MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Ugbe Ojile,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent

March 24, 2023

Court of Appeals Case No. 22A-PC-2322

Appeal from the Ohio Circuit Court

The Honorable James D. Humphrey, Judge

Trial Court Cause No. 58C01-1411-PC-4

Memorandum Decision by Judge Vaidik
Judges Tavitas and Foley concur.

Vaidik, Judge.

Case Summary

[1] Ugbe Ojile appeals the denial of his petition for post-conviction relief. He contends the post-conviction court erred in finding he did not receive ineffective assistance of trial and appellate counsel and in finding that a new trial is not warranted based on juror misconduct. We affirm.

Facts and Procedural History

[2] Our Supreme Court addressed this case in the appeal of Kenyatta Erkins, Ojile's co-defendant. *Erkins v. State*, 13 N.E.3d 400 (Ind. 2014). The following facts are taken from that opinion:

> On October 5, 2010, police were monitoring Kenyatta Erkins and Ugbe Ojile via a wiretap on Erkins's cell phone and GPS monitors on vehicles commonly driven by the two men. After driving to and from various southeastern Indiana casinos for most of the night, Erkins and Ojile arrived at the Grand Victoria Casino (now Rising Sun) in Rising Sun, Indiana, at 12:50 a.m. on October 6. Erkins stayed in the vehicle as Ojile entered the casino, where he remained for about three hours. Casino surveillance cameras recorded Ojile's subsequent actions.
>
> Aside from the times he stepped away to phone Erkins, Ojile watched S.M. play cards at a nearby table. Around 1:00 a.m., Ojile called Erkins and told him that S.M. had about six hundred dollars in front of him on the table. Ten minutes later, Ojile placed another call and told Erkins that he witnessed S.M. take what appeared to be "at least twenty grand" out of his pocket.

After discussing whether to wait and see if S.M. would soon leave the casino, the men agreed to wait another hour.

At 2:48 a.m., Erkins called Ojile for an update. Ojile explained that S.M. had just won twenty-eight thousand dollars on the roulette machine and declined the casino's offer for a room. Then Ojile suggested "we should go lay on him" and declared that he was "willing like, go all the way with this mother f* * * er" because he didn't "think [they were] going to see any like this like anytime soon."

At 3:37 a.m., Ojile exited the casino. S.M. reserved a hotel room at 3:41 a.m. Driving home after dropping Erkins off at his house, Ojile called Erkins. In that conversation, the two men discussed robbing S.M. the next day:

> Ojile: Yeah, so. I take it's a wrap like that's a hot area right?
>
> Erkins: I mean, it might not be a wrap but I'm just saying though like, like just being around there in the day time and s**t like that going off knowing that that's a working neighborhood.
>
> Ojile: Right.
>
> Erkins: You know what I'm saying? Like, it probably still can work but, I just think he gonna be a problem.
>
> Ojile: Yeah, he ain't gonna just be no smooth.

* * *

> Early the next morning, police stopped Erkins and Ojile in Erkins's vehicle and conducted a search. Several items were seized, including dark clothing, camouflage gloves, a roll of duct tape, and a backpack containing a .40-caliber Glock handgun, a .40-caliber round of ammunition, a BB gun that resembled a handgun, and documents in Ojile's name. Police also searched Ojile's apartment and discovered a loaded magazine for the Glock.

Id. at 402-04 (internal citations omitted).

[3] The State charged both Ojile and Erkins with Class A felony conspiracy to commit robbery causing serious bodily injury. A trial for both men was held in March 2012. Detective Anthony Scott of the Indiana State Police briefly testified that he was investigating Ojile and Erkins along with agents from the Cincinnati Police Department and Hamilton County (Ohio) Sheriff's Department, and that during this investigation a wiretap was placed on Erkins's phone. Detective Tina Ziegler of the Cincinnati Police Department testified, over the defense's objection, as to her interpretation of the slang terms used by Ojile and Erkins in the phone calls. Specifically, she testified that when Ojile stated that "we should go lay on him," he meant to "lay in wait to rob [S.M.]" and "go all the way" meant "to do whatever it takes, use whatever act of violence, to rob him." Trial Tr. Vol. II p. 71. Ojile's trial counsel did not cross-examine either witness, nor did Erkins's.

