MEMORANDUM DECISION

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IN THE
COURT OF APPEALS OF INDIANA

David Hooker,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

February 24, 2021

Court of Appeals Case No. 20A-PC-1076

Appeal from the Vanderburgh Circuit Court

The Honorable David Kiely, Judge

The Honorable Kelli E. Fink, Magistrate

Trial Court Cause No. 82C01-1808-PC-14

Vaidik, Judge.

Case Summary

[1] David Hooker appeals the denial of his petition for post-conviction relief. He contends the post-conviction court erred in finding he did not receive ineffective assistance of trial and appellate counsel. We affirm.

Facts and Procedural History

[2] We set forth the following facts in our decision on Hooker's direct appeal:

> Asghar Ali owned a Kwik Wash Laundromat. At about 9:15 a.m. [on January 20, 2005,] Robin Wade placed a load of clothes in a washer and then left while her clothes were being washed. Ali was the only other person there at the time. Hooker, wearing a camouflage jacket, entered the Laundromat at about 9:30 a.m. Wade returned at about 10:00 a.m. and placed her clothes in a dryer. She saw that Ali and another customer were in the Laundromat, and the customer was a black man wearing a fatigue jacket and a black or navy blue stocking cap. Wade then left while her clothes were drying and went home.
>
> Ali checked the moneychanger and went to his desk in the storage room. Ali then walked over to Hooker. Hooker drew a gun, pointed it at Ali's head, and told Ali to get the key for the snack machine. The two walked back to Ali's desk. Ali removed cash and placed the money in a bag. Ali took the key for the snack machine, and while Hooker held the gun to his head Ali tried, but could not open the machine. Wade returned about this time and saw the customer holding the gun to Ali's head. Hooker ordered Wade to get on the floor, which she did. While Ali was looking for the key to the snack machine, the storage room door closed leaving Ali on one side and Hooker on the other. Hooker fired two shots at the door and it opened. Hooker then shot Ali in the shoulder. Hooker then fled.

> When the police arrived they found clothes in only one washing machine. The washing machine had a can of Mello Yello sitting on it. The Laundromat had a vending machine that sold Mello Yello. No other beverage cans were found sitting out in the Laundromat. The can was almost full; it was cool and had no condensation on it. A detective swabbed the can where a person's mouth would have been.

Hooker v. State, No. 82A01-0703-CR-126, 2007 WL 3244055 (Ind. Ct. App. November 5, 2007) (transcript citations omitted), *trans. denied*.

[3] The swab from the Mello Yello can was sent to the State Police Laboratory for analysis. In December 2005, police received a Certificate of Analysis from the Laboratory, which stated the DNA on the can was consistent with a convicted offender sample from Hooker. However, "to confirm this information for criminal prosecution" an evidentiary sample from Hooker would be needed for further comparison. Ex. 7b, p. 39.[1] That same month, police prepared an affidavit and applied for a search warrant to draw Hooker's blood, which was granted. In May 2006, police received confirmation from the Laboratory that the DNA on the can matched Hooker's. Ex. 7c, p. 3.

[4] In June 2006, the State charged Hooker with Class A felony robbery and Class C felony battery. He was also charged with being a habitual offender. A three-day jury trial was held in December 2006. The State relied primarily on two pieces of evidence tying Hooker to the robbery: Ali's in-court identification of

[1] The exhibits referred to in this opinion are exhibits entered in the post-conviction hearing,

Hooker and the Mello Yello can. The defense theory was Hooker had been in the laundromat the day before the robbery with his wife and infant daughter, which explained his DNA on the Mello Yello can and caused Ali to misidentify him as the robber. The jury found Hooker guilty as charged. A bench trial was then held on the habitual-offender charge, and the court took the matter under advisement. The following month, the trial court found Hooker to be a habitual offender. Hooker received a sentence of thirty years for the robbery conviction, enhanced by thirty years for being a habitual offender.[2]

[5] In 2007, Hooker filed his direct appeal, challenging the sufficiency of evidence and the trial court's denial of his untimely motion to strike hearsay evidence. We affirmed, finding there was sufficient evidence to convict and that Hooker had failed to establish fundamental error regarding the hearsay evidence. In August 2008, Hooker filed a petition for post-conviction relief, asserting ineffective assistance of counsel.[3] A hearing was held in November 2019. In April 2020, the post-conviction court denied Hooker's petition.

[6] Hooker now appeals.

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[2] No conviction was entered on the battery count due to double-jeopardy concerns.

[3] The proceedings were stayed from 2008 to 2011 so the state public defender could investigate the case. In 2011, a law professor from Valparaiso University entered an appearance on behalf of Hooker, and again the proceedings were stayed to give the new counsel an opportunity to investigate. In 2014, that counsel withdrew, a state public defender again appeared, and the proceedings were stayed. In September 2019, the final amended petition was submitted.

