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IN THE
COURT OF APPEALS OF INDIANA

GEORGE FOOTE, JR.,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 28A04-1102-PC-140
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE GREENE CIRCUIT COURT
The Honorable Erik C. Allen, Judge
Cause No. 28C01-0909-PC-141

December 30, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

After George Foote, Jr. ("Foote") initiated a direct appeal of his convictions for two counts of Child Molesting, both as A felonies,[1] and two counts of Incest, one as a B felony and one as a C felony,[2] he filed a voluntary motion to dismiss his appeal so that he could initiate a Davis/Hatton procedure.[3] We granted his motion to dismiss and thereafter Foote filed three petitions for post-conviction relief. These petitions were denied.

Foote now appeals the denial of his petitions for post-conviction relief and raises two issues for our review, which we restate and consolidate into the following single issue: whether he was denied the effective assistance of trial counsel. Foote raises no issue on direct appeal. We affirm.

Facts and Procedural History

Foote and his wife, Karen Foote ("Karen"), had two daughters, J.F. and B.F. J.F. was born on December 20, 1990 and B.F. was born on December 17, 1991. In 2004, Karen traveled to Florida to attend her mother's funeral. While Karen was away, Foote forced the girls to perform several sexual acts. He put his mouth on J.F.'s vagina, put his finger in her

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[1] Ind. Code § 35-42-4-3(a)(1).

[2] I.C. § 35-46-1-3.

[3] The Davis/Hatton procedure involves a termination or suspension of a direct appeal already initiated, upon appellate counsel's motion for remand or stay, to allow a post-conviction relief petition to be pursued in the trial court. Peaver v. State, 937 N.E.2d 896, 897 n.1 (Ind. Ct. App. 2010), trans. denied. If, after a full evidentiary hearing, the post-conviction court denies the petition, the appeal can be reinstated. Slusher v. State, 823 N.E.2d 1219, 1222 (Ind. Ct. App. 2005). Thus, in addition to the issues initially raised in the direct appeal, the issues litigated in the post-conviction relief proceeding can also be raised. Id. That way, a full hearing and record on the issue will be included in the appeal. Id. If the post-conviction relief petition is denied after a hearing, and the direct appeal is reinstated, then the direct appeal and the appeal of the denial for post-conviction relief are consolidated. Id.

vagina, and put his penis in her buttocks. Foote also put his mouth on B.F.'s vagina and blew it while he masturbated into a black pipe of insulation. He also made B.F. suck on his penis.

On one occasion in early March of 2007, Foote made B.F. take off all her clothes and lie on the living room floor. He pulled down his pants, made B.F. turn onto her stomach, and put his penis on her vagina. Foote's penis penetrated B.F.'s vagina "[a] little." Exhibit B, p. 256. He rubbed it until he ejaculated, and, while doing this, told B.F. that her ass looked good. On other occasions in 2007, Foote made B.F. suck on his penis or he put his mouth on her vagina and blew it or licked it.

On March 12, 2007, J.F. and B.F. were playing outside when Foote returned from taking Karen to work. He told B.F. to go inside and told J.F. to clean herself and then come back outside. Foote and J.F. then went into Foote's utility van, which Foote had equipped with a cushion that rested on the floor, a black bench, and a curtain behind the two seats to eliminate visibility through the front windshield. Foote had also painted the other windows white to eliminate all other visibility.

Inside the van, Foote made J.F. undress and then he put his mouth on her vagina. He told J.F. that her vagina was dirty and he cleaned it with a rag and also placed his finger inside. Foote then made J.F. get on top of him. He pulled her down, put his penis in her vagina, and told J.F. to say "fuck me." Exhibit 2, p. 224. Having Foote's penis inside her hurt J.F., and so she pulled off of him. Foote then made J.F. suck on his penis while he sat on the bench until he ejaculated into a tissue.

The next day at school, J.F. told her guidance counselor that her father was molesting

her. Her guidance counselor notified the Assistant Principal, who then alerted the Greene County Department of Child Services (DCS). DCS representatives arrived at the school and J.F. repeated her report. B.F. was then called from class and also interviewed by DCS. She initially denied any inappropriate contact, but then eventually told DCS that she was being molested by Foote. DCS detained the children,[4] made arrangements for foster care, and sent the girls to the emergency room for a sexual abuse examination.

After an investigation, DCS petitioned to have all three children declared Children in Need of Services (CHINS). The hearing on that petition was held on May 2, 2007. All of the children are currently placed with foster parents.