[4] The jury found Ojile and Erkins guilty as charged. At sentencing, Detective Ziegler testified about the investigation into Ojile and Erkins, including that they previously committed several similar robberies in Ohio. As a result, in

2011 Ojile was found guilty of five counts of complicity to robbery, four counts of aggravated robbery, one count of robbery, and one count of conspiracy to commit aggravated robbery. Detective Ziegler also testified that the two tended to target Asian or elderly victims, believing them to be "easier targets" who were "not apt to report" crimes. Trial Tr. Vol. III pp. 4-5. The court found two aggravators: (1) the "particular facts and circumstances" of the case, namely that Ojile's comments on the wiretap showed a "callous disregard for others," and (2) Ojile's criminal history, consisting of the eleven robbery-related convictions committed in Ohio. *Id.* at 34. The trial court sentenced Ojile to fifty years, to be served consecutively to the sentences for his Ohio convictions.[1]

[5] Ojile and Erkins appealed separately, and this Court consolidated those appeals. *See Erkins & Ojile v. State*, 988 N.E.2d 299 (Ind. Ct. App. 2013), *summarily aff'd in part by Erkins v. State*, 13 N.E.3d 400 (Ind. 2014). The two asserted the same five claims, challenging (1) the State's amendment of the charging information, (2) the sufficiency of evidence, which involved an issue of first impression as to the evidence needed to prove the intent to inflict serious bodily injury in conspiracy cases, (3) the admission of evidence gathered after the men left the casino, (4) the admission of Detective Ziegler's testimony explaining the men's slang, and (5) remarks made by the prosecutor during

[1] At the time of sentencing, as the trial court noted, Ojile had thirteen robbery-related convictions in Ohio. Two were later vacated on appeal. *See Ojile v. Smith*, 779 Fed. Appx. 288, 291 n.2 (6th Cir. 2019) (explaining the case history of Ojile's Ohio convictions). Ojile received an aggregate sentence of twenty-two years for the eleven convictions. *Id.* According to the Ohio Department of Rehabilitation & Correction's website, his projected release date is September 30, 2032.

closing statements. Ojile also argued that his trial counsel was ineffective in not pursuing an abandonment defense. We affirmed as to all claims.

[6] Ojile and Erkins filed separate petitions to transfer. Our Supreme Court denied Ojile's pro se petition but granted Erkins's. The Court addressed only two issues—the amendment of the charging information and the sufficiency of the evidence—finding no error and summarily affirming this Court's opinion as to the other issues. *See Erkins*, 13 N.E.3d at 411.

[7] In May 2017, Ojile filed a pro se petition for post-conviction relief, alleging ineffective assistance of trial and appellate counsel, as well as three freestanding claims asserting (1) juror misconduct, (2) an error in the charging information, and (3) that he was erroneously denied a jury instruction on a lesser-included offense. A hearing was held in March 2022.

[8] At the hearing, Special Deputy Irvin McKinley testified that he volunteered for "Ohio County" as a special deputy and transported Ojile to and from the trial each day and stayed with him in the courtroom during the trial.[2] Tr. p. 39. Unbeknownst to the trial court and the parties, his son, Andrew McKinley, was on the jury. Juror McKinley testified he had not seen or spoken to his father "other than maybe [at] funerals" in eighteen years. *Id.* at 10. He stated that at

[2] Special Deputy McKinley testified that he did not consider himself to have been a "law enforcement" officer at the time of the trial because he worked in a "volunteer" capacity as a "transporter," although his official title was special deputy. Tr. p. 38. For purposes of this appeal, we will assume, as the post-conviction court appears to have done, that this constitutes a law-enforcement officer. Additionally, it is not clear from the record what law-enforcement agency in Ohio County Special Deputy McKinley volunteered for.

the time he filled out his jury questionnaire, which asked the potential jurors to list any family members who were "in law enforcement," he "didn't know [his father] was an officer of any sort" and therefore did not list him. *Id.* at 10, 35. For the same reason, he did not disclose this information during voir dire. He acknowledged he saw his father in the courtroom on the second day of trial and recognized him to be performing some type of law-enforcement role but did not disclose this information to anyone. He also stated this did not "sway [him] in any way, shape, or form for a guilty verdict." *Id.* at 34.

