NO: _____

IN THE

SUPREME COURT OF THE UNITED STATES

Elmer Dean Baker

Petitioner,

v.

Ron Neal

Warden of the Indiana State Prison

Respondent,

On Petition for Writ of Certiorari to

Indiana Supreme Court

APPENDIX - A

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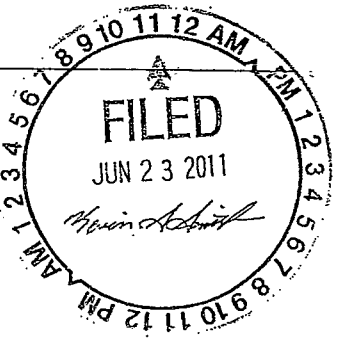

In the Indiana Supreme Court

No. 17S04-1009-CR-500

ELMER D. BAKER,

Appellant (Defendant below),

v.

STATE OF INDIANA,

Appellee (Plaintiff below).

Appeal from the DeKalb Superior Court, No. 17D01-0607-FA-007
The Honorable Kirk D. Carpenter, Special Judge

On Petition To Transfer from the Indiana Court of Appeals, No. 17A04-0905-CR-299

June 23, 2011

Rucker, Justice.

After a conviction for three counts of child molesting the defendant appealed contending, among other things, that his convictions must be vacated because they were not the product of a unanimous jury verdict. We granted transfer to explore this issue.

Facts and Procedural History

On July 3, 2006 the State charged then fifty-nine-year-old Elmer Dean Baker with two counts of child molesting as Class A felonies. The victims of the alleged offenses were two of Baker's grandchildren, C.B. and J.A. And the offenses were alleged to have occurred in "June and July of 2003." Appellant's App. at 11. After a jury trial in June of 2007 the trial court declared a mistrial when the jury could not reach a verdict. Thereafter the State sought leave to amend the charging information to reflect the time period "from October 2000 through August 2003." Appellant's App. at 76, 78. An additional count of child molesting as a Class C felony was also added. The alleged victim was A.H., a cousin of C.B. who is unrelated to Baker. This offense was alleged to have occurred "in or about 2002." Appellant's App. at 80. Baker was also alleged to be a habitual offender.

Over Baker's objection the trial court permitted the amendments. And a retrial began on August 13, 2008. Evidence presented by the State is summarized in part as follows: C.B, who was eighteen years of age at the time of trial, testified that she was born in September 1990, Tr. 291; her cousin J.A. was born in December 1990, Tr. at 297; and that during the period between 2000 and 2003 she, J.A., and A.H. were close friends. Tr. at 297-98. C.B. also testified that during that period of time her family lived at various locations in DeKalb County including houses and apartments in Spencerville, Auburn, and Garrett, Indiana. According to C.B., Baker first began touching her inappropriately when she was about nine or ten years old. Tr. at 318. Specifically C.B. recounted an incident in which she and J.A. spent the night at Baker's apartment in Auburn which was next door to her own home where she lived with her parents. J.A. and C.B. were first sleeping in the living room but became frightened for some reason and went into Baker's room to lie down on his bed. C.B. testified that at that point "he started to touch us and he pulled me on top of him. . . . He [ ] pretended like he was having sex with me but we had, like I had my underwear on. . . . He like touched our vaginas." Tr. at 321. She went

on to say, "He like placed my hand on his penis and made like the motion of masturbating." Id. at 322.

When C.B. was ten or eleven years old Baker, who was a long distance truck driver, often took C.B. with him on overnight truck trips several weekends during the summer months of 2001 and 2002. According to C.B. most of the "sexual stuff" happened "in the semi" and it happened "a lot." Tr. at 322, 326. When asked by the prosecutor "what kind of stuff happened in the semi truck?" C.B. responded "my grandpa had sex, my grandpa had sex with me." Tr. at 324. When asked "[w]hat other sex acts took place in the semi truck?" C.B. recounted an incident in which she and J.A. were together on one of the truck trips and both of them fellated Baker; on another occasion Baker digitally penetrated her and touched her breast. Tr. at 325.

By the summer of 2003 Baker owned a small house on Story Lake in DeKalb County. At that point C.B. was twelve years of age. On July 3rd of that year C.B. and J.A. were present for a family gathering and spent the night at Baker's house. At some time during the course of the night C.B. and J.A. went into Baker's room and according to C.B. "[u]m, he had sex with me. . . . Um, he inserted his penis into my vagina." Tr. at 334. C.B. further testified, "he like touched us and had us touch him . . . on the private parts." Tr. at 335. The "us" referred to J.A. Tr. at 335. C.B. also testified that both she and J.A. "would take turns" fellating Baker. Tr. at 335.

C.B. recounted another incident occurring at a trailer that Baker owned at the North Pointe Crossing Mobile Home park just north of where she lived in Garrett. The precise date is unclear but the record suggests sometime between 2001 and 2003. C.B., J.A., and A.H. were present at Baker's trailer. The three girls went into Baker's bedroom where he pretended to be asleep. Tr. at 345. According to C.B. she and J.A. "took turns" fellating Baker, Tr. at 346; and all three of the girls "touch[ed] his penis." Tr. at 347.

J.A., who was seventeen years of age at the time of trial, testified that C.B. is her step first cousin and that she refers to Baker as "Grandpa Dean." Tr. at 545-46. She also testified that during 2000 to 2003 she, C.B., and A.H. were good friends. Tr. at 584. She offered testimony that tended to corroborate that of C.B. including an incident involving A.H.

According to J.A. the three girls were present at Baker's house. Baker was present and pretending to be asleep. The three girls went into his bedroom where A.H. fellated Baker and J.A. played with his scrotum. "And then me and [A.H.] switched." Tr. at 567. She further recalled that C.B. was on top of Baker and he was "sucking on her [breast]." Tr. at 568.

A.H., who was also seventeen at the time of trial, was the third of the alleged victims to testify. Although no specific dates were given, A.H. largely corroborated the testimony of C.B. and J.A. concerning the alleged incident occurring at Baker's house at the mobile home park. Among other things she confirmed that C.B. fellated Baker, and "then [J.A.] did it and then after that I tried it." Tr. at 650. A.H. also recounted an occasion when she and J.A. were together on a trucking trip with Baker in his semi. The truck was equipped with a bed. While J.A. was in the passenger seat, A.H. went to sleep in the bed. A.H. testified that when she awoke Baker was lying next to her, and her clothing had been removed. Tr. at 653, 654. Baker rubbed his fingers over her "private area," got on top of her, and "humped [her] stomach until he ejaculated." Tr. at 654.

Baker testified on his own behalf. He acknowledged occasionally taking all of his grandchildren on semi trucking trips at one time or another, Tr. at 946, 963; and acknowledged owning a house on Story Lake. See generally Tr. at 963-65. However, Baker denied engaging in any sexual activity with C.B., J.A., or A.H. In response to his attorney's question "[a]nd you're saying to me that they are lying," Baker responded, "[t]hey absolutely are." Tr. at 950. Essentially he testified that he believed C.B. had organized the girls to offer false testimony as part of a conspiracy to get even with him after he caught C.B. in a car with a boy at three in the morning as a result of which "she got grounded." Tr. at 950. According to Baker, about two weeks later C.B. started a "rumor" about him engaging in inappropriate sexual activity. Tr. at 950.

Following a five-day jury trial Baker was convicted as charged, and he pleaded guilty to the habitual offender allegation. The trial court sentenced him to a consecutive term of imprisonment on each of the three child molest counts for a total of seventy-six years. One of

the counts was enhanced by thirty years for the habitual offender adjudication. The total executed term was 106 years.

Baker appealed framing his contentions as follows: (1) the convictions are not sustained by evidence of jury unanimity, (2) the trial court's ruling allowing amendment of the information was in violation of proscriptions under the state and federal constitutions against ex post facto laws; if the amendment can be lawfully applied in this case, it was not applied properly, (3) the trial court committed fundamental error in giving its preliminary instruction 6 and final instruction 5, and (4) defendant's convictions should be set aside due to ineffective assistance of counsel. Br. of Appellant at i. The Court of Appeals rejected Baker's arguments and affirmed the judgment of the trial court. See Baker v. State, 922 N.E.2d 723 (Ind. Ct. App. 2010), aff'd on reh'g, 928 N.E.2d 890 (Ind. Ct. App. 2010). We granted transfer to explore Baker's jury unanimity claim. In all other respects we summarily affirm the opinion of the Court of Appeals. See Indiana Appellate Rule 58(A)(2).

Background

Although the United States Supreme Court "has never held jury unanimity to be a requisite of due process of law," Johnson v. Louisiana, 406 U.S. 356, 359 (1972) (affirming a state robbery conviction based on a nine-to-three jury verdict),[1] this jurisdiction has long required that a verdict of guilty in a criminal case "must be unanimous." Fisher v. State, 291 N.E.2d 76, 82 (Ind. 1973) (rejecting argument that the trial court erred in instructing the jury that its verdict must be unanimous); Taylor v. State, 840 N.E.2d 324, 333 (Ind. 2006) ("[W]hile jury unanimity is required as to the defendant's guilt, it is not required as to the theory of the defendant's culpability.").

In general, the precise time and date of the commission of a child molestation offense is not regarded as a material element of the crime. Accordingly, this Court has long recognized "that time is not of the essence in the crime of child molesting. It is difficult for children to remember specific dates, particularly when the incident is not immediately reported as is often

[1] But see Richardson v. U.S., 526 U.S. 813, 817 (1999) (declaring "a jury in a federal criminal case cannot convict unless it unanimously finds that the Government has proved each element").

the situation in child molesting cases." Barger v. State, 587 N.E.2d 1304, 1307 (Ind. 1992) (citations omitted). Depending on the facts of a particular case, applying the rule of jury unanimity can present difficult challenges in charges of child molestation.

We find it useful to review a few scenarios, each with some relevance to the case before us, in which the issue of jury unanimity commonly arises in child sex offense cases. The first of these occurs when a young child is abused by "an abuser residing with the child . . . [who] perpetuate[s] the abuse so frequently . . . that the young child loses any frame of reference in which to compartmentalize the abuse into distinct and separate transactions. Such evidence of abuse has been termed generic evidence." See R.L.G. v. State, 712 So.2d 348, 356 (Ala. Crim. App. 1997) (internal quotation marks omitted). The victim's "generic testimony" may describe a pattern of abuse ("every time mama went to the store") rather than specific incidents ("after the July 4th parade"). Thus, a concern arises because the jury is not presented with a specific act upon which they unanimously may agree.

In response to this recurring problem, several jurisdictions have enacted criminal statutes that do not require evidence of particular incidents for prosecution. See, e.g., State v. Fortier, 780 A.2d 1243, 1249, 1250 (N.H. 2001) ("A continuous course of conduct crime . . . does not require jury unanimity on any specific, discrete act . . . . [O]ur legislature created [N.H. Rev. Stat. 632-A:2] to respond to the legitimate concern that many young victims, who have been subject to repeated, numerous incidents of sexual assault over a period of time by the same assailant, are unable to identify discrete acts of molestation.").[2] However, the Indiana legislature

[2] See also Cal. Penal Code § 288.5(a), (b) ("Any person who . . . over a period of time, not less than three months in duration, engages in three or more acts of substantial sexual conduct with a child under the age of 14 years . . . is guilty of the offense of continuous sexual abuse of a child . . . [;]" "To convict under this section the trier of fact, if a jury, need unanimously agree only that the requisite number of acts occurred not on which acts constitute the requisite number."); N.Y. Penal Law § 130.75 (1) ("A person is guilty of course of sexual conduct against a child in the first degree when, over a period of time not less than three months in duration: (a) he or she engages in two or more acts of sexual conduct . . . with a child less than eleven years old; or (b) he or she, being eighteen years old or more, engages in two or more acts of sexual conduct . . . with a child less than thirteen years old."); Tex. Penal Code Ann. § 21.02(b)(1), (d) ("A person commits an offense if: during a period that is 30 or more days in duration, the person commits two or more acts of sexual abuse, regardless of whether the acts of sexual abuse are committed against one or more victims . . . . [M]embers of the jury are not required to agree unanimously on which specific acts of sexual abuse were committed by the defendant or the exact date when those acts were committed.

has not adopted a statute criminalizing an ongoing pattern of sexual abuse when the victim is unable to reconstruct the specific circumstances of any one incident. We encourage the General Assembly to consider this issue.

