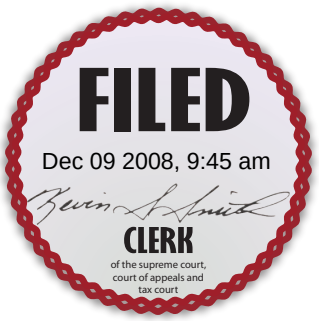


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# IN THE
# COURT OF APPEALS OF INDIANA

| | | |
|---|---|---|
| SHAWN A. JOHNSON, | ) | |
| | ) | |
| Appellant-Petitioner, | ) | |
| | ) | |
| vs. | ) | No. 34A05-0804-PC-226 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Respondent. | ) | |

APPEAL FROM THE HOWARD SUPERIOR COURT
The Honorable Stephen M. Jessup, Judge
Cause No. 34D02-0009-CF-326

**December 9, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**DARDEN, Judge**

## STATEMENT OF THE CASE

Shawn A. Johnson appeals from the denial of his petition for post-conviction relief.

We affirm.

## ISSUE

> Whether the trial court erred in denying Johnson's petition for post-conviction relief because he received ineffective assistance of counsel at trial.

## FACTS

On September 20, 2000, the State charged Johnson with four counts of class A felony child molesting -- three counts alleging criminal deviate conduct as to his eight-year-old stepson, W.R.; and one count alleging sexual intercourse with his four-year-old stepdaughter, M.S. A jury trial was held, and on September 20, 2001, the jury found Johnson guilty of the three child molesting offenses involving W.R., but not guilty of the count as to M.S. On February 7, 2002, the trial court ordered Johnson to serve an aggregate sentence of eighty years.

Johnson appealed, and we summarized the facts adduced at trial as follows:

> In December 1999, Johnson began living with his girlfriend, Teresa, and her two minor children, W.R. and M.S. In January 2000, Johnson and Teresa were married. During the summer of 2000, W.R., then eight years old, told an adult neighbor, Melissa Byrd, that Johnson had been "touching" him. Byrd told Teresa about W.R.'s claim. But when Byrd learned that Teresa had not contacted the police, Byrd called the police herself to report the alleged molestation.

*Johnson v. State*, No. 34A04-0203-CR-121 at *2 (Nov. 15, 2002). Further, before trial,

> the State filed a motion in limine seeking to exclude from evidence W.R.'s psychological and school records. The trial court granted that motion in part, but allowed redacted versions of some of W.R.'s psychological records.

*Id.*

Johnson's appellate argument was that the trial court abused its discretion when it excluded evidence regarding W.R.'s psychological treatment and prior bad acts. We noted that the trial court allowed Johnson to introduce into evidence portions of W.R.'s psychological "records with specific references to W.R.'s reputation for truthfulness," and that "Johnson and five other witnesses testified regarding W.R.'s penchant for lying on various occasions." *Id.* at *6. We concluded that Johnson had failed to demonstrate that any of the excluded evidence was admissible, and held that the trial court's ruling was not an abuse of discretion, and affirmed his convictions.

On September 19, 2003, Johnson filed a *pro se* petition for post-conviction relief. On April 26, 2007, the petition was amended by counsel, and on November 5, 2007, an evidentiary hearing was held. Johnson's trial counsel, Brad Hamilton, testified that he had no recollection of any of the decisions he had made at the trial more than five years before. Johnson argued to the post-conviction court that trial counsel was ineffective for failing to object to the vouching of W.R. testimony by Dr. Derinda Radjeski (who examined W.R.), Byrd (the neighbor whom W.R. told about the molestation), W.R.'s maternal grandmother, and Brian Smith (with whom W.R. and M.S. lived after Johnson's arrest in August of 2000) that they believed W.R.'s account of having been molested; to

hearsay testimony by Smith; and to Teresa (W.R.'s mother) being asked at trial whether she believed W.R.; and to demand the giving of the special jury instruction required by Indiana Code section 33-37-4-6 when a videotaped statement of a child is admitted in evidence.

The trial record reflects the following facts relevant to Johnson's arguments to the post-conviction court and on appeal. The State's first witness, the police officer who first talked to W.R. and Teresa on August 9, 2000, testified that W.R. told him that Johnson had molested him. On cross-examination, trial counsel got the witness to confirm that Teresa had told the officer "that [W.R.] ha[d] a habit of lying." (Tr. 229).

