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**IN THE
COURT OF APPEALS OF INDIANA**

ORVILLE CARTER,)
)
 Appellant-Defendant,)
)
 vs.) No. 49A02-0803-PC-253
)
 STATE OF INDIANA,)
)
 Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Sheila A. Carlisle, Judge
The Honorable William T. Robinette, Master Commissioner
Cause No. 49G03-9907-PC-99435

April 8, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Orville Carter appeals the denial of his petition for post-conviction relief from his conviction for child molesting¹ as a Class A felony and his adjudication as an habitual offender.² He appeals raising several issues, which we consolidate and restate as: whether the post-conviction court erred when it denied his petition for post-conviction relief.

We affirm.

FACTS AND PROCEDURAL HISTORY

The facts supporting Carter's conviction as set forth on his direct appeal are as follows:

M.C. is a highly intelligent child who sometimes makes inappropriate comments because she is autistic. On May 25, 1999, M.C.'s mother Jessica Carter talked with her about subjects that are "personal" and not for public discussion. M.C. asked if weather was personal, and Jessica said no. M.C. then asked "if someone showing you their w[ie]nie was a personal thing."

M.C. went on to tell Jessica that Carter, M.C.'s father, came into her room one night and had M.C. touch his penis, then put it in her mouth. Jessica asked M.C. what that felt like, and M.C. replied that it felt like rubber.

Jessica told M.C. that other people would want to talk to her, and that M.C. should tell them the same story. She immediately sought advice at M.C.'s school, where she happened to encounter Dr. Robin Murphy, a psychologist specializing in autism who had worked with M.C. on three or four previous occasions. At the urging of school authorities, Jessica then took M.C. to the Family Advocacy Center for a videotaped interview with police officer Kathy Graban, where M.C. related the same story.

Officer Graban found it curious that M.C. "blurted out" her story unprompted. On Dr. Murphy's advice, she visited M.C. unannounced on June 4th to make sure that this spontaneity was the result of autism rather than coaching. M.C.'s story remained consistent.

¹ See Ind. Code § 35-42-4-3.

² See Ind. Code § 35-50-2-8.

The State charged Carter with child molesting, a class A felony, and with being an habitual offender.

M.C. was the first witness at trial. The prosecutor encountered difficulty immediately, when M.C. was unable to identify Carter in the courtroom. She did elicit a disjointed version of M.C.'s story. M.C.'s responses then became so rambling and incoherent that the prosecutor concluded her direct examination.

On cross-examination, M.C. admitted that she did not remember Carter's attorney, whom she had met previously, and said, "I do get confused. I mostly forgot about you..." When asked "Do you get confused a lot with things that have happened?", M.C. acknowledged, "Yes." She did reassert, however, that her father "went to jail because he--because he done something--touched my w[ie]nie... He made me touch his w[ie]nie, I should say."

Jessica Carter testified next. On direct examination, she described what M.C. said about the molestation. On cross, defense counsel elicited the fact that three weeks after this disclosure, Jessica overheard M.C. talking to herself about a schoolmate who said that "if you put a w[ie]nie in your mouth it grows." Jessica questioned M.C. further, and asked her again about the incident involving Carter. According to Jessica, M.C. said that "daddy woke her up and then daddy pulled his big-boy shorts down..." Jessica pointed out to M.C. that "big-boy shorts" was their household term for briefs, which M.C.'s younger brother wore but her father did not. M.C. "looked a little confused and [] said, well, maybe it wasn't daddy."

Jessica also testified on cross-examination that M.C. is "[v]ery imaginative." She said that M.C. sometimes imagines things such as earthquakes and tornadoes that become very real in her mind.

The State next called Dr. Murphy as an expert witness. Officer Graban took the stand last and the State introduced M.C.'s videotaped May 25th interview. Officer Graban testified that M.C.'s story remained consistent on her June 4th unannounced visit.

Carter did not call any witnesses. The jury found him guilty of child molesting, and he pled guilty to being an habitual offender. The court entered a judgment of conviction and imposed a sixty-year sentence.

Carter v. State, 754 N.E.2d 877, 878-79 (Ind. 2001) (internal citations and footnotes omitted).

In his direct appeal, Carter claimed that the evidence presented was insufficient to support his conviction and that the trial court committed fundamental error because: (1) the State's expert improperly vouched for the victim's testimony; (2) the victim's videotaped statement was unreliable; (3) hearsay evidence was admitted; (4) the charging information contained an alias for Carter; (5) the victim was not a competent witness; and (6) his right to cross-examine the victim's mother was violated. Our Supreme Court affirmed his conviction. Carter then filed a pro se petition for post-conviction relief. In his petition, Carter claimed that he received the ineffective assistance of both his trial counsel and appellate counsel, that the State committed prosecutorial misconduct, and that newly discovered evidence existed. The post-conviction court issued its findings of fact and conclusions thereon denying Carter's petition for post-conviction relief. Carter now appeals.

