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**IN THE
COURT OF APPEALS OF INDIANA**

ADRIAN/DANIEL GONZALEZ,)

Appellant-Petitioner,)

vs.)

No. 20A04-0702-PC-88

STATE OF INDIANA,)

Appellee-Respondent.)

APPEAL FROM THE ELKHART CIRCUIT COURT
The Honorable Gene Duffin, Judge
Cause No. 20C01-9403-CF-22

November 21, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Adrian/Daniel Gonzalez appeals the denial of his petition for post-conviction relief. On appeal, Gonzalez raises one issue, which we restate as whether the post-conviction court properly denied Gonzalez relief on his claims of ineffective assistance of counsel. Concluding the trial court properly denied Gonzalez's claims, we affirm.

Facts and Procedural History

On Gonzalez's direct appeal, this court related the following facts:

[O]n March 12, 1994, Charles Moore ("victim") was visiting his sister, Victoria Watkins ("Watkins"). A group of the victim's friends drove to Watkins' apartment to give the victim and Watkins a ride. Before leaving, Watkins stopped to speak with a friend outside. The victim and his friends waited in a car for her.

During the wait, the victim and his friends began arguing with a group of people which included Gonzalez. In the ensuing melee, Gonzalez shot the victim who had been sitting in the back of the car. Watkins heard the shot, saw her brother had been hit, tried to help him, but was restrained. Watkins then saw Gonzalez shoot the victim in the head. Gonzalez's girlfriend, Rusti Waterson ("Waterson"), witnessed the shooting and later asked Gonzalez why he had done it. Gonzalez replied, "because they was messing with us."

Gonzalez v. State, No. 20A04-9508-CR-303, slip op. at 2-3 (Ind. Ct. App., July 11, 1996), trans. denied. The State charged Gonzalez with murder, a felony. Gonzalez's first trial resulted in the trial court declaring a mistrial based on a hung jury. A second trial, however, resulted in a guilty verdict. The trial court sentenced Gonzalez to fifty years. On direct appeal, this court affirmed Gonzalez's conviction. Id. at 8.

Following this court's decision, Gonzalez filed a petition for post-conviction relief asserting four claims of ineffective assistance of counsel. The post-conviction court conducted a hearing at which Gonzalez's trial counsel and three of the investigating officers

testified. Following the hearing, the post-conviction court issued findings of fact and conclusions of law denying Gonzalez's petition for relief. Gonzalez now appeals.

Discussion and Decision

I. Standard of Review

To obtain relief, a petitioner in a post-conviction proceeding bears the burden of establishing his claims by a preponderance of the evidence. Ind. Post-Conviction Rule 1, § 5. We accept the post-conviction court's findings of fact unless they are clearly erroneous, but we do not defer to the post-conviction court's conclusions of law. Martin v. State, 740 N.E.2d 137, 139 (Ind. Ct. App. 2000). Moreover, when the petitioner appeals from a denial of relief, the denial is considered a negative judgment and therefore the petitioner must establish "that the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court." Stevens v. State, 770 N.E.2d 739, 745 (Ind. 2002), cert. denied, 540 U.S. 830 (2003).

II. Waiver

Gonzalez's petition asserted four claims of ineffective assistance of counsel 1) counsel failed to move for a continuance in response to the State's motion to admit a witness's prior testimony into evidence; 2) counsel failed to object to a jury instruction; 3) counsel deficiently argued the motion to suppress Gonzalez's written confession; and 4) counsel failed to subpoena two witnesses. On appeal, however, Gonzalez raises the first three claims, omits the fourth claim, and adds a claim that counsel was ineffective because he failed to object to an oral confession Gonzalez made to Detectives Dale Pflibsen and Frank

Owens before making his written confession. “Issues not raised in the petition for post-conviction relief may not be raised for the first time on post-conviction appeal.” Allen v. State, 749 N.E.2d 1158, 1171 (Ind. 2001), cert. denied, 535 U.S. 1061 (2002) (citing Ind. Post-Conviction Rule 1, § 8). Thus, Gonzalez’s attempt to add a claim not raised in his petition results in waiver of that claim. Waiver notwithstanding, we will address this claim and the other three claims Gonzalez raises on appeal.¹

