MEMORANDUM DECISION

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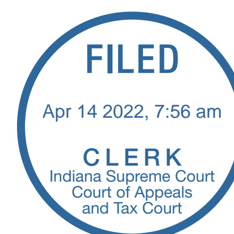

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IN THE COURT OF APPEALS OF INDIANA

Charles A. Benson,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent

April 14, 2022

Court of Appeals Case No. 21A-PC-132

Appeal from the Allen Superior Court

The Honorable David M. Zent, Judge

Trial Court Cause No. 02D05-1706-PC-66

May, Judge.

[1] Charles A. Benson appeals following the denial of his petition for postconviction relief. He raises four issues, which we consolidate and restate as:

I. Whether the postconviction court properly denied Benson's motion for an evidentiary hearing and ordered the parties to submit evidence by affidavit; and

II. Whether the postconviction court erroneously denied Benson's petition for relief because:

> a. Benson demonstrated he received ineffective assistance of trial counsel;
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> b. Benson demonstrated he received ineffective assistance of appellate counsel; or
>
> c. Benson proved his claim of newly discovered evidence or a *Brady* violation.

We affirm.

Facts and Procedural History

[2] On direct appeal, we relayed the facts of Benson's offense as follows:

> Around 2:00 p.m. on January 30, 2016, Officer Robert Geiger ("Officer Geiger") of the Fort Wayne Police Department was driving in his marked squad car, in full police uniform. After seeing a vehicle make an improper turn, Officer Geiger initiated a traffic stop. He then approached the vehicle and asked the driver

for her license and registration. The driver said she did not have her driver's license with her and eventually produced an identification card. Officer Geiger then spoke with the male passenger—later identified as Benson—and Officer Geiger noticed that Benson would not make eye contact with him. Benson identified himself as Antoine Woods.

Officer Geiger returned to his squad car to run the information he had been given. While Officer Geiger was doing so, he saw Benson step out of the vehicle and make eye contact with him. Benson had his hands positioned in front of him, toward his waistband, as though he was concealing a weapon. Benson then began running. Officer Geiger immediately ran after Benson, telling Benson to stop, and using his radio to notify dispatch of the pursuit.

Officer Geiger chased Benson, who ran by residences, a church, and an empty market. At times, there were bystanders in the area. At one point while running, Benson turned and made eye contact with Officer Geiger. Benson had a gun in his hand. Benson held eye contact with Officer Geiger, pointed the gun directly at him, and fired multiple shots. Officer Geiger dropped to the ground, called out "shots fired" over his radio, and continued chasing Benson. Officer Geiger then fired several rounds, each missing Benson.

After running through an intersection, Benson ran around one side of a house, while Officer Geiger pursued Benson from the other side. When Benson came around the house, Benson squared up his body so that he was facing Officer Geiger. Benson made eye contact with Officer Geiger, raised his gun so it pointed directly at Officer Geiger, and fired. Officer Geiger returned fire, and Benson stumbled to the ground. Benson let go of the gun, lifted his hands, and Officer Geiger kneeled on Benson to control him. Additional officers arrived, and Benson was arrested. No one was struck during the pursuit, which lasted

> around ninety seconds. It was later determined that Benson's gun had jammed during the shooting, and the gun contained additional rounds of ammunition.

Benson v. State, 73 N.E.3d 198, 200 (Ind. Ct. App. 2017), *trans. denied*.

[3] The State charged Benson with Level 1 felony attempted murder,[1] Level 4 felony unlawful possession of a firearm by a serious violent felon,[2] Level 6 felony criminal recklessness committed with a deadly weapon,[3] and Level 6 felony resisting law enforcement with use of a deadly weapon.[4] The State also alleged Benson was eligible for an enhanced sentence because he was a habitual offender[5] and he used a firearm in the commission of his offense.[6] The State subsequently dismissed the charge of unlawful possession of a firearm by a serious violent felon and the enhancement for using a firearm in the commission of a crime, and the trial court held a two-day jury trial.

[4] Attorney Quinton Ellis represented Benson at the jury trial. During voir dire, Attorney Ellis used peremptory strikes to remove a prospective juror whose boyfriend and other family friends were police officers; a prospective juror who

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[1] Ind. Code § 35-41-5-1 (2014) (attempt) & Ind. Code § 35-42-1-1 (2014) (murder).

[2] Ind. Code § 35-47-4-5 (2014).

[3] Ind. Code § 35-42-2-2(b)(1) (2014).

[4] Ind. Code § 35-44.1-3-1(b)(1) (2014).

[5] Ind. Code § 35-50-2-8 (2015).

[6] Ind. Code § 35-50-2-11 (2015).

practiced law with Karen Richards, the elected Allen County Prosecutor, twenty years prior; and a prospective juror who hesitated to say whether he or she could be impartial because several of the juror's friends were in law enforcement. Attorney Ellis did not use a peremptory strike to remove Juror 46, who stated he was friends with several police officers but nonetheless maintained he would evaluate all the evidence and form his own conclusions.

[5] Officer Geiger testified at trial that he saw Benson "turn back directly at" him when he started running after Benson. (D.A.[7] Tr. Vol. I at 152.) Officer Geiger went on to explain, Benson "wasn't completely squared up with me, but he was facing me, making eye contact with me, with his body angled towards me, and I noticed a weapon in his hand, which was a silver pistol at that time, and he fired multiple shots at me." (*Id.*) Officer Geiger continued to chase Benson. After Benson ran around a house to attempt to evade Officer Geiger, Benson "squared up with [Officer Geiger] and raised the firearm at [Officer Geiger] and fired a shot at [Officer Geiger's] direction again while making eye contact with [Officer Geiger] again for the second time[.]" (*Id*. at 154.)

[6] Attorney Ellis questioned Officer Geiger regarding a videotaped statement he gave to Detective Cary Young of the Fort Wayne Police Department after the shooting. Attorney Ellis asked Officer Geiger about perceived inconsistencies between his testimony and the account of the incident he relayed to Detective

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[7] "D.A." refers to the appellate record on Benson's direct appeal.

Young. Officer Geiger testified he believed his memory was better at the time of trial than when he gave the interview with Detective Young because he further reflected on the event after giving the interview. Attorney Ellis also asked Officer Geiger questions about Benson's position when Benson shot at him. Charlene Morrow testified she was outside with her husband, Roger Morrow,[8] on January 30, 2016, when she saw a black man, later identified as Benson, get out of a vehicle that had been pulled over on Lewis Street in Fort Wayne and shoot multiple gunshots at a police officer. Roger testified he was looking down, working on a toy truck, when he heard gunshots, so he did not see who fired them.

[7] Officer John Drummer of the Fort Wayne Police Department responded to Officer Grieger's radio call. After Benson was handcuffed, Officer Drummer helped Benson up from the ground, and Benson said, "They were shooting at me" and "I didn't know it was you." (*Id*. at 217.) Officer Jeffrey Norton of the Fort Wayne Police Department also responded to the scene and heard Benson make a spontaneous statement "that he didn't know it was the police" who were chasing him. (*Id*. at 220.) Officers recovered a .45 caliber handgun from Benson and found two .45 caliber shell casings at the scene.

