IN THE
COURT OF APPEALS OF INDIANA

No. 31A01-1703-PC-547

LAWRENCE NUNLEY,
Appellant-Defendant,

V.

STATE OF INDIANA,
Appellee-Plaintiff.

Appeal from the Harrison Superior Court,

No. 31D01-1009-PC-011,

Hon. Joseph Claypool, Judge.

BRIEF OF APPELLEE

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II. Whether the post-conviction court clearly erred when finding Nunley failed to prove his appellate counsel had been ineffective.

STATEMENT OF THE CASE

A jury found Nunley guilty of three counts of child molesting, Class A felonies, one count of child molesting, a class C felony; and one count of disseminating matter harmful to minors, a class D felony (Trial App. Vol. I, 9-13, 71-75). Nunley was later sentenced to an aggregate sentence of 75 years and 17 months (Trial App. Vol. I, 83). On appeal, this Court vacated Nunley's convictions for one count of child molesting, a Class A felony, and one count of child molesting, a class C felony. *Nunley v. State*, 916 N.E.2d 712, 723 (Ind. Ct. App. 2009), *trans. denied*. Because the trial court had ordered the surviving Class A felony child molesting sentences and the sentence for Nunley's Class D felony conviction to be served consecutively, this Court's decision reduced Nunley's aggregate sentence by four years and eight months (Trial App. Vol. I, 83). *Id.*

Nunley filed a petition for post-conviction relief on September 24, 2010 (PCR App. Vol. II, 2). The State filed an answer on October 14, 2010 (PCR App. Vol. II, 24). The trial court had appointed the State Public Defender to represent Nunley when his petition was filed; the Public Defender withdrew from the case on June 27, 2013 (PCR App. Vol. II, 27). Nunley filed an amended petition on January 14, 2016,

and the State filed its answer on January 22, 2016 (PCR App. Vol. II, 46, 70). The post-conviction court held an evidentiary hearing on January 12, 2017 (PCR App. Vol. II, 7). On March 2, 2017, the post-conviction court denied Nunley's petition with findings of fact and conclusions of law (PCR App. Vol. III, 81).

Nunley filed his notice of appeal on March 17, 2017 (Docket). The notice of completion of the clerk's record was issued on April 11, 2017 (Docket). The notice of completion of the transcript was issued on July 24, 2017 (Docket). After proceedings to obtain the transcript, and after this Court granted Nunley an extension of time to file his brief, Nunley filed his brief on October 16, 2017, serving the State by United States mail (Docket). The State now timely files its brief.

STATEMENT OF THE FACTS

This Court summarized the facts of Nunley's offenses and trial in its opinion on Nunley's direct appeal, as follows:

> Nunley lived with his teenage son and his son's girlfriend, K.S. K.S. sometimes babysat six-year-old A.Y. A.Y.'s mother, T.C., testified A.Y. "loved [K.S.] to death." On April 13, 2007, A.Y. asked to spend the night at Nunley's residence. When T.C. dropped off A.Y., Nunley told her K.S. was on the way there. T.C. was under the impression that K.S. would be watching A.Y. According to A.Y., K.S. and her boyfriend were there for only a brief time that night.
>
> Sometime during the evening, Nunley called A.Y. back to his bedroom and showed her a pornographic video. A.Y. was wearing a tee shirt and panties. He took off her panties and licked her vagina. He also made her suck on his penis.
>
> The next day, T.C. and R.C. picked up A.Y. After they had been in the car for a few minutes, A.Y. told them she and Nunley had a secret. [R.C. is A.Y.'s step-father. R.C. and T.C. were separated at the time, but they were still sharing a car and were planning to exchange possession of the car when they picked up A.Y.] A.Y. would not say what it was, so T.C. tried to trick her into telling by saying, "That's okay. I know what the secret is." Then A.Y. wanted to tell them, but she did not want to say it out loud, so her parents gave her a pencil

and an envelope to write on. Her note indicated she "was sucking his weenie-bob and he was licking my pee-pee."

After reading the note, T.C. turned the vehicle around and went back to Nunley's residence. She took a bat and started hitting Nunley's motorcycle and truck so he would come outside. Nunley came to the door. T.C. yelled at him and accused him of molesting A.Y. Nunley denied her accusation

T.C., R.C., and A.Y. then went to the Washington County Police Department to make a report. They spoke to State Trooper Kevin Bowling. Trooper Bowling first attempted to interview A.Y. alone, but that did not work well, so T.C. stayed in the room with her while A.Y. answered questions. A.Y. said Nunley made her watch a "bad movie." Trooper Bowling asked her what she meant by that, and she said, a "naked movie." T.C. showed him the note A.Y. had written. T.C. believed she left the note with Trooper Bowling, but Trooper Bowling had no record or recollection of what happened with the note. Trooper Bowling referred the case to the Department of Child Services.

Authorities tried to arrange a forensic interview of A.Y., but T.C. did not immediately follow through. The interview was finally conducted on April 18, 2008, a little over a year after A.Y. was molested.

Donna Lloyd Black conducted the forensic interview of A.Y. at Comfort House. A.Y.'s interview was videotaped. Comfort House has an observation room for representatives from the prosecutor's office, law enforcement, and the Department of Child Services. Black can communicate with them by two-way radio, but a child being interviewed cannot see or hear the people in the observation room. Detective William Wibbels was in the observation room during A.Y.'s interview.

Nunley was charged with four counts of Class A felony child molesting: Count 1 alleged he touched A.Y.'s vagina with his mouth, Count 2 alleged he made A.Y. put her mouth on his penis, Count 3 alleged he put his hand in A.Y.'s vagina, and Count 4 alleged he touched A.Y.'s vagina with his penis. He was also charged with one count of Class D felony dissemination of matter harmful to minors, which alleged he showed A.Y. a pornographic movie.

At the time of trial, A.Y. was eight years old. A.Y. started crying at several points during her testimony and needed multiple breaks. A.Y. stated it was hard to say what had happened and that she could only write it. The prosecutor then had her write down what happened and read it to the jury. She testified she saw Nunley's penis when he made her suck on it and he licked her "pee pee." A.Y. testified he forced her to do these things by threatening to hurt her parents or call the police.

> T.C. testified as to why she did not immediately bring A.Y. for a forensic interview: "I had second thoughts ... just because of the fact of putting my daughter through this. And not only that ... there's a side of you that thinks maybe if you just don't acknowledge it, that it'll go away." A juror asked, "[W]hat made you continue to think about it? What, was it brought up by [A.Y.]?" T.C. responded, "No, it wasn't brought up by [A.Y.]. It was brought up by other people. Uhm, there were other allegations that I had heard about." Nunley objected and moved for a mistrial, because T.C. had been instructed not to refer to any other allegations against him. The trial court denied the motion for mistrial because T.C. did not specify the nature of the allegations, and it instructed the jury to disregard T.C.'s answer.
>
> The videotape was played for the jury. The video was difficult to understand in some places, but Black testified she was able to understand what A.Y. was saying to her during the interview. The prosecutor therefore asked Black to recount how A.Y. had said Nunley had touched her. Black testified A.Y. said Nunley "touched her on her pee-pee with his weenie-bob, his hand and his tongue," that he "made her put his weenie-bob in her mouth and suck it," and that he made her watch a video with naked people in it. Detective Wibbels also testified concerning A.Y.'s allegations made during the interview.
>
> Nunley testified in his own behalf. He claimed T.C. called and asked if he could watch A.Y. while she went to Corydon. He asserted T.C. did not bring any extra clothes for A.Y., and he did not think A.Y. would be spending the night. He claimed A.Y. fell asleep on the couch soon after arriving, and then his friend, Michelle Cayton, came over to Nunley's residence to spend the night, leaving shortly before T.C. picked up A.Y. [Although Nunley had spoken to police, he never reported before trial that Clayton had been at his house.] Nunley claimed he was in a relationship with T.C., and when T.C. came to pick up A.Y., she asked to move in with him. He would not let her, and she was angry when she left. Although Nunley voluntarily spoke with the police, he never told them Cayton had been at his residence on the night in question.
>
> The jury found Nunley guilty as charged.

