ATTORNEYS FOR APPELLANT

Amy E. Karozos
Jeffrey R. Wright
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Justin F. Roebel
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

Christopher Johnston,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent.

March 2, 2021

Court of Appeals Case No. 20A-PC-1135

Appeal from the Marion Superior Court

The Honorable Barbara Crawford, Judge

The Honorable Amy J. Barbar, Magistrate

Trial Court Cause No. 49G01-1707-PC-25755

Riley, Judge.

STATEMENT OF THE CASE

[1] Appellant-Petitioner, Christopher Johnston (Johnston), appeals the post-conviction court's denial of his petition for post-conviction relief.

[2] We affirm.

ISSUES

[3] Johnston presents the court with four issues, which we consolidate and restate as the following two:

> (1) Whether he was denied the effective assistance of Trial Counsel, who did not challenge entry of judgment of conviction on his multiple stalking convictions; and
>
> (2) Whether he was denied the effective assistance of Appellate Counsel, who did not raise the issue of the entry of judgment of conviction for his multiple stalking convictions on appeal.

FACTS AND PROCEDURAL HISTORY

[4] The facts pertaining to the underlying offenses as found by the Court are as follows:

> Johnston met the victim, D.K., in 2012. Johnston proceeded to contact D.K. via phone calls, texts, and social media until 2015. D.K. requested, on several occasions and by various means, that Johnston stop contacting her. He did not. On May 30, 2014, D.K. obtained a protective order against Johnston.
>
> On February 7, 2015, Johnston was arrested after going to D.K's home. He claimed to not know D.K. Johnston was served with

> the protective order on his release from custody. On March 9, 2015, Johnston went to D.K.'s home. D.K. called the police, but they were unable to locate Johnston when they responded. On March 10, 2015, Johnston again went to D.K.'s home, and this time he was arrested.
>
> On April 10, 2015, the State charged Johnston with Level 5 felony stalking for going to D.K.'s residence in March 2015, Level 6 felony stalking for going to D.K.'s residence in February 2015, and two counts of Class A misdemeanor invasion of privacy. The State later amended these charges to add another count of [Class C] felony stalking for texts and Facebook messages sent between April 2013 and July 2013, and of [Class D] felony stalking for Facebook messages sent between February 2014 and May 2014.

Johnston v. State, 69 N.E.3d 507, 509 (Ind. Ct. App. 2017). At Johnston's bench trial, the State produced evidence that, after D.K. had rebuffed Johnston's communications and efforts to be in a relationship, between April 2, 2013, and July 26, 2013, Johnston sent her a series of text and Facebook messages, in which he stated, among other things:

> (April 2, 2013) I have so much anger and hate towards u . . . I hate u [D.K.]!!! I fucking hate u!!! Hey [D.K.] can i eat ur pussy and fuck the dog shit out of you and lick ur butt hole maybe that will fix ur attitude . . .lol; Can I put my dick in ur ass and pull ur hair as im fucking the shit out of you? . . . Can I choke u as im fucking lmao . . . Ignore me all u want wait till I see u ur gonna get something u cant ignore its all good all this will catch up to u . . .
>
> (April 9, 2013) I got to go cus im starting to get hate and anger feelings . . . I can't believe u called the cops ur a dirty bitch for

> that . . . honestly if I see i dont know how ill react, i maybe just beat the shit out of u . . . at this point i want to beat ur fucking ass . . . if I saw u tomorrow, I probably would just being honest . . .
>
> (May 23, 2013) I do hope to god I see u sometime cuz its either gonna be good or its gonna be really ugly.
>
> (July 26, 2013) [D.K.], now i don't even want to fix shit with u when I see u im beating ur fucking ass bitch

(Trial Exh. Vol., pp. 23, 31, 35, 37). The State produced additional evidence that, between February 7, 2014, and May 23, 2014, using accounts with different usernames, Johnston sent D.K. the following Facebook messages:

> (February 7, 2014, username Chris Stone) [Y]ou know this isn't over between us . . . Tell ur girl I said hi i hope she's at the house when i come over . . . Your right there by 70 any ways i proved my point so when i comeby don't be surprised
>
> (February 18, 2014, username Chris Stone) Can i get ur new number lets start over fresh and do this right this time. To new beginnings [D.K]
>
> (February 21, 2014, at 5:58 p.m., username Chris Crown) I want you to go on with ur life not having to block me or whatever you do to avoid me . . . was all this fighting and everything u did worth it . . .
>
> (February 21, 2014, at 10:30 p.m., username Chris Crown) [O]ne of these days in gonna stop by ur hs . . . and hopefully we can settle our differences. Ill give u some time so we can collect our thoughts before my visit . . . Well ill see you soon.

