MEMORANDUM DECISION

IN THE
Court of Appeals of Indiana

Kevin Dwayne Mersch,
Appellant-Petitioner

v.

State of Indiana,
Appellee-Respondent

February 16, 2024

Court of Appeals Case No.
23A-PC-2152

Appeal from the Hamilton Superior Court

The Honorable Michael A. Casati, Judge

Trial Court Cause No.
29D01-2211-PC-8018

Memorandum Decision by Judge Crone
Judges Bailey and Pyle concur.

Crone, Judge.

Case Summary

[1] A jury found Kevin Dwayne Mersch guilty of battering his girlfriend's two-year-old daughter. Mersch filed a petition for post-conviction relief alleging that his trial counsel was ineffective in failing to tender an instruction regarding circumstantial evidence. The post-conviction court denied Mersch's petition. Mersch contends that this ruling is erroneous. We disagree and therefore affirm.

Facts and Procedural History

[2] Tayler Jacobs and her husband Nicholas had a daughter, E.J., who was born in July 2017. They separated in June 2019, and Tayler was given primary custody of E.J. Tayler met Mersch on a dating app in September 2019, and they moved into an apartment with E.J. in Noblesville in October 2019. Mersch had a job installing playground equipment, and Tayler worked at E.J.'s daycare in Fishers. Initially, their relationship was "good[,]" but "[t]owards the end of October, beginning of November[,]" Mersch "became angry and short tempered and like he resented [Tayler and E.J.] being there." Trial Tr. Vol. 2 at 157. Mersch "played [Tayler] into thinking that he was one way when he was completely another and he just wanted someone there to clean and cook and help pay the bills with him, not a relationship." *Id*. at 158.

[3] Nicholas had parenting time with E.J. on November 6 and 7, 2019. His next scheduled parenting time date was Friday, November 15. On the morning of Friday, November 8, Mersch told Tayler that he needed her and E.J. "to vacate

the apartment that night because he had a date with someone else planned." *Id.* at 160. Tayler called Nicholas and asked him to pick up her and E.J. and take them to a women's shelter in Anderson. Nicholas picked them up in the apartment complex's parking lot. They "went to the complex's office to give [Mersch's] keys to his sister who was the complex manager at the time." *Id.* at 163. Tayler "told her what was going on and how [she] couldn't do it anymore and that [she] was leaving[.]" Tayler got back in Nicholas's vehicle, and they "drove out of the complex." *Id.*

[4] Mersch's sister told Mersch "what [Tayler's] plans were[.]" *Id.* at 164. Mersch "started calling and texting" Tayler and "asked [her] not to go and [they] could fix this and get it situated." *Id.* Tayler asked Nicholas to "take [her] back to the apartment and he kept [E.J.] for the weekend and [Tayler] stayed at the apartment." *Id.* When Nicholas brought E.J. to his home, he did not notice any injuries on her. Over the weekend, Tayler asked Nicholas to bring E.J. back, which he did not want to do, but his attorney "told [him] that [he] didn't really have a choice because that was the Court's decision." *Id.* at 58.

[5] On the afternoon of Monday, November 11, Nicholas dropped off E.J. at daycare. At that time, E.J. had a bruise on her shin but no other visible injuries. Mersch picked up Tayler and E.J. from daycare at 5:30 p.m. When they got home, Tayler "started cooking dinner and [Mersch] took [E.J.] into [their] bedroom and [watched] TV with her." *Id.* at 167.

[6] On the morning of Tuesday, November 12, Tayler dressed E.J., who did not have any bruises or injuries at that time. Mersch "got a text saying that [his] work was called off that day due to the temperatures[,]" and he drove Tayler and E.J. to daycare in his pickup truck. *Id.* at 169. When they pulled into the parking lot around 7:30 a.m., Tayler saw a teacher that she disliked in E.J.'s classroom and "vent[ed]" her "frustration to [Mersch] while [she] was getting [her] stuff out to go in." *Id.* at 170. Mersch "offered to keep [E.J.] with him for the day[,]" and Tayler "agree[d] to this[.]" *Id.* at 171. Tayler went into the building, and Mersch went home with E.J.