Nunley, 916 N.E.2d at 714-16 & nn. 3, 4 (footnote numbers replaced with footnote text in excerpt, record cites omitted). This court reversed Nunley's child molesting convictions in Counts III and IV, finding they were supported only by A.Y.'s statements during the forensic interview at Comfort House and that these

statements were not properly admitted under the protected person statute. *Id.* at 718-19. Nunley's convictions under Counts II, IV and V were affirmed. *Id.*

Nunley was represented at trial by attorney Susan Schultz (PCR Tr. Vol. II 24). Schultz had been practicing law in Michigan and Indiana for 27 years (PCR Tr. Vol. II 22, 24; Trial App. Vol. I, 4, 65). Criminal law formed a significant part of her practice (PCR Tr. Vol. II 23). At the post-conviction evidentiary hearing, Schultz recalled having represented Nunley on a prior occasion in which Nunley was charged with invasion of privacy and battery (PCR Tr. Vol. II 24; Trial App. Vol. II, 116). Those charges were later dismissed (PCR Tr. Vol. II 24). In preparing Nunley's defense Schultz had visited him at the jail at least six times and deposed A.Y.; she recalled the defense was, "That you [Nunley] didn't do it. That the child was there to visit you overnight and that the events that she described did not happen, and, as I recall, the explanation that was provided to me was that the child's mother was angry with you about something and you believed that she . . . had encouraged the kid to manufacture the facts because of her anger with you, is what I recall" (PCR Tr. Vol. II, 26, 28).

Schultz recalled A.Y. using a writing to aid her testimony at trial and her impression that it was unusual, but likened it to a witness drawing a diagram or using photographs during their testimony (PCR Tr. Vol. II, 30-31). She didn't recall allowing any 'vouching' testimony to pass without objection, but did note the Court of Appeals addressed inconsistencies in some of A.Y.'s statements when vacating Counts 3 and 4 (PCR Tr. Vol. II, 28). Schultz recalled, "when the Court enters the

separation of witnesses order, it is not my understanding it means that they cannot have any contact with each other whatsoever during the trial," but rather that, "the witnesses are not to speak with one another about their testimony, or the facts of the case" PCR Tr. Vol. II 33-34). She testified that she thought it was "appropriate" for the trial court to order the deputy prosecutor to attend and observe A.Y. and her parents during a lunch break that occurred in A.Y.'s trial to ensure that they observed the separation-of-witnesses order (PCR Tr. Vol. II, 33-34).

Matthew McGovern was Nunley's appellate counsel (PCR Tr. Vol. II, 36-37). McGovern had been practicing law for approximately 17 years (PCR Tr. Vol. II, 35). He recalled researching claims of 'vouching' for A.Y, and that he considered a phrase in the prosecutor's argument to be error worth raising on appeal (PCR Tr. Vol. II, 41). McGovern also testified that while it is possible to raise an un-preserved issue on appeal, but the claim must be "pretty strong," otherwise "the chances for getting reversal on that issue are relatively slim" (PCR Tr. Vol. II, 39).

SUMMARY OF THE ARGUMENT

I.

The post-conviction court did not clearly err when finding Nunley failed to prove that his trial counsel was ineffective. Nunley wrongly claims the State cannot oppose his post-conviction request; the State filed an answer and opposed his claim for relief at the evidentiary hearing. Nunley has not shown clear error regarding his complaints about Schultz's performance. Nunley has waived several of these

arguments, namely his claims regarding the separation of witnesses order, and alleged vouching by Detective Wibbels, by failing to argue cogently from the record about his claims. Waiver aside, and to Nunley's other claims, he has not shown that Schultz's representation was deficient or prejudicial regarding those claims or her impeachment of A.Y.; A.Y.'s written answers to several questions on direct examination; or the admission of the pornographic video Nunley showed A.Y. There is evidence in the record which can support the post-conviction court's denial of relief on all Nunley's claims. Likewise, Nunley's claim of 'cumulative' ineffective assistance also fails.

II.

Nunley has failed to show clear error regarding his appellate counsel's performance because there is evidence in the record which can support the post-conviction court's denial of relief. Nunley's claim that McGovern failed to properly raise 'denial of a defense' under the United States Constitution is waived for failure to make a cogent argument. Assuming Nunley refers to the exclusion of evidence under Rule 608 which occurred at his trial, this claim would be directly contradicted by the record of his appeal. Nunley's claim that McGovern should have raised a double jeopardy challenge to his convictions fails because it relies on superseded authority which minimally-competent counsel could not have persuasively cited. Nunley's claim that McGovern should have raised a sentencing challenge under Appellate Rule 7(B) is waived because he does not attempt to show what competent counsel ought to have argued regarding the nature of his offenses and character.

Even if it had not been waived, a review of the record shows that minimally-competent counsel would not have chosen to raise this issue given the facts of Nunley's case. Nunley's remaining claims merely allude to his complaints regarding Schultz's performance; the discussion of those claims in Part I, combined with the applicable standards of review, show that McGovern was not deficient in foregoing these issues and their absence from Nunley's appeal was not prejudicial.

ARGUMENT

Standard of Review

Nunley's complaints about the post-conviction court's findings regarding the performance of his trial and direct-appeal attorneys must overcome a "rigorous standard of review." *Dewitt v. State*, 755 N.E.2d 167, 170 (Ind. 2001). Below, Nunley had the burden of establishing the grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); *Ben-Yisrayl v. State*, 738 N.E.2d 253, 258 (Ind. 2000). Nunley is therefore appealing from a negative judgment. *Id.* at 258. The PCR court's findings of fact are accepted unless "clearly erroneous." *Davidson v. State*, 763 N.E.2d 441, 443-44 (Ind. 2001). This Court will not reweigh or re-evaluate the evidence, and will consider only the probative evidence and reasonable inferences that support the PCR court's denial of relief, *State v. Greene*, 16 N.E.3d 416, 418 (Ind. 2014), and the PCR court's decision will not be disturbed unless "the evidence is without conflict and leads to but one conclusion, and the PCR court has reached the opposite conclusion." *McCary v. State*, 761 N.E.2d 389, 392 (Ind. 2002). "In other words, [Nunley] must convince this Court that there is *no* way within the

law that the court below could have reached the decision it did." *Stevens v. State*, 770 N.E.2d 739, 745 (Ind. 2002) (emphasis original). Nunley has failed to show clear error in the post-conviction court's denial of his claims regarding trial and appellate counsel's representation.

I.
The post-conviction court did not clearly err when finding Nunley had failed to prove that his trial counsel was ineffective.

