

## MEMORANDUM DECISION

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.



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## IN THE COURT OF APPEALS OF INDIANA

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Matthew Richardson,  
*Appellant-Defendant,*

v.

State of Indiana,  
*Appellee-Plaintiff.*

August 15, 2022

Court of Appeals Case No.  
21A-PC-2461

Appeal from the Porter Superior  
Court

The Honorable Mary A. DeBoer,  
Judge

Trial Court Cause Nos.  
64D05-1910-PC-10185 and 64D05-  
1601-MR-538

**Altice, Judge.**

## Case Summary

[1] Following a jury trial, Matthew Richardson was convicted of murder and pointing a firearm. He received permission to file a belated appeal, which was stayed while he also pursued post-conviction relief (PCR), claiming that he received ineffective assistance of trial counsel. Following a hearing, the post-conviction court denied Richardson's PCR petition. Richardson now brings this joint appeal of his convictions and the denial of PCR, raising the following restated issues for our review:

1. Did the trial court abuse its discretion by refusing to instruct the jury on the defense of domicile?
2. Was irrelevant and improper character evidence admitted at trial and, if so, did it amount to fundamental error?
3. Did the post-conviction court err in determining that Richardson did not receive ineffective assistance of trial counsel?

[2] We affirm.

## Facts & Procedural History

[3] On December 18, 2015, Katie Ryan (Katie) and her fiancé Joshua Smith (Josh) were running errands in Portage, Indiana. Their last stop that evening was Menards, where Katie waited in the car. At some point, Katie heard shouting coming from behind the car and then Josh angrily got in and sped out of the parking lot onto Highway 6. He then turned onto Willowcreek Road and was

driving side-by-side with a car driven by twenty-two-year-old Richardson, a stranger to both Josh and Katie. Josh was driving fast, honking, and yelling. At some point, according to Katie, Richardson screamed, “I’m going to f\*\*k your bitch and shoot her in the head.” *Transcript Vol. I* at 123. This “sent Josh into a rage.” *Id.*

- [4] Mary Wentz, another motorist, witnessed part of the road rage incident on Willowcreek shortly after it began. According to Wentz, “There were two cars that you could tell clearly were in some kind of confrontation because one would drive fast and the other one would catch up with it, and he’d slow down, and he’d slow down. And you could see hands.” *Transcript Vol. II* at 46.

When the cars reached a red light at Lute Road, Josh nosed his vehicle in front of Richardson’s and then jumped out of his car and approached Richardson’s passenger door. Josh’s hands were flailing, he was screaming, and he tried to open the door, but it was locked.

- [5] When the light turned green, Richardson pulled around Josh’s car and left, and Josh resumed the pursuit. Katie eventually joined in on the “yelling and screaming and cussing as well.” *Transcript Vol. I* at 123. Before Wentz turned onto another street, she saw the cars “jockeying” for position as they proceeded down Willowcreek in front of her. *Transcript Vol. II* at 48. Around this time, approximately 7:20 p.m., Richardson made a video recording with his phone. The brief video shows Josh, with his window down, driving alongside Richardson, taunting him and shouting threats such as, “I’ll smash your whole f\*\*king face” and “I’ll f\*\*k you up.” *State’s Exhibit 112*. Josh then accelerated

and cut in front of Richardson. As Richardson tried to record Josh's license plate, Josh slowed down and turned left (west) onto Sunrise as Richardson proceeded straight.

[6] After separating from Josh, Richardson called his older brother, Daniel Zampini (Daniel), who advised him to hurry up and get home. Around this time, Richardson turned left (west) onto Mulberry Avenue, the street where he lived. Daniel and their younger brother, Zachary Zampini (Zach), lived with Richardson and were at home. Before reaching home, Richardson realized that Josh was behind him again. Richardson pulled into his driveway on the western edge of the lot and parked in the carport attached to the home.