Another source of concern stems from jury instructions that are delivered disjunctively or charging instruments that allege the defendant engaged in either "X" or "Y" behavior. In this regard, our jurisprudence has drawn a distinction between disjunctive instructions and charging instruments allowing for alternative *means* of committing an offense, versus alternative *separate criminal offenses.*

One of the well-established rules of criminal pleading is that there can be no joinder of separate and distinct offenses in one and the same count. Vest v. State, 930 N.E.2d 1221, 1225 (Ind. Ct. App. 2010). "A single count of a charging pleading may include but a single offense." Townsend v. State, 632 N.E.2d 727, 730 (Ind. 1994). Thus, a disjunctive instruction, which allows the jury to find a defendant guilty if he commits either of two or more underlying acts, either of which is in itself a separate offense, is fatally ambiguous because it is impossible to determine whether the jury unanimously found that the defendant committed one particular offense. See, e.g., Lainhart v. State, 916 N.E.2d 924, 942 (Ind. Ct. App. 2009) (noting that by charging and arguing different victims, the State improperly joined several alternative crimes); Castillo v. State, 734 N.E.2d 299, 304 (Ind. Ct. App. 2000), summarily aff'd on trans. 741 N.E.2d 1196 (Ind. 2001) (vacating defendant's conviction on grounds that jury's verdict may not have been unanimous because "the State chose to charge Castillo with one act of dealing in cocaine even though there was evidence that Castillo committed two separate acts of dealing in cocaine").

By contrast "the State may allege alternative means or 'theories of culpability' when prosecuting the defendant for a single offense." Vest, 930 N.E.2d at 1225. In essence the State is permitted to "present[] the jury with alternative ways to find the defendant guilty as to *one element.*" Cliver v. State, 666 N.E.2d 59, 67 (Ind. 1996); see also Taylor, 840 N.E.2d at 333-34 ("It is settled that as long as each juror is convinced beyond a reasonable doubt that the

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The jury must agree unanimously that the defendant, during a period that is 30 or more days in duration, committed two or more acts of sexual abuse.").

defendant is guilty of murder as that offense is defined by statue, it need not decide unanimously by which theory he is guilty.") (citation omitted).

In the context of cases where a defendant is charged with a single sexual offense, this Court has noted that because the crime of child molesting is committed if the defendant performs either sexual intercourse or deviate sexual conduct on a child, "[t]he charged crime of child molesting would be proven in the event of either of the alternative acts described in the statute." Tague v. State, 539 N.E.2d 480, 481-82 (Ind. 1989); see also State v. Hartness, 391 S.E.2d 177, 180 (N.C. 1990) (holding the crime of indecent liberties against a child is "a single offense which may be proved by evidence of the commission of any one of a number of acts").

Similar to the first noted concern, jury unanimity is also at issue where, as in the case before us, evidence is presented of a greater number of separate criminal offenses than the defendant is charged with. Jurisdictions have approached this problem in a variety of ways. See generally Cooksey v. State, 752 A.2d 606 (Md. 2000) (cataloging cases). The procedure most commonly followed to balance the need to prosecute cases involving repetitive acts charged in a single count with the defendant's assurance of jury unanimity has been described as the "either/or" rule. That is to say, the defendant is entitled *either* to an election by the State of the single act upon which it is relying for a conviction *or* to a specific unanimity instruction. For example, in State v. Petrich the defendant was charged with two counts of an offense that in this jurisdiction would amount to child molesting. At trial numerous incidents of sexual contact were described in varying detail. The defendant was convicted of both counts and on appellate review he contended, among other things, that the State's failure to elect the act upon which it relied for conviction deprived him of the right to a unanimous verdict. With respect to this contention the Washington Supreme Court reached the following conclusions:

> When the evidence indicates that several distinct criminal acts have been committed, but [the] defendant is charged with only one count of criminal conduct, jury unanimity must be protected. . . . The State may, in its discretion, elect the act upon which it will rely for conviction. Alternatively, if the jury is instructed that all 12 jurors must agree that the same underlying criminal act has been proved beyond a reasonable doubt, a unanimous verdict on

> one criminal act will be assured. When the State chooses not to elect, this jury instruction must be given to ensure the jury's understanding of the unanimity requirement.

683 P.2d 173, 178 (Wash. 1984)[3] (overruled on other grounds by State v. Kitchen, 756 P.2d 105 (Wash. 1988)). Some jurisdictions endorse this view. See, e.g., Covington v. State, 703 P.2d 436, 441 (Alaska Ct. App. 1985) (relying on the Petrich analysis and concluding "[i]n the instant case [charging multiple counts of sexual misconduct] the state did not elect specific incidents, nor was a clarifying instruction given") (clarified on reh'g, 711 P.2d 1183); State v. Arceo, 928 P.2d 843, 874-75 (Hawaii 1996) (agreeing with Petrich and holding where separate and distinct acts are subsumed within a single count of sexual assault, the prosecution is required to elect the specific act upon which it is relying to establish the "conduct" element of the offense, or the trial court must give the jury a specific unanimity instruction).

The California Supreme Court has adopted a slight variation of the either/or rule. In instances in which the State declines to make an election and the evidence indicates the jurors might disagree as to the particular act defendant committed, a standard unanimity instruction should be given. People v. Jones, 792 P.2d 643, 649 (Cal. 1990). Where, however, the

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[3] In support of its conclusion the court observed:

> These options are allowed because, in the majority of cases in which this issue will arise, the charge will involve crimes against children. Multiple instances of criminal conduct with the same victim is a frequent, if not the usual, pattern. Note, The Crime of Incest Against the Minor Child and the States' Statutory Responses, 17 J. Fam. Law 93, 99 (1978-79). Whether the incidents are to be charged separately or brought as one charge is a decision within prosecutorial discretion. Many factors are weighed in making that decision, including the victim's ability to testify to specific times and places. Our decision in this case is not intended to hamper that discretion or encourage the bringing of multiple charges when, in the prosecutor's judgment, they are not warranted. The criteria used to determine that only a single charge should be brought [ ] may indicate that the election of one particular act for conviction is impractical. In such circumstances, [the] defendant's right to a unanimous verdict will be protected with proper jury instructions.

Id.

testimony of the victim recounts undifferentiated or generic occurrences of the sexual act, a modified unanimity jury instruction must be given because:

> [A]lthough a prosecutorial election or unanimity instruction can help focus the jury on the same specific act where evidence of several distinct acts has been elicited, nonetheless neither an election nor a unanimity instruction is very helpful where the victim is unable to distinguish between a series of acts, any one of which could constitute the charged offense. In a case consisting only of "generic" evidence of repeated sex acts, it would be impossible for the prosecutor to select a specific act he relies on to prove the charge, or for the jury to unanimously agree the defendant committed the same specific act.

Id. at 650. Therefore, the Court explained:

> [W]hen there is no reasonable likelihood of juror disagreement as to particular acts, and the only question is whether or not the defendant in fact committed all of them, the jury should be given a modified unanimity instruction which, in addition to allowing a conviction if the jurors unanimously agree on specific acts, also allows a conviction if the jury unanimously agrees the defendant committed all the acts described by the victim. . . . [In this latter situation], because credibility is usually the "true issue" [] the jury either will believe the child's testimony that the consistent, repetitive pattern of acts occurred or disbelieve it. In either event, a defendant will have his unanimous jury verdict and the prosecution will have proven beyond a reasonable doubt that the defendant committed a specific act, for if the jury believes the defendant committed all the acts it necessarily believes he committed each specific act.

Id. at 659 (internal quotation marks and citations omitted).

Discussion

In this case Baker contends that his three child molest convictions must be vacated because "the record provides no basis for a finding of jury unanimity for the verdict on any of those counts." Br. of Appellant at 13. Essentially Baker complains that although he was charged with one count of child molesting with respect to each alleged victim, the jury heard evidence of

multiple acts of molestation concerning each alleged victim. Thus, according to Baker, "[n]o one can read the record and have the slightest basis for saying that any of the verdicts were reached by twelve jurors all agreeing as to a particular incident." Br. of Appellant at 35. In essence he complains that some jurors may have relied on different evidence than the other jurors to convict on each of the three counts.

We adopt the reasoning of the California Supreme Court in Jones, supra and hold that the State may in its discretion designate a specific act (or acts) on which it relies to prove a particular charge. However if the State decides not to so designate, then the jurors should be instructed that in order to convict the defendant they must either unanimously agree that the defendant committed the same act or acts or that the defendant committed all of the acts described by the victim and included within the time period charged.[4] See also State v. Muhm, 775 N.W.2d 508,

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[4] A slightly modified version of the State of California jury instruction – titled "When Proof Must Show Specific Act or Acts Within Time Alleged" – provides a useful model for this jurisdiction:

> The defendant is accused [in Count[s] ___] of having committed the crime of _____, a violation of Indiana Code Section _____, on or about a period of time between _____ and _____.
>
> In order to find the defendant guilty, it is necessary for the State to prove beyond a reasonable doubt the commission of [here insert a specific act [or acts] constituting that crime] [all of the acts described by the alleged victim] within the period alleged.
>
> And, in order to find the defendant guilty, you must unanimously agree upon the commission of [here insert the same specific act [or acts] constituting the crime] [all of the acts described by the alleged victim] within the period alleged.
>
> It is not necessary that the particular act or acts committed so agreed upon be stated in the verdict.

See CALJIC 4.71.5 (West 2011).

The notes accompanying the instruction provide in pertinent part:

> Where the information charges an act or series of acts within a specified period and the prosecution has not elected to rely upon any specific date or dates, and the alleged criminal activity does not come within the continuous course of conduct exception, use this instruction . . . .

520 (S.D. 2009) (adopting the Jones Court's formulation of the "either or approach"); Thomas v. People, 803 P.2d 144, 153-54 (Colo. 1990) (adopting the reasoning of the Jones Court).

In the case before us, the State did not designate which specific act or acts of child molestation that it would rely upon to support the three-count charging information. But as noted above, the State was not compelled to do so. Concerning the unanimity requirement, the trial court instructed the jury in relevant part "Your verdicts must represent the considered judgment of each juror. In order to return a verdict of guilt or innocence you must all agree. . . . Upon retiring to the jury room the Foreperson will preside over your deliberations and must sign and date the verdicts to which you agree. Each verdict must be unanimous. . . ." Appellant's App. at 286-87 (Court's Final Instruction number 25).

It is clear that the foregoing instruction did not advise the jury that in order to convict Baker the jury must either unanimously agree that he committed the same act or acts or that he committed all of the acts described by the victim and included within the time period charged. However, Baker neither objected to the trial court's instruction nor offered an instruction of his own. This issue is waived. "[A] defendant who fails to object to an instruction at trial waives any challenge to that instruction on appeal." Mitchell v. State, 726 N.E.2d 1228, 1241 (Ind. 2000) (citing Ind. Trial Rule 51(C)). In like fashion the "[f]ailure to tender an instruction results in waiver of the issue for review." Ortiz v. State, 766 N.E.2d 370, 375 (Ind. 2002). We will review an issue that was waived at trial if we find fundamental error occurred. Bruno v. State, 774 N.E.2d 880, 883 (Ind. 2002). The fundamental error doctrine provides a vehicle for the review of error not properly preserved for appeal. In order to be fundamental, the error must represent a blatant violation of basic principles rendering the trial unfair to the defendant and thereby depriving the defendant of fundamental due process. Pope v. State, 737 N.E.2d 374, 380 (Ind. 2000). The error must be so prejudicial to the defendant's rights as to make a fair trial

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> In a case in which the jurors might disagree as to the particular act [the] defendant committed, use the first bracketed phrase. When there is no reasonable likelihood of juror disagreement as to particular acts, and the only question is whether or not the defendant committed all of them, use the second bracketed phrase and delete the first.

Id.

impossible. Id. In considering whether a claimed error denied the defendant a fair trial, we determine whether the resulting harm or potential for harm is substantial. Id. Harm is not shown by the fact that the defendant was ultimately convicted. Id. Rather, harm is determined by whether the defendant's right to a fair trial was detrimentally affected by the denial of procedural opportunities for the ascertainment of truth to which he would have been entitled. Id.

In this case the only issue was the credibility of the alleged victims. The only defense was to undermine the young women's credibility by, among other things, pointing out inconsistencies in their statements, and advancing the theory that they were lying in retaliation for Baker getting C.B. into trouble. Essentially "this case is about whether or not these kids will lie about [Baker] and make stuff up about him . . . ." See State v. Muhm, 775 N.W.2d at 521 (internal citation omitted) (rejecting on harmless error grounds a claim that trial court erred in failing to give jury unanimity instruction in child sexual assault case where defendant requested no such instruction). "Ultimately the jury resolved the basic credibility dispute against [Baker] and would have convicted the defendant of *any* of the various offenses shown by the evidence to have been committed." See id. (emphasis in original). We conclude Baker has not demonstrated that the instruction error in this case so prejudiced him that he was denied a fair trial.

Conclusion

We affirm the judgment of the trial court.

Shepard, C.J., and Dickson, Sullivan and David, JJ., concur.

