MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Karim Jabr Al-Azawi,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent.

March 19, 2021

Court of Appeals Case No. 20A-PC-1114

Appeal from the Elkhart Superior Court

The Honorable Teresa L. Cataldo, Judge

Trial Court Cause No. 20D03-1906-PC-28

Mathias, Judge.

[1] Karim Jabr Al-Azawi[1] appeals the Elkhart Superior Court's order denying his petition for post-conviction relief. Al-Azawi argues that the post-conviction court erred when it concluded that he was not subjected to ineffective assistance of trial and appellate counsel. Concluding that Al-Azawi is not entitled to the relief sought, we affirm the court's order denying his request for post-conviction relief.

Facts and Procedural History

[2] We summarized the pertinent facts and procedural history of this case in Al-Azawi's direct appeal:

> On Saturday, December 9, 2006, A.S., who was then almost four years old, and her six-year-old brother were staying with their father, Al Azawi. A.S. spent most of the evening at the home of Al Azawi's girlfriend, Tammy Pruitt, who lived in the apartment next door to Al Azawi. Al Azawi and his son went to his apartment, but returned to Pruitt's apartment at approximately 1:00 a.m. to spend the night. On Sunday, December 10, 2006, Al Azawi woke up at approximately 10:00 a.m. and returned to his apartment with his son. Between noon and 1:00 p.m., A.S. returned to her father's apartment. The mother of A.S. and S.S. returned to pick up the children at approximately 7:00 p.m. that evening.
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> Within a few hours of returning home with her mother, A.S. grabbed the area between her legs and complained that her vagina hurt. Her mother examined the area and noticed that it was red and irritated. A.S.'s mother then asked if anyone had

[1] Al-Azawi's surname is not hyphenated in the trial and direct appeal proceedings. However, it is hyphenated in the post-conviction proceedings.

touched A.S. in that area, and she replied, "Yeah. Daddy." Using a doll, A.S. indicated to her mother that Al Azawi had touched her vagina with his hand. A.S. also told her mother that Al Azawi had "pee-peed" in her mouth.

The next morning, A.S.'s mother took her to the emergency room where A.S. was seen by Dr. Jonathan Shenk. Dr. Shenk testified that the exam was normal "except there was redness. There was redness in the area of the perineum, in the area right around the sexual organ. It went down as far as the anus and there was no, no tears or bruising[,] but there was some redness." Dr. Shenk also agreed that the redness he observed could be "consistent with some sort of friction being applied by an object to the vulva area," and that this object could have been either a penis or a finger. Dr. Shenk diagnosed A.S. with "possible sexual abuse," and contacted Child Protective Services. This led A.S.'s mother to contact the police.

A.S. was then taken to speak with Gayla Konanz, a forensic interpreter, who conducted a video-recorded interview. A.S. told Ms. Konanz that Al Azawi had touched her vagina with his finger and penis. A.S. also told Ms. Konanz that Al Azawi had done something involving her mouth and his penis, such that Al Azawi "peed" in her mouth.

On December 27, 2006, the State charged Al Azawi with Class A felony child molesting, alleging that he had performed deviate sexual conduct on A.S, and Class C felony child molesting, alleging that Al Azawi fondled A.S. At trial, A.S. testified that Al Azawi had touched the area between her legs with his hand and that Al Azawi had "peed" on her face. The jury found Al Azawi guilty as charged.

At a sentencing hearing held on November 29, 2007, the trial court identified as aggravating the following circumstances: that Al Azawi had two prior felony convictions and four misdemeanor convictions; that Al Azawi was on probation at the time of the instant offenses; that Al Azawi violated a position of

> trust by molest[ing] a girl who, at the very least, considered Al Azawi to be her father; and that A.S. was of a tender age, which made it more difficult for her to avoid Al Azawi or report what had happened. The trial court found Al Azawi's sporadic employment history to be a low-level mitigating circumstance. Concluding that the aggravators outweighed the mitigator, the trial court sentenced Al Azawi to fifty years on the Class A felony conviction to be served concurrently with eight years on the Class C felony conviction.