[7] It was about 7:25 p.m. and dark outside, though there were holiday lights illuminating the area. Most of the critical events over the next approximately four minutes were documented by surveillance cameras at the home, including the shooting of Josh about a minute and a half into the fateful encounter. Certain other details can be pieced together from the trial testimony of Katie and Richardson.

[8] The aforementioned evidence reveals that Josh drove past Richardson's home and then backed into the driveway and stopped briefly, as Richardson ran out from the carport with a small wooden bat. Josh then drove east, just past the house, as he was chased by Richardson and Zach, who rushed out from the front of the home. One of them threw an object, possibly the wooden bat,

which damaged the passenger side of the windshield. Daniel was standing outside watching from the front yard.

[9] Now irate again, Josh began to turn his car around. At the same time, Richardson, who was no longer carrying the wooden bat, ran inside to retrieve a loaded, high-powered rifle from his bedroom, and Zach ran under the carport. Josh drove east past the driveway, and Daniel, standing in the driveway, threw a partially full Gatorade bottle at the car. Zach then joined Daniel in the driveway, as Josh parked in the street just east of the home. Josh exited his car holding an aluminum bat, with Katie following behind, and he confronted Zach and Daniel, who had moved to under the carport. Within seconds, Richardson came from the front of the home pointing a rifle. Undeterred, Katie, who was unarmed and substantially smaller than Richardson,<sup>1</sup> approached Richardson, and Josh pulled her back by the shirt. At that same time, Daniel grabbed the bat away from Josh's other hand, while Katie kicked toward Zach, who was more than twice her weight.

[10] Within about ten seconds of Richardson arriving with the rifle and five seconds of Josh being disarmed, Josh backed away into the neighbor's yard. In the process, Daniel swung the aluminum bat at Josh and then Zach punched Josh. Katie yelled at Daniel in the driveway, while Richardson, still armed with a

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<sup>1</sup> Katie stands five feet tall, while Richardson is about six feet three inches tall.

rifle, and Zach chased Josh around the neighbor's property. Zach then shoved Josh into the road before heading for Katie.

[11] As Josh stood in the road, Richardson took a couple steps back, aimed the rifle, and shot Josh in the upper left thigh from less than ten feet away.<sup>2</sup> The bullet struck Josh's femoral artery and, after exiting the back of his thigh, ricocheted off the road behind him, leaving a gouge mark in the road. Richardson then turned and walked toward his property, as Josh stumbled to his car.

[12] Katie immediately ran in Josh's direction but, after she crossed into the neighbor's yard, Zach punched her, knocking her off her feet, and then continued to beat her while she was on the ground. Josh turned his car around to drive back by Richardson's residence to grab Katie. Josh exited his car near Katie but had to run back to the car without her because he had accidentally put it in reverse. Zach then started beating Katie again in the middle of the road until Josh pulled forward in the car and Zach jumped out of the way. At the same time, Daniel threw the aluminum bat at Josh's car.

[13] Josh, with his leg bleeding profusely, parked his car in the road in front of the residence, picked up the bat, and again tried to retrieve Katie. Daniel, Zach, and Richardson, however, approached them, and Richardson pointed his rifle

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<sup>2</sup> Josh was about twenty-eight feet from Richardson's property when he was shot.

at Katie and reloaded it, ejecting the spent casing.<sup>3</sup> A passing motorist stopped during the chaos and called 911 at Katie's direction. This caused Daniel, Zach, and Richardson to retreat, and Richardson put the rifle inside the residence. It took Josh about another minute to get Katie into his car, as she continued to yell at the brothers and was punched again by Zach as she approached him in the front yard. After shoving Katie in through the driver's side, Josh sped away only to crash about six houses down the road, as he began to succumb to his fatal injury. Josh died in the hospital a week later from organ failure due to severe blood loss.