[7] Mersch picked up Tayler shortly after 5:30 p.m. E.J. was in the truck, and "[a]s soon as [Tayler] opened the door, [Mersch] said that [E.J.] had fallen and hit the side of her head off the metal stripping in the entryway of the apartment." *Id.* at 172. Tayler saw that E.J. "did in fact have a bruise on the side of her eye." *Id.* at 173. They went to Walmart and then to Tayler's friend's apartment to move the friend's belongings to a storage unit. E.J. stayed in her car seat after they left Walmart because Mersch said that "she would probably get in the way and maybe get hurt." *Id.* at 174. After the move, they picked up some food and arrived home to eat dinner around 9:00 p.m. Tayler then got into the shower with E.J.; "the bruise on her eye [was] still there[,]" but Tayler did not "notice any other bruising on her[.]" *Id.* at 179. Tayler called Mersch into the bathroom so that he could get E.J. ready for bed. When Mersch pulled back the shower curtain and Tayler handed E.J. to him, E.J. "started crying." *Id.* at 180. Tayler

finished showering and went into E.J.'s room to say goodnight. E.J. "had a clean diaper on and clean pajamas on." *Id*. at 181.

[8] On the morning of Wednesday, November 13, Tayler was supposed to clock in at 7:30 but slept until almost 7:00. She woke Mersch, who was scheduled to work in Fort Wayne later that morning, got dressed, "and went in to get [E.J.] ready." *Id*. at 182. Tayler saw that E.J. "had three bruises across her forehead." *Id*. Tayler "called in [Mersch] and asked him what happened." *Id*. "He said he didn't know." *Id*. at 183. Tayler did not change E.J.'s diaper because they "were running late" and the daycare staff would "change her diaper immediately because that was protocol." *Id*. When Tayler "went to put on [E.J.'s] coat and she lifted her arms, she said ow. And then put her arm back down." *Id*. Mersch drove them to daycare, carried E.J. inside the building in her car seat, and left. Tayler did not report E.J.'s injuries to the daycare staff because she "was rushed." *Id*. at 184. She took E.J. to E.J.'s classroom and then went to her own assigned classroom.

[9] Tayler clocked in at 7:37 a.m. At 7:38 a.m., Mersch texted Tayler, "Did she scream or anything again when you took her coat off[?]" Trial Ex. Vol. 4 at 85. Later that morning, one of E.J.'s teachers came into Tayler's classroom "and said they were getting an ice pack for [E.J.] because her lip was swollen." Trial Tr. Vol. 2 at 185. Tayler went to check on E.J., "and when [she] got into [E.J.'s] classroom [she] did see that [E.J.'s] lip was puffing." *Id*. Tayler asked if E.J. had fallen or gotten "hit with something," and she was told that "nothing had happened to [E.J.] that morning." *Id*. at 185, 186.

[10] Tayler returned to her classroom. After 12:00 p.m., she went "to clock out for lunch and the lobby was full of people. Turned out it was the fire department, police," and the Department of Child Services (DCS), which had responded to a call from the daycare's assistant director about E.J.'s injuries. *Id*. at 188. Tayler texted Mersch, "F*****g work called dcs for the bruises from yesterday[.] Like I need you to call me so I can let them know what happened[….] You said she fell on the [metal] thing in the living room or doorway?" Trial Ex. Vol. 4 at 97-98. Mersch replied, "Yeah on the corner." *Id*. at 98. Tayler asked, "Did she roll her head when she got up[?]" *Id*. Mersch responded,

> I don't think so. She didn't even cry. I didn't see a bruise or cut until I put her in the truck to come get you. That's why I told you when I got there. I [didn't] think it was that serious or I would have said something sooner. Have you heard if she is ok at least? I'm so sorry I didn't think it was that bad [or] I would have made sure to get you so sh[e] could go to the Dr Baby Girl. Is she ok?

Id. at 99. Tayler started typing the following reply, which she did not send: "If that's the only thing that happened to her, then sh[.]" *Id*.