(March 16, 2014, at 2:57 p.m., username Chris Stark) Hi! Im comming to see u.

(March 16, 2014, at 10:48 p.m., username Chris Stark) I couldn't come by today but ill be by to see u at it house on s missouri st now do u believe me see u soon!

(May 2, 2014, at 11:33 a.m., username James Jordan) In all capital letters: I can be ur bestfriend or ur worst mother fuckin enemy . . .

(May 2, 2014, at 11:35 a.m., username James Jordan) And call the fucking cops on me, fuck you, fuck the cops and everything else.

(May 8, 2014, username 100008287842571) In all capital letters: This demon, derty bitch, that lives inside u!; I dont care what u gotta do to get rid of that demon that lives inside u but I suggest u get an exorcism, burn it, barrie it, rebuke it! . . . I dont ever want to see that demon bitch ever again! Do I make myself clear! . . .We will learn to get along!

(May 13, 2014, at 6:32 p.m, username 100008330230571) In all capital letters: Aww u are so sweet! I gotta surprise for ya! I bet it will make ur jaw drop!

(May 13, 2014, at 10:00 p.m., username 100008312628010) In all capital letters: This shit right here? This why Ive got multiple FBS because u say ur bullshit then block me like a shady mother tucker, instead of talking out our differences like normal mother fuckers, that's why I've got multiples . . .

(May 22, 2014, username Sam Hesh) You cant try to make things right with me? you would rather talk ur shit, hide from

> me, lie to me, be scandalous to me and go to the cops and block me on shit . . . why???

(Trial Exh. Vol., pp. 38-41, 43-46). D.K. and her girlfriend testified that they had seen Johnston at D.K.'s home on February 7, 2015, and D.K. testified that she had seen Johnston at her home on March 9 and 10, 2015.

[5] Sergeant Steven Schafer (Sergeant Schafer) of the Indianapolis Metropolitan Police Department was qualified as an expert in the forensic analysis of social media records and the digital trails left by internet use. The trial court overruled Trial Counsel's objection that Sergeant Schafer was unqualified to interpret Facebook records or render an opinion as to how accounts with different usernames could be linked. Sergeant Schafer then explained that Facebook records associated with the various accounts alleged to have been used by Johnston showed that they had cookies in common, indicating that the account users were using the same device. Sergeant Schafer also testified based on his review of the Facebook records that all the accounts at issue had accessed the internet via the same IP address, indicating that all the account users had used the same router. The trial court sustained Trial Counsel's objection to Sergeant Schafer opinion as to whether all the messages had been sent by the same person. After Trial Counsel questioned Sergeant Schafer about other explanations for multiple Facebook accounts having shared cookies and IP addresses, Sergeant Schafer stated that the likelihood of multiple people using the same device and IP addresses to contact D.K. with messages of a similar tone was less likely than "being struck by lightning while hitting the super lotto

and being bitten by a polar bear at the same time." (Trial Transcript Vol. II, p. 226). Trial Counsel did not object to that opinion.

[6] The trial court found Johnston guilty as charged but did not enter judgment of conviction on the misdemeanor convictions due to double jeopardy concerns. On February 19, 2016, the trial court sentenced Johnston to six years for the Level 5 felony, with two years suspended; 545 days for the Level 6 felony, to be served concurrently; six years for the Class C felony, to be served consecutively; and one year for the Class D felony, to be served concurrently. Thus, Johnston received an aggregate sentence of twelve years, with two years suspended.

[7] Johnston pursued a direct appeal of his convictions. Appellate Counsel raised two issues: (1) Whether the trial court abused its discretion in qualifying Sergeant Schafer as an expert; and (2) Whether the admission of Sergeant Schafer's polar bear analogy constituted fundamental error. *Johnston*, 69 N.E.3d at 509. Johnston's challenge to Sergeant Schafer's expert testimony was that he did not have sufficient training in statistics to form a valid opinion about the probability of an event, presumably in relation to the polar bear analogy. *Id*. at 511. The Court rejected that argument, reasoning that the trial court had not declared the officer to be an expert in statistics and Sergeant Schafer had testified regarding his training and experience that qualified him to assist the trial court in understanding social media records and digital trails. *Id*. The Court also rejected Johnston's argument that the admission of Sergeant Schafer's polar bear analogy constituted fundamental error, concluding that Johnston had failed to rebut the presumption that the trial court would have

