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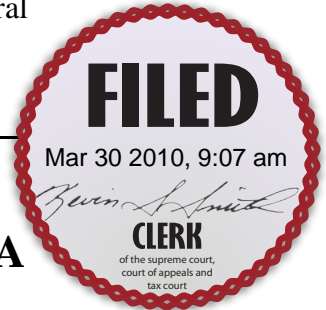
ATTORNEY FOR APPELLANT:

FRED R. JONES
Jones Huff & Jones
Plymouth, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

MONIKA PREKOPA TALBOT
Deputy Attorney General
Indianapolis, Indiana



**IN THE
COURT OF APPEALS OF INDIANA**

ANTHONY J. DEMARCO,)

Appellant-Petitioner,)

vs.)

No. 43A03-0909-PC-431

STATE OF INDIANA,)

Appellee-Respondent.)

APPEAL FROM THE KOSCIUSKO SUPERIOR COURT
The Honorable Duane G. Huffer, Judge
Cause No. 43D01-0902-PC-28

March 30, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Anthony J. DeMarco appeals the post-conviction court's denial of his petition for post-conviction relief. DeMarco raises two issues for our review, which we restate as the following issue: whether DeMarco was denied the effective assistance of trial or appellate counsel.

We affirm.

FACTS AND PROCEDURAL HISTORY

The facts underlying DeMarco's convictions were stated by this court in his direct appeal:

D.B., who was born on October 14, 1989, met De[M]arco while attending the fifth grade at a Kosciusco County elementary school. De[M]arco worked as a teacher's aide and basketball coach at D.B.'s school. At some point during the school year, De[M]arco accepted D.B.'s invitation to ride four-wheelers at D.B.'s house. Thereafter, De[M]arco and D.B. went to movies and played basketball on a regular basis. The following year, De[M]arco was at D.B.'s house two or three times per week.

After D.B. completed the sixth grade, De[M]arco moved in with D.B.'s family. D.B.'s parents permitted De[M]arco to reside with them because they liked him and De[M]arco said that he was unable to afford the costs of room and board while he attended college. De[M]arco initially stayed in D.B.'s bedroom and slept in a queen-sized bed with him, but later moved into another room.

Sometime prior to October 2003, De[M]arco began to discuss sexual issues with D.B. De[M]arco eventually asked D.B. if he wanted to try masturbation. Approximately two weeks later, De[M]arco rubbed D.B.'s penis until D.B. ejaculated. De[M]arco continued this routine on a daily basis. D.B. and De[M]arco also engaged in anal sex on numerous occasions.

On one occasion, D.B. walked in on De[M]arco as he was performing oral sex on another boy, J.B., in D.B.'s bedroom. Thereafter, De[M]arco moved out of the residence at D.B.'s insistence. De[M]arco was angry with D.B. and began calling him and emailing him, stating that

he was going to kill D.B. However, when D.B. was in the ninth grade, the two began talking again. On one occasion, D.B. went to De[M]arco's mother's home and De[M]arco performed oral sex on D.B. D.B. then drove home with De[M]arco in his truck and De[M]arco performed oral sex on D.B. in the vehicle.

The State ultimately filed four class A felony child molesting charges against De[M]arco, alleging that the acts had occurred sometime prior to October 2003. . . .

At a jury trial that commenced on January 16, 2006, the evidence established that an individual by the name of Stacy Klosowski knew De[M]arco from the local YMCA. Klosowski believed that De[M]arco was like a "big brother" to her son. On several occasions, Klosowski heard De[M]arco speak about how close he felt to a boy named D.B. Klosowski understood De[M]arco's conversation to mean that D.B. had an intimate relationship with De[M]arco. Specifically, De[M]arco often talked to Klosowski about "road head," which Klosowski knew to mean one person performing oral sex on another while the recipient was driving.

