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IN THE COURT OF APPEALS OF INDIANA

DONALD WINCHESTER,

Appellant-Petitioner,

vs.

STATE OF INDIANA,

Appellee-Respondent.

No. 02A05-0702-PC-99

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable John F. Surbeck, Jr., Judge
Cause No. 02D04-0305-PC-67

September 28, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Donald Winchester appeals the denial of his petition for post-conviction relief. We affirm.

Issue

The issue is whether Winchester received ineffective assistance of appellate counsel.

Facts and Procedural History

Another panel of this Court set forth the following facts in Winchester's direct appeal:

> The facts most favorable to the verdict are that in June of 2000, Winchester, while standing outside of his car, reached into his car and grabbed a handgun, which he pointed at Michelle Crebb. Because he had a prior child molesting conviction, Winchester was charged with violating Indiana's serious violent felon statute, which states that it is illegal for certain persons classified as "serious violent felons" to knowingly or intentionally possess a firearm. Ind. Code § 35-47-4-5(c). A "serious violent felon" is defined by statute as a person who has committed a serious violent felony in Indiana. Ind. Code § 35-47-4-5(a)(1)(A). Child molesting is included in the definition of a "serious violent felony." Ind. Code § 35-47-4-5(b)(10).

Winchester v. State, No. 02A03-0106-CR-173, slip op. at 2 (Ind. Ct. App. Oct. 10, 2001) (footnote omitted).[1]

On the morning of Winchester's jury trial in May 2001, Winchester's counsel, Jeffrey Raff, offered to stipulate that Winchester had "a conviction that is one of those enumerated in the [serious violent felon ("SVF")] statute and is defined as a serious violent felon." Trial Tr. at 6. The prosecutor responded that he would allow Winchester "to stipulate that he is one and the same Donald Winchester who was convicted of child molesting in the Allen Superior Court under cause number 02D04-9008-CF-494." *Id.* at 7. After a brief discussion of

Spearman v. State, 744 N.E.2d 545 (Ind. Ct. App. 2001), *trans. denied*, a then-recent opinion addressing the prejudicial aspects of SVF prosecutions, the trial court proposed wording the stipulation as follows: "[R]espective counsel stipulate that the Defendant is one and the same Donald Winchester convicted of Child Molesting, a Class B felony on February 19, 1991, Allen Superior Court, cause number and two, that child molesting is one of the offenses classified as a serious violent felony in" the SVF statute. *Id.* at 9-10. Raff replied, "You could go even further and remove the description of his prior felony to say the parties so stipulate that Mr. Winchester has a prior criminal conviction which is one enumerated under the [….] statute and defined as a serious violent felon." *Id.* at 10. The prosecutor responded, "I'm not willing to do that. I like the way the court worded it the first time, if that's unacceptable to the Defendant we'll present our evidence as to his conviction." *Id.* The trial court stated, "[O]ne of the reasons I propose this is that I don't expect for prosecution to hammer repeatedly on the prior child molesting conviction. That is what is recommended against, strongly recommended against if not prohibited in [*Spearman*]." *Id.* at 10-11. Winchester's counsel made no further comment regarding the stipulation.

In his opening statement to the jury, the prosecutor said,

> [T]his case is very simple and in a few moments we'll start the evidence and at some point the Judge will read to you a stipulation that the Defendant, his attorney and myself have entered into and basically Mr. Winchester stipulated that in fact he is a serious violent felon having been convicted and sentenced for Child Molesting, a Class B felony. So the only issue you're going to have to decide today is whether or not Mr. Winchester was in possession of a firearm. Did he have the gun or didn't he.

[1] Before trial, the State dismissed a charge of carrying a handgun without a license. *Winchester*, slip op. at 2 n.1.

Id. at 14. The prosecutor then called seven witnesses, including Winchester's brother, Timothy, all of whom testified unequivocally that they saw Winchester with a handgun at Michelle Crebb's home in June 2000.[2] Their descriptions of the handgun varied in minor respects, but every witness denied that Winchester might have wielded something other than a handgun, such as a flashlight.