[8] Detective Young testified regarding his interview of Benson at the police department's headquarters after his arrest. While the State attempted to

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[8] Hereafter, we will refer to Charlene Morrow as "Charlene" and Roger Morrow as "Roger."

introduce into evidence a videorecording of the interview, the State withdrew the exhibit because of its poor quality and the trial court instructed the jury to disregard the portions of the video they viewed. The State then proceeded to question Detective Young about what occurred during his interrogation of Benson. Detective Young testified that, during the interrogation, Benson "said he was running and he was being shot at, that there was people after him." (D.A. Tr. Vol. II at 38.) Benson denied having a gun, and Benson told Detective Young he was not the person who shot at Officer Geiger. The jury returned guilty verdicts on the remaining counts, and the trial court sentenced Benson to an aggregate term of sixty-two and one-half years.

[9] Attorney Michelle Kraus represented Benson on his direct appeal. She raised one issue on appeal: "Whether fundamental error occurred by the trial court failing to give a specific jury unanimity instruction?" (D.A. Appellant's Br. at 4.) She argued the unanimity instruction given by the trial court was insufficient because while the evidence adduced at trial indicated Benson shot at Officer Geiger twice, the State only charged Benson with one count of attempted murder, and therefore, "[t]here is no way to know if the jury was unanimous [as] to which act constituted the attempted murder." (*Id*. at 15.) We held a special unanimity instruction was not necessary because, while Benson shot at Officer Geiger two times, each occasion was part of the same continuous crime. *Benson*, 73 N.E.3d at 203. Thus, we affirmed Benson's attempted murder conviction.

[10] Benson filed a petition for postconviction relief pro se on June 28, 2017. The Public Defender of Indiana entered an appearance on Benson's behalf shortly thereafter, but the Public Defender withdrew from the case on May 22, 2019. The State then filed a motion to require Benson to submit his case by affidavit. Benson filed a response opposing the State's motion, but the postconviction court granted the State's motion. Benson filed several motions asking the court to reconsider its decision and hold an evidentiary hearing on his petition for postconviction relief, but the postconviction court denied each of those motions.

[11] Benson filed an amended petition for postconviction relief on July 25, 2019. Benson alleged he was denied effective assistance of both his trial counsel and his appellate counsel. He also asserted the State suppressed evidence in his criminal trial and this evidence constituted newly discovered evidence entitling him to a new trial. Benson and the State exchanged discovery, including interrogatories and requests for production. Benson filed several motions to compel after receiving discovery responses from the State, but each of his motions to compel was denied. On June 17, 2020, Benson filed a memorandum of law, affidavits, and evidence in support of his petition for postconviction relief. The State filed its response to Benson's submission on August 21, 2020, including an affidavit submitted by Attorney Ellis. On December 29, 2020, the postconviction court entered an order with findings of fact and conclusions of law denying Benson's petition for postconviction relief. The postconviction court found: "The law is with the State of Indiana and

against the Petitioner," and Benson "failed to prove his claim on the merits by a preponderance of the evidence." (App. Vol. II at 34 & 47.)

Discussion and Decision

[12] Initially, we note that, like he did before the postconviction court, Benson proceeds on appeal pro se. We hold pro se litigants to the same standard as trained attorneys and afford them no inherent leniency because of their self-represented status. *Zavodinik v. Harper*, 17 N.E.3d 259, 266 (Ind. 2014). Pro se litigants "are bound to follow the established rules of procedure and must be prepared to accept the consequences of their failure to do so." *Basic v. Amouri*, 58 N.E.3d 980, 983-84 (Ind. Ct. App. 2016), *reh'g denied*. "One of the risks that a [litigant] takes when he decides to proceed pro se is that he will not know how to accomplish all of the things that an attorney would know how to accomplish." *Smith v. Donahue*, 907 N.E.2d 553, 555 (Ind. Ct. App. 2009), *trans. denied*, *cert. denied*, 558 U.S. 1074 (2009).

I. Motion for Evidentiary Hearing

[13] Indiana Post-Conviction Rule 1, section 9(b) states:

> In the event petitioner elects to proceed pro se, the court at its discretion may order the cause submitted upon affidavit. It need not order the personal presence of the petitioner unless his presence is required for a full and fair determination of the issues raised at an evidentiary hearing.

The decision to hold an evidentiary hearing on a petition for postconviction relief or to order the cause submitted by affidavit is left to the postconviction court's discretion, and we review such a decision for an abuse of discretion. *Smith v. State*, 822 N.E.2d 193, 199 (Ind. Ct. App. 2005), *trans. denied*. "An abuse of discretion occurs when the court's decision is clearly against the logic and effect of the facts and circumstances before it." *Fuquay v. State*, 689 N.E.2d 484, 486 (Ind. Ct. App. 1997), *trans. denied*. When the postconviction court orders the cause submitted by affidavit pursuant to Rule 1(9)(b), "it is the court's prerogative to determine whether an evidentiary hearing is required, along with the petitioner's personal presence[.]" *Smith*, 822 N.E.2d at 201.

[14] Benson argues the postconviction court erred in denying his repeated motions for an evidentiary hearing. Yet, Benson does not identify any evidence that could have been presented to the court only through an evidentiary hearing. *See Smith*, 822 N.E.2d at 201-02 (holding trial court did not abuse its discretion in ordering cause submitted to the court by affidavit when postconviction relief petitioner failed to show how an evidentiary hearing would have aided him). In support of his petition for postconviction relief, Benson submitted a lengthy affidavit and over twenty exhibits. He also obtained and submitted affidavits from several witnesses. Benson utilized the discovery process to obtain information from the State, and he sought court intervention when he was dissatisfied with the State's discovery responses. Benson claims he was precluded "from obtaining information and vital evidence through examination or cross-examination" of his trial counsel, (Appellant's Br. at 25), but an

affidavit from Benson's trial counsel was included in the State's submission of evidence. To the extent Benson believes his trial counsel would have testified differently at an evidentiary hearing than he averred in his affidavit, such a belief is simply speculation. Therefore, Benson has not demonstrated the postconviction court abused its discretion in denying his motions for an evidentiary hearing. *See Fuquay*, 689 N.E.2d at 486 (noting petitioner's argument that "his trial counsel would never 'sign an affidavit saying he is ineffective'" was "pure speculation" and holding postconviction court did not abuse its discretion in ordering cause submitted by affidavit).