only relied on admissible evidence, the impact of the challenged evidence was contained as it pertained to only one of the stalking convictions, and other substantial evidence sustained his convictions. *Id*. at 512. The Court also observed that the trial court had sustained Trial Counsel's objection to the State asking Sergeant Schafer's opinion about whether all the messages had been sent by the same person and that the trial court had been left to draw its own conclusion based on the evidence, which it did. *Id*. at 513. Therefore, the Court upheld Johnston's convictions. *Id*.

[8] On July 6, 2017, Johnston filed a *pro se* petition for post-conviction relief which was amended on November 21, 2019, after Johnston's post-conviction counsel appeared. Among other claims, Johnston ultimately argued that Trial Counsel had rendered him ineffective assistance by failing to challenge his multiple charges for stalking based on Johnston's reading of the stalking statute, the continuing crime doctrine, and Indiana's double jeopardy law. Johnston also argued that Appellate Counsel was ineffective for failing to raise the same claims on direct appeal.

[9] On December 17, 2019, the post-conviction court held a hearing on Johnston's petition at which Trial Counsel and Appellate Counsel testified. Trial Counsel testified that her main defense strategy was to challenge the State's evidence that D.K. was placed in fear by Johnston's conduct and the evidence that Johnston had sent all of the Facebook messages at issue. Trial Counsel had not considered arguing that Johnston could not be convicted of more than one stalking charge. Appellate Counsel testified that he had evaluated the viability

of an argument that Johnston's multiple stalking convictions could not be sustained based on double jeopardy principles. Appellate Counsel had decided against advancing the argument based on his assessment of how the trial court had merged convictions and sentenced Johnston, his conclusion that all of Johnston's conduct was not one course of action, and his conclusion that Johnston's conduct was not similar enough in time, place, or manner for the argument to have traction. Appellate Counsel thought that Sergeant Schafer did not have the expertise to testify regarding the likelihood that Johnston had sent all the Facebook messages as alleged by the State and that the issue did have traction. Appellate Counsel felt that "you just have to make a judgment call where you have issues that work and issues that won't work, whether or not it will strengthen your credibility in your brief with the Court of Appeals if you include issues that may be considered frivolous . . ." (PCR Tr. p. 35). On May 12, 2020, the post-conviction court entered its Order denying Johnston relief.

[10] Johnston now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Standard of Review*

[11] Petitions for post-conviction relief are civil proceedings in which a petitioner may present limited collateral challenges to a criminal conviction and sentence. *Weisheit v. State*, 109 N.E.3d 978, 983 (Ind. 2018). In such a proceeding, the petitioner bears the burden of establishing his claims by a preponderance of the evidence. *Id*. When a petitioner appeals from the denial of his petition for post-conviction relief, he stands in the position of one appealing from a negative

judgment. *Hollowell v. State*, 19 N.E.3d 263, 269 (Ind. 2014). 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 [PCR] court." *Id*. In addition, where a post-conviction court makes findings of fact and conclusions of law in accordance with Indiana Post-Conviction Rule 1(6), we do not defer to its legal conclusions, but we will reverse its findings and judgment only upon a showing of clear error, meaning error which leaves us with a definite and firm conviction that a mistake has been made. *Id*.

II. *Strickland*

[12] We evaluate ineffective assistance of trial and appellate counsel claims under the two-part test articulated in *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail on such a claim, a petitioner must show that 1) his counsel's performance was deficient based on prevailing professional norms; and 2) that the deficient performance prejudiced the defense. *Weisheit*, 109 N.E.3d at 983 (citing *Strickland*, 466 U.S. at 687). In order to demonstrate sufficient prejudice, the petitioner must show that there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceeding would have been different. *Id*. (citing *Strickland*, 466 U.S. at 694). A reasonable probability is one that is sufficient to undermine confidence in the outcome. *Id*. A petitioner's failure to satisfy either the 'performance' or the 'prejudice' prong of a *Strickland* analysis will cause an ineffective assistance of counsel claim to fail. *Taylor v. State*, 840 N.E.2d 324, 331 (Ind. 2006).

