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IN THE COURT OF APPEALS OF INDIANA

DAMON A. MYERS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-1001-PC-154
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Robert R. Altice, Judge
Cause No. 49G02-0510-FC-186328
Cause No. 49G02-0510-FC-186329

November 10, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Damon A. Myers, pro se, appeals the denial of his petition for post-conviction relief (PCR), by which he challenged his conviction of two counts of class C felony child molesting. Myers presents the following restated issues for review:

1. Did Myers receive ineffective assistance of trial counsel?

2. Did Myers receive ineffective assistance of appellate counsel?

We affirm.

This appeal involved two separate criminal cases against Myers, which were consolidated upon direct appeal. *See Myers v. State*, Nos. 49A05-0610-CR-616 and 49A04-0612-CR-690 (Ind. Ct. App. July 23, 2007). At the trial court level, under cause number 49G02-0510-FC-20-186328 (Case 328), Myers was alleged to have molested J.C. and D.P. Under cause number 49G02-0510-FC-20-186329 (Case 329), Myers was alleged to have molested A.E. Myers was represented in Case 328 by attorney Karen Brogan. He was represented in Case 329 by attorney Richard Bucheri. The underlying facts were set out as follows in the unpublished opinion affirming Myers's convictions upon direct appeal:

> On a Saturday or Sunday in October of 2005, Myers babysat Elizabeth Coleman's (Coleman) four children, including her two daughters, J.C. and D.P., who were respectively eleven years old and six years old at the time. Myers and Coleman are cousins. While under Myers' supervision, J.C. and D.P. called Coleman at work and reported that Myers had inappropriately touched them. On October 21, 2005, Coleman brought J.C. and D.P. to the Child Advocacy Center in Marion County where child interviewer, Diane Bowers (Bowers), met with the girls. J.C. reported that Myers squeezed her buttocks several times, grabbed her by the arm, and tried to put his hand down the front of her shirt and jumper. J.C. also reported that Myers came up behind her and touched his private area to her buttocks. D.P. reported that Myers touched her breasts under her clothing, and rubbed her buttocks and vagina on the outside of her clothes.
>
> Previously, in July of 2005, Myers lived with and was romantically involved with the grandmother of nine-year-old, A.E. On October 18, 2005,

> Kara Casaban (Casaban) of the Indianapolis Police Department conducted a Body Safety Program at A.E.'s elementary school, after which A.E. reported to her that Myers had reached around him and touched his penis several times while A.E. sat at the computer at his grandmother's house.
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> On October 28, 2005, the State filed an Information charging Myers with two Counts of child molesting, one as to J.C. and one as to D.P., as Class C felonies under I.C. § 35-42-4-3 (First Cause). On the same date, and under a different Cause Number, the State filed a separate Information charging Meyers with child molesting, as a Class C felony, for the molestation of A.E. (Second Cause). On August 28 through 29, 2006, a jury trial was held on the First Cause. Myers was found guilty of both Counts of child molesting. On September 27, 2006, the trial court held a sentencing hearing and sentenced Myers to four years on each Count, with the sentences to run consecutive to the sentence imposed in the Second Cause.

Myers v. State, Nos. 49A05-0610-CR-616 and 49A04-0612-CR-690, slip op. at 1-2 (footnotes omitted). On August 30, 2007, Myers filed his PCR petition. After amendments to his petition, on September 2, 2009, a hearing was conducted. On January 13, 2010, the trial court denied the petition and this appeal ensued.

We note at the outset that in a post-conviction proceeding, the petitioner bears the burden of establishing his claims for relief by a preponderance of the evidence. *Overstreet v. State*, 877 N.E.2d 144 (Ind. 2007), *cert. denied*, 129 S.Ct. 458 (2008). When appealing from the denial of a PCR petition, the petitioner stands in the position of one appealing from a negative judgment and therefore must show that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. *Id*. We further observe that the post-conviction court is the sole judge of the weight of the evidence and credibility of witnesses. *J.J. v. State*, 858 N.E.2d 244 (Ind. Ct. App. 2006).

