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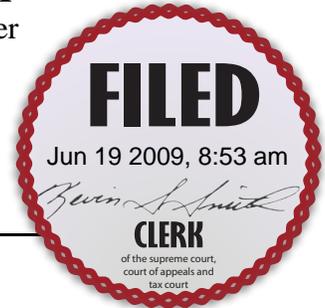
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**IN THE
COURT OF APPEALS OF INDIANA**

STATE OF INDIANA,)
)
 Appellant-Respondent,)

vs.)

No. 02A04-0902-PC-100

JERRY L. TAYLOR,)
)
 Appellee-Petitioner.)

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable John F. Surbeck, Jr., Judge
Cause No. 02D04-0311-PC-150

June 19, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

The State of Indiana appeals the granting of Jerry L. Taylor's petition for post-conviction relief. We reverse.

Issues

The State raises the following issues for review:

- I. Did the post-conviction court err in finding Taylor's trial counsel ineffective for failing to object to the admission of prior statements by a protected person?
- II. Did the post-conviction court err in finding Taylor's trial counsel ineffective for failing to object when the trial court omitted a mandatory jury instruction listing the elements of the protected person statute?
- III. Did the post-conviction court err in finding Taylor's appellate counsel ineffective for failing to raise the above issues in Taylor's direct appeal?

Facts and Procedural History

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

[O]n May 28, 2001, Taylor went to his girlfriend's home to celebrate the birthday of one of her sons. Taylor's girlfriend eventually put all of her children to bed, but they refused to be quiet. Taylor offered to go upstairs to calm them down. Taylor was upstairs for approximately twenty minutes. While upstairs, Taylor went into seven-year-old D.B.'s bedroom and put his finger inside her vagina. D.B. also described Taylor "biting" her vaginal area. *Transcript* at 110.

On May 31, 2001, D.B. told her aunt, Letha Hill-Bryant that Taylor had hurt her. Based on D.B.'s statements, Hill-Bryant took D.B. to the Child Advocacy Center for an interview and a physical examination.

At the Child Advocacy Center, Detective Dave Colon interviewed D.B. while other investigators and prosecutors watched through a hidden camera. During the interview, D.B. told Detective Colon about how Taylor had bitten her on her private parts and put his finger inside her. Following the interview,

Dawn Rice, a member of the medical staff, examined D.B. and found a bruise near her vaginal area consistent with being bitten. Rice also found injuries to D.B.'s hymen area that would not normally occur without placing something inside her vaginal opening. Rice testified at trial that these injuries were consistent with D.B. being bitten and having a finger inserted in her vagina. The State charged Taylor with three counts of child molesting. At trial, D.B. attempted to testify, but many of the responses were inaudible and the trial court found her to be unavailable. The trial court allowed the State to play a videotape of D.B.'s interview with Detective Colon for the jury.

Appellant's App. at 146 (citing *Taylor v. State*, No. 02A05-0208-CR-359, slip op. at 2-3 (Ind. Ct. App. May 20, 2003)).

On April 23, 2002, a jury found Taylor guilty of one count of class A felony child molesting and one count of class C felony child molesting.¹ On June 17, 2002, the trial court sentenced Taylor to a forty-year aggregate term. On May 20, 2003, another panel of this Court affirmed his convictions in an unpublished memorandum decision.

On November 14, 2003, Taylor filed a petition for post-conviction relief. He filed an amended petition on December 5, 2007. On July 21, 2008, the post-conviction court held a hearing, and on December 29, 2008, the court granted his petition, vacated his convictions, and reinstated his not guilty pleas. The State now appeals. Additional facts will be provided as necessary.

Discussion and Decision

The State contends that the post-conviction court erred in granting Taylor's petition. The petitioner in a post-conviction proceeding "has the burden of establishing grounds for

¹ Because the jury was unable to reach a unanimous verdict on Count II, the trial court declared a mistrial as to that count.

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*. Indiana Trial Rule 52(A) governs review of a judgment granting post-conviction relief. *State v. Moore*, 678 N.E.2d 1258, 1261 (Ind. 1997). Here, the post-conviction court entered extensive findings of fact and conclusions of law in accordance with Indiana Post-Conviction Rule 1(6). We do not defer to the post-conviction court’s legal conclusions; however, the post-conviction court’s findings of fact and judgment will be reversed only upon a showing of clear error—that which leaves us with a firm conviction that a mistake has been made. *State v. Cozart*, 897 N.E.2d 478, 482 (Ind. 2008).

