MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Durell Crain,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent.

April 28, 2023

Court of Appeals Case No. 22A-PC-933

Appeal from the Marion Superior Court

The Honorable Peggy R. Hart, Magistrate

Trial Court Cause No. 49D31-1901-PC-3828

Memorandum Decision by Judge Brown
Judges Bailey and Weissmann concur.

Brown, Judge.

[1] Durell Crain appeals the denial of his petition for post-conviction relief and asserts that he was denied the effective assistance of trial counsel. We affirm.

Facts and Procedural History

[2] The relevant facts as discussed in Crain's direct appeal follow:

> On October 9, 2017, Crain called his sixty-two-year-old cousin Freddie Hollis to find out his plans for the day. Hollis said that he was going to a friend's house south of downtown Indianapolis. Crain asked if he could go with Hollis, and Hollis agreed. Hollis drove his truck to Crain's house at 12th Street and Arlington Avenue, picked him up, and drove them to Hollis's friend's house.
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> While there, Hollis observed that Crain appeared intoxicated and started "talking crazy for no reason." Tr. Vol. 2 at 64. Hollis was embarrassed by Crain's behavior. At one point, a gun fell out of Crain's pocket. Hollis decided it was time to leave. Hollis was upset that Crain had a gun and did not want him to get in his truck. However, Hollis did not want to leave Crain stranded, so he allowed Crain to come with him.
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> As Hollis was driving, he expressed his displeasure with Crain's behavior. Crain took his gun out of his pocket and said that he was tired of Hollis "getting on his case." *Id.* at 68. Hollis asked Crain, "What are you doing? You threaten me with a gun now?" *Id.* Hollis pulled over and repeatedly asked Crain to get out of his truck, but Crain would not comply. Hollis continued driving, but stopped again near 21st Street and Arlington Avenue and asked Crain to get out of the truck. Crain would not get out. Hollis told Crain that Hollis was going to drive to Hollis's home.
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> At 30th Street and Franklin Road, Crain said, "Let me out right here at the light." *Id.* at 71. Hollis pulled over, but Crain still would not get out. Hollis continued to drive to his home. As they approached 36th Street and Post Road, Crain called his

> mother and told her, "Freddie go kill me. He goes to kill me, mom. He gonna kill me. I know he is. I know he is." *Id.* at 72. Crain still had his gun out. Suddenly, Crain fired the gun. Hollis believed that he had been shot. Hollis put the truck in park and jumped out to see if he had been injured. When Hollis turned back toward the truck, he saw that Crain had "the gun pointed towards [him]" and that smoke was coming out of the barrel. *Id.* Crain told Hollis, "I ain't going to your house. You take me to my mom's." *Id.* Hollis got back in the truck because he was "scared for [his] life." *Id.* Crain kept the gun pointed at Hollis while Hollis drove Crain to his mother's apartment. *Id.* at 73.
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> When Hollis arrived at Crain's mother's apartment, Crain would not get out of the truck. Hollis told Crain that he was going to call 911, and Crain finally exited the vehicle. However, when Crain saw Hollis actually calling 911, Crain ran back toward the truck waving his gun. Hollis drove away and finished his 911 call at a gas station. During the investigation, police observed what appeared to be a bullet hole and bullet fragments in the dashboard of Hollis's truck. Police obtained a search warrant for Crain's home and found a firearm under the hood of a vehicle in a garage attached to Crain's house.

Crain v. State, No. 49A02-1710-CR-2299, slip op. at 2-3 (Ind. Ct. App. May 10, 2018).

[3] The State charged Crain with level 3 felony kidnapping, level 5 felony attempted battery by means of a deadly weapon, and unlawful possession of a firearm by a serious violent felon, and it alleged he was an habitual offender. *Id.* at 4. On August 13, 2017, the State filed a motion to amend the information "[b]y specifying the street locations near which the alleged kidnapping occurred to better fit the facts that will be presented at trial." Appellant's Direct Appeal

Appendix Volume II at 139. On August 14 and 15, 2017, the court held a jury trial. Before the presentation of evidence, the court granted the State's motion for separation of witnesses. During a discussion regarding the motion to amend the information, Crain's trial counsel argued that it was late to change the charging information and that Crain was prejudiced because "we have to contend with a different location." Trial Transcript Volume II at 25. The court indicated it would grant a motion to continue so he would have additional time to prepare and referenced the locations in the probable cause affidavit. Crain's trial counsel stated that he did not think a continuance was warranted, and the court allowed the amendment over the objection.