W.R. testified at trial that Johnson had hurt him when he "stuck his thing," clarified by W.R. to mean Johnson's penis, in "[his] butt"; Johnson had also "put that part of his body" in W.R.'s mouth; and these actions had taken place in the living room and the bedroom where they lived, and at Johnson's parents' home. (Tr. 237, 238). W.R. also testified that Johnson had used a lubricant and that he had told his neighbor, Byrd, what happened.

Tonda Cockrell, another police officer, testified that she had conducted a videotaped interview of W.R. on August 9, 2000, in which he told her "basically the same" as he testified but "gave a lot more detail." (Tr. 272). On cross-examination, Hamilton asked Cockrell a series of questions about whether specific statements by W.R. concerned her as to his credibility. Hamilton further asked Cockrell whether she "believe[d]" W.R.'s account of molestation, and she answered, "Yes." (Tr. 338).

Hamilton elicited from Cockrell that Teresa "stated that she didn't believe her son" and "called him a liar." (Tr. 346, 347).

The videotaped interview of W.R. was played for the jury. Therein, W.R. provided multiple details: Johnson had penetrated him anally with his penis and inserted his penis in W.R.'s mouth; the sites where these molestations took place; the reasons for Teresa or Johnson's mother's absences at those times; the size of Johnson's penis; "white stuff" came out of Johnson's penis and tasted like "blood or guts"; W.R.'s positions and Johnson's positions during the molestations; Johnson called his actions "sex"; after W.R. told Johnson that the anal penetration hurt, he used a lubricant; after the anal penetrations, W.R.'s anus hurt when he had a bowel movement; and Johnson told him not to talk about these acts. (Ex. 6).[1]

Dr. Radjeski, a pediatrician, testified that she examined W.R. in August of 2000 and found his anus "normal," but that W.R. told her Johnson "put something on his own penis before he put his penis in [W.R.'s] bottom," and that "his bottom hurt afterwards and that it hurt to have a bowel movement afterward." (Tr. 305). Dr. Radjeski stated that it was not "unusual for a child who has had anal" abuse to have a normal examination, a scenario found in one study to occur in 66% of cases. She confirmed that it would be

[1] At the post-conviction evidentiary hearing on November 5, 2007, the record of the trial proceedings was admitted. However, the trial record contained only a photograph of the videotape that was Exhibit 6 – the videotaped interview of W.R., which videotape had been played for the jury during trial.

Subsequent to the post-conviction evidentiary hearing, Johnson moved to incorporate Exhibit 6 itself into the post-conviction record. The CCS reflects no action on that motion, and the post-conviction record submitted to this court did not include the videotape that is Exhibit 6.

On October 21, 2008, in order to facilitate the review to which Johnson's appeal is entitled, we ordered the trial court reporter to submit to us Exhibit 6. Accordingly, we have received and reviewed it during the course of our consideration of this appeal.

consistent with anal penetration for the victim to complain of bowel movement pain soon thereafter. On cross-examination, Hamilton queried Dr. Radjeski on having found M.S.'s examination abnormal, W.R.'s examination normal, and both not "inconsistent with the possibility of abuse" -- how she could find W.R.'s normal examination "consistent with abuse"? (Tr. 317, 318). She replied, "Because he told me what was going on. And in children you can have sexual molestation and abuse and a completely normal exam." (Tr. 318). Subsequently, on redirect examination, Dr. Radjeski testified that with respect to "whether anything in [W.R.]'s examination indicated possibility [sic] abuse[,] . . . although his physical examination was completely normal, he did make statements to [her], and children typically do not lie about things like that." (Tr. 320). She explained that "his exam was consistent with abuse because of what he told [her] happened" and that she "can't ignore that." (Tr. 321).

After the State rested, Hamilton pursued the admission of W.R.'s psychological treatment and school records, resulting in the admission of records making specific references to W.R.'s truthfulness but the exclusion of others. Hamilton's arguments made clear that Johnson's defense was to discount W.R.'s credibility.