III. *Effectiveness of Trial Counsel*

[13] Johnston claims that Trial Counsel should have argued to the trial court that, based on his proffered construction of the stalking statute, the continuing crime doctrine, and Indiana's double jeopardy law, judgment of conviction could be properly entered only on his Level 5 felony stalking conviction and that Trial Counsel's failure to so object or argue constituted ineffective assistance. In order to prove ineffectiveness of counsel for failing to raise such a claim, a petitioner must show that the objection would have been successful. *See, e.g., Madden v. State*, 656 N.E.2d 524, 528 (Ind. Ct. App. 1995) (finding that Madden's trial counsel was not ineffective for failing to raise a double jeopardy challenge to the elevation of multiple felony challenges based on his same use of a knife, where that argument would not have been successful), *trans. denied*.

A. *Statutory Construction*

[14] In what he refers to as his "statutory construction" argument, Johnston claims that Trial Counsel should have argued that Indiana's stalking statute precluded his conviction for more than one count of stalking D.K. (Appellant's Br. p. 38). Johnston essentially argues that the statute's language contemplates stalking as a series of actions and, therefore, that the State may not obtain multiple convictions against him by breaking up his conduct over a period of time into separate offenses.

[15] The stalking statute provides in relevant is follows:

> As used in this chapter, "stalk" means a knowing or an intentional course of conduct involving repeated or continuing

> harassment of another person that would cause a reasonable person to feel terrorized, frightened, intimidated, or threatened and that actually causes the victim to feel terrorized, frightened, intimidated, or threatened.

Ind. Code § 35-45-10-1. We have interpreted the statute's prohibition against "repeated or continuing harassment" to mean "more than once." *Johnson v. State*, 721 N.E.2d 327, 332-33 (Ind. Ct. App. 1999), *trans. denied*. In *Peckinpaugh v. State*, 743 N.E.2d 1238, 1241 (Ind. Ct. App. 2001), *trans. denied*, the defendant argued that he could not be convicted under the stalking statute for two offenses for stalking the same victim. Peckinpaugh subjected his victim to a series of unwanted contacts, including leaving voicemails for her, coming to her house, and threatening to kill her and any other man she dated. *Id*. at 1239-40. Thereafter, the victim obtained a protective order against Peckinpaugh. *Id*. at 1240. Just three months after the protective order was issued, Peckinpaugh confined his victim in her house and kept her there against her will overnight until she escaped. *Id*. After the break-in, the State filed a host of charges against Peckinpaugh, including one for stalking. *Id*. Following the filing of the charges, Peckinpaugh left voicemail messages for his victim and went to the home where she was temporarily staying, after which the State filed a second stalking charge against Peckinpaugh. *Id*. Peckinpaugh was convicted of both stalking offenses, and he argued on appeal that his actions from the issuing of the protective order up to the second home encounter constituted only one violation of the stalking statute, not two. *Id*. at 1241. The Court rejected that argument, holding that "a defendant may be convicted of separate counts of

stalking the same victim if the respective series of incidents upon which the charges are based can be divided into distinct and separate series." *Id*. at 1241. The Court found that the filing of the first set of charges against Peckinpaugh and being ordered to stay away from his victim provided a distinct and separate division of the series of events such that two stalking convictions could be obtained. *Id*.

[16] Johnston argues that his case shows "a 'course of conduct involving repeated and continuing harassment' from 2013 to 2015, unbroken by the filing of a criminal charging information for stalking that separated that conduct into distinct and separate series as required by *Peckinpaugh*." (Appellant's Br. p. 23). However, Johnston's argument is based on a misreading of the holding of that case. The *Peckinpaugh* court did not hold that the filing of criminal charges against a defendant is the only manner in which a defendant's conduct may be divided for purposes of supporting multiple stalking convictions against a defendant; it merely held that in Peckinpaugh's case the filing of the charges against him was a sufficient division. Indeed, our supreme court has held that, because the Legislature did not include an explicit time frame in the stalking statute, "the trier of fact should determine if the 'course of conduct involved repeated or continuing harassment.'" *Nicholson v. State*, 963 N.E.2d 1096, 1101 (Ind. 2012) (quoting I.C. § 35-45-10-1).

[17] Relying on *Peckinpaugh*, the post-conviction court concluded that in light of the protective order issued against Johnston which represented

> a divider between separate and distinct factual events, in no way whatsoever did I.C. [§] 35-45-10 stand in the way of [Johnston's] convictions on multiple counts of stalking. Trial [C]ounsel's performance is not deficient for failing to make an argument clearly contrary to law.