III. Ineffective Assistance of Counsel

To establish a violation of the right to effective counsel as guaranteed by the Sixth Amendment, the petitioner must establish both prongs of the test set forth in Strickland v. Washington, 466 U.S. 668 (1984). Wesley v. State, 788 N.E.2d 1247, 1252 (Ind. 2003). First, the petitioner must show counsel was deficient. Id. “Deficient” means that counsel’s errors fell below an objective standard of reasonableness and were so serious that counsel was not functioning as “counsel” within the meaning of the Sixth Amendment. Id. Second, the petitioner must show that counsel’s deficiency resulted in prejudice. 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.” Strickland, 466 U.S. at 694. We need not address whether counsel’s performance was deficient if we can resolve a claim of ineffective assistance based on lack of prejudice. Wentz v. State, 766 N.E.2d 351, 360 (Ind. 2002).

¹ The State argues Gonzalez waived his other three ineffective assistance of counsel claims because he failed to admit the trial transcript as an exhibit during the post-conviction hearing. Although we agree with the State that “[i]t is ‘practically impossible to gauge the performance of trial counsel without the trial record,’” appellee’s brief at 4-5 (quoting Tapia v. State, 753 N.E.2d 581, 587 n.9 (Ind. 2001)), Gonzalez did include portions of the trial transcript in his Appendix. Based on this inclusion, and in light of our preference

A. Motion for Continuance

During Gonzalez's second trial, the trial court allowed the State to read Rusti Waterson's testimony from Gonzalez's first trial into evidence over Gonzalez's objection after the trial court found she was unavailable to testify. The trial court's finding was based on testimony from Waterson's mother that Waterson was experiencing emotional and physical problems resulting from the death of her child. Gonzalez argues counsel was deficient because "he did not request a continuance . . . to contact Rusti Waterson or contact her medical provider concerning her availability to testify in the case." Appellant's Brief at 17. The post-conviction court concluded counsel was not deficient based on this court's conclusion on direct appeal that the trial court was within its discretion when it admitted Waterson's testimony from the first trial.

We note initially that we disagree with the basis for the post-conviction court's conclusion. Although it is true that when a reviewing court resolves an issue on direct appeal, the doctrine of res judicata prevents relitigation of the issue in a post-conviction proceeding, Ben-Yisrayl v. State, 738 N.E.2d 253, 258 (Ind. 2000), cert. denied, 534 U.S. 1164 (2002), that doctrine does not apply here. On Gonzalez's direct appeal, the issue was whether the trial court abused its discretion in admitting Waterson's prior testimony. See Gonzalez, slip op. at 5-7. In his post-conviction claim, however, Gonzalez describes the issue as whether counsel was ineffective when he failed to move for a continuance. Implicit in this issue is that had counsel moved for a continuance and had the motion been granted, a

to decide cases on their merits, see Welch v. State, 828 N.E.2d 433, 435-36 (Ind. Ct. App. 2005), we conclude

proper investigation would have revealed that Waterson was in fact available. Gonzalez's description of the issue as such is therefore not an attempt to "escape the effect of claim preclusion merely by using different language to phrase an issue and define an alleged error." Ben-Yisrayl, 738 N.E.2d at 258. Stated differently, Gonzalez is not rearguing the trial court abused its discretion in admitting Waterson's prior testimony, but arguing that a proper motion for a continuance would have been granted, resulting in an investigation that would have revealed Waterson was in fact available, thus compelling her live testimony and resulting in a different outcome.

Although Gonzalez's argument avoids the preclusive effect of *res judicata*, he still must establish that counsel's performance was deficient and that the deficient performance resulted in prejudice. Putting the issue of counsel's deficiency to the side, two reasons convince us that Gonzalez has not established prejudice. First, Gonzalez has not presented evidence that Waterson was in fact available to testify. Absent such evidence, Gonzalez cannot establish that the outcome would have been different. Second, assuming Waterson was available to testify, Gonzalez has not explained how her live testimony at the second trial would have differed from her prior testimony or how it would have resulted in a different outcome. Cf. Lowery v. State, 640 N.E.2d 1031, 1047 (Ind. 1994), cert. denied, 516 U.S. 992 (1995) ("When ineffective assistance of counsel is alleged and premised on the attorney's failure to present witnesses, it is incumbent upon the petitioner to offer evidence as to who the witnesses were and what their testimony would have been."). Gonzalez cites

