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

James David Boyd,
Appellant-Respondent,

v.

State of Indiana,
Appellee-Petitioner.

November 17, 2021

Court of Appeals Case No. 21A-PC-624

Appeal from the Wells Circuit Court

The Honorable Benjamin D.R. Vanderpool, Special Judge

Trial Court Cause No. 90C01-1907-PC-3

Najam, Judge.

Statement of the Case

[1] James David Boyd appeals the post-conviction court's denial of his petition for post-conviction relief. Boyd raises one issue for our review, namely, whether the post-conviction court erred when it concluded that he was not denied the effective assistance of counsel.

[2] We affirm.

Facts and Procedural History

[3] In Boyd's direct appeal, this Court stated the facts and procedural history as follows:

> In July 2001, nine-year-old S.M. was at the home of her babysitter, Alicia Jarrett. Twenty-three-year-old Boyd was a friend of Jarrett, and was also at her home on the day in question. Boyd was playing a computer game when S.M. entered the room he was in. He finished playing, turned around, and kissed her. He then pulled her pants down and performed oral sex on her. Boyd asked her if she "like[d] that," and she put her pants back on without responding. Boyd then took S.M. to the bathroom, where he removed her pants and underwear and got on top of her, penetrating her vagina with his penis. S.M. "felt ripping" and told Boyd that it hurt, to which Boyd responded, "it's okay baby." Boyd continued until he ejaculated. He told S.M., "don't tell nobody or I will do it to you again." Boyd placed S.M. on his lap, telling her that "what he did to [her] was child molestation" and that he would go to jail if she took "him to Court." Several years later, S.M. told employees at her school what Boyd had done to her. In April 2006, S.M.'s mother contacted the police.

> On May 16, 2006, the State charged Boyd with class A felony child molesting. Boyd's jury trial took place on October 15 and 16, 2009,[1] after which the jury convicted Boyd as charged. At Boyd's December 4, 2009, sentencing hearing, the trial court found no mitigating circumstances and found Boyd's criminal history to be an aggravating factor. At the conclusion of the hearing, the trial court imposed a fully executed sentence of fifty years imprisonment.

Boyd v. State, No. 90A04-1001-CR-30, 2010 WL 2396260, at *1 (Ind. Ct. App. June 16, 2010) (citations omitted) (*Boyd I*), *trans. denied*.

[4] On direct appeal, Boyd raised issues regarding prosecutorial misconduct, admission of evidence, and sentencing. We affirmed the trial court's judgment in part and reversed in part, finding that Boyd's sentence was inappropriate but that no other reversible error occurred. *Id.* We remanded with instructions to revise Boyd's sentence to forty years imprisonment. *Id.* The Indiana Supreme Court denied Boyd's transfer petition on September 2, 2010.

[5] On July 11, 2019, Boyd filed a petition for post-conviction relief. In his petition, Boyd alleged that he had received ineffective assistance from his trial counsel. That same day, Boyd filed an Affidavit for Change of Judge, requesting that the Honorable Kenton Kiracofe recuse from presiding over his post-conviction relief proceedings because Judge Kiracofe was the prosecutor for Boyd's criminal trial. The Honorable Benjamin D.R. Vanderpool assumed

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[1] Boyd sought and received three continuances, resulting in a nearly two-year delay of the trial.

jurisdiction over Boyd's post-conviction relief case. A fact-finding hearing was held on February 5, 2021, after which the post-conviction court entered findings and conclusions in which it denied Boyd's petition for post-conviction relief. This appeal ensued.

Discussion and Decision

Standard of Review

[6] Boyd appeals the post-conviction court's denial of his petition for post-conviction relief. Our standard of review in such appeals is clear:

> "The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence." *Campbell v. State*, 19 N.E.3d 271, 273-74 (Ind. 2014). "When appealing the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment." *Id*. at 274. In order to prevail on an appeal from the denial of post-conviction relief, a petitioner must show that the evidence leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. *Weatherford v. State*, 619 N.E.2d 915, 917 (Ind. 1993). 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). Although we do not defer to the post-conviction 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." *Ben-Yisrayl v. State*, 729 N.E.2d 102, 106 (Ind. 2000) (internal quotation omitted).
>
> When evaluating an ineffective assistance of counsel claim, we apply the two-part test articulated in *Strickland v. Washington*, 466 U.S. 668 (1984). *See Helton v. State*, 907 N.E.2d 1020, 1023 (Ind.

