MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Jose Luis Flores,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent.

December 8, 2022

Court of Appeals Case No. 22A-PC-446

Appeal from the Hamilton Circuit Court

The Honorable Paul A. Felix, Judge

Trial Court Cause No. 29C01-2102-PC-1055

Robb, Judge.

Case Summary and Issue

[1] In 2020, a jury found Jose Luis Flores guilty of child molesting, a Class A felony, and sexual battery, a Class D felony. In 2021, Flores filed a petition for post-conviction relief, alleging that he received ineffective assistance of trial counsel during the criminal proceedings. The post-conviction court denied his petition and Flores now appeals, raising a sole issue for our review: whether the post-conviction court erred in concluding Flores' trial counsel was not ineffective and denying him relief. Concluding the post-conviction court's judgment is not clearly erroneous, we affirm.

Facts and Procedural History

[2] In 2009, P.L. lived in a mobile home in Westfield, Indiana, with her parents; two sisters; her maternal aunt, Guedelia; and Guedelia's husband, Flores. Guedelia and/or Flores sometimes watched P.L. and her sisters when their parents were at work. P.L. recalled that Flores would "hug you in a different way that wasn't a normal hug. . . . [I]t would kind of feel like he was . . . putting my chest all over his front." Transcript of Evidence, Volume 2 at 32-33. P.L.'s older sister also recalled that Flores would hug her in a way that she did not like: "[H]e would hug us and . . . not let go even though we were . . . telling him to let go of us. He would hug us from . . . behind. . . . It made me uncomfortable the way he hugged me." *Id.* at 73-74.

[3] When P.L. was seven or eight years old, Flores penetrated her external genitals with his fingers when the two were alone in his bedroom in the Westfield mobile home. By 2011, P.L., her sisters, and her mother (now separated from her father) had moved to a mobile home in Noblesville, Indiana. Guedelia and Flores lived nearby. Several families, including P.L.'s, gathered at Flores' home on Thanksgiving. During a game of hide and seek, P.L. hid in Flores' bedroom. Flores found her and started kissing her. Flores pulled down P.L.'s pants and underwear, pulled down his own pants and underwear, held her to him back to front, and touched her buttocks with his penis. When Flores heard someone calling for him, he let P.L. go, pulled his pants back up, and left the room.

[4] P.L.'s older sister recalled that around this time, P.L. "would get angry real quick, she'd yell. She was just like sad. She'd listen to . . . her sad music. She'd be mad at everything or everyone. She got migraines a lot." *Id.* at 77. When P.L. was about to turn fifteen, she told her mother about the molestation, and the police became involved.

[5] In 2019, the State charged Flores with child molesting for the Westfield incident and sexual battery for the Noblesville incident. Naun Anthony Benitez ("Counsel") represented Flores during the majority of the criminal proceedings, including during the two-day jury trial.[1] During its opening statement, the State

[1] Two other attorneys were involved in Flores' case at various times, but Flores has made no allegations of ineffective assistance against them.

gave "a roadmap for what [it expected] the evidence will show[,]" including that while Flores was touching P.L. inappropriately on Thanksgiving, he heard someone call his name, stopped what he was doing, and "hurriedly flushed a nearby toilet to provide cover for his absence[.]" *Id.* at 23, 25. The State presented the testimony of P.L., her older sister, her mother, and two detectives who worked on the case. P.L. testified to the events as described above. During P.L.'s testimony about the Thanksgiving incident, she clearly stated that the incident occurred in Flores' bedroom. She did not say that there was an adjoining bathroom in the bedroom she was hiding in or that Flores flushed a toilet before leaving the room.

[6] Counsel cross-examined each witness. Outside the presence of the jury, Counsel questioned both P.L. and her mother about their knowledge of U-Visas.[2] Although both knew what a U-Visa was and that it might be available to them because of their testimony in this case, neither had spoken to an attorney or applied for one. Although Counsel had initially broached the subject because his understanding was P.L. was in the United States "as a dreamer"[3] and "one of our defenses is that she brought all these things up after 2016 and the current administration to be able to stay in this country more

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[2] "A noncitizen who becomes a victim of certain crimes while in the United States may petition for U nonimmigrant status[.] Congress created the visa to encourage crime victims to report crimes and assist law enforcement with investigation and prosecution. A U visa generally entitles an eligible citizen to lawfully remain in the United States and to seek work authorization." *Meza Morales v. Barr*, 973 F.3d 656, 658 (7th Cir. 2020) (citing 8 U.S.C. § 1101(a)(15)(U)).