Gonzalez has not waived these three claims.

counsel's testimony at the post-conviction hearing that Waterson's live testimony would have permitted the jury to observe her facial gestures and other non-verbal conduct, but overlooks that counsel also testified he was uncertain whether Waterson's live testimony would have helped Gonzalez's case:

The problem, and the reason for the objection, was that the facial gestures that are non-verbal communication, would not have been available to the jury and, in my experience, deposition testimony, or prior trial testimony, never has quite the same impact as live testimony. Sometimes it's better for you and sometimes, it's worse, but it's never the same.

Transcript at 109-10 (emphasis added). The foregoing reasons convince us that Gonzalez has not shown there is a reasonable probability that the outcome of his trial would have been different if counsel had moved for a continuance. Because Gonzalez has not made this showing, he cannot establish prejudice. Thus, Gonzalez did not receive ineffective assistance of counsel based on counsel's failure to move for a continuance.

B. Objection to Jury Instruction

Gonzalez argues counsel was deficient for failing to object to a jury instruction explaining the jurors' obligations during deliberation. To establish that counsel was deficient, Gonzalez must show the trial court would have sustained a proper objection to the instruction. Whitener v. State, 696 N.E.2d 40, 44 (Ind. 1998). A trial court must sustain a proper objection to an instruction if the instruction contains an incorrect statement of the law, is not supported by the evidence, is covered by another instruction, or tends to confuse or mislead the jury. See Nantz v. State, 740 N.E.2d 1276, 1283 (Ind. Ct. App. 2001), trans. denied.

The jury instruction reads in pertinent part:

It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion if convinced it is wrong, but do not surrender your honest conviction as to the weight or effect of evidence based solely upon the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

If you should fail to reach a decision, this case will be left open and undecided. Like all cases it must be disposed of at some time. Another trial would be a heavy burden on both sides.

There is no reason to believe that the case can be tried again any better or more exhaustively than it has been. There is no reason to believe that more evidence or clearer evidence would be produced on behalf of either side.

There is no reason to believe that the case would ever be submitted to twelve people more intelligent, more impartial or more reasonable than you. Any future jury must be selected in the same manner as you were.

This does not mean that those favoring any particular position should surrender their honest convictions as to the weight or effect of any evidence solely because of the opinion of other jurors or because of the importance of arriving at a decision.

This means that you should give respectful consideration to each other's views and talk over any differences of opinion in a spirit of fairness and candor. If at all possible, you should resolve any differences and come to a common conclusion so that this case may be completed.

Appellant's Appendix at 12-13. Gonzalez argues the instruction was erroneous "because it unfairly suggested to the jury that they must reach an outcome in [the] case." Appellant's Br. at 17. The post-conviction court did not address this argument in its findings of fact and conclusions of law. Nevertheless, because the record allows for meaningful appellate review, we will address Gonzalez's argument on its merits. See Harrison v. State, 707 N.E.2d 767, 784 n.20 (Ind. 1999), cert. denied, 519 U.S. 933 (1996) (concluding that although the post-conviction did not address an issue raised in the petition for relief, "remand is not necessary

because the facts supporting [the petitioner's] claim are in the trial record and a legal argument is presented in his brief").

Prior to Gonzalez's trial in March 1995, our supreme court had held consistently that it is reversible error for a trial court to reread this type of instruction to a deadlocked jury without reading the other jury instructions.² See Bailey v. State, 669 N.E.2d 972, 975 n.7 (Ind. 1996) (citing pre-1995 cases). The rationale for this rule is that reading such an instruction in isolation may improperly influence minority jurors into siding with the majority. See Lewis v. State, 424 N.E.2d 107, 109 (Ind. 1981). However, also prior to Gonzalez's trial, our supreme court had held that it was harmless error for a trial court to read such an instruction to a jury before it retires for deliberation and in conjunction with other instructions. Broadus v. State, 487 N.E.2d 1298, 1304 (Ind. 1986).

