MEMORANDUM DECISION

IN THE
Court of Appeals of Indiana

Robert W. Carr, III,
Appellant-Defendant

v.

State of Indiana,
Appellee-Plaintiff

February 16, 2024

Court of Appeals Case No.
23A-PC-1474

Appeal from the Marion Superior Court

The Honorable Angela D. Davis, Judge

Trial Court Cause No.
49D27-1809-PC-032953

Memorandum Decision by Judge Felix
Judges Bailey and May concur.

Felix, Judge.

Statement of the Case

[1] Robert W. Carr, III, filed a petition for post-conviction relief ("PCR"), alleging he received ineffective assistance of trial counsel. After an evidentiary hearing, the PCR court denied Carr's petition. Carr now appeals and presents one issue for our review: Whether the PCR court clearly erred when it denied Carr's PCR petition.

[2] We affirm.

Facts and Procedural History

In 2018, a jury convicted Carr of criminal confinement while armed with a deadly weapon, a Level 3 felony; battery resulting in serious bodily injury, a Level 5 felony; and escape, a Level 6 felony, among other offenses. *Carr v. State*, 106 N.E.3d 546, 548 (Ind. Ct. App. 2018), *trans. denied*. We have previously set out the facts underlying those convictions:

> On November 18, 2016, Haley Price and her housemate, S.G., held a party with friends at their home on South Dequincy Street in Indianapolis. Carr and S.G. had dated and had previously lived together. However, Carr had not been invited to S.G.'s home that evening.
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> Carr, who was on house arrest and wore an ankle monitoring device, went to S.G.'s parents' home looking for S.G. When S.G.'s parents informed him that S.G. was not there, Carr went to Price's home. Price's grandmother let Carr in the home when he arrived during the party, and he proceeded to the basement

where he found S.G. with the other party attendees. Carr was in the basement for two to three minutes before he asked S.G. to come outside to help him with something. S.G. left the basement with Carr.

Approximately twenty minutes later, Dakota Burgess drove up to the home and saw S.G. lying on the ground in a puddle, unresponsive. Burgess saw someone he could not identify climb into a car and quickly drive away. At the same time that Burgess arrived, Price's grandmother looked out the front door and saw Carr, who was bent down, get up with something in his hand. Carr got into his car and drove away rapidly. There was no one else around apart from Burgess and Carr when Price's grandmother looked out the front door.

Price called 9-1-1. During the 9-1-1 call, S.G. can be heard identifying "Robert" as the person who had stabbed her in the eye. When paramedics arrived, they found S.G. in critical condition. She was covered in blood, having sustained a stab wound to her left eye, a complex orbital fracture caused by a fist or a kick, and lacerations above her clavicle and on the posterior of her left thigh. S.G. was transported to the hospital for treatment. At the hospital, Detective Tobi Cobain took a statement from S.G. in which S.G. identified Carr as the person who held her in his vehicle while armed with a steak knife and stabbed her in her left eye with the same knife. After interviewing Price, Burgess, and S.G., Detective Cobain concluded probable cause existed to arrest Carr.

On November 28, 2016, the State charged Carr with a number of offenses.

Carr, 106 N.E.3d at 548–49 (record citations omitted).

[3] Approximately one month later, "the trial court entered a no-contact order that prohibited Carr from having contact with S.G." until after Carr was tried and sentenced, if found guilty. *Carr*, 106 N.E.3d at 549. This no-contact order did not stop Carr from contacting S.G. As we explained previously:

> Carr's trial was set for September 11, 2017. In March of 2017, Carr began sending letters to S.G. in which he apologized to her. On April 28, 2017, Carr's second attorney, Robert Alden, deposed S.G. The deposition was recorded but not transcribed. After taking S.G.'s deposition, Alden informed Carr that S.G. was "on board" and mentioned plea negotiations. Carr rejected the possibility of a guilty plea. Carr then filed a notice of intention to plead insanity and underwent a competency review.
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> S.G. cooperated with the prosecutor through May of 2017 by staying in contact and participating in discovery. Between May 25, 2017, and May 30, 2017, Carr made a series of telephone calls from jail. On May 25, 2017, Carr discussed the fact that he had offered S.G. $20,000 if she needed help and stated, "I'm not giving up," when it appeared that she did not accept it. On May 26, 2017, Carr stated in a telephone conversation,
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> > I have to fill you in because *she's gonna call you because I told her I was going to give her some of the money from my Auntie. She's gonna help me out for that cash bro*... She's gonna call you and you just gotta play along...She's gotta clear everything up. Once she does that I'm gonna be outta here. This is gonna get me outta jail. This is gonna clear everything up...I told her I got this $20,000 – but I don't have the whole thing...
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> In a May 27, 2017, telephone call with S.G., she expressed her desire to see him go to trial and serve some time. Carr told S.G.