> 2009). To satisfy the first prong, "the defendant must show deficient performance: representation that fell below an objective standard of reasonableness, committing errors so serious that the defendant did not have the 'counsel' guaranteed by the Sixth Amendment." *McCary v. State*, 761 N.E.2d 389, 392 (Ind. 2002) (citing *Strickland*, 466 U.S. at 687-88). To satisfy the second prong, "the defendant must show prejudice: a reasonable probability (i.e.[,] a probability sufficient to undermine confidence in the outcome) that, but for counsel's errors, the result of the proceeding would have been different." *Id*. (citing *Strickland*, 466 U.S. at 694).

Humphrey v. State, 73 N.E.3d 677, 681-82 (Ind. 2017). Failure to satisfy either of the two prongs will cause the claim to fail. *French v. State*, 778 N.E.2d 816, 824 (Ind. 2002). Indeed, most ineffective assistance of counsel claims can be resolved by a prejudice inquiry alone. *Id*.

Assistance of Trial Counsel

[7] Boyd asserts that the post-conviction court erred when it denied his petition because, according to Boyd, he received ineffective assistance of trial counsel. Specifically, Boyd alleges that his attorney was ineffective for failing to: object to alleged prosecutorial misconduct, call certain witnesses to testify, object to the prosecutor's use of leading questions during direct examination of the victim, object to the introduction of impeachment evidence, present certain alibi evidence, and present evidence refuting the size of the bathroom where Boyd forced himself on S.M. Boyd also argues that the cumulative effect of all the ineffective assistance of trial counsel claims that he raises is grounds for reversal. We address each argument in turn.

1. Prosecutorial Misconduct

[8] Boyd first asserts that his trial counsel rendered ineffective assistance when counsel failed to object to certain comments the prosecutor made during opening statements. Boyd claims that the prosecutor impermissibly vouched for S.M.'s truthfulness when the prosecutor commented as follows: "[Y]ou will hear [S.M.] testify there is no[ ] motive for her to fabricate this story[;] she's truthful and we believe that[.]" Direct Appeal Tr. at 86-87. Boyd maintains that his counsel should have objected to the comments, requested an admonishment to the jury, and moved for mistrial. However, the State contends that because Boyd challenged these comments on direct appeal, the doctrine of res judicata bars Boyd from raising this issue again in his petition for post-conviction relief. We cannot agree with the State.

[9] As a general rule,

> when this Court decides an issue on direct appeal, the doctrine of res judicata applies, thereby precluding its review in post-conviction proceedings. The doctrine of res judicata prevents the repetitious litigation of that which is essentially the same dispute. A petitioner for post-conviction relief cannot escape the effect of claim preclusion merely by using different language to phrase an issue and define an alleged error.

Ben-Yisrayl v. State, 738 N.E.2d 253, 258 (Ind. 2000) (internal citations omitted), *cert. denied*, 534 U.S. 1164 (2002).

[10] On direct appeal, Boyd argued that the prosecutor committed misconduct when, during his opening statement, he made comments that personally

vouched for S.M.'s credibility. In our decision, we first noted that Boyd failed to object to the statement at trial; thus, to prevail, Boyd needed to establish that "the prosecutor committed misconduct *and* that the alleged misconduct constituted fundamental error." *Boyd*, 2010 WL 2396260, at *2. We also observed that opening statements are not evidence and that the jury in Boyd's case was "instructed accordingly during preliminary and final jury instructions." *Id.* Ultimately, however, we did not address Boyd's issue of prosecutorial misconduct on the merits. Instead, we "decline[d] to find that th[e] statement rose to the level of fundamental error[,]" "[g]iven the content of the jury instructions and the brevity of the [prosecutor's] remark in the context of the trial as a whole[.]" *Id.*

[11] Here, we find that Boyd's current claim – that his trial counsel was ineffective for failing to object to the prosecutor's comments – does not rephrase an issue that was adversely decided on direct appeal. *See Reed v. State*, 856 N.E.2d 1189, 1195 (Ind. 2006) (found doctrine of res judicata inapplicable to Reed's post-conviction sentencing claim where Court of Appeals did not address that particular sentencing issue on direct appeal). As such, the doctrine of res judicata is not applicable here. Therefore, we address Boyd's claim that he was denied the effective assistance of trial counsel on grounds that counsel failed to object to comments made by the prosecutor during opening statements.

