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

Dontay Martin,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent.

April 14, 2021

Court of Appeals Case No. 20A-PC-1447

Appeal from the Allen Superior Court

The Honorable David Zent, Judge

Trial Court Cause No. 02D06-1406-PC-82

Riley, Judge.

STATEMENT OF THE CASE

[1] Appellant-Petitioner, Dontay Martin (Martin), appeals the denial of his petition for post-conviction relief.

[2] We affirm.

ISSUE

[3] Martin presents two issues on appeal, which we restate as:

(1) Whether Martin received ineffective assistance from his trial counsel; and

(2) Whether the post-conviction court properly denied admission of Martin's allegedly newly discovered evidence.

FACTS AND PROCEDURAL HISTORY

[4] The relevant facts, as set forth in this court's memorandum decision issued in Martin's direct appeal, are as follows:

> In the early morning hours of September 9, 2012, Martin was at a nightclub in Fort Wayne with two of his fellow gang members, Alfonso Chappell and Traneilous Jackson. An altercation ensued between Jackson and Jermaine Loyall in which Jermaine was stabbed in the back.
>
> An ambulance was summoned for Jermaine. Eric Zeigler of the Fort Wayne Fire Department arrived at the scene to drive the ambulance to the hospital while Jeromy Yadon and Diana Lantz treated Jermaine in the back of the ambulance. The ambulance left for the hospital, and Jermaine's sisters, Dominic Loyall and

> Latosha Loyall, followed the ambulance in a Chevy Impala driven by Dominic's friend, Lashonda Conwell.
>
> Martin, Jackson, Chappell, and another man followed the ambulance in Chappell's car. Chappell was driving, Jackson was in the front passenger seat, and Martin was in backseat on the passenger side. Martin instructed Chappell to "follow the f* * * * *g ambulance right now. Somebody got to f* * * * *g die, they not making it to the hospital." When Chappell's car caught up with the Impala, Jackson was armed with his own Ruger, which could hold sixteen cartridges, and Martin was armed with Chappell's Glock 17 with an extended magazine, which was designed to hold thirty-four cartridges. As Chappell drove alongside the Impala, Jackson and Martin fired at it. Then, as Chappell drove alongside the ambulance, Jackson and Martin fired at it.
>
> Although no one in the ambulance was shot, Yadon was injured by bullet fragments and glass shards. As for the occupants of the Impala, Conwell and Dominic were each shot once and Latosha was shot six times. At least twenty casings from the Glock were recovered at the intersection where the shooting occurred. Several casings from the Ruger were also recovered. Eighteen bullet holes were identified in the Impala, and at least seventeen bullet holes were identified in the ambulance. After the shooting, Chappell fled until police used stop sticks to disable his car.

Martin v. State, 02A05-1303-CR-113, *slip op.* at 1 (Ind. Ct. App. Nov. 27, 2013) (record citation omitted).

[5] Chappell was arrested and then interviewed. At first, Chappell told the police that "Martin was possibly involved in the shooting," but the interviewing detective noticed that Chappell "was rather evasive." (Trial Transcript Vol. II,

p. 260). Also, in that first interview, Chappell "denied any involvement with a gun." (Trial Tr. Vol. II, p. 260). But, in a subsequent interview, Chappell admitted that he owned a Glock pistol with an extended magazine.

[6] Martin was also interviewed, and he gave a statement to Detective Brian Martin (Detective Martin). Martin claimed that he did not fire any shots and that it was Chappell who leaned over Jackson and fired at the ambulance and Impala. When the police told Martin that two guns were fired, Martin claimed that he did not know who fired the second gun. Martin further alleged that he leaned over in the back seat after Chappell started shooting, and that after the shooting, Chappell threw the handgun on his lap and then he tossed it out of the window when Chappell made a left turn.

[7] Officer Tara Noll (Officer Noll), who collected the handgun that had been thrown out of Chappell's vehicle, noted in her initial report that the handgun had a red colored substance which appeared to be blood at the top by the slide. Also, during the investigation, the police sought and were granted a search warrant to obtain a buccal swab from Martin for DNA analysis. Martin's buccal swab matched the DNA on Chappell's handgun.