Al-Azawi v. State, No. 20A03-0803-CR-95, 2008 WL 3842943, at *1–2 (Ind. Ct. App. Aug. 15, 2008) (record citations omitted), *trans. denied*.

[3] Al-Azawi appealed his convictions and sentence. In a memorandum decision, our court concluded that 1) the evidence was sufficient to support his Class A and Class C felony child molesting convictions; and 2) his aggregate fifty-year sentence was not inappropriate in light of the nature of the offense and the character of the offender. *Id.* at *2–5.

[4] On June 12, 2019, almost eleven years after his direct appeal was decided, Al-Azawi filed a petition for post-conviction relief. In his petition, Al-Azawi alleged he was denied due process because the Arabic interpreter did not provide translation in his Iraqi dialect, and therefore, he was unable to understand the trial proceedings. He also claimed his trial and appellate counsel were ineffective in several respects.

[5] The post-conviction court held an evidentiary hearing on November 26, 2019. Al-Azawi presented testimony from an Arabic language expert who opined that the trial interpreter did not speak Al-Azawi's Iraqi dialect; therefore, his

interpretation did not aid Al-Azawi at trial. *P-C.R. Tr. p.* 100. The State presented evidence that Al-Azawi's proficiency in the English language was greater than he claimed and that Al-Azawi was able to understand the trial interpreter because he provided his interpretation in Standard Arabic. Both Al-Azawi's trial interpreter and the interpreter at the post-conviction hearing translated the proceedings from English to Standard Arabic. *Id*. at 80. Al-Azawi spoke Standard Arabic to communicate with the trial interpreter. *Id.*

[6] The post-conviction court also heard argument and evidence concerning trial counsel's failure to 1) raise a *Batson* challenge, 2) challenge the State's amendment to the charging information, 3) challenge the admission of the Child Family Advocate Center interviewer's testimony, and 4) argue that his Class C felony child molesting conviction should be vacated on double jeopardy grounds. Al-Azawi claimed his appellate counsel was ineffective for failing to raise these same issues on direct appeal. He also testified that he had limited communication with his appellate counsel during the direct appeal proceedings. *Id*. at 50–51.

[7] On May 4, 2020, the post-conviction court issued its order denying Al-Azawi's petition for post-conviction relief. He now appeals, arguing that the court erred when it concluded he was not subjected to ineffective assistance of trial and appellate counsel.

Standard of Review

[8] Post-conviction proceedings are not "super appeals" through which convicted persons can raise issues they failed to raise at trial or on direct appeal. *McCary v. State*, 761 N.E.2d 389, 391 (Ind. 2002). Instead, post-conviction proceedings afford petitioners a limited opportunity to raise issues that were unavailable or unknown at trial and on direct appeal. *Davidson v. State*, 763 N.E.2d 441, 443 (Ind. 2002). The post-conviction petitioner bears the burden of establishing grounds for relief by a preponderance of the evidence. *Henley v. State*, 881 N.E.2d 639, 643 (Ind. 2008). Thus, on appeal from the denial of a petition for post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. *Id.* To prevail on appeal from the denial of post-conviction relief, the petitioner must show that the evidence, as a whole, leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. *Id.* at 643–44.

[9] The post-conviction court made specific findings of fact and conclusions of law in accordance with Indiana Post-Conviction Rule 1(6). On review, we must determine if the court's findings are sufficient to support its judgment. *Graham v. State*, 941 N.E.2d 1091, 1096 (Ind. Ct. App. 2011) Although we do not defer to the post-conviction court's legal conclusions, we review the court's factual findings for clear error. *Id.* Accordingly, we will not reweigh the evidence or judge the credibility of witnesses, and we will consider only the probative evidence and reasonable inferences flowing therefrom that support the post-conviction court's decision. *Id.*

Ineffective Assistance of Trial Counsel

[10] Al-Azawi argues that the post-conviction court erred when it concluded he was not denied effective assistance of trial counsel. Our supreme court has summarized the law regarding claims of ineffective assistance of trial counsel as follows:

> A defendant claiming a violation of the right to effective assistance of counsel must establish the two components set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). First, the defendant must show that counsel's performance was deficient. This requires a showing that counsel's representation fell below an objective standard of reasonableness, and that the errors were so serious that they resulted in a denial of the right to counsel guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. To establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.
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> Counsel is afforded considerable discretion in choosing strategy and tactics, and we will accord those decisions deference. A strong presumption arises that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. The Strickland Court recognized that even the finest, most experienced criminal defense attorneys may not agree on the ideal strategy or the most effective way to represent a client. Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective. The two prongs of the Strickland test are separate and independent inquiries. Thus, if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed.

Timberlake v. State, 753 N.E.2d 591, 603 (Ind. 2001) (citations and quotations omitted).

[11] Al-Azawi claims his trial counsel was ineffective in several respects. We address each argument in turn.

A. *Arabic Interpretation*

[12] Al-Azawi's most concerning claim is that his trial counsel was ineffective for failing to ensure that he had an interpreter who was able to provide precise interpretation enabling Al-Azawi to understand and participate in the trial proceedings.[2] As our supreme court has observed, "Impaired access to justice resulting from language inequalities is particularly damaging in the criminal context when someone's very liberty is at stake and a faulty trial can have irrevocable consequences." *Ponce v. State*, 9 N.E.3d 1265, 1268 (Ind. 2014). Ensuring competent interpretation services is "an essential component of a functional and fair justice system." *Id.* (citation and quotation omitted).[3]

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[2] Al-Azawi also attempts to raise a free-standing due-process claim concerning the Arabic interpretation provided at his trial. But this issue was known to Al-Azawi and could have been raised on direct appeal. Therefore, the free-standing due process claim is not available in post-conviction proceedings. *See Woods v. State*, 701 N.E.2d at 1208, 1213 (Ind. 1998).

[3] Acknowledging the challenges faced by limited English proficiency litigants, our supreme court adopted in 2008 the Indiana Interpreter Code of Conduct and Procedure Rules, which includes a code of ethics for interpreters and sets specific certification standards. *See* Court Interpreter Certification Program. https://www.in.gov/courts/admin/language-access (last visited on March 8, 2021). These rules were not in place during Al-Azawi's trial.

[13] The post-conviction court made the following factual findings addressing this issue:

> The Record shows that during Petitioner's trial, Arabic interpretation was provided by Abakar Bechir, a standard Arabic Translator. During the course of the PCR evidentiary hearing, Petitioner was provided Arabic interpretation by an interpreter who also spoke standard Arabic. Petitioner repeatedly indicated that he had no trouble understanding the Arabic used. Also, at the PCR hearing Abakar Bechir testified that he interpreted for Petitioner during the 2007 trial, and that he used the same standard Arabic as the interpreter at the PCR hearing was using. Bechir further testified that Petitioner indicated he understood the interpretation that was being utilized during the course of the jury trial, and there is no evidence that Petitioner ever indicated that he had any difficulty understanding Bechir during the course of the jury trial. The evidence also reflects that Petitioner had been in the United States for ten (10) years prior to the jury trial in 2007, was employed and worked a job at an English speaking company, and maintained a romantic relationship with an American woman who spoke English. The two lived together for two (2) years and had a child together, shared custody, and arrangements for visitation were conducted in English. Additionally, Petitioner participated in an interview with Detective Carl Conway prior to charges being filed in the criminal case, and that interview was conducted in English. There are also records showing that the Petitioner had five (5) other cases in the Elkhart County Courts, all hearings in those cases were conducted in English and Petitioner never utilized an interpreter. Finally, Petitioner was on probation and was able to communicate with and complete his obligations with an English speaking Probation Officer.

Appellant's App. pp. 14–15.

