MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Jamar Minor,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent.

August 18, 2023

Court of Appeals Case No. 22A-PC-1207

Appeal from the Marion Superior Court

The Honorable Shatrese Flowers, Judge

The Honorable James Snyder, Magistrate

Trial Court Cause No. 49D28-1603-PC-10908

Memorandum Decision by Judge Kenworthy
Judges Crone and Felix concur.

Kenworthy, Judge.

Case Summary

[1] Following a jury trial in 2014, Jamar Minor was convicted of murder, attempted murder, and carrying a handgun without a license. The trial court sentenced Minor to an aggregate term of seventy years, including consecutive sentences for murder and attempted murder. Minor appealed his convictions, but not his sentence. His convictions were affirmed on direct appeal.

[2] In 2016, Minor filed a petition for post-conviction relief that was amended several times. Ultimately, Minor's petition alleged he received ineffective assistance from his trial and appellate counsel and his right to due process was impinged because the State knowingly presented false evidence during his trial. The post-conviction court denied the petition after an evidentiary hearing. Minor raises multiple issues on appeal, all essentially asking if the post-conviction court clearly erred in denying his petition for relief. Concluding the post-conviction court's decision is not clearly erroneous, we affirm.

Facts and Procedural History

[3] In June 2013, Minor and Jordan Gray became involved in a neighborhood dispute. The dispute began when ten-year-old "Bam," a member of the Tate family, felt eleven-year-old "Punney" Williams had stolen his iPod; Punney maintained he won the iPod in a bet. Female members of the Tate family tried to intercede and became embroiled in an altercation with male members of the

Williams family. Damien Williams, however, tried to break up the fight. Police came and the crowd dispersed.

[4] Afterward, the Tate group went to a nearby home (the "Tate home"). Kabrea Slatter, a member of the Tate family, called Minor, her stepbrother, and told him about the fight. She asked Minor to come pick her up. Minor's friend Gray drove him to the Tate home in his mother's SUV. When Minor and Gray arrived, they parked across the street from the Tate home in front of a van. They spoke with the Tate group and then returned to their SUV but did not leave. Several minutes later, Damien, three of his cousins, and friend Eric Taylor approached the Tate home because they had heard a rumor someone was being sent to shoot at the Williamses' grandmother's home. The Tate group assured them everything was fine.

[5] As the Williams group left the area, they passed the SUV. Someone inside the SUV said something and the group stopped walking and turned around to face the SUV. Minor and Gray jumped out of the vehicle and began shooting at the group. Damien was hit immediately and fell into the street. The other men ran from the gunfire. Taylor was hit in the leg as he was running away. Minor and Gray kept firing as Taylor crawled to a nearby house where he received assistance. Minor and Gray then left the scene and discarded their guns.

[6] Damien died from two fatal gunshot wounds, one to his abdomen and one to his back. The two bullets were fired by different weapons. Taylor required surgery to place a metal rod in his leg from kneecap to ankle. Police

investigators recovered sixteen spent shell casings at the crime scene from two weapons "spread out over an area of approximately 75 feet." *Direct Appeal App. Vol. 1* at 26.[1] Investigators also found a fully loaded pistol under the van the SUV had been parked near. There was no evidence the pistol had been fired and no DNA or fingerprints were recovered from it. When investigators inspected the SUV, there were no signs it had been struck by gunfire.

[7] Detective Thomas Lehn spoke with several witnesses during his investigation, including Kabrea Slatter and Anthony ("Tony") Tate. According to the probable cause affidavit Detective Lehn prepared, Slatter talked briefly with Minor when he arrived to pick her up. She noticed "six males from the other half of the fight walking in the alley" toward the Tate home. *Id.* at 28. "Slatter said she saw Damien . . . pull a pistol from his waistband. Slatter ran in the [Tate home] and multiple shots were fired." *Id.* Detective Lehn also reported Tony was at the Tate home at the time. "[Tony] said . . . about six males surrounded a SUV parked in front of [the Tate home]. [Tony] said three of the males had guns. . . . [T]here were then about seventeen (17) shots fired. [Tony] said the males in the SUV were being shot at and were probably shooting back [from inside the SUV] to defend themselves." *Id.*

[1] Page number citations to the Direct Appeal documents are to the .pdf page number.

[8] The State charged Minor with murder, attempted murder, and carrying a handgun without a license.[2] The State also sought a firearm sentence enhancement. Minor was represented by two attorneys, Jennifer Harrison and James Fisher.

[9] Before the trial, the State filed a Motion in Limine. One of the items raised in the motion was a request to prohibit the defense from calling Slatter as a witness because she had not been deposed.[3] At a pretrial conference, defense counsel confirmed they would not be calling Slatter as a witness, and the trial court granted the motion.