II. Benson's Petition for Postconviction Relief

[15] Our standard of review following the denial of a petition for postconviction relief is well-settled:

> Post-conviction proceedings are civil proceedings in which a defendant may present limited collateral challenges to a conviction and sentence. *Gibson v. State*, 133 N.E.3d 673, 681 (Ind. 2019), *reh'g denied*, *cert. denied*; Ind. Post-Conviction Rule 1(1)(b). "The scope of potential relief is limited to issues unknown at trial or unavailable on direct appeal." *Gibson*, 133 N.E.2d at 681. "Issues available on direct appeal but not raised are waived, while issues litigated adversely to the defendant are *res judicata*." *Id*. The petitioner bears the burden of establishing his claims by a preponderance of the evidence. *Id*.; P.-C. R. 1(5).
>
> When, as here, the petitioner "appeals from a negative judgment denying post-conviction relief, he 'must establish that the evidence, as a whole, unmistakably and unerringly points to a conclusion contrary to the post-conviction court's decision.'" *Gibson*, 133 N.E.2d at 681 (quoting *Ben-Yisrayl v. State*, 738

> N.E.2d 253, 258 (Ind. 2000)). We generally review the post-conviction court's factual findings for clear error, neither reweighing the evidence nor judging the credibility of witnesses. *Hinesley v. State*, 999 N.E.2d 975, 981 (Ind. Ct. App. 2013), *trans. denied*. Here, the PC Court made its ruling on a paper record and, thus, we are reviewing the same information that was available to the PC Court. In such cases, this Court owes no deference to the PC Court's findings. *Baysinger v. State*, 835 N.E.2d 223, 224 (Ind. Ct. App. 2005), *trans. denied*. We, therefore, review the denial of [the petitioner's] petition for PCR *de novo*. *Id*.

Bell v. State, 173 N.E.3d 709, 714-15 (Ind. Ct. App. 2021).

A. Trial Counsel's Alleged Ineffectiveness

[16] The Sixth Amendment to the United States Constitution states a defendant in a criminal prosecution is entitled "to have the assistance of counsel for his defense." U.S. Const., Am. VI. This right requires counsel be effective. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052 (1984), *reh'g denied*. "Generally, to prevail on a claim of ineffective assistance of counsel a petitioner must demonstrate both that his counsel's performance was deficient and that the petitioner was prejudiced by the deficient performance." *Davis v. State*, 139 N.E.3d 246, 261 (Ind. Ct. App. 2019), *trans. denied*. Counsel is deficient if his performance falls below the objective standard of reasonableness established by prevailing professional norms. *Id*. There is a strong presumption trial counsel provided effective representation, and the petitioner must rebut that presumption with strong evidence. *Warren v. State*, 146 N.E.3d 972, 977 (Ind. Ct. App. 2020), *trans. denied*, *cert. denied*, 141 S. Ct. 858 (2020).

[17] Isolated poor strategy, inexperience, or bad tactics does not necessarily constitute ineffective assistance of counsel. *McCullough v. State*, 973 N.E.2d 62, 74 (Ind. Ct. App. 2012), *trans. denied*. "To meet the appropriate test for prejudice, the petitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Davis*, 139 N.E.3d at 261 (internal citation omitted). If we determine the petitioner cannot succeed on the prejudice prong of his claim, we need not address whether counsel's performance was deficient. *Lee v. State*, 892 N.E.2d 1231, 1233 (Ind. 2018).

1. Officer Drummer's Testimony

[18] Several of Benson's claims of ineffectiveness stem from decisions by his trial counsel not to object during the State's presentation of its case-in-chief. To succeed on a petition for postconviction relief alleging trial counsel was ineffective due to his failure to object, the petitioner must show the objection would have been sustained by the trial court. *Walker v. State*, 843 N.E.2d 50, 59 (Ind. Ct. App. 2006), *reh'g denied*, *trans. denied*, *cert. denied*, 549 U.S. 1130 (2007).

[19] Benson argues his trial counsel should have objected to Officer Drummer's testimony about what Benson said at the scene because Benson was not read his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966). Police officers are required to read individuals their rights pursuant to *Miranda* before subjecting them to a custodial interrogation. *Richardson v. State*, 794 N.E.2d 506, 512 (Ind. Ct. App. 2003), *trans. denied*. "'[I]nterrogation' includes

express questioning and words or actions on the part of the police that the police know are reasonably likely to elicit an incriminating response from the suspect." *Id*. "Volunteered statements do not amount to interrogation." *Id*.

[20] Officer Drummer testified he helped Benson up from the ground, and Benson said, "They were shooting at me" and "I didn't know it was you." (D.A. Tr. Vol. I at 217.) Officer Drummer explained that, after Benson commented he was not sure who was shooting at him, Officer Drummer said, "'It was the police shooting at you, since you were shooting at them.'" (*Id*.) With respect to whether Benson's statements were the product of interrogation, the postconviction court concluded:

> Mr. Benson complains that his "unmirandized" statements reported by Officer Drummer were admitted without effective objection from attorney Ellis . . . but he points to no evidence having any tendency to establish that the statements in question were elicited by interrogation. The prosecutor argued without contradiction, though in informal language, that the questions asked by the police were about Mr. Benson's well-being (not reasonably likely to elicit an incriminating response), and that Mr. Benson's statements about the shooting incident itself were volunteered.

(App. Vol. II at 34.) We agree with the postconviction court that Benson's comments were voluntary and not made in the course of an interrogation. Therefore, Officer Drummer was not required to read Benson his rights pursuant to *Miranda*, and Attorney Ellis cannot have been ineffective based on his failure to object because any objection would not have been sustained. *See*

Ritchie v. State, 875 N.E.2d 706, 717-18 (Ind. 2007) (holding trial counsel was not ineffective for failing to object to voluntary statements made by defendant because any objection would not have been sustained), *reh'g denied*.

2. Interrogation Video

[21] Benson also alleges his trial counsel was ineffective because he did not object to the State's playing the video of his interrogation by Detective Young. Before the video was played to the jury, Attorney Ellis confirmed the video had been edited so that inadmissible material was removed, and Attorney Ellis approached the bench when he thought he heard an inadmissible statement. However, the State withdrew the exhibit due to its poor quality, and the trial court admonished the jury to disregard the portion of the interrogation video they had been shown. We trust juries to obey the trial court's instructions, and an admonishment is usually sufficient to protect the defendant's rights. *See Alvies v. State*, 795 N.E.2d 493, 506 (Ind. Ct. App. 2003) ("a timely and accurate admonition to the jury is presumed to sufficiently protect a defendant's rights and remove any error created by the objectionable statement"), *trans. denied*. The postconviction court found:

> Mr. Benson points to no evidence having any tendency to establish that the jury disregarded the admonishment, and indeed does not even mention the admonishment or the withdrawal of the exhibit. As Mr. Benson has not shown that the withdrawn interview video had any effect on the outcome of his trial, he has not shown that attorney Ellis was ineffective in failing to object to the admission of the video.

(App. Vol. II at 35.)

[22] Benson notes our Indiana Supreme Court explained in *Bonner v. State*, "the simple fact that an admonition is given does not necessarily mean that particularly prejudicial, erroneously admitted evidence will be erased from the minds of reasonable jurors or omitted from their deliberations." 650 N.E.2d 1139, 1142 (Ind. 1995) (holding erroneous admission of testimony that officers learned from an informant defendant was a drug trafficker was not cured by instruction to the jury that the testimony was only to be considered to explain the officers' course of investigation). However, Benson fails to point to evidence in the record that demonstrates the State's withdrawal of the interrogation video and the trial court's admonishment were insufficient to cure any inadmissible statement from the video. Therefore, Benson's claim fails. *See Carter v. State*, 738 N.E.2d 665, 675 (Ind. 2000) (holding trial counsel was not ineffective in not moving for mistrial after trial court admonished juror).