In order to prevail on his claims that trial and appellate counsel rendered ineffective assistance, Myers must demonstrate the existence of the two components of that claim, as

established in *Strickland v. Washington*, 466 U.S. 668 (1984). *Creekmore v. State*, 853 N.E.2d 523 (Ind. Ct. App. 2006), *clarified on reh'g*, 858 N.E.2d 230. He must first establish that counsel's performance was deficient, i.e., fell below an objective standard of reasonableness, and that the errors in representation were so serious that counsel was not functioning as counsel guaranteed by the Sixth Amendment. *Id*. A showing of deficient performance alone is not enough, however, to prevail on a claim of ineffective assistance of counsel. The petitioner must also show that the deficient performance prejudiced the defense. *Id*. Because a petitioner must prove both elements, the failure to prove either element defeats the claim. *See Young v. State*, 746 N.E.2d 920 (Ind. 2001) (holding that because the two elements of *Strickland* are separate and independent inquiries, the court may dispose of the claim on the ground of lack of sufficient prejudice if it is easier).

We note that, with respect to several of his claims, Myers iterates and reiterates the same claim of error multiple times throughout his appellate brief. This appears to be attributable to arranging claims variously by counsel, stage of the proceedings, and in some cases in ways we cannot discern. Rather than address Myers's claims in the fashion he presents them, we will group them generally into claims of ineffective assistance of trial counsel and ineffective assistance of appellate counsel.

1.

Myers contends he received ineffective assistance of trial counsel in at least twenty-six separate respects. In presenting many of these claims, Myers has neglected to identify the prejudice flowing therefrom. The following claims fail on this basis: (1) "Karen Brogan and Richard Bucheri were ineffective for failing to lay the proper foundations for inherently

contradictory testimony, possibly exculpatory evidence, and inconsistent statements, to impeach the State's witnesses", *Appellant's Brief* at 8 (after listing fourteen separate instances where trial counsel failed to take action, followed by a confusing amalgam of vague assertions, Myers ultimately identifies the prejudice for this claim thus: "Given the significant incompetence of counsel, there is a reasonable probability that the outcome of trial would have been different[;]" *id*. at 13; in "identifying" the prejudice in this manner, Myers merely begs the question); (2) "Bucheri was ineffective for failing to move for continuance due to surprise witnesses;" *id*. at 14 (Myers claims that the disputed evidence was "not merely cumulative", *id*. at 16); (3) "Failing to object to the State of Indiana violation of Indiana Trial Rule 5(A)(6);" *id*. at 16; (4) "Bucheri was ineffective for failing to object to the State of Indiana's violation of the rules set forth in *Modesitt v. State*, 578 N.E.2d 649, (1991) and *Lambert v. State*, 534 N.E.2d 235, (Ind. 1989)", *id*. at 17; (5) "Karen Brogan and Richard Bucheri were incompetent for failing to research a critical legal issue", *id*. at 20 (he merely offers the unexplained and unsupported assertion that further investigation "would have provided evidence favorable to the defendant", *id*.); (6) "Bucheri was ineffective for failing to object to the trial judge's abandonment of the position of neutrality", *id*. at 21 (he claims the trial court intervened and "elicited important details counsel had not yet had the chance to bring out", *id*., but does not specify what those details were and how such prejudiced his case); (7) "Bucheri was ineffective for failing to investigate and present mitigation evidence or testimony from the accused's parents or siblings", *id*. at 23; (8) "Richard Bucheri was ineffective for failing to conduct a pretrial investigation", *id*. at 24 (Myers lists four "facts" such an investigation would have revealed, all of which are too