There is a strong presumption counsel rendered adequate assistance and made all significant decisions in the exercise of his or her reasonable professional judgment; Nunley could only have rebutted this presumption with "strong and convincing evidence" to the contrary. *Carr v. State*, 728 N.E.2d 125, 132 (Ind. 2000). Such evidence was required to prove that trial counsel's representation fell below an objective, minimum standard of reasonableness. *Strickland v. Washington*, 466 U.S. 668, 694 (1984); *Troutman v. State*, 730 N.E.2d 149, 154 (Ind. 2000). The review of counsel's representation "must be highly deferential." *Strickland*, 466 U.S. at 689. Isolated poor strategy, bad tactics, a mistake, carelessness, or inexperience do not amount to ineffective assistance unless, taken as a whole, the defense was incompetent. *Carr*, 728 N.E.2d at 131; *Woods v. State*, 701 N.E.2d 1208, 1211 (Ind. 1998). Counsel's decisions are to be assessed objectively, in view of what a reasonable, minimally-competent attorney could have chosen in the circumstances; this inquiry should not involve hindsight or rely entirely on counsel's subjective opinions or beliefs. *Harrington v. Richter*, 562 U.S. 86, 106-07 (2011); *Brewington v. State*, 7 N.E.3d 946, 977 (Ind. 2014).

As to prejudice, "It is not enough 'to show that the errors had some conceivable effect on the outcome of the proceeding.'" *Harrington*, 562 U.S. at 104 (quoting *Strickland*, 466 U.S. at 687). Rather, Nunley must show that, had counsel performed competently, there is "'a reasonable probability that . . . the result of the proceeding would have been different.'" *Id.* (quoting *Strickland*, 466 U.S. at 687). Failure to demonstrate both deficient performance *and* prejudice is fatal to an ineffective-assistance claim. *Vermillion v. State*, 719 N.E.2d 1201, 1208 (Ind. 1999). Accordingly, "'[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed.'" *Wentz v. State*, 766 N.E.2d 351, 360 (Ind. 2002) (quoting *Williams v. State*, 706 N.E.2d 149, 154 (Ind. 1999), in turn quoting *Strickland*, 466 U.S. at 697). Nunley's brief alleges six instances of incompetence by trial counsel (Def. Br. 16-28). He has not shown the post-conviction court clearly erred in finding his claims unpersuasive.

A. Opposing Nunley's appeal.

As an initial matter, Nunley incorrectly claims that he is entitled to post-conviction relief because the State's defense did not meet Nunley's standards for opposing his claims (Def. Br. 12-16). His argument mistakes cases finding waiver of unpreserved claims at the appellate level for cases addressing proceedings in post-conviction courts (Def. Br. 12-16). The State entered a denial of Nunley's petition and his amended petition and appeared and contested his petition at the evidentiary hearing (PCR. App. Vol. II, 24, 70; PCR Tr. 44-45). A pleading denying the right to relief puts the complaining party to its burden of proof. *Hubble v. Berry*,

180 Ind. 513, 103 N.E. 328, 331 (1913). The State's answers were sufficient to put Nunley's claims at issue and require him to carry his burden of proof and persuasion below. *See Evolga v. State*, 722 N.E.2d 370, 374 (Ind. Ct. App. 2000) ("[T]he State's general denial of the facts alleged by Evolga was enough to trigger the need to hold an evidentiary hearing"). The State may likewise defend the post-conviction court's findings of fact and conclusions of law on appeal. P-C.R. 1(5); *Ben-Yisrayl*, 738 N.E.2d at 258; *Evolga*, 722 N.E.2d at 374.

B. Impeachment of A.Y.

Nunley incorrectly claims that Schultz was ineffective in failing to use A.Y.'s deposition more extensively during her cross examination of the victim (Def. Br. 18-22). While Nunley generally says that, "A.Y. made a number of statements that were inconsistent with her trial testimony, including 'denying recollection' of events that she claimed happened to her, he does not analyze these alleged inconsistencies or explain how pointing them out to the jury would have altered the outcome of his trial (Def. Br. 22). He simply insists there are inconsistencies, that they are all are of the utmost significance, and that counsel only needed to have shown them all to the jury in order to prevent them from believing A.Y. (Def. Br. 18-21).

In point of fact, however, proving that a witness did not recall something on the day of a deposition is not necessarily impeaching. For example, competent counsel could have reasonably determined that she would make little headway saying that A.Y. was a malicious liar because the girl did not remember whether

she was wearing one- or two-piece pajamas when Nunley molested her (Dep. 218).[1] (Def. Br. 22). A.Y. was only six years old when Nunley molested her in April, 2007; she was seven years old when she gave the deposition in September, 2008 (Trial Tr. 423, 532-33; Dep. 194). As our Supreme Court has observed in an analogous context, "equivocations, uncertainties, and inconsistencies" in a child do not prevent a jury from believing a child's account when it is "appropriate to the circumstances presented, the age of the witness, and the passage of time between the incident and the time of her statements and testimony." *Fajardo v. State*, 859 N.E.2d 1201, 1209 (Ind. 2007).

Or, as A.Y. said during her deposition, "I don't have very fast memories" (Dep. 213). It is apparent that A.Y. was reluctant to discuss what Nunley had done to her, saying at one point, "It's better not to remember" (Dep. 215-16, 224, 231-32). A.Y. managed to recount how Nunley compelled her to submit to fellatio, but was extremely reluctant to discuss Nunley's penis (Dep. 219, 237-39). At one point, A.Y. gave the following deposition testimony:

> Q: Okay. And now the only thing that you remember was that he licked your pee-pee?
>
> A: Yeah.
>
> Q: Do you - - do you remember if you saw his private parts?
>
> A: No.
>
> Q: You don't remember anything else? You want to block it out of your mind, huh?

[1] The deposition is included in Nunley's confidential appendix on direct appeal (Trial App. Vol. II, 194). It will be cited as "Dep."

A: Yeah, I don't want to know any of it anymore after this.

Q: Okay.

A: Only if it would've never happened, I wouldn't have to be talking right now. I could be at school right now.

(Dep. 231-32). Later, when asked to say the name of Nunley's "boy part," A.Y. declined and said she could not remember (Dep. 237-39). Along the way, A.Y. repeatedly testified she had not been told what to say by her mother (Dep. 215-16).

As noted above, little would be gained by 'proving' A.Y. had said she did not remember Nunley's penis on the day she gave her deposition, because the child's reluctance to describe Nunley's penis is not a straightforward sign of fabrication. Moreover, reasonable counsel would have considered the fact that A.Y.'s prior statements would be admissible to rehabilitate her after Nunley's proposed impeachment. *Bassett v. State*, 895 N.E.2d 1201, 1214 (Ind. 2008) (adopting *Moreland v. State*, 701 N.E.2d 288, 292 (Ind. Ct. App. 1998)). Nunley's proposed line of cross-examination would have called for rehabilitation from the deposition that would have included (a) A.Y.'s denial of having been coached; (b) A.Y.'s consistent statements about Nunley's abuse; and (c) A.Y.'s traumatic reaction to the mere mention of Nunley's penis. *Id*.

