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IN THE
COURT OF APPEALS OF INDIANA

TOBY E. VAUTAW,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 85A02-0906-PC-548
	)	
STATE OF INDIANA,	)	
	)	
Appellee.	)	

APPEAL FROM THE WABASH CIRCUIT COURT
The Honorable Robert R. McCallen, III, Judge
Cause No. 85C01-0411-FA-135

February 9, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Toby Vautaw appeals the denial of his petition for post-conviction relief.

We affirm.[1]

ISSUE

Whether Vautaw received ineffective assistance of trial counsel.

FACTS

The relevant facts are set forth in this Court's decision in *Vautaw v. State*, No. 85A02-0706-CR-469, slip op. at 1-2 (Ind. Ct. App. Dec. 19, 2007), which reads as follows:

> L.N., born December 21, 1987, is Vautaw's nephew. Because L.N.'s family was extremely dysfunctional, L.N. lived with various relatives and friends throughout his childhood. Around 1997 or 1998, L.N.'s two younger brothers lived with Vautaw and his wife, Shelly, in Urbana, Indiana, and L.N. visited and spent the night "pretty often". Vautaw was the only "father figure" in L.N.'s life. While L.N. stayed at Vautaw's Urbana home, Vautaw inappropriately touched him on several occasions. Vautaw would take L.N. into his bedroom, lay him on the bed, undress him, and then "grind" on L.N. and fondle him. On other occasions, L.N. would be asleep on the couch and Vautaw would kneel beside him and perform oral sex on him. L.N. testified that Vautaw performed oral sex on him "pretty regularly", estimating that the act occurred between thirty and forty times. Vautaw would tell L.N. that "if you love your uncle, you won't tell nobody." L.N., who told Vautaw numerous times to "stop" and/or "quit", was humiliated and embarrassed about what Vautaw was doing. Despite feeling this way, L.N. continued to visit Vautaw's home to see his brothers and because "it was better to be around [Vautaw] then [sic] to be at home and be . . . beat . . . unmercifully" by his abusive mother.

[1] On January 5, 2009, the State filed a motion to strike Vautaw's supplemental appendix, arguing that it contains documents not admitted into evidence during the post-conviction hearing. We hereby deny the State's motion to strike.

After a couple of years, Vautaw, Shelly, and one of L.N.'s brothers moved to a trailer in Lakeview. L.N., who was thirteen or fourteen at the time, eventually moved into the trailer as well and lived there for approximately three or four months. During that time, Vautaw continued fondling L.N. and performing oral sex on him. L.N. testified that Vautaw would grab his penis and "start to jack [him] off", and L.N. would tell him to "quit, stop." Vautaw would tell L.N. to be quiet and that if L.N. loved him, he would let him continue.

When Vautaw and Shelly moved to a third home on Ross Avenue, L.N. moved in with them. Vautaw inappropriately touched L.N. at the Ross Avenue home by continuing to fondle and perform oral sex on L.N. L.N. estimated that Vautaw performed oral sex on him more than twenty times while he was staying at the home on Ross Avenue. Vautaw would also ask L.N. to perform oral sex on him, but L.N. refused. On occasion, Vautaw would have L.N. masturbate him to ejaculation. L.N. continued to protest Vautaw's conduct, telling him numerous times, "Stop. Quit. Do you have to do this? I don't . . . like this". Eventually, L.N. left Vautaw's home and moved in with another uncle, Vautaw's half-brother.

L.N. testified that he waited over a year to tell anyone what had occurred because he was embarrassed and humiliated. Prior to opening up about the abuse, L.N. would deny that Vautaw had molested him even when directly confronted. In the fall of 2004, L.N. finally disclosed Vautaw's molestation to his girlfriend and her mother, and shortly thereafter, to his grandmother. L.N. then disclosed the offenses to the police.

On November 9, 2004, the State charged Vautaw under Count I with child molesting as a class A felony and under Count II with sexual misconduct with a minor as a class B felony. Count I related to the time period prior to December 21, 2001, when L.N. was less than fourteen years of age. Count II related to the time period between December 21, 2001 and December 20, 2003, when L.N. was between the ages of fourteen and sixteen.

. . . .