[14] Evidence from the evidentiary hearing supports the court's findings. The Arabic language expert testified that Standard Arabic is generally utilized for translation, and an individual who speaks the Iraqi dialect would understand the language. P-C.R. Tr. pp. 101–02. Further, Al-Awazi's trial counsel testified that he was able to communicate with Al-Awazi in English, and Al-Awazi actively assisted in preparing his defense to the child molesting charges. *Id*. at 28–29.

[15] In support of his argument that his counsel was ineffective on this issue, Al-Awazi cites to *Ponce v. State*, 9 N.E.3d 1265 (Ind. 2014). In that case, the interpreter inaccurately interpreted Ponce's *Boykin* rights. Given his limited understanding of English, Ponce only understood the faulty advisement of his *Boykin* rights, and therefore, did not have an accurate understanding of those rights before pleading guilty. *Id.* at 1273. Thus, our supreme court concluded that Ponce did not knowingly and intelligently plead guilty, and he was entitled to post-conviction relief. *"To* declare that a defendant with limited English proficiency who received an incorrect interpretation of the trial court's *Boykin* advisements should be equally culpable for his guilty plea as a defendant who is fluent in the English language and received an accurate and uninterrupted advisement directly from the trial court would work a great injustice not only on the LEP defendant, but on the integrity of our system as a whole". *See id*. at 1274

[16] Unlike the circumstances in *Ponce*, Al-Azawi has not alleged or proven that any specific interpretation at trial was faulty. He did not allege that there were

aspects of his trial proceeding that he did not understand. He generally asserts that he did not understand the interpretation because his interpreter did not speak in his Iraqi dialect. But the State presented evidence that the trial interpreter translated from English to Standard Arabic, and Al-Azawi understands Standard Arabic. Al-Azawi's trial and post-conviction interpreters both translated from English to Standard Arabic, and Al-Azawi had no trouble understanding the Arabic translation provided at the post-conviction hearing. Moreover, Al-Azawi never told trial counsel that he did not understand the Standard Arabic translation. At the post-conviction hearing, trial counsel stated that if Al-Azawi had informed counsel that he could not understand the trial interpreter, counsel would have raised the issue with the trial court. P-C.R. Tr. pp. 14, 31–32.

[17] In addition, at trial, counsel and Al-Azawi agreed that he would forego simultaneous translation of the proceedings and notify counsel when he required translation. Trial Tr. Vol. I, pp. 5–7. Al-Azawi argues that trial counsel was ineffective for waiving his right to simultaneous translation. However, trial counsel testified that, in his experience, simultaneous translation can be distracting for the attorneys and parties, and because Al-Azawi understood English, he allowed him to forego simultaneous translation as that was Al-Azawi's preference. P-C.R. Tr. pp. at 31–32.

[18] In short, Al-Azawi has not claimed there was a translation error in any specific aspect of the proceedings or that there was any aspect of the trial proceedings that he did not fully understand. He also has not established that he informed

trial counsel that he could not understand the interpretation provided during his trial. Therefore, trial counsel was not deficient for failing to object to the interpreter provided at Al-Azawi's trial or for informing the trial court that Al-Azawi did not need the proceedings simultaneously translated. For all of these reasons, we conclude that trial counsel was not ineffective.

B. Batson *Challenge*

[19] Al-Awazi also argues that his trial counsel was ineffective for failing to raise a *Batson* challenge when the State exercised a preemptory challenge to excuse a Hispanic male as a potential juror. However, the trial court sua sponte raised the *Batson* issue during voir dire and asked the State for a race-neutral explanation.[4] The State struck the Hispanic male due to concerns that he did not understand the questions asked during voir dire.