[10] Another motion in limine item was the State's request for defense counsel to "refrain from mentioning, eliciting any testimony, or offering any evidence regarding the existence and/or substance of [Minor's] statement" to Detective Lehn if not first offered by the State. *Direct Appeal App. Vol. 1* at 88. The State indicated it did not anticipate offering the entire statement in its case-in-chief; the "only thing that State will reference . . . is that both defendants admit[ted] that they were present the day of the incident." *Id.* At a subsequent motion in

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[2] Gray was charged with the same, and the two were tried together as co-defendants. Gray was also found guilty.

[3] The State elaborated in its motion: "[I]n the beginning of February[,] State contacted both Defense attorneys and informed them that State would not be calling Kabrea Slatter as a State witness. And that if either of them planned on calling her as a defense witness to please let [the State] know asap so that [it] could set a deposition of her. [The State] did not hear anything from either attorney." *Direct Appeal App. Vol. 1* at 89. Although the State's motion requested a prohibition on "[a]ny questions, testimony, or evidence of Kabrea Slatter," *id.*, the State clarified at the motion in limine hearing it wanted only to preclude her as a witness. *See Direct Appeal Tr. Vol. 4* at 130–31.

limine hearing and again the morning of trial, the court and the parties discussed the State's request. In the ensuing discussion, the State said it wanted to reference the statement in questioning Detective Lehn to prove identity by asking, for example, "In speaking to the defendants did . . . they both admit to being on [the street where the Tate home is] that evening[?]" *Direct Appeal Tr. Vol. 4* at 112. The State offered to "phrase that however Your Honor sees fit." *Id.* Defense counsel expressed concern about taking the admission "out of context and say[ing], . . . [Minor] talked to the police and . . . said [he] was there . . . when some sort of follow-up would normally be expected." *Direct Appeal Tr. Vol. 1* at 6. The State replied:

> [I]f the Court wants us to take that approach I'm more than happy to say did they come in voluntarily – yes; had there been a warrant out for their arrest at that point – no; who did they come in with . . . and lay that out. I'm not trying to hide any of the circumstances around which . . . it happened[.]

Id. at 7.[4]

[11] Detective Lehn was one of the State's witnesses at Minor's jury trial. He testified about his investigation into the shooting, including that he spoke with both Slatter and Tony.[5] As for Tony, Detective Lehn testified:

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[4] Ultimately, the trial court took the matter under advisement "to see how it flows" during Detective Lehn's testimony, which is when the State indicated it intended to bring this up. *Direct Appeal Tr. Vol. 1* at 12.

[5] Detective Lehn confirmed that he spoke with Slatter but did not elaborate on the substance of their conversation.

> Q. . . . And why did you speak with Tony Tate?
>
> A. [It was m]y understanding Mr. Tate was inside the [Tate home] when the shooting occurred. All the information I had he was inside but I still wanted to confirm that and make sure he had not seen anything or heard anything that could help with the investigation.
>
> Q. And in fact, were you able to speak with him and confirm that and continue with your investigation?
>
> A. Yes, ma'am.

Direct Appeal Tr. Vol. 3 at 75.

[12] Ultimately, the State did not ask Detective Lehn anything about Minor's statement on direct examination. But on cross-examination, Detective Lehn was asked, "[Minor] came in voluntarily and that was your first contact with [him], right? . . . Couple days after these events?" *Id.* at 100. Detective Lehn confirmed that was correct. On redirect, Detective Lehn elaborated and explained Minor came in with his father twenty-four hours after the shooting. He was "polite," but "reluctant[,] . . . nervous[,] . . . [and] scared." *Id.* at 118. At that time, there was no warrant for his arrest, but he was a suspect.

[13] Minor was the sole defense witness. He claimed Damien pointed a gun at him as he sat in the SUV. Minor heard gunshots, dove out of the car, and returned fire in self-defense. No other witnesses testified to seeing Damien with a gun.

Minor said when his dad told him police were looking for him, he asked his dad to drive him to the police station where he gave a statement.

[14] During closing arguments, the State made the following statements to which no objection was made:

> After Eric [Taylor] was being shot shots are still being fired as he's being pulled into the house. Again, that matches up with the evidence because they fired 16 shots. He also said that the passenger which in this case would be Jamar Minor *was running down the street still firing shots*.
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> * * *
>
> I want you to also look at what each group did in response – how they followed up with everything – the victims – call 911 by all the friends and family, stayed in the area, talked to the police, went to the police there. What did the defendant's [sic] do – they hunt them down. *They flee.* They do not call the police. They chuck the murder weapons. Once they hear oh yeah, you guys . . . are suspects in this murder. They know who you are. *Their parents dragged them down to the police station* and Mr. Minor's still not even honest then.
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> * * *
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> Don't be dissuade [sic] by these lessers [sic] of . . . reckless homicide which is . . . the same level of a crime as a forgery – writing a bad check[.]