The State claims that the post-conviction court erred in concluding that Taylor was denied his constitutional right to effective assistance of counsel. To prevail on his ineffective assistance of counsel claim, Taylor was required to demonstrate both deficient performance and prejudice resulting from it. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Deficient performance means that counsel’s representation fell below an objective standard of reasonableness based on prevailing professional norms. *Carr v. State*, 728 N.E.2d 125, 131 (Ind. 2000). Prejudice occurs when a reasonable probability exists that, but for counsel’s errors, the result of the proceeding would have been different. *Id.* Such prejudice is not established unless counsel’s error rendered the result of the proceeding fundamentally unfair or unreliable. *Id.* A strong presumption arises that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *State v. Holmes*, 728 N.E.2d 164, 172 (Ind. 2000). Thus, the defendant must offer

strong and convincing evidence to overcome the presumption that counsel prepared and executed an effective defense. *Ritchie v. State*, 875 N.E.2d 706, 714 (Ind. 2001). We must assess counsel’s performance based on facts known at the time rather than those revealed in hindsight. *Moore*, 678 N.E.2d at 1261. “Isolated poor strategy, bad tactics, a mistake, carelessness or inexperience do not necessarily amount to ineffective counsel unless, taken as a whole, the defense was inadequate.” *Carr*, 728 N.E.2d at 131.

I. Admission of Evidence

The State contends that the post-conviction court erred in finding Taylor’s trial counsel ineffective for failing to object to the admission of D.B.’s prior statements pursuant to the protected person statute. Before a petitioner can show that his counsel’s failure to object constituted deficient performance, he must show that the trial court would have been required to sustain such an objection. *Whitener v. State*, 696 N.E.2d 40, 43 (Ind. 1998). To establish ineffective assistance, the petitioner must also demonstrate a “prejudicial effect” stemming from counsel’s failure to object. *Stephenson v. State*, 864 N.E.2d 1022, 1035 (Ind. 2007).

During the post-conviction hearing, Taylor contended that his counsel was ineffective for failing to insist that the trial court follow certain procedural and substantive mandates outlined in the protected person statute.² The post-conviction court agreed, concluding that the State did not follow the statute, D.B.’s testimony was so minimal as to make her unavailable under the statute, and that D.B.’s prior statements were not admissible for the

² It is undisputed that D.B. is a protected person under Indiana Code Section 35-37-4-6(b) (1994).

truth of the matter asserted. Appellant's App. at 147-51.

The protected person statute allows the use of hearsay statements of child sex crime victims under age fourteen if certain procedural steps are taken; for example, the statute requires that the State notify the defendant of its intent to introduce a prior videotape or statement, that the trial court conduct a hearing to determine whether the statement or videotape is admissible, that the defendant attend the hearing, and that the child be available for cross examination. Ind. Code § 35-37-4-6(d)(1) (1994). Here, the State provided notice to Taylor, and the trial court held the required hearing on April 19, 2002. Taylor attended the hearing, and D.B. was available for questioning. At the hearing, the trial court must make a substantive finding "that the time, content, and circumstances of the statement or videotape provide sufficient indications of reliability." *Id.*

On April 24, 2002, the trial court entered the following order:

The court, having taken the State's Notice of Intent under advisement, has now reviewed the videotaped statement of the victim [to Detective Colon]. Court finds the victim is a protected person, as defined by statute. Court further finds the victim was available for cross-examination at the hearing and will be available to testify at trial. (State indicates victim will testify at trial). Based upon the evidence presented, Court finds that *the time, content and circumstances of the statement provide sufficient indicia of reliability* and that the statement is admissible for trial under I.C. 35-37-4-6. (Court did not review the deposition in State's Exhibit 2).

Appellant's App. at 25-26 (emphasis added). The post-conviction court concluded that the record contained "no finding of indicia of reliability" regarding D.B.'s statements to Detective Colon. *Id.* at 151.³ This conclusion is clearly erroneous.⁴

³ The post-conviction court presided at Taylor's trial but not at the pretrial hearing.