On October 1, 2007, the State charged Foote with two counts of Child Molesting, both as A felonies, and two counts of Incest, one as a C felony and another as a B felony. Foote's first jury trial ended in a mistrial due to an issue with a juror. His second jury trial started on August 18, 2008 and concluded on August 22, 2008. At the conclusion of the second trial, the jury found Foote guilty as charged.

Foote initiated a direct appeal of his conviction on November 17, 2008. On March 27, 2009, he filed a motion to dismiss, which we granted on April 7, 2009. The appeal was dismissed without prejudice so that Foote could file a petition for post-conviction relief pursuant to the Davis/Hatton procedure.

Thereafter, Foote filed petitions for post-conviction relief on September 14, 2009, October 26, 2010, and November 18, 2010. A hearing on the post-conviction petitions was

[4] The Footes also had a son who was also detained by DCS.

held on November 18, 2010. On February 3, 2011, the post-conviction court issued findings and conclusions and denied Foote's petitions for post-conviction relief.

Foote now appeals. Additional facts will be supplied as necessary.

Discussion and Decision

Standard of Review

The petitioner in a post-conviction proceeding bears the burden of establishing the grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); Fisher v. State, 810 N.E.2d 674, 679 (Ind. 2004). When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. Id. On review, we will not reverse the judgment of the post-conviction court unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. Id. 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. Id. In this review, findings of fact are accepted unless they are clearly erroneous and no deference is accorded to conclusions of law. Id. The post-conviction court is the sole judge of the weight of the evidence and the credibility of witnesses. Id.

Effectiveness of Trial Counsel

Foote argues that his trial attorney, James Riester ("Riester"), was ineffective because he (1) did not attempt to impeach J.F. and B.F. at trial with their CHINS testimonies; (2) did not call certain witnesses at trial; and (3) did not address other problems or advance other

defenses that Foote claims to have discussed with him. To establish a post-conviction claim alleging a violation of the Sixth Amendment right to effective assistance of counsel, a defendant must establish the two components set forth in Strickland v. Washington, 466 U.S. 668 (1984). "First, a defendant must show that counsel's performance was deficient." Id. at 687. This requires a showing that counsel's representation fell below an objective standard of reasonableness and that "counsel made errors so serious that counsel was not functioning as 'counsel' guaranteed to the defendant by the Sixth Amendment." Id. "Second, a defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial," that is, a trial where the result is reliable. Id. To establish prejudice, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. A reasonable probability is one that is sufficient to undermine confidence in the outcome. Id. Further, we "strongly presume" that counsel provided adequate assistance and exercised reasonable professional judgment in all significant decisions. McCary v. State, 761 N.E.2d 389, 392 (Ind. 2002).

Decision not to Impeach J.F. and B.F. at Trial

Foote's main argument on appeal is that Riester provided ineffective counsel because he did not impeach J.F. and B.F. at trial with their prior testimonies at the CHINS hearing. Foote maintains that he was prejudiced by this decision because he perceives his conviction to be primarily a result of his daughters' testimonies, not the "weak" or "inconclusive" DNA evidence presented by the State. Appellant's Br. p. 17; Appellant's Reply Br. p. 4.

A decision about whether or not to impeach a witness is a matter of trial strategy. See Kubsch v. State, 934 N.E.2d 1138, 1153 (Ind. 2010) (holding that decision not to impeach a witness was a matter of trial strategy and did not amount to ineffective assistance), cert. denied, 76 U.S. 3629 (2008). Counsel is to be afforded considerable discretion in the choice of strategy and tactics. Timberlake v. State, 753 N.E.2d 591, 603 (Ind. 2001), cert. denied, 537 U.S. 839 (2002). Counsel's conduct is assessed based upon the facts known at the time and not through hindsight. State v. Moore, 678 N.E.2d 1258, 1261 (Ind. 1997), cert. denied, 523 U.S. 1079 (1998). We do not "second-guess" strategic decisions requiring reasonable professional judgment even if the strategy in hindsight did not serve the defendant's interests. Id.

At the CHINS hearing, J.F. was questioned about the events in the van on March 12, 2007, and testified that Foote blew on her vagina and made her suck his penis. She did not testify that Foote forced sexual intercourse. When asked whether anything else happened that day, J.F. said no. At the criminal trial, J.F. testified that, in addition to acts of oral sex, Foote pulled her on top of him and forced sexual intercourse. Foote argues that Riester should have impeached J.F. at trial with this inconsistency.

It is true that Riester may have successfully impeached J.F.'s credibility as to sexual intercourse with her prior inconsistent statement. By so doing, however, he ran the risk of bolstering her credibility because J.F. made prior consistent statements about oral sex. The State alleged that on March 12, 2007, Foote "did engage in sexual intercourse or deviate sexual conduct" with J.F., which constituted Incest. App. 294. "Deviate sexual conduct"

includes an act involving a sex organ of one person and the mouth or anus of another person. I.C. § 35-41-1-9. Thus, Foote could have been convicted of either, and his theory of the case was that he had not committed any of the alleged crimes.