Direct Appeal Tr. Vol. 3 at 229; *Vol. 4* at 27–28 (emphases added).

[15] Minor tendered final jury instructions on reckless homicide, criminal recklessness, and aggravated battery as lesser-included offenses. The trial court refused the criminal recklessness instruction but did instruct the jury on reckless homicide and aggravated battery. The jury found Minor guilty of murder, attempted murder, and carrying a handgun without a license. Minor then waived his right to a jury trial on the firearm sentence enhancement and the trial court found the State had proved the requirements of the enhancement.

[16] At sentencing, the trial court noted two primary aggravators—Minor's criminal history and the crime occurred in the presence of children—but found they "are not significant enough that they outweigh the mitigators. I think the mitigators clearly carry the weight here." *Direct Appeal Tr. Vol. 4* at 79. But the trial court also noted, "I feel an obligation to recognize each victim of a crime and so I will stack." *Id.* Therefore, the trial court issued a "mitigated sentence, but it is a stacked sentence." *Id.* at 80. Minor was sentenced to forty-five years for murder,[6] enhanced by five years for the firearm enhancement; twenty years for attempted murder,[7] to be served consecutively to the sentence for murder; and one year for carrying a handgun without a license, to be served concurrently with the other two sentences. Minor's total sentence is seventy years.

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[6] The applicable sentencing range for murder was "a fixed term between forty-five (45) and sixty-five (65) years, with the advisory sentence being fifty-five (55) years." Ind. Code § 35-50-2-3 (2007).

[7] The applicable sentencing range for attempted murder, a Class A felony, was "a fixed term of between twenty (20) and fifty (50) years, with the advisory sentence being thirty (30) years." I.C. § 35-50-2-4 (2005).

[17] Minor filed a direct appeal, raising the following issues: exclusion of certain evidence, error in instructing the jury regarding accomplice liability, and error in refusing to instruct the jury on criminal recklessness as an inherently lesser included offense of attempted murder. Minor was represented on appeal by Patricia Caress McMath. A panel of this Court affirmed Minor's convictions. *Minor v. State*, 36 N.E.3d 1065, 1068 (Ind. Ct. App. 2015), *trans. denied*.

[18] In 2016, Minor petitioned for post-conviction relief. The petition was amended twice in 2018 and again in early 2021. Minor ultimately alleged several instances of ineffective assistance of trial counsel, ineffective assistance of appellate counsel, and violation of his rights to due process and a fair trial. The post-conviction court held a hearing in June 2021 at which Minor and one of his trial counsel, Harrison, testified. Harrison's testimony will be detailed where relevant below. The post-conviction court also took judicial notice of the trial court proceedings and admitted several exhibits, including the public defender's file from the trial, the record from Minor's direct appeal, and several affidavits. Fisher, Minor's other trial attorney, filed an affidavit saying he had no specific recollection of Minor's case. *See PCR Ex. Vol. 1* at 28. McMath, Minor's appellate attorney, filed an affidavit explaining she raised the issues on appeal she considered "more compelling." *Id.* at 26.

[19] In May 2022, the post-conviction court issued an order meticulously discussing each claim of error and ultimately denying Minor's petition for relief. Minor now appeals. Additional facts will be provided as necessary.

Discussion and Decision

[20] In post-conviction proceedings, the petitioner must establish his claims by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); *Isom v. State*, 170 N.E.3d 623, 632 (Ind. 2021). Where, as here, the petitioner is appealing 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." *Wilkes v. State*, 984 N.E.2d 1236, 1240 (Ind. 2013) (quoting *Ben-Yisrayl v. State*, 738 N.E.2d 253, 258 (Ind. 2000)). "In other words, the [petitioner] must convince [the] Court that there is *no* way within the law that the court below could have reached the decision it did." *Stevens v. State,* 770 N.E.2d 739, 745 (Ind. 2002), *cert. denied*.

[21] The post-conviction court is the sole judge of the weight of evidence and credibility of witnesses. *Coleman v. State*, 741 N.E.2d 697, 700 (Ind. 2000), *cert. denied*. When reviewing an order denying post-conviction relief, we accept the findings of fact unless they are clearly erroneous, but we give no deference to the court's legal conclusions. *Id*.