[14] Richardson fled the scene, and responding officers had to bring in the SWAT team to remove Zach and Daniel from the residence. After traveling to Chicago, Richardson returned to Indiana the day after the shooting and turned himself in with the assistance of his lawyer. Richardson did not provide a statement but assisted detectives with accessing the home surveillance recordings and opening his gun safe, which held the rifle he had used to shoot Josh along with ammunition and a .22 caliber rifle. Richardson also provided the cell phone video he took during the road rage incident.

[15] On December 21, 2015, the State charged Richardson with aggravated battery, a Level 3 felony, and pointing a firearm, a Level 6 felony. When Josh died, a charge of murder was added. In March 2016, after learning that the rifle used

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<sup>3</sup> It is unclear exactly when during the conflict, but Katie testified to hearing Zach direct Richardson to "get the gun and shoot this crazy b\*tch in her head." *Transcript Vol. I* at 137.

in the shooting had been stolen, the State added a Level 6 felony theft count. The State dropped the aggravated battery charge before trial.

- [16] Richardson's jury trial began on March 1, 2017. He testified in his own defense and claimed that he had never shot a gun before that night and that he was only trying to shoot the ground. Richardson acknowledged that Josh was not on his property at the time of the shooting, but he claimed to be scared for his life because Josh had made threats and he thought that Josh had a pistol. Richardson also testified that he did not realize at the time that Josh had been shot, yet he acknowledged on cross-examination that he turned his back on Josh after firing and walked away.
- [17] The jury ultimately rejected Richardson's claims of self-defense and lack of intent to kill and found him guilty of murder and pointing a firearm. The jury found him not guilty of theft. On April 28, 2017, the trial court sentenced Richardson to fifty-five years in prison on the murder conviction with two years to be served concurrently on the pointing a firearm conviction.
- [18] On August 9, 2019, this court granted Richardson's motion to file a belated appeal. We later granted, on November 22, 2019, a stay of the direct appeal while Richardson sought PCR. Richardson had filed his PCR petition on October 23, 2019, which was later amended. A hearing on the PCR petition was held in July 2021, and the post-conviction court denied the petition by order dated October 11, 2021.



[19] Richardson now appeals his convictions and the denial of his PCR petition. Additional information will be provided below as needed.

## **Discussion & Decision**

### ***1. Instruction on Defense of Domicile***

[20] Richardson argues that the trial court abused its discretion by rejecting his requested instruction on the defense of domicile based on Ind. Code § 35-41-3-2(d), which provides:

A person:

(1) is justified in using reasonable force, including deadly force, against any other person; and

(2) does not have a duty to retreat;

if the person reasonably believes that the force is necessary to prevent or terminate the other person's unlawful entry of or attack on the person's dwelling, curtilage, or occupied motor vehicle.

Richardson directs us to evidence that Josh acted as the aggressor both during the road rage incident and when he came onto Richardson's curtilage with a bat to confront Richardson, Zach, and Daniel.

[21] The manner of instructing the jury rests within the sound discretion of the trial court. *Pattison v. State*, 54 N.E.3d 361, 366 (Ind. 2016). On review, we generally consider whether the instruction correctly states the law, whether it is supported by record evidence, and whether its substance is covered by other instructions. *Id.* Only the second of these considerations is at issue here.

[22] A criminal defendant is entitled to have a jury instruction on any defense that has some foundation in the evidence – even if weak and inconsistent. *Hernandez v. State*, 45 N.E.3d 373, 376 (Ind. 2015). “However, even if the refusal to give a tendered jury instruction was error, this Court must assess whether the defendant was prejudiced by the trial court’s failure to give the instruction.” *Id.*

[23] In rejecting the proposed instruction, the trial court stated: “I think the evidence is crystal clear that the decedent was shot after he had retreated well away from [Richardson’s property]. He was not on the real estate. He had crossed the neighbor’s yard. He was standing in the street.” *Transcript Vol. IV* at 16. We agree with the trial court. The video evidence establishes that, upon coming onto Richardson’s property, Josh was quickly disarmed of the bat that was never used against Richardson, who was armed with a high-powered rifle. Thereafter, Josh, pursued by both Richardson and Zach, retreated off the property into the neighbor’s yard and then into the street, toward his vehicle. At this point, Josh was no longer the aggressor, was unarmed and outnumbered, and was standing in the street nearly thirty feet from Richardson’s property. The evidence does not support an inference – not even a weak inference – that Richardson could have reasonably believed that shooting Josh at that point was necessary to prevent or terminate Josh’s unlawful entry of or attack on Richardson’s curtilage.

