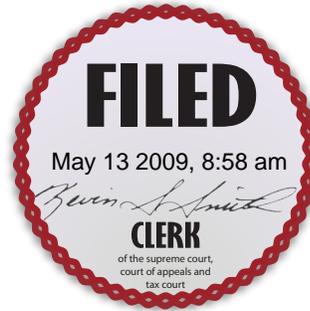


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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SHAKIMA LEWIS, )  
 )  
Appellant-Defendant, )  
 )  
vs. ) No. 45A04-0811-PC-675  
 )  
STATE OF INDIANA, )  
 )  
Appellee-Plaintiff. )

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APPEAL FROM THE LAKE SUPERIOR COURT  
The Honorable Thomas P. Stefaniak, Jr., Judge  
Cause No. 45G04-0704-PC-3

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**May 13, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**CRONE, Judge**

## Case Summary

Shakima Lewis appeals the denial of her petition for post-conviction relief. We affirm.

### Issues

We restate the issues as follows:

- I. Was Lewis's trial counsel ineffective in failing to hire an expert in child forensic interviews?
- II. Was her counsel ineffective in stipulating to certain pretrial hearsay statements?
- III. Was her counsel ineffective in failing to call members of her family as witnesses?

### Facts and Procedural History

The facts as summarized by this Court in Lewis's direct appeal and adopted by the post-conviction court are as follows:

Lewis is the biological mother of C.B., born on June 4, 1994, S.B. born on July 10, 1995, and S.L., born on July 16, 1996, and M.C., born on November 5, 1998, (collectively referred to as the "Children"). Prior to August 2001, the Children lived with Lewis and Sedrick Lamont Curtis ("Curtis") in Lake County, Indiana. On August 31, 2001, as a result of allegations of physical abuse, the Children were removed from Lewis and Curtis's home and placed with a foster parent, Evelyn Murad ("Murad"). While the Children were in her care, Murad observed scars and open lacerations on C.B.'s back, arm, and side; "open spots" on S.B.'s back and thigh; and open lacerations on S.L.'s thigh and arm. Tr. at 51. Murad also noticed that: (1) the Children were extremely thin, with the exception of M.C.; (2) the Children were very comfortable walking around each other nude; and (3) C.B. treated S.B. like his girlfriend rather than his sister. On [sic] day, C.B. and S.B. spontaneously shared their family "secrets" with Murad. *Id.* at 59. In particular, C.B. [said] that sometimes he watched Lewis and Curtis having sex and that they would call him into the room and force him to perform oral sex on them. C.B. told Murad that Lewis and Curtis would beat him if he did not

do what they had requested. C.B. further recalled that he and S.B. were made to perform sexual acts on each other while other people paid Curtis to watch.

S.B. told Murad that she and S.L. had to simulate a sexual act on each other “for the people,” and that, on several occasions, she was forced to perform oral sex on Curtis or she would receive a beating. *Id.* at 60. S.B. also told Murad that, sometimes, Curtis would pick her up while both of them were naked and would press her to his body and dance around the room until “white stuff came out of” his penis. *Id.* at 64. Similarly, S.L. told Murad that she also was forced to perform oral sex on Curtis, and C.B., S.B., and S.L. all agreed that M.C. had to perform oral sex on Curtis and that, in so doing, M.C. bit Curtis. While the Children were in her care, Murad also witnessed C.B. jabbing a little plastic toy that resembled a penis between S.B.’s legs.

After hearing the Children’s horrific secrets, and after noticing the Children’s bizarre behavior, Murad contacted the Children’s caseworker about the alleged abuse. Subsequently, because Murad, who was seventy-five years old at the time of the trial, could no longer care for the Children, the Children were moved to the home of Sharon Hicks (“Hicks”).

On November 16, 2001, the Lake County Advocacy Center interviewed the Children separately. During his interview, C.B. testified that Lewis made “[S.B.] and [S.L.] suck between each other’s legs” in front of ten other people and that Curtis made C.B., S.B., and S.L. “suck on him.” *Id.* at 296, 304. C.B. also testified that Curtis “peed on [his] sisters.” *Id.* at 312. C.B. further testified that Curtis “stuck his thing” in C.B.’s “butt,” and M.C. “suck[ed] on him and [M.C.] bit him.” *Id.* at 306-07.