We further observe that, rather than impeach J.F., Riester chose to call J.F. as a witness in his case in chief later in the trial so that he could hear all of the State's evidence before questioning her. When Riester called J.F. as a witness, he questioned her on a wide range of topics, was able to develop other theories as to why she would report sexual abuse, and tested her recollection of events. Riester was particularly inquisitive regarding discrepancies between statements J.F. made to a DCS representative and statements made at trial concerning whether she had showered and changed her underwear after the March 12, 2007 incident. Riester's decision was thus clearly a matter of trial strategy that we will not second-guess on appeal.

Foote also asserts that Riester was ineffective for not impeaching B.F. with what he describes as "blatantly coached" and inconsistent statements made at the CHINS hearing. Appellant's Br. p. 14. At the CHINS hearing during cross examination, B.F. stated that Foote never penetrated her. On re-direct examination, the following exchange took place between B.F. and the DCS attorney:

> Q: Now you have testified that there has never been any penetration into your vagina is that correct?
>
> A: Yes.
>
> Q: Has there been any penetration into any other parts of your body?
>
> A: Yes

Q: What or where?

A: My butt.

Q: When did this happen, do you know?

A: Last year.

Q: Did it happen more than once?

A: It has only happened a couple of times.

Q: At any time did you feel you had a choice?

A: No.

Q: And your dad is your dad so you do what he says right?

A: Yes.

Q: And we have mentioned the thousands of times that is in our report that we submitted to the Court, the thousands of times can mean many things, it may not means thousands of times, but it would be fair that thousands of times means many times?

A: Yes.

Q: But it has occurred I believe since you were 5 so the last ten years has been numerous?

A: Yes.

Exhibit 6, p. 57.

Foote describes this as coached testimony because "incidents of penetration went from thousands in the Report to the Court to none at all, and then to only a couple of times and then, after some coaxing, back up to numerous times." Appellant's Br. p. 15 (internal

citations omitted). He therefore argues that Riester should have used it to impeach B.F.

Riester explained that he did not impeach B.F. with this testimony because the questions asked were "terrible," "bad," and "leading." Tr. 149. Riester also stated that, in his experience, it is difficult to impeach a witness with a response to a leading question. Instead, as he did with J.F., Riester called B.F. later in the trial and tested her credibility and recollection then.

Riester further opined that the CHINS testimony was not coached. We agree. During the re-direct examination exchange excerpted above, the DCS attorney first clarified that B.F.'s prior statement that she had not been penetrated referred to vaginal penetration. The DCS attorney then asked about other penetration, which B.F. explained happened "a couple of times" in her buttocks. The DCS attorney then sought to re-direct B.F.'s prior statements at the hearing concerning a prior report, not included in the appellate record, in which she stated that there had been thousands—clarified to mean numerous—incidents of oral sex with Foote.[5] B.F. thus testified to a different number of incidents because she was testifying about different types of sexual contact. We find Riester's decision not to impeach B.F. with this testimony was within the range of professional norms and not deficient performance.

Failure to Call Certain Witnesses

Foote also maintains that Riester was ineffective for not calling certain witnesses. "A

[5] Prior statements at the hearing make it clear that the incidents described in the report refer to oral sex. For example, at one point while questioning B.F., Foote's attorney stated, "And these episodes you state on here that you have no idea how many times oral sex has happened, you just replied thousands of times[.]" Exhibit 6, p. 30. Later, while questioning B.F. about oral sex, Foote's attorney stated that "In other words, you are saying that in your report you are saying that this happened thousands of times." Exhibit 6, p. 31.

decision regarding what witnesses to call is a matter of trial strategy which an appellate court will not second-guess … although a failure to call a useful witness can constitute deficient performance." Brown v. State, 691 N.E.2d 438, 447 (Ind. 1998). "Absent a clear showing of injury and prejudice, we will not declare counsel ineffective for failure to call a witness." Osborne v. State, 481 N.E.2d 376, 380 (Ind. 1985). "'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.'" Lee v. State, 694 N.E.2d 719, 722 (Ind. 1998) (quoting Lowry v. State, 640 N.E.2d 1031, 1047 (Ind. 1994)), cert. denied, 525 U.S. 1023 (1998).