3. Shackles and Officer Presence

[23] Benson further contends the jury observed him in shackles and there was excessive officer presence at his trial. In the affidavit Benson submitted in support of his petition for postconviction relief, Benson stated his leg shackles were removed prior to voir dire, but "the bailiff replaced [sic] the leg shackles back on Benson's legs when he took him to use the restroom but failed to remove them once he returned back into the courtroom." (App. Vol. III at 20.) Benson also asserted the leg shackles kept him from participating in sidebars or testifying. Benson submitted affidavits from his brother, his cousin, and a

family friend stating they attended both days of Benson's trial and they observed him wearing shackles. However, notably, none of these three individuals reported that jurors were able to see Benson in the shackles.

[24] Benson's brother averred "there were massive/excessive amount of police officers in and out of the courtroom, exposing their badges and weapon[;]" Benson's cousin witnessed "a numerous amount of police officers in and out of the courtroom[;]" and Benson's friend stated, "police were everywhere, some were in the courtroom and others were standing outside the door of the courtroom." (*Id*. at 103, 107, & 105.) Yet, the affidavits do not specify how many police officers were inside the courtroom during trial nor do they detail any menacing behavior by the officers. Uniformed officers generally carry both a badge and a gun.

[25] In its response to Benson's petition for postconviction relief, the State submitted an affidavit from Benson's trial counsel. In the affidavit, Attorney Ellis averred he did not recall Benson wearing leg shackles during his trial. However, Attorney Ellis was familiar with the practices of the Allen Superior Court to ensure jurors do not see a defendant's shackles, and Attorney Ellis would have objected had those practices not been followed. Attorney Ellis also explained:

> My recollection is that fewer than ten (10) police officers in uniform were in the courtroom at any time during the trial. I was, and am, aware that the visible presence of an excessive number of officers in uniform, in a courtroom during a trial in a criminal case, may tend to impair the defendant's right to a fair trial. I did notice officers in uniform in the courtroom during the

> trial, but their number and actions were not sufficient to cause me concern about any possible effect on Mr. Benson's right to a fair trial. Had their number or actions been sufficient to cause me such concern, I am confident that I would have requested the court to limit the number of officers in uniform in the courtroom.

(App. Vol. IV at 81.)

[26] The postconviction court addressed these claims by Benson in its conclusions of law seven through nine:

> 7. A defendant's right to a fair trial may be impaired if jurors can see the defendant in shackles. *See*, *e.g.*, *Forte v. State*, 759 N.E.2d 206, 208 (Ind. 2001). Attorney Ellis knew of no reason to believe that any juror could see that Mr. Benson was in shackles during the trial, and would have objected had he known of any such reason [Findings of Fact, ¶ 11]. The statements of Mr. Benson's witnesses [*id*.] do not establish that jurors could see the shackles and that attorney Ellis should have known the jurors could see them. In the absence of evidence that Ellis, from his perspective at the time, knew or should have known that jurors could see the shackles, he cannot be found ineffective for failing to complain that jurors could see them. *See Strickland*, 466 U.S. at 689-690.
>
> 8. Mr. Benson also asserts that Ellis should have complained that the shackles prevented Mr. Benson from "fully participat[ing] in his own defense, including sidebars or testifying." Petitioner's Affidavit, at 10. Mr. Benson does not assert that he would have testified at trial in any event, nor does he identify any contributions he might have made to any sidebar conference. In the absence of any showing of a possible effect on the outcome of the trial had Mr. Benson not been in shackles, Ellis cannot be found ineffective for failing to raise such a complaint. *Taylor*, 840 N.E.2d at 331.

> 9. A defendant's right to a fair trial may be impaired if an excessive number of police officers in uniform are visible to the jury in the courtroom. *Meadows v. State*, 785 N.E.2d 1112, 1123-25 (Ind. Ct. App. 2003), *trans. denied*. However, the mere presence of up to ten (10) or twelve (12) uniformed police officers in the courtroom has repeatedly been held not to impair a defendant's right to a fair trial. *Id*., and cases cited therein. Attorney Ellis recollected that fewer than ten (10) police officers in uniform were in the courtroom at any time during the trial [Findings of Fact, ¶ 12]. From Ellis's perspective at the time, it did not appear that the number or actions of the uniformed officers in the courtroom tended to impair Mr. Benson's right to a fair trial, and Mr. Benson's submissions fall far short of establishing that Ellis was mistaken on this point [*id*.]. Ellis therefore cannot be found ineffective for failing to complain about the number of uniformed officers in the courtroom. *See Strickland*, 466 U.S. at 689-690.

(App. Vol. II at 37-38) (brackets in original). We agree with the postconviction court that Benson's trial counsel was not ineffective on this count. Neither an objection to Benson wearing leg restraints during trial nor an objection to officer presence in the courtroom would have been sustained because there is no evidence the jury observed the leg shackles or there was excessive officer presence inside the courtroom. *See Forte*, 759 N.E.2d at 208 (holding trial court did not abuse its discretion when it ordered defendant tried in leg shackles because trial court took measures to prevent jury from seeing the restraints).

4. Decision Not to Excuse Juror 46

[27] Benson further asserts his trial counsel was ineffective for failing to use a peremptory strike to excuse Juror 46 on account of the juror's friendships with

police officers. During voir dire, Benson's counsel posed a general question to the venire asking the prospective jurors if they were "gonna give the officer's testimony any more weight than, say, the individual that comes in with their jeans and t-shirt on?" (D.A. Tr. Vol. I at 75.) Juror 46 volunteered he was friends with several police officers, including one who had been injured by a suspect, and these relationships might affect how he evaluated officer testimony. (*Id*. at 76) ("I know enough police officers and things like that and, you know, I know an officer that was injured severely by a suspect. That's, you know, just—maybe it'll cloud my judgment."). However, upon further questioning by Benson's counsel, Juror 46 stated he would not blindly accept what a police officer said, and he would evaluate all the evidence to form his own conclusions. Benson's trial counsel chose not to exercise a peremptory strike to excuse Juror 46 from the jury. Benson's trial counsel explained:

> I have no memory of particular decisions regarding peremptory strikes that I made during voir dire in Mr. Benson's case. However, my habit or routine practice is to consult with the defendant before deciding whether to exercise peremptory strikes, and generally to accede to the defendant's wishes if the defendant wishes a particular prospective juror to be struck. On the other hand, if Mr. Benson had requested that all jurors having any connection with law enforcement (no matter how remote or tenuous) be struck, I would not have acceded to that request out of concern that I might run out of peremptory strikes, and thereby be forced to accept undesirable jurors who were not subject to challenges for cause.

(App. Vol. IV at 82.)