CLERK

SUPREME COURT, COURT OF APPEALS, AND TAX COURT

STATE OF INDIANA

216 STATE HOUSE, INDIANAPOLIS, IN 46204

317-232-1930 • FAX: 317-232-8365

Kevin S. Smith
Clerk

Cause Number

LATRIEALLE WHEAT
107 WEST MAUMEE STREET

ANGOLA, IN 46703

17S04-1009-CR-00500
Lower Court Number:
17D010607FA7
Court of Appeals No:
17A040905CR00299

BAKER, ELMER D. V. STATE OF INDIANA

You are hereby notified that the SUPREME COURT has on this day 9/07/11

APPELLANT'S PETITION FOR REHEARING IS HEREBY DENIED.
RANDALL T. SHEPARD, CHIEF JUSTICE
ALL JUSTICES CONCUR.
(ORDER REC'D. 9/7/11 AT 2:50 PM) ENTERED 9/7/11 KM

WITNESS my name and the seal of said Court,

this 7TH day of SEPTEMBER, 2011

Kevin S. Smith

Clerk, Supreme Court, Court of Appeals and Tax Court

VERIFICATION

I, Elmer Dean Baker, Petitioner, do hereby verify under the penalties for perjury that the contents in Appendix's A and B are true and accurate copies of the records in the case at bar.

Elmer Dean Baker

Elmer Dean Baker, Petitioner Pro Se

NO: _____

IN THE

SUPREME COURT OF THE UNITED STATES

Elmer Dean Baker

Petitioner,

v.

Ron Neal

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APPENDIX - B

APPENDIX - B

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Clerk of the Appellate Courts

Greg Pachmayr, Clerk • 317-232-1930 • courts.in.gov

Elmer D Baker
#913003
Indiana State Prison
One Park Row
Michigan City, IN 46360

CAUSE NO.: 24A-SP-01072
LOWER COURT CAUSE NO.: 17D010607FA7

IN RE: Elmer D Baker v. State of Indiana

You are hereby notified that the Indiana Court of Appeals has on this day, Thursday, August 15, 2024, issued the attached order, opinion, or notice.

Transmitted pursuant to the requirements of Indiana Appellate Rule 26.

Clerk of the Indiana Supreme Court, Court of Appeals, and Tax Court
Statehouse Rm. 216
200 W. Washington St.
Indianapolis, IN 46204

Clerk of the Appellate Courts

Greg Pachmayr, Clerk • 317-232-1930 • courts.in.gov

August 15, 2024

Elmer D Baker

Re: Petition to Transfer: 24A-SP-1072

Dear Elmer Baker:

Our office received your Petition to Transfer referencing the above-mentioned case on August 6, 2024. Petitions to Transfer under Successive Post Conviction Cases are Prohibited by Appellate Rule 57 (B). See the following Appellate Rule:

Rule 57. Petitions To Transfer And Briefs

A. Applicability. This Rule applies to Petitions to Transfer an appeal from the Court of Appeals to Supreme Court after an adverse decision by the Court of Appeals.

B. Decisions From Which Transfer May be Sought. Transfer may be sought from adverse decisions issued by the Court of Appeals in the following form:

(1) a published opinion;

(2) a not-for-publication memorandum decision;

(3) any amendment or modification of a published opinion or a not-for-publication memorandum decision; and

(4) an order dismissing an appeal.

Any other order by the Court of Appeals, including an order denying a motion for interlocutory appeal under Rule 14(B) or 14(C) and an order declining to authorize the filing of a successive petition for post conviction relief, shall not be considered an adverse decision for the purpose of petitioning to transfer, regardless of whether rehearing by the Court of Appeals was sought.

For more information, please refer to the Indiana Rules of Appellate Procedure.

Sincerely,

Gregory Pachmayr
Clerk of the Appellate Courts
wo

IN THE

COURT OF APPEALS OF INDIANA

Elmer D. Baker,

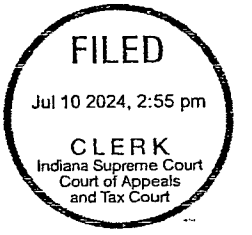
Petitioner,

v.

State of Indiana,

Respondent.

Court of Appeals Cause No.
24A-SP-1072



Order

[1] On June 7, 2024, this Court declined to authorize the filing of Petitioner's Successive Petition for Post-Conviction Relief. Petitioner, pro se, has filed a Petition for Rehearing.

[2] Having reviewed the matter, the Court finds and orders as follows:

Petitioner's Petition for Rehearing is denied.

Ordered: 7/10/2024

Mathias, Kenworthy, JJ., Robb, Sr.J., concur.

For the Court,

Chief Judge

IN THE

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Elmer D. Baker,

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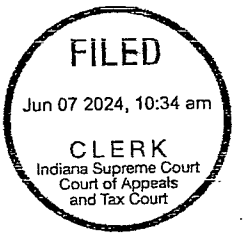


Order

[1] Petitioner has filed a Successive Petition for Post-Conviction Relief.

[2] Having reviewed the matter, the Court finds and orders as follows:

1. Petitioner has failed to establish a reasonable possibility that Petitioner is entitled to post-conviction relief, and accordingly, the Court declines to authorize the filing of the petition.
2. The Clerk of the Court is directed to send this order to Petitioner and the DeKalb Circuit and Superior Courts Clerk.
3. The DeKalb Circuit and Superior Courts Clerk is directed to file this order under Cause Number 17D01-0607-FA-7, and, pursuant to Indiana Trial Rule 77(D), the Clerk shall place the contents of this order in the Record of Judgments and Orders.

Ordered: 6/7/2024

Mathias, Kenworthy, JJ., Robb, Sr. J., concur.

For the Court,

Chief Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

ELMER DEAN BAKER,

Petitioner,

v. CAUSE NO. 3:19-CV-423-RLM-MGG

WARDEN,

Respondent.

OPINION AND ORDER

Elmer Dean Baker, a prisoner without a lawyer, filed a habeas corpus petition to challenge his convictions for child molestation under Cause No. 17D01-607-FA-7. Following a jury trial, on February 6, 2009, the Dekalb Superior Court sentenced Mr. Baker as a habitual offender to one hundred six years of incarceration.

PROCEDURAL DEFAULT

Before considering the merits of a habeas petition, the court must ensure that the petitioner has exhausted all available remedies in state court. 28 U.S.C. § 2254(b)(1)(A); Lewis v. Sternes, 390 F.3d 1019, 1025 (7th Cir. 2004). A habeas petitioner must fully and fairly present his federal claims to the state courts. Boyko v. Parke, 259 F.3d 781, 788 (7th Cir. 2001). Fair presentment "does not require a hypertechnical congruence between the claims made in the federal and state courts; it merely requires that the factual and legal substance remain the same." Anderson v. Brevik, 471 F.3d 811, 814–815 (7th Cir. 2006) (citing Boyko

v. Parke, 259 F.3d at 788). It does, however, require "the petitioner to assert his federal claim through one complete round of state-court review, either on direct appeal of his conviction or in post-conviction proceedings." Lewis v. Sternes, 390 F.3d at 1025 (internal quotations and citations omitted). "This means that the petitioner must raise the issue at each and every level in the state court system, including levels at which review is discretionary rather than mandatory." Id. "A habeas petitioner who has exhausted his state court remedies without properly asserting his federal claim at each level of state court review has procedurally defaulted that claim." Id.

Mr. Baker's habeas petition presents thirty-seven claims for relief. He raises eleven claims against the trial court and one claim against the Indiana Supreme Court for its decision on direct appeal. His petition to transfer on direct appeal raised only two claims: whether the trial court erred by not requiring jury unanimity on a specific criminal incident and whether the statute allowing the prosecution greater latitude in amending the charges violated the Ex Post Facto Clause. Under Indiana law, "if an issue was known and available but not raised on direct appeal, the issue is procedurally foreclosed." Stephenson v. State, 864 N.E.2d 1022, 1028 (Ind. 2007). The claims against the trial court and the Indiana Supreme Court that weren't raised in the petition to transfer on direct appeal are procedurally defaulted. Further, the Indiana Supreme Court found that Mr. Baker waived the jury unanimity claim by not raising it at trial, so this claim is also procedurally defaulted. The Indiana Supreme Court reviewed the jury unanimity claim under the fundamental error doctrine, but such limited review

doesn't allow this court to consider the claim in this habeas case. See Carter v. Douma, 796 F.3d 726, 734 (7th Cir. 2015); Gray v. Hardy, 598 F.3d 324, 329 (7th Cir. 2010). The court will consider the remaining claim of whether the trial court violated the Ex Post Facto Clause by allowing the prosecution to amend the charges.

Mr. Baker raises fourteen claims of ineffective assistance of trial counsel. Under Indiana law, "a Sixth Amendment claim of ineffective assistance of trial counsel, if not raised on direct appeal, may be presented in postconviction proceedings." Woods v. State, 701 N.E.2d 1208, 1220 (Ind. 1998). "However, if ineffective assistance of trial counsel is raised on direct appeal by a Davis petition or otherwise, the issue will be foreclosed from collateral review." Id. (referring to mechanism to expedite review of post-conviction claims set forth in Davis v. State, 368 N.E.2d 1149 (Ind. 1977)). Mr. Baker raised four claims of ineffective assistance of trial counsel on direct appeal, asserting that trial counsel erred by entering into a stipulation on uncharged crimes, by not objecting to the instruction on the elements of child molestation, by not requesting an instruction on unanimity, and by not presenting an expert witness. He didn't present of these claims in his petition to transfer to the Indiana Supreme Court, so the ineffective assistance claims raised on direct appeal are procedurally defaulted. Further, due to Indiana's all-or-nothing approach on the presentation of ineffective assistance of trial counsel claims, the ineffective assistance of trial counsel claims that weren't raised on direct appeal are also procedurally defaulted.

Mr. Baker raises eleven claims of ineffective assistance of appellate counsel. In the petition to transfer to the Indiana Supreme Court on post-conviction review, Mr. Baker didn't assert that appellate counsel rendered ineffective assistance by asserting ineffective assistance of trial counsel claims on direct appeal or that she mishandled any arguments presented to the Court of Appeals of Indiana. Mr. Baker maintains that he presented these claims to the Indiana Supreme Court by incorporating by reference his brief to the Court of Appeals of Indiana, but Indiana law doesn't let parties to present arguments that way. Bigler v. State, 732 N.E.2d 191, 197 (Ind. App. 2000) ("[A] party may not present an argument entirely by incorporating by reference from a source outside the appellate briefs."). Mr. Baker also says that appellate counsel didn't properly present the jury unanimity claim to the Indiana Supreme Court, but Mr. Baker didn't have a right to counsel at that stage of the proceedings. See Resendez v. Smith, 692 F.3d 623, 626 (7th Cir. 2012) ("A criminal defendant enjoys a right to counsel through his first appeal of right but once the direct appeal has been decided, the right to counsel no longer applies."). For these reasons, Mr. Baker can't proceed on these ineffective of assistance of appellate counsel claims.

Mr. Baker fairly presented claims that he received ineffective assistance of appellate counsel based on these issues: (1) trial counsel should have objected to a juror who had a disqualifying relationship with the prosecuting attorney's husband; (2) trial counsel should have objected to the addition of a third count of child molestation in the amended information because it violated the statute of limitations; (3) the trial court allowed trial counsel to waive his right to a jury

trial on the habitual offender enhancement in violation of Indiana's personal waiver requirement; (4) the trial court sentenced him in violation of Apprendi v. New Jersey, 530 U.S. 466 (2000); (5) the prosecution improperly vouched for the victim's credibility and relied on vouching testimony; (6) trial counsel should have objected to juror bias as a result of pretrial publicity; and (7) the trial court should not have allowed the stipulation of evidence.

In consideration of Mr. Baker's pro se status, the court construes the ineffective assistance of appellate counsel claims as an assertion of cause-and-prejudice for the underlying claims of trial error and deficient performance by trial counsel. A habeas petitioner can overcome a procedural default by showing both cause for not abiding by state procedural rules and a resulting prejudice from that failure. Wainwright v. Sykes, 433 U.S. 72, 90 (1977); Wrinkles v. Buss, 537 F.3d 804, 812 (7th Cir. 2008). Cause sufficient to excuse procedural default is defined as "some objective factor external to the defense" that prevented a petitioner from pursuing his constitutional claim in state court. Murray v. Carrier, 477 U.S. 478, 492 (1986). "Meritorious claims of ineffective assistance can excuse a procedural default." Richardson v. Lemke, 745 F.3d 258, 272 (7th Cir. 2014). "But those claims must themselves be preserved; in order to use the independent constitutional claims of ineffective assistance of trial and appellate counsel as cause to excuse a procedural default, a petitioner is required to raise the claims through one full round of state court review, or face procedural default of those claims as well." Id. As detailed above, Mr. Baker fairly presented seven claims of ineffective assistance of appellate counsel. Therefore, the court will

consider whether appellate counsel error on those seven claims excuses procedural default on the underlying claims involving the trial court and trial counsel.

LEGAL STANDARD

"Federal habeas review . . . exists as a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal." Woods v. Donald, 135 S.Ct. 1372, 1376 (2015) (quotations and citation omitted).