[3] Counsel was referring to P.L. being part of the Deferred Action for Childhood Arrivals program.

permanently[,]" *id.* at 55, Counsel did not pursue this line of questioning in front of the jury.

[7] In Flores' case-in-chief, Counsel presented the testimony of Flores and Guedelia. Flores testified he was never alone with any of the three girls while he lived with them in Westfield, and he was never alone with P.L. on Thanksgiving in Noblesville nor did he play games with the children. Guedelia testified that there were ten to twelve people at her home on Thanksgiving, named them, and stated that she never saw any of the adults, including Flores, playing with the children that night. She described the trailer she and Flores occupied in Noblesville. Both Guedelia and Flores testified that Guedelia's father, Adolfo San Juan Reyes, was living with them in the trailer on Thanksgiving, that his bedroom was the only one in the trailer with an adjacent bathroom, and that Adolfo confined himself to his bedroom that night because for religious reasons he could not be around people who were drinking alcohol.

[8] In his closing argument, Counsel pointed to testimony that Flores was never alone with P.L. to refute the allegations due to lack of opportunity and suggested that the State's investigation was incomplete because officers never interviewed several people who were allegedly at the Flores' home on Thanksgiving. He also pointed to the State's opening statement describing the Thanksgiving incident and argued that the State's description that Flores "went into a bedroom and . . . took a girl's pants off and then his pants off, and then wrestled a little bit, then put her pants on and then his pants on and then came

out and flushed the toilet because someone was calling him . . . doesn't make sense." *Id.* at 219.

[9] The jury found Flores guilty as charged and the trial court sentenced him to thirty years in the Indiana Department of Correction.

[10] Flores filed a petition for post-conviction relief on February 22, 2021.[4] He alleged that Counsel "was deficient in two main ways, by failure to introduce evidence in front of the jury that would undermine the victim's credibility, and by failure to subject the prosecution's case to meaningful adversarial testing." Appellant's Appendix, Volume II at 3. Relevant to this appeal,[5] Flores specifically alleged that 1) he provided a list of Thanksgiving attendees to Counsel, but Counsel did not contact or call any of those witnesses, including Guedelia's father, Adolfo, to testify at trial, and 2) Counsel did not introduce the U-Visa evidence "that would undermine the victim's, and her mom's, credibility and provide a reason for her to give false testimony." *Id.* at 3.

[11] The post-conviction court held a hearing in December 2021. Flores provided a transcript of the jury trial of which the post-conviction court took judicial notice. Flores also entered into evidence the affidavit of Adolfo San Juan Reyes and called Counsel and Guedelia as witnesses.

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[4] In 2020, Flores initiated a direct appeal but later dismissed it in favor of pursuing post-conviction relief. *See* Appellant's Motion to Dismiss Appeal, Cause Number 20A-CR-419.

[5] Flores made several other specific allegations that the post-conviction court also determined were not ineffective assistance of counsel. On appeal, however, Flores advances only these two allegations.

[12] Counsel testified that after he entered his appearance, he reviewed the probable cause affidavit and charging information; talked with Flores, Guedelia, and their children; obtained a copy of the forensic interview of P.L.; and workshopped the case generally with other attorneys regarding how to deal with "facts that are not the most favorable to my client." Tr., Vol. 3 at 5.

[13] Counsel acknowledged that prior to trial he asked for and was provided a list of everyone who was present at Flores' home on Thanksgiving 2011 but did not contact anyone from that list because one of the defense theories of the case "was that the State of Indiana did just enough to get an arrest. They didn't even do an investigation. . . . And another reason was because I knew they were all going to say that there was nothing abnormal about that day[.]" *Id*. at 3. He did not call Adolfo because he had been told Adolfo was out of the country.

[14] As for the cross-examination of P.L. and her mother, Counsel stated "the family had said that maybe the alleged victim was thinking about some sort of possible immigration benefit[,]" Tr., Vol. 2 at 248, but upon questioning P.L. and her mother about U-Visas outside the presence of the jury, he determined that it was in Flores' best interest not to pursue that line of questioning in front of the jury.

[15] Guedelia largely confirmed what Counsel had already said. She provided Counsel with a list of people present at her home on Thanksgiving 2011 but he did not contact any of them, including her father. She believed her father would have been a particularly helpful witness because "he was occupying the

bedroom where [Flores] was charged with this." Tr., Vol. 3 at 11. Adolfo's affidavit attested that he was present at Flores' trailer on Thanksgiving 2011, that he stayed in his bedroom during the gathering except for a five-minute period when he left the bedroom to pray over the meal, and that he did not see anyone going into the bedroom during that time nor was anyone ever with him in the bedroom. *See* Exhibit Binder, Volume 4 at 6-7.