[9] Trial counsel also testified at the hearing and was asked about his failure to cross-examine two of the State's witnesses. He stated that his strategy was to not cross-examine a witness unless "there was something we thought we could get worthwhile out of a cross examination" and that he was "really walking on [eggshells] to try to keep certain things out of evidence," namely that Ojile had been convicted of similar offenses in Ohio stemming from this investigation. *Id.* at 56. When asked specifically about Detective Ziegler's testimony about the slang, trial counsel testified that he chose not to question her interpretation because "it wasn't an issue we were [going to get] a definite answer from her on anyway" and he was concerned that she "knew [Ojile's] background completely" and that questioning her as to her opinion on his language would open the door to questions about the Ohio convictions. *Id.* at 58. As to Detective Scott's testimony, trial counsel stated this testimony was mainly used to "bolster . . . up the videos from the casino and the phone calls" and that

questioning him "would cause more damage potentially than just letting it go." *Id.* at 60, 62.

[10] Following the hearing, the post-conviction court denied Ojile's petition.

[11] Ojile now appeals.

Discussion and Decision

[12] The petitioner in a post-conviction proceeding bears the burden of proving the grounds for relief by a preponderance of the evidence. *Henley v. State*, 881 N.E.2d 639, 643 (Ind. 2008). Ojile is appealing a negative judgment; therefore, he must show that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. *Id*. at 643-44. Although we do not defer to the post-conviction court's legal conclusions, a post-conviction court's findings and judgment will be reversed only upon a showing of clear error—that which leaves us with a definite and firm conviction that a mistake has been made. *State v. Damron*, 915 N.E.2d 189, 191 (Ind. Ct. App. 2009), *reh'g denied, trans. denied*.

I. Juror Misconduct

[13] Ojile first argues that the post-conviction court erred by not granting him a new trial based on juror misconduct. Specifically, Ojile argues Juror McKinley failed to disclose that his father was the deputy that transported Ojile to and from trial and this violated Ojile's Sixth Amendment right to an impartial jury.

[14] The Sixth Amendment to the United States Constitution provides, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State . . . ." This is made binding on the states by the Fourteenth Amendment. *Wilkes v. State*, 984 N.E.2d 1236, 1250 (Ind. 2013). To prevail on a claim of juror misconduct under the federal standard, Ojile must first demonstrate that a juror failed to answer honestly a material question and then further show that a correct response would have provided a valid basis for a challenge for cause. *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 556 (1984).[3] The motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial. *Id.*

[15] Even assuming the circumstances here satisfy the first prong of the *McDonough* test, Ojile must also show that this information would have provided a valid basis for a challenge for cause.[4] Indiana Code section 35-37-1-5 governs challenges for cause and provides that:

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[3] *McDonough* was a civil case, but it has since been applied to criminal cases. *State v. Dye*, 784 N.E.2d 469, 473 (Ind. 2003). The State responds to Ojile's claim using the test for juror misconduct articulated in *Gann v. State*, 330 N.E.2d 88, 91 (Ind. 1975), requiring the defendant to show gross juror misconduct and that the misconduct probably harmed him. This test is used to address juror-misconduct claims brought under the Indiana Constitution. But Ojile brought his claim under the federal constitution, and thus we use the *McDonough* test. *See Wilkes*, 984 N.E.2d at 1249-51 (explaining the two analyses under the separate constitutions).

[4] It is unclear if *McDonough* even applies in circumstances such as this, where the juror did not know the correct information, as opposed to intentional concealment of information or failure to disclose known information for an innocent reason. *Dye*, 784 N.E.2d at 473 (*McDonough* "applies equally to deliberate concealment and to innocent non-disclosure."); *U.S. v Perkins*, 748 F.2d 1519, 1531 (11th Cir. 1984) (first

> (a) The following are good causes for challenge to any person called as a juror in any criminal trial:
>
> * * *
>
> (11) That the person is biased or prejudiced for or against the defendant.

