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IN THE COURT OF APPEALS OF INDIANA

MAURICE JONES,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 65A04-0605-CR-266
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE POSEY SUPERIOR COURT
The Honorable S. Brent Almon, Judge
Cause No. 65D01-0508-FA-369

November 30, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Maurice Jones appeals the denial of his motion to correct error following his conviction of child molesting as a Class A felony.[1] The evidence was sufficient for the jury to conclude Jones molested the victim, and trial counsel's performance was not deficient. Therefore, the trial court did not abuse its discretion in denying Jones' motion to correct error. Accordingly, we affirm.

FACTS AND PROCEDURAL HISTORY

On July 13, 2005, Jennifer Lantrip and Rita Jordan went to the home of Wesley Georges to have Jordan's brother fix Lantrip's van. Sometime in the afternoon, Jones arrived at the residence. When it became late, the women put their four children—Lantrip's five-year-old daughter M.L. and one-year-old son C.L., and Jordan's seven-year-old daughter R.J. and five-year-old son J.J.—in the guest bedroom to sleep. Lantrip took C.L. out of the bedroom at one point because he was throwing a fit and attempted to calm him. M.L. and R.J. were in the bed. J.J. was asleep on the floor. At one point, R.J. left to go to the bathroom.[2]

Jones entered the bedroom and shut the door. He pulled the covers off M.L. and told her three bedtime stories. He touched M.L.'s genitals with his finger, pushed aside her clothing, and licked inside her vagina. Jones then left the room.

Later, Lantrip and Jordan took the children to Jordan's sister's home a few blocks away, intending to sleep outside in tents. While Lantrip went to get cigarettes, M.L. told

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[1] Ind. Code § 35-42-4-3(a)(1).

[2] It is not clear whether R.J. was in the bathroom or asleep on the far side of the bed when Jones molested M.L.

Jordan "that guy had licked her down there." (Tr. at 112.) When Lantrip returned, M.L. told her mother Jones had "licked her 'pee-pee' and touched her." (*Id.* at 75.) The women returned to Georges' residence to call the police. By then, Jones had left Georges' house.

Appointed counsel represented Jones at trial. After Jones was convicted, he hired a second attorney and filed a motion to correct error, alleging the evidence was not sufficient and he had not received effective assistance from trial counsel. The trial court denied the motion.

DISCUSSION AND DECISION

When ruling on a motion to correct error, the trial court sits as the initial factfinder on the issues raised. *Booher v. State*, 773 N.E.2d 814, 817 (Ind. 2002). We review the trial court's determination for an abuse of discretion. *Id.* An abuse of discretion occurs when the trial court's decision is against the logic and effect of the facts and circumstances before the court or if the court has misinterpreted the law. *Hayden v. State*, 830 N.E.2d 923, 930 (Ind. Ct. App. 2005), *trans. denied* 841 N.E.2d 184 (Ind. 2005).

1. Sufficiency of the Evidence

In reviewing sufficiency of the evidence, we will affirm a conviction if, considering only the probative evidence and reasonable inferences supporting the verdict, and without weighing evidence or assessing witness credibility, a reasonable trier of fact could conclude the defendant was guilty beyond a reasonable doubt. *Hawkins v. State*, 794 N.E.2d 1158, 1164 (Ind. Ct. App. 2003). A victim's testimony, even if

uncorroborated, is ordinarily sufficient to sustain a conviction of child molesting. *Bowles v. State*, 737 N.E.2d 1150, 1152 (Ind. 2000).

Jones was charged under Ind. Code § 35-42-4-3(a), which provides, in relevant part:

> A person who, with a child under fourteen (14) years of age, performs or submits to sexual intercourse or deviate sexual conduct commits child molesting, a Class B felony. However, the offense is a Class A felony if . . . it is committed by a person at least twenty-one (21) years of age[.]

"Deviate sexual conduct" refers to "an act involving: (1) a sex organ of one person and the mouth or anus of another person; or (2) the penetration of the sex organ or anus of a person by an object." Ind. Code § 35-41-1-9. "[A] finger is an object for purposes of deviate sexual conduct under the child molesting statute." *Hurley v. State*, 560 N.E.2d 67, 69 (Ind. Ct. App. 1990).