Discussion and Decision

[7] The petitioner in a post-conviction proceeding must prove the grounds for relief by a preponderance of the evidence. *Henley v. State*, 881 N.E.2d 639, 643 (Ind. 2008). Hooker is appealing a negative judgment; therefore, he must show the evidence as a whole leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. *Id*. at 643-44. "Although we do not defer to the postconviction court's legal conclusions, a post-conviction court's findings and judgment will be reversed only upon a showing of clear error—that which leaves us with a definite and firm conviction that a mistake has been made." *State v. Damron*, 915 N.E.2d 189, 191 (Ind. Ct. App. 2009), *reh'g denied, trans. denied*.

I. Trial Counsel

[8] Hooker contends the post-conviction court erred in finding his trial counsel was not ineffective. To prevail on a claim of ineffective assistance of counsel, Hooker must show both that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced him. *Coleman v. State*, 694 N.E.2d 269, 272 (Ind. 1998) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). There is a strong presumption counsel rendered adequate assistance. *Id*. "Evidence of isolated poor strategy, inexperience or bad tactics will not support a claim of ineffective assistance." *Id.* at 273. "Counsel's performance is evaluated as a whole." *Lemond v. State*, 878 N.E.2d 384, 391 (Ind. Ct. App. 2007), *trans. denied*. To establish prejudice, the

defendant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Sims v. State*, 771 N.E.2d 734, 741 (Ind. Ct. App. 2002), *trans. denied*. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. "Prejudice exists when the conviction or sentence resulted from a breakdown in the adversarial process that rendered the result of the proceeding fundamentally unfair or unreliable." *Coleman*, 694 N.E.2d at 272.

A. Exculpatory Evidence

[9] Hooker first argues his trial counsel was ineffective for failing to "elicit exculpatory evidence about the Mello Yello can[.]" Appellant's Br. p. 20. At trial, the State relied on the Mello Yello can, which had Hooker's DNA on it, to tie Hooker to the robbery. The State contended the can was found on the washer used by the robber and in a condition that indicated it had been placed there around the time of the robbery, leading to the conclusion it belonged to the robber. Hooker's defense theory was that the can was his but was left there the night before. Detective William Schaefer, a crime-scene investigator with the Evansville Police Department, testified he arrived at the crime scene first and took photographs of the Mello Yello can. *See* Exs. 10a-c. He noted the can appeared almost "full," was "cool" to the touch despite the heated building, had "[n]o condensation," and "there was moisture left behind on the top" of the can—all of which the State argued was consistent with the can being placed there recently. Trial Tr. Vol. I p. 55. Officer Tony Walker, also a crime-scene investigator with the Evansville Police Department, gave similar testimony—

that the can was mostly full and cool, had no condensation, and had moisture on the top. He arrived on scene after Detective Schaefer and took close-up photos of the Mello Yello can. *See* Exs. 10d-e. Officer Walker also testified that although he "handled" and "swabbed" the can, he did not touch or move the can before taking the photos. Trial Tr. Vol. I p. 156.

[10] Hooker now asserts there is a discrepancy in the crime-scene photos—in Detective Schaefer's photos the can is facing one direction, and in Officer Walker's photos the can is facing the opposite direction, indicating the can was moved before Officer Walker took his photos.[4] Hooker argues it was ineffective assistance for his trial counsel not to notice this discrepancy and use it to undermine the State's evidence at trial.

[11] Hooker first asserts this was deficient performance because trial counsel could have used this discrepancy to undermine the credibility of the DNA results on the soda can. We disagree. Hooker's trial counsel testified at the post-conviction hearing that his defense theory was Hooker **had** touched the Mello Yello can when he had been in the laundromat the night before. The defense used this theory not only to explain the can, but also to explain Ali's identification of Hooker. Disputing the source of the DNA on the can would undermine this

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[4] Upon our own examination of Exhibits 10a-e, we agree the can appears to have been moved. In Exhibits 10a-c (Detective Schaefer's photos), the mouth of the can is facing out, while in Exhibit 10d (Officer Walker's photo) the mouth of the can is facing in toward the washing machine. The orientation of the can in Exhibit 10e cannot be seen as it is a close-up of the top of the can. No explanation for the apparent movement of the can is provided. Hooker did not call either crime-scene investigator to testify at the post-conviction hearing, and both testified at trial that they did not move the can before photographing it.

defense theory. And choice of a defense theory is a matter of trial strategy which we give significant deference. *Benefield v. State*, 945 N.E.2d 791, 804 (Ind. Ct. App. 2011), *trans. denied*.

[12] Hooker also asserts not eliciting this evidence was deficient performance because trial counsel could have used the discrepancy to call into question the State's evidence—specifically the State's assertion "Hooker had recently drunk from the Mello Yello can" as evidenced by the moisture on top of the can. Appellant's Reply Br. p. 11. Hooker claims the discrepancy in the photos would undermine this theory because the moisture could have come from the can being moved between the photos.