DISCUSSION AND DECISION

Post-conviction proceedings do not afford the petitioner an opportunity for a super appeal, but rather, provide the opportunity to raise issues that were unknown or unavailable at the time of the original trial or the direct appeal. *Ben-Yisrayl v. State*, 738 N.E.2d 253, 258 (Ind. 2000), *cert. denied* (2002); *Wieland v. State*, 848 N.E.2d 679, 681 (Ind. Ct App. 2006), *trans. denied, cert. denied*. The proceedings do not substitute for a direct appeal and provide only a narrow remedy for subsequent collateral challenges to convictions. *Ben-Yisrayl*, 738

N.E.2d at 258. The petitioner for post-conviction relief bears the burden of proving the grounds by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5).

When a petitioner appeals a denial of post-conviction relief, he appeals a negative judgment. *Fisher v. State*, 878 N.E.2d 457, 463 (Ind. Ct. App. 2007), *trans. denied*. The petitioner must establish that the evidence as a whole unmistakably and unerringly leads to a conclusion contrary to that of the post-conviction court. *Id.* We will disturb a post-conviction court's decision as being contrary to law only where the evidence is without conflict and leads to but one conclusion, and the post-conviction court has reached the opposite conclusion. *Wright v. State*, 881 N.E.2d 1018, 1022 (Ind. Ct. App. 2008), *trans. denied*. The post-conviction court is the sole judge of the weight of the evidence and the credibility of witnesses. *Lindsey v. State*, 888 N.E.2d 319, 322 (Ind. Ct. App. 2008), *trans. denied*. We accept the post-conviction court's findings of fact unless they are clearly erroneous, and no deference is given to its conclusions of law. *Fisher*, 878 N.E.2d at 463.

Carter argues that the post-conviction court erred when it denied his petition for post-conviction relief. He makes many contentions as to why the court erred, which include ineffective assistance of both trial and appellate counsel, the existence of newly discovered evidence, and claims of prosecutorial misconduct. We will address each of these claimed errors.

I. Prosecutorial Misconduct

Carter makes several contentions alleging prosecutorial misconduct because the prosecutor used Carter's silence against him, proffered false testimony to conceal another

possible perpetrator, alleged that Carter had changed his appearance prior to trial, and alleged that Carter used an alias. “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). All of Carter’s claims of prosecutorial misconduct were available at the time of his direct appeal, but were not raised and cannot now be raised as free-standing claims in his post-conviction proceedings. These claims may only be raised in connection with claims of ineffective assistance of counsel. *Reed v. State*, 857 N.E.2d 19, 22 (Ind. Ct. App. 2006) (citing *Sanders v. State*, 765 N.E.2d 591, 592 (Ind. 2002)). Therefore, to the extent that Carter failed to raise these claims as part of his ineffective assistance of counsel claims, they are waived.

II. Ineffective Assistance of Trial Counsel

We review ineffective assistance of trial counsel claims under the two-prong test set out in *Strickland v. Washington*, 466 U.S. 668 (1984). *Fisher*, 878 N.E.2d at 463. First, the petitioner must demonstrate that counsel’s performance was deficient, which requires a showing that counsel’s representation fell below an objective standard of reasonableness and denied the petitioner the right to counsel guaranteed by the Sixth Amendment to the United States Constitution. *Timberlake v. State*, 753 N.E.2d 591, 603 (Ind. 2001), *cert. denied* (2002). Second, the petitioner must demonstrate that he was prejudiced by counsel’s deficient performance. *Id.* To show prejudice, a petitioner must show that there is a reasonable probability that the outcome of the trial would have been different if counsel had

not made the errors. *Id.* A probability is reasonable if it undermines confidence in the outcome. *Id.*

We presume that counsel rendered adequate assistance and give considerable discretion to counsel's choice of strategy and tactics. *Smith v. State*, 765 N.E.2d 578, 585 (Ind. 2002). "Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective." *Id.* "If we can resolve a claim of ineffective assistance of counsel based on lack of prejudice, we need not address the adequacy of counsel's performance. *Fisher*, 878 N.E.2d at 463-64.