vaguely described to permit an evaluation of the actual prejudice suffered, if any); (9) "Bucheri was ineffective for failing to object to inadmissible expert opinion testimony", *id*. at 42 (in arguing this issue, Myers concedes there was no prejudice, *viz*., "[h]er testimony adds an imponderable to an already imponderable prosecution decision *and does not make Myers's guilt any more or less likely*", *id*. at 43 (emphasis supplied); (10) "Bucheri was ineffective for failing to object to the State of Indiana violation of Indiana Rule of Trial Procedure 6(D)", *id*. at 46; and, for a second time (see (7) above), (11) "Bucheri was ineffective for failing to investigate or present mitigation evidence or present mitigation testimony from Myers's siblings or parents", *id*. at 55. These claims are unavailing. *See Young v. State*, 746 N.E.2d 920.

Myers contends trial counsel rendered ineffective assistance of counsel "for failing to object to the absence of a finding of necessity for the accused's participation in the trial wearing jail garb." *Appellant's Appendix* at 6. As indicated above, this appeal is a consolidation of two separate trials – one a jury trial, the other a bench trial. Myers wore prison garb in only one of them, i.e., the bench trial. He contends he was denied due process in that he was compelled to stand trial in his jail uniform. The United States Supreme Court has held that a state denies an accused due process if it forces him to be tried in identifiable jail or prison clothing. *Estelle v. Williams,* 425 U.S. 501 (1976). "[T]he Court refused to establish a per se rule invalidating every conviction in which the defendant was dressed in jail attire." *Carter v. Estelle,* 537 F.2d 197, 199 (5th Cir. 1976). "Instead, *Estelle v. Williams* and subsequent cases have clearly established that the central issue is whether the accused was compelled to appear before the *jury* in jail garb." *Bledsoe v. State*, 274 Ind. 286, 288-89,

410 N.E.2d 1310, 1313 (1980) (citations omitted) (emphasis supplied). As explained by the Michigan Court of Appeals, "the underlying rationale of this rule is that a "defendant's presumption of innocence would be unduly prejudiced *before the jury* if defendant was forced to be tried in prison garb. No such prejudicial effect could be shown in [a] case, *tried before a judge.*" *People v. Daniels,* 163 Mich.App. 703, 415 N.W.2d 282, 285 (1987) (emphasis supplied).

Here, the court undoubtedly knew that Myers was in jail. Thus, Myers's jail attire did not convey information not already known to the court. If Myers had wanted a trier of fact who was insulated from such knowledge, he should have requested a jury trial. He did not do so. We conclude that the rationale behind *Estelle v. Williams* cannot logically be applied to bench trials. Therefore, counsel did not render ineffective assistance in failing to object to Myers's prison garb at the bench trial.

Myers contends trial counsel rendered ineffective assistance in failing to object to the testimony of Kara Casaban, who was in charge of the Body Safety Programs for the Indianapolis Police Department. Casaban interviewed the victims in this case. Casaban testified that it is not unusual for a child victim to earlier disclose some but not all molestation incidents and then later disclose the remaining incidents. Myers contends this testimony violated the principles enunciated in *Steward v. State,* 652 N.E.2d 490 (Ind. 1995), which prohibited expert testimony on child sexual abuse syndrome. Such evidence, "paired with expert testimony concerning similar syndrome behaviors, [creates] the invited inference … that the child was sexually abused because he or she fits the syndrome profile[.]" *Id*. at 499.

In the instant case, however, Casaban did not provide child sexual abuse syndrome evidence. A.E. had attended a body safety program conducted by Casaban. A.E. approached Casaban after the presentation was concluded and informed her that he had been molested by a group of kids after school. He then left, but returned a few minutes later and informed Casaban that he had not been truthful, that it was in fact Myers, not a group of children, who had molested him. Casaban's testimony merely explained that it is not unusual for children to disclose a molestation in the manner that A.E. did. Therefore, this testimony did not concern the child sexual abuse syndrome and was not inadmissible on that basis. Accordingly, the failure to object to Casaban's testimony did not constitute ineffective assistance of counsel.