[13] But even if this did constitute deficient performance, Hooker has failed to establish prejudice. The State provided other evidence the can had been placed there recently—namely Detective Schaefer's testimony and photos. Detective Schaefer arrived at the crime scene before Officer Walker and took photos first—including Exhibits 10a-c. Detective Schaefer testified the can was cool to the touch and had no condensation, despite being in a heated building, and that it had moisture on the top. Furthermore, Detective Schaefer's photos, which were taken before Officer Walker's photos, show moisture on top of the can. *See* Ex. 10c.

[14] As such, Hooker has failed to establish trial counsel was ineffective for failing to elicit evidence of alleged discrepancies in the crime-scene photos.

B. Hearsay Evidence

[15] Hooker also claims trial counsel was ineffective for failing to make a timely objection to hearsay testimony. At trial, Officer Stanley Ford of the Evansville Police Department testified as to his interview with Wade on the day of the robbery. During his direct examination, the following exchange occurred:

> Q: Did she point out anything to you in the laundromat while you were talking to her?
>
> A: She pointed out the Mello Yello can on the washing machine.
>
> Q: Why?
>
> A: She said the robber was . . .

Trial Tr. Vol. I pp. 222-23. At this point defense counsel objected, although he did not say on what grounds, and the court sustained the objection. Questioning then went on:

> Q: How did she point it out?
>
> A: She pointed out the Mello Yello can **and said the robber was drinking that Mello Yello can or drinking out of that Mello Yello can.**

Id. at 223 (emphasis added). This time, defense counsel did not object. Notably, Officer Ford had not previously mentioned this alleged statement by Wade, and it contradicted Wade's earlier testimony she "did not see" a Mello Yello can at

the scene. *Id.* at 117. Defense counsel immediately impeached Officer Ford by pointing out these inconsistencies:

> Q: Did you put that [statement] that the robber was drinking out of that Mello Yello can in any report, anywhere?
>
> A: Uh [illegible]
>
> Q: Did you tell anybody in the known world that until this very second in this Court room?
>
> A: The first thing I told the Crime Scene Technician that entered the room, to pay close attention to that Mello Yello can because the lady, the witness said the robber was drinking the Mello Yello can.
>
> Q: Didn't she, in fact, say that the robber was messing around with that washer? If she were to say that she didn't see the Mello Yello can or hadn't mentioned the Mello Yello can, would her recollection be better than [yours]?
>
> A: I recall her specifically mentioning the Mello Yello can, and she said that he was doing laundry at that washing machine.
>
> Q: Do you remember if she mentioned the Mello Yello can, and said he was doing laundry at that machine? Is that what she said?
>
> A: Like I say, in general, what she said as far as our conversation, I don't remember verbatim, it wasn't recorded, but the conversation was she pointed out the washing machine and the Mello Yello can, and said the robber was drinking from that can and that he was doing laundry up there.

> Q: Well this is very important, do you have specific recollection that she said he was drinking from that can?
>
> A: No she said that's his Mello Yello can. I don't recall if she said he was drinking or if it was his can, but it was . . .
>
> Q: Or that it was a can, that he was at that laundry at that location?
>
> A: She said, the best I recall, she said that was his can whether she said he was drinking from it, I don't recall that specifically.

Id. at 224-225. Defense counsel was also allowed to recall Wade, who again testified she did not "recall seeing" the Mello Yello can during the robbery, let alone the robber drinking from it. Trial Tr. Vol. II p. 133. She also stated she did not tell anyone she saw the robber with a Mello Yello can, although she admitted it was "possible" she had said that and forgotten. *Id.* at 134.

[16] The next day, before the jury was brought in, defense counsel moved to strike Officer Ford's testimony that Wade stated "the [robber] drank out of that Mello Yello can" as inadmissible hearsay and asked the court to admonish the jury to disregard it. *Id.* at 192, 193. The trial court denied the motion because it was not "timely," despite "agree[ing] with the defense" that the statement was inadmissible hearsay and that this was "critical testimony." *Id.* at 195. Hooker now argues counsel's failure to make a timely objection was ineffective assistance of counsel.

[17] As an initial matter, this testimony was at issue in Hooker's direct appeal. Because Hooker had not contemporaneously objected at trial, the standard of review of the admission of that testimony was fundamental error. "[F]undamental error and prejudice for ineffective assistance of trial counsel are different questions and [] a finding on direct appeal that no fundamental error occurred does not preclude a post-conviction claim of ineffective assistance of trial counsel." *Benefield*, 945 N.E.2d at 804. "Further, because the standard for ineffective assistance prejudice is based on a reasonable probability of a different result and fundamental error occurs only when the error is so prejudicial that a fair trial is rendered impossible," the standard required to establish ineffective-assistance prejudice presents a lower bar. *Id.*

[18] Nonetheless, we do not believe Hooker has cleared that bar here. We agree with the post-conviction court that counsel's failure to object was likely deficient performance. Officer Ford's testimony was classic hearsay, and the trial court even stated that had trial counsel's objection been timely, it would have been sustained. But Hooker has not shown a reasonable likelihood the result of the proceeding would have been different.

