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IN THE COURT OF APPEALS OF INDIANA

Nicholas Pelissier,
Appellant-Petitioner,
v.
State of Indiana,
Appellee-Respondent.

June 9, 2022

Court of Appeals Case No. 21A-PC-2033

Appeal from the Lake Superior Court

The Honorable Salvador Vasquez, Judge

The Honorable Kathleen A. Sullivan, Magistrate

Trial Court Cause No. 45G01-2003-PC-13

Friedlander, Senior Judge.

[1] Nicholas Pelissier appeals from the post-conviction court's order denying his request for relief, contending that the post-conviction court erred because he was denied the effective assistance of both trial and appellate counsel. We affirm.

[2] The facts and procedural history supporting Pelissier's conviction were set forth in our decision on his direct appeal affirming his conviction, and the following summarization comes from that decision. *See Pelissier v. State*, 122 N.E.3d 983 (Ind. Ct. App. 2019), *trans. denied*. On November 12, 2016, Timothy Fryerson and his friend, Jondell Golida, walked to a gas station near Golida's house. After they purchased items there, and as they crossed the parking lot, an occupant of a red Dodge Durango SUV that was parked at one of the pumps said something to the pair. When they did not respond, an occupant seated in the rear of the SUV opened the door and displayed a gun, saying "come here." *Id.* at 157. Fryerson recognized that person as Galloway, someone with whom he had attended middle school. This interaction was captured on surveillance video which was later admitted in evidence at trial.

[3] Fryerson and Golida continued walking, and while doing so Fryerson called his father to inform him about their dangerous situation, letting his family know to "be looking out for" him because he thought "they gonna shoot us." Tr. Vol. II, p. 157, 160. As they turned a corner, heading toward Fryerson's house, they noticed the SUV was following them. The SUV stopped, and the two rear passenger doors opened. Fryerson and Golida began running, and Fryerson was shot once in the back, "had a stroke and . . . blacked out." *Id.* at 163. Fryerson's mother, who heard multiple shots from inside the family home, ran outside where she found Fryerson lying in the gutter. Fryerson's brother called the police, and after the ambulance arrived, Fryerson was transported to a hospital in Chicago. Fryerson remained there for a month, during which time he was placed in a medically-induced coma and experienced partial paralysis as

a result of his injuries. The doctor who treated Fryerson testified that without medical intervention "it's very likely he would have died." *Id.* at 178.

[4] As for Golida, officers found him further down the street from where Fryerson fell. Golida had been shot ten times and died as a result of his wounds. Officers found eight 10-millimeter cartridge cases at the scene of the shooting, all of which had been fired from the same gun. The police also found three 45-caliber cartridge casings that had been fired from a single gun. Police additionally located a mutilated spent bullet from a 40-caliber firearm that did not match the firearm associated with the other shell casings found at the scene.

[5] Gary Police Officer Marcus Harris reviewed surveillance footage showing the interactions between those in the SUV and the victims. He then drove around the neighborhood looking for the SUV and found it parked in front of a residence about five to six blocks away from the gas station. Another officer arrived on the scene with his K-9 partner, and the dog led the officers to the front door of a nearby house. After speaking with the owner of the SUV and obtaining consent, officers towed the SUV to the crime lab for investigation. Pelissier's fingerprint was found on one of the rear passenger doors.

[6] Police interviewed Tammarshea Jones after establishing her connection to the SUV. Jones, in her recorded statement, told the officers that she was in the SUV at the time of the shooting. She identified the other occupants of the SUV as her boyfriend, Kendall Vaughn, William Galloway, another person, and a "light-skinned dude." State Ex. 108. Jones told police that Galloway and the "light-skinned dude" were the shooters. *Id.* Jones knew "the light-skinned guy" as "Freaky" and she said that after the shooting, Freaky returned to the SUV, saying, "I got his ass." *Id.* At trial, Jones identified Pelissier as the "light skinned dude" she referred to during her interview with police. Trial Tr. Vol. V, p. 96.

[7] Police interviewed Jones' boyfriend, Vaughn, two times during which he identified Pelissier and Galloway as the shooters. He also said that Galloway's gun jammed during the shootings. During the second interview, Vaughn looked at a photo array and identified a person he knew as "Freaky" as one of the shooters. Next to Pelissier's picture in the photo array, Vaughn wrote "kill[ed] the boy." State's Ex. 107. During trial, Vaughn identified Pelissier as the person he knew as "Freaky." *Id.* at 198.