[8] Two other witnesses to the shooting were identified: Shane Hedges (Hedges) and his fiancé Stephanie Davis (Davis). The couple were driving in the opposite direction of the ambulance. Hedges informed the police that he thought the shots were coming from the front passenger seat of Chappell's

vehicle. Davis was not able to identify if the shots were coming from the front or back seat of the passenger's side of Chappell's vehicle.

[9] On September 19, 2012, the State filed an Information, charging Martin with four Counts of Class A felony attempted murder relating to Jermaine, Dominic, Latosha, and Conwell, one Count of Class C felony carrying a handgun without a license, one Count of Class C felony battery relating to Yadon, two Counts of Class D felony criminal recklessness relating to Lantz and Ziegler, and one Count of Class D felony criminal gang activity.

[10] A jury trial was held from February 3 through February 6, 2013. Martin's theory at trial was that he was seated in the back seat on the passenger side of the car and he did not fire any shots. Several witnesses, including Davis, Hedges, Dominic, and Officer Noll, testified.

[11] Notwithstanding her initial report to the police that she could not tell if the shots were coming from the front or back seat of the passenger's side of Chappell's vehicle, Davis testified that she saw "gun fire out of the passenger front windshield, or the front passenger window and the back passenger window." (Trial Tr. Vol. I, p. 26). On cross-examination, Davis reiterated that she "saw sparks" from "both [of] the passenger sides" of Chappell's vehicle. (Trial Tr. Vol. I, p. 30). Trial Counsel did not seek to impeach Davis. Contrary to his prior statement to the police that he thought the fired shots came from the right front passenger seat, Hedges testified that he saw "shots from the front and

the back." (Trial Tr. Vol. I, p. 36). Trial Counsel did not impeach Hedges on his prior inconsistent statements.

[12] Another eyewitness, Dominic, who was shot and was riding in the Impala, initially reported to the police that she saw "a dude hanging out the front passenger window" at the time of the shooting. (Trial Tr. Vol. I, p. 81). At trial, however, Dominic testified that she did not see the person who fired the shots. Trial counsel did not conduct any cross-examination of Dominic.

[13] The handgun that was recovered after the shooting was subsequently displayed to the jury. Officer Noll initially noted in her report that there was blood only by the slide of the handgun. At trial, however, Officer Noll added that there was blood by the handle. During cross-examination, Trial Counsel did not impeach Officer Noll for her prior inconsistent statements.

[14] Chappell and Jackson, who were riding with Martin, testified. Chappell, who had received no consideration for his testimony, recounted Martin ordering him to follow the ambulance and Martin shooting at the Impala and ambulance. Jackson, who testified pursuant to a plea agreement under the terms of which he received a sixty-year sentence, also recounted Martin instructing Chappell to follow the ambulance. Jackson claimed that he saw Martin with Chappell's handgun, admitted to firing shots, and implicated Martin in the shooting.

[15] At the close of the evidence, the jury found Martin guilty as charged. The trial court then entered judgment of conviction on the handgun charge as a Class A misdemeanor. At his sentencing hearing on March 2, 2013, the trial court

sentenced Martin to forty years on each of the attempted murder convictions, one year on the handgun conviction, six years on the battery conviction, two years on each of the criminal recklessness convictions, and two years on the criminal gang activity conviction. The trial court ordered that the sentences for attempted murder, battery, and criminal recklessness be served consecutively because they involved different victims. The trial court ordered that the handgun and criminal gang activity convictions be served concurrent with the other sentences for a total sentence of 170 years. On appeal, this court confirmed Martin's convictions and sentence.

[16] Martin subsequently filed a petition for post-conviction relief which was later amended by counsel with the final petition being filed on May 5, 2019. Specifically, Martin alleged that Trial Counsel was ineffective for failing to suppress the DNA results, for not impeaching Hedges, Davis, Dominic, and Officer Noll with prior inconsistent statements, for not cross-examining Dominic, and for not objecting to prosecutorial misconduct in the State's closing arguments. Martin also alleged that he suffered cumulative error from Trial Counsel's alleged deficiencies. Martin further alleged that newly discovered evidence entitled him to a new trial. On July 28, 2020, following an evidentiary hearing, the post-conviction court denied Martin's post-conviction petition.