Ineffective Assistance of Counsel

[22] Minor alleges he was deprived of the effective assistance of both trial and appellate counsel. He faults trial counsel for: (1) failing to call witnesses who would have corroborated his testimony and supported his claim of self-defense; (2) failing to impeach Detective Lehn with a prior inconsistent statement; (3) failing to tender jury instructions on additional lesser-included offenses; (4)

failing to object to prosecutorial misconduct during closing argument; (5) failing to note during closing the fact Williams was shot in the abdomen; and (6) failing to object to the trial court's imposition of consecutive sentences. He claims appellate counsel was ineffective for failing to challenge the consecutive sentences on appeal.

[23] To prevail on claims of ineffective assistance of counsel, the petitioner must show counsel's performance was deficient—that is, fell short of prevailing professional norms—and the deficient performance prejudiced his defense—in other words, there is a reasonable probability the result would have been different but for counsel's errors. *Gibson v. State*, 133 N.E.3d 673, 682 (Ind. 2019) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)), *cert. denied*. The standard is the same for claims of trial and appellate counsel ineffectiveness. *Ritchie v. State*, 875 N.E.2d 706, 723 (Ind. 2007).

[24] In evaluating a claim of ineffective assistance, "[w]e afford counsel considerable discretion in choosing strategy and tactics, and our review of counsel's performance is highly deferential." *Isom*, 170 N.E.3d at 632. We presume counsel gave adequate assistance and "made all significant decisions in the exercise of reasonable professional judgment." *Stevens*, 770 N.E.2d at 746. The petitioner must offer "strong and convincing evidence to overcome this presumption." *Williams v. State*, 771 N.E.2d 70, 73 (Ind. 2002). "[I]solated mistakes, poor strategy, inexperience and instances of bad judgment do not necessarily render representation ineffective." *Weisheit v. State*, 109 N.E.3d 978, 984 (Ind. 2018), *cert. denied*.

Trial Counsel

1. Failure to Present Exculpatory Testimony[8]

[25] Minor alleged his trial counsel were ineffective for failing to present witnesses who would have corroborated his testimony and supported his claim of self-defense—namely, Kabrea Slatter and Tony Tate.

[26] Detective Lehn spoke with both Slatter and Tony during his investigation. The probable cause affidavit reports Slatter said she saw Damien with a gun in his waistband before the shooting started; Tony said about six men—three of whom had guns—surrounded the SUV and the males in the SUV "were being shot at and were probably shooting back to defend themselves" from inside the SUV. *Direct Appeal App. Vol. 1* at 28.

[27] An affidavit Slatter provided in November 2018 was admitted into evidence at the post-conviction hearing. In the affidavit, Slatter said when the Williams group walked up to the Tate home, Damien "lifted up his shirt and showed [her] a gun in his waist band. . . . [Damien] and his family walked towards the [SUV] for no reason and . . . [Damien] took out his gun and shot into the car. [She] ran into the house to hide and . . . never saw what happened after" that. *PCR Ex. Vol. 1* at 23. Slatter also asserted she was never contacted by Minor's counsel but if she had been asked to testify at trial she would have, and her

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[8] Minor's post-conviction petition also alleged trial counsel failed to investigate these witnesses. *See PCR App. Vol. 2* at 62–63. On appeal, however, Minor argues only ineffective assistance for failing to call them as witnesses. *See Appellant's Br.* at 25–29.

testimony would have been consistent with the statements in the affidavit. A transcript of the statement Tony gave to Detective Lehn in 2013 was also admitted into evidence at the post-conviction hearing.

[28] Harrison testified at the post-conviction hearing that she could not recall if she spoke to Tony during trial preparation, but because her notes from the case said nothing about him, her "best guess [is she] didn't talk to him." *PCR Tr. Vol. 2* at 17. Harrison also did not recall speaking with Slatter; however, a review of counsel's file from the trial proceeding shows she did meet with Slatter for an hour in August 2013. *See PCR Ex. Vol. 2*, Exhibit 13 at 370.

[29] In the context of an ineffective assistance of counsel claim, deciding what witnesses to call is a matter of trial strategy and we do not second-guess that decision. *Brown v. State*, 691 N.E.2d 438, 447 (Ind. 1998). We will not determine counsel was ineffective for failing to call a particular witness absent a clear showing of prejudice. *Ben-Yisrayl v. State*, 729 N.E.2d 102, 108 (Ind. 2000), *cert. denied*.

a. Kabrea Slatter

[30] Based on its review of the post-conviction evidence—including trial counsel's contemporaneous file—the post-conviction court found it was reasonable for trial counsel to conclude Slatter "was not [a] witness to the shooting, although she was [a] witness to events that led up to it." *PCR App. Vol. 2* at 214. Slatter's affidavit claimed otherwise, but the post-conviction court found the affidavit was "less than credible regarding [Slatter] witnessing the actual shots being

fired[,]" in part because it conflicted with her initial statement and with statements made by other witnesses during Detective Lehn's investigation. *Id*. at 216. "What remains is that . . . Slatter saw Damien . . . with a gun." *Id.*