[19] Although defense counsel did not object to this statement, he did immediately impeach Officer Ford, pointing out he had never mentioned this critical information before. This impeachment led to Officer Ford retracting some of his statement, admitting he could not recall if Wade had actually said the robber drank from the can. Furthermore, Wade twice testified and contradicted Officer Ford, stating not only did she never say the robber drank from the can

or that it was his can, but that she did not even see a can at the scene. As we stated on direct appeal, any "error which may have occurred was remedied by impeaching the officer's testimony during cross examination and by recalling Wade to the stand." *Hooker*, 2007 WL 3244055 at *4.

[20] Therefore, Hooker has not shown this testimony prejudiced him as required to establish ineffective assistance.

C. Witness Identification

[21] Hooker also argues trial counsel was ineffective for not challenging Ali's in-court identification. During the State's direct examination of Ali, the following exchange occurred:

> Q: You see the defendant here, right?
>
> A: Yes sir.
>
> Q: Does he bear any resemblance to the robber? Does he look like the robber at all?
>
> A: Looks to me the same.
>
> Q: He does?
>
> A: Yeah.
>
> Q: Are you kinda sure or really sure?
>
> A: Yeah, I'm sure.

Trial Tr. Vol. II p. 31. On cross-examination, Ali also testified he had been told by police they had arrested Hooker and that his "DNA was on that can." *Id.* at 55.

[22] Hooker argues trial counsel was ineffective for not objecting to Ali's identification because it was elicited using unduly suggestive tactics: the State's "blatantly leading questions" to Ali during his in-court identification and the police informing Ali before trial that Hooker matched the DNA evidence on the Mello Yello can. Appellant's Br. p. 27.

[23] Where an ineffective-assistance-of-counsel claim hinges on a failure to object, the appellant must show the objection would have been sustained. *Gourley v. State*, 640 N.E.2d 424, 428 (Ind. Ct. App. 1994), *trans. denied*. The post-conviction court found trial counsel was not ineffective because the identification was admissible as "Ali had an independent basis for the identification under the totality of the circumstances." Appellant's App. Vol. III p. 29. We agree.

[24] "A defendant's Fourteenth Amendment due process right may be violated by the admission of identification evidence that is a product of unduly suggestive procedures." *Young v. State*, 700 N.E.2d 1143, 1146 (Ind. 1998). But even if the in-court identification is the product of unduly suggestive procedures, it need not be suppressed if the totality of the circumstances shows the witness had "an independent basis for the in-court identification." *Id.* To determine whether an independent basis exists, we consider the following factors:

> [T]he amount of time the witness was in the presence of the perpetrator and the amount of attention the witness had focused on him, the distance between the two and the lighting conditions at the time, the witness's capacity for observation and opportunity to perceive particular characteristics of the perpetrator, the lapse of time between the crime and the subsequent identification, the accuracy of any prior descriptions, the witness's level of certainty at the pre-trial identification and the length of time between the crime and the identification.

Wethington v. State, 560 N.E.2d 496, 503 (Ind. 1990).

[25] Here, Ali testified Hooker came into the laundromat on at least two occasions—the night before the robbery and the day of the robbery. Ali testified Hooker came in the night before with a "baby girl in [a] carrier about six months old[.]" Trial Tr. Vol. I p. 239. He also testified Hooker came into the laundromat the following morning around 9:30 and was there "forty to forty-five minutes." Trial Tr. Vol. II p. 46. During that time, Hooker and Ali had a conversation, and Hooker was within "two feet" of Ali. *Id*. This is sufficient to find an independent basis for identification. *Logan v. State*, 729 N.E.2d 125, 132 (Ind. 2000) (finding independent basis for identification where the witness saw the defendant in a lit hallway "for a few minutes" from "just a short distance away").

[26] Hooker argues Ali did not have a sufficient basis for identification because his post-robbery description of the robber did not match Hooker and because the prosecutor argued during closing argument that Ali "probably didn't have a good look at Mr. Hooker's face because most of that time there was a gun to his

head." Trial Tr. Vol. II p. 201. However, any prior inconsistent statements would go to the identification's credibility, not admissibility. *See Young*, 700 N.E.2d at 1147 (prior "uncertainty" in identification does not make it inadmissible); *Harris v. State*, 619 N.E.2d 577, 581 (Ind. 1993) (inconsistencies in identification testimony affect credibility of witness, not admissibility of identification).

[27] Because Ali's in-court identification of Hooker was admissible, trial counsel cannot be held to have been ineffective because Hooker has not shown the objection would have been sustained by the trial court.