Myers contends trial counsel rendered ineffective assistance in failing to advise him that he was under no compulsion to testify. Attorney Bucheri testified that he was sure he did advise Myers of the right not to testify. The post-conviction court was entitled to believe Bucheri's claim and to discredit Myers's countervailing claim, which it obviously did. *See J.J. v. State*, 858 N.E.2d 244. Therefore, Myers failed to establish a factual basis to support this claim and trial counsel did not render ineffective assistance in this regard.

Myers contends counsel rendered ineffective assistance in "failing to offer adequate closing arguments and presenting argument that was ineffective at proffering any semblance of defense theory." *Appellant's Brief* at 21. Again, Myers's claim is not supported by the evidence. He contends Bucheri failed in some cases to make arguments favorable to the defense and in other cases made arguments that affirmatively prejudiced Myers's defense. As to the former, our review reveals that counsel highlighted inconsistencies in A.E.'s

statement, as well as called the jury's attention to what he perceived to be weaknesses in the State's case. Bucheri also pointed out that there were five or six people living in the house at the time A.E. alleged the molestations occurred, yet there were no witnesses to corroborate A.E.'s testimony. As to the latter claim, i.e., that Bucheri made comments prejudicial to Myers's defense, the examples he cites are taken out of context and the meanings mischaracterized. For instance, Myers claims that Bucheri "conceded, 'the events had occurred but probably between July 01, 2005 and September 15, 2005[.]" *Id.* Myers implies that this constituted an admission on his counsel's part that the alleged molestations occurred. A review of the complete statement reveals not only that Myers has misquoted the counselor's remarks, but he has also mischaracterized them as well, *viz.*: "I don't think there's been testimony to say that these events, even if they did occur, actually occurred between July 1st and September the 15th." *Transcript* at 131. Viewed in its entirety, Bucheri's statement did not concede that Myers committed the charged acts, but rather constituted an alternative argument in favor of a not-guilty verdict. Such is common and valid legal strategy, and certainly does not constitute ineffective assistance of counsel. Myers's other claims of damaging comments by Bucheri during closing argument are similarly flawed. Counsel did not render ineffective assistance of counsel in this respect.

Myers contends counsel rendered ineffective assistance in neglecting to object to the trial court's failure to advise him that, if found guilty, his sentences could be imposed consecutively. Once again, the claim is without foundation in the evidence. Before trial in Case 328, counsel explained to the trial court, in Myers's presence, why Myers had rejected a plea agreement:

MR. BUCHERI: and I made that offer to my client, Mr. Myers, on several occasions, including today. We discussed the possibility of a plea and he is adamant he does not wish to plead.

THE COURT: Okay. That's why we have jury trials. But just so he understands – how many charges are there on today's? Just two counts, I mean?

MS. GAGEN (the State**):** Two counts today.

MR. BUCHERI: Yes.

THE COURT: And I could stack those, so he's looking at a maximum of 16 on that?

MS. GAGEN: Yes.

THE COURT: And then the third case, he's looking at another eight on top of that?

MS. GAGEN: Yes.

THE COURT: Okay. So maximum 24, and you've offed [sic] cap of –

MS. GAGEN: -- 12.

THE COURT: Cap of 12. Okay. All right. We got clothes for Mr. Myers?

Transcript of Case 328 at 6-7. As the foregoing reflects, the trial court informed Myers of the possibility of consecutive sentences.

Myers contends trial counsel rendered ineffective assistance in "failing to file an application for funds or request a continuance to hire experts to consult with or to examine the prosecution expert's interview techniques and opinions." *Appellant's Brief* at 25. According to Myers, "[h]ad Bucheri filed an application for funds or requested a continuance

to hire experts to consult with or to examine Kara Casaban's interview techniques and opinions the result of the trial would have been different." *Id*. at 26. Such vague allusions to what "experts" would say does not permit this court to assess the prejudice and therefore does not carry Myers's burden in this regard. *See Creekmore v. State*, 853 N.E.2d 523.