T.M. knew De[M]arco from school because De[M]arco was a "student helper teacher" in one of his seventh grade classes. On one occasion, T.M. went to the YMCA and played pool with De[M]arco. De[M]arco wanted to perform oral sex on T.M. and told him that D.B. liked it. D.B. also told another boy, T.B., that he and De[M]arco performed oral sex on each other. T.M. told Steven Jungbauer, the chief executive officer of the Kosciusko Community YMCA, what he knew about De[M]arco and D.B. and also contacted the police.

During the trial, the State introduced testimony from both D.B. and J.B. about De[M]arco performing oral sex on both of them. In particular, both J.B. and D.B. testified about the comment that D.B. had made to J.B. when he walked in on De[M]arco and J.B., where D.B. told J.B. to "just let him finish; he does it to me, it feels good." . . . The jury ultimately found De[M]arco guilty as charged.

DeMarco v. State, No. 43A03-0603-CR-128, at *1-*2 (Ind. Ct. App. Dec. 22, 2006) (citations to the record omitted), trans. denied. The trial court sentenced DeMarco to an aggregate sentence of 120 years.

On direct appeal, DeMarco raised three issues. First, DeMarco asserted that the trial court had erroneously admitted D.B.'s and J.B.'s testimony regarding his alleged molestation of J.B. Next, DeMarco argued that the court erred when it permitted additional testimony during the sentencing hearing. Finally, DeMarco averred that his 120-year aggregate sentence was inappropriate. We affirmed the trial court on the first two issues. On the third, we remanded with instructions that the court impose a sixty-year aggregate sentence.

On February 4, 2009, DeMarco filed his petition for post-conviction relief in which he alleged, among other things, that he was denied the effective assistance of trial and appellate counsel. After a hearing, on August 20 the post-conviction court entered findings of fact and conclusions of law denying DeMarco's petition. This appeal ensued. Additional facts will be provided where necessary.

DISCUSSION AND DECISION

DeMarco asserts that the post-conviction court erred when it denied his petition for relief. Our standard of review from the post-conviction court's denial of a petition for post-conviction relief is well settled:

The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5). When appealing the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment, Fisher v. State, 810 N.E.2d 674, 679 (Ind. 2004), and we will not reverse the judgment unless the evidence unerringly and unmistakably leads to the opposite conclusion, Patton v. State, 810 N.E.2d 690, 697 (Ind. 2004). We also note that the post-conviction court in this case entered findings of fact and conclusions of law in accordance with Indiana Post-Conviction Rule 1(6). We will reverse a post-conviction court's findings and judgment only upon a showing of clear error, which is that which leaves us with a definite and firm conviction that a mistake has been made.

Hall v. State, 849 N.E.2d 466, 468 (Ind. 2006). Such deference is not given to conclusions of law, which we review de novo. Chism v. State, 807 N.E.2d 798, 801 (Ind. Ct. App. 2004).

Taylor v. State, 882 N.E.2d 777, 780-81 (Ind. Ct. App. 2008).

Further:

Postconviction procedures do not afford a petitioner with a super-appeal, and not all issues are available. Rouster v. State, 705 N.E.2d 999, 1003 (Ind. 1999). Rather, subsequent collateral challenges to convictions must be based on grounds enumerated in the postconviction rules. P C.R. 1(1); Rouster, 705 N.E.2d at 1003. If an issue was known and available, but not raised on direct appeal, it is waived. Rouster, 705 N.E.2d at 1003. If it was raised on appeal, but decided adversely, it is res judicata. Id. (citing Lowery v. State, 640 N.E.2d 1031, 1037 (Ind. 1994)). If not raised on direct appeal, a claim of ineffective assistance of trial counsel is properly presented in a postconviction proceeding. Woods v. State, 701 N.E.2d 1208, 1215 (Ind. 1998). A claim of ineffective assistance of appellate counsel is also an appropriate issue for postconviction review. As a general rule, however, most free-standing claims of error are not available in a postconviction proceeding because of the doctrines of waiver and res judicata.