"A juror's bias may be actual or implied." *Alvies v. State*, 795 N.E.2d 493, 499 (Ind. Ct. App. 2003), *trans. denied*. The post-conviction court determined there was no actual or implied bias here. We agree.

[16] Ojile contends actual bias should be inferred "since [Juror McKinley] intentionally failed to disclose that he was the son of [Special Deputy McKinley]." Appellant's Br. p. 34. But the post-conviction court found Juror McKinley did not intentionally fail to disclose this information, and the record supports this finding. Juror McKinley testified at the 2022 post-conviction hearing that he had barely seen or spoken to his father in eighteen years, meaning at the time of the 2012 trial he had not spoken to his father in eight years, and did not know that he was in law enforcement. Thus, it does not appear that he intentionally failed to disclose this information on the questionnaire or during voir dire. Further, he testified that he did not see his father in the courtroom until the second day of trial. As the State points out, the

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prong of *McDonough* requires not only a finding that the juror answered a material question incorrectly, but also that the juror "was aware of the fact that his answers were false").

jury was only instructed to alert the court upon realization that they knew "a witness or either Defendant," neither of which describes Special Deputy McKinley. Appellant's App. Vol. III p. 85. Thus, we do not agree with Ojile that Juror McKinley's failure to disclose the relationship shows actual bias.

[17] Nor do we see any implied bias. Juror bias may be implied "where a relationship exists between the juror and one of the parties." *Caruthers v. State*, 926 N.E.2d 1016, 1020 (Ind. 2010). Here, Juror McKinley was the son of Special Deputy McKinley, who transported Ojile to and from trial and remained in the courtroom with him. Special Deputy McKinley was not a witness, nor was he involved in the investigation. *Cf. Woolston v. State*, 453 N.E.2d 965, 968 (Ind. 1983) (implied bias existed where juror knew three of the testifying witnesses and his wife worked for the police department on defendant's case). In fact, it does not appear he even volunteered for the same law-enforcement agency involved in Ojile's investigation and arrest.[5] *See Porter v. State*, 391 N.E.2d 801, 816 (Ind. 1979) (trial court did not err in refusing to remove for cause juror who was a volunteer sheriff's deputy at an uninvolved law-enforcement agency). Furthermore, Special Deputy McKinley and Juror McKinley were estranged, and Juror McKinley testified his father's involvement in the trial had no bearing on the guilty verdict. Given the tenuous

[5] When asked at the hearing what agency he volunteered for, Special Deputy McKinley stated, "Ohio County." Tr. p. 39. Presumably, this refers to the Ohio County (Indiana) Sheriff's Office. Detective Scott testified at trial that the investigation and ultimate arrest of Ojile involved coordination between the Indiana State Police, the Hamilton County (Ohio) Sheriff's Department, and the Cincinnati Police Department.

relationship between Special Deputy McKinley and the prosecution, and between Special Deputy McKinley and Juror McKinley, we cannot say the post-conviction court erred in finding no implied bias here.

[18] The post-conviction court did not err in determining that a new trial is not warranted based on Ojile's juror-misconduct claim.

II. Trial Counsel

[19] Ojile next contends the post-conviction court erred in finding his trial counsel was not ineffective. As an initial matter, we note that a defendant may raise a claim of ineffective assistance of trial counsel for the first time in a post-conviction proceeding. *Timberlake v. State*, 753 N.E.2d 591, 602 (Ind. 2001). But once the defendant chooses to raise his claim of ineffective assistance of trial counsel (either on direct appeal or post-conviction), he must raise all issues relating to that claim. *Id.* A defendant who chooses to raise on direct appeal a claim of ineffective assistance of trial counsel is foreclosed from relitigating that claim. *Id.* In his direct appeal, Ojile raised, and this Court considered and rejected, a claim of ineffective assistance of trial counsel. *See Erkins & Ojile*, 988 N.E.2d at 317-18. Res judicata thus bars him from relitigating this issue in post-conviction proceedings. *Timberlake*, 753 N.E.2d at 602.