In her videotaped interview, S.B. corroborated C.B.’s testimony that Lewis and Curtis would make S.B. “suck between their legs.” *Id.* at 341[.] S.B. also testified that Curtis “put his pee-pee in her pee-pee” while people paid Lewis to watch. *Id.* at 346. Likewise, during her interview, L.L. testified that M.C. sucked on Curtis’s “ding-a-ling” and bit it. *Id.* at 368. She also confirmed that all of the Children were forced to perform oral sex and S.B. “sucked on [C.B.’s] ding-a-ling.” *Id.* at 373. In another videotaped interview, M.C. testified that he bit Curtis but he did not know where.

Doctor Edwin Udani (“Doctor Udani”) examined the Children for signs of abuse and found that C.B. and S.B. had multiple scars on their backs, but S.L. and M.C. did not exhibit any physical signs of abuse. On January 7, 2002, Doctor Kalyani Gopal (“Doctor Gopal”) interviewed the Children separately and they reported to her the allegations of physical and sexual abuse. Doctor Gopal began therapy with the Children, which focused upon controlling the Children’s sexual urges—i.e., C.B. had acted sexually toward S.B.; S.B. and S.L. molested some children; and S.L. said that she wanted to have sex with S.B. and other kids.

Appellant's App. at 82 (citing *Lewis v. State*, No. 45A03-0404-CR-187, slip op. at 2-4 (Ind. Ct. App. Sept. 8, 2004)).

On May 29, 2002, the State charged Lewis with four counts of class A felony child molesting, four counts of class C felony vicarious sexual gratification, four counts of class D felony neglect of a dependent, and three counts of class D felony battery. On August 22, 2003, the State amended the information, removing the neglect of a dependent counts. On August 29, 2003, following a change of venue, a Jasper County jury convicted Lewis of two counts of class A felony child molesting, three counts of class C felony vicarious sexual gratification, and three counts of class D felony battery. On September 18, 2003, the trial court sentenced Lewis to an aggregate sentence of sixty-four years. On September 8, 2004, this Court affirmed Lewis's convictions on direct appeal.

Lewis filed a pro se petition for post-conviction relief on April 16, 2007. On June 2, 2008, she filed an amended petition by counsel. The post-conviction court held a bifurcated hearing on April 9, 2008, and August 1, 2008. On October 10, 2008, the post-conviction court entered findings of fact and conclusions of law, and on November 12, 2008, the trial court entered judgment denying Lewis's petition for post-conviction relief. This appeal ensued. Additional facts will be provided as necessary.

### **Discussion and Decision**

Lewis contends that the post-conviction court erred in denying her petition. The petitioner in a post-conviction proceeding "has the burden of establishing grounds for relief

by a preponderance of the evidence.” Ind. Post-Conviction Rule 1(5); *Brown v. State*, 880 N.E.2d 1226, 1229 (Ind. Ct. App. 2008), *trans. denied*. When appealing the denial of a petition for post-conviction relief, the petitioner stands in the position of one appealing a negative judgment. *Brown*, 880 N.E.2d at 1229. Therefore, “[o]n review, we will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court.” *Id.* Here, the post-conviction court entered extensive findings of fact and conclusions of law in accordance with Indiana Post-Conviction Rule 1(6). “A post-conviction court’s findings and judgment will be reversed only upon a showing of clear error—that which leaves us with a definite and firm conviction that a mistake has been made.” *Brown*, 880 N.E.2d at 1230 (citation and quotation marks omitted).

Lewis claims that she was denied her constitutional right to effective assistance of counsel. A petitioner must satisfy two components to prevail on her ineffective assistance claim. *Id.* She must demonstrate both deficient performance and prejudice resulting from it. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Deficient performance is “representation that fell below an objective standard of reasonableness, committing errors so serious that the defendant did not have the ‘counsel’ guaranteed by the Sixth Amendment.” *Brown*, 880 N.E.2d at 1230. “[C]ounsel’s performance is presumed effective, and a defendant must offer strong and convincing evidence to overcome this presumption.” *Ritchie v. State*, 875 N.E.2d 706, 714 (Ind. 2007). Prejudice occurs when a reasonable probability exists that, “but for counsel’s errors the result of the proceeding would have been different.”

*Brown*, 880 N.E.2d at 1230. We can dispose of claims upon failure of either component. *Id.*

### ***I. Child Interview Expert***

Lewis contends that her trial counsel provided ineffective assistance when he failed to hire an expert in child forensic interviewing. She asserts that her case involved the complicated issues of suggestibility of multiple children, which are not topics within the knowledge of the average juror.

We expect jurors to draw upon their own personal knowledge and experience in assessing credibility and deciding guilt or innocence. When they are faced with evidence that falls outside common experience, we allow specialists to supplement the jurors' insight. Indiana Evidence Rule 702(a) says: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, *may* testify thereto in the form of an opinion or otherwise."