Timberlake v. State, 753 N.E.2d 591, 597-98 (Ind. 2001). Our decisions encourage counsel to avoid the “kitchen-sink” method of advocacy. Martin v. State, 760 N.E.2d 597, 601 n.3 (Ind. 2002). “A multitude of marginal issues may hide those with merit. To quote Justice Jackson: ‘Legal contentions, like the currency, depreciate through over-issue.’” Id. (quoting Justice Robert H. Jackson, *Advocacy Before the United States Supreme Court*, 25 *Temple L.Q.* 115, 119 (1951)).

DeMarco contends that he was denied the effective assistance of trial or appellate counsel for numerous reasons, which are detailed in turn below. Generally, a claim of ineffective assistance of counsel must satisfy two components. Strickland v. Washington, 466 U.S. 668 (1984). First, the defendant must show deficient performance:

representation that 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. at 687-88. Second, the defendant must show prejudice: 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. at 694. For example, “[t]o 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 trial court would have had no choice but to sustain it.” Little v. State, 819 N.E.2d 496, 506 (Ind. Ct. App. 2004), trans. denied. Otherwise, any error in not objecting cannot meet Strickland’s requirement of prejudice.

DeMarco first argues that his trial counsel rendered ineffective assistance by not “fil[ing] a Motion to Dismiss or otherwise object[ing] to Count I of the Amended Information.” Appellant’s Br. at 8. Count I of the amended information stated as follows:

**COUNT I
CHILD MOLESTATION
CLASS A FELONY**

. . . sometime after August 2002 and prior to October 13, 2002, Anthony J. De[M]arco did, with a child under twelve (12) years of age, namely, D.B., date of birth October 14, 1989, perform or submit to deviate sexual conduct by fondling D.B.’s penis until climax, when Anthony J. De[M]arco was at least twenty-one (21) years of age, all of which is contrary to the form of the statutes in such cases made and provided by Indiana Code [§] 35-42-4-3
. . . .

Appellant’s App. at 1. Indiana Code § 35-42-4-3 states:

(a) A person who, with a child under fourteen (14) years of age, performs or submits to sexual intercourse or deviate sexual conduct commits child molesting, a Class B felony. However, the offense is a Class A felony if:

(1) it is committed by a person at least twenty-one (21) years of age;

* * *

(b) A person who, with a child under fourteen (14) years of age, performs or submits to any fondling or touching, of either the child or the older person, with intent to arouse or to satisfy the sexual desires of either the child or the older person, commits child molesting, a Class C felony. . . .

And “deviate sexual conduct” is defined by statute as an act involving “(1) a sex organ of one person and the mouth or anus of another person; or (2) the penetration of the sex organ or anus of a person by an object.” Ind. Code § 35-41-1-9 (2002).

Thus, DeMarco asserts that his trial counsel should have objected to the language in Count I that commingled the Class C felony of fondling a child with the Class A felony of committing deviate sexual conduct on a child. But DeMarco’s argument does not demonstrate reversible error. Count I plainly alleged a “Class A felony” against DeMarco for his act of “deviate sexual conduct” with D.B, and the information directly tracked the language of subsection (a) of Indiana Code Section 35-42-4-3. See Appellant’s App. at 1. While the allegation went on to erroneously describe the deviate sexual conduct as “fondling,” the State did not charge DeMarco with a Class C felony and it did not assert that the alleged fondling was done “with intent to arouse or to satisfy the sexual desires of either the child or the other person.” See I.C. § 35-42-4-3(b). Had the State intended to charge DeMarco with a Class C felony for fondling D.B., the State’s information would have tracked the language of subsection (b) rather than subsection (a).