[20] Nor would Ojile's ineffectiveness claims succeed on the merits. To prevail on a claim of ineffective assistance of counsel, Ojile must show both that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced him. *Coleman v. State*, 694 N.E.2d 269, 272

(Ind. 1998) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). There is a strong presumption that counsel rendered adequate assistance. *Id*. "Evidence of isolated poor strategy, inexperience or bad tactics will not support a claim of ineffective assistance." *Id.* at 273. "Counsel's performance is evaluated as a whole." *Lemond v. State*, 878 N.E.2d 384, 391 (Ind. Ct. App. 2007), *trans. denied*. To establish prejudice, the defendant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Sims v. State*, 771 N.E.2d 734, 741 (Ind. Ct. App. 2002), *trans. denied*. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. "Prejudice exists when the conviction or sentence resulted from a breakdown in the adversarial process that rendered the result of the proceeding fundamentally unfair or unreliable." *Coleman*, 694 N.E.2d at 272.

A. Cross-Examination

[21] Ojile first argues his trial counsel was ineffective in not cross-examining Detectives Ziegler and Scott. We disagree. "[I]t is well-settled that the nature and extent of cross-examination is a matter of trial strategy which we do not second-guess on appeal." *Williams v. State*, 160 N.E.3d 563, 579 (Ind. Ct. App. 2020), *trans. denied*.

[22] Trial counsel's decision to not cross-examine Detectives Zielger and Scott was clearly a strategic decision. Trial counsel testified at the post-conviction hearing that he decided not to cross-examine these witnesses because he did not believe

he could elicit helpful testimony. Specifically, he noted that Detective Scott's testimony was brief and almost exclusively to admit the video surveillance. Thus, there was little to cross-examine him on. As for Detective Ziegler's testimony about the slang used by Ojile in the recorded phone calls, trial counsel objected to her testimony. Trial counsel testified that when he lost that objection he chose not to cross-examine her because he did not believe she would change her opinion. Additionally, he testified that for both witnesses he was concerned that any cross-examination would open the door for the witnesses to discuss the other robberies committed by Ojile, which counsel had worked hard to keep out of evidence.

[23] Given this was a clear strategic decision by trial counsel—and a reasonable one at that—we cannot say counsel was deficient by not cross-examining these witnesses. *See Douglas v. State*, 663 N.E.2d 1153, 1155 (Ind. 1996) (trial counsel's strategic decision to not cross-examine witnesses whose testimony would not have advanced the defense's theory was not deficient performance).

B. Jury Instruction

[24] Ojile also argues his trial counsel was ineffective because he failed to request the trial court instruct the jury on the "lesser included offense" of Class B felony conspiracy to commit robbery with a deadly weapon. Appellant's Br. p. 38. However, as the State points out, this argument is built on a false premise, as Class B felony conspiracy to commit robbery with a deadly weapon is not a lesser-included offense of the charged crime here.

[25] When asked by a party to instruct a jury on a lesser-included offense of the crime charged, a trial court should first compare the statute defining the crime charged with the statute defining the alleged lesser-included offense to determine if the alleged lesser-included offense is inherently included in the crime charged. *Fisher v. State*, 810 N.E.2d 674, 678 (Ind. 2004). An offense is an inherently lesser-included offense when it may be established by proof of the same material elements or less than all the material elements that define the "greater" crime charged. *Whitham v. State*, 49 N.E.3d 162, 168 (Ind. Ct. App. 2015), *trans. denied*.

[26] If a trial court determines that an alleged lesser-included offense is not inherently included in the crime charged under step one, then it must determine whether the alleged lesser-included offense is factually included in the crime charged. *Fisher*, 810 N.E.2d at 678. An offense is a factually lesser-included offense when the charging instrument alleges the means used to commit the crime charged includes all the elements of the alleged lesser-included offense. *Whitham*, 49 N.E.3d at 168. "If the alleged lesser-included offense is neither inherently nor factually included in the crime charged, the trial court should not give an instruction on the alleged lesser-included offense." *Fisher*, 810 N.E.2d at 678.

[27] At the time of Ojile's offense, the robbery statute provided,

> A person who knowingly or intentionally takes property from another person or from the presence of another person:

> (1) by using or threatening the use of force on any person; or
>
> (2) by putting any person in fear;
>
> commits robbery, a Class C felony. However, **the offense is a Class B felony if it is committed while armed with a deadly weapon** or results in bodily injury to any person other than a defendant, and **a Class A felony if it results in serious bodily injury** to any person other than a defendant.