[4] On August 15, 2017, the prosecutor asserted that Crain called his grandmother from jail and told her what Hollis testified to and told his grandmother to tell his mother "what needed to be said." *Id.* at 178. After a recess, the prosecutor argued that Crain and his grandmother talked "at length about the substance of the case that was tried yesterday." *Id.* at 181. A portion of the jail call was played for the court. The prosecutor also summarized another phone call in which Crain spoke with his grandmother who referenced the fact that she had at that point talked to Crain's mother. Crain asked to speak and stated:

> I was like I need you to basically just tell him exactly what you told him when you – when he took his interview with you. That's what I need you to say. That's what I need her to say because Freddie kind of said like that you heard – that you heard his gun. . . . I just told my grandmother just to basically just tell her to say what she told the detective in her interview.

Id. at 183. The court stated that "[t]he big issue as I look at this is that you were in court yesterday when I granted the State's motion for a separation of witnesses." *Id.* at 184. Crain's trial counsel argued that the call did not give rise to a violation of the separation of witnesses order. The following exchange occurred:

> THE COURT: So when you tell witnesses what the separation of witness's order means, do you not include that they're not to talk about their testimony. They're not to talk about anything they said or anything they hear in the court.
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> [Crain's Counsel]: I usually give – I usually just say, look, don't come into court. You can't listen to any testimony. You know –
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> THE COURT: You can't talk about what you were asked –
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> [Crain's Counsel]: Yeah.
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> THE COURT: – right, etcetera.
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> [Crain's Counsel]: Yeah.
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> THE COURT: Can't talk about what somebody said?
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> [Crain's Counsel]: Yeah. So I guess my point is I don't think this is that clear. It's not – he's not talking to his mom and saying like Freddie said this, so you need to say this. . . .

Id. at 186. The trial court granted the State's motion to exclude the testimony of Crain's mother, Margaret Gilbert. Crain's counsel asked for a brief recess to discuss different strategies with Crain, and the court took a brief recess.

[5] Crain's trial counsel called Dara Chesser, an investigative paralegal with the Marion County Public Defender Agency. Chesser testified that she was asked

to locate and photograph Crain's clothing "that was held in property," she "went to Marion County Jail II or CCA and located Mr. Crain's clothing there in property," and took photographs of the clothing on May 17, 2017. *Id.* at 192. When asked why someone's clothes would be at CCA, she answered: "Typically, the clothing that is held in property is what they came into the jail wearing." *Id.*

[6] The jury acquitted Crain of the attempted battery charge but found him guilty of the remaining charges and of being an habitual offender. *Crain*, slip op. at 4. The trial court sentenced Crain to an aggregate term of thirty-two years. *Id.* On direct appeal, Crain challenged the sufficiency of the evidence to support his kidnapping conviction. *Id.* This Court affirmed. *Id.* at 6.

[7] On January 29, 2019, Crain filed a petition for post-conviction relief alleging that he received ineffective assistance of trial counsel by failing to adequately advise him about the meaning of a separation of witness order related to Gilbert, failing to seek a continuance following the amended information, failing to challenge the search warrant, calling Chesser as a witness whose testimony revealed to the jury that he was still in custody seven months after his arrest, and failing to adequately investigate and prepare for trial.

[8] On January 20, 2021, the court held an evidentiary hearing at which it heard the testimony of Crain, his trial counsel, and his mother. On April 5, 2022, the court entered a sixteen-page order denying Crain's petition.

Discussion

[9] The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. *Fisher v. State*, 810 N.E.2d 674, 679 (Ind. 2004); Ind. Post-Conviction Rule 1(5). When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. *Fisher*, 810 N.E.2d at 679. On review, we will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. *Id.* "A post-conviction court's findings and judgment will be reversed only upon a showing of clear error – that which leaves us with a definite and firm conviction that a mistake has been made." *Id.* In this review, we accept findings of fact unless clearly erroneous, but we accord no deference to conclusions of law. *Id.* The post-conviction court is the sole judge of the weight of the evidence and the credibility of witnesses. *Id.*

[10] Crain argues that his trial counsel was ineffective for: (A) failing to investigate and prepare for trial; (B) failing to challenge the search warrant; (C) failing to request a continuance after the charging information was amended; (D) failing to preserve the error of excluding Gilbert's testimony; and (E) eliciting testimony implying he was in custody months after his arrest.