[12] "In order to prove ineffective assistance of counsel due to the failure to object, a defendant must prove that an objection would have been sustained if made and that he was prejudiced by the failure." *Kubsch v. State*, 934 N.E.2d 1138, 1150

(Ind. 2010). When reviewing a claim of prosecutorial misconduct, we determine (1) whether the prosecutor engaged in misconduct, and, if so, (2), whether the misconduct, under all of the circumstances, placed the defendant in a position of grave peril to which he should not have been subjected. *Carter v. State*, 956 N.E.2d 167, 169 (Ind. Ct. App. 2011), *trans. denied*. The gravity of the peril turns on the probable persuasive effect of the misconduct on the jury's decision, not on the degree of impropriety of the conduct. *Id.*

[13] It is well-settled that a prosecutor may not state his or her personal opinion as to the credibility of a witness during trial, as such statements amount to vouching for a witness. *Thomas v. State*, 965 N.E.2d 70, 77 (Ind. Ct. App. 2012), *trans. denied*. However, "a prosecutor may comment as to witness credibility if the assertions are based on reasons arising from the evidence presented in the trial." *Id.*

[14] As stated above, Boyd challenges the following part of the prosecutor's opening statements as improper vouching: "[Y]ou will hear [S.M.] testify there is no[ ] motive for her to fabricate this story[;] she's truthful and we believe that[.]" Direct Appeal Tr. at 86-87. We find that these statements constitute improper vouching for S.M.'s credibility and that an objection by Boyd's counsel would have been sustained. The credibility of S.M. was central to this case. And the prosecutor's statements were not based on, indeed could not yet have been based on, evidence presented at trial. *Id.*

[15] Nevertheless, we cannot say that under the circumstances of this case, the prosecutor's misconduct placed Boyd in a position of grave peril or that but for counsel's deficient performance in failing to object to the comments, the outcome of Boyd's trial would have been different. First, opening statements are not evidence. *McIntyre v. State*, 717 N.E.2d 114, 123 (Ind. 1999). And the jury in this case was instructed that they may not be taken as such. Specifically, the trial court preliminarily instructed the jury as follows: "[T]he attorneys will have an opportunity to make opening statements. These statements are not evidence and should be considered only as a preview of what the attorneys expect the evidence will be." Direct Appeal Tr. at 85. The court's final instruction to the jury on the matter was that "the unsworn statements or comments of counsel on either side of the case should not be considered as evidence in this case." *Id.* at 161. Second, the prosecutor's remarks were brief in the context of the trial as a whole. *See Boyd*, 2010 WL 2396260, at *2. Third, during the trial, the jury heard the testimony of S.M., who testified that Boyd kissed her, got down on his knees, pulled her pants down and performed oral sex on her, and then took S.M. into the bathroom, laid her down and penetrated her vagina with his penis. *See* Direct Appeal Tr. 93-94. It is unlikely that the jury found Boyd guilty of child molesting for a reason other than the evidence introduced at trial. Lastly, any harm done by the prosecutor's comments was not substantial, and did not result in fundamental error. *See Boyd*, 2010 WL 2396260, at *2. Therefore, the post-conviction court did not err by denying relief on this claim.

2. *Victim's Statements During the Medical Examination*

[16] Boyd also claims that his trial counsel was ineffective for failing to call Dr. George Merkle ("Dr. Merkle") and Nelle Marie Brown, the doctor's nurse practitioner ("Nurse Brown"), as witnesses. We note that a decision regarding what witnesses to call is a matter of trial strategy which an appellate court will not second-guess. *Brown v. State*, 691 N.E.2d 438, 447 (Ind. 1998); *see also Wrinkles v. State*, 749 N.E.2d 1179, 1200 (Ind. 2001) (stating that the decision of which witnesses to call is "the epitome of a strategic decision") (citation omitted), *cert. denied*, 535 U.S. 1019 (2002).