[17] Martin now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Standard of Review*

[18] Under the rules of post-conviction relief, the petitioner must establish the grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5): *Strowmatt v. State*, 779 N.E.2d 971, 974-75 (Ind. Ct. App. 2002). To succeed on appeal from the denial of relief, the post-conviction petitioner must show that the evidence is without conflict and leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. *Id*. at 975. The purpose of post-conviction relief is not to provide a substitute for direct appeal, but to provide a means for raising issues not known or available to the defendant at the time of the original appeal. *Id*. If an issue was available on direct appeal but not litigated, it is waived. *Id*.

[19] Further, the post-conviction court in this case entered findings of fact and conclusions of law in accordance with Indiana Post-Conviction Rule 1, § 6. "A post-conviction court's findings and judgment will be reversed only upon a showing of clear error—that which leaves us with a definite and firm conviction that a mistake has been made." *Little v. State*, 819 N.E.2d 496, 500 (Ind. Ct. App. 2004) (quoting *Ben-Yisrayl v. State*, 729 N.E.2d 102, 106 (Ind. 2000), *reh'g denied*), *trans. denied*. In this review, findings of fact are accepted unless clearly erroneous, but no deference is accorded to conclusions of law. *Id*. Additionally, we remind Martin that he 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).

A. *Ineffective Assistance of Counsel*

[20] Martin contends that he was denied the effective assistance of Trial Counsel. The standard by which we review claims of ineffective assistance of counsel is well-established. In order to prevail on a claim of this nature, a defendant must satisfy a two-pronged test, showing that: (1) his counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms; and (2) there is a reasonable probability that, but for counsel's errors the result of the proceeding would have been different. *Jervis v. State*, 28 N.E.3d 361, 365 (Ind. Ct. App. 2015) (citing *Strickland v. Washington*, 466 U.S. 668, 690, 694, (1984) *reh'g denied*), *trans. denied*. The two prongs of the *Strickland* test are separate and distinct inquiries. *Id*. 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) (quoting *Strickland*, 466 U.S. at 697), *reh'g denied; cert. denied*, 537 U.S. 839 (2002).

[21] In his petition for post-conviction relief, Martin claimed that Trial Counsel was ineffective for failing to suppress the DNA results, impeach Hedges, Davis, and Officer Noll with prior inconsistent statements, cross-examine Dominic, and object to prosecutorial misconduct in the State's closing arguments. Davis also claims that he was rendered ineffective assistance due to Trial Counsel's cumulative errors. We will address each issue in turn.

1. *Suppression of Evidence*

[22] Martin claims that Trial Counsel was ineffective because he failed to suppress the DNA results that linked him to the blood found on Chappell's gun.

[23] Martin argues that the evidence shows that he was seated in the right back passenger seat and that the affidavit supporting the search warrant, averred that the witness, Hedges, "observed shots being fired from the passenger side of the white sedan and that the shots were being fired into the ambulance." (PCR App. Vol. II, p. 95). Martin claims that Hedges' statement, however, failed to mention "which area of the suspect vehicle [the] shots appeared to be coming from." (Appellant's Br. p. 30). Thus, Martin claims that the search warrant that was used to obtain his buccal swab contained material omissions "which cast doubt on the existence of probable cause, and it lacked reliable information to establish the credibility of one of the witnesses quoted in the affidavit." (Appellant's Br. p. 16).

[24] 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. *Keeylen v. State*, 14 N.E.3d 865, 871 (Ind. Ct. App. 2014), *clarified on reh'g*, 21 N.E.3d 840 (2014), *trans. denied*. The determination of 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*.

[25] In *Ware v. State*, 859 N.E.2d 708, 718 (Ind. Ct. App. 2007), a panel of this court explained that "a probable cause affidavit must include all material facts, which are those facts that 'cast doubt on the existence of probable cause.'" (quoting *Query v. State*, 745 N.E.2d 769, 772 (Ind. 2001), *trans. denied*). When the State omits information from a probable cause affidavit, in order 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." *Id*. We have recognized that omissions from a probable cause affidavit are made with reckless disregard "if an officer withholds a fact in his ken that '[a]ny reasonable person would have known that this was the kind of thing the judge would wish to know.'" *Gerth v. State*, 51 N.E.3d 368, 375 (Ind. Ct. App. 2016) (quoting *Wilson v. Russo*, 212 F.3d 781, 788 (3rd Cir. 2000)).