Next, the protected person statute addresses the use of prior statements when the child is available or unavailable to testify at trial. The statute outlines reasons and procedures for determining that a child is “unavailable” to testify. Specifically, it provides that a protected person’s statement or videotape is admissible if, after a proper hearing is held and reliability is established, the protected person

(A) testifies at the trial; *or*

(B) is found by the court to be unavailable as a witness for one (1) of the following reasons:

(i) From the testimony of a psychiatrist, physician, or psychologist, and other evidence, if any, the court finds that the protected person’s testifying in the physical presence of the defendant will cause [her] to suffer serious emotional distress such that [she] cannot reasonably communicate.

Ind. Code 35-37-4-6(d)(2)(i) (1994) (emphasis added).

In addressing whether D.B. *testified* at trial, we note that many of her responses were inaudible. However, the State argues that her audible responses were sufficient to constitute trial testimony. After D.B. was dismissed from the stand, defense counsel suggested to the trial court that “as a practical matter, she’s not available,” and the trial court agreed. Trial Tr. at 111. Clearly, as a protected person whose statements possessed indicia of reliability, either D.B. *testified* at trial and therefore met subsection (A), or she was *unavailable* and thus fell within the ambit of subsection (B). If her responses constituted testimony, as the State asserts, then the use of an expert to establish emotional distress under subsection (B) was not

⁴ Notwithstanding this conclusion, the post-conviction court entered this finding: “All parties, at the ‘Protected Person’ hearing and at trial, expected D.B. to testify and such expectations were reasonable based upon her earlier ability to make statements, containing sufficient indicia of crebility [sic], regarding the allegations of the charges.” Appellant’s App. at 148.

required in order to admit the videotape or statements as evidence.⁵

Excerpts of D.B.'s trial responses indicate that she gave limited but important testimony:

CROSS EXAMINATION:

[Defense Counsel]: ... Did anybody ever touch you where you didn't want them to touch you?

[D.B.]: (no audible response.)

[Defense Counsel]: Can you tell me where that happened?

[D.B.]: Home.

[Defense Counsel]: Did it happen at school?

[D.B.]: (no audible response.)

[Defense Counsel]: Did it happen at your grandmothers [sic]?

[D.B.]: No.

[Defense Counsel]: Do you know where it happened?

[D.B.]: Yes.

[Defense Counsel]: Where?

[D.B.]: At home.

....

[Defense Counsel]: And [the trial court] asked you if you knew the difference between telling the truth and telling a lie?

⁵ Taylor relies on *Howard v. State*, 853 N.E.2d 461, 467 (Ind. 2006), for the proposition that an unresponsive child may be deemed unavailable for purposes of the protected person statute. However, *Howard* involved a Sixth Amendment confrontation challenge where the child victim refused to respond to questions posed at trial and is therefore distinguishable from this case.

[D.B.]: Yes.

[Defense Counsel]: What is it when you tell the truth?

[D.B.]: When you tell somebody what I think is the real truth.

....

[Defense Counsel]: Okay. And what's a lie?

[D.B.]: When you tell somebody something that's not real.

[Defense Counsel]: And you've talked about good touches and bad [sic] touches before, haven't you?

[D.B.]: Yes.

[Defense Counsel]: You talked about that in school?

[D.B.]: Yes.

....

REDIRECT EXAMINATION:

[Prosecutor]: [Defense counsel] asked you where this happened. Where did it happen?

[D.B.]: At home.

[Prosecutor]: At home. What room of your home did it happen in?

[D.B.]: In my room.

[Prosecutor]: In your room. And who did this?

[D.B.]: (no audible response.)

[Prosecutor]: Is he here today?

[D.B.]: (no audible response.)

[Prosecutor]: He is? Can you tell me where he's at?

[D.B.]: (no audible response.)

[Prosecutor]: You can point.

[D.B.]: (no audible response.)

[Prosecutor]: Is that him sitting over there by [defense counsel]?

[D.B.]: (no audible response.)

[Prosecutor]: Is that a yes?

[D.B.]: Yes.

[Prosecutor]: Your Honor, can the record reflect that [D.B.] has identified the Defendant, Jerry Taylor.