[8] The State charged Pelissier with murder and Level 1 felony attempted murder. At trial, Vaughn claimed he did not remember what he was doing on the day of the shooting, that he did not remember what he said when he gave the two statements to police, and that he did not remember anything related to the shooting. Over Pelissier's objection, the court admitted the video recordings of his two statements to police. In the published portions of his statements, he said that Pelissier shot the one who ran, meaning Fryerson, that Galloway shot the individual closer to 49th Avenue, meaning Golida, but that when Galloway's gun jammed, Pelissier finished him off. That evidence was corroborated by firearm expert testimony as well as the testimony of a forensic pathologist. The forensic pathologist's conclusion was that the shot to Golida's forehead was the only inherently fatal shot, which was further corroborated by Vaughn's statement that Pelissier finished off Golida. The State argued that Pelissier possessed the .45 caliber firearm that shot Fryerson and killed Golida.

[9] During the trial, when asked if Pelissier was in the SUV on the date of the shooting, Vaughn answered, "Not sure. No." Trial Tr. Vol. V, p. 203. During Vaughn's testimony, Pelissier moved for a mistrial, moved to exclude evidence, and asked permission to depose Vaughn. The trial court denied all three requests.

[10] The court also admitted, over Pelissier's objection, the photo array containing his picture, and Detective Jeffrey Minchuk was permitted to testify that Vaughn wrote on the photo array next to Pelissier's picture, "kill[ed] the boy." Trial Tr. Vol. VI, p. 20. Detective Minchuk also identified Pelissier as an "individual near the vehicle" on the gas station surveillance tape. *Id.* at 24.

[11] The jury found Pelissier guilty on both counts, and on February 15, 2018, the trial court sentenced Pelissier to fifty-five years for murder, to be served consecutively to a thirty-year sentence for Level 1 felony attempted murder, resulting in an aggregate sentence of eighty-five years incarcerated.

[12] On direct appeal Pelissier challenged the admission of Vaughn's statement as well as his identification of Pelissier, which was written on the photo array and testified to by Officer Minchuk. He also challenged his sentence on grounds that it was inappropriate. After holding oral argument, we affirmed his convictions and sentence, and the Supreme Court denied transfer. *See Pelissier*, 122 N.E.3d 983. On petition to transfer, Pelissier's appellate counsel erroneously, but not in a way that was intentionally misleading, informed the Supreme Court that Jones had definitively testified that her recorded statement was accurate.

[13] Next, Pelissier pursued post-conviction relief, arguing that his trial counsel's performance was deficient because she failed to object to the final jury instructions or to provide the court with a correct instruction on accomplice liability as it relates to the crime of attempted murder. More specifically, he argued that an instruction should have been provided to the jury stating the requirement that an accomplice to attempted murder must independently have the requisite specific intent to kill the victim. He claimed that trial counsel should have objected to the instruction on accomplice liability (Instruction 7), but did not, nor did she tender a correct instruction. *See* Appellant's Br. pp. 16-17, 21-25. As for appellate counsel, Pelissier challenged appellate counsel's

decisions regarding the admission of Jones' and Vaughn's recorded statements and the manner in which he contested or did not contest the admission of those statements.

[14] Trial counsel testified during the evidentiary hearing that she did not recall any deficiencies in the attempted murder and accomplice liability instructions at the time of trial. She said that she had objected to the admission of the statements made by Vaughn and Jones and had submitted a form recommending to appellate counsel to raise those issues on appeal. Appellate counsel also testified at the hearing and stated his strategic reasons for not attacking the admission of Jones' recorded statement. He also testified about why he did not challenge the instructional error regarding the accomplice liability instruction as it related to the attempted murder charge.

[15] The post-conviction court issued findings of fact and conclusions of law, denying Pelissier's petition. Pelissier now appeals.

[16] "Post-conviction proceedings do not provide criminal defendants with a 'super-appeal.'" *Garrett v. State*, 992 N.E.2d 710, 718 (Ind. 2013). Rather, they provide a narrow remedy to raise issues that were not known at the time of the original trial or were unavailable on direct appeal. *Id.* Issues available but not raised on direct appeal are waived, while issues litigated adversely to the defendant on direct appeal are res judicata. *Pruitt v. State*, 903 N.E.2d 899 (Ind. 2009).