[24] Moreover, any error in refusing the instruction did not impact Richardson’s substantial rights. *See Filice v. State*, 886 N.E.2d 24, 37 (Ind. Ct. App. 2008) (“Before a defendant is entitled to a reversal, he must affirmatively show that

the instructional error prejudiced his substantial rights.”), *trans. denied*. Here, while the jury was not instructed on the defense of domicile, it was instructed on self-defense.<sup>4</sup> These two defenses are “analogous” to each other and derive from the same statute. *Gomez v. State*, 56 N.E.3d 697, 702 (Ind. Ct. App. 2016). The jury rejected Richardson’s claim of self-defense, and we fail to see how a claim of defense of domicile would not have been similarly rejected. Thus, we can say with confidence that the jury would have reached the same verdict even if it had received the proposed instruction. *See Filice*, 886 N.E.2d at 37.

## ***2. Admission of Evidence***

[25] Richardson claims that the State introduced “irrelevant and prejudicial character evidence” at trial in violation of Ind. Evidence Rule 404. *Appellant’s*

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<sup>4</sup> Final Instruction No. 9 provided:

It is an issue whether the Defendant acted in self-defense.

A person may use reasonable force against another person to protect himself or someone else from what the Defendant reasonably believes to be the imminent use of unlawful force.

A person is justified in using deadly force, and does not have a duty to retreat, only if he reasonably believes that deadly force is necessary to prevent serious bodily injury to himself or a third person.

However, a person may not use force if:

He is committing a crime that is directly and immediately connected to the confrontation, or

He is escaping after the commission of a crime that is directly and immediately connected to the confrontation, or

He provokes a fight with another person with intent to cause bodily injury to that person, or

He has willingly entered into a fight with another person or started the fight, unless he withdraws from the fight and communicates to the other person his intent to withdraw and the other person nevertheless continues or threatens to continue the fight.

The State has the burden of proving beyond a reasonable doubt that the Defendant did not act in self-defense.

*Trial Appendix* at 107. Final Instructions No. 11 and 12 also addressed self-defense.

*Brief* at 21. Acknowledging that he did not make a contemporaneous objection to any of this evidence below, he contends that the admission of the evidence constituted fundamental error.

[26] It is well established that a failure to object when evidence is introduced at trial generally waives the issue for appeal but that we may review such a claim if we determine that fundamental error occurred. *Delarosa v. State*, 938 N.E.2d 690, 694 (Ind. 2010). The fundamental error exception, however, is “extremely narrow, and applies only when the error constitutes a blatant violation of basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process.” *Id.* (quoting *Mathews v. State*, 849 N.E.2d 578, 587 (Ind. 2006)). The exception is available only in egregious circumstances, where the claimed error made a fair trial impossible or constituted a clearly blatant violation of basic and elementary principles of due process. *Id.*

[27] In support of his fundamental error claim, Richardson equates his case to *Oldham v. State*, 779 N.E.2d 1162 (Ind. Ct. App. 2002), *trans. denied*. At Oldham’s murder trial, the State introduced novelty photos of him with text reading, “America’s Most Wanted,” “Wanted for: robbery, assault, arson, jaywalking,” “Considered armed and dangerous,” and “Approach with extreme caution.” *Id.* at 1171. The State used the photos to paint fifteen-year-old Oldham as a dangerous criminal. On appeal, this court determined that admission of the photos constituted fundamental error under the specific

circumstances of that case.<sup>5</sup> There, Oldham had not raised the issue of his character at trial and the evidence against him was circumstantial and “not overwhelming.” *Id.* at 1173. Among other things, no one saw Oldham shoot the victim, the murder weapon was never recovered, and no blood was found on Oldham’s shirt – a shirt that matched one worn by the apparent murderer.

