MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Harry L. Roberson, III,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

December 27, 2023

Court of Appeals Case No. 23A-CR-933

Appeal from the Madison Circuit Court

The Honorable Angela G. Warner Sims, Judge

Trial Court Cause No. 48C01-2011-F4-2497

Memorandum Decision by Judge Tavitas
Judges Pyle and Foley concur.

Tavitas, Judge.

Case Summary

[1] Harry Roberson appeals his convictions for burglary, a Level 5 felony, and theft, a Class A misdemeanor. Roberson argues that he was denied the effective assistance of counsel because his trial counsel inadvertently opened the door to the admission of Roberson's previous convictions. We conclude that trial counsel's mistake does not rise to the level of ineffective assistance of counsel, and accordingly, we affirm.

Issue

[2] Roberson raises one issue on appeal, which we restate as whether Roberson was denied the effective assistance of counsel because his trial counsel inadvertently opened the door to the admission of Roberson's previous convictions.

Facts

[3] This case centered around allegations that Roberson broke into and stole items from a house in Anderson that once belonged to Roberson's grandfather, Albert Broadnax. Albert had three daughters: Donna, Rhonda, and Jean, who is Roberson's mother. According to Donna, Albert and Jean were "estranged," and Albert had no relationship with Roberson. Tr. Vol. I p. 206.

[4] Albert owned and lived in the Anderson house, where he collected Native American artwork, artifacts, and other items. At some point in 2019, however, Albert stopped living at the Anderson house, and on May 21, 2019, he transferred ownership of the house to Donna.

[5] Albert died in early October 2020. On October 9, 2020, Donna and Rhonda met to discuss funeral arrangements, and Roberson showed up unannounced.[1] Donna was surprised because she had not seen Roberson in years. Roberson asked Donna and Rhonda when they were going back to Indianapolis, which Donna thought was "an odd question to ask." *Id*. at 208. Roberson then left, driving a black SUV.

[6] On October 31, 2020, Rhonda drove by the house and noticed that it appeared to have been broken into. The side door's chain locking mechanism was broken, and inside, the door trim had been pulled from the wall. Items were strewn about the house, and several items were missing. Additionally, certain items were present in the house that had not been there before, including blankets, clothing, half-eaten food, and a used cigarette. Rhonda contacted law enforcement and called Donna, who drove to the house. Before leaving, Rhonda and Donna "barricaded" the doors with furniture and other items. *Id*. at 217.

[7] Rhonda and Donna returned to the house on November 1, 2020, where they discovered Roberson's black SUV parked in the driveway and contacted law enforcement. Inside the house, the items used to barricade the doors had been moved, and Roberson and a woman were in a bedroom watching television. Donna told law enforcement that she recognized several items from Albert's

[1] This meeting took place at a different location than the Anderson house.

house inside the SUV. Law enforcement subsequently recovered from the SUV: a bracelet engraved with the words "Daddy love Donna," tools, lights, household items, clothing, artwork, magazines, and prescription medications. *Id*. at 226.

[8] The State charged Roberson with two counts: Count I: burglary, a Level 5 felony; and Count II: theft, a Class A misdemeanor. The State also alleged that Roberson was an habitual offender.

[9] A jury trial was held on February 22, 2022. Roberson was represented by Attorney Sean Moore. Donna testified regarding the facts stated above. She further testified that she and Rhonda never gave Roberson permission to enter the house.

[10] Roberson testified in his own defense. He testified that he was "a lot closer" to Albert than Donna claimed and that, in approximately April 2020, Albert gave him permission to live at the Anderson house. Tr. Vol. II p. 15. Roberson denied knowing that Albert transferred ownership of the house to Donna. According to Roberson, "[e]verybody knew I was staying there." *Id*. at 16.

[11] Roberson claimed that he was "legally blind" and that the woman he was with was driving the SUV for him. *Id*. at 30. Roberson admitted that, on November 1, 2020, he "knew someone had been [to the house] because someone barricaded the door." *Id*. at 33. Roberson observed the trim hanging from the wall; however, Roberson "decided to go to bed and . . . handle it in the

morning." *Id*. at 31. Roberson also admitted that he placed some tools, lights, and magazines in the SUV, but denied knowing how the other items got there.

[12] During Roberson's testimony, the following exchange took place:

> ATTORNEY MOORE: [T]he State's gonna ask you about this anyway so I might as well get it out of the way. You have a prior conviction for armed robbery. Correct?
>
> ROBERSON: Yes.
>
> ATTORNEY MOORE: It is [what] it is[,] right[?] You have that conviction. That's your history.
>
> ROBERSON: It is what it is. That's my history.
>
> * * * * *

Id. at 17. The State argued that Roberson's testimony implied that armed robbery was Roberson's only previous conviction and that Roberson, therefore, opened the door to his other previous convictions. Attorney Moore admitted that he "opened the door by asking a poorly worded question." *Id*. at 24. Attorney Moore requested that the trial court allow him to ask follow-up questions to clarify that armed robbery was not Roberson's only previous conviction; however, the trial court denied that request.