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

> [This] standard is intentionally difficult to meet. We have explained that clearly established Federal law for purposes of §2254(d)(1) includes only the holdings, as opposed to the dicta, of this Court's decisions. And an unreasonable application of those holdings must be objectively unreasonable, not merely wrong; even clear error will not suffice. To satisfy this high bar, a habeas petitioner is required to show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.

Woods v. Donald, 135 S. Ct. at 1376 (quotation marks and citations omitted). Criminal defendants are entitled to a fair trial but not a perfect one. Rose v.

Clark, 478 U.S. 570, 579 (1986). To warrant relief, a state court's decision must be more than incorrect or erroneous; it must be objectively unreasonable. Wiggins v. Smith, 539 U.S. 510, 520 (2003). "A state court's determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision." Harrington v. Richter, 562 U.S. 86, 101 (2011) (quotation marks omitted). "[I[n the cause-and-prejudice context, we apply the same deferential standard as we would when reviewing the claim on its own merits." Richardson v. Lemke, 745 F.3d 258, 273 (7th Cir. 2014).

ANALYSIS

Ex Post Facto Clause

Mr. Baker argues that he is entitled to habeas relief because the trial court violated the Ex Post Facto Clause by allowing the prosecution to amend the charges. "The ex post facto prohibition forbids the Congress and the States to enact any law which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed." Weaver v. Graham, 450 U.S. 24, 28 (1981) ("[T[wo critical elements must be present for a criminal or penal law to be ex post facto: it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." Id. at 29. "The critical question is whether the law changes the legal consequences of acts completed before its effective date." Id. at 31.

In July 2006, the prosecution charged Mr. Baker with two counts of child molestation and a habitual offender enhancement accusing him of misconduct with two minor children in June or July 2003. The omnibus date was in December 2006. In June 2007, a jury trial on those charges resulted in a mistrial. Shortly after the trial, the trial court allowed the prosecution to amend the existing charges by expanding the timeframe to October 2000 to August 2003 for each of the two counts and to add a third count of child molestation involving another minor in 2002. In August 2008, a second jury convicted Mr. Baker.

At the time of the crimes, the relevant statute required the prosecution to notify a criminal defendant of substantive amendments at least thirty days before the omnibus date. Ind. Code § 35-34-1-5(b)(1) (2003). That limitation didn't apply to amendments to cure immaterial defects, including "the failure to state the time of place at which the offense was committed where the time or place is not of the essence of the offense." Ind. Code § 35-34-1-5(a) (2003). This statute was amended effective May 8, 2007, to allow amendments at any time before trial "if the amendment [did] not prejudice the substantial rights of the defendant." Ind. Code § 35-34-1-5(b)(2) (2008).

On direct appeal, the Court of Appeals of Indiana rejected Mr. Baker's claim of error on the basis that it had previously held that the revised statute didn't violate the Ex Post Facto Clause in Ramon v. State, 888 N.E.2d 244 (Ind. App. 2008). In Ramon, the appellate court reasoned that the revised statute "creates no new crimes, does not change the elements of any crime, and does not alter the sentencing statutes." Ramon v. State, 888 N.E.2d at 252. The

appellate court also found that even the previous version of the statute would have allowed the expansion of the timeframes for the first two counts of child molestation. It reasoned that time wasn't of the essence in such cases given the inability of children to remember specific dates.

After reviewing the state court record, the court cannot find that the state court made an unreasonable determination with respect to the Ex Post Facto Claim. The relevant statute would have allowed the prosecution to amend the first two counts of child molestation by expanding the timeframe even before the effective date of the revisions. At all relevant times, the statute allowed the prosecution to amend the information to correct "the failure to state the time or place at which the offense was committed where the time or place is not of the essence of the offense." Ind. Code. § 35-34-1-5 (a)(7). In other words, the change in the law had no effect on these amendments, and so couldn't have violated the Ex Post Facto Clause.

The addition of third count of child molestation is a different matter. As the state court noted, the revised statute didn't criminalize previously legal behavior or increase the severity of the sentence for child molestation. But the reasoning can't stop there, because the same line of reasoning could apply to the statute challenged in Stogner v. California, 539 U.S. 607 (2003), which Mr. Baker cited in his appellate brief. In that case, the Supreme Court of the United States considered a statute that allowed prosecuting attorneys to pursue certain criminal charges after the limitations period for those charges had expired. The Supreme Court found that this statute violated the Ex Post Facto Clause for

criminal defendants whose limitations period had expired before its effective date. Stogner v. California, 539 U.S. at 609. It likened the expiration of a limitations period to a form of amnesty and reasoned that the new statute imposed punishment for conduct that was, in essence, immunized from punishment by the passage of time. Id. at 611-615.

Nevertheless, the deadline for substantive amendments to criminal charges isn't equivalent to a statutory limitations period. Before the statutory revision, the amendment deadline was tied to the omnibus date, which, under Indiana law, broadly serves as a point of reference for scheduling in criminal proceedings. Ind. Code Ann. § 35-36-8-1(b). The trial court's discretion to modify the omnibus date is and was relatively constrained, particularly given the wide latitude typically afforded to trial courts for setting deadlines. According to Ind. Code § 35-36-8-1(d), "[o]nce the omnibus date is set, it remains the omnibus date for the case until final disposition," unless certain circumstances apply, including the substitution of trial counsel, the prosecution's failure to comply with a discovery deadline, or the agreement of the parties. But these circumstances, though limited in number, don't arise infrequently and suggest that extensions of omnibus dates are common enough occurrences. In sum, the amendment deadline's relationship to the omnibus date indicates that the amendment deadline isn't meant to afford criminal actors the degree of amnesty afforded by a statutory limitations period.

Expiration of the amendment deadline does not make a criminal act unpunishable, so an extension of an expired amendment deadline, through

statutory revision or otherwise, doesn't violate the Ex Post Facto Clause. Mr. Baker's claim that the amendment of the charges violated his rights under the Ex Post Facto Clause is not a basis for habeas relief.

Ineffective Assistance of Appellate Counsel

Mr. Baker asserts that he is entitled to habeas relief because he received ineffective assistance of appellate counsel. He also asserts that he is entitled to habeas relief due to trial error and ineffective assistance of trial counsel, but these claims are procedurally barred. As a result, the court can't grant habeas relief based on these claims unless Mr. Baker demonstrates that the procedural bar was caused by ineffective assistance of appellate counsel.

To prevail on an ineffective assistance of counsel claim, a petitioner must show that counsel's performance was deficient and that the deficient performance prejudiced him. Strickland v. Washington, 466 U.S. 668 (1984). The test for prejudice is whether there was 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 a probability "sufficient to undermine confidence in the outcome." Id. at 693. In assessing prejudice under Strickland, "[t]he likelihood of a different result must be substantial, not just conceivable." Harrington v. Richter, 562 U.S. 86, 112 (2011). "On habeas review, [the] inquiry is now whether the state court unreasonably applied Strickland." McNary v. Lemke, 708 F.3d 905, 914 (7th Cir. 2013). "Given this high standard, even 'egregious' failures of counsel do not always warrant relief." Id.

Mr. Baker argues that appellate counsel erred by declining to argue that the publicity caused by local newspaper articles deprived him of the right to an impartial jury. Trial counsel didn't object on this basis, so appellate counsel could present this claim only as an ineffective assistance of trial counsel claim, which would have required a showing of prejudice, or to argue that it resulted in fundamental error. See Baumholser v. State, 62 N.E.3d 411, 414 (Ind. App. 2016) ("Failure to object at trial waives the issue on review unless fundamental error occurred."). Under Indiana law, "[f]undamental error is an extremely narrow exception that applies only when the error amounts to a blatant violation of basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process." Id. The appellate court rejected this claim on post-conviction review because Mr. Baker didn't show that the newspaper articles prejudiced him. He didn't provide any evidence that the jurors were aware of the newspaper articles or that the pretrial publicity had any effect on the verdict. Given the lack of evidentiary support for this claim, the court can't find that this determination was unreasonable.

Mr. Baker argues that appellate counsel erred by declining to argue that trial counsel should have moved for a mistrial after a juror's conversation with the prosecuting attorney's spouse. Under Indiana law, "[d]efendants seeking a mistrial for suspected jury taint are entitled to the presumption of prejudice only after making two showings, by a preponderance of the evidence: (1) extra-judicial contact or communications between jurors and unauthorized persons occurred, and (2) the contact or communications pertained to the matter before the jury."

Ramirez v. State, 7 N.E.3d 933, 939 (Ind. 2014). At trial, the prosecuting attorney told the court that, at a fast food restaurant, a juror asked her spouse whether he planned to play on a soccer team and that he replied that he would if he asked. The prosecuting attorney represented that her spouse and the juror didn't discuss the case. Id. The appellate court rejected this claim on post-conviction review for lack of deficient performance, reasoning that since this communication didn't relate to Mr. Baker's trial, trial counsel had no basis for requesting a mistrial. Mr. Baker didn't show that the lack of an objection caused him prejudice, so this determination was not unreasonable.

Mr. Baker argues that his appellate counsel erred by declining to argue that trial counsel should have objected to the third count of child molestation in the amended information for untimeliness. The applicable limitations period is five years. Ind. Code § 35-41-4-2(a)(1). The prosecution added the third count on June 18, 2007, asserting that, "in or about 2002," Mr. Baker "did perform or submit to fondling or touching with A.H." Direct Appeal App. 80. At trial, the three victims described an event in which Mr. Baker molested each of them. J.A. testified that Mr. Baker began molesting her around the time of another trial that occurred in October 2002. A.H. testified that all of the molestation incidents involving Mr. Baker occurred within the year preceding her August 2003 police report. On the basis of this testimony, the appellate court found that Mr. Baker didn't suffer prejudice as a result of trial counsel's decision not to object on the basis of timeliness. The court can't find that this determination was unreasonable. As detailed above, the record reflects that the prosecution had

evidence to support a timely count of child molestation with respect to A.H. Had objected to the amended information on the basis of timeliness, it seems more likely that such an objection would have resulted in another amendment rather than the prosecution discontinuing their pursuit of it.

Mr. Baker argues that appellate counsel erred by declining to argue that Mr. Baker didn't knowingly, voluntarily, and intelligently waive his right to a jury trial on the habitual offender enhancement. He maintains that a criminal defendant can waive the right to a jury trial only by personally communicating it to the trial court, citing Horton v. State, 51 N.E.3d 1154 (Ind. 2016). The appellate court rejected this claim on post-conviction review, reasoning that Horton hadn't been decided during trial proceedings and that it was unclear whether its holding applied to habitual offender enhancements.

This court further adds that, in her appellate briefs, appellate counsel focused on her arguments on jury unanimity, which resulted in the Indiana Supreme Court agreeing to require more specific jury instructions in certain circumstances, and on the Ex Post Facto Clause, a substantial, if ultimately unsuccessful, constitutional argument as detailed above. Success on these arguments would have resulted in a new trial or dismissal for all charges. By contrast, the argument on personal waiver would have entitled Mr. Baker to a new trial only on the habitual offender enhancement. Prior convictions, which are a matter of public record, are difficult to contest, and Mr. Baker offers no basis to suggest a jury would not have found him to be a habitual offender. Given the substantial issues raised on direct appeal and the limited relief afforded by

a successful personal waiver argument, the court can't find that the State court's determination that appellate counsel did not perform deficiently was unreasonable.

Mr. Baker argues that appellate counsel erred by declining to argue that his sentence violated Apprendi v. New Jersey, 530 U.S. 466 (2000), in which the Supreme Court of the United States held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id. at 490. The appellate court correctly determined that Apprendi didn't apply to Mr. Baker's sentence. Apprendi, by its own terms, doesn't apply to prior convictions and so didn't apply to the habitual offender enhancement. The trial court found other aggravating factors without the assistance of a jury, but didn't impose a sentence beyond the prescribed statutory maximum. See Ind. Code Ann. § 35-50-2-4 (2005) (fifty years for Class A felony); Ind. Code Ann. § 35-50-2-6 (2005) (eight years Class C felony); Ind. Code Ann. § 35-50-2-8 (2005) (thirty years for habitual offender enhancement).

Mr. Baker argues that appellate counsel erred by declining to argue that the prosecution improperly introduced vouching testimony and improperly vouched for the victims during closing arguments. In his appellate brief, Mr. Baker referenced the testimony of a caseworker who explained her role in the case and the investigatory process for her agency. wrote in her report that the victim's mothers believed the accusations and that she would not have submitted the case to the prosecutor's office if she and her supervisor didn't agree that it

had merit. He referenced the testimony of the victim's family members that they believed the victims. He also referenced the testimony of a physician that she performed certain medical procedures on a victim because she suspected sexual abuse. According to Mr. Baker, at closing, the prosecution implied that the caseworker, the detective, and the prosecution believed the victims by observing that these individuals didn't abandon the case and directed the jury to review the exhibits, which included the caseworker's reports. The prosecution also made references to the victims' testimony, including that they had cried and that they had taken an oath "to tell the truth as they remembered it today."

