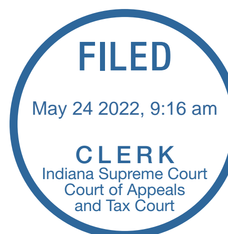
MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEYS FOR APPELLANT

Amy E. Karozos
Public Defender of Indiana
Indianapolis, Indiana

Deidre R. Eltzroth
Deputy Public Defender
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Samuel J. Dayton
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Justin D. Littlejohn,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent

May 24, 2022

Court of Appeals Case No. 21A-PC-2489

Appeal from the Allen Superior Court

The Honorable Frances C. Gull, Judge

Trial Court Cause No. 02D04-1707-PC-74

May, Judge.

[1] Justin D. Littlejohn appeals the post-conviction court's denial of his petition for post-conviction relief. Littlejohn argues the court erred when it did not

conclude Littlejohn's trial counsel provided ineffective assistance by: (1) failing to call a witness during his trial; and (2) failing to object on the proper grounds to an intervening-cause instruction. Littlejohn also argues the post-conviction court erred when it did not conclude Littlejohn's appellate counsel provided ineffective assistance by failing to raise the proper arguments regarding the intervening-cause instruction. We affirm.

Facts and Procedural History

[2] The facts of Littlejohn's conviction were set forth in our opinion deciding his direct appeal:

> Randy Dial was a mildly mentally disabled man who received treatment through Park Center, a mental health treatment facility in Fort Wayne. As part of his services, he was provided the funds to stay at a local motel. Described by those who knew him as a nice and friendly guy, Dial allowed Littlejohn (who was homeless and broke) to stay in his motel room.
>
> On the night of December 27, 2015, Dial and several friends were hanging out in his motel room, watching television, and smoking spice. A while later, Littlejohn and another man entered the room. Dial stood up to use the restroom, and the agitated Littlejohn said, "Sit your f**king a** down." Tr. Vol. I at 160. Dial explained that he was only trying to use the restroom, reminded Littlejohn that it was his motel room, asked that he respect him, and sat down as instructed.
>
> Littlejohn approached Dial and punched him twice in the face, knocking him to the floor. As Dial lay unconscious, his friend George Lowrimore attempted to intervene, but Littlejohn's companion drew a gun and threatened to "put a bullet in [his] brain." *Id.* at 162-63; Tr. Vol. II at 44, 51, 54.

Littlejohn picked up a fifteen-pound microwave oven and struck the unconscious Dial in the head several times. When the hinges on the microwave broke and the door was ajar, Littlejohn took the heavy glass turntable plate from within and shattered it against Dial's face. Immediately thereafter, one of the onlooking friends told Littlejohn to stop, and Littlejohn responded that he could "pick [Dial] up and throw him out the window." *Id*. at 46, 56-57. At that point, Littlejohn and several others left.

Lowrimore helped Dial onto the bed and got him a towel for the bleeding. The bloody and disoriented Dial told Lowrimore that he was "okay," so Lowrimore left. Tr. Vol. I at 164-65, 178. Later that night, when Lowrimore returned to check on Dial, he could not get inside the locked room, and he could hear gasping and stumbling sounds. Lowrimore tried unsuccessfully to get a key from the front desk.

The next afternoon, Lowrimore persuaded the motel manager to open Dial's door. They found Dial unconscious on the floor with labored breathing and mucus coming from his mouth and phoned 911. Paramedics transported Dial to a local hospital. Meanwhile, police arrived and found a large puddle of blood and tissue matter on the floor. They also found blood on the microwave, television, refrigerator, bed, and pillows, as well as in the bathroom.

Dial never regained consciousness and died at the hospital on December 29, 2015. An autopsy revealed the cause of death to be severe brain injury caused by blunt force trauma to the head. The pathologist reported that Dial's brain injuries and subdural hematomas were consistent with multiple blows to the head involving a substantial amount of force. Dial also suffered a skull fracture, a fractured middle finger, contusions on the neck, purple eyes, and abrasions and bruises on his neck, chest, shoulder, thighs, knees, forearm, and hands.