[17] In January 2003, S.M.'s mother, suspecting that S.M. and S.M.'s twin sister A.M. had been molested, took the girls to Dr. Merkle's office to have them examined. Because of the sensitive nature of the office visit, Nurse Brown performed the examination, but Dr. Merkle remained in the room while the examination took place and did briefly examine the girls' external genitalia. Nurse Brown prepared medical reports for the visit, and Dr. Merkle signed-off on the reports. The reports revealed, in relevant part, that during the course of the examination, S.M. told Nurse Brown that "Jamie Boyd[ ] is approximately 25 years old" and that "Jamie tried to kiss me and ripped my underwear, *but did not do it to me*." Ex. Index at 215 (emphasis added). The reports also stated that the examination of S.M.'s "external genitalia show[ed] the hymen intact and no tears[.]" *Id.* 205, 215.

[18] Several years later, in 2012, Boyd obtained sworn affidavits from Dr. Merkle and Nurse Brown regarding the 2003 examination. Dr. Merkle stated in his

affidavit that he "d[id] not clearly remember, independent from [his] review of the subject medical reports, the medical examination in question." *Id.* at 200. However, both the doctor and Nurse Brown stated in their affidavits that the examination found both girls' hymens to be intact, with no signs of tears, and that there was "no physical, [sic] medical evidence of them having been sexually assaulted." *Id.* at 201, 211.

[19] Boyd claims that his trial counsel was ineffective for failing to call Dr. Merkle and Nurse Brown as witnesses because they could have impeached S.M's testimony regarding the statements that she made to Nurse Brown about Boyd. He also claims that the witnesses could have "directly contradict[ed] S.M.'s allegations [of sexual abuse] by providing medical proof of no sexual intercourse[.]" Appellant's Br. at 20. According to Boyd, "[t]his would have been strong evidence that could have been presented to a jury that would have helped support a reasonable doubt argument." *Id.*

[20] Regarding S.M.'s visit to Dr. Merkle's office and her statements to Nurse Brown, Boyd's counsel cross-examined S.M. as follows at trial:

> [Defense Counsel] . . . Did there come a time when your mother took you to a Dr. Merkle?
>
> [S.M.] A Dr. Nel [sic] Marie.
>
> [Defense Counsel] Okay. A Dr. Nel [sic] Marie?
>
> [S.M.] Yes.

> [Defense Counsel] And did she work for Dr. Merkle?
>
> [S.M.] Yes.
>
> [Defense Counsel] . . . [D]id you tell either [Nurse Brown] or Dr. Merkle that [Boyd] tried to kiss me and rip my underwear but did not do it to me?
>
> [S.M.] No, never said that.
>
> [Defense Counsel] So if they, if their report says that, that's not true?
>
> [S.M.] Yes.
>
> [Defense Counsel] . . . but you did go to the doctor?
>
> [S.M.] Yes, I did.

Direct Appeal Tr. at 102.

[21] Boyd's counsel chose cross-examination as the means to address the discrepancy regarding S.M.'s statements to Nurse Brown and to impeach S.M. S.M. unequivocally denied the accuracy of the medical reports with regard to the statements. It is well-settled that the method of impeaching witnesses is a tactical decision and a matter of trial strategy that does not amount to ineffective assistance. *Kubsch*, 934 N.E.2d at 1151 (citing *Bivins v. State*, 735 N.E.2d 1116, 1134 (Ind. 2000)).

[22] Regarding the medical reports' findings that there was no medical evidence that S.M. had been sexually assaulted, we are not persuaded that the outcome of Boyd's trial would have been different had the doctor and the nurse actually testified to this evidence. One and one-half years had passed between the time Boyd molested S.M. and the time S.M. was medically examined. And, as our Supreme Court noted in *Carter v. State*, 754 N.E.2d 877, 880 (Ind. 2001), "by its very nature[,] child molestation often occurs without witnesses or physical evidence."