[11] E.J. was taken by ambulance to an Indianapolis emergency room, where she was examined by child abuse pediatrician Dr. Cortney Demetris. E.J. had bruising across "almost the entire forehead" from "multiple points of impact" and on her right cheek and jawline. Trial Tr. Vol. 2 at 235, 238. She had a "fat lip" and a torn frenula, which connects "your lip to your gum[,]" as well as five "goose egg-type bruises" on her scalp. *Id*. at 236, 240. She also had bruising on

her shoulders, legs, genitalia, and the bottom of her right foot. Her right ulna and radius were fractured near the wrist, likely as a result of "fall[ing] on an outstretched arm where she tried to brace herself[.]" *Id*. at 246. The fractures were at most seven days old, with no "evidence of bone healing." *Id*. She had also suffered a possible concussion and a pancreatic contusion, likely caused by an impact to her abdomen, which required evaluation by a level 1 trauma center. E.J.'s "emotional distress and pain seemed severe and then became moderate" after Nicholas arrived and comforted her. *Id*. at 249. DCS ruled out Nicholas "as a perpetrator" and determined that Mersch "had access to [E.J.] during the time period of the injuries." *Id*. at 138.

[12] On the afternoon of November 13, Noblesville Police Department Detective Robert Saxon interviewed Tayler, who let him make copies of her text conversation with Mersch. On November 19, the detective interviewed Mersch. The interview was recorded on video. Mersch claimed that E.J. slipped and fell and hit her eye on the metal floor trim when they got home on the morning of November 12, but that afterward she felt okay and did not cry. Mersch also claimed that E.J. did not have any bruises that day, contrary to Tayler's November 13 text about "the bruises from yesterday." Mersch acknowledged that E.J. was "fine" on November 11 after Nicholas dropped her off at daycare. State's Trial Ex. 40 at 34:59. Mersch had no explanation for E.J.'s injuries and claimed that neither he nor Tayler caused them.

[13] Tayler was charged with and pled guilty to level 3 felony neglect of a dependent. The State charged Mersch with level 3 felony neglect of a

dependent, level 3 felony battery, and class B misdemeanor failure to report child abuse or neglect.[1] At Mersch's June 2022 jury trial, Tayler denied causing any of E.J.'s injuries. Her text conversation with Mersch and Mersch's interview with Detective Saxon were shown to the jury. Dr. Demetris testified, "The general understanding in terms of what we know about bruises is that impact occurs and then the bruise occurs within 24 hours about, you know, plus or minus a few hours at the maximum, is what we know right now based on medical science." Trial Tr. Vol. 3 at 16. The doctor opined that E.J.'s injuries "were characteristic of child physical abuse" and were not "consistent with the explanation that she fell on that [metal] door strip[.]" *Id*. at 2, 3. On cross-examination by Mersch's counsel, she acknowledged that "*some* of the injuries [could have been] accidental[.]" *Id*. at 14 (emphasis added).

[14] At the beginning and at the end of trial, the court gave the following instruction to the jury:

> Under the law of this state, a person charged with a crime is presumed to be innocent. This presumption of innocence continues in favor of the Defendant throughout each stage of the trial and you should fit the evidence presented to the presumption that the Defendant is innocent if you can reasonably do so. If the evidence lends itself to two reasonable

[1] The charging information alleged that Mersch committed level 3 felony neglect by knowingly placing E.J., who was in his care, in a situation that endangered her life or health and which resulted in serious bodily injury to E.J. The information also alleged that Mersch committed level 3 felony battery by knowingly or intentionally touching E.J., a person under the age of fourteen, "in a rude, insolent, or angry manner by actions including but not limited to striking, punching, hitting, pushing, grabbing and/or kicking, said touching resulting in serious bodily injury including but not limited to lacerations and/or swelling and/or bruising and/or bone fractures and/or internal injuries." Appellant's App. Vol. 2 at 19.

> interpretations, you must choose the interpretation consistent with Defendant's innocence. If there is only one reasonable interpretation, you must accept that interpretation and consider the evidence with all the other evidence in the case in making your decision. To overcome the presumption of innocence, the State must prove the Defendant guilty of each element of the crime charged beyond a reasonable doubt. The Defendant is not required to present any evidence to prove his innocence or to prove or explain anything.