[28] The case at hand is not on par with *Oldham*. Here, Richardson is on video shooting Josh, and Richardson admitted to committing the shooting with his own high-powered rifle (though he claimed that he did so in self-defense and without an intention to kill). The challenged evidence is also not as objectionable as in *Oldham*, as we will discuss briefly below.

[29] On cross-examination, the State asked Richardson, a self-proclaimed YouTuber, whether he had a history of riling people up and then video recording their reaction. He denied any such history. Richardson does not explain on appeal how this denial constituted improper character evidence. The State also asked Richardson about Zach’s “OTF” tattoo, which Richardson indicated stood for “only the family” and, he believed, came from a rap song. *Transcript Vol. III* at 227. Upon further questioning, Richardson denied that this was his and Zach’s motto. While evidence regarding Zach’s tattoo might be of questionable relevance, we fail to see how it reflected on Richardson’s character

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<sup>5</sup> We observed that, “[o]f course, the erroneous admission of character and uncharged bad act evidence to prove guilt does not always require reversal. Such errors are harmless and not fundamental when, for example, the defendant pursues the improperly opened issue of his character by testifying about the matter, and when there is overwhelming evidence of the defendant’s guilt.” *Id.* at 1173.

or amounted to fundamental error. Finally, during cross-examination, the State briefly asked Richardson about his next-door neighbor, Michael Hammonds,<sup>6</sup> having Richardson's mother arrested for stealing at some point after the shooting. This evidence was not elicited to establish Richardson's character but rather to suggest a motive for Richardson's belated claim that he purchased the rifles from Hammonds. Further, evidence of his mother's arrest had already come in during his cross-examination of Hammonds, during which Richardson attempted to impeach Hammonds with allegations that he sold the stolen firearms to Richardson.

[30] In passing, Richardson also suggests that the booking photos of himself and his brothers constituted improper character evidence. But these photos were admitted for the sole purpose of showing that the three men (unlike Katie and Josh) had no apparent injuries immediately following the incident in which Richardson claimed to be acting in self-defense. *Cf. Wheeler v. State*, 749 N.E.2d 1111, 1115 (Ind. 2001) (mug shot from arrest in current case admissible to show defendant's head injury).

[31] Similarly, Richardson notes that the State introduced evidence regarding pictures on Zach's Facebook account of Zach with two different guns. This testimony, however, was fleeting, and the pictures were not admitted into

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<sup>6</sup> Hammonds testified as an eyewitness to the chaos immediately following the shooting. He also denied Richardson's claims that he was the one who had, on two separate occasions, sold the stolen rifles to Richardson.

evidence. Moreover, when read in context, it is evident that this testimony was not elicited to establish Richardson or his family's character but rather to show the early course of the investigation.

[32] Lastly, Richardson argues that admission of evidence related to the stolen .22 caliber rifle that was found in his gun safe, along with the rifle used in the shooting, was irrelevant and prejudicial and amounted to fundamental error. But Richardson ignores the fact that he, not the State, elicited this evidence. *See Transcript Vol. III* at 111 (defense cross-examination of the lead detective), 182 (defense direct examination of Richardson). In soliciting this evidence, the defense sought to establish that the .22 caliber rifle was also purchased by Richardson from Hammonds, though on a different date, and that Hammonds was the individual who stole both firearms. Further, the defense established that the .22 caliber rifle had been stolen from a home about a month before the instant shooting and that other weapons and electronics had been stolen – none of which were found in Richardson's home. In other words, the defense sought to show that Richardson, although in possession of two stolen guns, purchased them from Hammonds and did not know that they were stolen. This strategy appeared to have worked, as the jury found Richardson not guilty of the felony theft charge.