Jones argues the State's evidence was insufficient because the State did not call R.J. and J.J. as witnesses, no DNA or other physical evidence of the incident was presented, key questions asked of M.L. were impermissibly leading,[3] and M.L.'s testimony was highly improbable.[4] We disagree.

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[3] Trial counsel, however, did not object to the questions; accordingly, for purposes of this sufficiency analysis, we consider M.L.'s responses to all the questions.

[4] Counsel for Jones suggests M.L.'s testimony must be accorded no weight at all because this is a "three in a bed" case. (Appellant's Br. at 11.) He cites *Penn v. State*, 237 Ind. 374, 146 N.E.2d 240 (Ind. 1957), a prosecution for statutory rape. In *Penn*, a sixteen-year-old unwed mother testified she had regularly slept in the same bed with Penn and his wife, Penn had sexual intercourse with both women on those occasions, and Penn's wife had consented to the arrangement. Penn and his wife disputed her testimony. Our Indiana Supreme Court concluded:

> Ordinarily reasonable men know that a wife will not knowingly and willingly share the sex life of her husband. Experience teaches that where another woman enters the sex life of her husband a wife does not remain on good terms with the other woman. She

M.L. testified she was five years old. She identified Jones as the reason why she was in court and as the person who came into the room. She described the incident as follows:

> Q. Okay. Do you remember him coming in the room?
> A. Yes.
> Q. Okay. Can you describe that?
> A. He shut the door.
> Q. Okay.
> A. He shut the door.
> Q. Okay. Can you tell us . . . Can you tell us what happened? When he came into the room, where did he go?
> A. He got on the bed.
> Q. Okay. And where were you at that time?
> A. I was on the bed beside [R.J.], and [R.J.] was on this side. He was on this side.
> Q. Okay. Were you under the covers or over the covers? Do you remember?
> A. I was under the covers, but. I mean, the covers were on me, and he took them off of me.
> Q. Okay. And how did he do that?
> A. He pulled them off with his hands.
> Q. Okay. Now. Did he tell you bedtime stories at some point or not?
> A. Three (3) bedtime stories. I think it was three (3).

> does not thereafter invite the other woman to her home to visit, pop corn, and watch television. Especially she will not share her husband and aid and abet the act by inviting the other woman to her home and accompanying her to the bed of her husband.
>
> In the extremely rare instances where the parties are so depraved that they see nothing wrong with two women sleeping and sharing the sexual attention of the husband of one of them in the same bed, then it is inconceivable that on the occasions thereafter when the women were together they would never mention the experience nor talk about sex.
>
> We conclude therefore that in this case the uncorroborated testimony of the prosecutrix was so improbable and incredible that no reasonable man could say that the appellant's guilt had been proved beyond a reasonable doubt.

237 Ind. at 381-82, 146 N.E.2d at 243.

Counsel characterizes this point regarding the sufficiency of the evidence against Jones as "the coup de grace, the 'high-fiver,'" (Appellant's Br. at 11), and "a cinch." (*Id.* at 14.) We characterize counsel's citation to *Penn* as "irrelevant" and his attempt to analogize *Penn* to this case, simply because seven-year-old R.J. may have been asleep on the bed when Jones molested M.L., as "offensive."

Q. Okay. Did he tell you bedtime stories before he pulled your covers off or not or after?
A. After he pulled the covers off.
Q. And then what happened after he pulled the covers down?
A. Uh, the finger then . . .
Q. Okay. You held up your finger and you said, "Finger." Right?
A. Uh huh (affirmative).
Q. Okay.
A. He touched me with his finger. I think it was three (3) times.
Q. Okay. Are you talking about his finger or your finger?
A. His finger.
Q. Okay. . . . . What did he do with his finger?
A. He touched me.
Q. Okay. Where did he touch you?
A. Right here. (Inaudible) I used to call it my "cookie."
Q. Is that what you call it or not?
A. No. I don't call it my "cookie" no more (sic).
Q. Okay. How come you don't call it . . . How come you don't call it your "cookie" anymore?
A. Because everybody knows it's the no spot that you shouldn't touch.
Q. What do you call it?
A. "No-no."
Q. Okay. Have you ever called it your "pee-pee" or not?
A. I used to call it that.