[11] 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. *French v. State*, 778 N.E.2d 816, 824 (Ind. 2002) (citing *Strickland v. Washington*, 466 U.S. 668, 104

S. Ct. 2052 (1984), *reh'g denied*). A counsel's performance is deficient if it falls below an objective standard of reasonableness based on prevailing professional norms. *Id.* 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. *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Perez v. State*, 748 N.E.2d 853, 854 (Ind. 2001). Failure to satisfy either prong will cause the claim to fail. *French*, 778 N.E.2d at 824. Most ineffective assistance of counsel claims can be resolved by a prejudice inquiry alone. *Id.*

[12] When considering a claim of ineffective assistance of counsel, a "strong presumption arises that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Morgan v. State*, 755 N.E.2d 1070, 1072 (Ind. 2001). "[C]ounsel's performance is presumed effective, and a defendant must offer strong and convincing evidence to overcome this presumption." *Williams v. State*, 771 N.E.2d 70, 73 (Ind. 2002). Evidence of isolated poor strategy, inexperience, or bad tactics will not support a claim of ineffective assistance of counsel. *Clark v. State*, 668 N.E.2d 1206, 1211 (Ind. 1996), *reh'g denied*, *cert. denied*, 520 U.S. 1171, 117 S. Ct. 1438 (1997). "Reasonable strategy is not subject to judicial second guesses." *Burr v. State*, 492 N.E.2d 306, 309 (Ind. 1986). We "will not lightly speculate as to what may or may not have been an advantageous trial strategy as counsel should be given deference in choosing a trial strategy which, at the

time and under the circumstances, seems best." *Whitener v. State*, 696 N.E.2d 40, 42 (Ind. 1998). In order to prevail on a claim of ineffective assistance due to the failure to object, the defendant must show a reasonable probability that the objection would have been sustained if made. *Passwater v. State*, 989 N.E.2d 766, 772 (Ind. 2013).

A. *Failure to Investigate*

[13] Crain argues that he told his trial counsel that the firearm damage to Hollis's vehicle was from a pre-existing incident, he requested that trial counsel obtain surveillance video from a gas station to disprove the force or threat of force element, and trial counsel did nothing with this information. He also asserts that his trial counsel's closing argument might have been reasonable had he sought to secure a ballistics expert.

[14] It is undisputed that effective representation requires adequate pretrial investigation and preparation. *Badelle v. State*, 754 N.E.2d 510, 538 (Ind. Ct. App. 2001), *trans. denied*. However, it is well-settled that we should resist judging an attorney's performance with the benefit of hindsight. *Id.* "When deciding a claim of ineffective assistance of counsel for failure to investigate, we apply a great deal of deference to counsel's judgments." *Boesch v. State*, 778 N.E.2d 1276, 1283 (Ind. 2002), *reh'g denied*. With the benefit of hindsight, a defendant can always point to some rock left unturned to argue counsel should have investigated further. *Ritchie v. State*, 875 N.E.2d 706, 719 (Ind. 2007), *reh'g denied*. The benchmark for judging any claim of ineffectiveness must be

whether counsel's conduct so undermined the proper functioning of the adversarial process that it deprived the defendant of a fair trial. *Id.* (citing *Strickland*, 466 U.S. at 686, 104 S. Ct. 2052). Generally, "[c]ounsel's failure to interview or depose State's witnesses does not, standing alone, show deficient performance." *Williams*, 771 N.E.2d at 74. "The question is what additional information may have been gained from further investigation and how the absence of that information prejudiced his case." *Id.*

[15] At the post-conviction hearing, Crain did not present testimony regarding the availability of any specific surveillance videos or the testimony of any ballistics expert. Crain's trial counsel testified that he reviewed all of the discovery that the State provided. He stated that he thought he had a discussion about the videos with the prosecutor. On cross-examination, he testified that "there might not have been videos is why I probably can't remember. But I'm not sure." Transcript Volume II at 27. When asked if he would have pursued it further if he had reason to believe there were videos and that they contained important information, he answered that he would have. We cannot say that the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court.

B. *Failure to Challenge Search Warrant*

[16] Crain argues that his trial counsel "testified that he saw the discrepancy between there being a report of shots fired at 6203 E. 12th Street and a warrant ultimately being issued for 6204 E. 12th Street and gave no explanation for not

challenging the warrant." Appellant's Brief at 19. He also asserts that the application was conclusory and lacked facts supporting the proposition that contraband or evidence would be found at 6204 East 12th Street.

[17] The search warrant affidavit described the residence located at 6204 East 12th Street and asserted that officers were dispatched on a shots fired run on October 9, 2016, when officers arrived, the suspect had fled the area to his residence located at 6204 East 12th Street, officers were dispatched around 7:00 p.m. that day to 6204 East 12th Street on shots fired, officers arrived and surrounded the residence, and Crain exited the residence and surrendered to the officers. The search warrant listed the residence to be searched as: "6204 E. 12th Street. A double residence. . . ." Exhibits Volume at 10. While the CAD report listed a location of 6203 East 12th Street, it also stated: "SUBJ POSS INSIDE 6204 E 12TH" and "COMPLT STATE THAT THE SUBJ MIGHT BE AT THE OTHER SIDE OF THE DUPLEX." *Id.* at 12. We cannot say that Crain has demonstrated that his trial counsel was ineffective in not challenging the search warrant or that he was prejudiced.