The next day, police interviewed Littlejohn, who initially denied attacking Dial. He later admitted hitting Dial with his fist, the microwave, and the glass plate, conceding that he "took it a little too far" with the microwave because Dial

> was unconscious, harmless, weak, and would not fight him. State's Ex. 49.
>
> The State charged Littlejohn with murder and a habitual offender count. A jury found him guilty as charged. The trial court sentenced him to sixty-five years for murder, plus twenty years for the habitual offender adjudication, for an aggregate sentence of eighty-five years executed.

Littlejohn v. State, 02A04-1608-CR-1936, *1-*2 (Ind. Ct. App. 2017). Littlejohn raised three issues on direct appeal. He argued: (1) the trial court abused its discretion in instructing the jury on intervening cause; (2) the State did not provide sufficient evidence to support Littlejohn's murder conviction; and (3) his sentence was inappropriate based on the nature of his offense and his character. We affirmed the trial court's judgment. *Id.* at *5.

[3] On July 21, 2017, Littlejohn filed a pro se petition for post-conviction relief in which he claimed he received ineffective assistance of trial and appellate counsel, Attorney Anthony Churchward (hereinafter, "Attorney Churchward"). The State filed its answer on August 7, 2017. On July 23, 2020, Littlejohn filed an amended petition for post-conviction relief with the assistance of counsel. On August 25, 2020, Littlejohn filed a second amended petition for post-conviction relief with the assistance of counsel in which he alleged the issues before us on appeal. The post-conviction court held an evidentiary hearing on Littlejohn's second amended petition for post-conviction relief on October 30, 2020, and April 9, 2021. The post-conviction court determined Littlejohn failed to prove his claims, and it denied his petition for post-conviction relief.

Discussion and Decision

[4] Post-conviction proceedings are not "super appeals" through which a convicted person can raise issues that he failed to raise at trial or on direct appeal. *McCary v. State*, 761 N.E.2d 389, 391 (Ind. 2002), *reh'g denied*. Instead, they afford petitioners a limited opportunity to raise issues unavailable or unknown at trial and on direct appeal. *Davidson v. State*, 763 N.E.2d 441, 443 (Ind. 2002). As post-conviction proceedings are civil in nature, the petitioner must prove his grounds for relief by a preponderance of the evidence. *Id*.

[5] A party appealing a negative post-conviction judgment must establish the evidence is without conflict and, as a whole, unmistakably and unerringly points to a conclusion contrary to that reached by the post-conviction court. *McCary*, 761 N.E.2d at 391-92. Where, as here, the post-conviction court enters findings of fact and conclusions of law in accordance with Indiana Post-Conviction Rule 1(6), we do not defer to the court's legal conclusions, but "the findings and judgment will be reversed only upon a showing of clear error - that which leaves us with a definite and firm conviction that a mistake has been made." *Ben-Yisrayl v. State*, 729 N.E.2d 102, 106 (Ind. 2000) (citation omitted), *cert. denied*, 534 U.S. 830 (2001). We neither reweigh evidence nor judge credibility of witnesses when reviewing the denial of a petition for post-conviction relief. *Mahone v. State*, 742 N.E.2d 982, 984 (Ind. Ct. App. 2001), *trans. denied*.

I. Ineffective Assistance of Trial Counsel

[6] 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 (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 presumption that trial counsel provided effective representation, and the petitioner must rebut that presumption with "strong and convincing evidence[.]" *McCullough v. State*, 973 N.E.2d 62, 74 (Ind. Ct. App. 2012) (quoting *Williams v. State*, 771 N.E.2d 70, 73 (Ind. 2002)), *trans. denied*.

[7] "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). We need not consider whether counsel's performance fell below the objective standard if the performance would have not changed the outcome. *Strickland*, 466 U.S. at 687.