The appellate court found that the prosecution didn't improperly vouch or elicit sympathy for the victims but instead fairly commented on the trial evidence. Under Indiana law, "a prosecutor may not state his or her personal opinion regarding the credibility of a witness during trial," but "a prosecutor may comment as to witness credibility if the assertions are based on reasons arising from the evidence presented in the trial." Thomas v. State, 965 N.E.2d 70, 77 (Ind. App. 2012). After reviewing the prosecution's closing argument, the court doesn't find that the state court's determination on this issue was unreasonable. The prosecution referenced and made observations about witness testimony but stopped short of expressing a personal opinion on the credibility of the victims.

The bulk of the testimony cited by Mr. Baker is not attributable to the prosecution but was instead elicited on cross-examination by trial counsel. This testimony doesn't support the claim of prosecutorial misconduct.

Additionally, under Indiana law, "to properly preserve a claim of prosecutorial misconduct for appeal, a defendant must not only raise a contemporaneous objection but must also request an admonishment; if the admonishment is not given or is insufficient to cure the error, then the defendant must request a mistrial." Neville v. State, 976 N.E.2d 1252, 1258 (Ind. App. 2012). In other words, this is another claim that appellate counsel could have presented only as an ineffective assistance of trial counsel claim, which would have required a showing of prejudice, or to argue that it resulted in fundamental error. Given that appellate counsel would have faced the more difficult task of demonstrating prejudice and given her focus on other, more substantial claims, the claim of prosecutorial misconduct is not a basis for habeas relief.

Mr. Baker argues that appellate counsel should have argued that the trial court abused its discretion by allowing the parties to stipulate on the admissibility of evidence. On May 14, 2008, the parties stipulated to the following:

> 1. Evidence regarding all allegations of sexual activity between the victims and the defendant is admissible, including but not limited to when those activities began.
>
> 2. Evidence regarding the opportunities for the victims to complain about that alleged sexual activity, including but not limited to the Loren Wilkins investigation, is admissible.

Direct Appeal App. 229.

The appellate court held on post-conviction review that the trial court didn't abuse its discretion by accepting a stipulation with the consent of both parties. Review of the pretrial motions indicates that trial counsel's decision to

stipulate was a reasonable strategic decision. The prosecution sought to exclude evidence of the victims' past sexual activity, including their involvement as victims of child molestation by another individual, while trial counsel sought to use such evidence as part of the defense. Direct Appeal App. 161-63, 194-97. By entering into the stipulation, trial counsel obtained a benefit for Mr. Baker, and the trial court might have allowed evidence of prior sexual activity between the victims and Mr. Baker without the stipulation. See Beasley v. State, 452 N.E.2d 982, 984 (Ind. 1983) ("The general rule is that evidence of criminal activity other than that which is charged is inadmissible on the question of guilt; however, such evidence may be admitted if it is relevant to show intent, motive, purpose, identification or common scheme or plan."). Therefore, this claim is not a basis for habeas relief.

CERTIFICATE OF APPEALABILITY

Pursuant to Section 2254 Habeas Corpus Rule 11, the court must grant or deny a certificate of appealability. To obtain a certificate of appealability under 28 U.S.C. § 2253(c), the petitioner must make a substantial showing of the denial of a constitutional right by establishing "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Slack v. McDaniel, 529 U.S. 473, 484 (2000). For the reasons explained in this opinion for denying habeas corpus relief, there is no basis for encouraging Mr. Baker to proceed further.

For these reasons, the court DENIES the habeas corpus petition (ECF 1), DENIES the certificate of appealability, and DIRECTS the clerk to enter judgment in favor of the Respondent and against the Petitioner.

SO ORDERED on March 22, 2021

s/ Robert L. Miller, Jr.
JUDGE
UNITED STATES DISTRICT COURT

Elmer D. Baker v. State of Indiana
SUPREME COURT OF INDIANA
127 N.E.3d 224; 2019 Ind. LEXIS 314

[NO NUMBER IN ORIGINAL]
May 9, 2019, Decided

Notice:

DECISION WITHOUT PUBLISHED OPINION

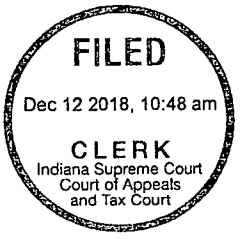
Editorial Information: Prior History

18A-PC-354.Baker v. State, 119 N.E.3d 230, 2018 Ind. App. Unpub. LEXIS 1480 (Ind. Ct. App., Dec. 12, 2018)

Opinion

Transfer Denied.

MEMORANDUM DECISION



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IN THE COURT OF APPEALS OF INDIANA

Elmer Dean Baker,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent.

December 12, 2018

Court of Appeals Case No. 18A-PC-354

Appeal from the DeKalb Superior Court

The Honorable J. Scott VanDerbeck, Special Judge

Trial Court Cause No. 17D01-1604-PC-3

Bradford, Judge.

Case Summary

[1] In August of 2008, Elmer Dean Baker was convicted of two counts of Class A felony child molestation and Class C felony child molestation and found to be a habitual offender, for which he was sentenced to 106 years of incarceration. We affirmed Baker's convictions on direct appeal, as did the Indiana Supreme Court on transfer.

[2] In 2016, Baker filed his amended petition for post-conviction relief ("PCR"), contending, *inter alia*, that he was entitled to relief because he received ineffective assistance of appellate counsel ("IAAC"). The post-conviction court denied his petition in full. Baker contends that the post-conviction court erred by denying him PCR. Because we conclude that Baker has failed to establish that he received IAAC, we affirm.

Facts and Procedural History

[3] The underlying facts leading to Baker's appeal of the denial of his PCR petition are as follows:

> On July 3, 2006 the State charged then fifty-nine-year-old Elmer Dean Baker with two counts of child molesting as Class A felonies. The victims of the alleged offenses were two of Baker's grandchildren, C.B. and J.A. And the offenses were alleged to have occurred in "June and July of 2003." After a jury trial in June of 2007 the trial court declared a mistrial when the jury could not reach a verdict. Thereafter the State sought leave to amend the charging information to reflect the time period "from October 2000 through August 2003." An additional count of

child molesting as a Class C felony was also added. The alleged victim was A.H., a cousin of C.B. who is unrelated to Baker. This offense was alleged to have occurred "in or about 2002." Baker was also alleged to be a habitual offender.

Over Baker's objection the trial court permitted the amendments. And a retrial began on August 13, 2008. Evidence presented by the State is summarized in part as follows: C.B., who was eighteen years of age at the time of trial, testified that she was born in September 1990, her cousin J.A. was born in December 1990, and that during the period between 2000 and 2003 she, J.A., and A.H. were close friends. C.B. also testified that during that period of time her family lived at various locations in DeKalb County including houses and apartments in Spencerville, Auburn, and Garrett, Indiana. According to C.B., Baker first began touching her inappropriately when she was about nine or ten years old. Specifically C.B. recounted an incident in which she and J.A. spent the night at Baker's apartment in Auburn which was next door to her own home where she lived with her parents. J.A. and C.B. were first sleeping in the living room but became frightened for some reason and went into Baker's room to lie down on his bed. C.B. testified that at that point "he started to touch us and he pulled me on top of him.... He [ ] pretended like he was having sex with me but we had, like I had my underwear on.... He like touched our vaginas." She went on to say, "He like placed my hand on his penis and made like the motion of masturbating."

When C.B. was ten or eleven years old Baker, who was a long distance truck driver, often took C.B. with him on overnight truck trips several weekends during the summer months of 2001 and 2002. According to C.B. most of the "sexual stuff" happened "in the semi" and it happened "a lot." When asked by the prosecutor "what kind of stuff happened in the semi truck?" C.B. responded "my grandpa had sex, my grandpa had sex with me." When asked "[w]hat other sex acts took place in the semi truck?"

C.B. recounted an incident in which she and J.A. were together on one of the truck trips and both of them fellated Baker; on another occasion Baker digitally penetrated her and touched her breast.

By the summer of 2003 Baker owned a small house on Story Lake in DeKalb County. At that point C.B. was twelve years of age. On July 3rd of that year C.B. and J.A. were present for a family gathering and spent the night at Baker's house. At some time during the course of the night C.B. and J.A. went into Baker's room and according to C.B. "[u]m, he had sex with me.... Um, he inserted his penis into my vagina." C.B. further testified, "he like touched us and had us touch him ... on the private parts." The "us" referred to J.A. C.B. also testified that both she and J.A. "would take turns" fellating Baker.

C.B. recounted another incident occurring at a trailer that Baker owned at the North Pointe Crossing Mobile Home park just north of where she lived in Garrett. The precise date is unclear but the record suggests sometime between 2001 and 2003. C.B., J.A., and A.H. were present at Baker's trailer. The three girls went into Baker's bedroom where he pretended to be asleep. According to C.B. she and J.A. "took turns" fellating Baker, and all three of the girls "touch[ed] his penis."

J.A., who was seventeen years of age at the time of trial, testified that C.B. is her step first cousin and that she refers to Baker as "Grandpa Dean." She also testified that during 2000 to 2003 she, C.B., and A.H. were good friends. She offered testimony that tended to corroborate that of C.B. including an incident involving A.H. According to J.A. the three girls were present at Baker's house. Baker was present and pretending to be asleep. The three girls went into his bedroom where A.H. fellated Baker and J.A. played with his scrotum. "And then me and [A.H.] switched." She further recalled that C.B. was on top of Baker and he was "sucking on her [breast]."

A.H., who was also seventeen at the time of trial, was the third of the alleged victims to testify. Although no specific dates were given, A.H. largely corroborated the testimony of C.B. and J.A. concerning the alleged incident occurring at Baker's house at the mobile home park. Among other things she confirmed that C.B. fellated Baker, and "then [J.A.] did it and then after that I tried it." A.H. also recounted an occasion when she and J.A. were together on a trucking trip with Baker in his semi. The truck was equipped with a bed. While J.A. was in the passenger seat, A.H. went to sleep in the bed. A.H. testified that when she awoke Baker was lying next to her, and her clothing had been removed. Baker rubbed his fingers over her "private area," got on top of her, and "humped [her] stomach until he ejaculated."

Baker testified on his own behalf. He acknowledged occasionally taking all of his grandchildren on semi trucking trips at one time or another and acknowledged owning a house on Story Lake. However, Baker denied engaging in any sexual activity with C.B., J.A., or A.H. In response to his attorney's question "[a]nd you're saying to me that they are lying," Baker responded, "[t]hey absolutely are." Essentially he testified that he believed C.B. had organized the girls to offer false testimony as part of a conspiracy to get even with him after he caught C.B. in a car with a boy at three in the morning as a result of which "she got grounded." According to Baker, about two weeks later C.B. started a "rumor" about him engaging in inappropriate sexual activity.

Following a five-day jury trial Baker was convicted as charged, and he pleaded guilty to the habitual offender allegation. The trial court sentenced him to a consecutive term of imprisonment on each of the three child molest counts for a total of seventy-six years. One of the counts was enhanced by thirty years for the habitual offender adjudication. The total executed term was 106 years.

> Baker appealed framing his contentions as follows: (1) the convictions are not sustained by evidence of jury unanimity, (2) the trial court's ruling allowing amendment of the information was in violation of proscriptions under the state and federal constitutions against ex post facto laws; if the amendment can be lawfully applied in this case, it was not applied properly, (3) the trial court committed fundamental error in giving its preliminary instruction 6 and final instruction 5, and (4) defendant's convictions should be set aside due to ineffective assistance of counsel. The Court of Appeals rejected Baker's arguments and affirmed the judgment of the trial court.

Baker v. State, 948 N.E.2d 1169, 1171–73 (Ind. 2011) (internal citations omitted).

[4] The Indiana Supreme Court granted transfer to explore Baker's jury unanimity claim, ultimately holding that any instructional error regarding jury unanimity was not fundamental and summarily affirming the balance of the decision by the Court of Appeals. *Id.* at 1173. On April 19, 2016, Baker filed an amended PCR petition, alleging that he received IAAC. On December 12, 2017, the post-conviction court held a hearing on Baker's PCR petition, at which Baker's appellate counsel Latrielle Wheat testified, and it was ultimately denied on January 16, 2018.