[17] A petitioner who has been denied post-conviction relief appeals from a negative judgment. *Saunders v. State*, 794 N.E.2d 523 (Ind. Ct. App. 2003). A post-conviction court's denial of relief will be affirmed unless the petitioner shows that the evidence leads unerringly and unmistakably to a decision opposite to that reached by the post-conviction court. *Id.* We review the post-conviction court's factual findings for clear error but do not defer to its conclusions of law. *Wilkes v. State*, 984 N.E.2d 1236 (Ind. 2013). We will not reweigh the evidence

or judge the credibility of the witnesses. *Hinesley v. State*, 999 N.E.2d 975 (Ind. Ct. App. 2013), *trans. denied*.

[18] Pellisier alleges ineffective assistance of both trial and appellate counsel in this appeal. When reviewing claims of ineffective assistance of counsel, we have stated the following:

> We evaluate claims of ineffective assistance under the two-part test originally set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). A petitioner must demonstrate that his or her counsel performed deficiently, resulting in prejudice. Counsel renders deficient performance when his or her representation fails to meet an objective standard of reasonableness. Prejudice exists when a petitioner demonstrates that, if not for counsel's deficient performance, there is a reasonable probability that the result would have been different. A petitioner must prove both parts of the test, and failure to do so will cause the claim to fail.
>
> We strongly presume counsel provided adequate assistance and exercised reasonable professional judgment in all significant decisions. Counsel's conduct is assessed based on facts known at the time and not through hindsight.

Cole v. State, 61 N.E.3d 384, 387 (Ind. Ct. App. 2016) (most citations omitted), *trans. denied.*

[19] We apply the same standard of review to claims of ineffective assistance of appellate counsel as we apply to claims of ineffective assistance of trial counsel. *See Walker v. State*, 843 N.E.2d 50 (Ind. Ct. App. 2006), *trans. denied*.

Trial Counsel

[20] Pelissier's argument here is premised on the theory that the jury concluded that Pelissier was not directly liable for any of the crimes, but instead was Galloway's accomplice in the murder and attempted murder. Though the post-

conviction court found any error in the jury instructions to be harmless, Pelissier reasserts his claim that it was not, as his trial counsel's performance was deficient in that she failed to object to final Jury Instruction 7 and failed to provide the court with a correct instruction on accomplice liability as it related to the crime of attempted murder. More particularly, Pelissier argues that due to counsel's failures, the jury was not properly instructed that to be convicted of attempted murder as an accomplice to Galloway, Pelissier must have had the specific intent to kill Fryerson. *See* Appellant's Br. pp. 16-17, 21-25.

[21] In *Spradlin v. State*, 569 N.E.2d 948 (Ind. 1991), our Supreme Court held that a jury must be instructed that attempted murder requires that the defendant had the specific intent to kill. And later, in *Williams v. State*, 737 N.E.2d 734 (Ind. 2000), our Supreme Court held that the *Spradlin* holding was equally applicable to jury instructions for attempted murder in the context of accomplice liability.

[22] Here, Jury Instruction 5 informed the jury as follows:

> Before you may convict the defendant of attempted murder as a Level 1 felony, the State must have proved each of the following elements:
>
> 1. The defendant,
>
> 2. acting with the specific intent to kill Timothy Fryerson,
>
> 3. did attempt to commit the crime of murder, which is to knowingly or intentionally kill another human being, namely: Timothy Fryerson,
>
> 4. by engaging in conduct, that is: knowingly or intentionally shoot Timothy Fryerson with the intent to kill,
>
> 5. which was conduct constituting a substantial step toward the commission of said crime of murder.
>
> If the State failed to prove each of these elements beyond a reasonable doubt, you must find the defendant not guilty of the

> crime of attempted murder, a Level 1 felony, as charged in Count II.

Direct Appeal Appellant's App. Vol. 2, p. 161.

[23] Next, as respects an attempt to commit a crime, Jury Instruction 6 stated:

> The two elements necessary for an attempt to commit a crime are:
>
> 1. acting with the specific intent to commit the crime and
>
> 2. engaging in conduct that constitutes a substantial step toward commission of the crime.
>
> The emphasis of the statute is on what the defendant has already done toward committing the crime and not on what remains to be done. What constitutes a substantial step must be determined from all the circumstances of each case, and the conduct must be strongly corroborative of the firmness of the defendant's criminal intent.