Myers contends he received ineffective assistance of counsel when counsel did not object "after it was revealed … [that] the State prosecutor commenced illegal underhand negotiations (as by bribery) with [A.E.] by issuing a writing or object to [A.E.] without first notifying the Court or the defendant of the State's *intent* to issue a legal document or thing to the alleged victim." *Appellant's Brief* at 27 (emphasis in original). Apparently, this claim is based upon the fact that, prior to his testimony at a pretrial child hearsay hearing, A.E. was provided with a copy of another witness's written statement in order to refresh his recollection. Myers claims it was error for counsel to have failed to object when that statement was not provided to him. At the post-conviction hearing, Brogan (Myers's attorney at that hearing) testified that she was aware of the document at the time because she had already seen it. Moreover, in order to attack A.E.'s credibility, Brogan brought to the court's attention that A.E. had read the statement in question. This does not constitute deficient performance. We note also that there was a simple mechanism whereby the statement could have been used to refresh A.E.'s memory in any event, thus Myers did not suffer prejudice. *See, e.g.*, *Thompson v. State*, 728 N.E.2d 155 (Ind. 2000) (if a witness states that he does not recall the information sought by the questioner, the witness may examine a writing, including one prepared by someone other than the witness, in order to refresh his memory).

Myers contends generally that Brogan and Bucheri "failed to lay proper foundations to impeach" multiple witnesses. *See Appellant's Brief* at 33-37. He submits twenty-four instances where this occurred, each of which consists of two slightly contradictory statements made by a witness. The following example is illustrative: "In her video interview [J.C.] said that Antonio did not believe her story. In the next breath, she said he sort of believed her." *Id* at 34. Noting the importance of the testimony of the child victims in this case and that he bears the burden upon petition for post-conviction relief of showing a reasonable probability that the outcome would have been different if not for the unprofessional errors, Myers's argument concerning prejudice is as follows: "Given the significant incompetence of counsel, there is a reasonable probability that the outcome of trial would have been different." *Appellant's Brief* at 39. This is not so much an argument supporting a finding of prejudice as it is a bald assertion that it is so. This is not sufficient to support his claim.

Myers claims counsel rendered ineffective assistance in failing to object to certain remarks made by the prosecuting attorney during closing argument, including: (1) "these children are telling you the truth", *Transcript of Case 328* at 222, and (2) referring to Myers as a "child molester". *Id*. Myers claims the former amounts to impermissible vouching testimony and the latter amounts to "misleading the jury with defamation of the accused by character assassination." *Appellant's Brief* at 40.

Read in context, the prosecutor's statement that the victims were telling the truth did not constitute vouching testimony. Rather, it came in the midst of a recapping of the evidence and stressing that their testimonies had remained consistent from the time the allegations were first made and how the children's claims were consistent with the evidence

adduced at trial. He also stressed to the jury that there was no evidence that the children had a motivation to lie. Also, the comment was intended to address attorney Bucheri's invitation to the jury to "speculate or guess why these kids would make that up." *Transcript of Case 328* at 221. "[A] prosecutor may comment on the credibility of the witnesses as long as the assertions are based on reasons which arise from the evidence." *Cooper v. State*, 854 N.E.2d 831, 836 (Ind. 2006) (quoting *Lopez v. State*, 527 N.E.2d 1119, 1127 (Ind. 1988)). Moreover, we note that the jury was instructed that "[t]he unsworn statements of counsel on either side of the case should not be considered as evidence." *Appellant's Appendix in Case 328* at 150. *See Surber v. State*, 884 N.E.2d 856 (Ind. Ct. App. 2008) (noting that this instruction mitigates against a finding of prejudice, even assuming an improper comment was made by the prosecuting attorney during closing argument), *trans. denied*. Taken as a whole, we conclude that this comment amounted to the prosecutor urging the jury to believe the victim's testimony because the evidence warranted it. Thus, the comment was not improper.