COURT: It may so reflect.

[Prosecutor]: Has anyone ever bit you [D.B.]?

[D.B.]: (no audible response.)

[Prosecutor]: Yes? Where did you get bit?

[D.B.]: (no audible response.)

[Prosecutor]: You're pointing. What's that part called?

[D.B.]: Private.

[Prosecutor]: A private. And what do you use that part for?

[D.B.]: To pee.

[Prosecutor]: To pee. And who bit you there?

[D.B.]: (no audible response.)

[Prosecutor]: Is it the same person you pointed to or somebody different?

[D.B.]: (no audible response.)

[Prosecutor]: Who bit you there honey?

[D.B.]: (no audible response.)

[Prosecutor]: That man over there?

[D.B.]: (no audible response.)

Trial Tr. at 107-11. Inaudible responses notwithstanding, we conclude that D.B. provided enough audible testimony to satisfy subsection (A) of the protected person statute.

Finally, regarding defense counsel's strategic use of D.B.'s videotaped statement, we find enlightening a conference between the trial court and counsel at the beginning of trial outside the presence of the jury. During this conference, the parties presented argument over the introduction of D.B.'s videotaped statement. The prosecutor indicated that she would not introduce the videotape unless D.B. "freezes on the stand.... But if the child, who I believe will be able to talk and tell what happened, then I do not intend to play this video ... because it contains [a statement by D.B. that a child named Justine had also touched her on her private area] which the Judge has already ruled, is inadmissible." *Id.* at 89. Conversely, defense counsel argued in favor of introducing the videotape. *Id.* at 85-90. The interchange clearly indicates that it was defense counsel's strategy to have the videotape introduced to create an inference that D.B.'s bruising and other physical indications of abuse were caused by someone other than Taylor. *Id.* As such, we will defer to such a strategy even though, in hindsight, it may have proved more detrimental than beneficial. *Moore*, 678 N.E.2d at 1261.

Even without resort to D.B.'s prior statements, her trial testimony, corroborated by the testimony of examining nurse Dawn Rice, supports Taylor's convictions to the extent that his trial counsel's failure to object to the prior statements did not unfairly prejudice Taylor. Rice testified that when she examined D.B., she observed bruising consistent with a bite wound and internal injury consistent with penetration. Trial Tr. at 205-06, 211, 217-18. Moreover, regarding Taylor's argument that D.B.'s injuries were caused by another child in a schoolyard incident, Rice specifically stated that D.B.'s petechiae were not consistent with a child striking a child in the genital area. *Id.* at 233. Further, Rice testified that she fully explained examination procedures to D.B. and that during the examination, D.B. said, "he bit me here." *Id.* at 197-200, 209. To the extent Taylor challenges the admissibility of this statement, we note that its context indicates that it was reasonably pertinent to treatment and was therefore otherwise admissible under Indiana Evidence Rule 803(4). *See Cooper v. State*, 714 N.E.2d 689, 690 (Ind. Ct. App. 1999) (holding child victim's statements to nurse admissible where nurse's testimony regarding procedures indicated child was motivated to provide truthful information to promote treatment or diagnosis), *trans. denied*.

Regarding trial counsel's decision to offer into evidence D.B.'s deposition, we note that the deposition contained the following: (1) statements tending to bolster defense counsel's argument that D.B.'s wounds were caused by a schoolyard incident; (2) conflicting statements about the clothing D.B. wore during the alleged molestation; (3) conflicting statements regarding when D.B. learned about good and bad touches; and (4) statements indicating whether D.B. merely gave Detective Colon responses that would please him.

Thus, it was a matter of defense strategy to introduce the deposition. Again, we defer to trial counsel's strategy to pursue the course that, at the time and under the circumstances, seemed best. *Nantz v. State*, 740 N.E.2d 1276, 1283 (Ind. Ct. App. 2001), *trans. denied*. Finally, to the extent D.B.'s trial testimony lacks clarity regarding the bite wound, we note that the jury was unable to reach a unanimous verdict on Count II, class A felony child molesting for contact between Taylor's mouth and D.B.'s sex organ. Appellant's App. at 15. Therefore, Taylor was not convicted on that count. *Id.* at 41.

