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IN THE
COURT OF APPEALS OF INDIANA

FARRELL BOYCE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 89A01-0901-CR-6
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE WAYNE SUPERIOR COURT
The Honorable Darrin M. Dolehanty, Judge
Cause No. 89D03-0710-FD-179

June 24, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Farrell Boyce appeals his conviction for Class D felony domestic battery and a habitual offender enhancement. Specifically, he contends that fundamental error and ineffective assistance of counsel occurred when his trial counsel failed to object to the State's late filing of the habitual offender information. We conclude that Boyce has not shown on this record that the State did not have good cause for its late filing. Moreover, we conclude that Boyce has not shown that he was prejudiced by the late filing, which occurred more than a month before trial. Therefore, neither fundamental error nor ineffective assistance of counsel occurred. We affirm the trial court.

Facts and Procedural History

On October 22, 2007, the State charged Boyce with Class D felony domestic battery, Class D felony strangulation, and Class A misdemeanor interference with reporting of a crime. Boyce's omnibus date was set for December 25, 2007.

On October 14, 2008, the day of Boyce's pretrial conference, the State filed an Information for Habitual Offender.[1] Appellant's App. p. 31. At the pretrial conference, the trial court acknowledged that the State had just filed the habitual offender information:

> The State has today filed information for Habitual Offender. Mr. Boyce, the Habitual Offender allegation alleges that on or about January 13, 1998, you were convicted and sentenced for Operating While Intoxicated, as a Class D Felony . . . . It alleges then that after you were sentenced [for that] you committed another felony offense called Non-Support Of A Dependent, which is a Class D felony, for which you were convicted and sentenced . . . on or about August 30, 2006 . . . .

[1] Ind. Code § 35-50-2-8.

Pre-Trial Conf. Tr. p. 2. The court then discussed several more aspects of the habitual offender information with Boyce, with which Boyce indicated his understanding. *See id.* at 2-4. At no time did Boyce's attorney object to the late filing of the habitual offender information.

Boyce's jury trial was held over a month later on November 18, 2008. The jury found him guilty of domestic battery and acquitted him of strangulation and interference with reporting of a crime. The jury then reconvened for the habitual offender phase and found him to be a habitual offender. The trial court sentenced Boyce to two years for domestic battery, enhanced by three years for the habitual offender finding. Boyce now appeals.

Discussion and Decision

Boyce raises two issues on appeal. First, he contends that his trial counsel's failure to object to the State's late filing of the habitual offender information amounts to fundamental error. Second, he contends that his trial counsel's failure to object to the State's late filing of the habitual offender information constitutes ineffective assistance of counsel.

Initially, we note that the State did not file an appellee's brief. "The obligation of controverting arguments presented by the appellant properly remains with the State." *Mateyko v. State*, 901 N.E.2d 554, 557 (Ind. Ct. App. 2009). Where, as here, the appellee fails to submit a brief, the appellant may prevail by making a prima facie case of error, *i.e.*, an error at first sight or appearance. *Id.* Still, we must correctly apply the law to the facts of the record to determine if reversal is required. *Id.*

I. Fundamental Error

Boyce concedes that his trial counsel did not object to the State's late filing of the habitual offender information. As such, he argues that the "failure to object to the late filing of the habitual offender was fundamental error." Appellant's Br. p. 6. The fundamental error doctrine is an exception to the general rule that the failure to object at trial constitutes a procedural default precluding consideration of an issue on appeal." *Jewell v. State*, 887 N.E.2d 939, 940 n.1 (Ind. 2008). The fundamental error exception is extremely narrow. *McQueen v. State*, 862 N.E.2d 1237, 1241 (Ind. Ct. App. 2007). To qualify as fundamental error, the error must be "so prejudicial to the rights of the defendant as to make a fair trial impossible." *Carden v. State*, 873 N.E.2d 160, 164 (Ind. Ct. App. 2007). The fundamental error exception "applies only when the error constitutes a blatant violation of basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process." *McQueen*, 862 N.E.2d at 1241.