Just days prior to trial, Vautaw filed a supplemental answer to discovery identifying for the first time several defense witnesses. The State objected to the late-disclosed witnesses, and the following day, the court

> held a hearing and directed Vautaw to make all prospective witnesses available to the prosecutor, taking under advisement whether to exclude the witnesses. At that hearing, Vautaw orally disclosed for the first time his intention to call his wife, Shelly, as a defense witness, and the State objected. The trial court ordered that Shelly be excluded as a witness for not having been previously disclosed.
>
> . . . .
>
> During trial, the trial court reconsidered its ruling to exclude Shelly as a witness and, per Vautaw's request, permitted Shelly to testify for the limited purpose of explaining her sleeping habits—specifically, that she slept with her bedroom door open, which testimony was contrary to L.N.'s testimony. Vautaw did not make an offer of proof as to other matters that Shelly would have testified to that were excluded by limiting Shelly's testimony.

(Internal citations omitted). The jury found Vautaw guilty as charged. The trial court sentenced Vautaw to an aggregate sentence of forty years.

Vautaw appealed, arguing, *inter alia*, that "he was denied a fair trial and the right to present witnesses in his favor when the trial court limited Shelly's testimony to one question, thereby effectively excluding her as a witness on his behalf."[2] *Id.* at 2. Finding that Vautaw failed to "make an offer of proof as to other matters that Shelly would have testified to that were excluded by limiting Shelly's testimony," this court held that

[2] Vautaw also asserted that the trial court erred in not declaring a mistrial after L.N. "made two generalized references to prior 'accusations' in violation of a motion in limine"; "the statute of limitation for sexual misconduct with a minor violate[s] the privileges and immunities clause of the Indiana Constitution"; and the evidence was insufficient to support his convictions. *Id.* at 1.

Vautaw waived appellate review of this issue.[3] *Id.* at 2. This court affirmed Vautaw's convictions on December 19, 2007.

Vautaw, by counsel, filed a petition for post-conviction relief on August 11, 2008. He asserted in his petition that his trial counsel was ineffective for 1) failing to "effectively cross examine the state's principal witness at trial"; 2) failing to list Shelly as a witness for the defense; and 3) repeatedly continuing the trial. (App. 16). The post-conviction court held a hearing on Vautaw's petition on March 9, 2009, and April 15, 2009. On June 3, 2009, the post-conviction court entered its findings of fact and conclusions of law, denying Vautaw's petition.

Additional facts will be provided as necessary.

DECISION

A post-conviction petitioner bears the burden of establishing his claims by a preponderance of the evidence. *Lindsey v. State*, 888 N.E.2d 319, 322 (Ind. Ct. App. 2008), *trans. denied*. An appeal from the denial of post-conviction relief constitutes an appeal from a negative judgment. *Id.* Thus, to prevail on appeal from the denial of post-conviction relief, the petitioner must show that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite to that reached by the post-conviction court. *Id.* In the post-conviction setting, conclusions of law receive no deference on appeal. *Id.* As to factual matters, the reviewing court examines only the probative evidence and

[3] Specifically, Vautaw asserted that Shelly also would have testified to "'the frequency with which they [she and Vautaw] slept together as husband and wife' and 'their sexual relationship.'" Slip op. at 2 n.3 (citation omitted).

reasonable inferences that support the post-conviction court's determination and does not reweigh the evidence or judge the credibility of the witnesses. *Id.*

Vautaw contends that his trial counsel was ineffective. Specifically, he argues that trial counsel failed to do the following: 1) list Vautaw's wife, Shelly, as a witness at trial and then make an offer of proof as to matters to which she would have testified had the trial court not limited her testimony; 2) resume L.N.'s deposition; 3) offer L.N.'s videotaped statement into evidence; 4) object to testimony that Vautaw "furnished a pornographic videotape" to L.N.; 5) introduce Vautaw's work records into evidence; and 6) depose L.N.'s mother and call her to testify regarding L.N.'s accusations that she abused him.[4] Vautaw's Br. at 9.

> To establish a post-conviction claim alleging a violation of the Sixth Amendment right to effective assistance of counsel, a defendant must establish before the post-conviction court the two components set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). First, a defendant must show that counsel's performance was deficient. This requires a showing that counsel's representation fell below an objective standard of reasonableness and that counsel made errors so serious that counsel was not functioning as "counsel" guaranteed to the defendant by the Sixth Amendment. Second, a defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair

[4] Regarding the last three issues, the State argues that Vautaw has waived these issues for appellate review because he did not raise the issues in his petition for post-conviction relief. *See Emerson v. State*, 812 N.E.2d 1090, 1098-99 ("Issues not raised in a petition for post-conviction relief may not be raised on appeal."); *see also* Ind. Post-Conviction Rule 1(3)(b) ("The petition shall be made under oath and the petitioner shall verify . . . the fact that he has included every ground for relief . . . known to the petitioner."). Any waiver notwithstanding, we shall address these issues on the merits. In so doing, we shall review Vautaw's claims de novo as the post-conviction court did not enter specific findings of fact and conclusions of law as to these three issues. *See Allen v. State*, 749 N.E.2d 1158, 1170 (Ind. 2001) (holding that where the post-conviction court fails to enter specific findings of fact and conclusions of law as required by Indiana Post-Conviction Rule 1(6), we shall review the petitioner's claims de novo), *cert. denied*, 122 S. Ct. 1925 (2002) .