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[4] "Purposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure." *Batson v. Kentucky*, 476 U.S. 79, 86 (1986). "The exclusion of even a sole prospective juror based on race, ethnicity, or gender violates the Fourteenth Amendment's Equal Protection Clause." *Addison v. State*, 962 N.E.2d 1202, 1208 (Ind. 2012). The trial court engages in a three-step process in evaluating a claim that a peremptory challenge was based on race. *Id.* First, the defendant must make a prima facie showing that there are "circumstances raising an inference that discrimination occurred." *Id.* Second, once the defendant makes a prima facie showing, the burden shifts to the State to "offer a race-neutral basis for striking the juror in question." *Id*. at 1209 (quotation omitted). "A race-neutral explanation means 'an explanation based on something other than the race of the juror.'" *Highler v. State*, 854 N.E.2d 823, 827 (Ind. 2006) (quoting *Hernandez v. New York*, 500 U.S. 352, 360 (1991)). "Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Addison*, 962 N.E.2d at 1209 (quoting *Purkett v. Elem*, 514 U.S. 765, 768 (1995)). "[T]he issue is the facial validity of the prosecutor's explanation." *McCormick v. State*, 803 N.E.2d 1108, 1111 (Ind. 2004) (quoting *Purkett*, 514 U.S. at 768). Third, where the State's reasons appear on their face to be race-neutral, the trial court must still perform the essential task of assessing whether the State's facially race-neutral reasons are credible. *Addison*, 962 N.E.2d at 1209.

[20] Because the *Batson* issue was raised during voir dire, Al-Azawi cannot establish that his counsel's failure to raise the *Batson* challenge prejudiced him. Moreover, Al-Azawi does not argue in his brief that he was prejudiced by trial counsel's failure to object to the juror's removal—i.e. that there was a reasonable probability that the result of the proceeding would have been different if counsel had raised a *Batson* challenge. Therefore, Al-Azawi has not established ineffective assistance of trial counsel on this issue.

C. *Amendment to the Charging Information*

[21] Al-Azawi's next allegation of ineffective assistance is centered on the amendment of his charging information. Four days before Al-Azawi's trial began, the State moved to amend the language for Count I. Originally, the charge alleged that Al-Azawi, "a person at least twenty-one years of age . . . did cause a child under fourteen (14) years of age . . . to perform or submit to deviate sexual conduct, to-wit: fondling and touching[.]" Apellant's P-C.R. App. p. 25. The State, without objection, was permitted to amend the charging information to remove the terms "fondling and touching."[5] *Id*. at 26.

[5] Al-Azawi claims for the first time in this appeal that trial counsel should have also objected because the State did not allege an intent to arouse or satisfy sexual desires. Al-Azawi did not raise this claim to the post-conviction court, and therefore, it is waived. *See Pavan v. State*, 64 N.E.3d 231, 233 (Ind. Ct. App. 2016). Also, "intent to arouse or satisfy sexual desires" was not an element of Class A felony child molestation on the date Al-Azawi committed his offense. *See* Ind. Code § 35-42-4-3(a) (1998); *see also D'Paffo v. State*, 778 N.E.2d 798, 801 (Ind. 2002).

[22] Al-Azawi claims that the amendment broadened the charges against him and that his trial counsel's failure to object to the amendment constitutes deficient performance. "A charging information may be amended at various stages of a prosecution, depending on whether the amendment is to the form or to the substance of the original information." *Fajardo v. State*, 859 N.E.2d 1201, 1203 (Ind. 2007).[6]

[23] The version of Indiana Code section 35-34-1-5 in effect when the State moved to amend the information provided in pertinent part that the information could be "amended in matters of substance . . .before the commencement of trial[] if the amendment does not prejudice the substantial rights of the defendant." (eff. May 8, 2007 to June 30, 2013); P.L. 178-2007. A defendant's substantial rights "include a right to sufficient notice and an opportunity to be heard regarding the charge; and, if the amendment does not affect any particular defense or change the positions of either of the parties, it does not violate these rights." *Gomez v. State*, 907 N.E.2d 607, 611 (Ind. Ct. App. 2009), *trans. denied*.

[24] Assuming without deciding whether counsel's performance was deficient for failing to object to the amended charging information, Al-Azawi has not established that he was prejudiced by the alleged deficient performance.

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[6] The version of Indiana Code section 35-34-1-5 in effect when the State moved to amend the information provided in pertinent part that the information could be "amended in matters of substance . . .before the commencement of trial[] if the amendment does not prejudice the substantial rights of the defendant." (eff. May 8, 2007 to June 30, 2013); P.L. 178-2007 §1.