[16] The post-conviction court issued findings of fact and conclusions of law denying Flores' requested relief, concluding he had failed to demonstrate that Counsel's investigation was incomplete or unreasonable and had failed to demonstrate that Counsel's strategic decisions regarding the nature and extent of cross-examination constituted deficient performance. Flores now appeals.

Discussion and Decision

I. Standard of Review

[17] Post-conviction proceedings are not an opportunity for a super-appeal. *Barber v. State*, 141 N.E.3d 35, 40-41 (Ind. Ct. App. 2020), *trans. denied*. Rather, they create a narrow remedy for subsequent collateral challenges to convictions that must be based on grounds enumerated in the post-conviction rules. *Timberlake v. State*, 753 N.E.2d 591, 597 (Ind. 2001), *cert. denied*, 537 U.S. 839 (2002).

[18] A petitioner for post-conviction relief must establish the grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5). A petitioner who has been denied relief faces a "rigorous standard of review." *Wesley v.*

State, 788 N.E.2d 1247, 1250 (Ind. 2003). To succeed on appeal, the petitioner must show the evidence as a whole leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. *Id*. The post-conviction court is the sole judge of the weight of the evidence and the credibility of witnesses. *Barber,* 141 N.E.3d at 41. When reviewing the post-conviction court's order denying relief, we will reverse the findings and judgment "only upon a showing of clear error – that which leaves us with a definite and firm conviction that a mistake has been made." *Humphrey v. State*, 73 N.E.3d 677, 682 (Ind. 2017) (citation omitted).

II. Ineffective Assistance of Counsel

[19] When reviewing claims of ineffective assistance of counsel, we apply the two-prong test established in *Strickland v. Washington*, 466 U.S. 668 (1984). *Bobadilla v. State*, 117 N.E.3d 1272, 1280 (Ind. 2019). To prevail, a petitioner must demonstrate both that counsel's performance was deficient and that the deficient performance prejudiced the petitioner. *Barber*, 141 N.E.3d at 42. Deficient performance exists if counsel's performance falls below an objective standard of reasonableness based on prevailing professional norms. *Id*. Prejudice exists if there is 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*. Failure to prove either prong causes the petitioner's claim to fail. *Id*.

[20] Counsel is afforded considerable discretion in choosing strategy and tactics and on review, we accord those decisions deference. *Jervis v. State*, 28 N.E.3d 361, 365 (Ind. Ct. App. 2015), *trans. denied*. As such, we will not speculate as to what may or may not have been advantageous trial strategy. *Id.* Ultimately, there is a strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Id.*

A. Failure to Investigate/Call Potential Witnesses

[21] Under this general category, Flores first argues that Counsel's performance was deficient in failing to conduct a complete investigation by contacting and/or calling as witnesses the other people who were at Flores' home on Thanksgiving.

[22] Although effective representation requires adequate pretrial investigation and preparation, we do not judge an attorney's performance with the benefit of hindsight but apply a great deal of deference to counsel's judgments. *McKnight v. State*, 1 N.E.3d 193, 200-01 (Ind. Ct. App. 2013). "[C]ounsel has a duty to make a reasonable investigation or to make a reasonable decision that the particular investigation is unnecessary." *Ritchie v. State*, 875 N.E.2d 706, 719-20 (Ind. 2007). Proving counsel was ineffective for failing to investigate requires going beyond the trial record to show what investigation, if undertaken, would have produced. *McKnight*, 1 N.E.3d at 201. This is necessary because success on the prejudice prong requires a showing of a reasonable probability of

affecting the result. *Woods v. State*, 701 N.E.2d 1208, 1214 (Ind. 1998), *cert. denied*, 528 U.S. 861 (1999).

[23] Further, "the decision of what witnesses to call is a matter of trial strategy and appellate courts do not second-guess that decision." *Reeves v. State*, 174 N.E.3d 1134, 1141 (Ind. Ct. App. 2021), *trans. denied*. "We will not find counsel ineffective for failure to call a particular witness absent a clear showing of prejudice." *Id*. And in the case of an uncalled witness, the petitioner is required to offer evidence as to what the testimony would have been. *Lee v. State*, 694 N.E.2d 719, 722 (Ind. 1998), *cert. denied*, 525 U.S. 1023 (1998).