A. Failure to Call Defense Witness

[8] Littlejohn first argues the post-conviction court erred when it denied his claim of ineffective assistance of trial counsel based on the failure of Attorney Churchward to call Kristina Elkin[1] to testify. Littlejohn contends the outcome of his trial would have been different if Attorney Churchward had called Elkin to testify that Dial provoked Littlejohn and that "Littlejohn did not intend to kill Dial." (Petitioner's Br. at 14.)

[9] "[A] decision regarding what witnesses to call is a matter of trial strategy which an appellate court will not second-guess." *Johnson v. State*, 832 N.E.2d 985, 1003 (Ind. Ct. App. 2005), *trans. denied*. 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." *Id.* at 997. "Isolated poor strategy, inexperience, or bad tactics does not necessarily constitute ineffective assistance of counsel." *McCullough,* 973 N.E.2d at 74.

[10] Regarding this issue, the post-conviction court determined there is no reasonable probability the result of Littlejohn's trial would have been different if Elkin had been called to testify:

---

[1] As the post-conviction court notes: "Littlejohn's brief refers to Kristina 'Elkins,' but the witness testified at the post-conviction hearing that her name is 'Elkin' with no 's' on the end. The Court here uses the spelling given by the witness herself at the hearing." (PCR App. Vol. II at 156.) We follow the post-conviction court's convention.

3. . . . . The testimony of Kristina Elkin, [Littlejohn] says, would have established that "Dial provoked Littlejohn by using the 'n word' and insulting his daughter[,]" and such "proof of provocation would have validly supported a not guilty verdict by the jury." Petitioner correctly refrains from arguing that a victim's use of insults, even highly offensive ones, may suffice to provide a complete defense to a charge of murder—an argument that would not be supported by any existing authority. But what he does argue on this point is not easy to discern. In lieu of cogent argument, he says only this:

> [P]roof of provocation would have validly supported a not guilty verdict by the jury. For example, under Indiana law, "[a] person engages in conduct 'knowingly' if, when the person engages in the conduct, he or she is aware of a high probability that he or she is doing so." Ind. Code § 35-41-2-2(b). Otherwise, "[a] person engages in conduct 'recklessly' if he or she engages in the conduct in plain, conscious, and unjustifiable disregard of harm that might result and the disregard involves a substantial deviation from the [sic] acceptable standards of conduct. Ind. Code § 35-41-2-2(c). Littlejohn's intent was the single matter at issue in the trial as there was no dispute about causation. No other witness [i.e., other than Kristina Elkin] testified to Dial's specific insults lodged at Littlejohn or to Littlejohn's behavior after the fight with Dial.

4. Petitioner says nothing about how a victim's use of insults could conceivably efface a defendant's awareness of a high probability that his conduct would cause the victim's death, and no authority suggests that it could. It has long been established that, far from effacing a defendant's awareness of that probability, words alone are not even sufficient provocation to reduce murder to manslaughter. *Perigo v. State*, 541 N.E.2d 936, 939 (Ind. 1989), and cases cited therein. Petitioner has fallen far short of establishing that, by calling Kristina Elkin to testify

> about the victim's use of the infamous "N word" and other insults, Attorney Churchward could have affected the outcome of Petitioner's trial.
>
> 5. Petitioner also claims that Kristina Elkin "stated that Littlejohn did not intend to kill Dial." A witness may not testify to an opinion concerning intent. Ind. Evid. R. 704(b). As Kristina Elkin's statement about Petitioner's intent would not have been admissible at trial, Attorney Churchward could not have affected the outcome of the trial by offering that statement.

(PCR App. Vol. II at 159-60) (internal citations to record omitted) (italics and brackets in original).