At a trial, A.Y. cried during direct examination and said she did not want to discuss the abuse because it was "too scary" (Trial Tr. 438). As the post-conviction court noted, Schultz was present during these events and could have observed the jurors' reaction to A.Y. (PCR App. Vol. III, 82). That aside, competent counsel might

rightly have concluded that Nunley's proposed course of bullying a little girl over small details such as her pajamas and then confronting her with accusatory questions about inconsistencies would be unwise. The first aspect of this proposed attack would create sympathy for A.Y. and antipathy for Nunley's defense. And the accusations could have been more than convincingly dealt with on redirect examination in ways that would reinforce A.Y.'s credibility.

In sum, Nunley's argument simply reinforces the repeated observations of our Supreme Court and this Court that challenging a witness' credibility is the epitome of a strategic decision which is not subject to second-guessing through a *Strickland* analysis. *See Kubsch v. State*, 934 N.E.2d 1138, 1151 (Ind. 2010), *reh'g. denied* ("[T]he method of impeaching witnesses is a tactical decision and a matter of trial strategy that does not amount to ineffective assistance"); *accord Fugate v. State*, 608 N.E.2d 1370, 1372 (Ind. 1993); *Olson v. State*, 563 N.E.2d 565, 568 (Ind. 1990). The post-conviction court did not clearly err in finding Nunley had not proved Schultz was ineffective in this regard (PCR App. Vol. III, 82-83). *Stevens*, 770 N.E.2d at 746.

C. A.Y.'s written answers.

Although A.Y. could answer questions about Nunley's abuse, she became distressed when asked about Nunley's penis (Trial Tr. 436-37, 451-52;Dep. 231-32). This continued during the trial, when A.Y. cried and asked if she could write down the answers to questions about what Nunley did to her during direct examination (Trial Tr. 441-42). She did so, writing, "I was on the bed and Ed was to [*sic*]," "He

made me suck on his weeny bob," and, "He made me suck on his weeny bob" (Trial Tr. 441-42, 448-49, Joint Exs. 1 & 2, Ex. 5). The trial court ordered two of these papers to be admitted as joint exhibits, "not in the sense that uh. Ms. Schultz is agreeing to it. but in the sense of identify it as the pieces of paper the witness, [A.Y.] wrote on" (Trial Tr. 445). Nunley incorrectly claims counsel was ineffective in not objecting to this procedure, arguing that the trial court's placing the answers in evidence before the jury put 'undue emphasis' on them (Def. Br. 23-24).

The procedure here was sanctioned by Indiana Rule of Evidence 611, which provides in pertinent part as follows:

> (a) Control by the Court; Purposes. The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:
>
> (1) make those procedures effective for determining the truth;
>
> (2) avoid wasting time; and
>
> (3) protect witnesses from harassment or undue embarrassment.

Courts regularly allow testimony to be given non-orally or through third parties, such as with interpreters for non-English speakers or persons with difficulty speaking. In *Arrieta v. State*, 878 N.E.2d 1238, 1241 (Ind. 2008), for example, our Supreme Court noted the results of surveys of Indiana trial judges which "revealed that 90 percent had used an interpreter in the past six months . . . more than half of the state's judges had used interpreters between one and ten times during that time period." *Id.* at 1241. Interpreters used in the surveys had spoken 22 different languages, including Polish, Punjabi, Croatian, Macedonian, Burmese, Tongan and

Rumanian. *Id.* And in *People v. Tran*, 47 Cal.App. 4th 759, 54 Cal. Rptr. 2d 905, (1996), the court affirmed the use of an interpreter who relayed the witnesses' answers, which were given by tapping once for yes and twice for no. *Id.* 47 Cal.App. 4th at 766, 54 Cal. Rptr. 2d at 910.

A.Y.'s young age and her reluctance to orally describe what Nunley had done permitted the trial court to allow the written answers under all three subsections of Rule 611(a). As Schultz explained during her post-conviction testimony, this process was no more improper than allowing a witness to testify in the form of a drawing or diagram (PCR Tr. 18-19). *See Yeagley v. State*, 467 N.E.2d 730, 734 (Ind. 1984) (permitting admission of diagrams of crime scene). The 'theatrical quality' of reading a deposition into evidence is also 'unusual,' but not barred, in Indiana courts. *See Walnut Creek Nursery, Inc. v. Banske*, 26 N.E.3d 648, 654 (Ind. Ct. App. 2015). Indiana does not disfavor the presentation of evidence through processes which are effective for determining the truth, avoid wasting time, and protect witnesses from harassment or undue embarrassment. Ind. Evidence Rule 611(a). There would be little to gain by prolonged testimony while A.Y. was forced to overcome her reluctance and say aloud what Nunley had done to her. Competent counsel would be uneasy about demanding this alternative process, because it would have strongly suggested that Nunley's defense amounted to nothing more than desperate procedural quibbles intended to capitalize on a young child's reluctance to speak bad words or orally describe frightening events.

As counsel allowed matters to unfold, however, the jurors saw only a young girl who wanted to write her answers and draw a picture (Tr. 453-54). That presentation is arguably consistent with a child whose innocence indicates truth. But it is equally consistent with a child under stress from being compelled to fabricate, or who does not seem to understand the gravity of her accusations. This equipoise was far more effective for Nunley than the tactics produced by his second-guessing counsel's decision. Nunley has not shown that counsel was incompetent or that he was prejudiced. *See Harrington*, 562 U.S. at 106-07 (discussing evaluation of deficient performance); *Myers v. State*, 33 N.E.3d 1077, 1109 (Ind. Ct. App. 2015), *trans. denied* (holding that " to prevail on a claim of ineffective assistance due to the failure to object, the defendant must show a reasonable probability that the objection would have been sustained if made") (quotation omitted). The post-conviction court did not clearly err on this issue and should be affirmed (PCR App. Vol. III, 82-83). *Stevens*, 770 N.E.2d at 746.

D. Alleged violation of the separation of witnesses order.

Nunley also improperly faults Schultz for not taking action regarding an alleged violation of the trial court's order for the separation of witnesses (Def. Br. 25-26). A.Y.'s testimony was interrupted by the need for a lunch break (Trial Tr. Vol. II, 444-45). After the jurors had been told about the procedures for obtaining lunch and had left the room, the trial court discussed A.Y.'s lunch with her parents, who had come to the trial (Trial Tr. Vol. II, 445-46). The trial court asked one of the deputy prosecutors to travel and lunch with A.Y. and her parents to ensure that the

separation of witnesses order was not breached (Trial Tr. Vol. II, 446). When the trial resumed, the trial court inquired, "Anything before we . . . begin again?" (Trial Vol. II, 447). When the deputy prosecutor replied there was nothing, the jury was brought in and A.Y.'s testimony resumed (Trial Tr. Vol. II, 447). These events do not support Nunley's claims.

Nunley errs by claiming the deputy prosecutor's presence during A.Y.'s lunch at the trial court's request was a violation of the order (Def. Br. 25-26). As Schultz explained during the evidentiary hearing, a separation order prevents witnesses from discussing testimony or the facts of a case (PCR Tr. Vol. II, 33). Such orders are not violated merely by the mutual presence of witnesses. Evid. R. 615; *Smiley v. State*, 649 N.E.2d 697, 700 (Ind. Ct. App. 1995), *trans. denied*. A.Y. was a young child, lunching with her parents in the midst of a stressful ordeal involving her testimony about Nunley's abuse (Tr. Vol. II, 423, 445-46). The trial court did not act imprudently prudently by ordering an officer of the court to attend the lunch to ensure that its order was not violated. Schultz's decision to forego a meritless objection was not deficient. *Peak v. State*, 26 N.E.3d 1010, 1016 (Ind. Ct. App. 2015).