> to, "take the police out of this," and that, "If you do this for me – I'm gonna - like I said I got that 20 grand." In a second call that day, Carr told S.G. that, "All it would take is you to say that you don't want this, that you want to keep it in the streets. That everything they say happen didn't happen." In a third call that day, Carr directed S.G. to say that she really did not feel like he had kidnapped her and that she should contact his uncle for some money. S.G. replied that she would consider it. On May 28, 2017, Carr again spoke with S.G. and expressed his hope that she had been thinking about what they had discussed. The next day, Carr told S.G. that his parents will help her financially but that they wanted to be sure that they could trust her to be loyal to Carr. S.G. told Carr that she would wait until after the trial to write him, and Carr replied that "they're trying not to go to trial." On May 30, 2017, S.G. told Carr that the first thing she wanted to do when he was out of jail is "make love."
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> On June 17, 2017, Carr's uncle left a message for S.G. on her father's cell phone that Carr had wanted him to contact her. Carr's uncle communicated to S.G. that Carr offered to allow her the use of Carr's vehicle, Carr would ask his mother to give her a couple hundred dollars, and that Carr said that she could stay at his father's home. S.G.'s father believed that S.G. ceased cooperating with the prosecutor after receiving this voicemail. Between June 26, 2017, and September 13, 2017, Carr placed 384 calls to S.G., forty-six of which were completed. Carr continued to speak to S.G. about changing her story and about not going forward to trial.

Id. at 549–50 (record citations and footnotes omitted).

[4] After plea negotiations lapsed, the parties began preparing for trial. *Carr*, 106 N.E.3d at 550. To that end,

[t]he prosecutor requested that defense attorney Alden turn over S.G.'s April 28 deposition. Alden did not immediately tender the deposition to the State, believing that he had an ethical conflict which prevented him from doing so. While Alden was aware that a State motion to compel production of the deposition was at least pending with the trial court, Alden met with Carr's family and explained that, if S.G. did not appear for trial, her deposition could be used against Carr at trial. Carr's father asked to take the deposition home so that he could listen to it with family members. Alden provided the audio recorder which held the only copy of the deposition to Carr's father.

From September 4, 2017, to September 9, 2017, Carr, his father, and his mother had several telephone conversations about the deposition that was then in the family's possession. These calls from jail were recorded. After talking about the upcoming trial, Carr's father expressed his hope that "people keep their word." The next day, Carr spoke with his mother about his view that the case was "cut and dry" if S.G. did not come to court. Carr wanted his lawyer, Alden, to tell them if the deposition could be used to convict him if S.G. did not come to trial. He expressed his opinion that the prosecutor had no other evidence against him if S.G. did not testify.

On September 5, 2017, Carr's father told Carr that he had listened to the audiotape of S.G.'s deposition and had given it to "Aunt Pat" who had taken the audio recording with her to Chicago. Carr's father speculated that the prosecutor might be angry because the audio recording might not be available for trial. Carr's father planned to consult with a friend to determine how the deposition could be used and "find out before we give it back to [Alden]." They discussed the fact that the prosecutor had to have either a live witness, a deposition, or both to convict Carr. During a second call that day, Carr's father told Carr that the family would not return the deposition to Alden and that, "if they want depositions and all that, they can pay for it their damn

selves," to which Carr responded, "Right." When Carr's family returned the audio recorder with S.G.'s deposition to Alden, the deposition had been erased. Depositions of other clients of Alden's were on the audio recording device, but only S.G.'s deposition was missing. It was not possible to accidentally erase recordings on Alden's recording device.