[25] Al-Azawi claims he was prejudiced because he had to "defend against charges other than had been prepared for trial[.]" Appellant's Br. at 49. But his defense at trial was that he could not have committed the offenses because he did not have enough time alone with A.S. to commit the charged offenses. *See* P-CR Tr. pp. 34–35; Trial Tr. Vol. II, pp. 71–73, 76. Al-Azawi has not explained how the amendment to the charging information affected his defense or trial strategy. Therefore, Al-Azawi has not established that he was prejudiced by trial counsel's allegedly deficient performance.

D. *The Forensic Child Interviewer's Testimony*

[26] Al-Azawi next contends trial counsel was ineffective for failing to object to testimony from child interviewer. During Al-Azawi's trial, the witness who interviewed four-year-old A.S. was unavailable to testify during the State's case-in-chief. After Al-Azawi presented his evidence, the State asked to reopen its case-in-chief so the witness could testify, and trial counsel did not object. Al-Azawi argues that counsel's failure to object constitutes deficient performance because the interviewer's testimony was cumulative of both the child's live testimony and the videotaped testimony.

[27] The interviewer's testimony was not entirely cumulative. She testified about her training and experience, her process for interviewing A.S., and whether her questions were beyond the four-year-old child's ability to understand and respond. *See* Trial Tr. Vol. 3, pp. 5–23, 29. She also testified about her discussion with A.S. regarding a drawing in which A.S. depicted what her

father had done to her. *Id.* at 28–34. Throughout the interviewer's testimony, Al-Azawi's trial counsel raised objections, including objections concerning the cumulative nature of the interviewer's testimony, where he deemed the objections appropriate. *Id*. at 25-27, 31,45-46. Trial counsel made strategic decisions when objecting during the interviewer's testimony, and Al-Azawi has not convinced us that counsel's failure to object to the State's request to reopen its case-in-chief so that the interviewer could testify constitutes deficient performance.

[28] We also observe that Al-Azawi only vaguely asserts that "the presentation of cumulative, repetitive evidence had the potential to prejudice the jury and trial counsel's failure to object prejudiced Al-Azawi's rights." Appellant's Br. at 53. Even if we were to conclude that counsel's performance was deficient, Al-Azawi has not explained how the result of his trial would have been different if the interviewer had not been permitted to testify.

E. *Double Jeopardy*

[29] Finally, Al-Azawi claims his trial counsel was ineffective for failing to argue that his Class C felony child molesting conviction should be vacated on double jeopardy grounds. The trial court imposed concurrent sentences for Al-Azawi's Class A felony and Class C felony child molesting convictions because the court was not certain whether the two acts of molestation "were part of one incident or two discrete incidents." Trial Tr. Vol. 4, p. 9.

[30] In his brief, Al-Azawi cites to only one authority to support this claim, *Kochersperger v. State*, 725 N.E.2d 918, 925 (Ind. Ct. App. 2000), in which our court reiterated that "a conviction even without a sentence is in violation of double jeopardy and must be vacated." The issue in that case was not whether a double jeopardy violation occurred but the proper remedy a trial court should employ when convictions for multiple offenses violate double jeopardy principles. *Id.* at 925–26. Here, Al-Azawi does not argue or cite to any authority in support of his assertion that his convictions violate double jeopardy principles; rather, he merely assumes a double jeopardy violation. Therefore, his argument is waived for lack of presenting a cogent argument. *See* Ind. Appellate Rule 46(A)(8)(a).

[31] Waiver aside, our court determined on Al-Azawi's direct appeal that there was sufficient evidence to support the Class A felony child molesting conviction—Al-Azawi placed his penis near or in A.S.'s mouth and either urinated or ejaculated—and the Class C felony child molesting conviction—Al-Azawi touched A.S.'s public area with his finger and penetrated her external genitalia. *Al-Azawi*, 2008 WL 3842943, at *3-4. Because the State presented evidence of two distinct acts of child molestation, we cannot conclude that Al-Azawi's trial counsel was ineffective for failing to argue that his convictions violate double jeopardy principles.