Trial Tr. Vol. 2 at 23; Trial Tr. Vol. 3 at 110.

[15] In closing argument, the State remarked, "How do you know it's the Defendant? Gives us two options here. There's only two reasonable viable options. It was Tayler or it was him." Trial Tr. Vol. 3 at 77. The State noted that E.J. had no injuries on the afternoon of November 11 and was "black and blue from head to toe" on the morning of November 13. *Id.* at 78. The State asserted, "Only two people had care and control of [E.J.] during that time period, Tayler and the Defendant. It is uncontradicted through the evidence that it wasn't Tayler.… If the evidence is uncontradicted that it wasn't Tayler, that only leaves us one option." *Id.* at 78-79. Mersch's counsel asserted that the State "failed to prove that [Mersch] battered anyone, particularly [E.J.,]" and that "[i]t is just as reasonable an interpretation of the evidence that Tayler is culpable for [E.J.']s injuries suffered intentionally and perhaps in conjunction with accidents as it is that [Mersch] is culpable for intentionally inflicting injuries to [E.J.]" *Id.* at 83-84. Counsel further asserted that the State had not eliminated "the reasonable interpretation that's consistent with [Mersch's] innocence for any of the three charges, not beyond a reasonable doubt." *Id.* at

100. On rebuttal, the State reiterated, "It was uncontradicted that Tayler did not inflict these injuries on [E.J.]" *Id*. at 103.

[16] The jury found Mersch guilty as charged. The trial court entered judgment of conviction only on the battery and failure to report counts and sentenced him to fourteen years. Mersch filed a notice of appeal but requested a remand for purposes of pursuing post-conviction relief. His appeal was dismissed, and he filed a petition for post-conviction relief alleging that his trial counsel was ineffective in failing to tender an instruction regarding circumstantial evidence. In September 2023, after a hearing, the post-conviction court issued an order denying Mersch's petition. This appeal ensued.

Discussion and Decision

[17] Mersch contends that the post-conviction court erred in denying his petition. "Post-conviction proceedings are civil proceedings in which a defendant may present limited collateral challenges to a conviction and sentence." *Bautista v. State*, 163 N.E.3d 892, 896 (Ind. Ct. App. 2021) (quoting *Gibson v. State*, 133 N.E.3d 673, 681 (Ind. 2019), *cert. denied* (2020)). "A defendant who files a petition for post-conviction relief 'bears the burden of establishing grounds for relief by a preponderance of the evidence.'" *Id.* (quoting Ind. Post-Conviction Rule 1(5)). "Because the defendant is appealing from the denial of post-conviction relief, he is appealing from a negative judgment[.]" *Id.* "Thus, the defendant must establish that the evidence, as a whole, unmistakably and unerringly points to a conclusion contrary to the post-

conviction court's decision." *Id.* (quoting *Wilkes v. State*, 984 N.E.2d 1236, 1240 (Ind. 2013)). "In other words, the defendant must convince this Court that there is no way within the law that the court below could have reached the decision it did." *Id.*

[18] "The right to effective counsel is rooted in the Sixth Amendment of the United States Constitution." *Taylor v. State*, 840 N.E.2d 324, 331 (Ind. 2006). "A defendant claiming a violation of the right to effective assistance of counsel must establish the two components set forth in *Strickland v. Washington*, [466 U.S. 668 (1984)]." *Perez v. State*, 748 N.E.2d 853, 854 (Ind. 2001). "First, the defendant must show that counsel's performance was deficient." *Id*. "This requires a showing that counsel's representation fell below an objective standard of reasonableness, and that the errors were so serious that they resulted in a denial of the right to counsel guaranteed the defendant by the Sixth Amendment." *Id*. (citations omitted). "There is a strong presumption that counsel rendered effective assistance and made all significant decisions in the exercise of reasonable professional judgment, and the burden falls on the defendant to overcome that presumption." *Peaver v. State*, 937 N.E.2d 896, 900 (Ind. Ct. App. 2010), *trans. denied* (2011). "Counsel is afforded considerable discretion in choosing strategy and tactics, and these decisions are entitled to deferential review." *Bradbury v. State*, 180 N.E.3d 249, 252 (Ind. 2022), *cert. denied*. "The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Id*. (quoting *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003)).