In sum, we conclude that Taylor's trial counsel acted in execution of a trial strategy regarding D.B.'s prior statements and videotape. Thus, we find neither deficient performance nor unfair prejudice based on his trial counsel's failure to object to the admission of such statements. As such, the post-conviction court erred in granting his petition for post-conviction relief on that basis.⁶

II. Jury Instruction

The State also contends that the post-conviction court erred in finding Taylor's counsel ineffective for failing to object when the trial court omitted a jury instruction

⁶ We note our supreme court's recent decision in *Tyler v. State*, 903 N.E.2d 463 (Ind. 2009), in which the court discussed the protected person statute and held that, despite the language of the statute, if the statements are consistent and otherwise admissible, the protected person may testify in open court or by prerecorded statement, but not both, except as authorized under the Rules of Evidence. *Id.* at 467. The court enumerated two reasons: (1) consistent statements are cumulative and thus can be unfairly prejudicial, and (2) if the child is sufficiently mature and reliable to testify in court, resort to the protected person statute is unnecessary. *Id.* at 466-67. In this vein, we note that the extent of D.B.'s testimony was limited; thus, her prior statements were not merely cumulative. Moreover, defense counsel could not properly be judged based on case law handed down in 2009. *See Walker v. State*, 843 N.E.2d 50, 59 (Ind. Ct. App. 2006) (stating counsel is not required to anticipate changes in the law and object accordingly to be considered effective), *trans. denied*. Thus, *Tyler* clearly would not serve as a basis for Taylor's ineffectiveness claim.

mandated by the protected person statute.⁷ Indiana Code Section 35-37-4-6(g) (1994) provides:

(g) If a statement or videotape is admitted in evidence under this section, the court *shall* instruct the jury that it is for the jury to determine the weight and credit to be given the statement or videotape and that, in making that determination, the jury shall consider the following:

- (1) The mental and physical age of the person making the statement or videotape.
- (2) The nature of the statement or videotape.
- (3) The circumstances under which the statement or videotape was made.
- (4) Other relevant factors.

(Emphasis added.)⁸

The post-conviction court entered the following conclusions regarding Taylor's counsel's failure to object to the trial court's omission:

2. Since D.B. was only able to testify minimally at trial, the court's failure to give the statutorily required instruction cannot be considered harmless error.

....
5. Had [defense counsel] tendered such an instruction, the Court would have had to give the instruction to the jury. *See Bell v. State*, 820 N.E.2d 1279 (Ind. Ct. App. 2005), *trans. denied*, April 14, 2005. Thus, [defense counsel's] failure to have done so rendered his performance deficient.

6. [Defense counsel's] representation was deficient, and but for the acts or omissions of counsel, the jury may not have found Taylor guilty of child molest....

7. There is a reasonable likelihood that but for [defense counsel's]

⁷ The State's proposed jury instruction reads as follows:

A statement or videotape of [D.B.] has been admitted into evidence. It is for you to determine the weight and credit to be given the statement or videotape and, in making that determination, you shall consider the following: (1) the mental and physical age of [D.B.], (2) the nature of the statement or videotape; (3) the circumstances under which the statement or videotape was made; and (4) other relevant factors.

Appellant's App. at 21.

⁸ This subsection is now codified as Indiana Code Section 35-37-4-6(h).

failure to object to the Court's omission or tender an instruction in accordance with the statutory provision [in Indiana Code Section 35-37-4-6(g) (1994)] would have had an effect on the jury's consideration of D.B.'s hearsay statements, and as a result, its verdict. Taylor's convictions and sentence must [be] vacated.

....

10. When the error is the failure to give an instruction, a tendered instruction is necessary to preserve error unless the error is so prejudicial to the rights of the defendant as to make a fair trial impossible. *Scott v. State*, 771 N.E.2d 718, 725 (Ind. Ct. App. 2002). The error must constitute a blatant violation of basic principles, the harm or potential for harm must be substantial, and the resulting error must deny the defendant fundamental due process. *Id.*

11. During Taylor's trial several hearsay statements made by D.B. were heard by the jury. Ind[iana] Code Section 35-37-4-6(g) [(1994)] requires a special instruction be given outlining the evaluative process in which the jury must engage in [sic] when determining the weight and credit to be given to the protected person's statement(s). *Bell*, 820 N.E.2d at 1279. The State's case is based on D.B.'s statements. The trial Court did not instruct the jury as required by the statute. Thus, the jury was not instructed on how they must evaluate D.B.'s statements when determining the weight and credit to be given to the statements. As a result, Taylor was denied fundamental due process.

