MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Clay M. Howard,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

November 6, 2023

Court of Appeals Case No. 22A-PC-2884

Appeal from the Madison Circuit Court

The Honorable David A. Happe, Judge

Trial Court Cause No. 48C04-1508-PC-21

Memorandum Decision by Judge Mathias
Judges Riley and Crone concur.

Mathias, Judge.

[1] Clay Howard appeals the post-conviction court's denial of his petition for post-conviction relief. He presents two issues for our review:

> 1. Whether he was denied the effective assistance of trial counsel.
>
> 2. Whether we should revise his sentence under Article 7, Section 6 of the Indiana Constitution.

[2] We affirm.

Facts and Procedural History

[3] In Howard's direct appeal, this Court stated the facts and procedural history as follows:

> In April 2007, Howard was an inmate at the Pendleton Correctional Facility. On April 5, 2007, Howard was transferred into cell 103 in Building D, where inmates live two to a cell with individual doors on each cell. Howard's new cellmate was Kent McDonald, a convicted child molester.
>
> On the night of April 5, 2007, two inmates played dominos with McDonald and later heard McDonald and Howard arguing around 11:30 p.m. On the morning of April 6, 2007, a correctional officer doing a body count observed Howard on the top bunk and McDonald lying under the covers on the lower bunk with his legs sticking up at an unusual angle. Although McDonald had never previously missed a meal, he missed breakfast that morning. Two inmates later came to see if McDonald wanted to join them for lunch and talked with Howard, who was "shaking" and appeared "afraid." Tr. p. 518.

Howard blocked the door so that they could not see into the cell and told them that McDonald was sleeping.

Shortly after noon on April 6, correctional officers found McDonald lying on the bottom bunk, with his legs still in the unusual position they had been in earlier that morning. McDonald's leg was cold to the touch, and when his blankets were removed, the officers discovered that he had a pillowcase tied around his head and observed a substantial amount of blood. He was not breathing, and medical personnel were unable to resuscitate him. Later, a pathologist conducting an autopsy observed that McDonald had multiple blunt force injuries to the head and neck, with evidence of asphyxiation.

In December 2010, the State charged Howard with McDonald's murder, alleging that Howard, "acting in concert with Paul M. Rayle, did knowingly kill" McDonald. Appellant's App. p. 266. Howard's jury trial took place from February 18 through 26, 2014. At the beginning of trial, the State filed an amended information omitting the phrase "acting in concert with Paul M. Rayle." *Id.* at 263. Howard objected that the amendment was untimely but the trial court overruled the objection, finding that the amendment was not substantive because it merely removed a surplusage of language.

During the trial, the State requested that the jury view the cell where the murder took place. The trial court allowed the jury to view the crime scene over Howard's objection, finding that it was "beneficial" to the jury to view the scene. Tr. p. 274.

At trial, the State introduced a letter into evidence. The State alleged that approximately one year after McDonald's murder, a corrections officer screening outgoing mail observed a letter from Howard to his father. The screening officer placed the letter in a secured box for further review. The letter was later retrieved by a Department of Correction (DOC) investigator and sent to

Indiana State Police officers. In relevant part, the letter stated as follows:

> I still go hunting. Just not your typical Game though. Tell Shane I Bagged and Tagged a [illegible]. It's got a gamey taste but a lot like Beef. They tried to get me on Poaching charges because the Son Bitch wasn't in season. The charges never stuck. That was 2 Birds w/one stone not only did he Play with kids, he Played with Boys so he was a F*g. How about that for earning some stripes. Thats something you can be Proud of. Throw this letter in the Fire Place or Burn it non-the less when your done reading it. Serious.

Ex. 33 (grammatical and spelling errors original; emphasis original). Howard objected that the State had failed to establish a sufficient chain of custody to introduce the letter into evidence. The trial court overruled the objection and admitted the letter into evidence.