Ind. Code § 35-42-5-1 (2010) (emphases added). Thus, Class B felony robbery is not an inherently lesser-included offense of Class A robbery, as each requires an element the other does not (the deadly weapon for a Class B felony and serious bodily injury for a Class A felony). *See Kingery v. State*, 659 N.E.2d 490, 495 (Ind. 1995) ("[T]he armed-with-a-deadly-weapon Class B offense is not a lesser included offense of Class A robbery.").

[28] Nor is the alleged lesser-included crime factually included here. The charging information provided,

> On or about October 6, 2010, in Ohio County, State of Indiana, Ugbe Ojile and [Kenyatta] Erkins, with the Intent to commit the felony of Robbery Causing Serious Bodily Injury, did agree with one another to commit the felony of Robbery Causing Serious Bodily Injury and Ugbe Ojile did perform an overt act in furtherance of said agreement, to-wit: conducted surveillance on [S.M.] at the Grand Victoria Casino.

Appellant's App. Vol. III p. 62. Again, this does not include all the elements of Class B felony conspiracy to commit robbery with a deadly weapon, because it does not include the deadly-weapon element.

[29] As Ojile was not entitled to an instruction on Class B felony conspiracy to commit robbery with a deadly weapon, trial counsel was not deficient in failing to request that instruction.

C. Charging Information

[30] Finally, Ojile contends trial counsel was ineffective in failing to correct the charging information to reflect the language of the statutory crime. Ojile is correct that while the charging information indicates he conspired to commit Class A felony robbery **causing** serious bodily injury, *see* Appellant's App. Vol. III p. 62 (charging information), the actual crime enumerated in the relevant statute is Class A felony conspiracy to commit robbery that **results in** serious bodily injury. I.C. §§ 35-42-5-1 (2010) (robbery statute); 35-41-5-2 (2010) (conspiracy statute). But this is not necessarily an error.

[31] Indiana Code section 35-34-1-2(a)(4) requires that the information be in writing "setting forth the nature and elements of the offense charged in plain and concise language without unnecessary repetition . . . ." The information should state the offense in the language of the statute or in words that convey a similar meaning. *Smith v. State*, 465 N.E.2d 702, 704 (Ind. 1984). Minor variances from the language of the statute do not make an information defective, so long as the defendant is not misled or an essential element of the crime is not omitted. *Id.*

[32] We see no error in the charging information here. "Causing" and "results in" convey similar meanings, although "causing" necessitates that an act produce the conclusion, while "results in" requires only a certain conclusion occur, regardless of why it occurred. *See* Black's Law Dictionary (11th ed. 2019) (defining "cause" as "[s]omething that produces an effect or result" and defining result as "[t]o be a physical, logical, or legal consequence; to proceed as an outcome or conclusion"). This distinction can matter in certain contexts. *See McElroy v. State*, 864 N.E.2d 392, 398 (Ind. Ct. App. 2007) (distinguishing between a statute that punished a defendant for "causing" death and a statute that punished leaving the scene of an accident "resulting" in death, reasoning that the first punished the defendant for causing the death and the second punished him for leaving the scene where a death resulted, regardless of who caused the death), *trans. denied*.

[33] But we do not believe this variance to be material here, as Ojile has not shown us how this misled him. Ojile argues that, had he been charged with conspiracy to commit robbery that results in serious bodily injury, trial counsel could have argued "it was not defendant's specific intent for the robbery to result in serious bodily injury." Appellant's Br. p. 26. We see no reason why this argument was unavailable to Ojile just because the information stated he intended to "cause" serious bodily injury. In fact, Erkins's counsel made this exact argument at trial. Trial Tr. Vol. II p. 146 (defense arguing in closing that "Mr. Ojile and Mr. Erkins never agreed to cause serious bodily injury during the phone calls"). So the minor variance in language did not preclude him from making this

argument trial, and he has failed to show this misled him. *See Higgins v. State*, 690 N.E.2d 311, 314 (Ind. Ct. App. 1997) (finding no error in charging information where the defendant did not contend that his defense was affected by the wording of the information).