D. Motion to Suppress DNA Evidence

[28] Hooker argues his trial counsel was ineffective for "not challenging the admission of the DNA results on the ground the affidavit for the search warrant for the blood draw was either deliberately misleading or drawn with reckless disregard for the truth[.]" Appellant's Br. p. 30. A month before trial, Hooker filed a pro se motion to suppress this evidence on similar grounds. This motion was still pending when trial began. On the second day of trial before the testimony of Detective Winters, defense counsel stated, "We can show the defendant's personal objections heretofore made at [sic] the Motion to Suppress[.]" Trial Tr. Vol. II p. 89. The court then asked what the argument is for the motion to suppress, and defense counsel replied, "The blood taken, Judge, [Hooker] said was improperly taken because the Probable Cause Affidavit doesn't state probable cause. I guess that's what he's saying." *Id.* at 89-90. The court denied the motion to suppress.

[29] The affidavit for the search warrant for Hooker's blood draw was signed by Detective Dan Winters, a detective with the Evansville Police Department and the lead detective on the robbery. The affidavit consisted of a summary of the robbery, including a description of the robber as "a black male, approximately 5'6'' [to] 5'8'', between 35 and 40 years of age, dark skinned, stocky build with large bug eyes, wearing a camouflage jacket and navy blue or black sock cap[.]" Ex. 7d, p. 7. The affidavit also stated the crime scene contained "a Mello Yello 12-ounce drink can that was sitting on top of the washing machine the black male was using." *Id.* at 8. The affidavit further explained the can was swabbed for DNA, which was later preliminarily matched to Hooker.

[30] Hooker alleges Detective Winters misrepresented evidence included in the affidavit and excluded material evidence, and that trial counsel was ineffective for not challenging the search warrant based on this. However, Hooker's trial counsel testified at the post-conviction hearing he did not move to suppress the evidence himself because he "had one theory"—that Hooker was not the robber but had been in the laundromat the night before. PCR Tr. p. 27. This theory explains why Hooker's DNA was on the can, and thus there was no need to suppress this evidence. And again, we give considerable deference to trial counsel's decisions regarding defense theory and strategy.

[31] To establish deficient performance for failure to file a motion, Hooker must show that such a motion would have been successful, which he has not done. *Wales v. State*, 768 N.E.2d 513, 523 (Ind. Ct. App. 2002), *clarified on reh'g*, 774 N.E.2d 116 (Ind. Ct. App. 2002), *trans. denied*. As an initial matter, Hooker filed

a pro se motion to suppress this evidence on similar grounds. *See* Appellant's Direct Appeal App. Vol. I pp. 81-90. This motion was discussed at trial and denied. Therefore, as the post-conviction court noted, "the suppression issue was addressed by the Court during trial" and was unsuccessful. Appellant's App. Vol. III p. 27. This is strong evidence a similar motion by counsel would not have succeeded.

[32] The post-conviction court found that while there may have been additional information that could have been included in the affidavit, Hooker "has failed to prove by a preponderance of the evidence that Winters included perjury or had a reckless disregard for the truth in the contents of the warrant." *Id*. We agree. The Fourth Amendment to the United States Constitution and Article 1, Section 11 of the Indiana Constitution both require probable cause for the issuance of a search warrant. *Rader v. State*, 932 N.E.2d 755, 758 (Ind. Ct. App. 2010), *trans. denied*. Determining probable cause is based on the facts of each case and requires the issuing magistrate to "make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit, there is a fair probability that evidence of a crime will be found in a particular place." *Id* at 758-59 (quotation omitted). "[A] warrant is invalid where the defendant can show by a preponderance of the evidence that the affidavits used to obtain the warrant contain perjury by the affiant, or a reckless disregard for the truth by him, and the rest of the affidavit does not contain materials sufficient to constitute probable cause." *Jones v. State*, 783 N.E.2d 1132, 1136 (Ind. 2003) (citing *Franks v. Delaware*, 438 U.S. 154, 171-72 (1978)). "[M]istakes and

inaccuracies of fact stated in a search or arrest warrant affidavit will not vitiate the reliability of the affidavits so long as such mistakes were innocently made." *Utley v. State*, 589 N.E.2d 232, 236-37 (Ind. 1992), *cert. denied*.

[33] Hooker alleges Detective Winters misrepresented the evidence when he wrote in the affidavit that the Mello Yello can swabbed was "sitting on top of the washing machine the black male was using." Ex. 7d, p. 8. Hooker claims this is misrepresentative because neither Wade nor Ali told Detective Winters the robber was "using" the washing machine the can was sitting on, and so this statement "falsely suggested a direct link between the robber and the DNA found on the can, which had been preliminarily matched to Hooker." Appellant's Br. p. 34. We disagree. In Detective Winters's supplemental report, he reported Wade as stating the robber "was messing with the front washer, like doing laundry, or something." Ex. 7a, p. 29. Another detective reported Ali stated the robber had been washing his clothes earlier in the morning—and the only washer in the laundromat with clothes in it was the washer with the Mello Yello can. As such, this statement was not misrepresentative.