At trial, inmate Toby Hicks testified that Howard admitted to him that he had discovered that his cellmate was a child molester and that he was ordered by the prison gang Aryan Brotherhood to "take care of it." Tr. p. 636. Howard told Hicks that he was in the process of joining the gang at that time. According to Hicks, Howard said that he had attempted to extort money from McDonald and McDonald refused to pay, after which Howard and another gang member "beat him and tortured him and left him in his bed and went to chow." *Id.* at 637. Howard stated that they "choked him out" until he passed out and then "put him on the bed and left him there." *Id.* at 639.

The State sought to enter pictures of Howard's Aryan Brotherhood tattoo into evidence. Howard objected because the photographs had not been disclosed to him prior to trial. The trial court granted the objection in part, denying the State's request to admit the photographs into evidence and instead ordering

> Howard to show his tattoo to the jury. The trial court reasoned that the State had laid a sufficient foundation by presenting Hicks's testimony regarding Howard's membership in the Aryan Brotherhood gang. A DOC investigator who monitors prison gang activity testified regarding gang activity in Indiana prisons and the Aryan Brotherhood tattoo, and then identified Howard's chest tattoo as an Aryan Brotherhood gang tattoo. The investigator also testified that the Aryan Brotherhood requires an act of violence to earn admission into the gang and that this particular gang is known for targeting and extorting child molesters.
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> At the close of trial, the jury found Howard guilty as charged. On May 5, 2014, the trial court sentenced Howard to sixty-five years imprisonment.

Howard v. State, Case No. 48A02-1406-CR-384, 2015 WL 803115, at *1-2 (Ind. Ct. App. Feb. 25, 2015) ("*Howard I*"). In that appeal, Howard raised four issues, including challenges to the admission of evidence. We affirmed Howard's conviction.

[4] On August 5, 2015, Howard filed a petition for post-conviction relief. Howard then filed nine amended petitions, with the final version being filed in November 2020. Following an evidentiary hearing held in March 2021 and February 2022, the post-conviction court denied his petition. This appeal ensued.

Discussion and Decision

Standard of Review

[5] Howard appeals the post-conviction court's denial of his petition for post-conviction relief. Our standard of review in such appeals is clear:

> "The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence." *Campbell v. State*, 19 N.E.3d 271, 273-74 (Ind. 2014). "When appealing the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment." *Id.* at 274. In order to prevail on an appeal from the denial of post-conviction relief, a petitioner must show that the evidence leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. *Weatherford v. State*, 619 N.E.2d 915, 917 (Ind. 1993). Further, the post-conviction court in this case entered findings of fact and conclusions of law in accordance with Indiana Post-Conviction Rule 1(6). Although we do not defer to the post-conviction court's legal conclusions, "[a] post-conviction court's findings and judgment will be reversed only upon a showing of clear error—that which leaves us with a definite and firm conviction that a mistake has been made." *Ben-Yisrayl v. State*, 729 N.E.2d 102, 106 (Ind. 2000) (internal quotation omitted).

Humphrey v. State, 73 N.E.3d 677, 681-82 (Ind. 2017).

Issue One: Effective Assistance of Trial Counsel

[6] Howard contends that the post-conviction court erred when it found that he was not denied the effective assistance of trial counsel.

> When evaluating an ineffective assistance of counsel claim, we apply the two-part test articulated in *Strickland v. Washington*, 466

> U.S. 668 (1984). *See Helton v. State*, 907 N.E.2d 1020, 1023 (Ind. 2009). To satisfy the first prong, "the defendant must show deficient performance: representation that fell below an objective standard of reasonableness, committing errors so serious that the defendant did not have the 'counsel' guaranteed by the Sixth Amendment." *McCary v. State*, 761 N.E.2d 389, 392 (Ind. 2002) (citing *Strickland*, 466 U.S. at 687-88). To satisfy the second prong, "the defendant must show prejudice: a reasonable probability (i.e.[,] a probability sufficient to undermine confidence in the outcome) that, but for counsel's errors, the result of the proceeding would have been different." *Id.* (citing *Strickland*, 466 U.S. at 694).