[33] In sum, we conclude that Richardson has not overcome the high hurdle of establishing fundamental error.

### 3. *Ineffective Assistance*

[34] Finally, Richardson challenges the denial of his PCR petition. He contends that he received ineffective assistance of trial counsel when counsel failed to object to numerous alleged instances of hearsay, unqualified expert testimony, and spoliated evidence.

[35] A petitioner, such as Richardson, who appeals the denial of his PCR petition faces a rigorous standard of review, as we may consider only the evidence and the reasonable inferences supporting the judgment of the post-conviction court. *Jent v. State*, 120 N.E.3d 290, 292 (Ind. Ct. App. 2019), *trans. denied*. To obtain relief on appeal, a petitioner must show that the evidence as a whole leads unerringly and unmistakably to a decision opposite of that reached by the post-conviction court. *Conley v. State*, 183 N.E.3d 276, 282 (Ind. 2022). In other words, the decision will be disturbed only where the evidence is without conflict and leads only to a conclusion contrary to the result of the post-conviction court. *Id.* We will affirm the denial of PCR, when a defendant fails to meet this “rigorous standard of review.” *Id.*

[36] The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to the effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 686 (1984). As our Supreme Court has explained:

Ineffective assistance of counsel claims are evaluated under the well-known, two-part test articulated in *Strickland*. To prevail, [a petitioner] must show that: (1) counsel’s performance was deficient based on prevailing professional norms; and (2) the



deficient performance prejudiced the defense. Failure to satisfy either prong will cause the claim to fail.

In analyzing whether counsel's performance was deficient, the Court first asks whether, considering all the circumstances, counsel's actions were reasonable under prevailing professional norms. Counsel is afforded considerable discretion in choosing strategy and tactics, and judicial scrutiny of counsel's performance is highly deferential.

There is a strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Counsel is afforded considerable discretion in choosing strategy and tactics and these decisions are entitled to deferential review. Furthermore, isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective.

To demonstrate prejudice, the 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

*Conley*, 183 N.E.3d at 282-83 (Ind. 2022) (internal quotation marks and citations omitted). In sum, a criminal defendant is "not entitled to a perfect trial, but is entitled to a fair trial, free of errors so egregious that they, in all probability, caused the conviction." *Averhart v. State*, 614 N.E.2d 924, 929 (Ind. 1993); *Oliver v. State*, 843 N.E.2d 581, 586 (Ind. Ct. App. 2006), *trans. denied*.

### *Hearsay*

[37] Richardson initially argues that trial counsel was ineffective because he failed to object to "several instances of hearsay." *Appellant's Brief* at 31. In his

Appellant's Brief, Richardson does not favor us with any of the objectionable instances of hearsay. He simply directs us to review nine pages of his initial PCR petition and then suggests that all the alleged hearsay statements constituted improper attempts by the State to bolster Katie's credibility by offering evidence of prior consistent statements.

[38] We agree with the State that Richardson has waived this appellate argument by not developing it as required by Ind. Appellate Rule 46(A)(8). *See Isom v. State*, 170 N.E.3d 623, 648 (Ind. 2021). A brief must be prepared so that each judge, considering the brief alone and independent of the transcript and record, can intelligently consider the question presented. *Ramsey v. Rev. Bd. of Ind. Dep't of Workforce Dev.*, 789 N.E.2d 486, 488 (Ind. Ct. App. 2003). Richardson's briefing of this issue offers us no ability to intelligently consider the alleged hearsay statements and evaluate their prejudicial effect.