Johnson's first witness was his mother, Diane Johnson, from whom Hamilton elicited testimony that she had "caught [W.R.] in lies" and that he was not a truthful child. (Tr. 466). Johnson's next witness was his father, James Johnson, from whom Hamilton elicited testimony that W.R. was "not too good with telling the truth." (Tr. 482). Hamilton then called Teresa, W.R.'s mother, to the stand. When Hamilton asked

her whether she had "told Officer Cockrell and others that [her] son [was] a liar," she invoked her Fifth Amendment privilege against self-incrimination. (Tr. 488). Additional questions by Hamilton produced the same result. On cross-examination, the State elicited Teresa's testimony that she had divorced Johnson in July of 2001; it then asked whether "in retrospect, on looking back on all of this," she "believe[d] that [W.R.] was molested by [Johnson]," and she again invoked the Fifth Amendment. (Tr. 493).

Hamilton then called Charlotte Spencer. He elicited from her that she was a long-time friend of Teresa and had known W.R. "since his birth." (Tr. 497). When Hamilton asked for her "opinion as to [W.R.]'s reputation for truthfulness in the community," Spencer testified that "[W.R.] ha[d] a big history of telling fibs." (Tr. 499).

Hamilton called Brian Smith, the fiancé of Sharon Pierson, Teresa's sister, who testified that W.R. and M.S. had lived with him and Sharon after Johnson's arrest in August of 2000. Hamilton elicited from Smith that W.R. "ha[d] a very difficult time . . . telling the truth" and "was afraid of getting in trouble." (Tr. 504). Hamilton asked how often W.R. lied, and Smith testified that he "lied a lot." (Tr. 504, 505). During cross-examination by the State, Smith testified about W.R. "acting out . . . in a sexual manner." (Tr. 507). The State asked Smith whether he believed that he knew "when [W.R.] was lying and when he was not lying," and Smith answered, "Yes." *Id.* When the State asked whether Smith believed W.R. "lied to [him] any about [Johnson] molesting him," Hamilton objected that the question "call[ed] for speculation." Tr. 504. The State then asked Smith about whether he talked to W.R. about the molestation, and he said he had.

Q. And did he tell you he was molested?

A. Yes.

Q. Did he describe to you what was done to him?

A. Yes.

Q. Did you believe him?

[no objection]

A. Yes.

Q. And so when you talk about him lying, it was about other things, not about the molestation?

A. Yes. Mainly the – the lying occurred and Sharon – and I had trouble believing him in the home, but as far as what happened prior to him coming . . . What happened prior to him coming, and he sat down with us and had intimate conversations. You know, very graphically detailed about some of the things and . . . At that point Sharon and I did believe . . . Uh, I did believe what he said.

Q. And do you still believe him?

[no objection]

A. Yes.

Q. Well, you can go ahead and explain why you believe him.

A. The reason . . . The reason I believed him at that point, when he first moved in – and this – we had talked to him about the sexual conduct and about three weeks, the first three weeks he moved in. And the graphic detail he explicitly put in front of us. I – I don't think he could have been taught or lied, or ever learned of – of that kind of thing before.

(Tr. 508-09, ellipses in original). On redirect examination, Hamilton got Smith to confirm that they had been told to provide separate sleeping quarters for W.R. and M.S.,

and that W.R. had been in counseling at Genesis Center during his stay in the household. On recross-examination, the State elicited testimony from Smith about W.R. "acting out" by urinating in a coffeepot, and asked whether he had been told "that children would do things like that that had been molested," and Smith answered, "Yes." (Tr. 512). The State asked whether there had been "other incidents similar to this," and Smith answered that M.S. "would frequently . . . urinate in the neighbors['] yard, uh, driveway" and W.R. "would . . . poop in the neighbors['] tree. Just whenever they felt like it." (Tr. 513). The State asked whether they "were told at the Genesis Center that these are symptoms of children who have been molested," and without objection, Smith answered, " . . . yes, I believe Sharon told me that." (Tr. 513).