At the close of the State's case in chief, the trial court read the following stipulation to the jury:

> Ladies and gentlemen, counsel for the State of Indiana, the Defendant personally and counsel for the Defendant have entered into a stipulation of fact which reads as follows. The Defendant, Donald Winchester is one and the same Donald Winchester convicted and sentenced of Child Molesting, a Class B felony, on February 19th, 1991, in the Allen Superior Court, Cause number 02D04-9008-CF-494, and Child Molesting, a Class B felony is a serious violent felony pursuant to Indiana Statute I.C. 35-47-4-5. You should accept this stipulation as if it had been testified to without contradiction.

Id. at 59.

Winchester then took the stand in his own defense. Winchester testified that he and his wife and cousin had gone to Crebb's home so that his cousin could retrieve some belongings from Crebb, his girlfriend. Winchester stated that while his cousin and Crebb were discussing matters in a back room, several teenage girls "set there and they taunted me, you know, because they found out that I had been in prison." *Id*. at 62. According to Winchester, one of the girls "jumped up and said, well, I'm scared of you. She said hell, I ought to just grab this lighter fluid and throw it on you and burn you up. And that's when I

[2] On cross examination, Timothy acknowledged that he had told Winchester's probation officer that Winchester did not have a gun. Timothy stated, "I know what the facts was, I tried to help [Winchester] out and I lied for him." Trial Tr. at 57.

jumped up, I got mad." *Id*. at 63. Winchester testified that he left Crebb's home and that Crebb and his cousin's "vicious dog" tried to bite him. *Id*. at 64. He stated that he reached into his car to grab a silver flashlight "to smash the dog in the head if it went after the kids" playing in Crebb's yard. *Id*. Winchester then said, "[T]he next thing I know my brother is on top of me grabbing it away from me talking about well you're on parole, you don't need this, get the hell out of here." *Id*.

During closing argument, the prosecutor mentioned Winchester's child molesting conviction three times. *See id*. at 85 ("Now [Winchester] says that when he was in the house, Rennae and Christina were teasing him, taunting him about the fact that he was a convicted child molester."), 86 ("They were fourteen year old teenage girls talking to a thirty-five year old man and taunting him, according to his testimony about being a convicted child molester.") and 89 (rereading of stipulation). Raff told the jury,

> You have heard the word and you have heard the fact that Mr. Winchester was convicted in 1990 [sic] of child molesting. Now I'm sure that gives you all a little bit of a shiver and some sort of negative reaction. I would not expect otherwise. I would like you to think and share your thoughts with the other jurors during your deliberations as to whether or not that fact is influencing you in determining whether or not he's guilty of what he is charged with today. He paid, if you can pay a price, he paid the only price that he had to pay, was required of him to pay for that conviction. It is unfair and I ask you to consider that carefully when you deliberate, make sure that you're not convicting him again for something he had done and paid the price for before.

Id. at 89-90. On rebuttal, the prosecutor stated,

> I have to prove two things to you. First of all I have to prove to you that Mr. Winchester is a serious violent felon. And that's been done by stipulation. But what Mr. Raff and I are both saying to you is the fact that he has been

convicted of child molesting does not mean he possessed a handgun. Your only issue is did he possess the handgun or did he not possess the handgun.

Id. at 93.