Gonzalez acknowledges that the trial court gave the instruction to the jury before deliberation and in conjunction with other instructions, but argues that counsel nevertheless was deficient based on Parish v. State, 838 N.E.2d 495 (Ind. Ct. App. 2005). In Parish, a panel of this court concluded counsel's performance was deficient based on his failure to conduct an adequate investigation and his failure to object to a similar instruction. 838 N.E.2d at 501-03. However, Parish was decided more than ten years after Gonzalez's trial, and therefore is not helpful in determining whether counsel's performance was deficient. See Shaffer v. State, 674 N.E.2d 1, 7 (Ind. Ct. App. 1996), trans. denied ("[A]n ineffective

² When read in this manner, the instruction is referred to as an "Allen charge," named after the first major case to consider the propriety of such an instruction, Allen v. United States, 164 U.S. 492 (1896). For

assistance claim cannot be based on counsel's failure to argue the legal reasoning of cases not yet decided at the time of trial."').

Notwithstanding the inapplicability of Parish, the question remains whether an objection to the instruction would have been sustained. In this respect, our supreme court's decision in Broadus requires further discussion. A portion of the instruction the trial court gave in Broadus is identical to a portion of the instruction the trial court gave in Gonzalez's case:

If you should fail to reach a decision, this case will be left open and undecided. Like all cases it must be disposed of at some time. Another trial would be a heavy burden on both sides.

There is no reason to believe that the case can be tried again any better or more exhaustively than it has been. There is no reason to believe that more evidence or clearer evidence would be produced on behalf of either side.

There is no reason to believe that the case would ever be submitted to twelve people more intelligent, more impartial or more reasonable than you. Any future jury must be selected in the same manner that you were.

487 N.E.2d at 1303. In discussing the propriety of this instruction, the Broadus court relied on Lewis v. State, 424 N.E.2d 107 (Ind. 1981). The court in Lewis resolved a split between two panels of this court, Lewis v. State, 409 N.E.2d 1276 (Ind. Ct. App. 1980), vacated, 424 N.E.2d 107 (Ind. 1981), and Guffey v. State, 179 Ind. App. 503, 386 N.E.2d 692 (1979). See Broadus, 487 N.E.2d at 1304-05. The Lewis panel concluded the trial court committed reversible error when it gave this instruction, while the Guffey panel cautioned against the trial court giving such an instruction, but concluded it did not constitute reversible error. See

an overview of the Allen charge and the various ways it has been characterized, see United States v. McElhiney, 275 F.3d 928, 935-39 (10th Cir. 2001), cert. denied, 541 U.S. 1055 (2004).

id. In endorsing the Guffey panel's conclusion, the Lewis court concluded that the instruction itself does not constitute reversible error, but reading it in isolation to a deadlocked jury does:³

The proper procedure is for the court to call the jury back into open court in the presence of all of the parties and their counsel, if they desire to be there, and to reread all instructions given to them prior to their deliberations, without emphasis on any of them and without further comment. This procedure will give the jury the aid necessary for them to continue their deliberations without compounding potential problems as the giving of an Allen-type instruction has done.

424 N.E.2d at 111. Thus, the proposition stated in Guffey and reaffirmed in Lewis and Broadus is that although a trial court should not give such an instruction, it nevertheless has discretion to do so in conjunction with other instructions.

Had our supreme court followed the Lewis panel's conclusion that giving the instruction was reversible error, we would agree with Gonzalez that the trial court would have been required to sustain an objection. However, our supreme court rejected the Lewis panel's conclusion, concluding instead that a trial court may use its discretion to give the instruction. See Broadus, 475 N.E.2d at 1304-05. In light of this discretion, we are not convinced the trial court would have sustained counsel's objection. Cf. Saylor v. State, 765 N.E.2d 535, 554 (Ind. 2002) (concluding that an objection to an instruction would not have been sustained because although case law did not recommend using the instruction, it was not

³ In this respect, we note that a trial court commits reversible error when it rereads any instruction in isolation. See Brannum v. State, 267 Ind. 51, 58-59, 366 N.E.2d 1180, 1185 (1977). The rationale for this rule is that an instruction reread in isolation places improper emphasis on the instruction and creates the possibility that a juror may infer from such emphasis that the trial court is commenting on the evidence. See id.

reversible error to do so), reversed on other grounds on reh'g, 808 N.E.2d 646 (Ind. 2004). Because Gonzalez has not established the trial court would have sustained an objection, it follows that counsel's performance was not deficient. Thus, Gonzalez did not receive ineffective assistance of counsel based on counsel's failure to object to the instruction.