Id. at 162.

[24] Jury Instruction 7 instructed the jury on accomplice liability. The concluding portion of the instruction reads as follows:

> Before you may convict the defendant, the State must have proved each of the following elements beyond a reasonable doubt:
>
> 1. The defendant,
>
> 2. knowingly or intentionally,
>
> 3. aided, induced or caused
>
> 4. William Galloway to commit the offense of Murder and Attempted Murder, Level 1 felony, (previously defined).
>
> If the State failed to prove each of these elements beyond a reasonable doubt, you must find the defendant not guilty.

Id. at 163. Clearly, the instruction does not include language about the element of specific intent to kill.

[25] Based on the trial record though, the post-conviction court found that "the failure to instruct the jury as to the specific intent required in order to convict Pelissier as an accomplice to attempted murder was harmless, and would not have impacted the outcome or verdict." Appellant's App. Vol. 2, p. 79. The court also found that "the trial record shows that the Petitioner, Pelissier, was the principle[sic] actor in the shooting of Timothy Fryerson and not acting as an accomplice to William Galloway for the purposes of that charge." *Id.* The trial transcript showed that though Fryerson, while on the phone with detectives from his hospital bed, initially identified Galloway as the man who shot him, he testified at trial that he was unable to see the two individuals who exited the vehicle just prior to the shooting.

[26] During closing argument, the State argued that according to Vaughn, Galloway shot the guy closer to 49th Street (Golida) and that Pelissier finished him off. The court also found that the evidence showed that while Golida was shot ten times, the fatal shot was delivered to his forehead. A firearm identification expert testified that there were eight spent 10mm casings and three spent .45 caliber casings, along with spent bullets of each caliber. In addition to the spent ammunition, the expert testified to the presence of a live round of 10mm ammunition that had markings consistent with having been worked through a firearm but never fired and that matched the markings found on the spent 10mm casings found on the scene. He concluded that the same firearm was used to work the live round as was used by those that were fired at the scene. The majority of the injuries suffered by Golida were made by 10mm ammunition. And of the nine total gunshot wounds, only three spent .45 caliber casings were recovered.

[27] State's Exhibit 112, Vaughn's recorded statement, was played for the jury in three sub-parts over objection. During the published portions, the jury learned that Vaughn gave several accounts of the events that night, including numerous inconsistencies. Vaughn's testimony was consistent, however, in his account that Pelissier initially shot Fryerson, that Galloway shot Golida, and that, when Galloway's gun jammed, Pelissier finished off Golida. Vaughn's statements were corroborated by the testimony of the firearms expert and the forensic pathologist. And the State argued in closing that Pelissier, possessing the .45 caliber firearm, shot Fryerson and then finished off Golida when Galloway's gun jammed.

[28] The post-conviction court concluded that based on the trial record, the jury had sufficient evidence to find Pelissier guilty of the attempted murder of Fryerson without the need to rely on a theory of accomplice liability, as the evidence showed that Pelissier was the sole actor in Fryerson's shooting, and thus, directly liable.

[29] We initially observe that Pelissier is not arguing that Jury Instruction 5 incorrectly instructs the jury that specific intent to kill is a required element of attempted murder. Because Jury Instruction 5 so instructs, the instructions as a whole "succeeded in informing the jury that [specific] intent to kill is an element of the crime of attempted murder." *Dawson v. State*, 810 N.E.2d 1165, 1175 (Ind. Ct. App. 2004), *trans. denied.*

[30] Nonetheless, Pelissier argues the weight of the evidence, stating that "Fryerson was shot one time [], the State could not prove which weapon was used and the State could not prove which man shot him." Reply Br. p. 9. Pelissier further argues that there "is a reasonable probability the attempted murder verdict was based on accomplice liability." *Id.* His argument concludes that as a consequence, the instructional error was not harmless. He also argues that

because Fryerson initially identified Galloway as his shooter, the attempted murder conviction must have been based on accomplice liability.