[32] In sum, Al-Azawi has failed to demonstrate that any of the alleged errors by trial counsel satisfies the two-part *Strickland* test. Thus, Al-Azawi has not shown that he was denied the effective assistance of counsel.

Ineffective Assistance of Appellate Counsel

[33] Finally, Al-Azawi challenges the post-conviction court's conclusion that his appellate counsel was not ineffective. The standard for evaluating claims of ineffective assistance of appellate counsel is the same standard as for trial counsel. *Garrett v. State*, 992 N.E.2d 710, 719 (Ind. 2013). Therefore, to establish any claim of ineffective assistance of counsel, a petitioner must demonstrate that counsel performed deficiently, and that the deficiency resulted in prejudice. *Lee v. State*, 892 N.E.2d 1231, 1233 (Ind. 2008) (citing *Strickland*, 466 U.S. at 687). Ineffective assistance of appellate counsel claims falls into three categories: 1) denying access to an appeal; 2) failing to raise issues; and 3) failing to present issues competently. *Timberlake*, 753 N.E.2d at 604.

[34] Al-Azawi argues that appellate counsel was ineffective for failing to raise issues in his direct appeal that were clearly stronger than the sufficiency and sentencing arguments raised. When evaluating a claim than an appellate attorney should have raised certain issues on appeal, we must determine "whether an unraised issue was significant and obvious from the face of the record" and "whether an unraised issue was 'clearly stronger' than the raised issue or issues." *Graham v. State*, 941 N.E.2d 1091, 1099 (Ind. Ct. App. 2011) (quoting *Fisher v. State*, 810 N.E.2d 674, 676 (Ind. 2004)).

[35] Counsel is very rarely found to be ineffective when the alleged error is failure to raise a claim on direct appeal. *See Montgomery v. State*, 21 N.E.3d 846, 854 (Ind. Ct. App. 2014). That is because "the decision of what issues to raise is one of

the most important strategic decisions to be made by appellate counsel." *Id.* (quoting *Bieghler v. State*, 690 N.E.2d 188, 193 (Ind. 1997)). Accordingly, "reviewing courts should be particularly deferential to counsel's strategic decision to exclude certain issues in favor of others, unless such a decision was unquestionably unreasonable." *Id.* (quoting *Bieghler*, 690 N.E.2d at 193–94).

[36] Al-Azawi argues that his appellate counsel should have raised the same issues he alleges his trial counsel was ineffective for failing to raise. But Al-Azawi does not specifically argue how appellate counsel was ineffective failing to raise these issues on appeal. He merely asserts that "[a]ppellate counsel's failure to raise issues that were apparent, strong, and obvious in the record showed deficient performance on appellate counsel's part. His failure to raise any of these issues prejudiced Al-Azawi's possibility of obtaining a new trial." Appellant's Br. at 58–59.

[37] Al-Azawi has waived the issue of ineffective assistance of appellate counsel for lack of cogent argument. *See* App. R. 46(A)(8)(a). Waiver aside, because Al-Azawi has not established that trial counsel's alleged deficient performance prejudiced him, he cannot establish that appellate counsel was ineffective for failing to raise the same issues on appeal.[7] *See Garret*, 992 N.E.2d at 724 (explaining that to establish that appellate counsel's deficient performance resulted in prejudice, the post-conviction petitioner must demonstrate that the

[7] Moreover, we note that the record available to appellate counsel would not have contained information concerning Al-Awazi's claims that he was unable to understand the Arabic interpreter used at trial.

issues counsel failed to raise would have been more likely to result in reversal or an order for a new trial).

Conclusion

[38] Al-Awazi has not established that he received ineffective assistance of either trial or appellate counsel. We therefore affirm the court's order denying his petition for post-conviction relief.

[39] Affirmed.

Altice, J., and Weissmann, J., concur.