Moreover, Nunley has failed to show clear error regarding the absence of prejudice from this procedure. He claims A.Y. gave incriminating testimony after lunch, and that she answered questions she had 'refused' to answer before lunch (Def. Br. 26). Nunley has not supported this argument with citations to the record and it is therefore waived (Def. Br. 26). App. R. Ind. Appellate Rules 46(A)(8)(a), 46(C); *see New v. Estate of New*, 938 N.E.2d 758, 766 (Ind. Ct. App. 2010), *trans.*

denied (observing this Court will not "search the record for support" of a party's argument or "consider issues" left unarticulated).[2] Even if Nunley had not waived review of this argument, his *post hoc* claims fail to show prejudice. *See Morell v. State*, 933 N.E.2d 484, 490-91 (Ind. Ct. App. 2010) (stating with respect to separation of witnesses, "where there is no affirmative evidence introduced that the witnesses had in fact discussed their testimony there is no reviewable question"). The post-conviction court was ineffective here (PCR App. Vol. III, 82-83). *Stevens*, 770 N.E.2d at 746.

E. *Sex Ed Tutor* video

The State admitted Exhibit 2, a video titled, *Sex Ed Tutor*, at Nunley's trial as evidence of guilt on Count V, which charged Nunley with disseminating matter harmful to minors (Trial App. Vol. I, 13; Trial Tr. Vol. III, 662). Nunley incorrectly faults Schultz for not objecting to the admission of the video on the grounds it had not been authenticated (Def. Br. 27). Under Rule 901, "When evidence establishes a reasonable probability that an item is what it is claimed to be, the item is admissible." *Thomas v. State*, 734 N.E.2d 572, 573 (Ind. 2000).

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[2] Pro se litigants "are held to the same standard regarding rule compliance as are attorneys duly admitted to the practice of law and must comply with the appellate rules to have their appeal determined on the merits." *Smith v. State*, 822 N.E.2d 193, 203 (Ind. Ct. App. 2005), *trans. denied*. This includes the Appellate Rules' requirements for briefs and arguments. *See, e.g., Ross v. State*, 877 N.E.2d 829, 833 (Ind. Ct. App. 2007) *and Boykin v. State*, 702 N.E.2d 1105, 1106 & n.1 (Ind. Ct. App. 1998) (both holding that *pro se* defendants waived review).

The exhibit was offered and admitted during the direct testimony of Detective Wibbels (Tr. Vol. III, 662). By that time, had A.Y. testified that after Nunley and she had laid down on his bed, he molested her while he played the video on a small television set in his room (Trial Tr.430-31, 470-72; Trial Ex. 1). A.Y. identified the DVD by its title and printed imagery; she remembered from when Nunley removed the disc and placed it in the player (Trial Tr. 432, 469). The DVD has several images printed on one side, including the image of a woman performing fellatio (Ex. 2). Detective Wibbels testified that after A.Y. had reported the abuse, he went to an apartment Nunley had rented as part of his investigation (Trial Tr. 660-61). Wibbels obtained Nunley's consent to search the apartment and found the *Sex Ed Tutor* DVD on a shelf (Trial Tr. 660-61). This evidence is sufficient to identify Exhibit 2 as the video Nunley forced A.Y. to watch. Evid. R. 901(b)(1); *Thomas*, 734 N.E.2d at 573.

Nunley's contrary argument is effectively a challenge to A.Y.'s credibility, and depends on the fact that the evidence is that he only showed her a pornographic video on one occasion and no one had forced A.Y. to watch the entire video again for purposes of authentication at Nunley's trial (Def. Br. 27-28). Thus he concludes that A.Y.'s inability to describe the actions shown on the film means the trial court could not have admitted it (Def. Br. 27). "Absolute proof of authenticity is not required . . . Once this reasonable probability [under Rule 901(a)] is shown, any inconclusiveness of the evidence's connection with the events at issue goes to evidential weight, not admissibility." *Richardson v. State*, 79 N.E.3d 958, 962 (Ind. Ct. App. 2017), *trans.*

denied. Nunley's objection runs to the credibility of both A.Y.'s testimony and the weight a jury might give to Exhibit 2, and does not involve the identification, for purposes of admission, of the video (Def. Br. 27). *Id.* Schultz was not deficient in failing to lodge a meritless objection to Exhibit 2, *Peak*, 26 N.E.3d at 1016, and Nunley has not shown prejudice because the trial court would have rightly overruled such an objection. *Myers*, 33 N.E.3d at 1109.

F. Alleged vouching testimony by Detective Wibbels.

Nunley "asserts that the State impermissibly offered testimony from Detective Wibbels' vouching for the veracity and truthfulness of A.Y." and that Schultz was ineffective in failing to object (Def. Br. 28). Nunley vaguely alleges it is "clear that the prejudicial effect of a police officer testifying that because of their experience they are able to tell when someone is telling them the truth and then vouching for the veracity of A.Y. was prejudicial to Mr. Nunley" (Def. Br. 28). But neither this Court nor, the State submits, an opposing party is obliged to search the record to support a party's claims. *Deloney v. State*, 938 N.E.2d 724, 733 n.15 (Ind. Ct. App. 2010), *trans. denied* (citing *Vanderburgh v. Vanderburgh*, 916 N.E.2d 723, 726 n.2, 730 (Ind. Ct. App. 2009)). Nunley's argument is not accompanied by citations to the trial record and analysis of Wibbels' testimony and is therefore waived. App. R. 46(A)(8)(a), 46(C); *New*, 938 N.E.2d at 766.

Despite Nunley's wavier, the record does contain testimony from Detective Wibbels' that he could tell when "someone is telling [him] the truth" and then "vouching for the veracity of A.Y." (Def. Br. 28). Detective Wibbels testified that he

was familiar through training and experience with the behaviors of children who had been coached and identified some of them; he also testified it was common for children to provide more details of allegations at Comfort House than at the police station; and that it was not uncommon for parents to delay bringing children forward with allegations of abuse (Trial Tr. III, 686-87, 688-89, 711). Such testimony was proper at the time of Nunley's trial. *Kindred v. State*, 973 N.E.2d 1245 (Ind. Ct. App. 2012), *trans. denied*, *overruled Sampson v. State*, 38 N.E.3d 985 (Ind. 2015). Nunley cannot fault Schultz for following prevailing law on this issue and not objecting. *Cole v. State*, 61 N.E.3d 384, 387 (Ind. Ct. App. 2016), *trans. denied*.

Even when the law on this issue changed, it still permitted testimony such as Detective Wibbels' in response to defense claims of coaching. *Sampson v. State*, 38 N.E.3d 985, 992 (Ind. 2015). That claim was the essence of Nunley's defense, to explain why A.Y. was fabricating and maintaining her story about his abuse (Tr. Vol. IV, 806) (Direct Appeal ["DA"] Def. Brief, 21-22). Consequently Nunley discussed coaching children with the jurors in *voir dire* and suggested that A.Y. had been coached in his opening argument (Trial Tr. Vol. II, 261, 410-12). Even under current law, Detective Wibbels' testimony was proper. *Id.* Nunley has failed to show deficient performance or prejudice. *Cole*, 61 N.E.3d at 387; *Peak*, 26 N.E.3d at 1016; *Myers*, 33 N.E.3d at 1109. The post-conviction court should be affirmed. *Stevens*, 770 N.E.2d at 746.