Discussion and Decision

[5] The standard of review for appeals from the denial of PCR is well-settled. Petitioners who have exhausted the direct-appeal process may challenge the correctness of their convictions and sentences by filing a post-conviction

petition. *Stevens v. State*, 770 N.E.2d 739, 745 (Ind. 2002). Petitioner bears the burden of establishing grounds for PCR by a preponderance of the evidence. *Id.* By appealing from a negative judgment, Petitioner faces a rigorous standard of review. *Wesley v. State*, 788 N.E.2d 1247, 1250 (Ind. 2003). Denial of PCR will be affirmed unless, "the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court." *Id.* We do not defer to the post-conviction court's legal conclusion but do accept its factual findings unless they are clearly erroneous. *Stevens*, 770 N.E.2d at 746. The post-conviction process does not provide petitioner with a "super-appeal" but, rather, a "narrow remedy for subsequent collateral challenges to convictions, challenges which must be based on grounds enumerated in the post-conviction rules." *Rouster v. State*, 705 N.E.2d 999, 1003 (Ind. 1999). Issues that were known and available but not raised on direct appeal are waived, and issues raised but decided adversely are *res judicata*. *Id.*

I. Sufficiency of Evidence

[6] Baker contends that there was insufficient evidence to convict him of the two counts of Class A felony child molestation because there was no evidence of penetration. Although Baker has tried to frame this as a new issue, it is nothing more than a freestanding claim that is waived. *See Rouster*, 705 N.E.2d at 1003 (noting that an issue known and available but not raised on direct appeal is waived by petitioner).

II. IAAC

[7] Baker contends that he received ineffective assistance from Wheat when she represented him on direct appeal. The standard for determining whether appellate counsel's performance was ineffective is the same as that for trial counsel. *McKnight v. State*, 1 N.E.3d 193, 204 (Ind. Ct. App. 2013). We review a claim for IAAC based on the standard articulated in *Strickland v. Washington*, 466 U.S. 668 (1984):

> Under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), a claim of ineffective assistance of counsel requires a showing that: (1) counsel's performance was deficient by falling below an objective standard of reasonableness based on prevailing professional norms; and (2) counsel's performance prejudiced the defendant so much that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" *Id.* at 687, 694, 104 S.Ct. 2052; *Lowery v. State*, 640 N.E.2d 1031, 1041 (Ind. 1994). [...] Failure to satisfy either prong will cause the claim to fail. *Vermillion v. State*, 719 N.E.2d 1201, 1208 (Ind. 1999).

French v. State, 778 N.E.2d 816, 824 (Ind. 2002). Counsel's performance is presumed effective, and instances of isolated poor strategy, inexperience, or bad tactics are not necessarily ineffective assistance; thus a defendant must offer strong and convincing evidence to overcome the presumption of effective assistance. *McKnight*, 1 N.E.3d at 200.

[8] "Ineffective assistance of appellate counsel claims generally fall into three basic categories: (1) denial of access to an appeal; (2) waiver of issues; and (3) failure

to present issues well." *Reed v. State*, 856 N.E.2d 1189, 1195 (Ind. 2006). "Judicial scrutiny is highly deferential regarding a claim that counsel was ineffective in failing to raise an issue on appeal thus resulting in waiver for collateral review, and the [petitioner] must overcome the strongest presumption of adequate assistance." *McKnight*, 1 N.E.3d at 204. Rarely is ineffective assistance found where petitioner contends that appellate counsel failed to raise an issue on direct appeal, because the decision of which issue to raise is one of the most important strategic decisions made by appellate counsel. *Id.*

A. IAC Claim Brought on Direct Appeal

[9] Baker contends that Wheat was ineffective for bringing an IAC claim on direct appeal rather than leaving the claim for a post-conviction proceeding. Baker contends that Wheat raised the claim ineffectively by failing to obtain testimony from Baker's trial counsel regarding trial counsel's decision not to obtain a medical expert to refute the State's medical expert's testimony at trial. Although post-conviction proceedings are usually the preferred avenue for bringing IAC claims, they are not prohibited from being brought on direct appeal. *Rogers v. State*, 897 N.E.2d 955, 965 (Ind. Ct. App. 2008), *trans. denied*. Post-conviction proceedings are preferred because presenting such a claim can require developing new facts that are not present in the trial record. *Id.*

[10] Baker has offered no proof of the testimony that needed to be elicited from his trial counsel to develop facts that were not already in the trial record. Arguing that his appellate counsel was ineffective by not eliciting testimony from trial

counsel, without more, is merely speculation. Further, it is Baker's burden to make a record, and because his trial counsel was never called to testify during his PCR hearing, the post-conviction court was not required to believe that trial counsel would have corroborated Baker's allegation. *See Culvahouse v. State*, 819 N.E.2d 857, 863 (Ind. Ct. App. 2004), *trans. denied* (finding that "[w]hen counsel is not called as a witness to testify in support of a petitioner's arguments, the post-conviction court may infer that counsel would not have corroborated the petitioner's allegations."). We cannot conclude that Wheat was ineffective by bringing an IAC claim on direct appeal.

B. Alleged Juror Prejudice

[11] Baker contends that Wheat provided ineffective assistance by failing to claim that trial counsel was ineffective for not moving for a mistrial based on juror exposure to prejudicial newspaper articles. Baker relies on two newspaper articles which discuss his initial arrest and his first trial that resulted in a mistrial. Because at his PCR hearing Baker never admitted these newspaper articles nor any evidence that jurors were exposed to these articles, there was never any evidence of juror prejudice properly before the post-conviction court. Therefore, his claim is unsupported by evidence and therefore groundless.

C. Alleged Juror Taint

[12] Baker also contends that Wheat provided ineffective assistance by failing to claim that trial counsel was ineffective for not moving for a mistrial based on a juror's conversation with the prosecutor's husband. "Defendants seeking

mistrial for suspected jury taint are entitled to the presumption of prejudice only after making two showings, by a preponderance of the evidence: (1) extra-judicial contact or communications between jurors and unauthorized persons occurred, and (2) the contact or communications pertained to the matter before the jury." *Ramirez v. State*, 7 N.E.3d 933, 939 (Ind. 2014). Even assuming that the prosecutor's husband was an unauthorized person, the communication was not related to Baker's case. The conversation solely consisted of whether the prosecutor's husband was going to play on the same soccer team as the juror that year. (Appellant's App. Vol. VI p. 14). Baker failed to establish that Wheat's performance was ineffective in this regard.

D. Statute of Limitations

[13] Baker contends that Wheat was ineffective on direct appeal for failing to raise that the State's amended charge of Count III, Class C felony child molestation, violated the applicable statute of limitations. Disregarding trial counsel's failure to object, Baker's claim has no merit. "A charging information must only state the date of the offense with sufficient particularity to show that the offense was committed within the period of limitations applicable to that offense." *Blount v. State*, 22 N.E.3d 559, 569 (Ind. 2014) (internal citations admitted). We have noted that when it comes to child molesting cases, time is not of the essence because it is difficult for children to remember specific dates, especially when these incidents of molestation are not immediately reported. *Baber v. State*, 870 N.E.2d 486, 492 (Ind. Ct. App. 2007), *trans. denied*. The statute of limitations for amended Count III in this case was five years. *See* Ind. Code § 35-41-4-2(b)

(2002). On June 18, 2007, the State filed amended Count III, Class C felony child molestation, alleging that the molestation occurred "in or about 2002[.]" The State argues, and Baker does not contest, that trial testimony established that at least one instance of molestation involving all three victims occurred after the conclusion of one Buzz Wilkens's trial, which concluded on October 30, 2002. Thus, that instance involving all three girls occurred after June 18, 2002, which is within the five-year statute of limitations. Baker has failed to establish that Wheat provided IAAC in this regard.

E. Waiver of Jury

[14] Baker contends that Wheat was ineffective for failing to claim that Baker did not knowingly, voluntarily, and intelligently waive his right to a jury trial. The waiver Baker is referring to occurred, through trial counsel, during the determination of his habitual offender status, at which the State presented evidence of his previous convictions and after which the trial court determined Baker to be a habitual offender. In support of his contention, Baker cites *Horton v. State*, 51 N.E.3d 1154, 1160 (Ind. 2016), in which the Indiana Supreme Court held that a defendant's right to a jury trial in a felony prosecution may only be waived by the defendant personally. Assuming, *arguendo*, that the holding in *Horton* extends to the determination of habitual offender status, said precedent did not exist when Baker's direct appeal was filed in 2009. When choosing the issues to raise on Baker's direct appeal, Wheat could not have been ineffective for failing to foresee legal developments seven years down the road.

F. Sentencing

[15] Baker contends that Wheat was ineffective for failing to make the following sentencing challenges on direct appeal: (1) his sentence violated the United States Supreme Court's holdings in *Blakely*[1] and *Apprendi*,[2] (2) the trial court abused its discretion by failing to explain why it imposed consecutive sentences, and (3) his sentence was manifestly unreasonable in light of the nature of his offense and his character.

[16] Although Baker contends that his sentence violated the United States Supreme Court's precedent in *Blakely* and *Apprendi* because the trial court considered aggravating circumstances not found by the jury, he fails to recognize that by the time he was sentenced, steps had been taken to conform Indiana's sentencing statutes with said precedent. In 2005, the Indiana General Assembly enacted new sentencing statutes to resolve the Sixth Amendment issues presented by *Blakely*. *Anglemyer v. State*, 868 N.E.2d 482, 489 (Ind. Ct. App. 2007), *clarified on reh'g* 875 N.E.2d 218. In doing so, the General Assembly eliminated fixed terms and enacted sentencing statutes that did not contain a maximum sentence a judge may impose without any additional findings. *Id.* (internal quotations admitted). "As a result, even with judicial findings of aggravating circumstances, it is now impossible to increase the penalty for a

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[1] *Blakely v. Washington*, 542 U.S. 296 (2004).

[2] *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

crime beyond the prescribed statutory maximum." *Id.* (internal quotations admitted). Therefore, even though the trial court found aggravating circumstances in Baker's case, it did not impose—nor could it have imposed—a sentence that was beyond the prescribed statutory maximum in violation of *Blakely* and *Apprendi.*

[17] Baker also contends that Wheat was ineffective for failing to claim that the trial court abused its discretion by failing to explain why it was imposing consecutive sentences. However, the trial court found Baker to have been convicted of multiple offenses against multiple victims, which is sufficient reasoning for ordering consecutive sentences. *See O'Connell v. State*, 742 N.E.2d 943, 952 (Ind. 2001) (emphasizing that multiple crimes or victims constitute a valid aggravating circumstance for imposing consecutive sentences).

[18] Finally, Baker contends that Wheat was ineffective for failing to argue that his sentence was manifestly unreasonable in light of the nature of his offenses and his character. We note that at the time of Baker's sentencing, the current Indiana Appellate Rule 7(B) was effective, which uses "inappropriate" as the standard rather than "manifestly unreasonable." We may revise a sentence if, "after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B). "Sentencing is principally a discretionary function in which the trial court's judgment should receive considerable deference." *Cardwell v. State*, 895 N.E.2d 1219, 1222 (Ind. 2008) (internal citations omitted). The defendant bears the burden of proving that his

sentence is inappropriate in the light of both the nature of his offense and his character. *Gil v. State*, 988 N.E.2d 1231, 1237 (Ind. Ct. App. 2013).

[19] The nature of Baker's offenses does not support a reduction in his sentence. Baker was convicted of two counts of Class A felony child molestation and one count of Class C felony child molestation. Baker committed these offenses against two of his granddaughters and C.B.'s step-cousin, requiring them to have intercourse with and fellate him while in his tractor trailer and home.

[20] Baker's character also does not support a reduction in his sentence. Baker has been convicted of Class B felony criminal confinement, Class D felony theft, Class A misdemeanor resisting law enforcement, Class A misdemeanor battery, Class B misdemeanor disorderly conduct, and two counts of Class A misdemeanor criminal confinement. Despite Baker's many contacts with the criminal justice system, starting in 1969, he has been unwilling to conform his behavior to societal norms. Baker's sentence was not inappropriate, therefore he was not prejudiced by Wheat's failure to raise a 7(B) challenge on direct appeal. Baker has failed to establish that Wheat provided ineffective assistance in this regard.

G. Prosecutorial Misconduct

[21] Baker contends that Wheat provided ineffective assistance by failing to raise a claim of prosecutorial misconduct. Baker specifically contends that the prosecutor committed improper vouching and elicited sympathy for the State's witnesses. Of the prosecutor's numerous statements which Baker alleges as

misconduct, the one alleged as the most blatant example was in the State's closing argument when the prosecutor, regarding the three victims' testimony, stated "All three (3) of them agreed before you, when they were under oath to tell the truth as they remember it today." Appellant's App. Vol. VI p. 95. We have reviewed this statement and the others Baker has provided and find none of them to be improper vouching or elicitation of sympathy for victims but, rather, fair commenting on the evidence presented at trial. *See Thomas v. State*, 965 N.E.2d 70, 77 (Ind. Ct. App. 2012), *trans. denied* (noting that while a prosecutor may not state his or her personal opinion regarding a witness's credibility at trial, he or she may comment as to witness credibility if the assertions are based on reasons arising from the evidence presented at trial). Baker has failed to establish that Wheat provided IAAC in this regard.

H. Stipulation of Evidence

[22] Baker contends that Wheat was ineffective by failing to claim that the trial court abused its discretion by allowing the evidentiary stipulation between Baker and the State, which involved testimony that would have allegedly otherwise been inadmissible. "An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court or when the court misinterprets the law." *Johnson v. State*, 36 N.E.3d 1130, 1133 (Ind. Ct. App. 2015), *trans. denied*. We cannot conclude that the trial court abused its discretion by allowing an evidentiary stipulation that was a clear agreement by both parties.