Carter first contends that his trial counsel was ineffective in counsel's investigation of autism and the particular circumstances of the present case. "When deciding a claim of ineffective assistance of counsel for failure to investigate, we apply a great deal of deference to counsel's judgments." *Parish v. State*, 838 N.E.2d 495, 500 (Ind. Ct. App. 2005). Here, Carter's trial counsel, William J. Rawls, testified that in preparation for the jury trial, he interviewed the victim and researched autism, including whether autism has any effect on a child's ability to tell the truth. Rawls spent significant time researching autism at the Indiana University Medical School and contacted individuals involved in the educational side of autism in order to ascertain how an autistic child would respond to her environment. He also took taped statements of both the victim and the victim's mother. We do not believe that Carter has shown Rawls's performance in his investigation of autism and its relationship to the case to be deficient. Further, Carter has failed to show any prejudice as he has not established that any additional investigation would have resulted in a different outcome at

trial. We conclude that trial counsel was not ineffective with regard to his investigation of the case.

Carter next argues that his trial counsel was ineffective for failing to communicate with him and his other trial counsel regarding his defense. Specifically, he claims that he was not able to assist in the choice of trial strategy because Rawls pursued the defense that M.C. was mistaken with regard to the molestation occurring at all instead of pursuing the defense that Jessica made up the allegations or that Jessica's older son committed the offense. Carter's initial trial counsel, Thomas Shirley, had passed away between the trial and the post-conviction proceedings, but the record indicates that Shirley hired Rawls a few months before trial to assist and that Rawls was Carter's only counsel at trial. Rawls testified at the post-conviction hearing that he chose the defense that M.C. made up the allegations because she was autistic, was unable to identify Carter, and said that the person who molested her was wearing "big-boy shorts," which were not the kind of underwear that Carter wore. *Tr.* at 109. "We will not lightly speculate as to what may or may not have been an advantageous trial strategy as counsel should be given deference in choosing a trial strategy that, at the time and under the circumstances, seems best." *Shanabarger v. State*, 846 N.E.2d 702, 708 (Ind. Ct. App. 2006). We decline to speculate whether another strategy would have been more advantageous and conclude that trial counsel was not ineffective for pursuing the defense that M.C. fabricated or was mistaken about her allegations.

Carter also claims that his trial counsel was ineffective for failing to hire a defense expert witness on autism. "A decision regarding what witnesses to call is a matter of trial

strategy which an appellate court will not second-guess.” *Johnson v. State*, 832 N.E.2d 985, 1003 (Ind. Ct. App. 2005); *see also Wrinkles v. State*, 749 N.E.2d 1179, 1200 (Ind. 2001) (stating that the decision of which witnesses to call is “the epitome of a strategic decision”). As previously stated, in preparation for the trial, Rawls interviewed the victim, researched autism, including whether it has any effect on a child’s ability to tell the truth, and spoke with people involved in the educational side of autism to obtain their opinions as to autistic children’s responses to their environment. During the jury trial, Rawls extensively cross-examined the State’s expert regarding autism. We decline to second-guess trial counsel’s strategic decision not to hire a defense expert. Carter has not shown any deficiency in trial counsel’s performance or any prejudice.

Carter further contends that his trial counsel was ineffective for failing to object to the State’s expert witness regarding her testimony on autistic children’s inability to lie. In order to prevail on a claim of ineffective assistance due to the failure to object, the defendant must show an objection would have been sustained if made. *Overstreet v. State*, 877 N.E.2d 144, 155 (Ind. 2007). The issue of the State’s expert witness testimony that autistic children find it difficult to deliberately deceive others was raised on Carter’s direct appeal, and our Supreme Court addressed whether this testimony constituted fundamental error, finding that it did not. *Carter*, 754 N.E.2d at 881-83. Based upon the reasoning of our Supreme Court, any objection to this evidence would not have been sustained. Further, the record from the post-conviction hearing does not indicate that Carter asked Rawls why he failed to object to the expert testimony; it could have been a strategic decision. We conclude that Carter has not

shown that the trial court would have been required to sustain any objection made by Carter's trial counsel.