Hamilton also called neighbor Byrd as a witness. He elicited her testimony that when she told Teresa that W.R. had told her Johnson was molesting him, Teresa "called him a liar." (Tr. 419). Hamilton asked Byrd whether she had "any question in [her] own mind as to whether [W.R.] was telling the truth when he made" the allegation that Johnson was molesting him; she answered, "He was telling the truth." (Tr. 524). Hamilton asked whether she had not told Cockrell that W.R. was "a liar," and she answered, "[W.R.] did lie, about petty stuff. A normal little kid lie, but he's not lying about this." *Id.* Hamilton asked, "You don't know that do you?" Byrd answered, "No, you're right I don't know that." *Id.* Hamilton then again elicited that she had "told Detective Cockrell that he was a liar," and she answered, "Yes, there was [sic] times he did lie." (Tr. 524). On cross-examination, the State asked whether she "felt compelled

enough to report" W.R.'s allegations "because [she] believed" him, and Byrd answered, without objection, "Yes, I do believe [W.R.]." (Tr. 531).

Hamilton called Teresa's mother, Helen Pierson, as a witness. He elicited her testimony that a few days before Johnson's arrest, W.R. had told her "that a fat woman in a secret clubhouse" molested him. (Tr. 566). On cross-examination, Helen testified that W.R. "would fib or lie" about "a minor thing . . . to try to keep out of trouble." (Tr. 569). She testified that she had come to believe that Johnson had molested W.R.

Finally, Johnson took the stand and testified on his own behalf. Johnson testified that W.R. "would lie quite often," was "not telling the truth" in the taped interview or at trial, and that he had never molested W.R. (Tr. 585, 588).

On February 21, 2008, the trial court issued its findings of fact and conclusions of law. It concluded that Hamilton had not provided ineffective assistance of counsel and denied post-conviction relief to Johnson.

## DECISION

The petitioner in a post-conviction proceeding bears the burden of proof by a preponderance of the evidence. *Lee v. State*, 892 N.E.2d 1231, 1233 (Ind. 2008). When appealing the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. *Henley v. State*, 881 N.E.2d 639, 643 (Ind. 2008). To prevail on appeal from the denial of post-conviction relief, a petitioner must show that the evidence as a whole leads unerring and unmistakably to a conclusion opposite that reached by the post-conviction court. *Id.* at 643-44.

To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel performed deficiently and the deficiency resulted in prejudice. *Lee*, 892 N.E.2d at 1233 (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. McManus*, 868 N.E.2d 778, 790 (Ind. 2007)). Although the performance prong and the prejudice prong are separate inquiries, failure to satisfy either prong will cause the action to fail. *Henley*, 881 N.E.2d at 645. Therefore, an ineffective assistance of counsel claim may be resolved by applying the prejudice inquiry only. *Id.* "Prejudice occurs when the defendant demonstrates that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Grinstead v. State*, 845 N.E.2d 1027, 1031 (Ind. 2006) (quoting *Strickland*, 466 U.S. at 694). Thus, we may apply the prejudice inquiry only, presuming unprofessional errors, and determine whether Johnson has demonstrated prejudice. *Id.*

Vouching Testimony

Johnson first argues that his trial counsel provided ineffective assistance by failing to object to numerous instances of vouching testimony. As he correctly notes, Indiana Evidence Rule 704(B) forbids testimony of a witness "to opinions concerning . . . the truth or falsity of allegations . . . ." He specifically asserts that the testimony of four witnesses – Cockrell, Smith, Byrd, and Pierson – violated this rule; as did Dr. Radjeski's testimony, adding the generalization that children do not lie; and that Teresa's refusal "to testify could only have indicated to the jury that she believed W.R. was telling the truth." Johnson's Br. at 17.

However, Johnson concedes that his trial counsel "purposely elicit[ed] the vouching testimony from" two witnesses, Cockrell and Byrd, as part of his trial strategy to portray W.R. as untruthful. *Id.* at 18. Hence, it is Johnson's argument that an objection by his trial counsel "would have resulted in the preclusion of Smith's and Pierson's testimony that they believed W.R.'s allegations, Dr. Radjeski's testimony that 'children usually do not lie,' and Teresa's invocation of her right against self-incrimination." *Id.* at 20.[2]

As to Smith, he was called as a witness for the defense, and Hamilton purposefully elicited from him testimony that W.R. frequently lied. Under cross-examination, Smith did testify that he believed W.R. had been molested, but he was neither asked nor did he testify to an opinion that W.R. was telling the truth when he said that it was Johnson who molested him. Pierson was also called as a defense witness, and trial counsel elicited her testimony that W.R. had made an earlier allegation about being molested by a fat woman in a secret clubhouse. On cross-examination by the State, Pierson testified that W.R. had not told her he had been molested by Johnson. Therefore, she did not give her opinion of the truthfulness of W.R.'s allegation that Johnson molested him.

