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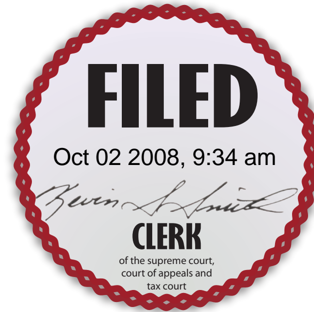

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IN THE
COURT OF APPEALS OF INDIANA

THOMAS L. DANIELS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 18A02-0804-CR-369
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE DELAWARE CIRCUIT COURT
The Honorable Wayne J. Lennington, Judge
Cause No. 18C05-0703-FD-34

October 2, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Thomas Daniels appeals his conviction and sentence for battery as a class D felony.[1]

We affirm.

ISSUES

1. Whether Daniels received ineffective assistance of trial counsel.
2. Whether the trial court abused its discretion in allowing a leading question.
3. Whether the trial court abused its discretion in sentencing Daniels.

FACTS

In the fall or winter of 2006, Whitney Crumes met Daniels at a bus stop and invited him to live with her and her then-two-year-old son, C.C., at her Muncie residence. During the afternoon of February 28, 2007, Zachary Scott was visiting Daniels at Crumes' home. Daniels and Scott were watching C.C. while Crumes "went to a plasma place to donate plasma." (Tr. 92). At some point, Daniels and Scott went upstairs to C.C.'s bedroom to feed him. When C.C. became fussy, Daniels "smacked him with an open hand . . . [a]round the back of his head." (Tr. 68-69). Daniels then pulled C.C.'s hair and "spit on him on top of his head." (Tr. 69).

On March 5, 2007, the State charged Daniels with class D felony battery. The trial court held a jury trial on January 22, 2008, after which the jury found Daniels guilty as charged. The trial court ordered a pre-sentence investigation report ("PSI"). According

[1] Ind. Code § 35-42-2-1.

to the PSI, Daniels had been adjudicated a juvenile delinquent for committing acts which, if committed by an adult, would have constituted class B misdemeanor battery; class D felony failure to return to lawful detention; class B misdemeanor criminal mischief; class D felony criminal confinement; and class A misdemeanor battery. Daniels' last juvenile adjudication was in 2004. As an adult, Daniels had convictions for class A misdemeanor conversion in 2006 and class C misdemeanor illegal consumption of alcohol in 2007. Daniels violated his probation in both cases.

On January 17, 2008, Daniels filed a motion for a competency examination, which the trial court granted. On or about January 20, 2008, Dr. Frank Krause conducted a psychological evaluation of Daniels. Dr. Krause found Daniels to be "competent and quite capable of appreciating the wrongfulness of his behavior . . . ." (App. 86).

Following a sentencing hearing on February 19, 2008, the trial court sentenced Daniels to three years. Additional facts will be provided as necessary.

DECISION

1. Ineffective Assistance of Counsel

Daniels asserts that his trial counsel was ineffective for "continuously allow[ing] the State to ask questions calling for hearsay and then fail[ing] to object to the answers." Daniels' Br. at 9-10. We disagree.

We evaluate claims concerning denial of the Sixth Amendment right to effective assistance of counsel using the two-part test articulated in *Strickland v. Washington*, 466 U.S. 668 (1984), *reh'g denied*; *Cooper v. State*, 687 N.E.2d 350, 353 (Ind. 1997). A defendant must show that his counsel's performance fell below an objective standard of

reasonableness, and that the deficiencies in the counsel's performance were prejudicial to the defense. *Id*. As to counsel's performance, we presume that counsel provided adequate representation. *Sims v. State*, 771 N.E.2d 734, 741 (Ind. Ct. App. 2002), *trans. denied*. "Counsel is afforded considerable discretion in choosing strategy and tactics, and we will accord that decision deference." *Id*. Furthermore, a defendant must show more than isolated poor strategy, bad tactics, a mistake, carelessness or inexperience. *Law v. State*, 797 N.E.2d 1157, 1162 (Ind. Ct. App. 2003) (discussing post-conviction remedy for ineffective assistance of counsel). As to prejudice, "there must be a showing of 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*. "It is not necessary to determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *Id.*

When a defendant brings an ineffective assistance of counsel claim based upon trial counsel's failure to make an objection, the defendant must demonstrate that the trial court would have sustained a proper objection. *Id.* at 1164. "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 defendant must demonstrate that failure to object prejudiced the defendant. *Law*, 797 N.E.2d at 1162.

Here, Daniels asserts that his counsel was ineffective for failing to object on the basis of hearsay to the following testimony by Crumes:

Q And then what happened?

A Then [C.C.] started, like he was just scared of [Daniels].

* * *

Q Did [Scott] get along with [C.C.]?

A Yeah.

Q Did he get—how did he get along with him? Did he get along with him well?

A Good. [C.C.] loved him.

* * *

Q . . . And what were you told?

A I was told that [Daniels] had put my son in the high chair in his bedroom, had smacked him across the head and spit in his face. I had also been told that he put him in a head lock, like a sleeper hold, has yelled in his ears when he had cried.

(Tr. 90, 91, 94).

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Ind. Evidence Rule 801(c). Generally, hearsay evidence is inadmissible pursuant to Evidence Rule 802.

> When an out-of-court statement is challenged as hearsay, we first determine whether the testimony describes an out-of-court statement that asserts a fact susceptible of being true or false. If the statement contains no such assertion, it cannot be hearsay and the objection should accordingly be overruled. However, if the statement does contain an assertion of fact, we consider the evidentiary purpose of the proffered statement; if it is to prove the fact asserted, and there are no applicable hearsay exceptions, the statement is inadmissible as hearsay.