[26] We note that there were several other occupants with Martin in the vehicle on the night of the shooting, and any reasonable person asked to issue a search warrant to obtain DNA from the occupants would have wanted to know how the occupants were connected to the shooting. Relying on Hedges' statement, the authoring officer of the search warrant application, represented that shots were "fired from the passenger side of the white sedan" and into the ambulance. (PCR App. Vol. II, p. 95). While the authoring officer did not state the specific origin of the shots, Martin was not driving, and he was seated on the passenger side, albeit in the back. Aside from his claims of omissions,

Martin has made no showing that the authoring officer omitted facts or acted with reckless disregard to omit facts in the warrant application so as to make the affidavit misleading.

[27] Moreover, even if Hedges failed to state the specific origin of the shots, other evidence connected Martin, either directly or indirectly, to the shooting. *See Mehring v. State*, 884 N.E.2d 371, 376-77 (Ind. Ct. App. 2008) (holding that to satisfy the requirement of probable cause, an affidavit only needs to provide a fair probability that evidence of a crime will be found in a particular place). The authoring officer stated that about sixteen shots were fired, Martin was in the vehicle when the shots were fired, a gun with blood on it was found on the route Martin's vehicle travelled, Martin was the only person in the car who was bleeding that night, and Martin was the last person seen with the gun that had been tossed out of the vehicle.

[28] The affidavit in the instant case, established facts, context, and a nexus from which a neutral and detached magistrate could find probable cause. Because the affidavit contained a description of a fair probability that evidence would be found from Martin's buccal swab, the warrant was therefore not defective, and Trial Counsel would not have been successful in attacking the warrant. Here, we find that Martin was not prejudiced by Trial Counsel's performance, and we conclude that he was rendered effective assistance at his trial.

2. *Failure to Impeach Witnesses*

[29] Martin next claims ineffectiveness for counsel not confronting three witnesses—Hedges, Davis, and Officer Noll, with prior inconsistent statements.

a. *Davis and Hedges*

[30] In their initial statements to the police, Davis was not able to advise if the shots were coming from the front or back seat of the white sedan. Hedges also informed the police that he thought the shots were coming from the front right passenger seat. At trial, Davis testified that she saw "gun fire out of the passenger front windshield, or the front passenger window and the back passenger window." (Trial Tr. Vol. I, p. 26). On cross-examination, Davis confirmed that she "saw sparks" from "both [of] the passenger sides" of Chappell's white sedan vehicle. (Trial. Tr. Vol. I, p. 30). On direct examination, Hedges testified he saw the shots coming "from the front and back" of the white sedan. (Trial Tr. Vol. I, p. 30). On cross examination, Hedges reiterated his direct testimony.

[31] Even assuming Martin's counsel's failure to impeach Davis and Hedges with their prior inconsistent statements constituted deficient performance, we fail to see how the deficiency resulted in prejudice. The post-conviction court found that Martin was not prejudiced and entered the following finding:

> Nevertheless, even if these witnesses had given no testimony at all to the effect that shots may have been fired from the back, the jury would have been left with the testimony of Chappell and Jackson incriminating [] Martin; [] Martin's own story about

> Chappell being one of the shooters; the undisputed fact that two guns were used in the shooting, of which Jackson testified that he had fired only one; and the identification of [] Martin's DNA on the other gun. This evidence would have strongly tended to incriminate [] Martin in any event, without regard to whether the fleeting observations of witnesses Hedges and Davis did or did not have some slight tendency to incriminate him further.