S.G. did not appear for a bail review hearing on September 7, 2017. Carr's September 11, 2017, trial date was continued due to his counsel withdrawing from the case. Carr's jury trial was reset for January 2 and 3, 2018. On November 14, 2017, the State personally served S.G. with a subpoena to appear for Carr's jury trial on January 3, 2018. The State served S.G. with the subpoena when she was at a meeting at the Hamilton County Prosecutor's office about another case because she had not responded to the prosecutor's attempts to contact her regarding the instant case.

Carr's jury trial commenced on January 2, 2018. S.G. did not appear to testify on January 3, 2017, the day for which she had been subpoenaed. The State moved to admit S.G.'s hospital statement to Detective Cobain, arguing that it was admissible due to Carr having procured S.G.'s absence from trial through wrongdoing. The trial court held a hearing outside of the presence of the jury during which it heard evidence from Detective Cobain, a deputy prosecutor involved in another case involving Carr, S.G.'s father, and former defense counsel Alden. Alden verified that the content of S.G.'s deposition and her statement to Detective Cobain was essentially the same.

The State represented that it had been attempting to locate S.G. for the month and a half preceding trial by placing multiple telephone calls to the number where Carr had successfully reached S.G. during the summer, which was also the last telephone number S.G.'s parents had for her. S.G. did not return the State's telephone calls. The State had remained in contact

> with S.G.'s parents, but they had no contact with S.G. either. After the first day of trial recessed, Detective Cobain attempted unsuccessfully to locate S.G. at her last known address in order to serve her with a second trial subpoena for January 3, 2018. Detective Cobain also went to an apartment complex where S.G. had previously lived but was unable to locate S.G. there either. The trial court enumerated several rationales for admitting S.G.'s statement to Detective Cobain into evidence, including that S.G. was unavailable to testify and that Carr had contributed to the wrongdoing that led to her being unavailable. In her statement, S.G. identified Carr as the person who had held her in his car while holding a knife and who had stabbed her in her left eye with the knife.

Id. at 550–51 (record citations omitted).

[5] The trial court sentenced Carr to an aggregate sentence of 15 years executed at the Indiana Department of Correction. *Carr*, 106 N.E.3d at 548. On direct appeal, Carr challenged the admission of S.G.'s statement to Detective Cobain because it violated his Sixth Amendment confrontation rights and because it constituted inadmissible hearsay. *Id.* We did not agree and affirmed Carr's convictions. *Id.* at 548, 552–55. The Indiana Supreme Court denied transfer. *Carr v. State*, 111 N.E.3d 197 (Ind. 2018).

[6] On September 27, 2018, Carr filed a verified PCR petition pro se. Carr originally raised five issues in his petition, but at the evidentiary hearing, he chose to focus on only one of those issues: ineffective assistance of counsel. Carr's ineffective assistance claim focused on two of his trial attorneys: (1) Robert Alden, his trial counsel who withdrew from the case in September 2017 due to the deleted deposition; and (2) Jonathan Gotkin, Carr's trial counsel

whom he hired after Alden's withdrawal and who represented Carr at trial. As to the latter, Carr claimed that Gotkin was ineffective for failing to obtain and introduce a recording of a phone call between Carr and S.G., during which S.G. allegedly recants her statements to law enforcement.

[7] On September 23, 2022, the PCR court held an evidentiary hearing on Carr's petition. At the evidentiary hearing, Carr presented testimony from Alden, Gotkin, and himself. He also offered the recording and transcript of the phone call, which the trial court admitted over the State's objection. At the conclusion of the trial, the PCR court took the matter under advisement.

[8] On May 25, 2023, the PCR court denied Carr's PCR Petition. Regarding Carr's ineffective assistance of counsel claim against Gotkin, the PCR court made the following relevant findings and conclusions:

> A review of the trial transcript makes clear that trial counsel was clearly aware that the recording existed. . . .
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> Carr argues that in this recording the victim recanted her accusation[,] which would have led to his being acquitted. On the contrary, the Court has reviewed the recorded phone calls as well as the record of proceedings, and finds that, while the victim[] does appear to agree to deny her previous statements, taken in context, these statements are the product of a campaign of literally hundreds of phone calls from the petitioner to the victim aimed at convincing her to recant or to cease cooperating with prosecutors. . . . Given this context[,] the Court finds that it is highly unlikely that if admitted, this recorded phone call would have benefitted Carr. It is equally likely that it could have been harmful as evidence of a guilty conscience and/or one desperate to alter evidence.