Carter next argues that his trial counsel was ineffective for failing to object to the prosecutor's closing argument. He contends that the prosecutor committed misconduct when she referred to Carter's silence. A defendant is only entitled to relief for prosecutorial misconduct if the misconduct, under all of the circumstances, placed the defendant in a position of grave peril to which he would not have been subjected. *Bassett v. State*, 895 N.E.2d 1201, 1208 (Ind. 2008). The gravity of peril is measured by the probable persuasive effect of the misconduct on the jury's decision rather than the degree of impropriety of the conduct. *Id.*

Here, during her closing argument, the prosecutor briefly commented on M.C.'s inability to recognize Carter as her father during the trial and Carter's refusal to answer M.C.'s request to identify himself as her father. "The Fifth Amendment privilege against compulsory self-incrimination is violated when a prosecutor makes a statement that is subject to reasonable interpretation by a jury as an invitation to draw an adverse inference from a defendant's silence." *Hand v. State*, 863 N.E.2d 386, 396 (Ind. Ct. App. 2007). We will not reverse if the prosecutor's comment, in its totality, focuses on evidence other than the defendant's failure to testify. *Id.* The prosecutor's comment was not referring to Carter's choice to exercise his Fifth Amendment right. Instead, it concerned M.C.'s inability to recognize Carter at trial and her question to Carter as to whether he was her father. Because the reference to Carter's silence only referred to the victim's perception of Carter and not to

his refusal to testify, he has not shown that any objection by his trial counsel would have been sustained. We do not find counsel ineffective for any failure to object.

Lastly, Carter alleges that his trial counsel was ineffective for failing to object to evidence introduced by the State regarding how many people lived in Carter's house. Although not testified to at trial, M.C. stated in her deposition that her "big brother" Nathan lived in the basement of the house she shared with her parents and younger brother. Therefore, Nathan could have had access to M.C. and could have committed the crime. However, as previously stated, the defense theory at trial was that M.C. was mistaken about the molestation and that nothing had happened. It would have been inconsistent for Rawls to object to the evidence about the number of individuals living in the house or to argue that Nathan was the perpetrator. Additionally, Carter has not shown any prejudice as he did not present any evidence that Nathan could have had anything to do with the molestation. We therefore conclude that Carter's trial counsel was not ineffective for any of the above reasons.

III. Ineffective Assistance of Appellate Counsel

The standard of review for claims of ineffective assistance of appellate counsel is the same as for trial counsel in that the defendant must show appellate counsel was deficient in his or her performance and that the deficiency resulted in prejudice. *Henley v. State*, 881 N.E.2d 639, 644 (Ind. 2008) (citing *Strickland*, 466 U.S. at 686). Ineffective assistance at the appellate level of proceedings generally falls into three basic categories: (1) denial of access to an appeal; (2) waiver of issues; and (3) failure to present issues well. *Wright v. State*, 881

N.E.2d 1018, 1023 (Ind. Ct. App. 2008) (citing *Bieghler v. State*, 690 N.E.2d 188, 193-95 (Ind. 1997), *cert. denied* (1998)), *trans. denied*.

Carter argues that his appellate counsel was ineffective for failing to raise several issues in his direct appeal. These included whether the State proffered false testimony at his trial and whether the State committed prosecutorial misconduct when it mentioned his silence during closing arguments and when it stated that Carter had changed his appearance prior to trial.

Pro se litigants “are held to the same standard as trained counsel and are required to follow procedural rules.” *Evans v. State*, 809 N.E.2d 338, 344 (Ind. Ct. App. 2004), *trans. denied*. “This has consistently been the standard applied to pro se litigants, and the courts of this State have never held that a trial court is required to guide pro se litigants through the judicial system.” *Id.* “Generally, a party waives any issue raised on appeal where the party fails to develop a cogent argument or provide adequate citation to authority and portions of the record.” *Smith v. State*, 822 N.E.2d 193, 202-03 (Ind. Ct. App. 2005), *trans. denied*; *see also* Ind. Appellate Rule 46(A)(8)(a).

Here, Carter’s argument regarding whether he received ineffective assistance of his appellate counsel does not contain any citation to authority or to the record. Additionally, the arguments he presents in his appellant’s brief are vague and merely a list of the errors he

claims. We therefore conclude that Carter has waived this argument on appeal for failure to develop a cogent argument or provide adequate citation to authority.³

Affirmed.

BAKER, C.J., and NAJAM, J., concur.

³ Carter also argues that the depositions taken of Jessica and M.C. by Rawls, which were not admitted at trial, were newly discovered evidence. Although Carter raises this as an issue, he cites to no authority and fails to make a cogent argument why this is newly discovered evidence and why he should be entitled to a new trial. “Generally, a party waives any issue raised on appeal where the party fails to develop a cogent argument or provide adequate citation to authority and portions of the record.” *Smith v. State*, 822 N.E.2d 193, 202-03 (Ind. Ct. App. 2005), *trans. denied*; *see also* Ind. Appellate Rule 46(A)(8)(a). Therefore, we conclude that Carter has waived this issue on appeal.