(PCR App. Vol. IV, pp. 220-21) (citations omitted). Evidence that there were multiple guns fired during the shooting, and testimony from Martin's co-perpetrators that he was one of the shooters, was overwhelming. As the post-conviction court correctly noted, that evidence would have been strong even without Davis' and Hedges' testimony. Martin has failed to show us how he was prejudiced by Trial Counsel's failure to impeach Hedges and Davis and we likewise conclude that Trial Counsel rendered effective assistance.

b. *Officer Noll*

[32] After recovering the gun that had been thrown out of Chappelle's vehicle, Officer Noll wrote in her report that the gun "had a red colored substance which appeared to be blood at the top by the slide." (PCR App. Vol II, p. 115). At trial, the recovered gun was displayed to the jury. When asked about the blood on the gun, Officer Noll testified, "If my memory serves me correct, it was on the top, on the slide, and I believe there was some down by the handle." (Trial Tr. Vol. I, p. 184). During her cross-examination, Trial Counsel specifically directed Officer Noll to her report and the following exchange occurred:

> [Trial Counsel]: You indicated some hesitation about where you may have noticed the red stains. I think you were just recalling it. Feel free to look at your report if it would refresh your recollection. I'm looking for as much accuracy there as possible. Perhaps it's not there. If it's not, that's fine.
>
> [Officer Noll]: Yes. I don't think it's there.

(Trial Tr. Vol. I, p. 186). The post-conviction court denied Martin's claim that Trial Counsel was ineffective for failing to impeach Officer Noll for her prior inconsistent statement and entered the following finding:

> . . .[I]t is not evident how the supposed absence of blood on the handle would have tended to corroborate [] Martin's story, in view of his own statement that the cut on his hand was between the thumb and forefinger, which could well have been adjacent to the charging slide rather than 'down on the handle' as stated by Officer Noll. Likewise, evidence of blood on the handle would not have tended to disconfirm [] Martin's story in view of the possibility that he could have grasped the gun by the handle while throwing it out of the car. For these reasons, as well as the strong evidence tending to prove that [] Martin did fire the gun before throwing it out of the car, [and Trial Counsel's] failure to impeach Officer Noll regarding the location of the blood on the gun had no effect on the outcome of the trial.

(PCR App. Vol. IV, pp. 221-22).

[33] Notwithstanding Officer Noll's fleeting testimony, we note that the gun was displayed to the jury and they were able to evaluate whether Officer Noll's recollection as to the location of the blood was accurate. We agree with the post-conviction court that the miniscule difference in Officer Noll's trial

testimony where she added that there might have been blood on the handle in addition to blood on the slide of the gun, would not have led to a different outcome to Martin's trial. Martin has not shown how he was prejudiced by Trial Counsel's failure to impeach Officer Noll on one detail of her testimony. *See Timberlake v. State,* 753 N.E.2d 591, 603 (Ind. 2001) (holding that isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective). Therefore, we hold that Trial Counsel was not ineffective.

3. *Failure to Cross-examine*

[34] Martin also argues that trial counsel was ineffective for failing to cross-examine Dominic, who was riding in the black Impala when the shots were fired. In her initial report to the police, Dominic claimed that she had seen "a dude hanging out the front passenger window" at the time of the shooting. (PCR App. Vol. II, p. 137). At Martin's jury trial, Dominic recanted her prior police statement and stated that she did not see any person firing shots from Chappell's vehicle. Trial Counsel did not cross-examine Dominic. Notably, after Dominic had testified, Jackson, who was seated in the front passenger seat, testified he had held his gun out of the window while shooting so that the shell casings would not eject into the vehicle. At the post-conviction hearing, Dominic testified that she would have testified at Martin's trial that she saw a man hanging out of the front passenger window shooting. The post-conviction court concluded that Dominic's statement "about the 'dude hanging out the front window,' if presented at trial, would have corroborated the undisputed fact that [] Jackson

was shooting, but would have had little or (more likely) no tendency to suggest that [] Martin was not shooting." (PCR App. Vo1. IV, p. 221).