12. The giving of the instruction was mandated by statute....

Appellant's App. at 152.

When examining a defendant's ineffectiveness claim based on an alleged error in instructing the jury, we examine the instruction or lack thereof in the context of all relevant information given to the jury, including other instructions. *See Bell v. State*, 820 N.E.2d 1279, 1284 (Ind. Ct. App. 2005) (noting the propriety of giving the statutory instruction in the absence of another instruction covering its substance), *trans. denied*.

Here, the trial court instructed the jury in part as follows:

You are the exclusive judges of the evidence, the credibility of the witnesses and of the weight to be given to the testimony of each of them. In considering the testimony of any witness, you may take into account his or her ability and opportunity to observe, the manner and conduct of the witness

while testifying; any interest, bias or prejudice the witness may have; any relationship with other witnesses or interested parties; and the reasonableness of the testimony of the witness considered in the light of all of the evidence in the case.

You should attempt to fit the evidence to the presumption that the defendant is innocent and the theory that every witness is telling the truth. You should not disregard the testimony of any witness without a reason and without careful consideration. If you find conflicting testimony you must determine which of the witnesses you will believe and which of them you will disbelieve.

In weighing the testimony to determine what or whom you will believe, you should use your own knowledge, experience and common sense gained from day to day living. The number of witnesses who testify to a particular fact, or the quantity of evidence on a particular point need not control your determination of the truth. You should give the greatest weight to that evidence which convinces you most strongly of its truthfulness.

Appellant's App. at 34.

The record includes a "State's Proposed Instruction" tracking the language mandated by the protected person statute. Appellant's App. at 21. However, the trial transcript does not indicate why the trial court omitted the statutory instruction. Before closing argument, the trial court held a conference with counsel to finalize jury instructions; yet, the statutory instruction was not mentioned at all among the instructions in question or in dispute. Trial Tr. at 250-52. Whether through inadvertence or otherwise, the trial court did not give the statutory instruction. To the extent defense counsel failed to call the omission to the trial court's attention, counsel's performance may be deemed deficient.

However, given the substance of the final instructions actually given by the trial court, we conclude that defense counsel's deficient performance did not render Taylor's trial fundamentally unfair or unreliable. *See Carr*, 728 N.E.2d at 131 (stating that prejudice is not established unless counsel's error rendered the result of the proceeding fundamentally unfair

or unreliable). Although the instructions did not track the specific language of the statutory instruction, they adequately emphasized the importance of evaluating the credibility of each witness and the weight to be given to each witness's statements. This would include D.B.'s statements as well as Detective Colon's in-depth testimony about the circumstances surrounding the videotaping process. Finally, as instructed, the jury members could use their own common sense, knowledge, and experience to evaluate D.B.'s mental and physical age. As such, the post-conviction court erred in concluding that trial counsel was ineffective in failing to insist that the trial court give the statutory instruction.

III. Appellate Counsel

The standard of review for a claim of ineffective assistance of appellate counsel is identical to the standard for trial counsel. *Lowery v. State*, 640 N.E.2d 1031, 1048 (Ind. 1994). The petitioner must establish deficient performance by appellate counsel resulting in prejudice. *Id.* “[T]he decision of what issues to raise is one of the most important strategic decisions to be made by appellate counsel.” *Reed v. State*, 856 N.E.2d 1189, 1196 (Ind. 2006). As a result, “[i]neffective assistance is very rarely found in cases where a defendant asserts that appellate counsel failed to raise an issue on direct appeal.” *Id.* Because we find that Taylor's trial counsel was not ineffective, appellate counsel did not err in failing to raise the above issues on direct appeal. *Smith v. State*, 792 N.E.2d 940, 946 (Ind. Ct. App. 2003), *trans. denied*.

In sum, the post-conviction court erred in concluding that Taylor's trial and appellate counsel were ineffective. Accordingly, we reverse.

Reversed.

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