The jury found Winchester guilty as charged. On May 23, 2001, the trial court sentenced Winchester to twenty years. Raff represented Winchester on appeal and raised the following issue: "whether [Winchester's] substantive due process rights were violated by the legislature's decisions to refer to the designated group of felonies as 'serious violent felonies' and to the crime as possession by a 'serious violent felon'." Pet. Ex. 3 at 1. On October 10, 2001, another panel of this Court affirmed Winchester's conviction in an unpublished memorandum decision. That decision reads in pertinent part,

> In serious violent felon cases, the existence of a prior conviction is essential to the determination of guilt or innocence. A person is not guilty of the offense unless he is a serious violent felon, and his status as a serious violent felon can only be proven by showing that he has been convicted of one of the crimes defined by statute as a serious violent felony. Thus, by keeping out evidence of a prior conviction, the trial court would be stripping the statute of its teeth and rendering it moot. We refuse to sanction such judicial legislation. Evidence of a prior conviction in a serious violent felon trial does not merely have a high probative value, it is indeed an element of the offense.
>
> Though the majority in Spearman recognized the possible danger of unfair prejudice presented in serious violent felon cases, both the majority and Judge Darden[3] pointed out that a defendant may be protected by the careful crafting of jury instructions and by limiting the evidence regarding the prior conviction given to the jury. Judge Darden mentioned in a crucially important

[3] Judge Darden voted to reverse Spearman's conviction, believing that the trial court erred in refusing to bifurcate the SVF proceedings. *See Spearman*, 744 N.E.2d at 550 ("Because the accused is clothed with a presumption of innocence, it is antithetical to our system of jurisprudence to label one accused of a crime as a 'serious violent felon' during proceedings to determine guilt."), 551 ("In my view, evidence of the predicate elements must be presented to the jury before it is informed of the accused's status as a serious violent felon. If the jury determines that the evidence is sufficient to establish beyond a reasonable doubt that the accused knowingly or intentionally possessed a firearm, then, as in the case of habitual offender enhancement, the jury would be informed of the second portion of the proceedings. In that manner, the accused's right to the presumption of innocence will not be trammeled by references to a previous serious violent felony conviction, as occurred here.") (footnote omitted) (Darden, J., dissenting in part).

> footnote that the defendant in Spearman was stripped of his presumption of innocence because the jury was repeatedly exposed to information and evidence regarding the prior conviction. Spearman, 744 N.E.2d at 550 n.9. Thus, if the jury is protected from being repeatedly exposed to evidence of the prior conviction, the risk of unfair prejudice is significantly decreased.
>
> Such careful structuring of the trial occurred in this case. During a pre-trial conference, Winchester's attorney quoted relevant parts of Judge Darden's dissent to the trial court and the State. The trial court and the State were aware of the importance of limiting references to Winchester's prior child molesting conviction in order to avoid any unfair prejudice. The State told the jury twice during its opening statement that the only issue before it was whether or not Winchester possessed a firearm. The parties entered into a stipulation regarding Winchester's prior conviction that was read to the jury without further elaboration. Winchester's attorney asked the jury during his closing argument not to consider the fact that Winchester was a convicted felon. The State then reiterated that point and told the jury that "the legal principle behind the fact that he's a serious violent felon does not mean he possessed a handgun." R. 92. The jury instructions made limited reference to the prior conviction. As careful measures were taken to avoid the risk of unfair prejudice, Winchester was not denied his substantive due process rights.

Winchester, slip op. at 5-6.

On May 12, 2003, Winchester filed a pro se petition for post-conviction relief, which was amended by counsel six days later. The amended petition alleged that Raff was ineffective in failing to argue on appeal that the trial court's stipulation constituted an abuse of discretion,

> as it allowed repeated references to [Winchester's] prior Child Molesting conviction. In addition, appellate counsel could have demonstrated that the trial court's abuse went beyond harmless error, given that the repeated references to [Winchester] being a convicted child molester no doubt had an impact on the jury's verdict and thus prejudiced [Winchester's] substantial rights.

Appellant's App. at 43. After a hearing, the post-conviction court denied Winchester's amended petition on December 27, 2006.

Discussion and Decision

Winchester contends that the post-conviction court erred in denying his petition for relief. Our general standard of review is well settled:

> The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5). When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. On 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. Further, the post-conviction court in this case entered findings of fact and conclusions thereon 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. In this review, we accept findings of fact unless clearly erroneous, but we accord no deference to conclusions of law. The post-conviction court is the sole judge of the weight of the evidence and the credibility of witnesses.