(Appellant's App. Vol. III, p. 60). In light of *Peckinpaugh* and *Nicholson*, we agree with the post-conviction court's determination and conclude that Johnston has failed to meet his burden on appeal to show that any argument offered by Trial Counsel based on the stalking statute would have been credited. *See Madden*, 656 N.E.2d at 528.

B. *Continuous Crime Doctrine*

[18] Johnston also asserts that Trial Counsel was ineffective for failing to advance an argument at trial that his multiple stalking convictions were barred by the continuous crime doctrine. This doctrine is a species of common law double jeopardy, the application of which is limited to situations where a defendant has been charged multiple times with the same continuous offense. *Hines v. State*, 30 N.E.3d 1216, 1219 (Ind. 2015). "The continuous crime doctrine does not seek to reconcile the double jeopardy implications of two distinct chargeable crimes; rather, it defines those instances where a defendant's conduct amounts only to a single chargeable crime." *Id*. Under the doctrine, the court considers whether the defendant's actions were "so compressed in terms of time, place, singleness of purposes, and continuity of action as to constitute a single transaction." *Walker v. State*, 932 N.E.2d 733, 735 (Ind. Ct. App. 2010). We have observed that any application of the doctrine is necessarily fact-sensitive

such that the failure of a defendant to explain how the doctrine applies to the facts of his case will result in the waiver of the issue on appeal. *Keith v. State*, 127 N.E.3d 1221, 1231 (Ind. Ct. App. 2019).

[19] The post-conviction court concluded that Johnston's convictions were not barred by the continuous crime doctrine because his

> conduct unfolded over a period of years, not seconds, minutes or hours. He met his victim in 2012 and engaged in multiple types of harassment off and on into 2015 during distinct time periods and from multiple places, both remotely and at the victim's residence. By adopting aliases online, he sometimes meant to deceive the victim, whereas at other times [Johnson's] purpose was to attempt persuasion in person.

[20] (Appellant's App. Vol. III, p. 61). Johnston acknowledges that the State charged him with Level 5 and Level 6 felony stalking for appearing at D.K.'s residence on February 7, 2015, and March 9 and 10, 2015. He also observes that the State charged him with Class C felony stalking D.K. through sending text and Facebook messages between April 2, 2013, and July 26, 2013, and that he was charged with Class D felony stalking for sending D.K. Facebook messages from February 7, 2014, and May 23, 2014. Other than noting these circumstances, Johnston makes no effort to explain how his actions were "so compressed in terms of time, place, singleness of purposes, and continuity of action as to constitute a single transaction." *Walker*, 932 N.E.2d at 735. As the appellant, Johnston bears the burden of persuading us that the evidence "as a whole leads unerringly and unmistakably to a conclusion opposite that reached

by the post-conviction court." *Hollowell*, 19 N.E.3d at 269. Due to his failure to apply the facts of his case to the doctrine, we must conclude that he has failed to meet this burden.

C. *Richardson's 'Actual Evidence' Test*

[21] Johnston also claims that Trial Counsel's was ineffective for failing to argue that his multiple stalking convictions were barred by Indiana's substantive double jeopardy law as set forth in the 'actual evidence' test enunciated in *Richardson v. State*, 717 N.E.2d 32 (Ind. 1999). Johnston also argues that the new framework for double jeopardy analysis announced by the Indiana Supreme Court in *Wadle v. State*, 151 N.E.3d 227 (Ind. 2020), also affords him relief. However, at the time *Richardson* was decided, it was itself a new methodology for double jeopardy analysis which our supreme court held was "not available for retroactive application in post-conviction proceedings." *Taylor v. State*, 717 N.E.2d 90, 95 (Ind. 1999). In light of *Taylor*, and given that the Court has not signaled otherwise, we conclude that only *Richardson* is applicable to Johnston's case.

[22] Under a *Richardson* double jeopardy analysis, two or more offenses are considered the "same offense" in violation of Article 1, Section 14 of the Indiana Constitution where, with respect to either the statutory elements of the challenged crimes or the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense. *Richardson*, 717 N.E.2d at 49. To show a violation of

Richardson's 'actual evidence' test, a defendant must establish "a reasonable possibility that the evidentiary facts used by the [factfinder] to establish the essential elements of one offense may also have been used to establish the elements of a second challenged offense." *Id*. at 53. However, if each conviction required proof of at least one unique evidentiary fact, the 'actual evidence' test has not been violated. *Spivey v. State*, 761 N.E.2d 831, 833 (Ind. 2002). Evaluation of a claim under the 'actual evidence' test involves identifying the essential elements of each of the challenged crimes and evaluating the evidence from the factfinder's perspective. *Hines*, 30 N.E.3d at 1222. In undertaking the analysis, it is appropriate to consider the charging information, the arguments of counsel, and any other factors that may have guided the factfinder's determination. *Id*.