[13] The trial court then permitted the State to ask Roberson about his previous convictions on cross examination.[2] *Id*. at 26. The State questioned Roberson about previous convictions for: (1) maintaining a common nuisance, a Class D felony, in 2005; (2) criminal recklessness, a Class D felony, in 2016; (3) battery resulting in bodily injury, a Class A misdemeanor, in 2008; (4) burglary, a Class C felony, in 2001; (5) theft, a Class D felony, in 2001; (6) residential entry, a Class D felony, in 1998; (7) possession of cocaine, a Class D felony, in 1997; (8) check fraud, a Class D felony, in 1997; and (9) forgery, a Class C felony, in 1990.[3]

[14] The jury found Roberson guilty as charged. Roberson then admitted to being an habitual offender. The trial court entered judgments of conviction and sentenced Roberson to concurrent sentences of: four years on Count I, enhanced by two years based on the habitual offender enhancement, and two years on Count II for a total sentence of six years in the Department of Correction.[4] Roberson now appeals.

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[2] Attorney Moore lodged a "standing objection" to the introduction of Roberson's other previous convictions, which the trial court noted. Tr. Vol. II p. 26.

[3] At trial, Roberson claimed that some of these offenses had been dismissed. On appeal, however, Roberson does not argue that this list incorrectly states his criminal history.

[4] At the sentencing hearing, the trial court stated that Roberson's sentences would "run concurrently" for a total of six years, and the abstract of judgment reflects this sentence. The trial court's sentencing order, however, states that Roberson's sentences shall be served "consecutively," although it also states that Roberson's total sentence was six years, not eight. Appellant's App. Vol. II p. 19. Roberson does not request that the sentencing order be corrected.

Discussion and Decision

[15] Roberson argues that he was denied the effective assistance of counsel because his trial counsel inadvertently opened the door to Roberson's previous convictions. We are not persuaded.

[16] To prevail on his ineffective assistance of counsel claim, Roberson must show that: (1) trial counsel's performance fell short of prevailing professional norms; and (2) trial counsel's deficient performance prejudiced his defense. *Gibson v. State*, 133 N.E.3d 673, 682 (Ind. 2019) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984)).

[17] A showing of deficient performance "requires proof that legal representation lacked 'an objective standard of reasonableness,' effectively depriving the defendant of his Sixth Amendment right to counsel." *Id.* (quoting *Overstreet v. State*, 877 N.E.2d 144, 152 (Ind. 2007)). The Sixth Amendment, however, does not guarantee "'perfect representation, only a reasonably competent attorney.'" *McCullough v. State*, 973 N.E.2d 62, 76 (Ind. Ct. App. 2012) (quoting *Woodson v. State*, 961 N.E.2d 1035, 1041-42 (Ind. Ct. App. 2012), *trans. denied*), *trans. denied*. We strongly presume that counsel exercised "reasonable professional judgment" and "rendered adequate legal assistance." *Gibson*, 133 N.E.3d at 682. Defense counsel enjoys "considerable discretion" in developing legal strategies for a client. *Id.* This "discretion demands deferential judicial review." *Id.* Additionally, counsel's "[i]solated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render

representation ineffective." *Id.* Rather, "the defense as a whole must be inadequate." *Miller v. State*, 702 N.E.2d 1053, 1059 (Ind. 1998); *accord Kimmelman v. Morrison*, 477 U.S. 365, 386, 106 S. Ct. 2574, 2589 (1986)) (indicating that reviewing courts should consider counsel's "overall performance" when determining whether the defendant was denied the effective assistance of counsel).

[18] As for the prejudice prong, "the defendant must show a reasonable probability that, but for counsel's errors, the proceedings below would have resulted in a different outcome." *Gibson*, 133 N.E.3d at 682. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068. Failure to satisfy either the performance or the prejudice prong will cause the claim to fail. *Grinstead v. State*, 845 N.E.2d 1027, 1031 (Ind. 2006).

[19] Roberson brings his ineffective assistance of counsel claim on direct appeal. Our courts have observed that "post-conviction proceedings are usually the preferred forum for adjudicating claims of ineffective assistance of counsel . . . because presenting such claims often requires the development of new facts not present in the trial record." *Rogers v. State*, 897 N.E.2d 955, 964-65 (Ind. Ct. App. 2008) (citing *McIntire v. State*, 717 N.E.2d 96, 101 (Ind. 1999); *Woods v. State*, 701 N.E.2d 1208, 1219 (Ind. 1998)), *trans. denied*. "'When the only record on which a claim of ineffective assistance is based is the trial record, every indulgence will be given to the possibility that a seeming lapse or error by defense counsel was in fact a tactical move, flawed only in hindsight.'" *Id.* at

965 (quoting *Woods,* 701 N.E.2d at 1216). Thus, ineffective assistance of counsel claims "'based solely on the trial record almost always fail.'"[5] *Id*. (quoting *Woods*, 701 N.E.2d at 1216) (brackets omitted).