[28] A criminal defendant is entitled to an impartial jury. *Whiting v. State*, 969 N.E.2d 24, 28 (Ind. 2012). However, "[j]urors need not be totally ignorant of the facts or issues involved in a case; rather, a constitutionally impartial juror is one who is able and willing to lay aside his or her prior knowledge and opinions, follow the law as instructed by the trial judge, and render a verdict based solely on the evidence presented in court." *Id*. The constitutional guarantee of a fair trial means biased jurors are to be struck for cause, *id*. at 29, and Indiana Code section 35-37-1-5 lists additional reasons a juror may be challenged for cause. A criminal defendant is also allowed to exercise a set number of peremptory challenges. Ind. Code § 35-37-1-3. These challenges may be used by the defendant to excuse a juror for practically any reason. *Whiting*, 969 N.E.2d at 29.

[29] During voir dire, a large number of prospective jurors indicated they had friends or family members who were in law enforcement. For example, Juror 31's uncle was a police officer in Pittsburgh, Juror 32's godfather was a police officer in Detroit, Juror 58's cousin was a police officer in Indianapolis, and Juror 66's nephew was a police officer in Muncie. Attorney Ellis was thus required to make strategic decisions regarding which of these prospective jurors to excuse by way of peremptory strike because it would not have been practical to strike every prospective juror with any connection to someone in law enforcement. Attorney Ellis used a peremptory strike to remove Juror 60, who had a boyfriend that was a police officer. Attorney Ellis also removed Juror 38 who indicated the juror had close friends in law enforcement and said, "I'd like to

think I could be impartial but I'm not 100 percent sure." (D.A. Tr. Vol. I at 115.) At Benson's request, Attorney Ellis used a peremptory strike to excuse Juror 19, a former law partner of the elected Allen County Prosecutor. However, Attorney Ellis made a strategic decision to not use a peremptory strike to remove Juror 46. We agree with the postconviction court's conclusion: "Ellis cannot be found ineffective for adopting this reasonable strategy, designed to exclude undesirable 'pro-police' jurors while not wasting peremptory challenges on those whose connections with law enforcement did not appear to render them undesirably 'pro-police.'" (App. Vol. II at 36.) We will not second guess Attorney Ellis's strategy, and therefore, we hold Attorney Ellis was not ineffective for choosing not to use a peremptory strike to excuse Juror 46. *See Brady v. State*, 463 N.E.2d 471, 477 (Ind. 1984) (holding trial counsel was not ineffective in making strategic decision not to use peremptory challenge to strike juror).

5. Impeachment

[30] Benson argues his trial counsel was ineffective for failing to sufficiently impeach Officer Geiger. The presentation of impeachment evidence allows the jury to accurately assess a witness's credibility. *Hamner v. State*, 553 N.E.2d 201, 203 (Ind. Ct. App. 1990). This includes raising doubt regarding a witness's trial testimony based on a prior inconsistent statement. *Townsend v. State*, 33 N.E.3d 367, 370 (Ind. Ct. App. 2015) ("A prior inconsistent statement may be used to impeach a witness."), *trans. denied*. The method and manner of impeachment is often a tactical decision. *See Kubsch v. State*, 934 N.E.2d 1138, 1151 (Ind. 2010)

("We have previously held that the method of impeaching witnesses is a tactical decision and a matter of trial strategy that does not amount to ineffective assistance."), *reh'g denied*.

[31] Benson contends Attorney Ellis did not adequately question Officer Geiger about perceived differences in Officer Geiger's accounts of the shooting. Specifically, Benson contends Attorney Ellis failed to question Officer Geiger about perceived inconsistent statements as to whether Benson fully turned around and directly shot at Officer Geiger during the first exchange of shots or whether Benson partially turned and shot Officer Geiger while looking over his shoulder. However, whether Benson fully or partially turned to shoot at Officer Geiger is not material to whether Benson committed attempted murder. *See Wisehart v. State*, 693 N.E.2d 23, 46 (Ind. 1998) (holding trial counsel was not ineffective for choosing not to attempt to impeach police officer during trial with prior testimony officer gave during suppression hearing because while the officer's two statements were slightly different, they were not inconsistent), *reh'g denied*, *cert. denied*, 526 U.S. 1040 (1999).

[32] Moreover, Attorney Ellis did question Officer Geiger on cross-examination about prior inconsistent statements. For instance, Attorney Ellis noted Officer Geiger's testimony at trial that Benson shot at him a second time was different from the videotaped statement he gave to Detective Young three days after the shooting in which he said he was not sure if Benson shot at him a second time. This led Officer Geiger to explain his memory of the shooting improved after he gave his account of the incident to Detective Young. Attorney Ellis also asked

Officer Geiger to "[s]quare" his testimony at trial that he did not lose sight of Benson with the statement he gave to Detective Young in which he said he momentarily lost sight of Benson. (D.A. Tr. Vol. I at 176.) This led Officer Geiger to clarify that he was able to observe Benson during the pursuit until Benson ran around a house, at which point Officer Geiger temporarily lost sight of him. Consequently, Benson has not shown Attorney Ellis was ineffective in his cross-examination of Officer Geiger. *Reeves v. State*, 174 N.E.3d 1134, 1142 (Ind. Ct. App. 2021) (holding trial counsel did not provide ineffective assistance of counsel when, after eliciting evidence undermining accomplice's credibility, he chose not to further impeach the accomplice by calling another witness), *trans. denied*.

[33] Benson also asserts his trial counsel was ineffective for failing to impeach Roger with his conviction of Level 6 felony domestic battery[9] and his probationary status. Indiana Rule of Evidence 609 provides:

> For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime or an attempt of a crime must be admitted but only if the crime committed or attempted is (1) murder, treason, rape, robbery, kidnapping, burglary, arson, or criminal confinement; or (2) a crime involving dishonesty or false statement, including perjury.

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[9] Ind. Code § 35-42-2-1.3(a).

Domestic battery is not a crime listed in Rule 609, nor is it a crime involving dishonesty or false statement. *See Lamb v. State*, 511 N.E.2d 444, 446 (Ind. 1987) ("the crime of assault and battery with intent to kill is not one of the nine 'infamous' crimes nor is it, on its face, a crime of dishonesty or false statement"). Therefore, Benson's trial counsel was not ineffective for not attempting to impeach Roger with Roger's domestic battery conviction because such an attempt likely would not have been allowed by the trial court. *See Weisheit v. State*, 109 N.E.3d 978, 991 (Ind. 2018) (holding trial counsel did not provide deficient performance by not objecting to witnesses' statements because such objections would not have been sustained), *reh'g denied*, *cert. denied*, 139 S. Ct. 2749 (2019).