On March 13, 2007, after making their reports to the DCS investigators, J.F. and B.F. were taken to Bloomington Hospital where they both underwent a sexual assault examination. The State called the two nurses who performed the examinations to testify at trial. Neither party called the treating physicians, Dr. Madden and Dr. Flint. Foote argues that Riester was ineffective for not calling them as witnesses.

However, Foote offered no evidence at the post-conviction hearing showing what the testimony of the physicians would have been. Indeed, Foote faults Riester for not investigating and determining what the physicians had concluded. Riester explained that he saw no reason to call the physicians as witnesses because the nurses' testimonies did not hurt Foote's case, and he did not want to risk calling a doctor who might testify adversely to his client. Riester's conclusion finds support in the trial record because the nurses testified that there was no evidence of external vaginal or anal tears, bruising, or injury. Stephanie Hall,

the nurse who examined J.F, testified that the examining physician did not make any comments to her concerning findings of sexual assault in his exam. We will not second guess Riester's strategy on this matter, and, regardless, by not introducing evidence on how the doctors would have testified, Foote has failed to demonstrate that he is entitled to post-conviction relief on this issue.

Foote also contends that Riester was ineffective because he did not call character witnesses on Foote's behalf. Riester explained that, although he had subpoenaed character witnesses, he ultimately chose not to call them because they had nothing to say about the particular facts of the case. His assessment was that although these witnesses may have testified that they worked with Foote and that he was a nice person, they knew nothing of Foote's family dynamics, and they would be more appropriate for a sentencing hearing. Riester also testified that, in his experience, introducing character witnesses can sometimes be perceived as desperate. Clearly the decision not to call character witnesses was a strategic one, and we will not second guess it.

Other Asserted Deficiencies

In his brief, Foote asserts that Riester committed several other miscellaneous errors. His first concerns Riester's failure to introduce evidence that he had plywood in the back of his van on March 12, 2007. However, according to Riester's testimony, Foote never told him about the plywood in the van. Pictures of Foote's van introduced at trial do not display plywood in the back. Although Foote maintains that he did inform Riester about the plywood, on appeal we only consider probative evidence and reasonable inferences that

support the post-conviction court's determination, and do not reweigh the evidence or judge the credibility of witnesses. Holloway v. State, 773 N.E.2d 315, 317 (Ind. Ct. App. 2002), trans. denied. The post-conviction court did not accept Foote's account and described his evidence of the plywood as "self-serving and sketchy at best." App. 7. We therefore conclude that Riester was not ineffective for not pursuing this avenue at trial.

Similarly, we find no merit to Foote's argument that Riester was ineffective for not adequately communicating with him. Riester testified that he met with Foote before his first trial and second trial, and thought that the number of their meetings was sufficient. Because Foote continued to work every day before trial, Riester worked around his schedule and met with him in the evening and on weekends. Foote's family members called Riester, and he met with them as well. Riester described Foote as "cooperative" and stated that if Foote needed anything, Foote would have talked to him. Tr. 30. Riester also testified that he always informs clients of the date and time of depositions, and prefers that his clients attend. The post-conviction court concluded that Foote did not demonstrate that he was entitled to relief because of alleged communication problems, and we must agree.

Foote also argues that Riester was ineffective for not alerting the court to a sleeping juror and not striking a juror who was hard-of-hearing. Riester did not notice any jurors sleeping at the trial. Nor did he recall having a conversation with Foote about a sleeping juror. Aside from his own testimony, Foote did not produce any evidence of jurors sleeping. Because we do not reweigh evidence, we find no error in this regard.

Turning to the juror who was hard-of-hearing and leaving aside whether or not

striking him constituted deficient performance, Foote has not demonstrated that he was prejudiced by permitting this juror to remain. During voir dire, this particular juror stated that he had no problems hearing when the speaker is looking at him. The juror also agreed to speak up at trial if he could not hear something during the proceedings. Foote assumes this prejudiced him because "[i]t is not realistic to expect a juror to call out when he cannot understand a witness." Appellant's Br. p. 24. He has not, however, introduced any evidence that the juror was actually unable to hear the proceedings. Instead, his claim of prejudice is based on speculation, and bare assertions of error are not available for review. Turner v. State, 508 N.E.2d 541, 548 (Ind. 1987).

Conclusion

Foote has not demonstrated that he is entitled to post-conviction relief. His arguments that he was denied ineffective assistance of counsel largely attack matters of trial strategy, which we do not second guess on appeal. His other alleged errors rest upon his own testimony or flimsy evidence that was ultimately rejected by the post-conviction court. Because we do not reweigh evidence or assess witness credibility on appeal, we find no error in the post-conviction court's conclusions on these alleged errors. The denial of Foote's petitions is affirmed.

Affirmed.

BAKER, J., and DARDEN, J., concur.