[23] Based on the foregoing, we agree with the post-conviction court that there was no deficient performance in counsel's decision not to call Dr. Merkle and Nurse Brown as witnesses, and we do not see how the introduction of additional impeachment evidence against S.M. would have resulted in a different outcome. *See McCary*, 761 N.E.2d at 392 (citing, *Strickland*, 466 U.S. at 694). Therefore, this ineffective assistance claim fails.

3. Leading Questions

[24] Boyd next contends that his trial counsel was ineffective for failing to object to what he describes as "a series of twenty-two consecutive leading questions" that the deputy prosecutor asked S.M. on redirect examination regarding the incident. Appellant's Br. at 21. To prevail on a claim of ineffective assistance due to the failure to object, the defendant must show an objection would have been sustained if made. *Overstreet v. State*, 877 N.E.2d 144, 155 (Ind. 2007), *cert. denied*, 555 U.S. 972 (2008). In determining whether an objection would have been sustained, we presume that the trial judge will act according to the

law. *Strickland*, 466 U.S. at 694. Furthermore, our Supreme Court has acknowledged that counsel may have a legitimate "strategy of declining to object." *Overstreet*, 877 N.E.2d at 155. "Counsel is afforded considerable discretion in choosing strategy and tactics, and we will accord that decision deference." *Pruitt v. State*, 903 N.E.2d 899, 906 (Ind. 2009) (quotations and alteration omitted).

[25] On cross-examination, Boyd's counsel challenged S.M.'s memory of the incident by pointing out that her trial testimony differed from the information she provided in her 2006 statement to the police regarding the incident. On redirect examination, the prosecutor asked S.M. a series of leading questions by which S.M. again recounted her recollection of the details of the incident. According to Boyd, the leading questions allowed the prosecutor to "essentially . . . get a '2nd bite of the apple' in that S.M. was able to retell her story to the jury a second time and reaffirm her prior testimony." Appellant's Br. at 21. Boyd maintains that, had his trial counsel objected to the string of leading questions, the objection would have been sustained. And Boyd proffers that his "counsel's [failure to object amounted to] performance [that] was deficient and fell below an objective standard of reasonableness" such that Boyd "suffered prejudice." *Id.*

[26] Indiana Evidence Rule 611(c) provides: "Leading questions should not be used on direct examination except as necessary to develop the witness's testimony." A leading question is one that suggests the desired answer to the witness. *Williams v. State*, 733 N.E.2d 919, 922 (Ind. 2000). The use of leading questions

is limited in order to prevent the substitution of the attorney's language for the thoughts of the witness as to material facts in dispute. *Id.* The trial court is afforded wide discretion in allowing leading questions, and the court's decision will be reversed only for an abuse of discretion. *Bussey v. State*, 536 N.E.2d 1027, 1029 (Ind. 1989).

[27] In its findings and conclusions, the post-conviction court found that Boyd's trial counsel was not ineffective for failing to object to the leading questions because

> no new, meaningful testimony was gained during the leading questions and the cumulative nature of the testimony was highly unlikely to have had a determinative outcome on the trial. As such, an objection to such questioning would not show that it was reasonably probable to lead to a different outcome, thus failing prong two of *Strickland*.

Appellant's App. Vol. II at 27. We agree. At this point in S.M.'s testimony, she had already explained Boyd's attack on her to the jury. The additional questioning, which revisited the details of the attack, was likely of minimal impact on the jury on the ultimate question of whether Boyd committed child molesting. As such, while the prosecutor's questions may have been leading, any error here was harmless. "Harmless error is defined as an error that does not affect the substantial rights of a party." *Lander v. State*, 762 N.E.2d 1208, 1213 (Ind. 2002) (citation and quotations marks omitted). And Boyd has not shown how he was prejudiced by the nature of the questions, that is, that but for his counsel's errors, the outcome of his trial would have been different. Finally, Boyd's trial counsel may well have made a strategic decision to not

object to the questions, and we will not reconsider that strategy. *See Pruitt*, 903 N.E.2d at 906. Boyd's trial counsel was not ineffective here.