[34] A probationer may have an incentive to lie out of fear the probationer's testimony will be used against the probationer or to obtain a perceived benefit. *See Rowe v. State*, 704 N.E.2d 1104, 1109 (Ind. Ct. App. 1999) ("If Hodges had corroborated Rowe's testimony regarding their use of illegal drugs, Hodges would have provided the State with all the evidence necessary to revoke his probation."), *reh'g denied*, *trans. denied*; *see also State v. Hollin*, 970 N.E.2d 147, 154 (Ind. 2012) (holding fact alleged accomplice did not implicate defendant in agreement to commit burglary until approximately eight months after the crime and after the accomplice had been charged with a new felony and proceedings to revoke his probation had begun was evidence favorable to the defense which could have been used to impeach the accomplice's credibility). However, neither of these concerns are present here. Benson presented no evidence Roger

received a benefit from testifying at Benson's trial. While Benson asserts Roger attempted to have the length of his term of probation reduced because of his testimony in Benson's case, there is no indication Roger's term of probation was actually shortened. Moreover, Roger's testimony did not run the risk of implicating Roger in criminal activity, and the testimony likely had a minimal impact on the jury's verdict. Roger did not see Benson fire a gun. Roger testified he was standing in his front yard, heard gunshots, and looked up to see a police officer chasing a black man, who was later identified as Benson. Roger's testimony was not as incriminating for Benson as Officer Geiger's testimony or Charlene's testimony. There is no reason to think revelation of Roger's probationary status would have changed the jury's assessment of his testimony or resulted in a different verdict, and we will not hold Attorney Ellis's representation of Benson was ineffective because he did not impeach Roger with his probationary status. *See Carter v. State*, 738 N.E.2d 665, 674 (Ind. 2000) (holding that while counsel could have conceivably impeached victim with prior inconsistent statement, there is no reasonable probability doing so would have resulted in a different verdict).

6. Trial Counsel's Investigation and Defense

[35] Benson additionally asserts his trial counsel was ineffective for not interviewing Charity Cherneski, an alleged potentially exculpatory eyewitness. We apply a well-settled standard of review to claims of ineffective assistance of counsel due to inadequate investigation:

> An attorney has a duty to make a reasonable investigation or to make a reasonable decision that the particular investigation is unnecessary. We give considerable deference to trial counsel's strategic and tactical decisions, but in order to make a reasonable tactical decision, counsel must have adequately investigated the client's case because strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.

Warren, 146 N.E.3d at 978 (internal quotation marks and citation omitted).

[36] In support of Benson's petition for post-conviction relief, he submitted an affidavit from Cherneski. She averred she was walking down Lewis Street on January 30, 2016, when she saw Benson get out of a parked car and start to run away with an officer in pursuit. According to Cherneski, Benson ran down an alley and shot his gun twice in the air, not in the direction of the officer. Attorney Ellis averred:

> Before Mr. Benson's trial, I was aware that a person known as "Charity C" had been associated with Mr. Benson in an unrelated encounter with police on January 16, 2016. I did not know the full last name of "Charity C," and I do not recall Mr. Benson ever providing me with her name. I do not recall having any information leading me to believe that Charity Cherneski had witnessed any part of the events of January 30, 2016, that led to Mr. Benson's conviction.

(App. Vol. IV at 82.) Finding Attorney Ellis was not ineffective, the postconviction court concluded:

> At the time of Mr. Benson's trial, it does not appear that attorney Ellis knew or should have known that Charity Cherneski might testify in Mr. Benson's defense [Findings of Fact, ¶ 16]. Furthermore, even if Ellis had known that Charity Cherneski was willing to testify to everything at trial that she later set down in her declaration, it would have been a highly reasonable decision to refrain from calling her to testify, and a highly unreasonable decision to call her. In his statements to police that were properly admitted at trial, Mr. Benson maintained that he did not shoot—not that he *did* shoot, but not at Officer Geiger. The presentation of both conflicting accounts at trial would foreseeably have led the jury only to the conclusion that both were false. Ellis cannot be found ineffective for failing to present evidence contradicting Mr. Benson's own account of events, and indeed he could very likely be found ineffective for *presenting* such evidence. *See Christian v. State*, 712 N.E.2d 4 (Ind. Ct. App. 1999) (defense counsel was ineffective in impeaching and contradicting his client's statements).

(App. Vol. II at 39) (emphases and brackets in original).

[37] We agree with the postconviction court's determination. "The decision of whether or not to present a defense can be considered a matter of trial strategy and will not be lightly second guessed." *Whitener v. State*, 696 N.E.2d 40, 43 (Ind. 1998). Likewise, we will not lightly second guess an attorney's strategic decision of which witnesses to call at trial. *Johnson v. State*, 832 N.E.2d 985, 1003 (Ind. Ct. App. 2005), *reh'g denied*, *trans. denied*. Attorney Ellis's trial strategy was to challenge whether Benson fired any shots at all. In his opening statement, Benson's trial counsel stated: "It's Mr. Benson's position that he did not fire at the police officer on that particular date and time[.]" (D.A. Tr. Vol. I at 134.) He expounded that "none of the eyewitnesses, as they're described by

the State, will point to Mr. Benson and say, 'Yes, we saw that man shooting at a police officer that day.' I think the best they'll give you is that they saw someone out there that day firing at the police." (*Id.*) Attorney Ellis also previewed for the jury the absence of DNA or fingerprint evidence connecting Benson to the gun recovered by the officers. Moreover, during closing argument, Attorney Ellis referenced Benson's statements during his interrogation that people were chasing him and he was not shooting, and Attorney Ellis highlighted inconsistencies in the State's evidence. To the extent Cherneski would have testified consistent with her affidavit, this testimony would have served only to raise doubt as to Benson's theory of defense and weakened his case. *See Johnson*, 832 N.E.2d at 1004 (holding trial counsel's decision not to call a witness at trial did not constitute deficient performance when the witness's testimony would not have assisted the defendant's defense).

7. Jury Instructions

[38] Benson also faults Attorney Ellis for not tendering lesser-included offense instructions regarding attempted aggravated battery and attempted battery. To succeed on such a challenge, the defendant must show he could have been convicted of the lesser offense. *See Davis v. State*, 139 N.E.3d 246, 262 (Ind. Ct. App. 2019), *trans. denied*. We therefore look first to whether the lesser offense is included in the greater offense, and secondly, whether an instruction on the lesser offense would have conformed to the evidence presented at trial. *Id*. "To justify a lesser included instruction, there must exist evidence before the jury

such that it could conclude the lesser included offense was committed while the greater one was not." *Id*.

[39] Regarding Benson's claim that his trial counsel was ineffective for failing to tender lesser included offense jury instructions, the post-conviction court concluded:

> Mr. Benson asserts that attorney Ellis was ineffective in failing to tender a jury instruction on a lesser included offense of attempted aggravated battery or attempted battery [Petitioner's Affidavit, at 17; Amended Petition, at 18-21]. A jury instruction on a lesser included offense should be given if, and only if, "there is a serious evidentiary dispute about the element or elements distinguishing the greater from the lesser offense and if, in view of this dispute, a jury could conclude that the lesser offense was committed but not the greater." *Wright v. State*, 658 N.E.2d 563, 567 (Ind. 1995). Mr. Benson identifies no serious evidentiary dispute in view of which the jury could possibly have concluded that he did intend to shoot Officer Geiger but did not intend to kill him. He therefore has not shown that an instruction on one of the specified lesser included offenses, if requested, would have been given. Failure to submit a jury instruction is not deficient performance "if the court would have refused the instruction anyway." *Williams v. State*, 706 N.E.2d 149, 161 (Ind. 1999), *cert. denied*, 529 U.S. 1113 (2000).

(App. Vol. II at 39-40) (brackets in original).