Inasmuch as Teresa did not answer the State's question about whether she believed that W.R. had been molested, we cannot agree that such indicated her belief that he was telling the truth. Dr. Radjeski's testimony did not state her opinion that W.R.'s allegation that Johnson molested him was truthful. Rather, she explained why her

[2] Johnson does not elaborate upon how the trial court would have precluded Teresa's invocation of her right against self-incrimination.

physical examination finding W.R.'s anus to be normal was not conclusive as to whether he had been molested.

Johnson urges us to find that Dr. Radjeski's testimony, along with that of Smith and Pierson, should lead us to find ineffective assistance as in *Rose v. State*, 846 N.E.2d 363 (Ind. Ct. App. 2006). We are not persuaded. In *Rose*, the physician testified that the alleged child victim was "so convincing in the way she talked" that he "was very convinced about it"; that what the child "did was accurate" to him; that his opinion was "not about medical evidence" but "how a six-year-old can use such detail, such accurate [sic] and in such a convincing manner," agreeing that this was "the subjective part." *Id.* at 365, 366. The physician proceeded to refer to his "five-year-old daughter," and knowing "what they talk about," noting the "calmness about" the alleged child victim, "no nervousness in her voice, such a lucid manner, the way she talked about it," and that "the main evidence" was "what the child said and what I felt, you know, what the child said." *Id.* at 366.

We acknowledge that portions of the testimony challenged by Johnson likely exceed the bounds of Evidence Rule 704(B). However, similar testimony by Cockrell and Byrd was purposefully elicited by trial counsel. We do not find that the evidence, as a whole, leads unerringly and unmistakably to the conclusion that Johnson demonstrated a reasonable probability that he was prejudiced by trial counsel having allowed the jury to hear the very limited nature of possibly impermissible testimony by Smith, Pierson, and Dr. Radjeski.

Hearsay Testimony

Johnson next argues that his trial counsel was ineffective for having failed "to object to testimony that [Smith] had learned from Sharon that someone at the Genesis Center had found W.R.'s behavior consistent with that of a child who had been molested." Johnson's Br. at 21. 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." Evid. R. 801(c). The State concedes that if Hamilton had "objected to this evidence, an objection would have been upheld." State's Br. at 11.

However, to prevail on his claim that such unprofessional error by trial counsel warrants post-conviction relief, it is Johnson's burden to demonstrate that he was prejudiced by the fact that the jury heard this testimony. At the point where the jury heard Smith's testimony about what Sharon was told at the Genesis Center, Smith had already testified that W.R. had been removed from their home because of "sexual tendencies towards" children in the household; that "several times" he had found "[W.R.] in [M.S.]'s bed with her pants down" and "W.R.'s pants down or off"; that W.R. "was acting out quite a bit . . . in a sexual manner"; that W.R. provided "graphic[] detail[s]" about being molested; that W.R. was attending counseling sessions at the Genesis Center; and that there had been an incident when W.R. "peed in the coffee pot." Tr. 503, 504, 507, 509, 512. Thus, the evidence likely established that when W.R. was living with Smith and Sharon in August of 2000, he was a troubled child. Further, this evidence may have already led the jury to draw an inference based on the general knowledge that

behavior like W.R.'s could reflect previous sexual abuse. Accordingly, we do not find that the evidence as a whole leads unerringly and unmistakably to the conclusion that Johnson demonstrated a reasonable probability that the outcome of his trial would have been different if trial counsel had objected to the hearsay testimony of Smith.

Jury Instruction

Johnson argues that his trial counsel provided ineffective assistance by failing to demand that the trial court instruct the jury as required by Indiana Code section 35-37-4-6(g) at the time of his trial. The statute stated that if the videotape of a child (under fourteen years of age and alleged to have been the victim of a sex crime) was admitted into evidence,

> the trial court shall instruct the jury that it is for the jury to determine the weight and credit to be given the statement or videotape and that, in making that determination, the jury shall consider the following:
> (1) The mental and physical age of the person making the statement or videotape.
> (2) The nature of the statement or videotape.
> (3) The circumstances under which the statement or videotape was made.
> (4) Other relevant factors.

