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.

APPELLANT PRO SE:

CHRISTOPHER KIMBRELL
Pendleton, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

RICHARD C. WEBSTER
Deputy Attorney General
Indianapolis, Indiana

FILED
Aug 12 2011, 9:41 am
CLERK
of the supreme court, court of appeals and tax court

IN THE
COURT OF APPEALS OF INDIANA

CHRISTOPHER KIMBRELL,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 49A02-1008-PC-1012
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Robert R. Altice, Jr., Judge
Cause No. 49G02-0406-PC-105656

August 12, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Christopher Kimbrell appeals the denial of his petition for post conviction relief. He raises three issues, which we consolidate and restate as:

1. Whether Kimbrell's trial counsel provided ineffective assistance because he did not call Kimbrell as a witness or object to a comment the prosecutor made during closing argument; and
2. Whether the post-conviction court erred when it found Kimbrell's judicial misconduct claim was *res judicata*.

We affirm.

FACTS AND PROCEDURAL HISTORY

On June 14, 2004, the State charged Kimbrell with two counts of Class A felony child molesting[1] and two counts of Class C felony child molesting[2] based on testimony from his daughter that he molested her on several occasions. Kimbrell's first trial ended with a hung jury. Kimbrell did not testify during his first trial.

Kimbrell's second trial began in June 2006. Kimbrell again did not testify and a jury found Kimbrell guilty as charged. The court entered convictions for one of the Class C and both Class A felonies. The trial court sentenced Kimbreel to fifty years incarcerated, twenty-five years for each Class A felony, to be served consecutively, and four years for the Class C felony, to be served concurrently with the sentences for the Class A felonies.

[1] Ind. Code § 35-42-4-3(a).
[2] Ind. Code § 35-42-4-3(b).

Kimbrell appealed, arguing the trial court erred in admitting portions of his videotaped statement to police and in imposing his sentence. We affirmed. *See Kimbrell v. State*, No. 49A02-0608-CR-711, slip op. at 1 - 2 (Ind. Ct. App. June 20, 2007).

On April 4, 2008, Kimbrell filed a petition for post-conviction relief, contending his trial counsel was ineffective because Kimbrell did not testify during trial and counsel did not object to a statement the prosecutor made during closing argument. Kimbrell also alleged the trial court erroneously relied on false information regarding his criminal history. The post-conviction court held an evidentiary hearing on October 21, 2009, and denied Kimbrell's petition on July 19, 2010.

DISCUSSION AND DECISION

Post-conviction proceedings afford petitioners a limited opportunity to raise issues that were unavailable or unknown at trial and on direct appeal. *Davidson v. State*, 763 N.E.2d 441, 443 (Ind. 2002). As post-conviction proceedings are civil in nature, the petitioner must prove his grounds for relief by a preponderance of the evidence. *Id*. A party appealing a negative post-conviction judgment must establish that the evidence is without conflict and, as a whole, unmistakenly and unerringly points to a conclusion contrary to that reached by the post-conviction court. *Id*. Where, as here, the post-conviction court makes findings of fact and conclusions of law in accordance with Indiana Post-Conviction Rule 1(6), we do not defer to the court's legal conclusions, but "the 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." *Ben-Yisrayl v. State*, 729 N.E.2d 102, 106 (Ind. 2000) (citation omitted).

1. Ineffective Assistance of Counsel

We review claims of ineffective assistance of counsel under the two-part test announced in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prevail, a claimant must show counsel's performance fell below an objective level of reasonableness based on prevailing professional norms, *Taylor v. State*, 882 N.E.2d 777, 781 (Ind. Ct. App. 2008), and that the deficient performance resulted in prejudice. *Id*.

"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 need not consider whether counsel's performance fell below the objective standard if that performance would have not changed the outcome. *Strickland*, 466 U.S. at 687.

a. Failure to Call Kimbrell to Testify

Kimbrell claims he was denied the right to testify at trial. His counsel indicated during a pretrial hearing that, if a videotaped statement Kimbrell made to police was introduced into evidence, Kimbrell would testify to "clean up any loose ends." (Tr. at 89.)[3]

[3] The transcript for Kimbrell's trial will be cited as "Tr." The transcript for Kimbrell's PCR hearing will be cited as "PC Tr."

At the end of the State's case, defense counsel indicated he did not wish to present any witnesses, despite that videotaped statement being introduced by the State. At his post-conviction hearing, Kimbrell's trial counsel testified:

> I know that what you're contending is that I think you wanted to testify and I didn't let you. I mean, there could have been a discussion, there could have been an argument between us, I simply do not know. Obviously if you didn't testify it was at least my recommendation to you at that time that you not testify, for whatever reason. But as your attorney I don't have the authority to keep you off the witness stand, if you want to take the witness stand.