I. Plea Offer

[23] Baker contends that Wheat was ineffective for failing to claim that Baker's trial counsel provided ineffective assistance by not communicating to him alleged plea offers from the State. Baker specifically contends that he declined a plea offer during trial because he was inadequately informed by counsel and that counsel never disclosed another plea offer. At Baker's PCR hearing, the post-conviction court asked Baker if he accepted the plea that was offered during trial, to which Baker responded, "On advice of my counsel I didn't, no." Appellant's App. Vol. II p. 191. Moreover, Baker presented another plea offer he alleged to have discovered in his file sent by the public defender's office, claiming it was never disclosed to him by trial counsel. However, the plea agreement was neither signed nor dated by the prosecuting attorney, and Baker presented no testimony from his trial counsel on the matter. "When counsel is not called as a witness to testify in support of a petitioner's arguments, the post-conviction court may infer that counsel would not have corroborated the petitioner's allegations." *Culvahouse*, 819 N.E.2d at 863. The post-conviction court denied Baker relief on these claims, and Baker's arguments on appeal are merely an invitation for us to reweigh the evidence, which we will not do. *Mahone v. State*, 742 N.E.2d 982, 984 (Ind. Ct. App. 2001), *trans. denied*. Baker has failed to establish that Wheat was ineffective in this regard.

J. Rehearing or Writ of Certiorari

[24] Baker contends that Wheat was ineffective for failing to seek a rehearing from the Indiana Supreme Court or a writ of *certiorari* from the United States

Supreme Court on the Indiana Supreme Court's ruling on his jury unanimity claim. Baker does not explain why a request for rehearing or *certiorari* would have been granted, let alone establish that he would have achieved a ruling any more favorable than that handed down by the Indiana Supreme Court on transfer. Moreover, Baker has not established that failing to seek rehearing or *certiorari* falls below the objective standard of reasonableness based on prevailing professional norms, given that a majority of lawyers never even seek transfer. *See Yerden v. State*, 682 N.E.2d 1283, 1286 (Ind. Ct. App. 1997) (noting that "[a] healthy majority of lawyers who lose before the Indiana Court of Appeals, for example, elect not to seek transfer. On the face of it, without any explanation, a lawyer who does not petition for transfer has simply performed according to the statistical norm."). Baker has failed to establish that Wheat's representation constituted IAAC.

Conclusion

[25] We conclude that Baker's sufficiency of the evidence claim is barred by waiver. We also find no merit in Baker's various IAAC claims. Baker has failed to establish that the post-conviction court erred by denying him PCR.

[26] The judgment of the post-conviction court is affirmed.

Bailey, J., and Brown, J., concur.

STATE OF INDIANA	)	IN DEKALB SUPERIOR COURT
COUNTY OF LAGRANGE	)	CRIMINAL DIVISION
ELMER D. BAKER	)	
	)	
v.	)	CAUSE NO. 17D01-1604-PC-00003
	)	
STATE OF INDIANA	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW DENYING POST-CONVICTION RELIEF

As required by Indiana Post-Conviction Rule 1(6), and after conducting an evidentiary hearing and reviewing the parties' proposed findings, the Court now enters its specific Findings of Fact and Conclusions of Law on all issues raised in this Cause.

FINDINGS OF FACT

1. On, July 3, 2006 the Petitioner was formally charged in 17D01-0607-FA-00007 with
   a. Count I: Child Molesting, a Class A Felony
   b. Count I: Habitual Offender
   c. Count II: Child Molesting, a Class A Felony
   d. Count II: Habitual Offender
2. A three (3) day jury trial was held on June 5, 6 & 7, 2007 in the DeKalb Superior Court, located in Auburn, Indiana. The Jury was unable to reach a decision and a mistrial was declared.
3. A third Count, Count III: Child Molesting a Class C Felony and another Count of being a Habitual Offender was filed, and granted.
4. A Jury Trial was held on August 18-22, 2008. The Defendant was found guilty of:
   a. Count I: Child Molesting, a Class A Felony
   b. Count II: Child Molesting, a Class A Felony
   c. Count III: Child Molesting, a Class C Felony
5. After waiving a Jury, the Court found the Defendant guilty of:
   a. Habitual Offender, as alleged in Count I
   b. Habitual Offender, as alleged in Count II
   c. Habitual Offender, as alleged in Count III
6. On January 30, 2009 the Defendant was sentenced to:
   a. Count I: 35 five years IDOC, none suspended
   b. Count II: 35 years IDOC, none suspended
   c. Count III: 6 years IDOC, none suspended
   d. Count I: Habitual Offender, 30 years IDOC

   Sentences to be served consecutively.

7. The Petitioner appealed his conviction to the Indiana Court of Appeals which affirmed the Trial Court in Baker v. State, 922 N.E.2d 723 (Ind. App. 2010). The Indiana Court of Appeals, on rehearing, affirmed the decision in Baker v. State, 928 N.E.2d 890 (Ind. App. 2010).

8. The Indiana Supreme Court affirmed the judgment of the trial court in Baker v. State, 948 N.E.2d 1169 (Ind. 2011).

9. The facts and procedural history used in the appellate cases are found at:

1. *Baker v. State*, 922 N.E.2d 723 (Ind. App. 2010) at 726-727
2. *Baker v. State*, 928 N.E.2d 890 (Ind. App. 2010) at 891.

10. The facts supporting Elmer Dean Baker's conviction as found by the Indiana Supreme Court are found at:

1. *Baker v. State*, 948 N.E.2d 1169 (Ind. 2011) at 1171-1173.

11. On December 12, 2017 the Court held an evidentiary hearing on the Petitioner's Amended Petition for Post-Conviction Relief. Elmer D. Baker elected to represent himself pro se. Petitioner's appellate trial counsel, Latrielle Wheat, testified. The Court has ordered a transcript of her testimony which has become part of the record.

12. The record for this case consists of: the transcript together with exhibits and arguments for the jury trial. The Court granted the State's request to take judicial notice of its file in case 17D01-0607-FA-00007. This trial judge does not have a copy of the trial transcript and will refer to the record found on a DVD sent with the transcript. All reference to location of testimony will be in the form of DVD 2008-filename-#.

13. This Court now finds Latrielle Wheat to be an expert in appellate law. She has worked 3 years in the Indiana Attorney General's Office in the appellate division. She has filed 30-40 appellate briefs. Her appellate training resulted in a strategy to present during direct appeal to the Court of Appeals, only the strongest issues.

14. Appellate Counsel, Latrielle Wheat, presented in direct appeal the following claims:

a. Trial Court Counsel was ineffective by entering into a stipulation.

b. Trial Court Counsel was ineffective by failing to hire an expert witness.

c. Trial Court Counsel was ineffective by not objecting to jury instructions at the time they were given.

d. Trial Court Counsel was ineffective by not objecting to jury instructions, verdict form or the verdicts.

15. This Court finds that trial counsel, David G. Pappas provided competent and effective representation. This is based on:

The extensive pre-trial arguments are located at DVD 2008 –Baker Pre-Trial 1-58. Trial Counsel presented a series of detailed motions, including: a Motion for Additional Security, Motion for Presentation of Exhibits used in the first Baker Trial, arguments to consider allowing a Deposition of State medical expert versus live testimony. Also discussed was the rights of the informant of the alleged molest to the Indiana Department of Child Services, contents of the State's six supplemental discovery

responses. Also was, defense motions for a Test Jury to determine prejudice from pre-trial publicity, Motion for Separation of Witnesses who were adults and parents of the minor child victims and the need to sequester a jury in a child molesting case with multiple victims. Also raised was a Motion for severance of counts, Defense Motion to utilize TR 412 evidence, Defense Notice of Intent to Use other Bad Acts of Evidence, State's Motion to Use Other Bad Acts, Defendant's Motion to Introduce Rape Shield Evidence, State's Motion in Limine, and a Stipulation regarding the admissibility of evidence. These discussions show defense counsel was competent and prepared for trial.

The Trial Judge Kirk Carpenter found that Mr. Pappas "was a competent defense counsel and he has a business practice and is a popular attorney". DVD 2008 Baker Pre-Trial 54.

This Court also finds Defense Counsel had adequate time to prepare for trial, develop a thorough trial strategy and was an effective avdovate.

CONCLUSIONS OF LAW

16. The Petitioner raised eight (8) issues in his Amended Petition for Post Conviction Relief. Petitioner's Verified Memorandum of Law presents his claimed error in 18 arguments. This Court will address his issues as they are developed in the Memorandum of Law.

1. *Standard Of Review:*

Post-Conviction relief is a collateral attack on the validity of a criminal conviction, and the petitioner carries the burden of proof. It has long been the rule that the post-conviction procedure is not a "super-appeal," and not all issues are available. *Timberlake, supra.* "If an issue was known and available, but not raised on direct appeal, it is waived. It is also black letter law that, "A petitioner for post-conviction relief cannot escape the effect of claim preclusion merely by using different language to phrase an issue and define an alleged error." *Ben-Yisrayl v. State*, 738 N.E.2d 253, 258 (Ind. 2000). *Also see e.g. Morris v. State*, 466 N.E.2d 13 (Ind., 1984). Moreover, courts cannot address an issue where it is merely raised as a convenient vehicle to present arguments that have been waived. See *Holt v. State*, 656 N.E.2d 495, 497 (Ind. Ct. App. 1995), *trans. denied.*

2. *Ineffective Assistance of Appellate Counsel*

Petitioner's Argument I

Claim: Appellate Counsel was ineffective by raising ineffective assistance of Trial Counsel on direct Appeal.

The Appellate Court resolved the issue of presenting alleged Trial Court Counsel error in *Baker v. State*, 922 N.E.2d 723 (Ind. App. 2010), at 729-732.

Considering the additional testimony and affidavits presented by Baker at the Post Conviction hearing, this Court finds no error. If an issue of attorney incompetency was raised on appeal, and decided adversely, it is res judicata to consider the issue again. If an issue is known and available, but not raised on direct appeal, it is waived. *Timberlake v. State*, 753 N.E.2d 591 (Ind. 2001).

An experienced appellate counsel was obtained by Petitioner after she was employed for three years in the Appellate division of the Indiana Attorney General's Office. After a complete review

of the issues and facts she chose to present to the Court of Appeals, this Court finds no error. Appellate Counsel was not ineffective. *Garrett v. State*, 922 N.E.2 710 (Ind. 2013).

Argument II

Claim: Appellate Counsel Error regarding the issue of improper juror voir dire.

Petitioner, claims that his appellate counsel was ineffective by not raising this issue, to his detriment.

The two prong standard for evaluating the effective assistance of Trial Counsel, was first announced in *Strickland v. Washington*, 466 U.S. 668, 80 L.E Ed 2d 674, 104 S. Ct. 2052 (1984). This standard has been applied to claims of ineffective assistance of appellate counsel. *Lowery v. State*, 640 N.E. 2d 1031, 1048 (Ind. 1994), *Henley v. State*, 881 N.E. 2d 639. There are three categories of counsel ineffectiveness of claims. Lissa Griffin, *The Right to Effective Assistance Appellate Counsel*, 97 W. Va. L. Rev. 1, 21-22 (1994). The first and the most serious type category would be denying Defendant access to appeal entirely. The second category of ineffective assistance of appellate claim, involves Appellate Counsel who did not raise issue which the convict later argues should have been raised. "Ineffectiveness is very rarely found in these cases." Lissa Griffin, *The Right to Effective Assistance Appellate Counsel*, 97 W. Va. L. Rev. 1, 21-22 (1994) – this in essence involves a waiver of issues. Lissa Griffin, *The Right to Effective Assistance Appellate Counsel*, 97 W. Va. L. Rev. 1, 25 (1994). The third category of appellate ineffectiveness claims allege that counsel's presentation of particular issues were inadequately presented in some way. Lissa Griffin, *The Right to Effective Assistance Appellate Counsel*, 97 W. Va. L. Rev. 1, 23 (1994). Cited in *Bigler v. State*, 690 N.E. 2d 188, 1997 Ind. LEXIS 231 and *Henley v. State*, 881 N.E 2d 639, 2008 Ind. LEXIS 170.

Petitioner alleges the Trial Counsel errored during the jury trial held August 18-22, 2008. Before trial one day, the DeKalb Prosecuting Attorney volunteered to the Trial Judge and opposing Counsel that her husband inadvertently spoke to a juror after the previous day of trial. The Trial Judge conducted a hearing on the record.

Transcript 903-906, DVD 2008 Baker 2d 214-219

Present for the hearing before the Judge Carpenter was Prosecutor Winebrenner, the Defendant and Petitioner's Trial Counsel, Daniel G. Pappas (Pappas). Pappas is now Magistrate for Allen County Superior Court. Pappas was familiar with the reputation of the Prosecuting Attorney and family. Counsel made a trial strategy and waived the right to pursue an in camera interview with the Juror.