> trial, meaning a trial whose result is reliable. To establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is one that is sufficient to undermine confidence in the outcome. Further, counsel's performance is presumed effective, and a defendant must offer strong and convincing evidence to overcome this presumption.

Overstreet v. State, 877 N.E.2d 144, 151-52 (Ind. 2007) (citations omitted), *cert. denied*, 129 S. Ct. 458 (2008). "[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." *Strickland*, 466 U.S. at 697.

1. Exclusion of Witness and Failure to Make an Offer of Proof

Vautaw argues that his trial counsel rendered ineffective assistance by failing to include Shelly on his witness list and then failing to ensure that a proper record was made regarding the trial court's exclusion of her as a witness. He maintains that Shelly could have testified regarding the following: "the layout of the home she shared with" Vautaw while L.N. lived them; her and Vautaw's work schedules, which "would establish dates and times when [Vautaw] was not at home and thus [sic] able to molest [L.N.]"; and "that when [L.N.] learned that his brothers were accusing [Vautaw] of molesting them," he denied that Vautaw "had ever touched him or had ever done such a thing." Vautaw's Br.

at 12. Thus, he asserts that "Shelly's testimony would have directly refuted and rebutted the testimony of [L.N.] at trial."[5] *Id.*

Here, L.N. testified that between 1998 and 2003, Vautaw repeatedly molested him. L.N., however, did not testify as to specific dates or times when the molestation occurred. As to Shelly's whereabouts during the molestation, L.N. testified that he did not "recall where [she] was" and that she "worked quite often[.]" (Vautaw's Ex. E at 41, 42). He further testified that Shelly worked the day shift. He also testified that if anyone was home at the time of the molestation, they would be "asleep" or "in the other room," "ensur[ing] that nobody was around." *Id.* at 47, 93. L.N. admitted that he had denied being molested; did not tell anyone "right away" about the molestation; and did not report the molestation until October of 2004. *Id.* at 60.

Steven Konz, a mental health counselor, testified that he began counseling L.N. in January of 2004, after L.N.'s probation officer referred him to Konz. Konz confirmed that L.N. denied any sexual abuse during his initial assessment. Ronald Coleman, a family friend and private detective, also testified that in the fall of 2004, L.N. denied being molested by Vautaw. Patricia Tucker, L.N.'s grandmother, testified that when asked whether Vautaw had molested him, L.N. replied "no." *Id.* at 139. She opined that

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[5] In his reply brief, Vautaw contends that "Shelly's testimony could have supplied motive, directly impacting the jury's decision." Reply Br. at 1. Other than a vague assertion raised in his appellant's brief that "Shelly could have testified that [L.N.] was afraid that his brothers would 'get in trouble' when it was discovered that their allegations" that Vautaw had molested them "were untrue," Vautaw presented no cogent argument that Shelly's testimony could have supplied a motive. Vautaw's Br. at 4. Thus, this issue is waived. *See French v. State*, 778 N.E.2d 816, 826 (Ind. 2002) (holding that grounds for error framed for the first time in a reply brief are waived).

L.N. does not know "how to tell the truth" and had "been in several different lies." *Id.* at 140.

Robert Shrock, L.N.'s stepfather, testified that he lived with Vautaw, Shelly, and L.N. for a period of time in several residences and gave extensive testimony regarding the residences' floor plans. He further testified that when he asked L.N. whether Vautaw had molested him, L.N. "said he didn't touch him." *Id.* at 157.

Although Vautaw's trial counsel was not allowed to elicit certain testimony from Shelly and did not make an offer of proof, he cross-examined L.N. and presented several witnesses on Vautaw's behalf. L.N. admitted that he had denied being molested; and several defense witnesses verified this. Trial counsel also elicited testimony regarding the floor plans of Vautaw's residences.