G. 'Cumulative impact' argument.

Nunley concludes his unpersuasive challenge to Schultz's performance by saying that even if he had failed to show she was ineffective, his conviction should still be reversed because the "totality" of his alleged errors (Def. Br. 28). As discussed above in Parts I(A) through (H), Nunley has not found an instance in which the post-conviction court clearly erred rejecting his claims that Schultz was ineffective. This Court should affirm the post-conviction court. *Id.*; *Carr*, 728 N.E.2d at 131.

II
The post-conviction court did not clearly err in finding Nunley failed to prove appellate counsel was ineffective.

The standard for gauging Nunley's complaints about McGovern's performance is the same as that for used to evaluate his claims against Schultz. *Allen v. State*, 749 N.E.2d 1158, 1166 (Ind. 2001). This Court will also "strongly presume" that appellate counsel rendered adequate assistance and made all significant decisions in the exercise of his or her reasonable professional judgment. *Martin v. State*, 760 N.E.2d 597, 600 (Ind. 2002). While an appellate counsel may be ineffective in failing to present issues on appeal, *Carter v. State*, 929 N.E.2d 1276, 1278 (Ind. 2010), "'Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most a few key issues.'" *Bieghler v. State*, 690 N.E.2d 188, 194 (Ind. 1997) (quoting *Jones v. Barnes*, 463 U.S. 745, 751-52 (1983)). This Court is "particularly deferential to counsel's strategic

decisions to exclude certain issues in favor of others, unless such a decision was unquestionably unreasonable." *Id*. Consequently, "[i]neffective assistance is very rarely found in cases where a defendant asserts that appellate counsel failed to raise an issue on direct appeal." *Reed v. State*, 856 N.E.2d 1189, 1196 (Ind. 2006).

Likewise, claims that counsel presented an issue, but did not do so with minimum competence, "are the most difficult for defendants to advance and reviewing tribunals to support." *Overstreet v. State*, 877 N.E.2d 144, 166 (Ind. 2007). This is because "such claims essentially require the reviewing court to reexamine and take another look at specific issues it has already adjudicated to determine 'whether the new record citations, case references, or arguments would have had any marginal effect on their previous decision.'" *Id.* (quoting *Bieghler*, 690 N.E.2d at 194). And even if McGovern's performance was shown to have been objectively incompetent, Nunley was still required to a reasonable probability that analysis of the issue under the appropriate standard of review would have produced a different result. *Stevens*, 770 N.E.2d at 746. Nunley has not shown clear error in the post-conviction court's denial of his claims that McGovern was ineffective.

A. Claim regarding 'denial of defense.'

As he did in the post-conviction court, Nunley generally says McGovern was incompetent because he "should have advanced an argument that state procedural rules cannot be mechanistically applied to preclude a complete defense" (PCR App. Vol. III, 70). (Def. Br. 29) Nunley presents no citations to the record to explain this claim, adding only a vague statement, "At issue here are prior false accusations

made by A.Y. against another person" to his argument without citations to the record (Def. Br. 29). This claim is therefore waived. App. R. 46(A)(8)(a), 46(C); *New*, 938 N.E.2d at 766.

Departing from Nunley's clear wavier of review, it could be imagined that he is referring to the analysis in this Court's opinion affirming his conviction against a challenge of error under Indiana Rule of Evidence 608. *Nunley*, 916 N.E.2d at 720. Such a speculation would not be entirely justified; Nunley's argument does not cite this Court's opinion or Rule 608 (Def. Br. 29-31). But continuing in that vein, McGovern argued that it had been error to prevent the defense from introducing evidence that would allow it to claim "A.Y. lied to the police on another occasion, accusing her step-father of hurting her" (Def. Br. 9). McGovern claimed the trial court's application of Rule 608 denied him the right to present a defense, which arises under the Sixth Amendment of our United States Constitution and the Due Process Clause of that Constitution's Fourteenth Amendment (DA Def. Br. 9-11). *In re Crisis Connection*, 949 N.E.2d 789, 800 (Ind. 2011). McGovern also advanced alternative arguments that the State had opened the door to the admission of this evidence notwithstanding Rule 608, and that the trial court's ruling constituted fundamental error (DA Def. Br. 11-14).

This Court rejected McGovern's argument. *Id*. He therefore petitioned for transfer on Nunley's behalf, arguing that this Court had applied a "mechanistic" approach to the issue and that he ought to be allowed to introduce the evidence at a new trial (DA Petition to Transfer, 6-7). McGovern's advocacy was sufficiently

effective that our Supreme Court ordered supplemental briefing on the issue. MyCase Docket, *Nunley v. State*, No. 31A01-0902-CR-88, entry of January 21, 2010. McGovern filed a supplemental petition for transfer, amplifying his claim that the trial court and this Court had incorrectly used a "mechanistic" approach to the issue and that the ruling had denied his "right to present his defense" (DA Supp. Petition to Transfer, 6-7). After considering McGovern's arguments for several months, our Supreme Court denied his request to transfer. MyCase Docket, *Nunley v. State*, No. 31A01-0902-CR-88, entry of March 4, 2010.

Assuming Nunley is referring to this issue, McGovern's representation on this issue was not incompetent. Nunley's arguments simply mimic McGovern's prior argument that an evidence rule should not have been "mechanistically applied" at Nunley's trial (Def. Br. 29) (DA Def. Br. 11-14; DA Petition to Transfer, 6-7; DA Supplemental Petition to Transfer, 6-7). Nunley's recitation of some general authority on the beginning point of McGovern's argument does not provide any indication that "new record citations, case references, or arguments would have had any marginal effect" on Nunley's appeal. *Overstreet*, 877 N.E.2d at 166. Even assuming Nunley's argument refers this issue, he has failed to show clear error. *Stevens*, 770 N.E.2d at 746.

B. Double jeopardy claim.

Nunley incorrectly faults McGovern for not appealing on double jeopardy grounds (Def. Br. 33-39). Nunley's says McGovern should have argued that Nunley performing fellatio on A.Y., and then compelling her to perform fellatio on him,

while showing her a pornographic video was a "single confrontation with a single victim" for which he should have received a lower sentence (Def. Br. 33-34)[3]. Nunley's discussion of the law regarding double jeopardy is incorrect, and does not show any deficiency in McGovern's representation.

Nunley incorrectly relies on *Bowling v. State*, 560 N.E.2d 658 (Ind.1990), in support of his argument. *Bowling* was decided prior to our Supreme Court's decision in *Richardson v. State*, 717 N.E.2d 32, 53 (Ind.1999), which changed and clarified Indiana's law of double-jeopardy (Def. Br. 34-35). *Richardson* superseded *Bowling*'s double-jeopardy analysis, specifically rejecting the 'single confrontation with a single victim' rationale that had been used in *Bowling*. *See Richardson*, 717 N.E.3d at 49 & n.36 (disapproving of Indiana double-jeopardy decisions between 1978 and 1997); *accord Scott v. State*, 771 N.E.2d 718, 730 (Ind. Ct. App. 2002), *trans. denied*, *disapproved on other grounds*, *Louallen v. State*, 778 N.E.2d 794 (Ind. 2002); *Ward v. State*, 736 N.E.2d 265, 269 n. 4 (Ind. Ct. App. 2000).