[35] Here, we find that any testimony that Dominic could have offered would have been cumulative of Jackson's testimony that he was shooting with his arm outside the window to avoid shell casings ejecting into the vehicle. Further, Dominic's suggested testimony was also cumulative of Hedges' and Davis' observations that they saw gunfire coming from the passenger side of Chappell's vehicle. Trial Counsel's failure to cross-examine Dominic to present cumulative evidence was not ineffective assistance of counsel and Martin's claim therefore fails. *See Moredock v. State*, 540 N.E.2d 1230, 1232 (Ind. 1989) (observing that the decision not to call a witness to testify whose testimony is cumulative does not constitute ineffective assistance of counsel).

4. *Prosecutorial Misconduct*

[36] To prevail on an ineffective assistance of counsel claim alleging prosecutorial misconduct, a petitioner for post-conviction relief must first establish that prosecutorial misconduct occurred. *Laux v. State*, 985 N.E.2d 739, 750 (Ind. 2013), *trans. denied*. In reviewing a properly preserved claim of prosecutorial misconduct, we must first determine whether the prosecutor's conduct was improper. *Stephens v. State*, 10 N.E.3d 599, 605 (Ind. Ct. App. 2014). If we determine the conduct was improper, we must then determine whether, under all the circumstances, the prosecutor's misconduct placed the defendant in a position of grave peril. *Id*. Whether a defendant has been placed in a position of grave peril is measured by the probable persuasive effect of the misconduct

on the jury's decision. *Samaniego v. State*, 679 N.E.2d 944, 949 (Ind. Ct. App. 1997), *trans. denied*.

[37] Whether a prosecutor's statements to the jury constitute misconduct is determined "by reference to case law and the disciplinary rules of the Code of Professional Responsibility." *Mahla v. State*, 496 N.E.2d 568, 572 (Ind. 1986). It is proper for the prosecutor to argue both law and fact during closing argument and propound conclusions based on an analysis of the evidence. *Hand v. State*, 863 N.E.2d 386, 394 (Ind. Ct. App. 2007). In judging the propriety of a prosecutor's remarks, we consider the challenged statements in the context of the argument as a whole. *Id*. "A prosecutor may comment on the credibility of the witnesses only if the assertions are based on reasons which arise from the evidence." *Gaby v. State*, 949 N.E.2d 870, 881 (Ind. Ct. App. 2011).

[38] Martin claims that the State made several misleading and prejudicial statements during its closing arguments. The State made the following argument in closing:

> Good afternoon. We know now, thanks to the video statement of [Martin] that we watched this morning, we know how he thinks. We know how he thinks. The context of that interview that he gave to Detective Martin was [] Chappell had talked, [Martin] knew it and at the end of the tape he says, [Chappell] snitched on me, I'm going to tell you he did it. [Chappell] did something to me, I'm going to do something right back. September 9th, 2012, Jermaine Loyall is disrespectful to me. He may have stabbed my friend[']s brother, he gets into it with my friend, gets blood on my shirt, I'm going to come right back at him. This case is simple. This case is simple. [Martin] was

> angry at Jermaine Loyall and the people he perceived to be connected with Jermaine Loyall and he went right back at them. And he did everything in his power to kill him and to kill the people that he thought were with him in that black car. This case is simple. It really is.

(Trial Tr. Vol. II, pp. 312-13). From the above excerpt, Martin argues that the State misled the jury and "made it sound as if [he] admitted to having a grudge against Jermaine, admitted to wanting to kill Jermaine [] and Jermaine's companions." (Appellant's Br. p. 44). Martin claims that Trial Counsel's failure to object to the State's misleading statements violated prevailing professional norms and placed him in a position of grave peril.

[39] In arguments to the jury, a prosecutor can state and discuss the evidence and reasonable inferences that can be derived therefrom so long as there is no implication of personal knowledge that is independent of the evidence. *Emerson v. State*, 952 N.E.2d 832, 837 (Ind. Ct. App. 2011), *trans. denied*. Furthermore, statements of opinion are not prohibited. *Id*.

[40] While the State started out discussing Martin's recorded statement to the police, it moved towards a thesis, ("This case is simple"), and then argued fair characterizations of the evidence to support that thesis. Indeed, we find that the commentary that Martin was angry at Jermaine was a fair explanation for the evidence considering that after being in a fight with Jermaine, Martin ordered Chappell to "follow the fucking ambulance" containing Jermaine; said that "[s]omebody got to fucking die, they not making it to the hospital"; and then shot multiple times into a car containing Jermaine's family and the ambulance

containing Jermaine. (Trial Tr. Vol. I, p. 156). Here, the State was simply commenting on the weight of the evidence and encouraging the jury to find Martin guilty as charged, and that was entirely permissible. Thus, we hold that there was no prosecutorial misconduct and Trial Counsel was not ineffective.