Given the testimony presented, e.g., the numerous incidents of sexual molestation spanning several years in at least three different residences, during times when Vautaw and Shelly worked different shifts, we are unable to conclude that, even if Shelly had been called to testify, the result of the proceeding would have been different. We therefore find that Vautaw has not demonstrated that he was prejudiced by his trial counsel's omission of Shelly from the witness list and subsequent failure to make an offer of proof.

2. <u>L.N.'s Deposition</u>

Vautaw also asserts that his trial counsel was ineffective for failing to conduct pre-trial discovery by not taking an additional deposition of L.N. Vautaw claims that trial

counsel "never finished [L.N.]'s deposition." Vautaw's Br. at 8. He argues that further deposing L.N. would have "pin[ned] [L.N.] down as to dates, times and places. In turn, this information would have made the cross examination of [L.N.], at trial, more effective." *Id.* at 15.

The record reveals that trial counsel deposed L.N. on April 19, 2007. During the deposition, L.N. testified that Vautaw had molested him "[n]umerous times" between 2001 and 2003, "[d]ay or night." (Vautaw's Ex. C at 29, 36). He, however, could not recall the specific dates or times. He testified that when he visited or stayed with Vautaw in his Urbana residence, Vautaw would molest him in several different rooms of the house; at trial counsel's request, he drew a diagram of that house's floor plan. The following colloquy between L.N. and trial counsel then took place:

> Q: . . . So you don't recall any the dates that these things occurred, is that right?
>
> A: That's right.
>
> Q: You don't recall any of the months this may have occurred?
>
> A. No.
>
> Q: Did it occur on some basis of daily, weekly, monthly, yearly?
>
> A: Every time I encountered [Vautaw] . . . .
>
> Q: Well, you were out there every weekend you're saying?
>
> A: Pretty much, yeah.
>
> Q: So, . . . is it your testimony that it occurred every weekend?

A: Yeah.

Q: And, it occurred very [sic] time that you were out there?

A: Pretty much every time, yeah.

Q: What exactly does "pretty much" mean?

A: About 90% of the time.

Q: Okay. And, was there any particular time of day?

A: It didn't matter, really, to [Vautaw].

* * *

Q: [H]ow many weekends were you there by yourself?

A: Numerous weekends.

Q: Do you remember when any of those times were?

A: I don't remember the dates. I never kept a journal.

* * *

Q: It may seem like I'm asking questions over again. . . . I'm trying to clarify, a little better, where and when things occurred. The information charging [Vautaw], states between December 21 . . . of '01, and December 20th, '03, that these things occurred. How many times, between that period of that time frame, did you and [Vautaw] have any kind of contact sexually?

A: Quite a few times.

* * *

Q: More than 10?

A: Yeah.

Q: . . . [Y]our testimony is, every time you were out there it happened, . . . on whatever day you were there something occurred, is that correct?

* * *

A: Like I said, about 90% of the time.

* * *

Q: [A]re you alleging . . . anything occurred in the evenings?

A: I don't recall anything during the evenings.

Q: It was always during the daylight hours?

A: Yeah.

Id. at 44-53.

L.N. further testified regarding events that occurred when Vautaw moved to a trailer in Lakeview; he also drew a diagram of the trailer's floor plan. He recalled one incident in particular, which took place on a Friday, before he went to the county fair. Other incidents occurred "everywhere" throughout the trailer, "[n]ormally" during the day. *Id.* at 61, 64.

L.N. also testified regarding events that occurred in the residence on Ross Avenue and drew a diagram of that house. He testified that Vautaw would come into his room and molest him after work, "about 11:00 or 12:00 at night." *Id.* at 75.

Trial counsel concluded the deposition after one hour and twenty-five minutes, stating that "maybe" he would "need to reschedule it." *Id.* at 76. Trial counsel, however, did not depose L.N. again. During the post-conviction hearing, trial counsel testified that

he did not reschedule L.N.'s deposition because, upon review, he "felt that essentially [h]e had what [h]e needed from [L.N.]" (Tr. 65).

Here, the record indicates that trial counsel conducted an extensive deposition of L.N.; he repeatedly attempted to elicit testimony regarding specific dates, times, and places that the molestation occurred. L.N., however, could offer few specifics. L.N.'s vagueness as to dates and times was consistent with his trial testimony.

Vautaw has failed to demonstrate that there is a reasonable probability that, but for trial counsel's failure to resume L.N.'s deposition, the result of the trial would have been different. We therefore cannot say that Vautaw was prejudiced by trial counsel's decision to forgo a second deposition of L.N.