Further, had DeMarco's counsel objected to the information, the State could have properly moved to amend the information to simply strike the "fondling" language, which was merely unnecessary descriptive material. An information may be amended by the State at any time based on any immaterial defect. Fajardo v. State, 859 N.E.2d 1201, 1204 (Ind. 2007). And "[u]nnecessary descriptive material in a charge is surplusage." Mitchem v. State, 685 N.E.2d 671, 676 (Ind. 1997). We also note that DeMarco does not suggest that the wording of Count I adversely affected his trial counsel's ability to prepare his defense to that charge. DeMarco is unable to demonstrate any prejudicial error on this issue.

DeMarco also complains about the time frame in which the State alleged he molested D.B. in Count I.¹ Between August 2002 and October 12, 2002, the dates specified in the charge, D.B. was twelve years old, contrary to the State's additional assertion that D.B. was "under twelve." See Appellant's App. at 1. But whether D.B. was under twelve was, again, immaterial. The crime alleged requires the victim to have been under fourteen. See I.C. § 35-42-4-3. Thus, had DeMarco's counsel objected, the State again could have properly sought a corrective amendment to cure the immaterial defect.

DeMarco also suggests that "[t]here is no evidence in the Trial Transcript of any sexual conduct occurring between DeMarco and the victim prior to the summer of 2002 [as alleged in Count I]" and that the "evidence to support the allegations contained in Counts III and IV of the Amended Information" was insufficient. Appellant's Br. at 10-

¹ DeMarco also describes these arguments under the rubric, "if the State alleges it, then the State must prove it." Appellant's Br. at 9. Substantively, however, DeMarco's arguments are the same as discussed in the text.

12. Insofar as DeMarco's arguments are freestanding claims of error, those claims were available to him on direct appeal and we will not consider them in this appeal from the denial of his petition for post-conviction relief. Timberlake, 753 N.E.2d at 597-98. And insofar as DeMarco's contentions are intended to reflect ineffective assistance from either his trial or his appellate counsel, they lack cogent argument and are therefore waived. See Ind. Appellate Rule 46(A)(8)(a).

Those waivers notwithstanding, DeMarco's claims do not withstand scrutiny. As the State correctly notes, "[t]ime is not of the essence in this case." Love v. State, 761 N.E.2d 806, 809 (Ind. 2002); see Appellee's Br. at 13. As such, "the State [wa]s not confined to proving the commission on the date alleged in the affidavit or indictment, but may prove the commission at any time within the statutory period of limitations." Love, 761 N.E.2d at 809 (quotations omitted). Here, the State charged DeMarco with four Class A felonies, and a "prosecution for a Class A felony may be commenced at any time." I.C. § 35-41-4-2(c). Thus, while the State may not have demonstrated that DeMarco molested D.B. within the time frame of Count I, the State did demonstrate that he molested D.B. within the (unlimited) limitations period for that charge. And to the extent that DeMarco suggests that one inference from the victim's testimony regarding the time frame of the molestations places the victim above fourteen years of age, that argument is merely a request to reweigh the evidence, and, therefore, it would not have been successful if raised on direct appeal. See, e.g., Jones v. State, 783 N.E.2d 1132, 1139 (Ind. 2003). Hence, DeMarco again cannot demonstrate reversible error.

DeMarco next contends that his trial counsel rendered ineffective assistance when he moved for a directed verdict without pointing out the above-stated allegations of error on Count I. For the reasons explained above, DeMarco cannot demonstrate prejudicial error on this issue either.

DeMarco states that his trial counsel should have objected to jury instruction number three. That instruction stated as follows:

This is a criminal case brought by the State of Indiana against ANTHONY J. DEMARCO. The case was commenced when an Information was filed charging the defendant . . . the offense of Child Molesting, a felony. That information, omitting formal parts, reads as follows:

COUNT I:

That in Kosciusko County . . . sometime after August 2002 and prior to October 13, 2002, [DeMarco] did, with a child under twelve (12) years of age, namely, D.B., date of birth October 14, 1989, perform or submit to deviate sexual conduct by performing oral sex on D.B. when [DeMarco] was at least twenty-one (21) years of age . . . ; and

* * *

COUNT III:

That in Kosciusko County . . . sometime prior to October 14, 2003, [DeMarco] did, with a child under twelve (12) years of age, namely, D.B., date of birth October 14, 1989, perform or submit to deviate sexual conduct by performing or submitting to anal sexual intercourse with D.B. when [DeMarco] was at least twenty-one (21) years of age . . . ; and

COUNT IV:

That in Kosciusko County . . . sometime prior to October 14, 2003, [DeMarco] did, with a child under twelve (12) years of age, namely, D.B., date of birth October 14, 1989, perform or submit to deviate sexual conduct by performing or submitting to anal sexual intercourse with D.B., when [DeMarco] was at least twenty-one (21) years of age

Petitioner's Exh. 4.² The instruction then recited Indiana Code Section 35-42-4-3(a) and Section 35-41-1-9.

DeMarco asserts that his trial counsel should have raised a number of objections to that instruction. First, he notes that the instruction "inaccurately quot[es] from the charging Information" in Count I because it refers to "oral sex" rather than "fondling." Appellant's Br. at 15. But DeMarco cites no law that requires the jury instruction to be a verbatim recitation of a charging information, and, as discussed above, had his counsel raised an objection the State merely would have corrected the charging information. Further, the objection to the instruction itself would not have been sustained because the evidence presented at trial supported the language of the instruction. See Corbett v. State, 764 N.E.2d 622, 629 (Ind. 2002) ("An instruction may deviate from the State's theory of the case as long as it is supported by the evidence and is a correct statement of law."). This purported inaccuracy, therefore, is not prejudicial error.

Likewise, DeMarco complains about the instruction's inaccurate references to the victim's age. Assuming that the dates in the jury instruction were confusing when viewed in isolation, any confusion was cured by jury instruction number six. Instruction number six expressly informed the jury that, to convict DeMarco of the State's charges, the victim had to have been "a child under fourteen (14) years of age" when the offenses occurred. Petitioner's Exh. 13. Thus, the jury instructions as a whole correctly informed the jury of the law. See Ringham v. State, 768 N.E.2d 893, 898 (Ind. 2002). And while the trial court might have corrected instruction number three upon a proper objection,

² We note that DeMarco does not cite this document's placement in the record, nor is it included in the Appellant's Appendix. See App. R. 46(A)(8)(a).

there is no reasonable probability that the outcome of the proceeding would have been different had that happened. See Strickland, 466 U.S. at 694.

Neither did DeMarco's trial counsel err by not objecting to the jury instruction for its failure to include the language of Indiana Code Section 35-42-4-3(b). As discussed above, the State charged DeMarco under subsection (a) of that statute. That is the only part of the statute, then, of which the jury needed to be aware, and the trial court would not have been obliged to sustain DeMarco's objection on that basis. See Little, 819 N.E.2d at 506.

Next, DeMarco contends that his trial counsel failed to object when the jury presented three questions to the court during deliberations. Specifically, the jury asked whether it could find DeMarco guilty so long as the acts occurred while D.B. was under fourteen, whether Count IV was redundant to Count III, and whether the statute allowed it to find DeMarco guilty on Count I even if the act did not happen on or before October 13, 2002. Without recalling the jury to the courtroom, the court provided the jury with one-sentence responses to each of the three questions after consulting with the State and DeMarco's trial counsel. DeMarco asserts that the court did not follow the proper procedure for receiving such questions as outlined by Indiana Code Section 34-36-1-6 and that the court did not respond to the questions appropriately.