Trial Counsel Pappas' strategy ultimately lead to a conviction. This does not mean that he was ineffective.

Trial Counsel was presenting the Petitioner in the best possible light when he waived the in camera interview with the juror, and not make the timely objection. Thus he waived the objection. Trial Counsel error is not ineffective. *Lewis v. State*, 511 N.E. 2 1054 (Ind. 1987). *VanMartin v. State*, 535 N.E.2 493 (Ind. 1989).

In preparation for the post conviction hearing, Petitioner had requested to send interrogatories to the juror in question. Petitioner requested that this juror be subpoenaed to testify at the Post

Conviction hearing. The PCR Judge denied both requests finding this issue was waived by trial court counsel. Also, due to the long delays, laches has occurred.

This issue was not presented by Appellate Court Counsel for direct appeal. The issue was waived by Appellate Court Counsel.

Petitioner claims incompetence even though he sites and briefs the point that appellate counsel should select for argument the strongest issues, and omit the rest. *Jones v. Barnes*, 463 U.S. 745, 751 – 52 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983).

Issue III:

Claim: Petitioner maintains Appellate Counsel performed ineffective assistance, and the State failed to prove that Count III, took place within the statute of limitation period.

Petitioner alleges ineffective counsel by Tracy Nelson (appointed counsel from Indiana Public Defender's Office for the original PCR Petition). (page 33 of his Verified Memorandum of Law). She declared in a letter this issue had no merit. This issue was denied by the Indiana Court of Appeals in *Baker v. State*, 922 N.E.2d 723 (Ind. App. 2010). Motion denied.

Argument IV:

Claim: Petitioner claims that Appellate Counsel was ineffective for not presenting a possible variance between the charging information and proof presented at trial.

Petitioner's argument is discredited by the facts, procedural history, findings and logic found by the Indiana Court of Appeals in *Baker v. State*, 922 N.E.2d 723 (Ind. App. 2010), pages 729-730.

Secondly, Petitioner alleges trial and appellate counsel provided ineffective assistance by failing to argue the Court's instructions were inadequate. A review of all of the jury instructions occurred in *Baker v. State*, 922 N.E.2d 723 (Ind. App. 2010) at 729-730. Trial Counsel for the Petitioner did not object to the jury instructions at the time they were given, the Court of Appeals found this resulted in waiver of the issue. *Baker v. State*, 729 N.E.2d 723 at 729-730, and *Blancherd v. State*, 802 N.E.2d 14, 32 (Ind. Ct. App. 2004).

Argument V:

Claim: Petitioner alleges Appellate Counsel was ineffective by not raising his "plea of guilty to being a habitual offender" was not done in a knowing, informed, intelligent or voluntary manner..

The record of proceedings for the Habitual Offender charge begin on DVD 2008 Baker 2e 94-134. Present was the Court, Mrs. Weinbrenner, Prosecuting Attorney, Defense Counsel, Mr. Pappas and the Petitioner. The Jury had just pronounced the Defendant guilty of Count I, Count 2 and Count 3 and each juror had been polled and affirmed the judgment of guilt. DVD 2008 Baker 2e 91-94. The official Court record does not state that the Defendant was present but this Court finds so as he does not claim he was not. Defense Counsel, Pappas, moved to dismiss the Phase II of the Habitual Criminal allegations for being unconstitutionally vague. Discussions on page 62-71. The Trial Court denied the Defendant's Motion to Dismiss DVD 2008 Baker 2e 95-107.

Mr. Pappas waived a jury as to phase two of the proceedings DVD 2008 Baker 2e 107-108. The State presented its case. The Court adjudged the Defendant to be a Habitual Offender. Judgement was entered on Count III. Defendant was taken into custody, a Pre-Sentence Report was Ordered

and a Sentencing date was set. DVD 2008 Baker 2e 109-131. The Indiana Court of Appeals found that Petitioner waived his right to trial by jury on the habitual offender count in *Baker v. State*, 922 N.E.2d 723 (Ind. App. 2010) at p. 727.

This Court finds the trial tactics of defense counsel were a major reason for the waiver of Defendant's rights to trial by jury on the habitual offender account. The tactics chosen were in an attempt to lessen the severity of the actions the Petitioner was found to have committed against his granddaughter and other victims at trial. Motion denied.

Argument VI:

Claim: Petitioner alleges Appellate Court committed ineffective assistance by failing to challenge the sentence in the motion to correct errors portion of the Post trial proceedings.

Petitioner alleges that trial Court was too harsh in sentencing. The Court is unconvinced that the trial court improperly waived the aggravators and mitigators and came to an improper decision.

This argument is denied outright as the decision was in the discretion of the Trial Court.

Argument VII:

Claim: Petitioner alleges that appellate and trial counsel were ineffective by not objecting to nor arguing against alleged improper vouching opinion testimony by the Prosecutor during the course of the trial.

This Court finds that there was corroborated trial testimony regarding the Defendant's behavior. The testimony provided overwhelming proof of his guilt.

There was considerable testimony from each of the three victims, all minors. Also, there was also cooberating evidence by adult witnesses.

1. Wendy Baker (mother of victim) DVD 2008 Baker Comp Part I 701-743.

2. Brandy Klemzcak (neighbor of victim) DVD 2008 Baker Comp Part I, 964-984.

3. Lisa Huff (mother of victim) DVD 2008 Baker Comp Part I, 985-1013.

Any claimed error was harmless. *Williams v. State*, 43 N.E.3d 578 (Ind. 2015). Motion is Denied.

Argument VIII:

Claims: Respondent alleges appellate counsel committed ineffective representation by failing to properly handle alleged prejudicial pre-trial publicity.

The Indiana standard to determine if a trial court errored by denying a motion for change of venue due to pre-trial publicity is outlined in *Specht v. State*, 734 NE2d 239 (Ind. 2000). In this case the trial court and trial counsel had extensive conversations about pre trial motions DVD 2008 Baker Pretrial 1-85. Defense moved for a test jury which was denied by the Trial Court. DVD 2008 Baker Pretrial 24-37.

During voir dire, all jurors were questioned on this point. The voir dire was extensive and lasted two (2) days. DVD 2008 Baker Comp Part I 3-356. The trial judge was satisfied the necessary protections in this case were received by the Petitioner.

The claim of error in argument VIII is denied.

Argument IX:

Claim: Petitioner alleges the Prosecuting attorney gave personal analogies of the beyond a reasonable doubt standard, causing him alleged harm. He claims the appellate counsel was ineffective when she failed to raise on appeal an alleged error on direct appeal.

Petitioner alleged Trial Counsel, Pappas errored by not objecting to Prosecutor's definition of beyond a reasonable doubt DVD 2008 Baker 2e 18. By choosing not to object, trial counsel reasonably chose a strategy which cast Defendant in the most favorable light.

Petitioner failed to prove that trial counsel was ineffective, as defined by *Saylor v. State*, 765 N.E.2d 525 (Ind. 2002) at 549.

Petitioner alleges defense counsel errored during his closing arguments by defining reasonable doubt. His discussion of the evidence was long. DVD 2008 Baker 2e 26-58. Trial counsel used an analogy that reasonable doubt was like "sending your kids out on the lake on ice, the first ice of the fall." DVD 2008 Baker 2e 57.

In Northeast Indiana frozen lakes in the winter is a reality. Many people live on or near a lake or a pond. Trial Counsel's strategy was an attempt to befriend the jurors and draw similarities between their lives and the Defendant's.

Appellate Counsel made no error by failing to point this issue to the Court of Appeals in direct appeal.

Also, Judge Carpenter read the standard final instructions regarding the definition of beyond a reasonable doubt. DVD 2008 Baker 2e 78-79. The Trial Court's instructions cured any possible error committed during the trial.

Petitioner claims he was denied affective assistance of appellate counsel on direct appeal. As the Indiana Supreme Court has noted, experienced appellate advocates must winnow out arguments on appeal and focus on one central issue, or at most a few conditions." *Bieghler v. State*, 690 N.E.2d 188, at 193-194 (*Jones v. Barnes*, 463 U.S. 745, 751-752, 77 L. Ed. 2d 987, 103 S. Ct. 3300 (1983).

Motion denied.

Argument X:

Claim: Petitioner alleges that appellate counsel errored when she did not raise on Appeal that the Trial Counsel signed an evidence stipulation

This claim was addressed by the Indiana Court of Appeals in *Baker v. State*, 922 N.E.2d 723 (Ind. App. 2010). The Court of Appeals found that the record indicates that Baker's trial counsel used the stipulations as part of a strategy to challenge the victims during cross examination. Trial Counsel was reasonable. The trial strategy of appellate counsel was reasonable. She "winnowed out the weaker arguments" on appeal. This was recommended in *Bieghler*.

Motion is denied.

Argument XI:

Claim: Petitioner claims that Appellate Counsel was ineffective regarding the admission in trial of two evidentiary stipulation. The Indiana Court of Appeals found against this Argument in *Baker v. State*, 922 N.E.2d 723 (Ind. App. 2010).

Trial Counsel's opening statements evidenced a strategy to use the testimony of the three minor victims as a tactic to attack their credibility. DVD Baker Comp Part 1, 393-401.

Appellate Counsel and Trial Counsel committed no error.

Petitioner's argument XI is denied.

Argument XII:

Claim: Petitioner claims appellate counsel was ineffective by failing to raise trial counsel did not move to sever the Counts for separate trials.

Using the logic expressed, in argument XI above, this Court finds that trial court's behavior was part of a trial strategy. Trial Counsel's strategy was reasonable. Appellate counsel committed no error.

Motion denied.

Argument XIII:

Claim: Petitioner alleges that Appellate Counsel was ineffective regarding the expert witness testimony of the trial.

This Court finds that trial court counsel developed a strategy that included presentations of evidence rebutting the state's trial witnesses. Trial Counsel's opening statement referenced the expected testimony of the State's expert witness. Counsel clearly intended to discredit during cross examination three minor victim's testimony. DVD 2008 Baker Comp Part I, 400-401 Appellate Counsel committed no error.

Further, the Indiana Court of Appeals resolved this issue unfavorably to the Petitioner in *Baker v. State*, 922 N.E.2d 723 (Ind. App. 2010) 733-734.

Petitioner's claimed error is denied.

Argument XIV:

Claim: Petitioner alleges Appellate Counsel was ineffective by not raising the allegation that trial counsel did not strongly and clearly advise the Defendant to accept a plea agreement.

Petitioner chose not to accept a plea agreement and suffered the consequences. Trial Counsel's strategy of going forward with a jury trial proved wrong.

Petitioner's motion is denied.

Argument XV:

Claim: Petitioner alleges Appellate Counsel was ineffective by not pointing out alleged Prosecutor misconduct.

The Court finds that trial court instructed the jury in preliminary and final instructions as to the sources of evidence to consider. Baker disk 2e, screens 52 to 56. The trial court's efforts cured any alleged error in this area. DVD Baker Comp Part I, 369, DVD 2008 Baker 2e, 72-90.

Petitioner's claim in argument XV is denied.

Argument XVI:

Claim: Petitioner alleges appellate counsel was ineffective by not petitioning for a rehearing by the Indiana Supreme Court and creatively arguing that he was denied rights under Federal and State equal protection laws.

There is overwhelming testimony to convict the Petitioner of multiple offenses. He may have been fortunate the Prosecuting Attorney did not file additional counts.

The Appellate Counsel's selective arguments regarding jury instructions in child molest cases with multiple counts and multiple victims resulted in new law being created in Indiana. *Baker v. State*, 948 N.E.2d 1169 (Ind. 2011). She was not prescient of all possible issues, lacking seven years of reflective thought, however, she is not ineffective.

This Court finds that appellate counsel is competent.

Petitioner's Argument XVI is denied.

Argument XVII:

Claim: Petitioner alleges Appellate Counsel was ineffective by not arguing the Indiana Supreme Court decision was an "unreasonable application of clearly established law".

The Petitioner's trial attorney was thoroughly familiar with the facts of the case and was highly competent.

Petitioner's trial attorney tactically allowed certain evidence to be introduced by reason of the calculated evidence stipulation. Together they took the calculated risk of trial. Petitioner now raises issue with the State of the record and how it contains uncertainty in the evidence. There was overwhelming testimony of guilt on each of the counts for each of the victims. There is a solid basis for a finding of guilt.

The complained of issue is waived.

Petitioner's Argument is denied.

Petitioner's Petition for Post Conviction Relief is denied.

SO FOUND AND ORDERED THIS 16 DAY OF JANUARY, 2018.

J. Scott VanDerbeck, Special Judge
DeKalb Superior Court

VERIFICATION

I, Elmer Dean Baker, Petitioner, do hereby verify under the penalties for perjury that the contents in Appendix's A and B are true and accurate copies of the records in the case at bar.

Elmer Dean Baker

Elmer Dean Baker, Petitioner Pro Se