Humphrey, 73 N.E.3d at 681-82. Failure to satisfy either of the two prongs will cause the claim to fail. *French v. State*, 778 N.E.2d 816, 824 (Ind. 2002). Indeed, most ineffective assistance of counsel claims can be resolved by a prejudice inquiry alone. *Id.*

[7] "[C]ounsel's performance is presumed effective, and a defendant must offer strong and convincing evidence to overcome this presumption." *Williams v. State*, 771 N.E.2d 70, 73 (Ind. 2002). Counsel has wide latitude in selecting trial strategy and tactics, which we afford great deference. *Ward v. State*, 969 N.E.2d 46, 51 (Ind. 2012). We "will not speculate as to what may have been counsel's most advantageous strategy, and isolated poor strategy, bad tactics, or inexperience does not necessarily amount to ineffective assistance." *Sarwacinski v. State*, 564 N.E.2d 950, 951 (Ind. Ct. App. 1991) (citation omitted).

[8] Howard maintains that his trial counsel's performance was deficient in several ways, including: improper jury selection; failure to investigate certain evidence;

failure to impeach certain witnesses; failure to submit certain evidence; failure to object to his "confession" letter on relevancy grounds; and failure to proffer jury instructions on reckless homicide and involuntary manslaughter. But we do not reach the merits of Howard's arguments on appeal because he does not support his arguments with cogent reasoning, citations to relevant authority, and/or citations to the record. *See* Ind. Appellate Rule 46(A)(8)(a). For instance, Howard merely cites to all thirty-seven pages of his petition for post-conviction relief in support of most of the arguments. At no point does Howard cite to any part of the record of the evidentiary hearing held on his petition.

[9] It is well settled that "a pro se litigant is held to the same standards as a trained attorney and is afforded no inherent leniency simply by virtue of being self-represented." *Zavodnik v. Harper*, 17 N.E.3d 259, 266 (Ind. 2014). "On review, we will not search the record to find a basis for a party's argument, nor will we search the authorities cited by a party in order to find legal support for its position." *Young v. Butts*, 685 N.E.2d 147, 151 (Ind. Ct. App. 1997). Howard's failure to provide cogent argument in support of his contention that he was denied the effective assistance of trial counsel waives this issue for our review.

[10] Waiver notwithstanding, Howard has not shown that he was denied the effective assistance of trial counsel. Howard's trial counsel testified at the post-conviction hearing regarding his strategy behind each decision challenged by Howard, and his explanations were reasonable. For instance, with respect to a videorecorded statement by Toby Hicks, trial counsel explained that, while he could not recall specifically, he believed that he did not seek to admit that

statement into evidence because "there were things on that video that weren't necessarily . . . helpful to us." Tr. pp. 14-15. And trial counsel explained that, because the defense theory was that Howard did not kill McDonald, "there wasn't a basis of evidence to" support jury instructions on reckless homicide and involuntary manslaughter. *Id.* at 16. Finally, Howard's contention that his "confession" letter to his father was irrelevant is simply unfounded. The relevance of that letter to show Howard's guilt was obvious.

[11] Again, trial counsel has wide latitude in selecting trial strategy and tactics, which we afford great deference. *Ward*, 969 N.E.2d at 51. Howard has not shown that his trial counsel's performance was deficient, let alone that he was prejudiced thereby. For all these reasons, we affirm the post-conviction court's denial of Howard's petition for post-conviction relief.

Issue Two: Sentence Revision

[12] Howard next invites this Court to revise his sentence based on Article 7, Section 6 of the Indiana Constitution. But while Howard states that we have the "authority" to revise his sentence, he does not explain how he would be able to raise a freestanding sentencing issue for the first time on post-conviction relief, and, further, his entire argument in support of a revision is as follows: "The State's evidence does not satisfy the elements for a murder conviction." Appellant's Br. at 27. To the extent Howard challenges the sufficiency of the evidence to support his conviction, that issue is not available on post-conviction relief. In any event, Howard has waived this issue for our review for failure to present cogent argument.

[13] Affirmed.

Riley, J., and Crone, J., concur.