C. Argument on Motion to Suppress

Gonzalez argues counsel deficiently argued the motion to suppress his written confession. To establish that counsel was deficient, Gonzalez must show that the manner in which counsel argued the motion to suppress fell below an objective standard of reasonableness based on prevailing professional norms. Strickland, 466 U.S. at 688. The post-conviction court concluded that Gonzalez did not receive ineffective assistance because “[t]here was no evidence that the performance of Mr. Gonzalez’s trial counsel fell below the standard required by Strickland and the Sixth Amendment” and, even if it did, Gonzalez had not established prejudice. Appellant’s App. at 17.

At the suppression hearing, counsel argued Gonzalez’s written confession should be suppressed because the investigating officers did not give him the opportunity to meaningfully consult with his mother prior to waiving his right to remain silent.⁴ Gonzalez argues counsel’s performance fell below an objective standard of reasonableness because counsel did not call Gonzalez’s mother to testify. Gonzalez submits that if his mother testified, she would have described “what efforts were made to obtain meaningful

consultation.” Appellant’s Br. at 15. At the same time, however, Gonzalez concedes that “the court did learn through testimony that officers contacted Gonzalez’s mother at her place of employment and that she did not talk with Gonzalez when he was in police custody.” *Id.* (emphasis added); see also Gonzalez, slip op. at 4 (“[A] detective acknowledged that no opportunity for consultation – meaningful or otherwise – was afforded to Gonzalez and his mother, thus contravening the statute’s requirement.”). In light of the testimony counsel did present, Gonzalez has not explained how counsel’s failure to elicit the same testimony through Gonzalez’s mother constitutes deficient performance. Absent such an explanation, we are not convinced the evidence leads unmistakably and unerringly to a conclusion contrary to the post-conviction court’s conclusion that counsel’s performance was not deficient. Thus, it follows that he did not receive ineffective assistance based on the manner in which counsel argued the motion to suppress Gonzalez’s written confession.

D. Objection to Oral Confession⁵

Gonzalez argues counsel was deficient for failing to object to testimony from Detectives Pflibsen and Owens regarding an oral confession Gonzalez made to them prior to making his written confession. To establish that counsel was deficient, Gonzalez must show the trial court would have sustained a proper objection to the detectives’ testimony. Whitener, 696 N.E.2d at 44. The post-conviction court did not address whether counsel’s

⁴ Gonzalez was a minor at the time, and Indiana law required that for a minor to waive his constitutional rights, “meaningful consultation” with the minor’s parent must have occurred. Ind. Code § 31-6-7-3(a)(2)(C) (1993) (amended and recodified at Indiana Code section 31-32-5-1).

⁵ We reiterate Gonzalez has waived this issue, see supra, Part II., but choose to address it notwithstanding the waiver.

performance was deficient, concluding instead that Gonzalez could not establish prejudice because “it can not be said that but for the admission of Mr. Gonzalez’s statement[s] the jury would have likely reached a different conclusion.” Appellant’s App. at 16.

We note initially that we disagree with the basis for the post-conviction court’s conclusion. The post-conviction court relied on this court’s conclusion on direct appeal that the trial court abused its discretion in admitting Gonzalez’s “statements,” but “the error was harmless beyond a reasonable doubt.” Gonzalez, slip op. at 4-5. Although not readily apparent from the opinion, the court’s reference to “statements,” id. at 4, refers to Gonzalez’s written confession, not the oral confession he made to the detectives before making his written confession. This distinction is made apparent after reviewing the court’s discussion of why the trial court’s error was harmless. There the court explained the error was harmless because three eyewitnesses testified Gonzalez was the shooter and because “the two police officers who had transported Gonzalez to the station had testified (without objection from Gonzalez) that he had admitted shooting the victim.” Id. at 5; see also id. at 2 (stating one of the issues as “[w]hether it was harmless error to admit Gonzalez’s incriminating statement”) (emphasis added). Thus, we disagree with the post-conviction court’s reliance on our opinion in Gonzalez because that opinion did not address whether the trial court abused its discretion in admitting Gonzalez’s oral confession.