> Moreover, the Court finds that the finding of "forfeiture by wrong-doing" that permitted admission of the victim[']s statement would also have likely rendered these victim's statements inadmissible under [Indiana Rule of Evidence] 804(a)(5)(B) [] because the hearsay exception does "not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying." . . .

Appellant's App. Vol. II at 21–23.

[9] Carr now appeals, challenging the PCR court's conclusion that Carr failed to show Gotkin provided ineffective assistance of counsel.[1]

Discussion and Decision

[10] As our Supreme Court has explained:

> Post-conviction actions are civil proceedings, meaning the petitioner (the prior criminal defendant) must prove his claims by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); *Wilkes v. State*, 984 N.E.2d 1236, 1240 (Ind. 2013). If he fails to meet this burden and receives a denial of post-conviction relief, then he proceeds from a negative judgment and on appeal must prove "that the evidence, as a whole, unmistakably and unerringly points to a conclusion contrary to the post-conviction court's decision." *Wilkes*, 984 N.E.2d at 1240 (quoting *Ben-Yisrayl v. State*, 738 N.E.2d 253, 258 (Ind. 2000)). When reviewing the court's order denying relief, we will "not defer to the post-conviction court's legal conclusions," and the "findings and judgment will be reversed only upon a showing of clear

[1] On appeal, Carr does not challenge the trial court's conclusion that he failed to show Alden provided ineffective assistance of counsel.

> 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) (quoting *Ben-Yisrayl v. State*, 729 N.E.2d 102, 106 (Ind. 2000)).

Bobadilla v. State, 117 N.E.3d 1272, 1279 (Ind. 2019).

[11] To evaluate a defendant's ineffective-assistance-of-counsel claim, "we apply the well-established, two-part *Strickland* test."[2] *Bobadilla v. State*, 117 N.E.3d 1272, 1280 (Ind. 2019) (citing *Humphrey v. State*, 73 N.E.3d 677, 682 (Ind. 2017)). Under that test, "the defendant must prove: (1) counsel rendered deficient performance, meaning counsel's representation fell below an objective standard of reasonableness as gauged by prevailing professional norms; and (2) counsel's deficient performance prejudiced the defendant, i.e., but for counsel's errors the result of the proceeding would have been different." *Id.* (citing *Ward v. State*, 969 N.E.2d 46, 51 (Ind. 2012)). 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.*

[12] Here, the PCR court denied Carr's ineffective assistance claim against Gotkin on two grounds: Gotkin's failure to offer the phone call as evidence at trial did not prejudice Carr because (1) in the context of Carr's intensive campaign to get S.G. to recant or not cooperate with the prosecution, the phone call likely

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[2] *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

would have harmed Carr's defense; and (2) the phone call would have been inadmissible at trial pursuant to Indiana Evidence Rule 804(a)(5)(B). Carr challenges only the former basis and not the latter.

[13] We take as true any findings and conclusions that Carr does not challenge on appeal. *See Madlem v. Arko*, 592 N.E.2d 686, 687 (Ind. 1992). Accordingly, we take as true the PCR court's undisputed finding of no prejudice based on its uncontested findings regarding the inadmissibility of the phone call. To the extent these findings may be legal conclusions concerning Evidence Rule 804(a)(5)(B), Carr does not challenge them here, so we assume without deciding that the PCR court did not make erroneous legal conclusions. *See Miller v. Patel*, 212 N.E.3d 639, 657 (Ind. 2023) (quoting *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (Scalia, J.)); Ind. Appellate Rule 46(A)(8)(a). Therefore, even if we assume that Carr is correct that the PCR court clearly erred in finding no prejudice based on the harm the phone call may have caused Carr's defense, the PCR court's unchallenged findings support its conclusion that Gotkin's failure to obtain and introduce the phone call did not constitute ineffective assistance of counsel. On this record and in light of the uncontested findings, we hold that the trial court did not clearly err in denying Carr's PCR petition.

[14] Affirmed.

Bailey, J., and May, J., concur.

ATTORNEY FOR APPELLANT

Timothy J. O'Connor
O'Connor & Auersch
Indianapolis, Indiana

Attorneys for Appellee

Theodore E. Rokita
Indiana Attorney General

James T. Whitehead
Deputy Attorney General
Indianapolis, Indiana