With respect to the claim concerning the prosecutor's comment that Myers is a child molester, again, we must consider the context in which the comment was made. In commenting upon the lack of physical evidence, the prosecutor noted that it is often the case that the crime of child molesting does not leave physical evidence. She also noted that there was no reason to disbelieve the victim's claims, and that "[e]very single bit of evidence you've had tells you that they're telling you the truth." *Transcript in Case 328* at 222. She followed with the request, "Go back and call the defendant what he is, a child molester." *Id*. Read in context, this comment amounts to little more than a request that the jury convict Myers of the charges against him. This clearly was not improper. *See Cooper v. State*, 854

N.E.2d at 837(rejecting a claim of prosecutorial misconduct where the prosecutor remarked that the defendant was "a back shooter and a woman beater", characterizing such as a "fair commentary on the facts introduced at trial"). Counsel did not render ineffective assistance in failing to object to this comment.

Myers contends "Brogan and Bucheri were ineffective for failing to object to the indirect contempt of Diane Bowers and Detective Julie Dutrieux or request an instruction to limit their indirect contempt solely to judge their credibility." *Appellant's Appendix* at 47. We presume this argument relates to a putative violation of Ind. Code Ann. § 31-33-8-1 (West, Westlaw through 2010 2nd Regular Sess.) or Ind. Code Ann. § 34-47-3-2 (West, Westlaw through 2010 2nd Regular Sess.), or both, by authorities investigating the victim's claims. Our presumption is based upon the fact that Myers cites these two provisions in the midst of making this argument, which includes the following assertion:

> Therefore, the indirect contempt of Detective Julie Dutrieux and Diane Bowers was sufficient to support an objection also by reason of the increased likelihood of suggestion and supported a request for an instruction to limit the State investigators [sic] subsequent violation of I.C. 31-33-8-1 solely to judge their credibility since there was a danger the jury would use their testimony as substantive evidence linking Myers to the misconduct in question.

Appellant's Brief at 48. Myers does not enlighten us, however, regarding which objections could have been lodged and for precisely what reasons. Therefore, even assuming for the sake of argument that an objection would have been appropriate, we are unable to assess the prejudice, if any, from the failure to interpose it. The argument fails.

Myers contends Bucheri was ineffective for failing to object to what Myers characterizes as "speculation testimony." *Appellant's Brief* at 48. According to Myers the

first instance of such testimony came during J.C.'s direct examination. She testified that her brother, D.C., was in the room one of the times that Myers molested her. She was asked, "So could [D.C.] see you, or was he looking?" *Transcript for Case 328* at 37. She responded, "No ma'am." *Id*. According to Myers, this constituted mere speculation as to what D.C. could see and thus was inadmissible and should have been the subject of an objection. To the contrary, J.C.'s answer is best understood as testimony about whether D.C. was looking in her direction when Myers molested her. This was a matter of direct observation and the rules of evidence clearly permit J.C. to testify as to what she observed in that regard. The evidence in question was admissible and not the subject of a proper objection.

The other instance of "speculation testimony" presented by Myers was Coleman's testimony that when her daughters called her at work to inform her that Myers had molested them, they seemed "scared." *Id*. at 107. According to Myers, "there was no way a reasonable person could infer that she could accurately judge demeanor by merely listening to their voices over the telephone." *Appellant's Brief* at 49. We summarily reject this assertion.

Myers contends "Bucheri and Brogan were ineffective for failing to object or motion for mistrial by reason of evidence of possible interrogation, prompting, or manipulation by adults." *Id*. Put plainly, Myers contends counsel should have objected to J.C.'s testimony because certain responses of J.C. "did not eliminate the possibility of fabrication, coaching, or confabulation[.]" *Id*. at 50. According to Myers, "Spontaneity was an inaccurate indicator of trustworthiness." *Id*. This frankly baffling contention, coupled with an unexplained citation to a United States Supreme Court case, comprises Myers's argument on this

question. This issue is not supported by cogent argument, therefore it is waived. *See Davis v. State*, 835 N.E.2d 1102, 1113 (Ind. Ct. App. 2005) ("party waives an issue where the party fails to develop a cogent argument or provide adequate citation to authority and portions of the record"), *trans. denied*; *see also* Ind. Appellate Rule 46(A)(8) (requiring contentions in appellant's brief be supported by cogent reasoning and citations to authorities, statutes, and the appendix or parts of the record on appeal).