Indiana Code § 35-34-1-5(e) provides:

> An amendment of an indictment or information to include a habitual offender charge under IC 35-50-2-8, IC 35-50-2-8.5, or IC 35-50-2-10 must be made not later than ten (10) days after the omnibus date. *However, upon a showing of good cause, the court may permit the filing of a habitual offender charge at any time before the commencement of the trial.*

(Emphasis added). Here, the trial court set the omnibus date for December 25, 2007. The State, however, did not file the habitual offender information until October 14, 2008, well beyond the ten-day period established for such filings by Indiana Code § 35-34-1-5(e), but nevertheless over a month before trial. Boyce alleges on appeal that good cause

for the late filing simply did not exist. But because Boyce did not object in the trial court (and given the chance he had to do so during the pretrial conference), the State did not have an opportunity to show good cause and, therefore, the trial court did not find good cause. *Cf. Hooper v. State*, 779 N.E.2d 596, 602 (Ind. Ct. App. 2002) (reversing habitual offender enhancement where the "State did not offer any showing of good cause for the late filing" *after* the defendant objected). Boyce is the one who bears the burden of proving that fundamental error exists, and he has not shown on this record that the State did not have good cause for the late filing of the habitual offender information.

Moreover, the State filed the habitual offender information more than a month before trial. Boyce does not even allege on appeal that this was an inadequate amount of time to prepare his defense to the habitual offender charge. The purpose of Indiana Code § 35-34-1-5(e) is to allow a defendant sufficient time to prepare a defense for the habitual offender charge. *Land v. State*, 802 N.E.2d 45, 53 (Ind. Ct. App. 2004), *trans. denied*. Because Boyce does not allege that he was prejudiced by the late filing of the habitual offender information, he cannot meet the extremely narrow exception of fundamental error, which requires that the error be so prejudicial to the rights of the defendant as to make a fair trial impossible. *See id.* at 53-54 ("Land does not argue that he had insufficient time to prepare his defense to the habitual offender charge. In fact, the habitual offender charge was filed in September 2002, and Land was not tried until February 2003. Because Land has not presented any explanation of how he was prejudiced by the timing of the additional charge, his request that we reverse his habitual

offender enhancement on these grounds is denied.”). There is no prima facie showing of error here.

II. Ineffective Assistance of Counsel

Boyce next contends that his trial counsel was ineffective for failing to object to the late filing of the habitual offender information. We review the effectiveness of trial counsel under the two-part test provided by *Strickland v. Washington*, 466 U.S. 668 (1984). *Bieghler v. State*, 690 N.E.2d 188, 192-93 (Ind. 1997), *reh'g denied*. A claimant must demonstrate that counsel's performance fell below an objective level of reasonableness based upon prevailing professional norms and that the deficient performance resulted in prejudice. *Strickland*, 466 U.S. at 687-88. "Prejudice occurs when the defendant demonstrates that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Grinstead v. State*, 845 N.E.2d 1027, 1031 (Ind. 2006) (quoting *Strickland*, 466 U.S. at 694). We presume that counsel rendered effective performance, and a defendant must offer strong and convincing evidence to overcome this presumption. *Loveless v. State*, 896 N.E.2d 918, 922 (Ind. Ct. App. 2008) (citing *Overstreet v. State*, 877 N.E.2d 144, 152 (Ind. 2007), *reh'g denied*), *trans. denied*. "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *Strickland*, 466 U.S. at 697. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." *Id.*

Here, even assuming trial counsel's performance was deficient for failing to object to the State's late filing of the habitual offender information, Boyce cannot show prejudice. The only prejudice Boyce alleges is that had counsel objected, "the State would have not been able to explain what good cause they had to file late." Appellant's Br. p. 8. Therefore, Boyce's argument continues, he would not be serving an additional three years. However, Boyce provides us with absolutely no basis for his allegation that the State had no grounds for its late filing, and because there was no objection, there is none in *this* record.[2] Therefore, Boyce can show no prejudice. Therefore, his ineffective assistance of counsel claim fails.

Affirmed.

NAJAM, J., and FRIEDLANDER, J., concur.

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[2] Ineffective assistance of counsel claims may be raised either on direct appeal or in post-conviction proceedings. *Benefiel v. State*, 716 N.E.2d 906, 911 (Ind. 1999), *reh'g denied*. However, "[a] post-conviction hearing is normally the preferred forum to adjudicate an ineffectiveness claim." *Woods v. State*, 701 N.E.2d 1208, 1219 (Ind. 1998), *reh'g denied*. This is because presenting such a claim often requires the development of new facts not present in the trial record, and the assessment of such a claim requires a court to consider the overall performance of counsel and the reasonable probability that the alleged error affected the outcome. *McIntire v. State*, 717 N.E.2d 96, 101 (Ind. 1999). If ineffective assistance of trial counsel is raised on direct appeal, "the issue will be foreclosed from collateral review." *Woods*, 701 N.E.2d at 1220.