[31] As noted in Minor's direct appeal, "Minor testified at trial and claimed that Damien pointed a gun at him and that he shot at Damien and Taylor in self-defense. *No other witnesses* testified that they saw a gun on Damien." *Minor*, 36 N.E.3d at 1069 (emphasis added). At first blush it seems Slatter's testimony of seeing Damien with a gun would have been beneficial to Minor under these circumstances, but counsel met with Slatter for approximately an hour while preparing for trial and, upon learning the State would not be calling her as a witness, did not add her to the defense witness list and did not object when the State later asked Slatter be preemptively excluded as a witness. Minor did not question Harrison about why the defense did not call Slatter.[9] It is reasonable to infer counsels' investigation led them to believe Slatter would be a weak witness or that her testimony would not ultimately be helpful to Minor. As counsel may make reasonable strategic decisions without us second-guessing that decision, *see Brown*, 691 N.E.2d at 447, we agree with the post-conviction

[9] In discussions during the motion in limine hearing unrelated to the request to exclude Slatter, the State indicated it was not calling Slatter because it believed she lied in her statement, and Gray's counsel said he was not calling Slatter because "[t]here does not appear to be a lot of difference between what [Slatter and another witness who was called at trial] have to say in their witness statements [and] I would prefer not to use a relative of a defendant[.]" *Direct Appeal Tr. Vol. 4* at 132–33. Minor's counsel did not specifically state their reasons for not calling Slatter.

court: Minor did not show counsels' failure to call Slatter as a witness constituted deficient performance.

b. Tony Tate

[32] As to Tony, Minor offered into evidence at the post-conviction hearing a transcript of the statement Tony gave to Detective Lehn in 2013 "as something that was available to the trial [counsel] and also to show prejudice for my claim . . . of ineffective assistance for failing to call [him] as a witness at trial." *PCR Tr. Vol. 2* at 13. Based on Tony's statement, Minor claims Tony would have testified he saw six members of the Williams group—three of them with guns—surround the SUV and shoot at the vehicle causing Minor and Gray to defend themselves.

[33] When claiming ineffective assistance regarding an uncalled witness, the petitioner must offer evidence as to what the witness's testimony would have been. *Lee v. State*, 694 N.E.2d 719, 722 (Ind. 1998), *cert. denied*; *see also PCR Tr. Vol. 2* at 10 (Minor acknowledging this burden). But Minor did not call Tony as a witness at the post-conviction hearing, nor did he offer an affidavit from Tony stating what his testimony would have been had he been called to testify. We cannot assume Tony would have testified consistently with a statement he gave within twenty-four hours of the incident. Because Minor failed to show what Tony's testimony would have been, he has also failed to show a reasonable probability the failure to call Tony affected the result of his trial. *See Woods v. State*, 701 N.E.2d 1208, 1214 (Ind. 1999), *cert. denied*.

[34] Moreover, even if we did assume Tony's statement reflects what his testimony would have been, the post-conviction court found the statement was equivocal and not as clear-cut as Minor asserts. Although Tony's statements were characterized in the probable cause affidavit as direct and declarative, several of Tony's answers start with, "I think" or "I'm guessin'" and he stated, "I barely seen anything. I was in the house." *PCR Ex. Vol. 1* at 34–35. Tony also claimed the Williams group was shooting at the SUV but there was no evidence the SUV was struck by gunfire. Given Tony's equivocal statements and the fact his observations conflicted with the physical evidence, Minor has failed to show he was prejudiced by counsels' failure to call Tony as a witness.

[35] In sum, the post-conviction court determined Minor's counsel were not ineffective for failing to call Slatter or Tony as witnesses at trial. We cannot say the evidence as a whole leads unerringly and unmistakably to the opposite result. *See Wilkes*, 984 N.E.2d at 1240.

2. Failure to Impeach Detective Lehn

[36] Next, Minor alleged his trial counsel were ineffective for failing to impeach Detective Lehn when his trial testimony conflicted with the probable cause affidavit he prepared.

[37] As quoted above, the probable cause affidavit stated Detective Lehn spoke with Tony and Tony said he was at the Tate home and "about six males surrounded a SUV parked in front of [the Tate home]. [Tony] said three of the males had guns. [T]here were then about seventeen (17) shots fired. [Tony] said the males

in the SUV were being shot at and were probably shooting back [from inside the SUV] to defend themselves." *Direct Appeal App. Vol. 1* at 28. At trial, Detective Lehn testified he spoke with Tony because "[m]y understanding [was] Mr. Tate was inside the [Tate home] when the shooting occurred. All the information I had he was inside but I still wanted to confirm that and make sure he had not seen anything or heard anything that could help with the investigation." *Direct Appeal Tr. Vol. 3* at 75. Minor's trial counsel did not impeach Detective Lehn's trial testimony with the probable cause affidavit. Minor did not ask Harrison at the post-conviction hearing whether there was a strategic reason for not impeaching Detective Lehn with this inconsistent statement.