[39] Moreover, in our own review of the record, we did not find a "drumbeat of repetition" of Katie's prior statements, as Richardson suggests. *Appellant's Brief* at 32. Richardson directs us to *Modesitt v. State*, 578 N.E.2d 649 (Ind. 1991), where the defendant's convictions for child molesting were reversed on direct appeal because the victim's mother, a welfare caseworker, and a psychologist were all permitted to testify, over the defendant's objection and before the child victim testified, as to what the victim had told each of them concerning the molestations. *Id.* at 652 (holding that "the drumbeat repetition of the [] statements prior to calling the victim herself precluded direct, immediate cross examination of the statements and constitutes error requiring reversal"). There

was no similar drumbeat repetition in this case and, unlike in *Modesitt*, the State's case against Richardson did not hinge on Katie's account of what occurred or her credibility.

[40] Richardson has wholly failed to establish that had counsel objected to the alleged hearsay statements there is a reasonable probability the result of the proceedings would have been different.

### *Unqualified Expert Testimony*

[41] Richardson claims that counsel failed to "object to unqualified expert testimony." *Id.* at 33. In this regard, he notes that Dr. John Feczko, the forensic pathologist who performed the autopsy, testified to the trajectory of the bullet that struck Josh. Dr. Feczko testified that it was "impossible" that the bullet ricocheted off the ground before hitting Josh and opined, with "100 percent medical certainty," that the bullet came from higher than the wound. *Transcript Vol. I* at 207. Richardson argues that there was no evidence that Dr. Feczko was qualified to provide expert testimony concerning bullet trajectory. Similarly, Richardson directs us to testimony from Detective Janis Crafton in which she testified, based on her viewing of the surveillance footage from the residence, that she believed the bullet hit the ground after entering and exiting Josh.

[42] Even assuming that this testimony from Dr. Feczko and Detective Crafton was objectionable, Richardson fails to establish prejudice. The video evidence is consistent with this testimony, plainly showing that Richardson stood in front

of Josh and shot him and the bullet then struck the ground behind Josh. Further, the testimony was consistent with the defense strategy of trying to establish that Richardson “aimed downward” and was not trying to kill Josh. *Id.* at 209.

[43] Richardson also argues that improper testimony came in regarding the play in the rifle’s barrel and how it would have affected the aim of the rifle. Scott Owens, a firearms examiner with the Indiana State Police (ISP), testified that “the receiver or barrel were a little bit lose [sic] in the stock,” about a quarter inch, but opined that the play would not affect aim “at short distances” but would “if we’re talking hundreds of yards.” *Transcript Vol. II* at 102-03. While trial counsel did not object to this testimony, Richardson does not explain on appeal why Owens was not qualified to so testify. Indeed, his own counsel indicated on cross-examination that Owens “appear[ed] to have quite a bit of experience with firearms” and then questioned Owens as a skilled or expert witness<sup>7</sup> along the same lines as the State.<sup>8</sup> *Id.* at 105. Counsel effectively cross-examined Owens, utilizing Owen’s expertise as a “trained firearms examiner,” and we cannot say that counsel was deficient in doing so.

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<sup>7</sup> Pursuant to Ind. Evidence Rule 702(a), “[a] witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.”

<sup>8</sup> For example, counsel asked: “If someone fires a gun such as [the one in this case] and it has barrel play in it, is it likely to have the projectile, the bullet, go somewhere other than where it was aimed?” *Id.* at 108. Owens responded: “It might.” *Id.*

[44] Moreover, another witness, Assistant Chief of Police Ted Uzelac with the Portage Police Department, a trained precision marksman and sniper instructor for precision rifles, testified that the play in the rifle's barrel in this case would not be a "significant detriment to the gun's accuracy" at short distances, though it "absolutely" would be if shooting 600 yards away. *Id.* at 227. Assistant Chief Uzelac testified that, upon viewing the surveillance footage, "[m]y interpretation ... is that the bullet went where the gun was pointed." *Id.* at 231. In light of this testimony, which Richardson does not challenge on appeal, we fail to see how Richardson could have been prejudiced by Owens's cumulative testimony, even if admitted in error.