Nunley incorrectly cites *Kocielko v. State*, 943 N.E.2d 1282 (Ind. Ct. App. 2011), *trans. denied*, to claim that *Bowling* is still good law (Def. Br. 33-34). There, the defendant had been convicted of two counts of sexual misconduct with a minor, as Class B and Class C felonies, and found to be a habitual offender. *Kocielko v. State*, 938 N.E.2d 243, 247 (Ind. Ct. App. 2010). During a previous trial, the jury

[3] Nunley's brief is not clear about whether he believes he is entitled to a single 35 year sentence for all three remaining convictions, or a single 35-year sentence for Counts II and IV, followed by his consecutive 21 month sentence for Count V (Trial App. Vol. I, 83). (Def. Br. 35). *Nunley*, 916 N.E.2d at 719.

had acquitted Kocielko of one count of sexual misconduct with a minor as a Class C felony but could not reach a verdict on two other counts. *Id.*; Ind. Code § 35-42-4-9(b)(1) (2007). Kocielko was retried and convicted on the two remaining counts and found to be a habitual offender. *Id.* On appeal, a panel of this Court rejected the defendant's use of *Bowling* for double-jeopardy principles when addressing his implied-acquittal claim, but read *Bowling* to announce a double-jeopardy principle forbidding the defendant to be punished twice for "'the same injurious consequences sustained by the same victim during a single confrontation.'" *Kocielko*, 938 N.E.2d at 251 (quoting *Bowling*, 560 N.E.2d at 659). The panel ordered one of the defendant's two convictions for sexual misconduct with a minor to be vacated. *Id.*

The State sought rehearing. *Kocielko*, 943 N.E.2d at 1283. The panel then abandoned what appeared to be its previous reading of *Bowling*, and held instead that a defendant can be validly convicted and sentenced for multiple offenses committed against the same victim during a single confrontation. *Id*. The panel went on to cite *Bowling* as a case which "espoused a sentencing rule that has not been explicitly rejected, i.e., a sentence must reflect the episodic nature of the crimes committed." *Id.* at 1283. "[U]pon further reflection and review," the panel found this concern had already been satisfied by the trial court's original imposition of multiple convictions and concurrent sentences and affirmed. *Id.*

But the trial court's imposition of concurrent sentences on Kocielko's multiple convictions was incapable of remedying any double jeopardy violation. *Gregory v.*

State, 885 N.E.2d 697, 703 (Ind. Ct. App. 2008), *trans. denied*. Had the *Kocielko* panel read *Bowling* as a double-jeopardy decision, the panel would have been obligated to vacate one of the defendant's convictions. *Id*. The fact that the panel affirmed the multiple convictions and sentences shows without question that *Kocielko* does not support Nunley's in claiming *Bowling* as valid law regarding Indiana's double-jeopardy protections. *Id.*

While the panel's re-consideration of *Bowling* as "a sentencing rule that has not been explicitly rejected, i.e., a sentence must reflect the episodic nature of the crimes committed" makes *Kocielko* arguably germane to a review of Nunley's sentence, that aspect of *Kocielko* is more appropriately discussed in the following section of this brief. *Id.* at 1283. In the context of Nunley's double jeopardy claims, it is clear that McGovern was not deficient in foregoing reliance on Nunley's superseded, invalid authority to pursue a meritless double-jeopardy claim. *Dawson v. State*, 810 N.E.2d 1165, 1177 (Ind. Ct. App. 2004), *trans. denied*[4]. Nunley has failed to show clear error and the post-conviction court should be *affirmed. Stevens*, 770 N.E.2d at 746.

C. Nunley's sentence.

Nunley's use of *Kocielko* to support a complaint that McGovern should have sought review of his sentences altogether is also unpersuasive (Def. Br. 34-35). As to *Kocielko*'s use of *Bowling* regarding the "episodic nature" of crimes in appellate

[4] Nunley makes no argument about his convictions under the two tests established in *Richardson* (Def. Br. 34-35). Analysis of McGovern's performance under that law is therefore waived. App. R. 46(A)(8)(a), 46(C).

review of sentences, it should be recalled that *Bowling* was decided in 1990, four years before the General Assembly limited the length of consecutive sentences by capping aggregate sentences for episodes of criminal conduct. *Bowling*, 560 N.E.2d at 658; *see Tedlock v. State*, 656 N.E.2d 273, 276 (Ind. Ct. App. 1995) (discussing enactment, in 1994, of Indiana's 'episode cap' on consecutive sentences). Nunley's sentences do not come under this provision because the General Assembly excluded his class A felony sentences from the cap (Trial App. Vol. I, 9-13). I.C. § 35-50-1-2(a)(10) (2007). But the point which is most relevant to his argument is that neither *Kocielko* nor *Bowling* announces a rule constraining courts from imposing consecutive sentences for offenses committed in a "single confrontation with a single victim." *See Vermillion v. State*, 978 N.E.2d 459, 466 (Ind. Ct. App. 2012) (noting that *Kocielko* is "not easily applied" as a rule governing review of consecutive sentences). Aside from statutory limitations which the General Assembly may place on consecutive sentences, *Kocielko* and *Bowling* can only be read as cases which stand for the idea that sentences must be appropriate to a defendant's offenses and character. App. R. 7(B) (2003). Nunley's arguments regarding McGovern's decision not to appeal his sentence under Rule 7(B) are not persuasive.

To begin, Nunley offers no argument about what McGovern's brief ought to have said about his offenses *and* his character. He claims the trial court abused its discretion in finding an aggravating fact, but that claim does not establish that Nunley's sentence would have changed even if his claim were true (Def. Br. 37-38). *See Means v. State*, 807 N.E.2d 776, 788 (Ind. Ct. App. 2004), *trans. denied* ("When

a reviewing court 'can identify sufficient aggravating circumstances to persuade it that the trial court would have entered the same sentence even absent the impermissible factor, it should affirm the trial court's decision") (quotation omitted). Likewise, while Nunley claims his offenses were ordinary and did not 'brutalize' A.Y., he does not propose an argument regarding his character which would have persuaded this Court on appeal (Def. Br. 37-38). *Cf. Anderson v. State*, 989 N.E.2d 823, 827 (Ind. Ct. App. 2013), *trans. denied* (holding failure to argue inappropriateness as to both the nature of the offense and character of the offender waives review under Rule 7(B)). It was Nunley's burden to show what McGovern ought to have argued and a reasonable probability that the outcome of the appeal would have differed. *Stevens*, 770 N.E.2d at 746. Nunley has not presented an argument to this effect and the post-conviction court should therefore be affirmed. *Id.*

Setting Nunley's waiver aside, he has still failed to show that McGovern was ineffective in choosing not to appeal Nunley's sentence. Nunley complains that he 'vigorously' disputed the prior criminal history found by the trial court, and says evidence was required before the trial court could find that he had an aggravating criminal history (Def. Br. 37-38). But the trial court heard sworn testimony, given during a hearing on the State's motion to introduce evidence of similar crimes committed by Nunley, from K.S. (Trial Tr. Vol. I, 41). K.S. was 10 years old when she testified, and recalled that she and her family stayed at Nunley's house during a summer when she was seven or eight years old (Trial Tr. Vol. I, 43-44, 47-48).