[19] "Second, the defendant must show that the deficient performance prejudiced the defense." *Perez*, 748 N.E.2d at 854. "To establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. "Although the two parts of the *Strickland* test are separate [inquiries], a claim may be disposed of on either prong." *Grinstead v. State*, 845 N.E.2d 1027, 1031 (Ind. 2006). "*Strickland* declared that the 'object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, … that course should be followed.'" *Id*. (quoting *Strickland*, 466 U.S. at 697).

[20] The State's case against Mersch on the battery count was based entirely on circumstantial evidence. Accordingly, Mersch argues that his trial counsel was ineffective in failing to tender the following instruction: "In determining whether the guilt of the accused is proven beyond a reasonable doubt, you should require that the proof be so conclusive and sure as to exclude every reasonable theory of innocence." *Hampton v. State*, 961 N.E.2d 480, 491 (Ind. 2012) (emphasis omitted). In *Hampton*, our supreme court held that, "when the trial court determines that the defendant's conduct required for the commission of a charged offense, the actus reus, is established exclusively by circumstantial evidence, the jury should be instructed" as above. *Id*. (italics omitted).

[21] Mersch argues, "[I]f there were two reasonable theories of who inflicted [E.J.'s] injuries, and the law requires the jury to exclude every reasonable theory of

innocence, then there is absolutely a reasonable probability that the result would have been different but for trial counsel's failure to tender the *Hampton* instruction." Appellant's Br. at 10.[2] Mersch's argument is based on the false premise that there were in fact two reasonable theories of who inflicted E.J.'s injuries. There was simply no evidence tending to show that Tayler caused any of E.J.'s numerous injuries. On the other hand, there was plenty of evidence tending to show that E.J.'s injuries were intentionally inflicted when she was in Mersch's exclusive care and control from 7:30 a.m. until 5:30 p.m. on November 12. In sum, there was no reasonable theory of Mersch's innocence, and thus he has failed to establish prejudice under *Strickland*. Consequently, we affirm the post-conviction court.[3]

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[2] At the post-conviction hearing, Mersch's trial counsel testified that he "overlooked" and "didn't consider" the *Hampton* instruction, that he "should have tendered" it, that there was no "strategic reason" for not doing so, and that the "standard of reasonableness with regard to criminal defense attorneys would require" him to tender it. PCR Tr. Vol. at 8, 9. Mersch relies on this testimony to argue that counsel's performance was deficient. Because we dispose of Mersch's ineffectiveness claim on lack of prejudice grounds, as did the post-conviction court, we need not address this argument.

[3] In its order, the post-conviction court remarked that "the Indiana Supreme Court has consistently held that there is no fundamental error in a trial court's failure to sua sponte give [a *Hampton*] instruction that was not requested by a defendant." Appealed Order at 8 (citing *Abd v. State*, 120 N.E.3d 1126, 1136 (Ind. 2019)). We have stated that

> fundamental error and prejudice for ineffective assistance of trial counsel are different questions and that a finding on direct appeal that no fundamental error occurred does not preclude a post-conviction claim of ineffective assistance of trial counsel. Further, because the standard for ineffective assistance prejudice is based on a reasonable probability of a different result and fundamental error occurs only when the error is so prejudicial that a fair trial is rendered impossible, we think the standard required to establish fundamental error presents a higher bar.

Benefield v. State, 945 N.E.2d 791, 804 (Ind. Ct. App. 2011).

[22] Affirmed.

Bailey, J., and Pyle, J., concur.

ATTORNEY FOR APPELLANT

James D. Crum
Coots, Henke & Wheeler, P.C.
Carmel, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Indiana Attorney General

Jesse R. Drum
Assistant Section Chief, Criminal Appeals
Indianapolis, Indiana