I.C. § 35-37-4-6(g). The State concedes that if trial counsel had tendered the instruction, "the trial court would have been bound to give it." State's Br. at 12.

At trial, the court did preliminarily instruct the jurors as follows:

> You are the exclusive judges of the evidence, the credibility of the witnesses and of the weight to be given to the testimony of each of them. In considering the testimony of any witness, you may take into account his or her ability and opportunity to observe, the manner and conduct of the witness while testifying, any interest or bias or prejudice the witness may have, any relationship with other witnesses or interested parties, and the

> reasonableness of the testimony of the witness considered in the light of all the evidence in the case.
>
> . . . . If you find conflicting testimony, you must determine which of the witnesses you will believe.
>
> In weighing the testimony to determine what or whom you will believe, you should use your own knowledge, experience and common sense gained from day to day living. . . . . You should give the greatest weight to that evidence which convinces you most strongly of its truthfulness.

(Direct Appeal App. 155). The same guidance was given jurors as a final instruction. (*Id.* at 181). Another final instruction had advised jurors to "weigh the evidence and give credit to the testimony in light of your own experience and observations in the ordinary affairs of life." (*Id.* at 180).

In his reply, Johnson argues that the lack of the statutory instruction "may well have resulted in the jury crediting the videotaped statement more than it would otherwise." Reply at 10. We cannot agree. The statutory instruction directed the jury to include in its considerations "the mental and physical age of the person making the statement" and "circumstances under which the statement" was made." I.C. § 35-57-4-6(g). These considerations would have included that W.R. was a year younger when he was making the videotape, and that his videotaped statement was made more than a year before his testimony at trial -- facts we find more likely to enhance the credit given to his videotaped statement.

Despite the lack of a single specific instruction, the ultimate question is whether "the jury instructions as a whole . . . were adequate," *Ringham v. State*, 768 N.E.2d 893, 898 (Ind. 2002), *i.e.*, whether the jury was misled as to a matter of law. Here, the trial

court expressly charged the jury with the sole responsibility of judging witness credibility, in determining which of the witnesses to believe. In addition, it twice instructed the jurors that in weighing credibility, they should use their knowledge, experience and common sense gained from day to day living; and, it further instructed the jurors to weigh evidence and give credit to testimony in light of their experience and observations in life. Such instructions necessarily encompassed the considerations embodied in the statutory instruction. Moreover, we reiterate that it is Johnson's burden to demonstrate that this failure on the part of his trial counsel resulted in prejudice to him. Taking into consideration all of the instructions that were given by the trial court, and the evidence as a whole, we are not led unerringly and unmistakably to the conclusion that Johnson has demonstrated a reasonable probability that he was prejudiced by trial counsel's failure to demand the statutory jury instruction.

Cumulative Error

Finally, Johnson cites *Williams v. State*, 508 N.E.2d 1264, 1268 (Ind. 1987), as follows: "while each error of counsel individually may not be sufficient to prove ineffective representation, an accumulation of such failure may amount to ineffective assistance." Johnson's Br. at 25. Johnson argues that here, the cumulative effect of trial counsel's failure to object to much of the vouching testimony; to Smith's hearsay testimony; in addition to seeking the statutory instruction has deprived him of a fair trial. We disagree.

Johnson's trial counsel extensively cross-examined the State's witnesses. He elicited testimony from defense witnesses, as well as State witnesses, that casted doubt on W.R.'s credibility. However, W.R. testified about the nature of the molestations he suffered, and his videotaped interview dated nearly a year earlier was seen and heard by the jury. The jury was expressly instructed of its role in weighing witness credibility, and the considerations to be applied in that weighing process.

A defendant is entitled to a fair trial, not a perfect one. *Myers v. State*, 887 N.E.2d 170, 196 (Ind. Ct. App. 2008), *trans. denied*. Taking into account the imperfections of Johnson's trial as discussed above, we nevertheless find that they were not sufficiently egregious to warrant our conclusion that he did not receive a fair trial. *Id.* Therefore, we affirm the trial court's conclusion that Johnson did not demonstrate that he received ineffective assistance of counsel.

Affirmed.

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