While Nunley and K.S. were watching a Disney movie, K.S. recalled, Nunley "pulled down his pants and he showed me his penis. . . . And then he grabbed my hand and made me rub his, and he rubbed my vagina" (Trial Tr. Vol. I, 43). She recalled that Nunley used a portable DVD player in his bedroom to show K.S. sexual activity "[a] lot of times" and that during these occasions he "[g]rabbed my vagina and make [made] me rub his penis" (Trial Tr. Vol. I, 45-47). Nunley also compelled K.S. to submit to fellatio on several occasions, and to perform fellatio on him (Trial Tr. Vol. I, 46-47). Nunley also digitally penetrated K.S. (Trial Tr. Vol. I, 47). Nunley also molested K.S. at her mother's house (Trial Tr. Vol. I, 48, 53).

The trial court specifically identified this testimony as showing that Nunley had a history of criminal activity (Trial Tr. Vol. IV, 911). Competent appellate counsel would have known that "long-standing Indiana precedent establishes that trial courts may consider previous criminal activity, even though uncharged, in the determination of aggravating circumstances at sentencing." *Washington v. State*, 902 N.E.2d 280, 291 (Ind. Ct. App. 2009), *trans. denied*. The trial court heard sworn testimony proving two aggravating facts: (1) Nunley's abuse of a position of trust, and (2) Nunley's abuse of K.S. Nunley, for his part, argued against a finding that he had abused K.S., but he did not testify or present contrary evidence (Trial Tr. Vol. IV, 849-50, 896-97, 910). The trial court did not abuse its discretion in finding that Nunley had abused a child before, and that this was an aggravating fact. *Id.*

Nunley's abuse of trust, and his Nunley's repeated abuse of K.S., would have counseled strongly against appealing Nunley's sentence. *See Allen v. State*, 722

N.E.2d 1246, 1253 (Ind. Ct. App. 2000) (holding that enhanced and consecutive sentences may be supported by only a single aggravating fact). Nunley's direct-appeal brief was filed on June 25, 2009 (DA Def. Br. Cover, Certificate of Service). Competent counsel would have been aware that, some four months earlier, our Supreme Court had held that an appellate court could *increase* a defendant's sentence if he or she chose to raise the matter on appeal. *McCullough v. State*, 900 N.E.2d 745, 750 (Ind. 2009). Even allowing for the prospect of reversing two of Nunley's convictions, the maximum sentence Nunley could have received *on appeal* was 103 years. *See* I.C. § 35-50-2-4 (2007) (sentencing range for Class A felonies); I.C. § 35-50-2-7 (2007) (sentencing range for Class D felonies). That one of Nunley's aggravating facts involved similar, repeated abuse of another young child, would have significantly aided the State in arguing for an increase in Nunley's sentence. *McCullough*, 900 N.E.2d at 750.

As to review for appropriateness, Nunley says that, while he sexually abused A.Y., he did not 'brutalize' her, is debatable at best (Def. Br. 39). By definition, the sexual abuse of a young child is brutal behavior. To the extent Nunley means to suggest that he did not subject A.Y. to violent injury, the fact is almost irrelevant for purposes of reviewing the nature of his offenses. The "nature of the offense" refers to the defendant's acts in comparison with the elements of his offense. *Cardwell v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008). The elements of child molesting and dissemination of matter harmful to minors do not include Nunley's abuse of his position of trust with A.Y. and her parents, or his custodial authority

over A.Y. while she was in his home. These facts more than support the imposition of five years over the advisory sentence for Nunley's two Class A felony convictions and three months over the advisory sentence for Nunley's Class D felony conviction (Trial App. Vol. I, 83). I.C. § 35-50-2-4 (2007); I.C. § 35-50-2-7 (2007).

The nature of Nunley's deplorable character is well illustrated by his refusal to cooperate in the preparation of his presentence report, by his extensive abuse of K.S., and his conduct in this case (Tr. Vol. IV, 856-57). Nunley told the officer preparing his presentence report that "he knew" that providing information "would not benefit him" (Trial Tr. Vol. IV, 857). Some of the information the officer found included Nunley's misconduct while awaiting sentencing, which involved sexual activity with another inmate and manufacturing alcohol at the jail (Trial Tr. Vol. IV, 866). Reports of at least other children of molesting by Nunley round out the picture (Trial App. Vol. II, 118; Trial Tr. IV, 864, 872)[5]. Neither the trial court nor this Court would have been obliged to discount these facts simply because Nunley argued, through counsel, that they should not be considered (Trial Tr. Vol. IV, 848-49). Even assuming he had not waived review, Nunley has failed to show clear error in the post-conviction court's finding that McGovern was not ineffective regarding Nunley's sentence. *Stevens*, 770 N.E.2d at 746.

[5] This does not include an allegation made to Detective Wibbels by Nunley's own daughter, which she testified was not true at the pretrial hearing (Trial Tr. Vol. I, 64).

D. Remaining claims against appellate counsel.

Nunley's remaining claims simply allude to his allegations against Schultz, addressed in Parts I(C), (E), and (F) of this Brief; Nunley claims his allegations also prove McGovern was ineffective (Def. Br. 39-40). With respect to Nunley's claims regarding A.Y.'s written answers, the admission of Exhibit 2, and alleged vouching testimony, the standard of review is abuse of discretion, which requires all facts to be taken favorably to the trial court's decision and will affirm the trial court on any basis apparent in the record. *Hale v. State*, 992 N.E.2d 848, 852 (Ind. Ct. App. 2013); *Crocker v. State*, 989 N.E.2d 812, 818 (Ind. Ct. App. 2013), *trans. denied*. The State would rely on its full discussion of those issues in Part I above to show that minimally-competent counsel could have decided not to pursue those claims and that, even if McGovern had pursued them, they would not have affected the outcome of Nunley's appeal. *Harrington*, 562 U.S. at 104, 106-07; *Stevens*, 770 N.E.2d at 746; *Beighler*, 690 N.E.2d at 194.

With respect to Nunley's claims regarding the separation of witnesses, he notes that claim could only be addressed as fundamental error, which is an even more daunting standard on direct review (Def. Br. 40). *See Ryan v. State*, 9 N.E.3d 663, 667-68 (Ind. 2014) (discussing fundamental error exception). The State would rely on its discussion in Part I(D) to show there was no error, let alone fundamental error; that minimally-competent counsel could have foregone this claim; and, that including the claim on appeal would not have affected the outcome of Nunley's case. *Harrington*, 562 U.S. at 104, 106-07; *Stevens*, 770 N.E.2d at 746; *Beighler*, 690

N.E.2d at 194; *Morell*, 933 N.E.2d at 490-91. Nunley has failed to show clear error and the post-conviction court should be affirmed. *Stevens*, 770 N.E.2d at 746.

CONCLUSION

This Court should affirm the post-conviction court.

Respectfully submitted:

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CERTIFICATE OF WORD COUNT

I verify that this brief contains no more than 14,000 words. This brief contains 10,067 words. The word count was conducted by selecting all portions of the brief not excluded by Indiana Appellate Rule 44(C) and selecting Review/Word Count in Microsoft Word, the word-processing program used to prepare this brief.

/s/ Ian McLean
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CERTIFICATE OF SERVICE

I certify that on November 20, 2017, the foregoing document was served on the following person(s) by first-class U.S. Mail:

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