Myers contends Bucheri rendered ineffective assistance in failing to object to Elizabeth Coleman's testimony about what D.C. said to her. Coleman was testifying about receiving a telephone call at work from D.C. She stated: "So when I went on break, [D.C.] called me back and he said, 'Mama, I have to call you right back.' And they – he said, 'Because the girls have to tell you something,' and then he called me back." *Transcript for Case 328* at 106. Even assuming for the sake of argument that this did constitute hearsay, Myers does not explain how this statement, standing alone, could have prejudiced his defense. The failure to object therefore did not constitute ineffective assistance of counsel.

In his final allegation of ineffective assistance of trial counsel, Myers claims "Brogan and Bucheri were ineffective for failing to object to the State violation of Ind. Code 31-33-8-1 that opened the door to violation of the spontaneity and excited utterance rules of the Confrontation Clause of the Sixth Amendment which applies in State court through the Fourteenth Amendment." *Appellant's Brief* at 56. This appears to be a challenge to trial counsels' failure to object to a six-day delay in commencing an investigation into the victims' allegations that Myers molested them.

I.C. § 31-33-8-1 (West, Westlaw through 2010 2nd Regular Sess.) governs

investigations into reports of suspected child abuse or neglect. It is clearly intended to protect children who might be victims of abuse by mandating prompt action on the part of appropriate state agencies when abuse is suspected. It is unclear to this court how this statute implicates the validity of evidence obtained in conjunction with investigations into suspected child abuse that are undertaken under its provisions. Neither does Myers enlighten us as to how this statute confers upon criminal defendants a right to secure the exclusion of evidence obtained from an investigation that did not fully comply with the time constraints set out in I.C. § 31-33-8-1. He merely contends that it does. We disagree. Because Myers has failed to persuade us that an objection on this basis would have been meritorious, his claim of ineffective assistance of counsel in this respect fails.

2.

Myers contends he received ineffective assistance of appellate counsel. In reviewing claims of ineffective assistance of appellate counsel, we use the same standard applied to claims of ineffective assistance of trial counsel. *Harris v. State*, 861 N.E.2d 1182 (Ind. 2007). The party seeking post-conviction relief must show that appellate counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that but for the deficient performance of counsel the result of the proceeding would have been different. *Id*. When, as here, a petitioner raises a claim of ineffective assistance of appellate counsel for failing to make a claim of ineffective assistance of trial counsel, he faces a compound burden. *Ben-Yisrayl v. State*, 738 N.E.2d 253 (Ind. 2000), *cert. denied*. If the claim relates to issue selection, the petitioner must demonstrate that appellate counsel's performance was deficient and that, but for the deficiency of appellate

counsel, trial counsel's performance would have been found deficient and prejudicial. *Id*. Thus, the petitioner bears the burden of establishing the two elements of ineffective assistance of counsel separately as to both trial and appellate counsel. *Id*.

Myers contends that appellate counsel was ineffective in failing to raise the issue of prosecutorial misconduct, the abandonment of judicial neutrality, and the failure to advise Myers of the possibility of consecutive sentences. We have already determined that Myers has not proven that he received ineffective assistance from his trial counsel in those particular respects. Therefore, any claim of ineffective assistance of appellate counsel premised upon the failure to challenge trial counsel's performance in those matters also fails. Accordingly, we conclude that the trial court properly denied Myers's PCR petition.

Judgment affirmed.

BARNES, J., and CRONE, J., concur.