Lampitok v. State, 817 N.E.2d 630, 639-40 (Ind. Ct. App. 2004) (citations omitted), *trans. denied*. "However, errors in the admission of evidence, including hearsay, are to be disregarded as harmless unless they affect the substantial rights of a party." *Dorsey v. State*, 802 N.E.2d 991, 994 (Ind. Ct. App. 2004). "Admission of hearsay is not grounds for reversal where it is merely cumulative of other evidence admitted." *Id.*

Crumes testimony regarding C.C.'s reaction to Daniels and C.C.'s relationship with Scott did not constitute hearsay as it was not describing out-of-court statements. Given that the testimony did not violate Evidence Rule 802, Daniels has failed to meet his burden of establishing that had an objection been made, the trial court would have sustained the objection.

As to Crumes' testimony regarding what she was told about Daniels' treatment of C.C., Scott previously had testified that Daniels "smacked [C.C.] with an open hand" on "the back of his head." (Tr. 68, 69). Scott also testified that he observed Daniels pull C.C.'s hair and "spit on him on top of his head." (Tr. 69). Scott further testified that prior to the offense, he had observed Daniels "yell at [C.C.], because [he] would cry or get on his nerves." (Tr. 80).

Although the latter question and response was hearsay, under the totality of the evidence presented, we find that Crumes' testimony was merely cumulative of Scott's testimony; therefore, we cannot say that Daniels was prejudiced to the extent that, but for his counsel's failure to object, the result of the proceeding would have been different. As the admission of the testimony did not constitute reversible error, we do not find that the failure to object to Crumes' testimony constituted ineffective assistance of counsel.

2. Leading Question

Daniels asserts that the trial court improperly allowed the State to lead Crumes during her direct examination. Again, we disagree.

The use of leading questions during direct examination generally rests within the trial court's discretion. *Riehle v. State*, 823 N.E.2d 287, 294 (Ind. Ct. App. 2005), *trans. denied*. Indiana Evidence Rule 611(c) provides that "[l]eading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness's testimony." "A leading question is one that suggests the desired answer to the witness." *Riehle*, 823 N.E.2d at 294. "The use of leading questions is limited in order to prevent the substitution of the attorney's language for the thoughts of the witness as to material facts in dispute." *Id.* "However, the mention of a subject to which a witness is desired to direct his or her attention is not considered to be a suggestion of an answer." *Vance v. State*, 860 N.E.2d 617, 619 (Ind. Ct. App. 2007).

Daniels argues that the trial court abused its discretion when it allowed Crumes to be examined as follows:

> Q [W]as there an incident at your house while you were gone?
>
> A I don't know whether—I don't know if that's the time when music was played loud early in the morning, or . . . .
>
> Q Okay, I'm not talking about that. Did [Scott] come up to you and inform you of an incident concerning [C.C.]?

(Tr. 93).

Clearly, Crumes was confused during her examination. The State merely elaborated on its examination to direct her attention to the events of February 28, 2007. We find no abuse of discretion in allowing the State's examination.

3. Sentencing

Daniels contends that the trial court abused its discretion in sentencing him to three years.[2] Daniels seems to argue that the trial court failed to enter a sentencing statement or, in the alternative, failed to identify mitigating circumstances.[3]

Sentences are within the trial court's discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007). "One way in which a trial court may abuse its discretion is failing to enter a sentencing statement at all." *Id.* An abuse of discretion also may occur if the record does not support the reasons given for imposing the sentence, or the sentencing statement omits reasons that are clearly supported by the record and advanced for consideration. *Id.* at 490-91. A trial court, however, "no longer has any obligation to 'weigh' aggravating and mitigating factors against each other when imposing a sentence," and therefore, "can not now be said to have abused its discretion in failing to 'properly weigh' such factors." *Id.* at 491.

Here, the trial court made the following statement:

> [Daniels] has a history of adult criminal activity. He's been charged and convicted in two cases out of City Court. . . . [T]his is a person who reports a history of ADHD, depression, anxiety, and schizophrenia. But still he is

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[2] Pursuant to Indiana Code section 35-50-2-7, "[a] person who commits a Class D felony shall be imprisoned for a fixed term of between six (6) months and three (3) years, with the advisory sentence being one and one-half (1 1/2) years."

[3] Daniels does not identify those mitigating circumstances in his brief.

> not to the point that he does not understand right or wrong or that he does not understand the seriousness of what was done here. And I don't know what to do, you know? This is a young man. He's only twenty years old. . . . [Y]ou know, I first thought when we sent this to Dr. Krause, I though[t] certainly it would be that this man doesn't have the capacity to get along in society and that's the reason he does this, but he does. . . . Back as far as 2002, Battery, a B misdemeanor, Assault with Bodily Fluids. And then he messed up with that. Indiana Boys School pending review hearing. August 2002, review hearing. . . . Petition to Terminate probation signed and filed. . . . He couldn't even stay on probation. . . . 2003, Criminal Mischief, Failure to Return to Lawful Detention. . . . Criminal Confinement. He's had plea agreements. He's had deals worked out and even in this particular case he violated while he was on either parole or probation. . . . Been smoking marijuana since, for years now and he's only twenty. I am so amazed at the contents of these things because there's no rhyme or reason. If we had a person who was compelled to do something, it would be different. He violated probation granted out of City Court. He's in need of correctional and rehabilitative treatment that can best be provided by commitment. Prior attempts have not been successful.

(Tr. 152-54).

Contrary to Daniels' assertion, the trial court did enter a sentencing statement. Furthermore, it identified the only proffered mitigating circumstance—Daniels' age—in its sentencing statement. We therefore find no abuse of discretion.

Affirmed.

FRIEDLANDER, J., and BARNES, J., concur.