Burnside v. State, 858 N.E.2d 232, 237 (Ind. Ct. App. 2006) (quotation marks and some citations omitted).

Regarding claims of ineffective assistance of appellate counsel, our supreme court has stated,

> A defendant claiming a violation of the right to effective assistance of counsel must establish the two components set forth in *Strickland v. Washington*, 466 U.S. 668 (1984); *accord Williams v. Taylor*, 529 U.S. 362, 390-91 (2000). First, the defendant must show that counsel's performance was deficient. *Strickland*, 466 U.S. at 687. This requires a showing that counsel's representation fell below an objective standard of reasonableness, *id*. at 688, and that the errors were so serious that they resulted in a denial of the right to counsel guaranteed the defendant by the Sixth Amendment, *id*. at 687. Second, the defendant must show that the deficient performance prejudiced the defense. *Id*. To establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id*. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id*.
>
> Counsel is afforded considerable discretion in choosing strategy and tactics, and we will accord those decisions deference. *Id*. at 689. A strong

> presumption arises that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Id.* at 690. The *Strickland* Court recognized that even the finest, most experienced criminal defense attorneys may not agree on the ideal strategy or the most effective way to represent a client. *Id.* at 689. Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective. *Bieghler v. State*, 690 N.E.2d 188, 199 (Ind. 1997); *Davis v. State*, 598 N.E.2d 1041, 1051 (Ind. 1992); *Ingram v. State*, 508 N.E.2d 805, 808 (Ind. 1987). The two prongs of the *Strickland* test are separate and independent inquiries. Thus, "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice … that course should be followed." *Williams v. State*, 706 N.E.2d 149, 154 (Ind. 1999) (quoting *Strickland*, 466 U.S. at 697).
>
> This Court has recognized three categories of alleged appellate counsel ineffectiveness: (1) denying access to an appeal, (2) failing to raise issues, and (3) failing to present issues competently. *Bieghler*, 690 N.E.2d at 193-95.

Timberlake v. State, 753 N.E.2d 591, 603 (Ind. 2001) (parallel citations omitted), *cert. denied* (2002).

More specifically, our supreme court has stated that

> [i]neffectiveness is rarely found when the issue is failure to raise a claim on direct appeal. The decision of what issues to raise is one of the most important strategic decisions to be made by appellate counsel. We give considerable deference to appellate counsel's strategic decisions and will not find deficient performance in appellate counsel's choice of some issues over others when the choice was reasonable in light of the facts of the case and the precedent available to counsel at the time the decision was made. We review the totality of appellate counsel's performance to determine whether the defendant received constitutionally adequate assistance.

Taylor v. State, 717 N.E.2d 90, 94 (Ind. 1999) (citations and quotation marks omitted). "Even if counsel's choice is not reasonable, to prevail, petitioner must demonstrate a reasonable probability that the outcome of the direct appeal would have been different." *Stevens v. State*, 770 N.E.2d 739, 760 (Ind. 2002), *cert. denied* (2003).

Assuming, without deciding, that Raff's decision not to challenge the stipulation on appeal was unreasonable, we agree with the State that Winchester has failed to demonstrate a reasonable probability that the outcome of his appeal would have been different. The post-conviction court reached the following conclusions:

> 3. Petitioner asserts that Raff should have challenged the references to his conviction for child molesting on the basis of *Old Chief v. United States*, 519 U.S. 172, 174 (1997), and *Sams v. State*, 688 N.E.2d 1323, 1326 (Ind. Ct. App. 1997), *trans. denied*. In *Old Chief*, the United States Supreme Court held that the trial court abused its discretion under Federal Rule of Evidence 403 in rejecting an offer to concede the fact of a prior conviction and instead admitting the full record of the prior judgment solely to prove the prior conviction, when "the name or nature of the prior offense raise[d] the risk of a verdict tainted by improper considerations." *Old Chief*, 519 U.S. 172, 174, 180 (1997). The principal issue in *Old Chief* involved the danger of unfair prejudice, which means "the capacity of some concededly relevant evidence to lure the fact finder into declaring guilt on a ground different from proof specific to the offense charged." *Id*. at 180. The Supreme Court remanded the case without implying any opinion as to whether the error in admitting the full record of the prior judgment was harmless. *Id*. at 192 & n.11. In *Sams*, the Indiana Court of Appeals applied the reasoning of *Old Chief* to the evaluation of unfair prejudice under Indiana's Rule 403, which is "identical to its federal counterpart in all pertinent respects" [*Sams*, 688 N.E.2d at 1325]. The Court of Appeals held that "the trial court abused its discretion in admitting into evidence Sams's entire motor vehicle driving record instead of allowing Sams to admit that his license was suspended for life [as an element of the 'HTV-Life' driving offense defined in IC 9-30-10-17]." *Id*. at 1326. However, the court found the error in admitting the entire driving record to be harmless because the evidence of defendant Sams's guilt was strong and because he did not request a limiting instruction on the purposes for which the driving record was to be used. *Id*.
>
> 4. For reasons stated below, any error in the [trial] Court's failure to accept a stipulation conforming to the requirements of *Old Chief* and *Sams*, and to preclude all references to the name or nature of Petitioner's prior offense, was harmless. Harmless errors, by definition, do not affect a defendant's substantial rights and do not warrant reversal on appeal. *See Fleener v. State*, 656 N.E.2d 1140, 1142 (Ind. 1995). Raff therefore cannot be found ineffective for failing to argue on appeal that the Court was required to accept such a stipulation and to preclude all such references. *Mauricio* [*v. State*, 659 N.E.2d 869, 872-73 (Ind. Ct. App. 1995), *trans. denied*].

….

6. Strong evidence of guilt tends to render harmless an error in the admission of evidence, especially when there has been no error in overruling a request for a limiting instruction. *See Sams*, 688 N.E.2d at 1326. In the present case, the evidence of guilt was at least as strong as that in *Sams*. A civilian eyewitness and at least two police officers unequivocally identified defendant Sams, but only the civilian saw him driving [*id*. at 1324-25]. All seven eyewitnesses here testified that they saw Petitioner with a gun, not a flashlight; any discrepancies in their descriptions were minor, and did not suggest that they might really have seen a flashlight but thought it was a gun. Sams's evidence, though not strong, had at least as much tendency to cast doubt on the perpetrator's identity as Petitioner's highly dubious testimony had to cast doubt on the witnesses' observations of his gun. [*Sams*, 688 N.E.2d at 1324]. The jury at Sams' trial was not instructed to limit consideration of his entire driving record, reflecting "many serious offenses" [*Sams*, 688 N.E.2d at 1324], to "the limited purposes of establishing that his license had been suspended for life and his knowledge of such suspension" [*id*. at 1325]. In contrast, "careful measures" were taken at Mr. Winchester's trial to limit the use of his prior conviction to its only legitimate purpose [*Winchester* (Mem.), at 5-6]. As the error in *Sams* was harmless [*Sams*, 688 N.E.2d at 1326], any comparable error in the present case must also have been harmless ….

7. The risk of unfair prejudice from evidence of a prior conviction is "substantial" whenever the "name or nature of the prior offense" would be "arresting enough to lure a juror into a sequence of bad character reasoning." *Old Chief*, 519 U.S. at 185. In *Old Chief*, for example, the risk of "bad character reasoning" was obvious because defendant Old Chief's prior conviction for assault causing serious bodily injury strongly suggested that he was a violent criminal, who would be likely to have committed the charged federal offenses of assault with a dangerous weapon, using a firearm in relation to a crime of violence, and possession of a firearm after being convicted of a crime punishable by imprisonment exceeding one year [*id*. at 174-175]. Likewise, in *Sams*, defendant Sams's driving record showed that he was accustomed to commit serious driving offenses, making it quite likely that he had committed another one. *Sams*, 688 N.E.2d at 1324-25.