4. Impeachment Evidence – Prior Burglary Conviction

[28] Boyd also argues that he received ineffective assistance of trial counsel because counsel failed to object to the admission of Boyd's past burglary conviction as impeachment evidence. On this claim, the State argues that Boyd's challenge to the admission of the evidence is barred by res judicata because Boyd raised this issue in his direct appeal. We agree.

[29] On direct appeal, Boyd argued that the trial court erred by admitting evidence of his past burglary conviction as impeachment evidence. Pretrial, Boyd had filed a motion in limine seeking to prohibit the introduction of the evidence; however, the trial court denied the motion. At trial, Boyd's counsel failed to object when the prosecutor asked Boyd questions regarding the conviction.[2] As such, this Court determined that Boyd had waived the issue for review. Therefore, to prove that he was entitled to relief on the claim, he was required to "establish that any error was fundamental." *Boyd*, 2010 WL 2396260, at *3. While we noted potential errors in the admission of the impeachment evidence, we ultimately determined that any error did not rise to the level of fundamental error because the prosecutor's "questioning regarding the prior conviction was very brief[,]" and there was a "lack of similarity between the prior burglary

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[2] Boyd testified in his own defense at trial.

conviction and the present child molesting charge [which] decrease[d] the possibility that the jurors impermissibly inferred Boyd's guilt based on the past conviction." *Id.* at *4.

[30] Here, Boyd asks this Court to find he received ineffective assistance of trial counsel because, according to Boyd, "the admission of his past burglary conviction rises to the level of fundamental error." Appellant's Br. at 21. In other words, Boyd merely asks us to reconsider our holding in *Boyd I* that this alleged error was not fundamental error. Boyd's efforts to redesignate and repackage this issue as an ineffective assistance of trial counsel claim is barred by res judicata. *See Trueblood v. State*, 715 N.E.2d 1242, 1248 (Ind. 1999) (holding that if an issue was raised on direct appeal, but decided adversely to the petitioner, it is res judicata), *cert. denied*, 531 U.S. 858 (2000).

5. Alibi Evidence

[31] Next, Boyd argues that trial counsel was ineffective for failing to call Jayne Franklin, a witness that, according to Boyd, would have established his alibi. In July 2001, Franklin was the co-owner of Prospect Contracting, LLC, was in charge of payroll and accounting at the company, and was Boyd's employer. At trial, S.M. provided testimony that the molestation "maybe" occurred over the 4th of July weekend in 2001. Direct Appeal Tr. at 92. Boyd testified that he was working in Ohio at the time the molestation took place.

[32] Regarding the alibi witness issue, the post-conviction court, in its findings and conclusions, "acknowledge[d] that this issue has more merit than the simple act

of filing the notice of alibi."[3] Appellant's App. Vol. II at 28. As for counsel's decision not to call Franklin as a witness, the court noted: "[o]n its face, [Franklin's] testimony and accompanying pay history provides some level of alibi defense"; and "[i]f nothing else, it at least provides some level of contradiction to the facts testified to by the victim at trial, which was that the molestation took place on July 4th weekend." *Id.* Ultimately, however, the court determined that "calling [Franklin] and presenting this evidence likely would not have led to the reasonable probability of a different outcome." *Id.* We agree.

[33] As set forth above, generally, "in the context of an ineffective assistance claim, a decision regarding what witnesses to call is a matter of trial strategy which an appellate court will not second-guess." *Curtis v. State*, 905 N.E.2d 410, 415 (Ind. Ct. App. 2009) (citation and quotations marks omitted), *trans. denied*. Also, in reviewing claims of ineffective assistance, we are mindful that the failure to present an alibi defense is not necessarily ineffective assistance of counsel. *D.D.K. v. State*, 750 N.E.2d 885, 890 (Ind. Ct. App. 2001) (citing *Jones v. State*, 569 N.E.2d 975, 982-83 (Ind. Ct. App. 1991)).

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[3] In his petition for post-conviction relief, Boyd argued that his trial counsel was ineffective for failing to file a notice of Boyd's intent to offer an alibi. In its findings and conclusions, the post-conviction court concluded that "even if [Boyd] had filed alibi paperwork, the odds of it having made any difference in the outcome of this matter is extraordinarily low." Appellant's App. Vol. II at 28. However, Boyd does not pursue this issue on appeal, therefore, we do not address it.