3. L.N.'s Videotaped Statement

Vautaw further maintains that his trial counsel's "inexplicable failure to confront [L.N.], at trial, with his videotaped interview further supports the conclusion that [he] was prejudiced by the ineffective assistance of his counsel." Vautaw's Br. at 15. Namely, he argues that "[a]ny prior statement made by [L.N.] which was inconsistent with his trial testimony could have been used to attack his credibility." *Id.*

The record reveals that in October of 2004, police officers twice conducted videotaped interviews of L.N. regarding his accusations against Vautaw. Trial counsel did not offer these interviews into evidence.

During the post-conviction hearing, trial counsel testified that L.N.'s statements during the interviews "might not have been consistent with things [Vautaw] might have

said . . . ." (Tr. 20) (emphasis added). Vautaw offered no evidence during the post-conviction hearing that the videotaped statements were inconsistent with L.N.'s trial testimony.[6] He therefore failed to demonstrate how he was prejudiced by trial counsel's decision to not seek admission of the videotaped statements into evidence.

Vautaw has not shown a reasonable probability that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *See Overstreet*, 877 N.E.2d at 152. Accordingly, his claim of ineffective assistance of trial counsel fails in this regard.

4. Failure to Object to Testimony

Vautaw also asserts that his counsel was ineffective at trial for failure to object to L.N.'s testimony that Vautaw had provided him with pornographic materials. Specifically, he argues that his counsel should have invoked Indiana Evidence Rule 404(b), which provides that

> [e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identify, or absence of mistake or accident . . . .

The purpose of this rule is "to prevent the jury from assessing the defendant's guilt in the present case on the basis of his past propensities." *Bryant v. State*, 802 N.E.2d 486, 498-99 (Ind. Ct. App. 2004), *trans. denied*. Thus, the State may not admit evidence of prior bad acts where it offers the evidence for the sole purpose of creating a forbidden

[6] Vautaw's brief also fails to cite to any inconsistencies between L.N.'s statements and L.N.'s subsequent testimony.

inference that the defendant's present charged conduct is in conformity with his prior bad conduct. *Id*. at 499.

When a defendant objects to the admission of evidence on the grounds that it violates Evidence Rule 404(b), we must: 1) determine whether the evidence is relevant to a matter at issue other than the defendant's propensity to commit the charged act; and 2) balance the probative value of such evidence against its prejudicial effect. *Wertz v. State*, 771 N.E.2d 677, 683-84 (Ind. Ct. App. 2002). We will affirm the trial court's admission of evidence of prior bad acts or misconduct if it is sustainable on any basis in the record. *Bryant*, 802 N.E.2d at 499.

However, harmless errors in admitting evidence under Evidence Rule 404(b) do not require reversal. "'The improper admission of evidence is harmless error when the conviction is supported by substantial independent evidence of guilt sufficient to satisfy the reviewing court that there is no substantial likelihood that the questioned evidence contributed to the conviction.'" *Wertz*, 771 N.E.2d at 684 (quoting *Headlee v. State*, 678 N.E.2d 823, 826 (Ind. Ct. App. 1997), *trans. denied*).

When a petitioner brings an ineffective assistance of counsel claim based upon trial counsel's failure to make an objection, the petitioner must demonstrate that the trial court would have sustained a proper objection. *Law v. State*, 797 N.E.2d 1157, 1164 (Ind. Ct. App. 2003). "To succeed on a claim that counsel was ineffective for failure to make an objection, the defendant must demonstrate that if such objection had been made, the court would have had no choice but to sustain it." *Sanchez v. State*, 675 N.E.2d 306,

310 (Ind. 1996). Additionally, the petitioner must demonstrate that failure to object prejudiced the petitioner. *Law*, 797 N.E.2d at 1162.

During the trial, L.N testified as follows:

> Q Did [Vautaw] buy you these [pornographic] movies or rent these movies for you?
>
> A Yes, he did.
>
> * * *
>
> Q Did you ask him to get [th]em for ya [sic]?
>
> A Yeah.
>
> Q He would get you pornographic movies?
>
> A Yeah.
>
> Q I'm talking like X-rated, I mean . . . .
>
> A Oh, yeah.
>
> Q You know the difference between rated R movies versus triple X movies?
>
> A Of course. I mean . . . he's taken me back to the adult section.
>
> Q When he'd get these movies for you, would you watch them by yourself or would other people be around?
>
> A He would insist that he be in the room.

(Vautaw's Ex. E at 94-95).

During the post-conviction hearing, trial counsel testified that he could not recall whether he objected to L.N.'s testimony. He, however, agreed that the testimony "[m]ight not be" helpful to the defense. (Tr. 48).