C. *Failure to Request a Continuance*

[18] Crain contends that his trial counsel failed to request a continuance after the State amended the charging information on the morning of the trial. He argues that "the location was important for impeaching Hollis because he lived near 36th Street and Post Road." Appellant's Brief at 26.

[19] At the post-conviction hearing, Crain's trial counsel testified on cross-examination that Crain did not want a continuance and that desire went into his decision not to request a continuance. He also stated: "I thought I could still go forward. I mean, he would just had to have been mad at me for – if I didn't feel that way. But I felt like we could still go forward." Transcript Volume II at 25. We cannot say reversal is warranted on this basis.

D. *Failure to Preserve the Exclusion of Defense Witness*

[20] In his summary of argument, Crain asserts: "[W]hen the State was granted the exclusion of arguably Crain's most important witness, Margaret Gilbert, who would testify that she heard the alleged victim threaten to kill Crain, he made no offer of proof, again forfeiting for Crain appellate review of the extreme sanction." Appellant's Brief at 15. In his argument section, without citation to the record, Crain asserts that "[t]rial counsel testified that he believed – incorrectly – that he had preserved the issue of witness exclusion for appeal. In fact, he had not." *Id.* at 24. In the argument section of his brief under the heading "Failure to Preserve Witness Exclusion," Crain does not mention which witness his argument involves and does not cite to the record. *Id.* at 23. Later in his brief, he contends that "[b]ut for his trial counsel's error in failing to make an offer of proof on the testimony of Margaret Gilbert, there is a reasonable probability the appellate courts would have reversed the judgment of the trial court." *Id.* at 27. Without citation to the record, he asserts that "her

testimony would have disproved the force or threat of force element of the offense of kidnapping."[1] *Id.*

[21] The record reveals that Crain's trial counsel argued that the jail call did not give rise to a violation of the separation of witnesses order. As pointed out by the post-conviction court, Crain chose to address the trial court regarding the jail calls and did not deny understanding the separation of witnesses order. At the post-conviction hearing, Gilbert testified that she received a phone call from Crain on October 9, 2016, Crain was crying, Hollis, who was her mother's cousin, was "cussing and stuff" in the background, and she asked Hollis what was going on. Transcript Volume II at 40. She stated that Hollis pulled up in front of her apartment building and Crain exited Hollis's truck, "was fussing," and "turned around like he was going back." *Id.* at 41-42. She testified she told Crain, "Come over here," and he entered her apartment building. *Id.* at 42. She also testified that she heard Hollis threaten to kill Crain. At trial, Hollis testified that he might have cussed at Crain, Crain called his mother "hollering and crying" and said, "Freddie go kill me. He goes to kill me, mom. He gonna kill me. I know he is. I know he is." Trial Transcript Volume II at 72, 89. Thus, Gilbert's testimony would have been largely cumulative of Hollis's

[1] We remind counsel that Ind. Appellate Rule 46(8)(a) provides that "[e]ach contention must be supported by citations to the authorities, statutes, and the Appendix or parts of the Record on Appeal relied on, in accordance with Rule 22."

testimony. Further, Gilbert was not present in the vehicle when the shooting occurred. We cannot say that Crain has demonstrated that he was prejudiced.

E. *Elicited Testimony Implying Crain was in Custody Months after Arrest*

[22] Crain contends, without citation to the record, that his trial counsel introduced through the testimony of an investigator that Crain's clothing was still at CCA about seven months following his arrest, "which ultimately disclosed to the jury by implication that he was still in custody." Appellant's Brief at 25. He argues that, "[w]hile [he] was not tried in jail clothes, there was not an explanation for why his clothes would have remained there months later that was more likely than the fact that he was still in custody." *Id.* In his statement of facts, he asserts that Chesser, the investigative paralegal, testified that at trial counsel's direction she was asked to photograph Crain's clothing at CCA in May 2017 and "[t]his revealed to the jury that Crain was still in custody about seven months after his arrest." *Id.* at 14 (citing Petitioner's Exhibit 2; Trial Transcript Volume II at 192).

[23] While Chesser testified that she located Crain's clothing at the CCA, Crain does not direct us to any specific testimony indicating that Crain was still in custody. The post-conviction court found that "there was no mention, in the questions or in her answers, that Crain was still in custody at the time the photos were taken." Appellant's Appendix Volume II at 117. We cannot say that Crain has demonstrated that his counsel's performance was deficient or

that he was prejudiced in this respect or that the alleged errors together require reversal.

[24] For the foregoing reasons, we affirm the post-conviction court's order.

[25] Affirmed.

Bailey, J., and Weissmann, J., concur.