Although we disagree with the post-conviction court’s basis for its conclusion, to establish that counsel was deficient, Gonzalez still must show that an objection to the detectives’ testimony would have been sustained. See Whitener, 696 N.E.2d at 44. Gonzalez

argues an objection would have been sustained because he “did not properly understand his right to remain silent.” Appellant’s Br. at 13. Prior to Gonzalez’s trial, our supreme court recognized that a defendant’s oral confession made under circumstances requiring a Miranda warning is inadmissible against him unless the defendant knowingly and voluntarily waived his rights after receiving a proper Miranda warning. Ortiz v. State, 265 Ind. 549, 553, 356 N.E.2d 1188, 1191 (Ind. 1976), overruled on other grounds, Smith v. State, 689 N.E.2d 1238, 1246 n.11 (Ind. 1997). Gonzalez received a Miranda warning and does not appear to argue that it was improper. Instead, Gonzalez argues his waiver was not knowing and voluntary because he did not understand English; that is, “Gonzalez did not understand the nature of the proceedings that were taking place, and specifically what was being said to him, and further what was being asked of him.” Appellant’s Br. at 13.

Although a defendant’s knowledge of the English language is an important factor in determining whether he knowingly and intelligently waived his rights, see Hoskins v. State, 563 N.E.2d 571, 577-78 (Ind. 1990) (concluding the defendant’s waiver was voluntary in part because the investigating officer testified he determined that the defendant understood English), Gonzalez has not presented sufficient evidence indicating he did not understand English when he made his oral confession. Gonzalez points to Detective Owens’s trial testimony where Owens admitted he was aware Gonzalez was not a native English speaker and had “a fairly thick accent.” Appellant’s App. at 45. Gonzalez also points to Officer Robert Roa’s post-conviction hearing testimony where he explained that after Gonzalez made his oral confession, he was asked “[t]o translate” and further explained that “normally when I

get called in – it’s because the other – the person does not speak English or understand Spanish, and I’m called in so I can translate for him.” Tr. at 61. Although Officer Roa’s testimony suggests Gonzalez did not understand English, Detective Owens testified at trial that “[w]e had the Interpreter come in. [Gonzalez] said he understood and spoke English very well. To cover all the bases, and so he couldn’t say at a later time he didn’t understand English; that is why we had the Interpreter come in.” Id. at 45. Detective Owens reiterated this point at the post-conviction hearing:

Q And do you recall Officer Roa coming in at the time that you arrived at the police station?

A Yes, sir, I do remember that.

Q And do you recall what the specific purpose for Officer Roa would have been in connection with this case at that time?

A Yes.

Q And what specific purpose would that have been at that time?

A We wanted Officer Roa to come in to read [Gonzalez’s] statement in Spanish and to make sure he understood everything that he had given me in English, but we just wanted to cover our bases and make sure that he understood everything in the statement that was given to him.

Q What would be the reason, if you recall at that time, that you would have – that that action would have been taken?

A I guess we just wanted to cover bases in case it came up later that he didn’t understand English that we would have the interpretation done so he would have had it in English and in Spanish.

Appellant’s App. at 65-66. Detective Owens’s testimony indicates that the decision to have Officer Roa translate Gonzalez’s written confession was based less on concern that Gonzalez did not understand English than it did on concern that Gonzalez would later claim a lack of understanding. Moreover, both detectives testified at trial that Gonzalez stated he “understood” the rights that were read to him. Id. at 23, 29.

The foregoing evidence convinces us that Gonzalez has not shown he did not understand English when his rights were read to him. Because Gonzalez has not made this showing, he cannot establish that an objection to the detectives' testimony would have been sustained. Thus, it follows that Gonzalez did not receive ineffective assistance of counsel based on counsel's failure to object to testimony from Detectives Pflibsen and Owens regarding Gonzalez's oral confession.

Conclusion

The post-conviction court properly denied Gonzalez relief on his ineffective assistance of counsel claims.

Affirmed.

KIRSCH, J., and BARNES, J., concur.