Section 34-36-1-6 did not apply here because none of the jury's three questions indicated disagreement among the jurors. See Bouye v. State, 699 N.E.2d 620, 627-28 (Ind. 1998). Neither was the trial court obliged, as DeMarco suggests, to simply reread the instructions in response to the jury's questions. As our supreme court has discussed:

The generally accepted procedure in answering a jury's question on a matter of law is to reread all instructions in order to avoid emphasizing any particular point and not to qualify, modify, or explain its instructions in any way. Riley v. State, 711 N.E.2d 489, 493 (Ind. 1999) (citing Wallace v. State, 426 N.E.2d 34, 36-37 (Ind. 1981)). However, we have permitted departure from this procedure when a trial court is faced with an omitted and necessary instruction or must correct an erroneous instruction, as long as it is "fair to the parties in the sense that it should not reflect the judge's view of factual matters." Id. (quoting Jenkins v. State, 424 N.E.2d 1002, 1003 (Ind. 1981)). Thus, "when the jury question coincides with an error or legal lacuna [i.e., gap] in the final instructions . . . a response other than rereading from the body of final instructions is permissible." Jenkins, 424 N.E.2d at 1003.

Martin, 760 N.E.2d at 601 (alterations original). Here, the trial court provided short responses to the jury's questions that were correct statements of law, and DeMarco presents no cogent argument in this appeal to show that the court's responses were somehow unfair or reflected the judge's interpretation of the facts. See App. R. 46(A)(8)(a). Thus, there is no prejudicial error on this issue.

DeMarco continues by asserting that his trial counsel was ineffective for not seeking to sever the charges. But even if DeMarco's counsel had sought to sever the charges, the trial court would not have been obliged to grant that motion. A trial court must grant a motion to sever charges only if multiple charges have been joined "solely on the ground that they [we]re of the same or similar character." I.C. § 35-34-1-11(a) (emphasis added). Here, although the charges were certainly of the same or similar character, they also involved the same victim, they occurred in the same locations, and they occurred repeatedly over multiple years. Thus, severance of the charges would not have been statutorily mandated, and DeMarco cannot satisfy his burden of showing

reversible error. See, e.g., Philson v. State, 899 N.E.2d 14, 17 (Ind. Ct. App. 2008), trans. denied.

DeMarco next complains that his trial counsel failed to properly object to the prosecutor's comment, during his opening statement, that DeMarco molested D.B. "both before [D.B.'s] fourteenth birthday and after [D.B.'s] fourteenth birthday." See Appellant's App. at 159. He does not further expound upon this complaint. But, assuming an objection would have been sustained if properly raised, there is no prejudicial error here. The State presented ample evidence of DeMarco's guilt, and the prosecutor's passing comment could not have possibly swayed the jury one way or another. See Booher v. State, 773 N.E.2d 814, 817 (Ind. 2002).

DeMarco also suggests that his trial counsel gave an ineffective closing statement. Similarly, DeMarco states, "[u]nfortunately, you just have to read and study the entire original trial transcript to get a feel for the manner in which the trial prosecutor controlled the courtroom and how the trial defense attorney failed to interpose timely objections and exert his own control over the courtroom." Appellant's Br. at 22. These statements are overbroad and are not cogent arguments of ineffective assistance of counsel. Thus, these statements present nothing for us to consider on appeal. See App. R. 46(A)(8)(a).

Finally, DeMarco argues that he received the ineffective assistance of appellate counsel in his direct appeal. Specifically, DeMarco states that his appellate counsel erroneously "did not raise any of the issues previously identified." Appellant's Br. at 22. It is well settled that "[t]he effectiveness of appellate counsel's representation is determined on appeal using the same standards as applied to trial counsel." Thornton v.

State, 570 N.E.2d 35, 37 (Ind. 1991). Thus, for the reasons stated above, DeMarco cannot demonstrate reversible error on his additional allegation of ineffective assistance of appellate counsel.

In sum, DeMarco has not meet his burden on appeal of showing clear error by the post-conviction court when it denied his petition for relief. DeMarco did not receive deficient performance from either his trial or his appellate counsel, and we cannot say that there is a reasonable probability that any of the alleged errors affected DeMarco's substantial rights or the outcome of his trial. Thus, we affirm the post-conviction court's judgment.

Affirmed.

VAIDIK, J., and BROWN, J., concur.