[20] We conclude that Roberson has not established that he was denied the effective assistance of counsel based on the record before us. As for the first prong of the *Strickland* test, the sole alleged error is that trial counsel inadvertently opened the door to Roberson's previous convictions. Trial counsel made the strategic decision to have Roberson admit to his previous conviction for armed robbery because trial counsel believed the State was going to ask Roberson about that conviction "anyway."[6] Tr. Vol. II p. 17. Trial counsel asked Roberson if that

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[5] We also note that, when an ineffective assistance of counsel claim is presented on direct appeal, "the issue will be foreclosed from collateral review." *Rogers*, 897 N.E.2d at 965.

[6] Evidence Rule 609 provides, in relevant part:

> (a) **General Rule**. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime or an attempt of a crime must be admitted but only if the crime committed or attempted is (1) murder, treason, rape, robbery, kidnapping, burglary, arson, or criminal confinement; or (2) a crime involving dishonesty or false statement, including perjury.
>
> (b) **Limit on Using the Evidence After 10 Years**. This subdivision (b) applies if more than ten (10) years have passed since the witness's conviction or release from confinement for it, whichever is later. Evidence of the conviction is admissible only if:
>
> (1) its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and
>
> (2) the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.

Here, it is not clear why trial counsel believed that the State would ask Roberson about his armed robbery conviction, which was more than ten years old at the time of Roberson's trial. It is also not clear whether the State provided notice to Roberson that it planned to introduce his armed robbery conviction or any other conviction. Because Roberson brings his ineffective assistance of counsel claim on direct appeal, trial counsel was not called to testify regarding these issues. As a result, the record lacks important facts that would be helpful to resolving Roberson's ineffective assistance of counsel claim.

conviction was Roberson's "history," and Roberson responded in the affirmative. *Id*. The trial court determined that Roberson's testimony implied that the armed robbery conviction was Roberson's only previous conviction, and that as a result, Roberson opened the door to his other previous convictions. The State then questioned Roberson about those convictions.

[21] Though trial counsel admitted that his question was "poorly worded," *id*. at 24, we are not persuaded that this isolated mistake rendered trial counsel's performance so deficient as to constitute a denial of the effective assistance of counsel. *See McCullough*, 973 N.E.2d at 76 ("'There is no constitutional requirement that a defense attorney be a flawless strategist or tactician.'") (quoting *Woodson*, 961 N.E.2d at 1042). Trial counsel also requested that the trial court allow him to ask follow-up questions to clarify that armed robbery did not constitute Roberson's only previous conviction in lieu of introducing Roberson's other previous convictions; however, the trial court denied that request.

[22] Furthermore, in light of the entire trial record, trial counsel's performance does not appear to be objectively deficient. Trial counsel zealously presented a defense despite strong evidence against Roberson. *See Parrish v. State*, 453 N.E.2d 234, 240 (Ind. 1983) (holding that defendant was not denied the effective assistance of counsel when trial counsel inadvertently opened the door to defendant's previous convictions by asking defendant's father about defendant's good character because court would not second-guess counsel's strategic and tactical decisions and because the court found "no strong and

convincing proof that counsel failed to discharge his duty fully" based on "the total circumstances of the trial"). Absent further facts regarding trial counsel's representation, we cannot say that trial counsel's performance fails the first prong of the *Strickland* test.

[23] Turning to the second prong, even if we assume that trial counsel's performance was deficient, that performance does not undermine our confidence in the outcome of the trial. According to Donna, shortly after Albert's death, Roberson wanted to know when Donna and Rhonda would return to Indianapolis. Weeks later, Roberson was found living in the Anderson house, he appeared to have been living there for some time, and items from the house were found in his SUV. Roberson testified that he saw that the doors had been barricaded from the inside and that the trim was hanging from the side door. Photographs admitted at trial show clear signs of forced entry into the side door. Roberson, however, did not contact the police or other family members when he noticed these irregularities.

[24] Roberson claimed that Albert gave him permission to live in the house in April 2020; however, Albert had already transferred ownership of the house to Donna in May 2019, which the State demonstrated via documentary evidence. Roberson never claimed that he obtained Donna's permission to enter the house. Finally, Roberson admitted that he placed some items from the house in the SUV and had no explanation for how the other items got there. Based on the strong evidence against Roberson, we cannot say that there is a reasonable probability that the outcome at trial would have been any different but for trial

counsel's alleged error. Accordingly, we cannot conclude that Roberson was denied the effective assistance of counsel.

Conclusion

[25] Based on the record before us, trial counsel's isolated mistake does not rise to the level of ineffective assistance of counsel. Accordingly, we affirm.

[26] Affirmed.

Pyle, J, and Foley, J., concur.