*Carter v. State*, 754 N.E.2d 877, 882 (Ind. 2001) (emphasis added), *cert. denied* (2002).

"Counsel is afforded considerable discretion in choosing strategy and tactics, and we will accord those decisions deference." *Timberlake v. State*, 753 N.E.2d 591, 603 (Ind. 2001), *cert. denied* (2002). "A strong presumption arises that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* Strategies are assessed based on facts known at the time and will not be second-guessed even if the strategy in hindsight did not serve the post-conviction petitioner's best interests. *State v. Moore*, 678 N.E.2d 1258, 1261 (Ind. 1997), *cert. denied* (1998). In the context of an ineffective assistance claim, "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), *trans. denied*.

At the post-conviction hearing, trial counsel testified that he believed the children had been coached, and that, in preparing for trial, he consulted experts in the area of suggestibility of children. P-CR Tr. at 24-25, 29-31. One of the experts, Dr. Phillip Lawlor, expressed the opinion that the consistency of the children's statements indicated that they were not victims of suggestibility and that their statements might be true. *Id.* at 33. As a result, counsel decided not to call him to testify as an expert at trial. Based on counsel's testimony that his trial strategy was to establish that the increasing consistency of the children's statements supported a finding of witness coaching rather than a finding of witness veracity, his decision not to call Dr. Lawlor was reasonable.<sup>1</sup>

Lewis argues that counsel should have sought another expert witness who would specifically testify that the consistency of the children's statements supports the conclusion that the interviewers used suggestible methods of questioning. However, the record at trial indicates that counsel placed suggestibility in evidence in other ways. For example, he questioned the children's therapist, Dr. Gopal, about the issue of false positives and interviewers' ability to shape children's responses. Tr. at 429-32. He also elicited testimony regarding the general lack of interviewer training in child sex abuse cases. *Id.* at 466-68, 471-72, 629-31. To the extent Lewis argues that an expert should have been called to connect suggestibility to unreliability and therefore inadmissibility of the children's statements, we note counsel's strategy to *admit* the statements and attack them on the basis of

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<sup>1</sup> In her brief, Lewis admits that Dr. Lawlor's opinion was "pointless and useless" and did "not make any sense." Appellant's Br. at 10-11.

witness coaching. As such, his strategy did not include any attempt to challenge the admissibility as Lewis asserts. Therefore, Lewis has failed to establish deficient performance based on her counsel's decision to forego hiring a child interview expert.

## ***II. Stipulation***

Lewis asserts that her trial counsel's decision to stipulate to certain pretrial hearsay statements amounted to ineffective assistance. The record indicates that the children had given over sixty interviews, and counsel stipulated to the admissibility of their various accounts of alleged sexual abuse. In support of her ineffective assistance argument, Lewis points to Indiana Code Section 35-37-4-6(e)(1)(B), which allows the introduction of statements made by children in certain criminal actions only if the trial court finds "that the time, content and circumstances of the statement or videotape provide sufficient indications of reliability." She asserts that the stipulated statements lacked reliability and therefore would have been inadmissible and improper for stipulation.

In fact, it is the unreliability of the statements themselves that led to counsel's decision to stipulate to their admission. The post-conviction court made the following findings in this regard:

10. Based on [counsel's] testimony we find that he stipulated to the introduction of the children's statements for two reasons: he believed the court would admit the statements under I.C. 35-37-4-6 (commonly referred to as the "protected person" statute), and the progressive details of the statements over time led [counsel] to conclude the children had been coached. He wanted the statements in evidence in order to present this theory and thereby engender reasonable doubt.
11. Based on [counsel's] testimony we find that he did not object to hearsay statements of the children because it would have defeated his objective

to introduce and discredit the statements.

Appellant's App. at 83. Accordingly, the post-conviction court concluded as follows:

9. The decision to stipulate was reasoned, deliberate and certainly strategic. Counsel was aware of the protected person statute and knew the facts of his case. It was his opinion that the court would admit the statements even if he objected. Based on the ultimate opinion of the consulting expert, this conclusion does not seem unreasonable. While different counsel may have made a different tactical decision, that in and of itself does not amount to deficient performance. On the contrary, it is the heart of advocacy. Nor does the fact that the strategy failed to effect acquittals prove ineffectiveness of counsel.

*Id.* at 86.