[34] Second, Hooker alleges Detective Winters "misrepresent[ed] the Mello Yello can evidence" by not putting "the magistrate on notice that the crime scene was altered before photos were taken and the Mello Yello was swabbed." Appellant's Br. pp. 34, 35. But Hooker has failed to establish Detective Winters even knew of this discrepancy, let alone used it to mislead the magistrate. Detective Winters was not present when the photos were taken, and he testified he assumed the crime-scene investigators followed the proper protocol when

taking the photos. He also testified he was not aware of any discrepancy in the photos until it was pointed out to him at the post-conviction hearing. It is also worth noting this discrepancy was apparently not noticed by Hooker's trial counsel, appellate counsel, the trial court, or this Court—lending credence to the possibility that Detective Winters also could easily, and innocently, overlook this discrepancy. Even if Detective Winters's failure to notice the discrepancy was an error, Hooker has failed to show it was not innocently made. *Darring v. State*, 101 N.E.3d 263, 269 (Ind. Ct. App. 2018) (upholding warrant despite the inaccurate chronology presented in the affidavit because the misinformation was "due to a misunderstanding").

[35] Third, Hooker alleges Winters omitted material information from the affidavit. When the State omits information from a probable-cause affidavit, for the warrant to be invalid, the defendant must show: "(1) that the police omitted facts with the intent to make, or in reckless disregard of whether they thereby made, the affidavit misleading, and (2) that the affidavit if supplemented by the omitted information would not have been sufficient to support a finding of probable cause." *Ware v. State*, 859 N.E.2d 708, 718 (Ind. Ct. App. 2007) (quotation omitted, cleaned up), *trans. denied*.

[36] Hooker argues Detective Winters intentionally or recklessly omitted the following material information: (1) that Ali described the robber's height as between 5'3'' and 5'6'', (2) that neither Wade nor Ali identified Hooker in a photo array, and (3) that Wade identified another man in a photo array and said she was "50/50" on whether he was the robber. Appellant's Br. p. 36. Yet,

even if Hooker is correct these omissions were made intending to mislead or in reckless disregard of the truth, he has not established that including this information would have negated the magistrate's finding of probable cause.

[37] Here, all this omitted information went to the identification of Hooker. And the strongest evidence in the affidavit—the preliminary match to Hooker's DNA evidence on the Mello Yello can—also went straight to identification. The can was found on a washer that both witnesses linked to the robber. So even if the magistrate had the omitted information, he also still would have had the preliminary match with Hooker's DNA and the connection between the robber and the can. Because of that strong identification evidence, we do not believe the witnesses' conflicting descriptions of the perpetrator, inability to pick Hooker out of a photo array, or saying with "50/50" confidence that another man in the photo array was the robber would have prevented a finding of probable cause. *See Ware*, 859 N.E.2d at 719 (finding there would still have been probable cause to issue the warrant if police had included in the affidavit that one witness had twice identified other people as the perpetrator in line-ups).

[38] Therefore, because Hooker has failed to show a challenge of the search warrant would have succeeded, he has not shown trial counsel was deficient.

E. Character Evidence

[39] Hooker next contends his trial counsel was ineffective for failing to object to testimony he fathered a child out of wedlock or to the State's references to that

testimony in its closing argument. At trial, the defense called Sherry Hooker, Hooker's wife of approximately four years. Sherry testified, among other things, that Hooker did not own a gun, did not own any of the clothes found in the washer used by the robber, and would have been at his garage working during the time of the robbery. Sherry stated she knew this because "usually [Hooker] told [her] everything[.]" Trial Tr. Vol. II p. 172. On cross-examination, the following exchange occurred:

> Q: Does [Hooker] have any children by anybody else?
>
> A: Yes.
>
> Q: What are their ages?
>
> A: One.

Id. at 175. The defense did not object. During closing argument, the State used this information to discredit Sherry's testimony, stating:

> [Sherry] also mentioned that [Hooker] has a one year old child. Now, they've been married since 2002. A one year old child is by somebody else. What does that tell you? That tells you that a child one year old, it was born about a year ago, and that it was conceived about nine months before that, so roughly within the two months span around probably right after this robbery, he conceived a child with another woman. Is it possible he might have had another life that she didn't know about? Other clothes? I think so.

Id. at 209-10. Later in closing, the State referenced this information again, stating, "We also know that he may, given her testimony, have some other life going on, we don't know, but that's a possibility . . . ." *Id.* at 235. Again, defense counsel did not object.