[38] "[A] prior inconsistent statement may be used to impeach a witness." *Martin v. State*, 736 N.E.2d 1213, 1217 (Ind. 2000). The presentation of impeachment evidence allows a jury to "make an informed judgment" about a witness's credibility. *Id.* at 1221. The Indiana Supreme Court has repeatedly held that the method of impeaching a witness is a tactical decision and a matter of trial strategy that does not amount to ineffective assistance. *Kubsch v. State*, 934 N.E.2d 1138, 1151 (Ind. 2010) (citing *Bivins v. State*, 735 N.E.2d 1116, 1134 (Ind. 2000) (acknowledging "there were inconsistencies between some of the [witnesses'] out-of-court and in-court statements . . . that might have been useful for impeachment purposes," but holding counsel may make reasonable judgments in strategy)).

[39] The post-conviction court found "Detective Lehn could have been impeached with the . . . probable cause affidavit [and] [c]ross-examination that included

this would have undermined Detective Lehn's credibility." *PCR App. Vol. 2* at 218. But the post-conviction court also found Minor failed to prove he was prejudiced because Detective Lehn "was not a material eyewitness to the murder and attempted murder" and was testifying only regarding the investigation he did. *Id.* at 219.

[40] We agree with the post-conviction court's determination about prejudice. Minor cites *State v. Hollin* as a case in which the court found a post-conviction petitioner's claim of failure to impeach a witness "particularly compelling" and affirmed the grant of post-conviction relief. 970 N.E.2d 147, 152 (Ind. 2012). In that case, petitioner's trial counsel failed to impeach a co-defendant who initially did not implicate the petitioner in a plan to commit burglary but—after entering a plea agreement reducing the charges and eliminating jail time for his own role in the incident—testified he and the petitioner had agreed to burglarize a home. Finding the case was essentially a credibility contest between the petitioner who said there was no agreement and the co-defendant who said there was, the post-conviction court found counsel was ineffective for failing to impeach the co-defendant because "any evidence bearing on" credibility was critical. *Id.* at 153. Of course, the credibility of any witness is important, but given Detective Lehn's role in this case—to explain the course of his investigation—his credibility was not of the same relation to Minor's guilt or innocence as the co-defendant's in *Hollin*.

[41] Indiana Evidence Rule 613 provides that a witness may be examined about a prior statement. When a prior inconsistent statement is used to impeach a

witness, it is not hearsay because the statement is not used to prove the truth of the matter asserted. *Martin*, 736 N.E.2d at 1217; *see* Ind. Evidence Rule 801(c). But the truth of the matter asserted in the probable cause affidavit—that is, the truth of Tony Tate's statements relayed in it—is exactly what Minor relies on to prove prejudice. *See Appellant's Br.* at 30 ("Lehn testified that [Tony] said he did not see the shooting. However, the probable cause affidavit would have shown that [Tony] said the exact opposite. He said he witnessed the shooting, and he provided information to Lehn which was strongly corroborative of Minor's testimony and his self-defense claim."). Although Evidence Rule 613 allows the use of a prior inconsistent statement to impeach a witness, if the witness acknowledges making the prior inconsistent statement, impeachment is complete and extrinsic evidence of the statement otherwise admissible under Indiana Evidence Rule 613(b) becomes inadmissible. *Shepherd v. State*, 157 N.E.3d 1209, 1219–20 (Ind. Ct. App. 2020), *trans. denied*.

[42] In *Appleton v. State*, the Supreme Court considered whether the trial court should have allowed the State to impeach a witness by reading a prior inconsistent statement line-by-line. 740 N.E.2d 122, 123 (Ind. 2001). The Court held it was error (albeit ultimately harmless): "Once [the witness] admitted that he made a police statement prior to trial that was inconsistent with his testimony regarding [the defendant's] involvement in the incident, impeachment was complete. [The witness] had admitted himself a liar." *Id.* at 126. Thus, the "only purpose" for reciting segments of the pretrial statement was "to get the details of [the witness'] former statement before the jury as

substantive evidence, the very thing" that is prohibited. *Id.* The information Minor claims would have helped him if counsel had impeached Detective Lehn would not likely have come before the jury on this reasoning, and therefore, Minor has not shown a reasonable probability the result of the proceeding would have been different. *See Carter v. State*, 738 N.E.2d 665, 674 (Ind. 2000) (holding although counsel could have conceivably impeached victim with prior inconsistent statement, there is no reasonable probability doing so would have resulted in a different verdict).