[31] We agree that the accomplice liability instruction did not inform the jury about the requisite element of the specific intent to kill as it should. *See Rosales v. State*, 23 N.E.3d 8 (Ind. 2015). We also agree with the post-conviction court, however, that the error was harmless. Here, despite Fryerson's hospital-bed identification of Galloway as his shooter, the munitions evidence and Vaughn's recorded statements to police identified Pelissier as Fryerson's shooter and as the shooter that delivered the kill shot to Golida after Galloway's weapon jammed. We further agree with the conclusion that identity was more at issue than intent, thereby rendering the instructional error to be harmless under these circumstances. Even though, as Pelissier puts it "the State could not prove which weapon was used and the State could not prove which man shot him," *see* Reply Br. p. 9, there was no uncontroverted evidence to suggest that Galloway shot Fryerson.

[32] Pelissier relies heavily on our Supreme Court's opinion in *Rosales*. Similarly, in that case, an incorrect accomplice liability instruction was given. But dissimilarly, the State, during closing argument, repeatedly argued that the specific intent to kill was not required for accomplice liability to commit attempted murder. *See Rosales*, 23 N.E.3d at 15. The State in that case also argued that "the State only has to prove that one person intended for death to occur." *See id.* On review, the Supreme Court observed that if the State "had not repeatedly misstated the law we likely would have found an insufficient likelihood of prejudice to Rosales from the instruction." *Id.* at 16.

[33] Pelissier has provided us with a segment of the State's closing argument, *see* Appellant's Br. p. 23, but taken in context, the State's argument in this case about accomplice liability does not misinform the jury about the law to the

extent found in *Rosales*. For the full context of the State's closing argument, we reproduce the discussion of accomplice liability here.

> During jury selection we talked a lot and I - - I talked a lot to most of you about accomplice liability. And why does that become relevant here? Well, you'll be instructed about accomplice liability. "A person who knowingly or intentionally aids another person to commit a crime such as murder, attempted murder, commits that offense." And it's enough. We were discussing in jury selection. We used the example of a robbery, when someone drives to a robbery - - a bank robbery, for example - - and one person gets out to rob it, the bank, but another person is the driver. And in that example each and every one of you agree at least with the - - the idea that the driver could be held accountable for that robbery. *And I think some of you indicated, well, you need some evidence of what the driver's intent was and if they knew what was going on.* Well, in this case, we're taking it a lot of steps further. We're not asking you to find the driver responsible for what happened to Jonquell Golida and Timothy Fryerson, no. We're asking you to find the shooters responsible for what happened to Jonquell Golida and Timothy Fryerson. And the whole reason why we brought up accomplice liability is that under the theory of accomplice liability - - and you've heard a lot of evidence about two shooters, that [Galloway] got out and started firing and that [Pellisier] got out and started firing. And together Jonquell Golida ended up dead and Timothy Fryerson ended up almost dead. And that's enough. That's enough. Two shooters. And the whole reason why we bring that up is it doesn't matter who shot the killing blow for Jonquell Golida. He had ten gunshot wounds. It's enough, if you believe that the State has proven that two separate shooters shot that individual and he ended up dead. It's irrelevant who shot the killing blow.

Direct Appeal Tr. Vol. 6, pp. 116-17 (emphasis added).

[34] Put in context, the State's closing argument referenced the accomplice liability instruction (which was an incorrect statement of the law) but then dovetailed

that reference with the voir dire example of participants in a robbery. The State then discussed the jurors' concern expressed during voir dire about requiring evidence of the robbery getaway driver's intent. Next, the State said that it was asking the jury to go even further and discussed the direct liability of the shooters for their actions. The State then concluded the discussion about accomplice liability by talking about Golida's murder, not Fryerson's attempted murder. These comments are strikingly dissimilar to the drumbeat recitation of the incorrect statement of law found in the *Rosales* case. We conclude that under the specific facts of this case, the post-conviction court correctly determined that the instructional error in this case was harmless. And as the error is harmless, Pelissier has failed to demonstrate that he was prejudiced by trial counsel's failure to object or tender a correct instruction on accomplice liability. He has not demonstrated that he received ineffective assistance of trial counsel.