Here, testimony regarding the pornographic materials constituted probative and admissible evidence to show Vautaw's preparation and plan to establish and reinforce his physical relationship with L.N.; any prejudice did not outweigh the probative value. Thus, the admission of the testimony did not violate Evidence Rule 404(b). *See Piercefield v. State*, 877 N.E.2d 1213, 1216-17 (Ind. Ct. App. 2007), *trans. denied*. Even if the admission of the evidence did violate Evidence Rule 404(b), any error was harmless as the jury heard extensive testimony regarding the offenses against L.N.

Given that the testimony did not violate Evidence Rule 404(b), Vautaw has failed to meet his burden of establishing that had an objection been made, the trial court would have sustained the objection. He also has failed to demonstrate any prejudice due to trial counsel's failure to object to L.N.'s testimony, as any error in admitting the testimony was harmless. Thus, we cannot say that Vautaw's trial counsel was ineffective in this regard.

5. Work Records

Vautaw also asserts that his trial counsel was ineffective for not "obtain[ing] [his] work records to show the dates and times when he would not have been at home, but rather at work." Vautaw's Br. at 5. Presumably, such records would have established an alibi for Vautaw.

Here, L.N. did not testify as to specific dates and times when the molestation occurred; rather, he testified that it occurred "numerous times," over a period of several years. (Vautaw's Ex. E at 42). He further testified that, at some point, Vautaw "worked second shift," while Shelly "worked the days." *Id.* at 50. During this time, L.N. testified that Vautaw "would come in at night off work," and fondle him. *Id.* at 53.

Vautaw testified that, at one point, Shelly worked the day shift, while he worked "[s]ix at night to six in the morning." *Id.* at 207. He further testified that while living in Lakeview, Shelly worked during the day and usually would be "in bed by 9:00" p.m. *Id.* at 215. He, however, worked the second shift; thus, he would get home from work "anywhere from 10:30 [p.m.] to 12:00" a.m. *Id.*

Vautaw has failed to demonstrate that there is a reasonable probability that, but for trial counsel's failure to obtain Vautaw's work records, the result of the trial would have been different, where L.N.'s testimony regarding times was vague; Vautaw testified regarding his work schedule; Vautaw's testimony substantially substantiated L.N.'s testimony regarding Vautaw's work schedule; and Vautaw did not present evidence that his work records would have refuted L.N.'s testimony. We therefore cannot say that trial counsel's failure to obtain Vautaw's work records prejudiced him.

6. <u>Failure to Depose or Call Mother as a Witness</u>

Finally, Vautaw asserts that trial counsel's failure to interview L.N.'s mother or call her as a witness amounted to ineffective assistance of counsel. He argues that "it was incumbent upon trial counsel . . . to investigate and interview [L.N.]'s mother. If she

denied [L.N.]'s allegations [that she abused him], then it was essential that she be called as a defense witness to directly rebut [L.N.]'s claims." Vautaw's Br. at 10-11.

Regarding deposing or calling L.N.'s mother as a witness, Richard Fisher, a criminal defense attorney testifying on behalf of Vautaw during the post-conviction hearing, testified as follows:

> Q You remember that [L.N.] testified at trial that one of the reasons he moved back into [Vautaw]'s house was because his mother beat him?
>
> A Yes.
>
> Q . . . [A]ssuming that you knew that ahead of time whether you took his deposition or he gave it in a statement to the police, . . . would you want to interview . . . [L.N.]'s mother then?
>
> A Yes.
>
> Q Why?
>
> A To find out if she would corroborate that testimony or not and, if not, then she would become a witness.
>
> Q Do you know if [trial counsel] interviewed . . . [L.N.]'s mother?
>
> A I don't . . . know. Not from what I've seen.
>
> Q He . . . certainly didn't call her as a witness?
>
> A I don't believe so.

(Tr. 272).

Given the testimony, we cannot say that trial counsel did indeed decline to interview L.N.'s mother. Furthermore, Vautaw did not call L.N.'s mother to testify as a witness during the post-conviction hearing. Therefore, there is no way to determine what

evidence might have been gained from her testimony. Given that Vautaw has failed to show prejudice, we do not find that he received ineffective assistance of counsel.

In sum, Vautaw has not shown that trial counsel's performance deprived him of a fair trial. We therefore find no error in denying Vautaw's petition for post-conviction relief.

Affirmed.

MAY, J., and KIRSCH, J., concur.