[23] Johnston's argument on this issue is that "the same evidence supported the conclusion that a reasonable person and D.K. felt terrorized, frightened, intimidated, and threatened by Johnston's continuing actions" because her fear started in 2013, was continuous until 2015, and cannot be "compartmentalized." (Appellant's Br. pp. 32-33). However, even if that were true, the fear felt by D.K. is but one of the essential elements of the offense of stalking. The other essential element of the offense is a "knowing or an intentional course of conduct involving repeated or continuing harassment of another person." I.C. § 35-45-10-1. In order to establish a violation of *Richardson*'s 'actual evidence' test, Johnston must also demonstrate a reasonable possibility that the trial court relied on the same evidence to prove all of the

essential elements, not just some of them. Johnston does not argue, based on the charging information, the argument of counsel, or any other factors, that the trial court relied upon the same evidence in concluding that he had engaged in the same course of conduct as to each or any of the challenged convictions. Therefore, he has not made the requisite showing that any argument or objection made by Trial Counsel on this basis would have been successful. *See Madden*, 656 N.E.2d at 528.

IV. *Effectiveness of Appellate Counsel*

[24] Johnston also argues that Appellate Counsel rendered ineffective performance for failing to challenge his multiple stalking convictions based on his statutory construction, continuing crime doctrine, and double jeopardy arguments. The standard of review for ineffective assistance of appellate counsel claims is the same as that for trial counsel: the petitioner must show deficient performance and that the deficiency resulted in prejudice to him. *Hollowell*, 19 N.E.3d at 269. Ineffective assistance of appellate counsel claims generally fall into three categories, namely (1) denial of access to an appeal; (2) waiver of issues; and (3) failure to present issues well. *Id*. at 270. In order to show that appellate counsel was ineffective for failing to raise an issue on appeal, thus resulting in waiver for collateral review, a defendant must overcome the "strongest presumption of adequate assistance, and judicial scrutiny is highly deferential." *Reed v. State*, 856 N.E.2d 1189, 1195 (Ind. 2006). In evaluating the performance prong of the *Strickland* standard, we determine whether the unraised issues are significant and obvious from the face of the record and whether the unraised issues are

clearly stronger than the raised issues. *Id*. In evaluating the prejudice prong of the *Strickland* standard, we determine whether the issues that appellate counsel failed to raise would have been clearly more likely to result in reversal or an order for a new trial. *Id*. It is very rare that we find appellate counsel to be ineffective for failing to raise an issue on appeal, as the decision of what issues to raise is one of the most important strategic decisions made by appellate counsel. *Id*.

[25] Johnston's only assertion of Appellate Counsel's ineffectiveness is that his counsel should have raised the very same claims that we have already determined were without merit in examining his claims of Trial Counsel's effectiveness. A defendant's appellate counsel will not be deemed ineffective for "failing to present meritless claims." *Vaughn v. State*, 559 N.E.2d 610, 615 (Ind. 1990). Because Johnston merely reiterates his meritless claims in the context of his appellate representation, he has failed to show either that his proffered issues were "clearly stronger" or that, if his chosen issues had been raised, they would have been "clearly more likely to result in reversal or an order for a new trial." *Reed*, 856 N.E.2d at 1195.

[26] In addition, Appellate Counsel testified at the hearing on Johnston's petition for post-conviction relief that he considered it an important aspect of appellate advocacy to winnow arguments. Appellate Counsel also testified that he had considered the double jeopardy aspects of the case and had decided that the issues that he presented on direct appeal were stronger. Thus, Appellate Counsel's choice of issues was the direct result of his considered professional

judgment, and Johnston has provided us with no valid reason to second-guess that judgment.

CONCLUSION

[27] Based on the foregoing, we conclude that Johnston received the effective assistance of his trial and appellate counsel.

[28] Affirmed

[29] Najam, J. concurs

[30] Crone, J. concurs in result without separate opinion