[34] Franklin's sworn statement that was admitted into evidence at the post-conviction hearing provided that, while Boyd was working in Ohio on Monday, July 2, 2001, Tuesday, July 3, Wednesday, July 4, and Thursday, July 5, Boyd did not work the weekend prior to July 4 or the weekend following July 4. Ex. Index at 219. Assuming arguendo that Boyd's trial counsel's performance was deficient for failing to call Franklin as an alibi witness, Franklin's testimony would not have conclusively disproved S.M.'s account that the molestation "maybe" took place over the 4th of July weekend. Direct Appeal Tr. at 92. As such, we cannot say that Boyd has shown that the result of his trial would have been different even if Franklin had testified. Boyd's trial counsel was not ineffective on this claim.

6. Bathroom Size

[35] Boyd next argues that his trial counsel was ineffective because, according to Boyd, counsel "should have called one or more witnesses to provide personal knowledge of the bathroom in question where the sexual penetration was alleged to have occurred in order to refute the State's witness[,]" Kyle Wilhite. Appellant's Br. at 23. Wilhite was living in the house where the molestation took place at the time the incident occurred. He testified at trial regarding the size of the bathroom, stating that "it was a pretty decent sized bathroom"; "I want to say roughly like all together [sic] could cram maybe 5 people in there"; "[i]t was rather a big bathroom." Direct Appeal Tr. at 118.

[36] Specifically, Boyd contends that Wilhite's testimony "bolster[ed] S.M.'s allegation that Boyd laid her down in the bathroom and had intercourse with

her on the floor." Appellant's Br. at 23. According to Boyd, refuting the size of the bathroom was "paramount in that the jury would have had testimony demonstrating that the bathroom would be too small for an adult male to have intercourse with a female child[.]" *Id.* Thus, Boyd maintains that his trial counsel's performance was deficient for failing to call a witness to refute Wilhite's testimony, and Boyd was prejudiced by counsel's deficient performance because "the jury was left with no counter evidence as to bathroom size for which to create a reasonable doubt regarding S.M.'s allegations." *Id.*

[37] We strongly presume that counsel rendered adequate assistance. *See Strickland*, 466 U.S. at 689-90. Still, under certain circumstances, a failure to call a useful witness can constitute deficient performance. *See Brown*, 691 N.E.2d at 447. However, both the Indiana Supreme Court and this Court have previously held that a "decision regarding what witnesses to call is a matter of trial strategy which an appellate court will not second-guess[.]" *Id.*; *see also Johnson v. State*, 832 N.E.2d 985, 1003 (Ind. Ct. App. 2005), *trans. denied*. And when an ineffective assistance of counsel claim alleges the failure to present witnesses, the petitioner must offer evidence as to who the witnesses were and what their testimony would have been. *Lee v. State*, 694 N.E.2d 719, 722 (Ind. 1998), *cert. denied*, 525 U.S. 1023 (1998).

[38] Here, in his petition for post-conviction relief and at the ensuing hearing, Boyd neither identified potential witnesses nor provided affidavits of what their testimony would have been had his counsel called them. Therefore, on this

claim of failure to call witnesses, Boyd has failed to show deficient performance on his trial counsel's part or any resulting prejudice. Accordingly, he has failed to show that the post-conviction court erred by denying relief on this claim.

7. Cumulative Effect of the Ineffective Assistance of Trial Counsel Claims

[39] Finally, Boyd contends that the cumulative effect of the alleged errors amounted to ineffective assistance and, thus, his conviction should be set aside. However, as we have discussed, Boyd has failed to demonstrate that his trial counsel rendered ineffective assistance. Alleged "[t]rial irregularities which standing alone do not amount to error do not gain the stature of reversible error when taken together." *Reaves v. State*, 586 N.E.2d 847, 858 (Ind. 1992). Boyd is entitled to no relief on this claim.

[40] We conclude that the post-conviction court properly rejected Boyd's claims of ineffective assistance of trial counsel and that Boyd's impeachment evidence claim is barred by res judicata because it was already litigated on direct appeal. The judgment of the post-conviction court is affirmed.

[41] Affirmed.

Riley, J., and Brown, J., concur.