* * * * *

Q. Okay. Now. Did he do anything else beside place his finger on what you call your "no-no" or your "cookie" or your "pee-pee"?
A. Uh huh (affirmative).
Q. Okay. What are you pointing to?

* * * * *

A. My tongue.
Q. Okay. And was it your tongue or someone else's tongue?
A. His tongue.
Q. Okay. What did he do with his tongue?
A. Uh, he licked inside my no-no.

(Tr. at 37-39.) M.L. also indicated Jones had touched her genital area by pointing out that area on an anatomically correct poster. She testified Jones had touched her with his finger and with his tongue on "bare skin." (*Id.* at 47.)

Lantrip testified Jones went into the bedroom, saying he was going to read a bedtime story to the children to try to calm them down. Lantrip and Jordan also confirmed R.J. left the bedroom at some point.

Indiana State Police Detective Alan Sherretz interviewed Jones during his investigation. Detective Sherretz testified Jones denied the allegations but admitted "he was in the room with [M.L.] on the date in question." (*Id.* at 132.) Detective Sherretz determined Jones was forty-four years old at the time of the incident.

A reasonable trier of fact could conclude Jones molested M.L. Accordingly, the trial court did not abuse its discretion in denying Jones' motion to correct error.

2. Assistance of Counsel[5]

To establish a violation of the Sixth Amendment right to the assistance of counsel, a defendant must establish the two components set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), *reh'g denied* 467 U.S. 1267 (1984). *Wesley v. State*, 788 N.E.2d 1247, 1252 (Ind. 2003), *reh'g denied*. First, a defendant must show defense counsel's performance was deficient. *Id.* This requires showing counsel's representation fell below an objective standard of reasonableness and counsel made errors so serious that he was not functioning as "counsel" guaranteed to the defendant by the Sixth Amendment. *Id.* The objective standard of reasonableness is based on "prevailing professional norms." *Id.*

[5] Jones raised the issue of ineffective assistance of trial counsel in his motion to correct error. *Res judicata* thus bars him from relitigating this issue in post-conviction proceedings, the preferred forum for such claims. *See Ben-Yisrayl v. State*, 738 N.E.2d 253, 259 (Ind. 2000), *reh'g denied, cert. denied* 534 U.S. 1164 (2002).

Second, a defendant must show counsel's deficient performance prejudiced the defense. *Id.* This requires showing counsel's errors were so serious as to deprive the defendant of a fair trial. *Id.* To establish prejudice, a defendant must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* A reasonable probability is one sufficient to undermine our confidence in the outcome. *Id.*

"If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." *Strickland*, 466 U.S. at 697. However, "there are occasions when it is appropriate to resolve a post-conviction case by a straightforward assessment of whether the lawyer performed within the wide range of competent effort that *Strickland* contemplates." *Grinstead v. State*, 845 N.E.2d 1027, 1031 (Ind. 2006).

Jones asserts trial counsel was ineffective for failing to call certain witnesses, for advising Jones not to testify, and for not investigating a claim that M.L.'s grandmother was coaching her testimony during the trial.[6]

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[6] Counsel for Jones states "other deficiencies" related to trial counsel's performance "exist," these deficiencies were not raised in the motion to correct error, and "cite[s] these deficiencies as fundamental or plain error." (Appellant's Br. at 13.) Counsel lists these deficiencies thus:

Other deficiencies

1) No challenge to M.L.'s competence. (A. 263-4) This in the face of serious questions about it. (This brief, p. 8)
2) No instructions tendered. (A. 386)
3) No objection to Court's or State's instructions. (A. 386)
4) No motion for judgment on the evidence. Ordinarily futile but a cinch here, "three in a bed".
5) No sentencing hearing or brief. (A. 10)
6) No evidence concerning the value of DNA evidence.

(*Id.* at 14.)