8. The offense of child molesting "is considered by most to be a particularly loathsome crime." *Guenther v. State*, 495 N.E.2d 788, 792 (Ind. Ct. App. 1986), *trans. granted*, *trial court decision aff'd*, 501 N.E.2d 1071, 1072 (Ind. 1986). Nevertheless, "a prior offense may be so far removed in time or nature from the current [charged offenses] that its potential to prejudice the defendant unfairly will be minimal." *Old Chief*, 519 U.S. at 185 n.8. In the present case, Petitioner was convicted of child molesting more than nine (9) years before he committed the firearm offense, which is also far removed in nature from child molesting (at least if the molestation does not involve

> violence, and the jury heard no evidence that it did). The risk of "bad character reasoning," therefore, was much more limited than in *Old Chief* or *Sams*. There is no reasonable probability that the jury disregarded the strong evidence of Petitioner's guilt, the weakness of his own evidence, and the careful measures taken to emphasize that the only issue was whether he possessed a gun, so as to convict him instead on the basis of emotional reactions to his prior offense of child molesting. Because there was no prejudice to the defense, Raff cannot be found to have rendered ineffective assistance, either at trial or on appeal, by failing to insist that the requirements of *Old Chief* and *Sams* be followed. *See Taylor* [*v. State*, 840 N.E.2d 324, 331 (Ind. 2006)].

Appellant's App. at 124-130 (citations to factual findings omitted) (brackets in original).[4]

Winchester contends that the post-conviction court's findings regarding harmless error "insufficiently account for the shock an unsuspecting jury would experience when bombarded with repeated references to child molesting and other serious violent felonies[5] in a case in which the only disputed issue was whether the defendant possessed a gun." Appellant's Br. at 16. Nonetheless, Winchester acknowledges that "[t]he improper admission of evidence is harmless error when the conviction is supported by substantial independent evidence of guilt sufficient to satisfy the reviewing court that there is no likelihood that the questioned evidence contributed to the conviction." *Bonner v. State*, 650

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[4] In conclusion number 5, which we have omitted here, the post-conviction court determined that the law of the case doctrine applied to Winchester's claim and that it was bound by this Court's determination on direct appeal that "the jury was carefully 'protected from being repeatedly exposed to evidence of the prior conviction.'" Appellant's App. at 126 (quoting *Winchester*, slip op. at 5-6). Given our resolution of this issue on harmless error grounds, we need not address the applicability of the law of the case doctrine.

[5] The trial court's final instruction defining the term "serious violent felony" enumerated the twenty-six crimes mentioned in the then-current version of Indiana Code Section 35-47-4-5(b). To the extent Winchester suggests that Raff was ineffective in failing to object to this or any other instruction or in failing to challenge any instructions on appeal, we note that he did not raise these issues in his petitions for post-conviction relief and has therefore waived them. *See Emerson v. State*, 812 N.E.2d 1090, 1098-99 (Ind. Ct. App. 2004) ("Issues not raised in a petition for post-conviction relief may not be raised for the first time on appeal. The failure to raise an alleged error in the petition waives the right to raise that issue on appeal.") (citation omitted).

N.E.2d 1139, 1141 (Ind. 1995). Here, all seven of the State's witnesses testified unequivocally that Winchester possessed a handgun, not a flashlight as he claimed.[6] Under these circumstances, we conclude that there is no reasonable probability that the outcome of Winchester's appeal would have been different if Raff had raised the stipulation issue. Therefore, we conclude that Raff did not render ineffective assistance and hereby affirm the denial of Winchester's petition for post-conviction relief.

Affirmed.

BAKER, C. J., and FRIEDLANDER, J., concur.

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[6] We reiterate that Winchester testified that he had been in prison and on parole and that one of the teenage girls in Crebb's home told him that she was scared of him and threatened to set him on fire.