[40] Our jurisprudence is muddled regarding whether aggravated battery is an inherently lesser included offense of attempted murder. *See Demby v. State*, --- N.E.3d ----, No. 20A-CR-1012, 2021 WL 614938, at *6 n.10 (Ind. Ct. App. Feb. 16, 2021) (aggregating cases), *trans. denied*. However, the primary difference

between attempted murder and aggravated battery or battery is an intent to kill. "The essential elements of attempted murder are that (1) the defendant (2) knowingly or intentionally (3) engaged in conduct that constituted a substantial step (4) toward killing another human being." *Hopkins v. State*, 747 N.E.2d 598, 603 (Ind. Ct. App. 2001) (synthesizing Ind. Code § 35-41-5-1 & Ind. Code § 35-42-1-1), *trans. denied*. In contrast, a person commits aggravated battery if he "knowingly or intentionally inflicts injury on a person that creates a substantial risk of death or causes: (1) serious permanent disfigurement; (2) protracted loss or impairment of the function of a bodily member or organ; or (3) the loss of a fetus;" Indiana Code § 35-42-2-1.5 (2014), and a person commits battery by "knowingly or intentionally" touching another person "in a rude, insolent, or angry manner[.]" Ind. Code § 35-42-2-1 (2014).

[41] The issue at trial was not whether Benson intended to kill Officer Grieger. As explained above, Benson's defense was that he was not the shooter. Officer Geiger testified Benson shot at him, and a jury may infer an intent to kill from a defendant pointing a firearm at someone and pulling the trigger. *See Corbin v. State*, 840 N.E.2d 424, 429 (Ind. Ct. App. 2006) ("Intent to kill may be inferred from the use of a deadly weapon in a manner likely to cause death or great bodily injury, in addition to the nature of the attack and circumstances surrounding the crime."). Therefore, Benson's trial counsel was not ineffective for choosing not to request such lesser included offense instructions because the evidence did not conform to giving them. *See Davis*, 139 N.E.3d at 263 (holding trial counsel was not ineffective for not tendering a lesser included offense

instruction when there was no evidence before the jury that the defendant sold methamphetamine but did not do so within 1,000 feet of a school).

8. Cumulative Effect

[42] Benson also argues the postconviction court erred by not analyzing whether the cumulative effect of the alleged errors by Benson's trial counsel denied him a fair trial. However, because Benson has failed to show any error by his trial counsel that could have accumulated, we reject this argument. *See Isom v. State*, 170 N.E.3d 623, 649 (Ind. 2021) ("The post-conviction court found that Isom failed to meet his burden in establishing even error, let alone cumulative prejudice. We agree."), *reh'g denied*.

[43] Nonetheless, even if Benson had demonstrated deficient performance by Attorney Ellis, we would still need to "evaluate whether 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Warren*, 146 N.E.3d at 980 (quoting *Strickland*, 466 U.S. at 694, 104 S. Ct. 2052). The evidence against Benson was overwhelming. Officer Geiger identified Benson as the individual who shot at him, and officers arrested Benson at the scene shortly after the shooting. Benson also made incriminating statements to the arresting officer, and officers recovered a .45 caliber pistol along with spent .45 caliber shells from the scene. Charlene testified she saw a black man, later identified as Benson, exit a vehicle during a traffic stop, run away from the vehicle, and turn back to shoot at a chasing officer. Therefore, we cannot reasonably say the

jury's verdict would have been different had Attorney Ellis performed any of the actions Benson faults him for not taking. *See Middleton v. State*, 72 N.E.3d 891, 892 (Ind. 2017) (holding no reasonable probability that but for trial counsel's deficient performance the jury would have rendered a different verdict).

B. Appellate Counsel's Alleged Ineffectiveness

[44] "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." *Montgomery v. State*, 21 N.E.3d 846, 854 (Ind. Ct. App. 2014), *trans. denied*. The petitioner must prove his appellate counsel's performance fell below the prevailing standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the result of petitioner's appeal would have been different. *Id*. There are three categories of ineffective assistance of appellate counsel claims: "(1) denial of access to an appeal; (2) waiver of issues; and (3) failure to present issues well." *Id*. When a petitioner raises a claim of ineffective assistance of counsel for failure to raise an issue on appeal, we afford appellate counsel a high degree of deference "because the selection of issues for direct appeal 'is one of the most important strategic decisions of appellate counsel.'" *Hampton v. State*, 961 N.E.2d 480, 491 (Ind. 2012) (quoting *Bieghler v. State*, 690 N.E.2d 188, 193 (Ind. 1997), *reh'g denied*, *cert. denied*, 525 U.S. 1021 (1998)). "To evaluate the performance prong when counsel waived issues upon appeal, we apply the following test: (1) whether the unraised issues are significant and obvious from the face of the record and (2) whether the unraised

issues are clearly stronger than the raised issues." *Reed v. State*, 856 N.E.2d 1189, 1195 (Ind. 2006) (internal quotation marks omitted).

[45] Benson argues his appellate counsel was ineffective for not arguing on Benson's direct appeal that Benson's trial counsel was ineffective. We note that while a defendant may raise a claim of ineffective assistance of trial counsel on direct appeal, this tactic is risky "because counsel's reasoning may not be 'apparent from the trial record,' making it 'necessary for an additional record to be developed to show the reason for an act or omission that appears in the trial record.'" *Brewington v. State*, 7 N.E.3d 946, 978 (Ind. 2014) (quoting *Woods v. State*, 701 N.E.2d 1208, 1212-13 (Ind. 1998)), *reh'g denied*, *cert. denied*, 574 U.S. 1203 (2015), *reh'g denied*. If ineffectiveness of trial counsel is raised on direct appeal, the issue is not available for collateral review through a petition for postconviction relief, which precludes the defendant from presenting additional evidence regarding the decisions of trial counsel. *Id*.

[46] Here, evidence outside the record on direct appeal was needed to decide the issue of ineffective assistance of trial counsel. Benson submitted affidavits from family and friends in support of his petition for postconviction relief, and the State introduced an affidavit from Benson's trial counsel. This evidence would not have been available on direct appeal, and therefore, Benson's appellate counsel was not ineffective for preserving Benson's claim of ineffective

assistance of trial counsel.[10] *Cf. Timberlake v. State*, 753 N.E.2d 591, 602 (Ind. 2001) (holding defendant could not bring ineffective assistance of trial counsel claim and present extra-record evidence as to the issue in connection with a petition for postconviction relief when ineffective assistance of trial counsel claim had been raised on direct appeal), *cert. denied*, 537 U.S. 839 (2002).

C. *Brady* Violation or Newly-Discovered Evidence

[47] Benson additionally alleges the post-conviction court erred in denying his petition for relief because the State withheld evidence of an interview Officer Geiger gave as part of an internal police investigation and the final report from the investigation. Benson argues he is entitled to a new trial because the interview and final report constitute illegally suppressed exculpatory evidence. *See Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97 (1963) (violation of criminal defendant's due process rights for prosecution to withhold favorable evidence). "To prevail on a Brady claim, a defendant must establish: (1) that the prosecution suppressed evidence; (2) that the evidence was favorable to the defense; and (3) that the evidence was material to an issue at trial." *Bunch v. State*, 964 N.E.2d 274, 292 (Ind. Ct. App. 2012), *reh'g denied*, *trans. denied*.

