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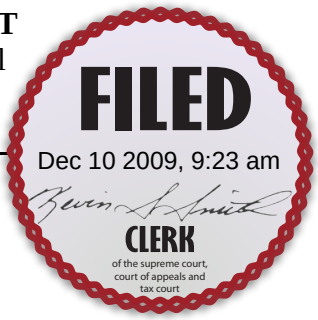

IN THE COURT OF APPEALS OF INDIANA

JOSHUA GASPER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 02A05-0906-PC-350
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable John F. Surbeck, Jr., Judge
Cause No. 02D04-0605-PC-48

December 10, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Joshua Gasper appeals the denial of his petition for post-conviction relief from his conviction on one count of child molesting[1] as a Class A felony. He appeals, raising the following restated issue: whether he received the effective assistance of trial counsel when his attorney failed to object on foundational grounds to the admission of two pieces of evidence.

We affirm.

FACTS AND PROCEDURAL HISTORY

The facts supporting Gasper's convictions as set forth by this court on his direct appeal are as follows:

> During the week of June 20, 2002, after dating Gasper for approximately three months, [S.F.] together with her eighteen-month-old daughter, H.V., moved into Gasper's home in Fort Wayne, Indiana. On the evening of June 19, 2002, Gasper promised [S.F.] to take on more responsibilities in caring for H.V. The next morning at approximately 10 a.m., after H.V. awoke and [S.F.] was still asleep, Gasper decided to give H.V. a bath. Because H.V. disliked bathing, she cried when Gasper poured water on her head. As H.V.'s crying woke up [S.F.], she entered the bathroom where she noticed Gasper placing a towel around H.V. and lifting her out of the bathtub. Gasper asked [S.F.] to leave the bathroom. After [S.F.] went into the living room, Gasper joined her and informed [S.F.] that H.V. was bleeding but that he did not know where from. When [S.F.] went into the bathroom to check on H.V., she noticed some blood between her legs and asked Gasper what had happened. Gasper told [S.F.] that he did not know but suggested that H.V. may have fallen or that he may have rubbed her too hard when he dried her with a towel. [S.F.] dressed H.V. and took her to the hospital.
>
> At the hospital, Dr. Kathryn Einhaus (Dr. Einhaus) examined H.V. under anesthesia and observed injuries to her vaginal area and rectum. After Fort Wayne Detective Kathy Morales (Detective Morales) spoke with [S.F.] at the hospital, she met with Gasper at his residence. Informing him

[1] *See* Ind. Code § 35-42-4-3.

> that she was looking for evidence relating to H.V.'s injury, Detective Morales received permission to search Gasper's residence. After the search, Gasper accompanied Detective Morales to the police station to make a statement. Prior to his statement, Detective Morales read Gasper his Miranda rights and Gasper signed a waiver of these rights.
>
> During the interview, Gasper initially told Detective Morales that he rubbed H.V. too hard with the towel after lifting her out of the bathtub. As Detective Dan Tyler (Detective Tyler) continued the interview when Detective Morales left the room, Gasper explained that H.V. was crying so he intentionally put his finger inside H.V.'s vaginal area to see how she would react. Upon Detective Morales' return, Gasper reiterated his statement and elaborated that he put his finger in H.V.'s vagina and actually lifted her off the ground.

Gasper v. State, 833 N.E.2d 1036, 1038-39 (Ind. Ct. App. 2005), *trans. denied*.

On June 20, 2002, the state charged Gasper with one count of child molesting as a Class A felony, one count of child molesting as a Class C felony, and one count of reckless possession of paraphernalia as a Class A misdemeanor, and attorney Kevin Likes entered his appearance as defense counsel. While representing Gasper, Likes received two washcloths containing red stains from either Gasper's mother or S.F. Approximately a year later, Likes withdrew as Gasper's counsel, and attorney Charles Rathburn entered his appearance. Likes transferred the file to Rathburn, including the two washcloths. Rathburn became concerned about the ethical ramifications of maintaining possession of the washcloths, and after receiving advice that he should turn them over, he gave them to Detective Morales. No evidence was presented that the washcloths or the red stains were ever scientifically tested by the State.

Detective Morales testified at trial that, about a month before the trial, she was contacted by the State and asked to collect the washcloths from Rathburn. When the

State moved to admit photographs of the washcloths, Rathburn objected to the admission of such evidence "unless there's some showing that they're somehow related to this." *Trial Tr*. at 372. The trial court held a sidebar conference outside of the presence of the jury, and Rathburn told the court that he received the washcloths from the previous defense counsel and believed that he had an ethical obligation to turn the evidence over to the State. *Id*. at 373-74. The State argued that the evidence was being offered to respond to the defense accusation that the State did not follow up on its investigation. *Id*. at 373. The trial court overruled the objection.

Gasper's primary defense at trial was that H.V.'s injuries resulted from H.V. "kind of throwing a little . . . tantrum" and "slamming herself down." *Id*. at 133; 471-72. He introduced expert testimony from a doctor that a fall could have caused H.V.'s injuries. *Id*. at 432. Gasper testified that H.V. threw a tantrum when he gave her a bath and that she "threw herself down" several times. *Id*. at 470-71. During the State's rebuttal closing argument, it stated that the defense had brought the washcloths to the attention of the State. *Id*. at 546.

At the conclusion of the trial, the jury found Gasper guilty of child molesting as a Class A felony, and he was sentenced to thirty years executed. Gasper filed a direct appeal, challenging the constitutionality of the police's failure to record his custodial interrogation, the admission of the washcloths into evidence, statements made by the prosecution as prosecutorial misconduct, the sufficiency of the evidence, and his sentence. A panel of this court affirmed his conviction, and transfer was denied by our

Supreme Court. On May 5, 2006, Gasper filed a petition for post-conviction relief, which was denied by the post-conviction court. Gasper now appeals.