[24] Here, Flores has failed to show what a pre-trial investigation into the Thanksgiving attendees other than Adolfo would have shown. Although Flores asserts these individuals could have offered exculpatory evidence, *see* Brief of Appellant at 10, he provided no affidavits or testimony from any of the identified witnesses indicating *what* that exculpatory evidence would have consisted of and thus, has not shown that calling them as witnesses at trial would have had a reasonable probability of affecting the result. In addition, Counsel explained at the post-conviction hearing why not calling those witnesses fit within his trial strategy. As to those witnesses, Flores failed to establish ineffective assistance.

[25] Flores next argues Counsel was ineffective for failing to contact Adolfo and call him at trial as "a witness who can refute the entirety of the allegation[.]" *Id.* at 9. Unlike with the other Thanksgiving attendees, Flores did provide in the post-

conviction proceedings an affidavit from Adolfo regarding what his testimony if called at trial would have been. He argues that had Adolfo been called to testify, "he would have provided a first-person account that would have undoubtedly resulted in a different outcome for Flores." *Id*. But Flores' claim of error regarding the failure to call Adolfo as a witness rests on the premise that the molestation occurred in a bedroom with an attached bathroom. Although the State mentioned in its opening statement that it expected the evidence to show that when Flores stopped touching P.L. on Thanksgiving, he flushed a nearby toilet to cover his absence before leaving the room, P.L.'s testimony included no such facts. She testified that she was hiding in *Flores and Guedelia's bedroom* during a game of hide and seek when Flores found her and touched her inappropriately. *See* Tr., Vol. 2 at 42 (P.L. testified she was "hiding in my uncle's room[,]" and then confirmed that she was talking about the room her uncle shared with her aunt). She never mentioned an attached bathroom or Flores flushing a toilet. Accordingly, Adolfo's testimony regarding the layout of *his* bedroom and what occurred or did not occur there on Thanksgiving would not have refuted P.L.'s testimony. Flores did not show prejudice from Counsel's failure to call Adolfo as a witness.

B. Failure to Adequately Cross-Examine

[26] Flores also argues that Counsel's performance was deficient in failing to adequately cross-examine P.L. and her mother about a possible motive to fabricate their testimony. He contends that had the jury heard evidence regarding the U-Visa and P.L. and her mother's awareness of it, they "would

have had reason to doubt the credibility of the victim and the victim's mother." Br. of Appellant at 12.

[27] "It is well settled that the nature and extent of cross-examination is a matter of strategy delegated to trial counsel." *Waldon v. State*, 684 N.E.2d 206, 208 (Ind. Ct. App. 1997), *trans. denied*. The presentation of impeachment evidence allows the jury to accurately assess a witness's credibility. *Hamner v. State*, 553 N.E.2d 201, 203 (Ind. Ct. App. 1990). But "the method of impeaching witnesses is a tactical decision and a matter of trial strategy that does not amount to ineffective assistance." *Kubsch v. State*, 934 N.E.2d 1138, 1151 (Ind. 2010).

[28] Counsel did explore the U-Visa question outside the presence of the jury. Upon learning that both P.L. and her mother knew what a U-Visa was and that it was possibly available in their situation but that they had not contacted an attorney or otherwise tried to apply for such a visa, he decided not to address the matter in front of the jury. Flores cites *Ellyson v. State*, 603 N.E.2d 1369 (Ind. Ct. App. 1992), as support for a finding that Counsel's "lack of action constituted substandard performance." Br. of Appellant at 12. But *Ellyson* is inapposite. In *Ellyson*, the court found that counsel's failure to lay a proper foundation for the introduction of impeachment evidence that he tried to admit was deficient performance. 603 N.E.2d at 1375. Here, Counsel did not fail to lay a proper foundation for the U-Visa evidence, he simply decided that the wiser strategy was not to introduce the evidence.

[29] Flores contends the U-Visa gave P.L. and her mother a "strong motive to bring these charges, as it was in their best interests to do so." Br. of Appellant at 11. But he fails to acknowledge the fact they had not pursued the benefit of a U-Visa. Counsel's decision not to pursue the U-Visa line of questioning was a reasonable tactical decision given that based on P.L. and her mother's answers to preliminary questions, he may not have been able to use the evidence to prove a nefarious motive but could have instead bolstered their credibility in the eyes of the jury. Flores did not establish that Counsel rendered ineffective assistance in failing to pursue this line of cross-examination.

Conclusion

[30] In sum, we conclude that Flores failed to establish that he received ineffective assistance of trial counsel and therefore has not shown that the post-conviction court clearly erred when it denied his petition for post-conviction relief. Accordingly, we affirm the judgment of the post-conviction court.

[31] Affirmed.

Mathias, J., and Foley, J., concur.