[34] Ojile has not shown his trial counsel rendered ineffective assistance, and thus the post-conviction court did not err in denying his claims.[6]

III. Appellate Counsel

[35] Ojile also alleges the post-conviction court erred in denying his claims of ineffective assistance of appellate counsel. The standard for a claim of ineffective assistance of appellate counsel is the same as for trial counsel in that the defendant must show appellate counsel was deficient in his performance and that the deficiency resulted in prejudice. *Timberlake*, 753 N.E.2d at 603. Our Supreme Court has recognized three types of ineffective assistance of appellate counsel: (1) denial of access to appeal; (2) failure to raise issues that should have been raised; and (3) failure to present issues well. *Wrinkles v. State*, 749 N.E.2d 1179, 1203 (Ind. 2001). Ojile's claims fall into the second category: failure to

[6] Ojile also asserts two freestanding claims—that his due-process rights were violated by the lack of jury instruction on Class B felony conspiracy to commit robbery with a deadly weapon and by using "causing" instead of "results in" serious bodily injury in the charging information. As the State points out, these claims were available to Ojile on direct appeal, and thus he is barred from asserting them now. *Reed v. State*, 866 N.E.2d 767, 768 (Ind. 2007) ("Only issues not known at the time of the original trial or issues not available on direct appeal may be properly raised through post-conviction proceedings." (citation omitted)). Furthermore, as noted above, Ojile was not entitled to a jury instruction on Class B felony conspiracy to commit robbery with a deadly weapon and the minor variance in the charging information was not an error. Thus, his due-process rights were not violated.

raise an issue. In evaluating such claims, we must consider "(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." *Gray v. State*, 841 N.E.2d 1210, 1214 (Ind. Ct. App. 2006) (cleaned up), *trans. denied*.

[36] Ojile first argues his appellate counsel was ineffective in failing to raise the above ineffective-assistance-of-trial-counsel claims on direct appeal. However, as noted above, there was no ineffective assistance of trial counsel, and thus appellate counsel was not ineffective in failing to assert these claims. *See Allen v. State*, 749 N.E.2d 1158, 1169 (Ind. 2001) "([A] claim that appellate counsel was ineffective for failing fully and properly to raise and support a claim of ineffective assistance of trial counsel will be successful only when the petitioner shows that both trial counsel and appellate counsel were ineffective under the *Strickland* standard." (citation omitted)). Ojile also argues appellate counsel was ineffective in failing to challenge the lack of a jury instruction on Class B felony conspiracy to commit robbery with a deadly weapon or the use of "causing" in the charging information. As explained above, these were not errors, and thus appellate counsel was not ineffective in not raising these claims.

[37] Ojile also contends his appellate counsel was ineffective in failing to challenge the appropriateness of his fifty-year sentence under Appellate Rule 7(B), which authorizes us to "revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Ojile's appellate counsel raised six claims on direct appeal, including

a sufficiency issue of first impression that was later analyzed by the Supreme Court. Ojile argues an inappropriate-sentence claim is clearly stronger than these claims. We do not agree.

[38] A person who commits a Class A felony shall be imprisoned for a fixed term of between twenty and fifty years. I.C. § 35-50-2-4(a). Ojile received the maximum fifty-year sentence and argues this likely would have been reduced on appeal given that he "had never been convicted of a prior felony" before being charged in this case. Appellant's Br. p. 12. But before committing and being arrested for the instant offense, Ojile committed eleven other robbery-related offenses. By the time of the sentencing in this case, Ojile had been convicted of those offenses. Furthermore, detectives testified he had engaged in a year-long violent crime spree involving multiple victims, and that he purposefully targeted racial minorities and the elderly. This reflects very poorly on his character. As to the nature and circumstances of the offense, we agree with Ojile that this offense likely was not "any more serious than any other 'conspiracy to commit robbery resulting in serious bodily injury'" case. *Id.* at 13. But his criminal record alone supports the sentence, and thus we cannot say this claim was clearly stronger than the other claims brought by appellate counsel.

[39] Ojile has failed to show his appellate counsel performed deficiently and therefore the post-conviction court did not err in finding no ineffective assistance of appellate counsel.

[40] Affirmed.

Tavitas, J., and Foley, J., concur.