DISCUSSION AND DECISION

Post-conviction proceedings do not afford the petitioner an opportunity for a super appeal, but rather, provide the opportunity to raise issues that were unknown or unavailable at the time of the original trial or the direct appeal. *Ben-Yisrayl v. State*, 738 N.E.2d 253, 258 (Ind. 2000), *cert. denied* (2002); *Wieland v. State*, 848 N.E.2d 679, 681 (Ind. Ct App. 2006), *trans. denied*, *cert. denied*. The proceedings do not substitute for a direct appeal and provide only a narrow remedy for subsequent collateral challenges to convictions. *Ben-Yisrayl*, 738 N.E.2d at 258. The petitioner for post-conviction relief bears the burden of proving the grounds by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5).

When a petitioner appeals a denial of post-conviction relief, he appeals a negative judgment. *Taylor v. State*, 882 N.E.2d 777, 780 (Ind. Ct. App. 2008). The petitioner must establish that the evidence as a whole unmistakably and unerringly leads to a conclusion contrary to that of the post-conviction court. *Id*. We will disturb a post-conviction court's decision as being contrary to law only where the evidence is without conflict and leads to but one conclusion, and the post-conviction court has reached the opposite conclusion. *Wright v. State*, 881 N.E.2d 1018, 1022 (Ind. Ct. App. 2008), *trans. denied*. The post-conviction court is the sole judge of the weight of the evidence and the credibility of witnesses. *Lindsey v. State*, 888 N.E.2d 319, 322 (Ind. Ct. App. 2008), *trans. denied*. We accept the post-conviction court's findings of fact unless they are

clearly erroneous, and no deference is given to its conclusions of law. *Taylor*, 882 N.E.2d at 780-81.

Gasper argues that he was denied the effective assistance of his trial counsel when his attorney failed to properly object to the foundation laid by the State for the admission of the two washcloths. He specifically contends that when the State was permitted to make reference, in the presence of the jury, to the fact that his defense attorney provided the washcloths to the State, he was effectively abandoned by his defense attorney in the eyes of the jury and his defense attorney failed to meet his responsibility to be a zealous advocate for his client. Gasper claims that he was prejudiced by the failure of his trial counsel to properly object to the evidence because, without the washcloths, there was no physical evidence tending to prove that he committed the crimes with which he was charged.

We review ineffective assistance of trial counsel claims under the two-prong test set out in *Strickland v. Washington*, 466 U.S. 668 (1984). *Fisher v. State*, 878 N.E.2d 457, 463 (Ind. Ct. App. 2007), *trans. denied* (2008). First, the petitioner must demonstrate that counsel's performance was deficient, which requires a showing that counsel's representation fell below an objective standard of reasonableness and denied the petitioner the right to counsel guaranteed by the Sixth Amendment to the United States Constitution. *Timberlake v. State*, 753 N.E.2d 591, 603 (Ind. 2001), *cert. denied* (2002). Second, the petitioner must demonstrate that he was prejudiced by counsel's deficient performance. *Id*. To show prejudice, a petitioner must show that there is a reasonable probability that the outcome of the trial would have been different if counsel

had not made the errors. *Id.* A probability is reasonable if it undermines confidence in the outcome. *Id.*

We presume that counsel rendered adequate assistance and give considerable discretion to counsel's choice of strategy and tactics. *Smith v. State*, 765 N.E.2d 578, 585 (Ind. 2002). "Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective." *Id.* "If we can resolve a claim of ineffective assistance of counsel based on lack of prejudice, we need not address the adequacy of counsel's performance. *Fisher*, 878 N.E.2d at 463-64.

Here, we need not address the adequacy of the performance of Gasper's trial counsel as Gasper has not shown that he suffered any prejudice. In light of the overwhelming evidence presented, we conclude that Gasper cannot show a reasonable probability that he would have been acquitted had the two washcloths been excluded. The evidence most favorable to the verdict shows that on the date of the incident, Gasper was twenty-one years old, while H.V. was eighteen months old. Detective Tyler testified that when he questioned Gasper, Gasper admitted that he intentionally inserted his finger into H.V.'s vagina because he was curious as to how she would react. *Trial Tr*. at 326-28. Gasper also told both Detective Tyler and Detective Morales that when he inserted his finger into her vagina, he actually lifted her off the ground. *Id*. at 330; 370.

Additionally, the State presented the testimony of Dr. Einhaus, who examined H.V. at the hospital. Dr. Einhaus testified that, based on the severity of H.V.'s injuries, "an assault" had occurred involving "several thrusts." *Id.* at 215. According to the doctor's expert opinion, H.V.'s injuries were consistent with being penetrated multiple

times with a finger. *Id*. at 217. She also firmly denied Gasper's claim that H.V.'s injuries could have been caused by rubbing too hard with a towel. *Id*. at 216.

Based on the evidence presented at trial, even if the evidence of the washcloths had been excluded, there was sufficient evidence to prove that Gasper committed child molesting as a Class A felony. There was not a reasonable probability that the outcome of Gasper's trial would have been different even if his trial counsel had objected to the admission of the washcloths and they had not been introduced into evidence. Therefore, Gasper has not shown that he was prejudiced by his trial counsel's performance. The post-conviction court properly denied his petition for post-conviction relief.

Affirmed.

NAJAM, J., and BARNES, J., concur.