At the hearing on the motion to correct error, trial counsel explained his strategy was to point out the discrepancies in, and keep the focus on, the State's case. He stated he did not call E.J., Jones' thirteen-year-old son, to testify because E.J.'s testimony contradicted the statement Jones gave to police. E.J. stated: "I was in the bedroom the whole time when my dad went in there and when he left, and I didn't see anything." (Motion To Correct Error Tr. at 43.) Jones' statement to the police indicated the only people in the bedroom with him were "a small girl, another small child and a baby." (App. at 16 (probable cause affidavit).) Trial counsel did not call R.J. because R.J. had stated she was not in the bedroom when the events occurred.[7] We decline Jones' apparent invitation to find counsel ineffective for choosing not to call witnesses who would offer unfavorable testimony or who were not present when the offense was committed.

Trial counsel advised Jones not to testify because he wanted to keep the focus "on the State's case and the problems that the State's case has." (Motion To Correct Error Tr. at 6.) Trial counsel "felt the case had not gone well for the State," (*id.*) and was concerned Jones' testimony might have "opened the door to other allegations." (*Id.* at 28.)

Ind. Appellate Rule 46(A)(8) requires the appellant support each contention with argument, including citations to legal authorities, statutes, and the record. Failure to present cogent argument constitutes waiver of an issue for appellate review. *Hollowell v. State*, 707 N.E.2d 1014, 1025 (Ind. Ct. App. 1999). As counsel for Jones provides neither authority nor cogent argument to support the claim trial counsel was ineffective based on these "other deficiencies," we are unable to consider these allegations of error.

[7] Five-year-old J.J. made only nonverbal responses when investigators questioned him after the incident. This suggests neither party called him because he was unable or unwilling to testify.

Jones' mother and brother testified at the hearing on the motion to correct error that M.L.'s testimony during the first day of trial might have been coached by someone in the audience. Jones' brother stated:

> The little girl's grandmother was just sitting up in front of me to my right a little bit. Uh, whenever the prosecutor asked the little girl a question, uh, if anything like this had happened before, the little girl says, "Yes." And the grandmother shook her head "no." And the little girl said, "Well, maybe it didn't" or something to that effect.

(*Id.* at 33.) Jones' mother stated:

> Q. Was there an incident that was brought to your attention while the little girl was testifying?
> A. Yes.
> Q. What was that?
> A. Uh, the grandmother nodding her head directing her how to answer the questions.
> Q. Do you remember what the question was?
> A. Uh, one (1) of them was [defense counsel] said, "Has this ever happened to you before, [M.L.]?" "Yes. Yes. It's happened before." And the mother . . . grandmother nodded her head "no." And [M.L.] said, "Now I can't remember. Maybe it didn't happen before."

(*Id.* at 36.) A friend of Jones' told Jones' attorney about the coaching the next day before the trial resumed.

Trial counsel explained his decision not to pursue the allegation M.L. was coached:

> I didn't because that's a fairly common occurrence. I've had that happen probably every third or fourth trial. A relative comes up and says there was coaching. So I tend to discount it to begin with. And then, secondly, in order to establish that type of evidence, you're calling a relative of the defendant who is, uh, not . . . Not that the person would not be telling the truth, but I think the jury would not tend to have a whole lot of faith in that person's credibility.

(*Id.* at 17.)

Poor trial strategy or bad tactics do not necessarily amount to ineffective assistance of counsel. *Troutman v. State*, 730 N.E.2d 149, 154 (Ind. 2000). Deciding which witnesses to call is a matter of trial strategy. *Id.* A reviewing court will not second-guess the propriety of trial counsel's tactics. *Davidson v. State*, 763 N.E.2d 441, 446 (Ind. 2002). Trial strategy is not subject to attack through an ineffective assistance of counsel claim, unless the strategy is so deficient as to fall outside the objective standard of reasonableness. *Id.*

Counsel challenged the State's case, emphasized the inconsistencies in M.L.'s statements, noted the lack of DNA evidence,[8] and elicited testimony Jones had denied the allegation in interviews with police. Trial counsel's strategy was reasonable and his performance was not deficient.

Because Jones has not demonstrated trial counsel's performance was deficient, his claim of ineffective assistance of counsel fails. The trial court did not abuse its discretion in denying Jones' motion to correct error. Accordingly, we affirm.

Affirmed.

RILEY, J., and BAILEY, J., concur.

[8] M.L.'s father took her to the hospital the day after the molestation. Although M.L. had not bathed since the incident, no swabs were taken to test for traces of DNA.