[40] Hooker claims his counsel should have objected because the evidence was irrelevant, its probative value was substantially outweighed by unfair prejudice, and it constituted impermissible character evidence. *See* Ind. Evidence Rules 402, 403, 404. The post-conviction court found it "highly like[ly] that the trial court would have sustained trial counsel's objection or at least limited the testimony in some form[.]" Appellant's App. Vol. III p. 33. We agree. However, this does not mean trial counsel's failure to object was deficient performance. Our Supreme Court has held that, because counsel is presumed to be competent, "an action or omission that is within the range of reasonable attorney behavior can only support a claim of ineffective assistance if that presumption is overcome by specific evidence as to the performance of the particular lawyer." *Morgan v. State*, 755 N.E.2d 1070, 1074 (Ind. 2001).

[41] Here, in the course of a three-day trial with fifteen witnesses and over sixty exhibits, Hooker's wife was asked two questions about this evidence—in which she gave one-word answers to both questions—and the State made brief mention of it in its closing argument. Given this, trial counsel could have reasonably concluded objecting to the State's few references to the matter would only draw more attention to it. *See Myers v. State*, 33 N.E.3d 1077, 1103 (Ind. Ct. App. 2015) (noting it can be reasonable trial strategy to not object to

evidence in order to avoid drawing attention to it), *trans. denied*. Furthermore, at the post-conviction hearing, trial counsel testified he didn't know if he generally would have even objected to comments like this. PCR Tr. p. 33-34. Thus, even if the statements were improper, Hooker cannot show his counsel was deficient for failing to object. And in any event, we—like the post-conviction court—are unconvinced that a few references to fathering a child out of wedlock would affect a jury's verdict for robbery.

[42] For these reasons, Hooker has established neither deficient performance nor prejudice stemming from counsel's failure to object to the complained-of statements.

F. Failure to Call Witness

[43] Finally, Hooker argues his trial counsel was ineffective for failing to call Officer Bufford Lundy of the Evansville Police Department as a witness. Officer Lundy interviewed Ali at the hospital immediately after the robbery. In his report on the interview, Officer Lundy noted that Ali stated he did not believe he had seen the robber before. *See* Ex. 12, p. 3. However, later that day Ali told another officer the robber had come into the laundromat the day before, and Ali stated this again at trial. Ex. 7b, p. 9.

[44] "A decision regarding what witnesses to call is a matter of trial strategy which an appellate court will not second-guess." *Smith v. State*, 822 N.E.2d 193, 204 (Ind. Ct. App. 2005), *trans. denied*. Here, the post-conviction court found it was reasonable for trial counsel not to call Officer Lundy, and we agree. Hooker

contends Officer Lundy's testimony as to Ali's statement would have "bolstered the defense case greatly" but does not specify how. Appellant's Br. p. 41. To the extent it would have poked holes in Ali's credibility in identifying Hooker as the robber, defense counsel had already done this quite successfully—pointing out that Ali's initial description of the robber differed from Hooker in several ways, that Ali stated "Black people looked the same to" him, and that Ali could not pick Hooker out of a photo array. Trial Tr. Vol II p. 38. Defense counsel also argued a sound defense theory that Ali's identification was due to him previously seeing Hooker in the laundromat and wrongly conflating him with the robber.

[45] Furthermore, Officer Lundy's report makes clear his communication with Ali was severely hampered—as Ali's English was difficult to understand, he was being worked on by medical personnel, and he was wearing an oxygen mask and in great pain—which calls into question the statement's usefulness. And, as the post-conviction court pointed out, calling Officer Lundy would likely have allowed in evidence unfavorable to Hooker, such as "the severity of Ali's injuries and his poor condition after the robbery." Appellant's App. Vol. III p. 35.

[46] Therefore, given that trial counsel had many other ways to undermine Ali's credibility and the possibility of harm coming from Officer Lundy's testimony, we believe it was reasonable for trial counsel not to call Officer Lundy. Hooker has not established trial counsel's failure to call Officer Lundy was deficient performance.

G. Cumulative Error

[47] Hooker also argues that while the alleged errors by counsel "standing alone" warrant relief, the errors "in combination" also prejudiced him. "Certainly, the cumulative effect of a number of errors can render counsel's performance ineffective." *Grinstead v. State*, 845 N.E.2d 1027, 1036 (Ind. 2006). However, Hooker's argument presupposes six errors—we have found at most two. And we do not believe the cumulative effect of these arguable errors constitutes ineffective assistance of counsel, especially given trial counsel's otherwise strong performance, as noted by the post-conviction court. *See* Appellant's App. Vol. III p. 34-35 (noting trial counsel was "clearly prepared" for trial, "detailed in his cross-examination," "made numerous objections" to inadmissible evidence, and "had a defense theory which was well thought out and took into consideration the many aspects of the State's case."); *see also Grinstead*, 845 N.E.2d at 1037 (finding "the modest nature of counsel's one or two failings [are] insufficient to overcome the strong presumption that counsel performed adequately within the meaning of the Sixth Amendment.").