3. Failure to Tender Lesser-Included Offense Instructions

[43] At the conclusion of trial, Minor requested jury instructions on reckless homicide, criminal recklessness, and aggravated battery. The trial court denied the criminal recklessness instruction but instructed the jury on reckless homicide as a lesser-included offense of murder and aggravated battery as a lesser-included offense of attempted murder. On post-conviction, Minor contended his trial counsel were ineffective for failing to also tender instructions on voluntary manslaughter, attempted voluntary manslaughter, and involuntary manslaughter as lesser-included offenses of the charged crimes. When asked at the post-conviction hearing if counsel "considered asking for any other lesser[-] included [instructions]," Harrison answered, "I don't recall if we ever discussed that or if we ever – again, if it wasn't in the file, then we didn't ask for it." *See PCR Tr. Vol. 2* at 17.

[44] Voluntary manslaughter is a knowing or intentional killing while acting under sudden heat. I.C. § 35-42-1-3(a) (2018). "[C]laims of self-defense and killing in sudden heat are not inherently inconsistent and, in appropriate circumstances, juries may be instructed on both." *Brantley v. State*, 91 N.E.3d 566, 573 (Ind. 2018), *cert. denied*. But here, the defense strategy centered on self-defense and *recklessness*. Minor testified he was not intentionally shooting *at* anyone, just "shooting in the direction." *Direct Appeal Tr. Vol. 3* at 178; *see also id.* at 189–90 (Minor testifying he was not aiming at anyone in particular). A voluntary manslaughter instruction would be inconsistent with a recklessness theory. Counsels' decision not to undermine the recklessness alternative to self-defense by offering lesser-included instructions implicating intentional or knowing conduct was reasonable and appropriate. *See Morgan v. State*, 755 N.E.2d 1070, 1076 (Ind. 2001) (noting where defendant charged with murder argued he acted in self-defense and the jury was instructed on self-defense and reckless homicide, a voluntary manslaughter instruction "would likely have conflicted with this theory of the case" and counsel's decision not to request such an instruction was "a reasonable strategic decision").

[45] Minor argues Harrison's answer at the post-conviction hearing about lesser-included instructions was that "she and co-counsel *probably did not consider* tendering instructions on voluntary manslaughter, attempted voluntary manslaughter, or involuntary manslaughter" and therefore no strategic decision was made. *Appellant's Br.* at 39 (emphasis added). An equally plausible interpretation of Harrison's answer is that she *did not recall* if they considered

asking for those instructions as opposed to saying they *did not consider* it. As the petitioner, Minor had the burden of establishing his grounds for relief, and to the extent Harrison's answer was ambiguous, he had the opportunity to clarify the ambiguity during Harrison's testimony. Because Minor failed to do so, we conclude the post-conviction court's determination that Minor failed to show trial counsels' decision was unreasonable is not clearly erroneous. *See Autrey v. State*, 700 N.E.2d 1140, 1141 (Ind. 1998) (noting trial strategy is not subject to attack through an ineffective assistance of counsel claim unless the strategy is "so deficient or unreasonable as to fall outside of the objective standard of reasonableness").[10]

[46] Minor also claimed trial counsel were ineffective for failing to request an instruction on involuntary manslaughter. At the time of Minor's crime, involuntary manslaughter occurred when a person killed another human being while committing or attempting to commit battery or a Class C felony, Class D felony, or a Class A misdemeanor that inherently poses a risk of serious bodily injury. I.C. § 35-42-1-4(c) (2010). Involuntary manslaughter is not an inherently lesser-included offense of murder. *Wilson v. State*, 765 N.E.2d 1265, 1271 (Ind. 2002). It may, however, be a factually lesser-included offense if the charging information alleges the means used to commit the murder include all the elements of involuntary manslaughter. *See Wright v. State*, 658 N.E.2d 563,

[10] The same analysis applies to Minor's claim counsel was ineffective for failing to request an instruction on attempted voluntary manslaughter.