[11] First, regarding Littlejohn's argument that Attorney Churchward should have called Elkin to testify Littlejohn did not intend to kill Dial, the post-conviction court is correct in noting Evidence Rule 704(b) would have prevented the admission of that testimony at Littlejohn's criminal trial. *See* Evid. R. 704(b) ("Witnesses may not testify to opinions concerning intent, guilt, or innocence in a criminal case[.]"). To the extent Littlejohn wishes us to hold the State's failure at the post-conviction hearing to object to Elkin's testimony about Littlejohn's intent creates a "colorable claim[,]" (Appellant's Br. at 15 n.4), as to the admissibility of that testimony at a criminal trial, we decline. Regardless of whether the State objected at the post-conviction hearing, the evidence would have been inadmissible at Littlejohn's criminal trial, and Littlejohn cannot demonstrate Attorney Churchward's failure to offer that testimony prejudiced Littlejohn's trial. *See*, *e.g.*, *Timberlake v. State*, 753 N.E.2d 591, 610 (Ind. 2001)

(counsel cannot be ineffective for failing to offer evidence that would not have changed the outcome), *cert. denied*, 525 U.S. 1073 (1999).

[12] Next, regarding Elkin's testimony that Dial provoked Littlejohn's attack by insulting Littlejohn's daughter and using a racial slur, we see no error in the post-conviction court's determination that Littlejohn has not demonstrated Attorney Churchward's decision not to present this evidence prejudiced Littlejohn. Littlejohn believes evidence of Dial's provocation would have resulted in a not guilty verdict. However, as Attorney Churchward testified at the post-conviction hearing, evidence of provocation would have contradicted his strategy of demonstrating Littlejohn did not have intent to kill Dial. (Tr. Vol. 2 at 7.) We cannot say the evidence points to a conclusion opposite that reached by the post-conviction court. *See*, *e.g.*, *Timberlake*, 753 N.E.2d at 606 (counsel's failure to raise inconsistent defenses cannot be seen as deficient).

B. Failure to Object to Intervening-Cause Instruction

[13] Littlejohn also argues the post-conviction court erred when it denied his claim of ineffective assistance of trial counsel based on Attorney Churchward's allegedly inadequate objection to the intervening-cause jury instruction. The intervening-cause instruction stated:

> The cause of death is not an element of the offense of murder itself but becomes a relevant matter when an intervening cause of death is suggested. An intervening cause is an independent force that breaks the causal connection between the actions of the defendant and the injury. A defendant is responsible for the death of the decedent if you find the injuries inflicted contributed

> either mediately or immediately to the death. In order for an intervening cause to break the chain of criminal responsibility, it must be so extraordinary that it would be unfair to hold the defendant responsible for the actual result.

(Prior Case App. Vol. 2 at 80.) At trial, Attorney Churchward objected to the intervening cause instruction because it contained language used as an appellate standard, but he did not object to the instruction because it was unsupported by the evidence or created a mandatory presumption of intent. Littlejohn contends he was prejudiced because, but for Attorney Churchward's failure to object to the jury instruction on proper grounds, there would have been a reasonable probability for the jury to return a not-guilty verdict.

[14] "To demonstrate ineffective assistance of counsel for failure to object, a defendant must prove an objection would have been sustained if made and that he was prejudiced by counsel's failure to make an objection." *McKnight v. State*, 1 N.E.3d 193, 202 (Ind. Ct. App. 2013). Stated another way, the petitioner must demonstrate that, had the objection been made, the trial court would have had no choice but to sustain it. *Taylor v. State*, 929 N.E.2d 912, 918 (Ind. Ct. App. 2010) (citing *Oglesby v. State,* 515 N.E.2d 1082, 1084 (Ind.1987)). Regarding this issue, the post-conviction court determined:

> 6. Petitioner presents no cogent argument as to how, if not for Attorney Churchward's claimed error in failing to object to Court's Instruction 4 [Findings of Fact, ¶ 7], the jury could rationally have concluded that Petitioner may not have been aware of a high probability that his attack on the victim would