II. Appellate Counsel

[48] Hooker also argues the post-conviction court erred in determining he had not received ineffective assistance of appellate counsel. Hooker asserts his appellate counsel was ineffective for not raising a claim that his waiver of jury trial during the habitual-offender proceedings was not made knowingly and voluntarily because it was not made personally by Hooker. It is undisputed Hooker did not

make a personal waiver of jury trial. Instead, trial counsel indicated Hooker would waive jury trial.

[49] The standard of review for a claim of ineffective assistance of appellate counsel is the same as for trial counsel in that the defendant must show appellate counsel was deficient in his performance and that the deficiency resulted in prejudice. *Timberlake v. State*, 753 N.E.2d 591, 603 (Ind. 2001), *cert. denied*. Our Supreme Court has recognized three types of ineffective assistance of appellate counsel: (1) denial of access to appeal; (2) failure to raise issues that should have been raised; and (3) failure to present issues well. *Wrinkles v. State*, 749 N.E.2d 1179, 1203 (Ind. 2001), *cert. denied*. Hooker's claim falls into the second category: failure to raise an issue. In evaluating such claims, we must consider "(1) whether the unraised issues are significant and obvious from the face of the record; and (2) whether the unraised issues are clearly stronger than the raised issues." *Gray v. State*, 841 N.E.2d 1210, 1214 (Ind. Ct. App. 2006) (cleaned up), *trans. denied*.

[50] Here, the post-conviction court found appellate counsel was not deficient because he raised two "strong" issues on appeal, which was "reasonable in light of the facts of the case and the precedent available to counsel when that choice was made." Appellant App. Vol. III pp. 42-43. We agree.

[51] Hooker argues the waiver issue was clearly stronger than the other two issues presented on appeal, as it likely would have been successful and led to a reversal of the enhancement. We agree that **today** this issue would be

significant, obvious, and stronger than the others raised. But at the time of Hooker's direct appeal, no Indiana case law had established a defendant must make a personal waiver of jury trial in a habitual-offender-enhancement proceeding. The first case to address that issue, *Garcia v. State*, 916 N.E.2d 219 (Ind. Ct. App. 2009), *trans. denied*, was not published until two years after Hooker's direct appeal. Appellate counsel cannot be held ineffective for failing to anticipate or effectuate a change in the law, or for failing to argue legal reasoning of cases not yet decided at the time of appeal. *Reed v. State*, 856 N.E.2d 1189, 1197 (Ind. 2006). We agree with the post-conviction court that, based on the legal precedent at the time, appellate counsel was not ineffective for not raising this argument.

[52] Hooker points us to *Reed*, where our Supreme Court found ineffective assistance of appellate counsel due to counsel's failure to raise an issue for review, despite the fact that the issue would have been one of first impression, because it was clearly evident by a plain reading of the applicable statute that the trial court erred and the appellant should have been granted immediate relief. In *Reed*, the defendant received consecutive sentences for two convictions of attempted murder arising out of the same episode of criminal conduct. An Indiana statute at the time limited a court's ability to impose consecutive sentences if the convictions were not "crimes of violence" and arose "out of an episode of criminal conduct." *Id.* at 1199. The statute included a definition of "crimes of violence"—and attempted murder was not on the list. Therefore, our Supreme Court determined it was "readily apparent based on a statutory

provision, clear on its face," that the trial court erred in making the sentences consecutive. *Id.*

[53] That is not the case here. Hooker points to a part of the habitual-offender statute in effect at the time of his direct appeal, Indiana Code section 35-50-2-8(f), which stated, in part, "If the person was convicted of the felony in a jury trial, the jury shall reconvene for the sentencing hearing." He also points to another statute in effect at that time, Indiana Code section 35-37-1-2, which stated, "The defendant and prosecuting attorney, with the assent of the court, may submit the trial to the court. All other trials must be by jury." Hooker argues these statutes make clear on their face that the defendant—not his counsel—must make the waiver. We disagree. While the personal-waiver requirement may be rooted in these statutes, Indiana case law shows there was nuance to this issue. *See Kellems v. State*, 849 N.E.2d 1110, 1114 (Ind. 2006) (holding defendant must personally waive right to jury trial for charged offense); *Garcia*, 916 N.E.2d at 223 (holding personal-waiver requirement applies to an enhancement proceeding); *Horton v. State*, 51 N.E.3d 1154, 1160 (Ind. 2016) (holding the personal-waiver requirement for enhancement proceeding applies even where defendant's choice to waive is "implied" or where defendant was clearly "aware of the right"). As such, these statutes do not make the personal-waiver requirement "readily apparent," as the consecutive-sentencing issue in *Reed* was.

[54] Hooker has failed to establish his appellate counsel was ineffective.

[55] Affirmed.

Brown, J., and Pyle, J., concur.