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[10] To the extent Benson's assertion his appellate counsel was ineffective for "failing to raise issues that were within the trial record such as; [sic] prosecutorial misconduct, abuse of discretion, and/or juror biasness," (Appellant's Br. at 51), is different from his allegation that Attorney Kraus should have argued on direct appeal Benson's trial counsel was ineffective, Benson fails to support such contention with cogent argument. *See* App. Rule 46(A)(8)(a) ("The argument must contain the contentions of the appellant on the issues presented, supported by cogent reasoning."). Therefore, any such argument is waived. *See Jervis v. State*, 28 N.E.3d 361, 368 (Ind. Ct. App. 2015) ("At the outset of his claim, we find that Jervis has waived this argument by failing to present a cogent argument on this issue."), *trans. denied*.

Evidence is material if it establishes a reasonable probability that the result of the proceeding would have been different had the evidence been disclosed. *Myers v. State*, 33 N.E.3d 1077, 1114 (Ind. Ct. App. 2015), *reh'g denied*, *trans. denied*.

[48] Related to his *Brady* allegations, Benson also contends the interview and final report constitute newly discovered evidence. Post-Conviction Relief Rule 1(a)(4) provides that an individual who has been convicted of a crime and sentenced may file a petition for postconviction relief alleging "there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice[.]" To receive a new trial as the result of newly discovered evidence, the petitioner must meet nine requirements:

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

Whedon v. State, 900 N.E.2d 498, 504 (Ind. Ct. App. 2009), *aff'd* 905 N.E.2d 408 (Ind. 2009).

[49] Benson argues:

> What the jury was erroneously precluded from hearing due to this suppression of evidence by the State was, 1) Geiger's interview transcripts by the FWPD Shooting team, where he

> states ‘Benson was running looking back while pointing back at him and fired, and 2) that once Benson stepped back into the alley he fired at Benson because Benson pointed the gun back towards him as if to fire but was unsure if he ever shot).

(Appellant’s Br. at 54) (errors in original). With respect to Officer Geiger’s transcribed interview in connection with the Fort Wayne Police Department’s internal investigation, the postconviction court examined what “[t]he relevant transcribed statements [in support of Benson’s argument] appear to be” and concluded:

> These statements do not contradict any of Geiger’s testimony at trial. Furthermore, to the extent (if any) that they may be thought to differ in detail from that testimony, they are merely impeaching. These statements have no tendency at all to contradict the most essential points of Geiger’s testimony: that Mr. Benson looked back, made eye contact with Geiger, and fired multiple shots directly at him. As these statements are (at most) merely impeaching and would not probably produce a different result upon retrial, they do not constitute newly discovered evidence entitling Mr. Benson to a new trial. *Taylor*, 840 N.E.2d at 330.

(App. Vol. II at 47) (internal citations to the record omitted).

[50] During the internal investigation interview, Officer Geiger stated: “And as soon as he steps into the alleyway, I fire one or two more shots at him because he pointed the gun in my direction again. I don’t recall if he fired, because I still had the auditory shooting.” (App. Vol. II at 148.) Attorney Ellis questioned Officer Geiger on cross-examination about this initial uncertainty regarding

whether Benson fired a second set of shots, which Officer Geiger also expressed in the statement he gave to Detective Young on the same day as the internal investigation interview. Officer Geiger testified his memory of the incident improved as he had more time to reflect on it. Thus, the jury was aware of this evolution in Officer Geiger's account of the incident and still returned a guilty verdict. At most, the additional statements by Officer Geiger given as part of the internal police investigation were consistent with his account of the shooting given to Detective Young and possessed minimal impeachment value. Therefore, Benson is not entitled to a new trial on the basis of a *Brady* violation or newly discovered evidence. *See Reid v. State*, 984 N.E.2d 1264, 1271-72 (Ind. Ct. App. 2013) (holding postconviction relief petitioner was not entitled to new trial because he was not prejudiced by the State's withholding of information that a witness committed an impeachable offense), *trans. denied*.

[51] Benson also contends the State withheld in-car and body cam footage recorded by Officer Stacy Jenkins. The postconviction court concluded:

> Furthermore, the video evidence from Officer Jenkins is supposed to have been relevant because it would allegedly have shown that Mr. Benson was too intoxicated to know where he was or what was going on, therefore it supposedly could have created reasonable doubt as to Mr. Benson's specific intent to kill Officer Geiger [Petitioner's Affidavit, at 24]. Intoxication is not a defense in a prosecution for an offense and may not be taken into consideration in determining the existence of a mental state that is an element of the offense unless the defendant meets the requirements of IC 35-41-3-5 [concerning involuntary intoxication]. IC 35-41-2-5 (1997). Mr. Benson has not asserted, much less proven, that he met the requirements of IC 35-41-3-5.

> His intoxication, even if it were somehow unquestionably evident from the video evidence, therefore could not be considered in determining whether he possessed the requisite specific intent to kill, and so could not affect the outcome at trial. As such evidence could not "probably produce a different result at retrial[,]" it does not constitute newly discovered evidence.

(App. Vol. II at 46) (quoting *Taylor v. State*, 840 N.E.2d 324, 330 (Ind. 2006)) (brackets in original).

[52] The record does not include the video footage Benson claims the State illegally suppressed. Nonetheless, as noted by the postconviction court, Benson stated in his affidavit in support of his petition for postconviction relief he believes the video footage would show he did not have the requisite mens rea for attempted murder because "he was so intoxicated he did not even know where he was nor what was even going on." (App. Vol. III at 35.) Detective Young testified that, during Benson's interrogation, Benson admitted to recently ingesting "[a]lcohol, mollies,[[11]] marijuana, and cocaine." (D.A. Tr. Vol. II at 42.) "However, voluntary intoxication is not a defense to a specific intent crime." *Johnson v. State*, 832 N.E.2d 985, (Ind. Ct. App. 2005), *reh'g denied*, *trans. denied*. Therefore, the postconviction court correctly found the video evidence from Officer Jenkins was not material to Benson's defense at trial, and Benson is not entitled to postconviction relief under *Brady*. *See Badelle v. State*, 754 N.E.2d

[11] Detective Young testified he did not know what substance Benson meant when he admitted ingesting "mollies." (D.A. Tr. Vol. II at 42.)

510, 530 (Ind. Ct. App. 2001) (holding any error in State's withholding evidence of detective's fruitless search of a store was harmless as the evidence was not material and would not likely have changed the result of the trial), *trans. denied*.

Conclusion

[53] The postconviction court did not err in denying Benson's motions for an evidentiary hearing because live testimony was not necessary to resolve Benson's claims. Further, Benson has not demonstrated his trial counsel or appellate counsel provided ineffective assistance. Finally, Benson has not demonstrated the State withheld potentially exculpatory evidence or newly discovered evidence brings his conviction into doubt. Therefore, we affirm the denial of Benson's petition for postconviction relief.

[54] Affirmed.

Vaidik, J., and Molter, J., concur.