Lewis's counsel's stipulation to the admission of the children's statements was strategic. While some question existed as to the admissibility of the children's statements, counsel concluded that the evidence would be introduced in one form or another and that the increasing complexity of and consistency among the children's statements might demonstrate witness coaching and thus work to Lewis's advantage. Lewis makes much of the fact that the children never testified at trial regarding the alleged sexual abuse and asserts that the pretrial hearsay statements served as the bases for those convictions. However, we note that she was acquitted on two of the child molesting counts and one of the vicarious sexual gratification counts. Although the record is unclear, the strategy employed by her counsel may well have been a factor in those acquittals. The post-conviction court properly refused to second-guess that strategy. Lewis has failed to establish deficient performance by her counsel in stipulating to the admission of the children's out-of-court statements.

### ***III. Failure to Call Witnesses***

Finally, Lewis asserts that her counsel provided deficient representation based on his failure to call family members to testify on her behalf. We reiterate that, when examining an ineffective assistance claim, “a decision regarding what witnesses to call is a matter of trial strategy which an appellate court will not second-guess.” *Johnson*, 832 N.E.2d at 1003.

Lewis alleges that her counsel failed to sufficiently investigate potentially mitigating evidence. She relies on *Ritchie*, 875 N.E.2d 706, in which our supreme court addressed counsel’s strategic choice not to present mitigating evidence. Although *Ritchie* involved counsel’s failure to present mitigating evidence during the penalty phase, we find its language instructive:

With the benefit of hindsight, a defendant can always point to some rock left unturned to argue counsel should have investigated further . . . . [W]e review a particular decision not to investigate by looking at whether counsel’s action was reasonable in light of all the circumstances. In other words, counsel has a duty to make a reasonable investigation or to make a reasonable decision that the particular investigation is unnecessary. A strategic choice not to present mitigating evidence made after thorough investigation of law and relevant facts is virtually unchallengeable, but a strategic choice made after less than complete investigation is challengeable to the extent that reasonable professional judgment did not support the limitations on the investigation. Thus, the Court’s principal concern is not whether counsel should have presented more in mitigation but whether the investigation supporting their decision not to introduce mitigating evidence was itself reasonable.

*Id.* at 719-20 (citations omitted).

The post-conviction court made the following findings and conclusions regarding Lewis’s counsel’s investigative activities and ensuing decision not to call her family members and neighbors:

13. Based on [counsel’s] testimony we find that an investigator with the Office of the Lake County Public Defender canvassed Lewis’

neighborhood but could find no one to testify to knowledge of the family or the allegations one way or the other. Hardly anyone acknowledged even knowing Lewis or her children.

14. Based on [counsel's] testimony, we find that the Office of the Lake County Public Defender mailed a letter to the Petitioner soliciting names of witnesses and information that might be helpful in the defense. The Petitioner did not name any family or friends as potential witnesses. She did, however, suggest that the video store clerk might prove helpful. [Counsel] communicated with the Petitioner's family members but none offered information that he deemed helpful.
15. Various members of Petitioner's family and the co-defendant's family testified at the post-conviction hearing. Among those who testified were two of the Petitioner's sisters, Tameka and Keana Johnson, three of Sedrick Curtis's siblings, Detrick, Ira and Tunya Curtis, and the Petitioner's parents, Nadell Maybell and Ernest Lewis. We find that these individuals visited the Petitioner's home frequently, some as often as two to three times a day, between 1999 and 2001. None saw any pornographic videotapes in the home or indications of sexual abuse of the children.

....

13. Finally, the Petitioner claims that counsel was ineffective for failing to present the testimony of witnesses who would have said they never saw the Petitioner abuse her children. Counsel spoke with members of the Petitioner's family and did not glean any helpful information. In addition, the fact that family members do not witness abuse does not mean the abuse did not occur. This is best evidenced by the fact that none of the Petitioner's family members testified at the post-conviction hearing to witnessing *physical* abuse of the children. However, we know from the [record] that most of the children were violently beaten based on the open wound, scars and bruises on their bodies as well as the admissions of the Petitioner and Curtis. We conclude that counsel's omission of these witnesses at trial did not prejudice the Petitioner since their testimony would not likely have produced a different outcome at trial. We conclude that counsel was not ineffective for failing to present these witnesses at trial.

Appellant's App. at 84, 87-88 (emphasis added).

At the post-conviction hearing, numerous extended family members testified that in their frequent visits to Lewis's home, they never saw any evidence of sexual abuse. We note, however, that the children never asserted that the sexual abuse occurred in front of extended family members. Based on the overwhelming evidence of guilt, we conclude that Lewis has failed to meet her burden of demonstrating that the outcome of her trial would have been different if these family members had provided at trial the same testimony that they provided at the post-conviction hearing. Accordingly, we affirm the denial of her petition for post-conviction relief.

Affirmed.

BRADFORD, J., and BROWN, J., concur.