(PC Tr. at 7.)

The decision to testify at trial lies with the defendant, not his counsel. *Daniels v. State*, 741 N.E.2d 1177, 1187 (Ind. 2001). Kimbrell directs us to nothing in the trial record indicating he wanted to testify and was denied that right. Nor has he indicated what his testimony would have been, or how it would have changed the outcome of his trial. Thus, has not proven he was prejudiced by any alleged error by counsel. Accordingly, we cannot find counsel's assistance was ineffective simply because Kimbrell did not testify.

b. <u>Failure to Object</u>

Kimbrell contends counsel was ineffective because he did not object to a comment by the prosecutor during his closing statement. He claims the following statement impermissibly referenced Kimbrell's failure to testify:

> But think about it, he's being accused of molesting his daughter. Is there anything that is more despicable than that, and he sits in a chair and twiddles his thumbs. Is that reasonable? Does that make sense? Of course it doesn't. What makes sense is, he's busted. He did it, and he knows it. Because

> otherwise you'd be screaming, you'd be yelling, I am not a child molester. I would never do anything like that. How dare you accuse me. How dare you say something like that.

(Tr. at 325.)

To show ineffective assistance based on failure to make an objection, a petitioner must demonstrate that the trial court would have sustained the objection. *Glotzbach v. State*, 783 N.E.2d 1221, 1224 (Ind. Ct. App. 2003). The petitioner must also establish prejudice. *Timberlake v. State*, 690 N.E.2d 243, 259 (Ind. 1997), *reh'g denied*. The Fifth Amendment prohibits the prosecutor from commenting during trial about the defendant's decision not to testify. *Owens v. State*, 937 N.E.2d 880, 893 (Ind. Ct. App. 2010), *reh'g denied*. However, our Indiana Supreme Court has held that if the prosecutor's comment in its totality is addressed to other evidence rather than the defendant's failure to testify, it is not grounds for reversal. *Boatright v. State*, 759 N.E.2d 1038, 1043 (Ind. 2001).

The prosecutor's comment was not about Kimbrell's silence at trial – it was part of her synopsis of Kimbrell's videotaped interview with police before trial. The prosecutor said, "I want to talk about the defendant's statement." (Tr. at 324.) She then went on to describe Kimbrell's videotaped statement that had been shown to the jury. An objection by Kimbrell's counsel would likely not have been sustained because the prosecutor was not commenting on Kimbrell's decision not to testify. Kimbrell has not proven his counsel's assistance was ineffective.

2. Judicial Misconduct

Kimbrell argues the trial court, during sentencing, erroneously believed one of Kimbrell's prior misdemeanor convictions was a felony, and then enhanced his sentence based on that erroneous criminal history. This, Kimbrell asserts, was judicial misconduct. However, Kimbrell waived this issue by not raising it on direct appeal. *See Timberlake v. State*, 753 N.E.2d 591, 597 (Ind. 2001) (if an issue is known and available, but not raised on direct appeal, it is waived).

On direct appeal, Kimbrell argued the trial court abused its discretion when it ordered him to serve his sentences consecutively.[4] We affirmed the trial court, holding it properly considered as aggravators Kimbrell's criminal history, his failure to take responsibility for his actions, and his history of blame-shifting. The aggravators outweighed Kimbrell's mitigators, which included the lack of a substance abuse problem, post-secondary education, and the hardship Kimbrell's imprisonment would have on his dependants.

In his petition for post-conviction relief, Kimbrell alleged the "Court relied on [a] faulty criminal history report. Judge assumed prior felony conviction when factually incorrect." (App. at 51.) Kimbrell's argument in his direct appeal was that his consecutive sentences were inappropriate because the trial court did not properly consider the aggravators

[4] We do not have before us the briefs from Kimbrell's direct appeal, so we are unable to ascertain precisely what was argued. To the extent this argument could be seen as overlapping with the issues Kimbrell raised in his direct appeal, it would be precluded by *res judicata*. *See Timberlake v. State*, 753 N.E.2d 591, 597 (Ind. 2001) (if issue was raised on direct appeal, but decided adversely, it is precluded by *res judicata*).

and mitigators he presented. It seems Kimbrell's argument in his petition for post-conviction relief is simply an extension of his argument on direct appeal, and therefore available at the time of his direct appeal. Accordingly, this issue is waived.

CONCLUSION

Kimbrell did not show his counsel was ineffective and his claim of judicial misconduct is waived. Accordingly, we affirm the post-conviction court.

Affirmed.

BAKER, J., and BRADFORD, J., concur.