front door, where Angel attacked Bryan. *Id.* Bryan testified that H.C. could see or hear what was going on between them. He could not remember if H.C. displayed a reaction because it "all happened really fast." *Id.* On cross-examination, Bryan testified that he may have actually been holding H.C. at the beginning of the attack. *Id.* at 131. Then, Attorney Todd asked Bryan if he remembered telling the officer that Angel was the one holding H.C. when she "started yelling at [him]"; however, Bryan said he did not remember telling the officer that because it was over a year ago. *Id.* at 131-33. Even crediting Angel's version that she was the one holding H.C., the touching occurred in the physical presence of H.C., Angel

knew H.C. was present, and H.C. might have been able to see or hear the offense. We therefore affirm Angel's conviction for Class D felony domestic battery.

Affirmed.

MAY, J., and ROBB, J., concur.