5. *Cumulative Error*

[41] Martin also contends that the cumulative effect of Trial Counsel's errors rendered the representation ineffective. "Errors by counsel that are not individually sufficient to prove ineffective representation may add up to ineffective assistance when viewed cumulatively." *French v. State*, 778 N.E.2d 816, 826 (Ind. 2002) (quotation omitted). Here, however, Martin has not established any errors by Trial Counsel; therefore, there can be no cumulative error. *See Lucas v. State*, 499 N.E.2d 1090, 1098 (Ind. 1986) (explaining that alleged errors that do not present a single basis for reversal "do not gain the stature of reversible error when viewed *en masse* ").

III. *Newly Discovered Evidence*

[42] Finally, Martin argues that the post-conviction court incorrectly rejected relief on his claim of newly discovered evidence. Indiana Post-Conviction Rule 1(1)(a)(4) provides that post-conviction relief is available to any "person who has been convicted of, or sentenced for, a crime by a court of this state, and who claims that "there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice."

> [N]ew evidence will mandate a new trial only when the defendant demonstrates that: (1) the evidence has been discovered since the trial; (2) it is material and relevant; (3) it is not cumulative; (4) it is not merely impeaching; (5) it is not privileged or incompetent; (6) due diligence was used to discover it in time for trial; (7) the evidence is worthy of credit; (8) it can be produced upon a retrial of the case; and (9) it will probably produce a different result at retrial.

Kubsch v. State, 934 N.E.2d 1138, 1145 (Ind. 2010). The burden of proving all nine requirements rests with the petitioner for post-conviction relief. *Id*.

[43] At Martin's post-conviction hearing, Jackson claimed that his own trial counsel had convinced him to lie under oath and assert that Martin was one the shooters. Jackson claimed the false testimony was made for purposes of obtaining a favorable plea agreement. Jackson then proceeded to testify that he was the one that ordered Chappell to follow the ambulance, he was the one that fired both guns, and that thereafter, he tossed both guns into Martin's lap and asked Martin to throw them out the window, and that Martin threw one of the guns out of the window and Martin put the other one in the front seat.

[44] Following Jackson's claim that his own attorney had convinced him to commit perjury and implicate Martin to the shooting, the State presented Jackson's attorney's affidavit into evidence. Jackson's attorney swore that he did not advise Jackson to give any false testimony, nor did he have any reason to believe that Jackson would offer false testimony against Martin.

[45] We have held that a new trial is not warranted if the post-conviction court determines that the recantation is not credible. *Greenwell v. State*, 884 N.E.2d 319, 329 (Ind. Ct. App. 2008) (denying the petitioner a new trial based on the fact that the recantation of a witness who previously identified him as the murderer was inconsistent and implausible).

[46] Among other things, the post-conviction court noted that Jackson's motive for recanting his trial testimony against Martin was evident from his recorded pre-trial statements where he referred to Martin being like a brother. The post-conviction court found that Jackson's post-conviction testimony was an attempt to make amends with Martin. In fact, the post-conviction court found that Jackson's recanted testimony appeared to "have been formulated in view of the evidence introduced at trial." (PCR App. Vol. IV, pp. 224-25). Because we defer to the post-conviction court's factual findings and given that Jackson's post-conviction testimony was not worthy of credit, Martin has failed to meet one of the nine factors for assessing the value of newly discovered evidence. Therefore, his claim fails. *Greenwell*, 884 N.E.2d at 329.

CONCLUSION

[47] Based on the foregoing, we hold that Martin has failed to show that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. Also, Martin's request for post-conviction relief on the basis of newly discovered evidence fails. Thus, we affirm the post-conviction court's judgment denying Martin's petition for post-conviction relief.

[48] Affirmed

[49] Najam, J. and Crone, J. concur