> cause the victim's death. His statement regarding the issue of prejudice to the defense is entirely devoid of reasoned argument:
>
> > Taken cumulatively, counsel's deficient performance in failing to call Elkins to testify and in failing to object to Final Instruction four prejudiced Littlejohn. "A conviction based upon an accumulation of defense attorney errors, when counsel's mistakes do substantial damage to the defense, must be reversed." *French* [*v. State*, 778 N.E.2d 816 (Ind. 2002)], at 826. Had the jury heard Elkins' testimony and not been offered final instruction four, it is reasonably probable they would not have returned a guilty verdict.
>
> Petitioner's Brief, at 8. This is not reasonably probable. Petitioner gives no hint, and states no facts in support of this bare assertion.
>
> 7. Furthermore, Court's Instruction 4 focuses entirely on the element of causation, not culpability. In context, the instruction that "[a] defendant is responsible for the death of the decedent if you find the injuries inflicted contributed either mediately or immediately to the death" [Findings of Fact, ¶ 7] can only mean that the defendant is responsible for causing the death of the decedent under those circumstances—not that the defendant may be found to have knowingly or intentionally caused the death merely because the injuries contributed to the death. The jury was correctly instructed that the State must prove a knowing or intentional killing [Findings of Fact, ¶ 6], and Court's Instruction 4 on causation had no cognizable tendency to negate the Court's correct instructions on culpability.

(PCR App. Vol. II at 160-61) (brackets and italics in original).

[15] We find no error in the post-conviction court's determination that Littlejohn has not demonstrated prejudice. Attorney Churchward testified he did not object to the intervening-cause instruction as unsupported by the evidence because he believed it may be helpful to put the issue of intervening cause into the jury's mind.

> [W]hile I agree there was no evidence of any intervening cause, there appeared to be quite a long time between the incident between Mr. Littlejohn and Mr. Dial and his eventual death. I believe there were multiple witnesses that came forward and said that they had actually seen Mr. Dial or heard him alive in the hotel room a day or so after the incident. So while I had no evidence of an intervening cause, I thought the instruction and putting that in the jury's mind might cause some reasonable doubt, so I wasn't actually that upset the – that the instruction got read to the jury.

(Tr. Vol. 2 at 10.) Moreover, as the court found, the challenged instruction deals with the cause of death, not with whether Littlejohn acted knowingly or intentionally. Multiple other instructions reminded the jury of its obligation to determine whether Littlejohn acted knowingly or intentionally. (*See* Prior Case App. Vol. II at 76 (stating charge); at 82 (defining knowingly and intentionally); & at 83 (regarding formation of intent to kill).) Thus, the instruction did not create an improper presumption of guilt, and Littlejohn has not demonstrated error by the post-conviction court. *See Benefield v. State*, 945 N.E.2d 791, 806 (Ind. Ct. App. 2011) (trial counsel did not render ineffective assistance of counsel when he did not object to jury instruction because the failure to object did not prejudice petitioner).

C. Cumulative Error

[16] Littlejohn asserts the combination of these alleged errors created prejudice. "Errors by counsel that are not individually sufficient to prove ineffective representation may add up to ineffective assistance when viewed cumulatively." *Pennycuff v. State*, 745 N.E.2d 804, 816-17 (Ind. 2001). The post-conviction court determined:

> 8. For the foregoing reasons, Petitioner has fallen woefully short of showing a reasonable probability that, if not for Attorney Churchward's claimed errors at trial, the outcome of Petitioner's trial would have been different. Attorney Churchward therefore cannot be found to have rendered ineffective assistance at trial, and no inquiry into his performance is needed.

(PCR App. Vol. II at 161) (internal citations omitted).

[17] As neither of the "errors" alleged by Littlejohn produced prejudice, and in light of the evidence at trial, *see Littlejohn*, 02A04-1608-CR-1936, *2 (Littlejohn admitted to police "hitting Dial with his fist, the microwave, and the glass plate, conceding that he 'took it a little too far' with the microwave because Dial was unconscious"), we cannot say that Littlejohn demonstrated cumulative prejudice that would invalidate the decision of the post-conviction court.