Appellate Counsel

[35] As for appellate counsel's performance, Pelissier challenges counsel's choice of arguments and execution of the arguments on appeal. Of the three categories of appellate ineffectiveness claims, the pertinent one here is failure to present issues well. *See Bieghler v. State*, 690 N.E.2d 188 (Ind. 1997). Those kinds of claims often allege that though "counsel raised particular issues, counsel's presentation of them was inadequate in some way." *Id.* at 197. In some instances, an appellate counsel's work is so deficient that an issue, though technically raised, is deemed waived for failure to present cogent argument and/or cite facts in the record to support the claim. *Id.* In other cases, the reviewing court is able to reach the issue on the merits despite counsel's deficient performance. *Id.*

[36] And Pelissier's argument incorporates the claim that appellate counsel was ineffective by failing to raise an issue Pelissier argues should have been raised. *See id.* This is pertinent because our holdings say that "issues which were or

could have been raised on direct appeal are not available for review in post-conviction" proceedings. *Id.* However, ineffectiveness is rarely found in these instances in part because we have held that "the decision of what issues to raise is one of the most important strategic decisions to be made by appellate counsel." *Id.* Part of appellate advocacy is the ability to "winnow[] out weaker arguments on appeal" to "focus[] on one central issue if possible, or at most a few key issues." *Id.* at 194 (quoting *Jones v. Barnes*, 463 U.S. 745, 751-52 (1983)). The petitioner bears the burden of showing the unraised issue was significant and obvious on the face of the record, in addition to showing that the unraised issue was clearly stronger than the issue or issues that counsel raised. *Bieghler*, 690 N.E.2d at 194.

[37] We begin by examining what we decided in Pelissier's direct appeal. On direct appeal, Pelissier's appellate counsel challenged the court's evidentiary ruling on the admissibility of Vaughn's recorded statement under Indiana Evidence Rule 803(5), the hearsay exception for recorded recollections. Our opinion acknowledged that the parties agreed that the foundation had been laid as respects the first two parts of Evidence Rule 803(5), but disagreed completely as to whether the foundation had been met as respects the third part, that the statement accurately reflects the witness's knowledge. We noted that at trial Vaughn "never indicated what he said was not true" and that he "repeatedly stated that he had already answered the questions and referred the questioner to the video." *Pelissier*, 122 N.E.3d at 988. We observed that "as part of his statement on November 2016, Vaughn indicated that he was telling the truth." *Id.* He said, at one point in his testimony, "play the video man, so I can get up out of here." Trial Tr. Vol. V, p. 160.

[38] The panel declined to conclusively determine whether the admission of Vaughn's recorded statement was proper, choosing instead to consider the question of harmless error. As part of the harmless error analysis, we concluded

that Jones' statement, the admission of which was not challenged on appeal, coupled with the discovery of Pelissier's fingerprint on one of the rear doors of the SUV, plus Fryerson's testimony that the shooters both came out the rear doors of the SUV, was cumulative and that "any error in the admission of Vaughn's videotaped statements was harmless because the evidence in question was cumulative of other properly-admitted evidence." *Id.*

[39] We also addressed Pelissier's appellate challenge to the admissibility of the photo array. Vaughn was presented with a photo array during his recorded statement. He was observed circling Pelissier's picture and writing next to Pelissier's photograph, "kill[ed] the boy." State's Ex. 107. We concluded that "any error in the admission of the writing on the photo array is harmless because it is cumulative of evidence properly admitted including Jones' testimony and fingerprint evidence indicating Pelissier was present in the rear of the vehicle involved in the shooting." *Pelissier*, 122 N.E.3d at 989.

[40] Vaughn's recorded statement arguably is more damaging to Pelissier than Jones', in part because he identifies the actions of the shooters as he observed them. He related that Pelissier shot Fryerson and that Galloway shot Golida, but that when Galloway's gun jammed Pelissier finished him off. On the other hand, Jones' statement placed Pelissier in the SUV (already established by the fingerprint and Vaughn's statement), and she stated that upon Pelissier's return to the SUV he stated that "I got his ass." State's Ex. 108. This information was also provided and/or corroborated by Vaughn's statement.

[41] Which leads us to Pelissier's argument on appeal from the denial of post-conviction relief, where he bears the burden of proving that appellate counsel performed deficiently resulting in prejudice to him. He claims that appellate counsel should have also challenged the admissibility of Jones' recorded statement on appeal and that his failure to do so, coupled with his inaccurate

concession on petition to transfer that Jones indicated that her recorded statement was accurate, resulted in prejudice to him.