[45] Richardson also claims that defense counsel should have objected to improper opinion testimony by Detective Michael Vaughan, which came out when counsel was cross-examining Vaughan. Counsel asked Detective Vaughan if he believed, based on his investigation, that Richardson was aiming at Josh's femoral artery. Detective Vaughan responded that he believed Richardson was "aiming below his waist, which, I mean, if you aim below my waist you're most likely going to hit my femoral artery." *Transcript Vol. III* at 88. It is evident that counsel elicited this testimony in an attempt to damage the detective's credibility because Assistant Chief Uzelac, an expert marksman, had just testified during cross-examination by the defense that "[y]ou would be a miracle man if you can aim for the femoral artery." *Transcript Vol. II* at 236. Richardson has failed to show that counsel's strategy during cross-examination

of Detective Vaughan was unreasonable or that the response elicited likely affected the outcome of the trial.

### *Spoliated Evidence*

[46] Richardson contends that counsel should have objected to or moved to suppress the rifle from evidence because it was altered while in the exclusive possession of the State. Owens testified that during the firearms examination with the ISP, just prior to the test firing, a screw was tightened and then loosened a bit. He estimated that after the adjustments about a quarter inch of play between the stock and the barrel remained and that the original play was “[j]ust slightly more,” meaning “less than a half an inch or a third of an inch” as opposed to a quarter inch. *Id.* at 108, 111. At either amount of play, Owens’s opinion remained that the rifle’s aim would not be affected at close range.

[47] While there is clear evidence that the play of the rifle was altered at the ISP laboratory, Richardson does not offer any relevant authority for his proposition that the rifle should have been suppressed from evidence based on spoliation.<sup>9</sup> Moreover, Richardson does not even attempt to establish that the screw tightening was done in bad faith or that the original play in the rifle was anything but potentially useful evidence. *See Bishop v. State*, 40 N.E.3d 935, 950 (Ind. Ct. App. 2015) (distinguishing between evidence that is materially

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<sup>9</sup> Spoliation, in the civil context, “consists of ‘[t]he intentional destruction, mutilation, alteration, or concealment of evidence, usually a document. If proved, spoliation may be used to establish that the evidence was unfavorable to the party responsible.’” *Cahoon v. Cummings*, 734 N.E.2d 535, 545 (Ind. 2000) (quoting Black’s Law Dictionary 1409 (7th ed. 1999)).

exculpatory – possessing an exculpatory value that was apparent before destruction – and potentially useful evidence – evidentiary material of which no more can be said than that it could have been subjected to additional testing that would have exonerated the defendant), *trans. denied*. Further, defense counsel cross-examined Owens regarding the manipulation of the play in the rifle and attempted to use this to Richardson’s advantage. Again, Richardson has failed to show deficient performance or prejudice.<sup>10</sup>

[48] Richardson was not entitled to a perfect trial, only a fair trial, free of errors so egregious that they, in all probability, caused the conviction. *See Averhart*, 614 N.E.2d at 929. No such errors occurred in this case. Indeed, our thorough review of the lengthy record reveals that Richardson received excellent representation at trial in the face of video evidence of the shooting, at close range with a high-powered rifle, of an unarmed, retreating man.

[49] Judgment affirmed.

Bailey, J. and Crone, J., concur.

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<sup>10</sup> In passing, Richardson argues that counsel was ineffective for failing to object to the alleged irrelevant and prejudicial character evidence addressed in section 2 of our decision and, for the most part, simply refers us to the fundamental error discussion in his brief. Taking this lead, we direct Richardson to our analysis in section 2, and we reject his tangential ineffectiveness arguments, as the evidence at issue was either unobjectionable (mug shots and mother’s arrest), strategic for the defense (.22 caliber rifle), or of trivial effect on the defendant (references to Zach’s OTF tattoo and his Facebook post with guns).