II. Ineffective Assistance of Appellate Counsel

[18] Littlejohn further contends the post-conviction court erred when it denied his claim of ineffective assistance of appellate counsel because Attorney Churchward failed to raise the correct argument in his appellate brief as to the

intervening-cause jury instruction. Littlejohn argues that if Attorney Churchward had argued the intervening-cause jury instruction created an impermissible mandatory presumption, the appellate court would have found reversible error, and his conviction would have been reversed.

[19] The standard for gauging appellate counsel's performance is the same as that for trial counsel. Therefore, "to prevail on an ineffective assistance of counsel claim, [the petitioner] must show both deficient performance and resulting prejudice." *Ward v. State*, 969 N.E.2d 46, 75-76 (Ind. 2012) (quoting *Pruitt v. State,* 903 N.E.2d 899, 928 (Ind. 2009)). 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." *Montgomery v. State*, 21 N.E.3d 846, 854 (Ind. Ct. App. 2014), *trans. denied*. It is very rare that we find appellate counsel to be ineffective for failing to raise an issue on appeal, as the decision of what issues to raise is one of the most important strategic decisions made by appellate counsel. *Johnston v. State*, 164 N.E.3d 817, 829 (Ind. Ct. App. 2021) (citing *Reed v. State*, 856 N.E.2d 1189, 1195 (Ind. 2006)), *trans. denied*.

[20] Regarding this issue, the post-conviction court determined:

> 9. The standard for determining the effectiveness of assistance of counsel is the same for both trial and appellate counsel. *Mato v. State*, 478 N.E.2d 57, 62 (Ind. 1985). Appellate counsel will not be found ineffective for failing to raise an issue that would not have been successful. *Mauricio v. State*, 659 N.E.2d 869, 872-873 (Ind. Ct. App. 1995), *trans. denied*.

> Petitioner correctly asserts that Attorney Churchward waived an issue regarding Court's Instruction 4 on appeal by failing to present cogent argument. Petitioner's Brief, at 8-10; *Littlejohn* (Mem.), at 6. In this post-conviction proceeding, Petitioner likewise presents no cogent argument as to how Court's Instruction 4, focusing entirely on the element of causation, might reasonably have been interpreted to negate the Court's correct instructions on the element of culpability. As Petitioner has not put forth the cogent argument that Attorney Churchward alleged should have presented, much less shown a reasonable probability that the argument would have been successful, Attorney Churchward cannot be found ineffective for waiving the argument. *Mauricio*, 659 N.E.2d at 872-873.

(App. Vol. II at 161-62) (italics in original). Because we held above that Littlejohn's claim of ineffective assistance of trial counsel failed because Littlejohn had not demonstrated error in the post-conviction court's determination that he was not prejudiced by trial counsel's failure to object on these grounds at trial, Littlejohn similarly cannot demonstrate the post-conviction court erred when it determined he was not prejudiced by the failure to raise these arguments regarding the challenged jury instruction on appeal. *See Timberlake*, 753 N.E.2d at 608 ("Because Timberlake did not establish trial counsel ineffectiveness on this point, he cannot establish that appellate counsel was ineffective for inadequate presentation of this issue.").

Conclusion

[21] Littlejohn has not demonstrated the post-conviction court erred in determining his trial counsel was not ineffective for failing to call a defense witness to testify

at trial or for failing to object to the intervening-cause instruction on the grounds raised in the post-conviction petition. Nor has Littlejohn demonstrated the post-conviction court erred in determining his appellate counsel was not ineffective. Therefore, we conclude Littlejohn has not demonstrated the post-conviction court erred when it denied his petition for post-conviction relief, and accordingly we affirm.

[22] Affirmed.

Brown, J., and Pyle, J., concur.