[42] At the hearing on the petition for post-conviction relief, Pelissier's appellate counsel stated that though the challenges to Jones' and Vaughn's recorded statements would be the same, i.e., a foundational challenge under Rule 803(5), he made the strategic decision not to make that challenge to Jones' statement. *See* PCR Tr. pp. 25-38. He stated that he believed that Jones' statement was beneficial to Pelissier's defense because he believed she placed another light-skinned individual in the SUV. That would have been helpful, in his opinion, because with the identity of the shooters at issue, it created the additional argument that another shooter shot Fryerson and killed Golida. He stated that she never identified Pelissier by name in the recorded statement nor did she pick him out of a lineup. However, appellate counsel also acknowledged that her statement harmed Pelissier in that she also stated that Pelissier, or "Freaky" as she knew him, returned to the SUV and announced that he had killed someone. *See id.* at 35-36. He further acknowledged that leaving Jones' recorded statement unchallenged meant that it left open the possibility that the admission of Vaughn's recorded statement would be found properly admitted on appeal despite the alleged foundational deficiency because it was cumulative of Jones' statement. That is exactly what we decided on direct appeal. *See Pelissier*, 122 N.E.3d at 988.

[43] "Counsel's performance is presumed effective, a presumption overcome only by strong and convincing evidence of ineffectiveness." *Hanks v. State,* 71 N.E.3d 1178, 1184 (Ind. Ct. App. 2017), *trans. denied.* What issues to raise is one of the most important strategic decisions to be made by appellate counsel. *Wrinkles v. State*, 749 N.E.2d 1179 (Ind. 2001). And counsel is afforded considerable discretion in choosing strategy and tactics, and appellate courts will accord that

decision deference. *See Conner v. State*, 711 N.E.2d 1238 (Ind. 1997). Further, even the finest, most experienced criminal defense attorneys may not agree on the ideal strategy or the most effective way to represent a client. *Id.* "Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective." *Bieghler*, 690 N.E.2d at 199. But, to make a reasonable tactical decision, counsel must have adequately investigated the client's case because strategic choices made after less than a complete investigation are reasonable to the extent the reasonable professional judgments support the limitations on investigation. *Conner*, 711 N.E.2d. at 1249.

[44] Here, appellate counsel, with thirty-three years' experience, made the strategic decision to roll the dice on not challenging Jones' recorded statement and lost. As the post-conviction court found, Jones' recorded statement established "the potential presence of a third individual in the back seat" that "would tend to raise doubt as to which individuals actually got out" of the SUV. Appellant's App. Vol. 2, p. 69. Other evidence placed Pelissier at the scene and showed he was a participant in interactions with the victims. Pelissier was identified by Detective Minchuk in the gas station surveillance video. Pelissier's fingerprint was found in the SUV. Fryerson testified that the SUV followed him and Golida to the scene of the crimes. We agree with the post-conviction court that the admission of Jones' statement led to our determination, seemingly in the alternative, that error in the admission of Vaughn's statement was harmless because it was cumulative of Jones' statement. Our holding[1] in that opinion clearly distinguishes the facts of this case from the facts of those in *Ballard v.*

[1] Though we did not explicitly and conclusively state on direct appeal in the *Pelissier* decision that there was no error in the admission of Vaughn's statement, one may presume the same because we engage in a harmless error, or assuming arguendo analysis after the discussion and distinction made between this case and the *Ballard* case.

State, 877 N.E.2d 860 (Ind. Ct. App. 2007). Because we decided the issue in that manner, we likely would have decided the issue the same way had appellate counsel raised a challenge as to the admissibility of Jones' recorded statement based on the comparison to the *Ballard* decision.[2]

[45] Furthermore, Pelissier's argument about appellate counsel's failure to challenge the inadequacy of the accomplice liability instruction must also fail. Because Pelissier's trial counsel did not object to the instruction or provide a correct instruction, any argument on appeal would have to have been based on fundamental error. We concluded above that trial counsel was not ineffective because Pelissier did not suffer prejudice from the harmless error. Here, we find that Pelissier has not met his burden of establishing ineffective assistance of appellate counsel. This is so because "a finding that Defendant was not denied the effective assistance of counsel also establishes that the alleged error was not so prejudicial as to constitute fundamental error." *Cowherd v. State*, 791 N.E.2d 833, 838 n.6 (Ind. 2003).

[46] Accordingly, we find that because Pelissier has not met his burden of establishing ineffective assistance of trial or appellate counsel, we must affirm.

[47] Judgment affirmed.

Bradford, C.J., and Vaidik, J., concur.

[2] Of course, in that instance, the harmless error analysis would be unavailable, at least as between the two statements, because it would lead to a circular argument as to which recorded statement was cumulative of the other.