567 (Ind. 1995). Generally, cases in which involuntary manslaughter is a factually included offense arise from a battery. *Blackburn v. State*, 130 N.E.3d 1207, 1212 (Ind. Ct. App. 2019). Here, the charging information alleged Minor knowingly or intentionally killed Damien by shooting a gun, a killing necessarily accomplished by a battery. *See Lynch v. State*, 571 N.E.2d 537, 539 (Ind. 1991) (noting where victim died by a gunshot wound, "the killing was obviously accomplished with a touching" in a rude, insolent, or angry manner) (citing Indiana Code Section 35-42-2-1 defining battery); *cf. Champlain v. State*, 681 N.E.2d 696, 702 (Ind. 1997) (observing an information alleging the defendant knowingly killed another without identifying the instrumentality did not assert a battery and therefore involuntary manslaughter was not a factually included offense). The propriety of an involuntary manslaughter conviction depends on whether there is a serious evidentiary dispute about whether the intent was to kill or to batter. *See id.*

[47] As with the voluntary manslaughter and attempted voluntary manslaughter instructions, asking for an involuntary manslaughter instruction would have been inconsistent with arguing Minor acted only recklessly, not intentionally or knowingly. Moreover, if requested, an involuntary manslaughter instruction would only have been given if there was a serious evidentiary dispute about whether Minor intended to kill or only to batter Damien. Yet Minor testified he did not intend either—he claimed he was not aiming at anyone when he fired his gun. Under these circumstances, the post-conviction court did not

clearly err in concluding trial counsels' decision not to request an involuntary manslaughter instruction did not constitute deficient performance.

4. Failure to Object to Prosecutorial Misconduct

[48] Minor also asserted his trial counsel were ineffective when they failed to object to certain statements made by the State during closing argument. *See supra* ¶ 14 (quoting State's comment about Taylor's testimony, its assertion Minor fled the scene and was "dragged" to the police station, and stating reckless homicide was the same class felony as writing a bad check).

[49] At the post-conviction hearing, Minor questioned Harrison about each of these statements. In general, Harrison had no specific recollection of the State's closing argument or of the State saying anything she considered misconduct at the time.

[50] As for the State's comments about Taylor's testimony, Minor represented to Harrison that Taylor "did not actually testify . . . that [Minor] ran down the street while firing shots[.]" *PCR Tr. Vol. 2* at 19. Harrison did not recall Taylor's testimony but agreed if Minor's representation was true, the State's argument that Taylor said "Minor was running down the street still firing shots" would be improper.

[51] With regard to the State saying Minor fled the scene and was "dragged" to the police station by his parents, again, Harrison did not remember the State's statements or the State allegedly stipulating prior to trial that Minor appeared at the police station voluntarily. Harrison saw no problem with the State's

argument about Minor leaving the scene. *See PCR Tr. Vol. 2* at 18 (Harrison stating, "I think that is something that the State can argue, that leaving the scene can be used as evidence of guilt" when asked about this comment). After Minor represented to Harrison that the State argued Minor was dragged to the police station "after the State stipulated that he went there voluntarily," Harrison said that statement was "probably an unfair assessment or characterization of what the evidence was[.]" *PCR Tr. Vol. 2* at 18.[11]

[52] Finally, as to the comment about reckless homicide, Harrison said she would consider that an improper argument and should have objected to it.

[53] In order to prevail on a claim of ineffective assistance of counsel due to a failure to object to the State's closing argument, Minor was required to prove his objections would have been sustained, the failure to object was unreasonable, and he was prejudiced. *Lambert v. State*, 743 N.E.2d 719, 734 (Ind. 2001). During closing argument, a "prosecutor may argue both law and facts and propound conclusions based upon his or her analysis of the evidence. It is proper to state and discuss the evidence and all reasonable inferences to be

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[11] To the extent Minor implies the State engaged in misconduct for violating a stipulation, we do not believe the parties' discussions amounted to a stipulation to this fact. *See supra* ¶¶ 10, 12.

Minor also cites *Doyle v. Ohio*, 426 U.S. 610, 618 (1976), and argues the State violated his constitutional right not to incriminate himself by commenting on a delay in waiving that right. One, this argument is not well developed, amounting only to a single sentence. *See Appellant's Br.* at 44. And two, in *Doyle*, the United States Supreme Court held that using a defendant's *post-arrest*, post-*Miranda* silence for impeachment purposes violates his due process rights. 426 U.S. at 620. Assuming for the sake of argument the State was commenting on Minor's silence prior to going to the police station, Minor had not yet been arrested and this is not a *Doyle* violation.

drawn therefrom, provided the prosecutor does not imply personal knowledge independent of the evidence." *Marsillett v. State*, 495 N.E.2d 699, 708 (Ind. 1986) (citations omitted).

[54] Minor claims the "State's mischaracterization of Taylor's testimony left the jury with the false impression that Minor chased the alleged victims down the street while he was firing at them" and the "State's misconduct misled the jury about Minor's reasons for leaving the scene and the circumstances surrounding his statement to the police." *Appellant's Br.* at 46. The post-conviction court found these comments about "[t]he manner in which and the reasons [Minor] left the scene of the crime, the means by which he appeared . . . at the police station, and where and at what pace he was firing shots" were proper characterizations of the evidence. *PCR App. Vol. 2* at 224. In essence, the post-conviction court determined an objection to these statements would not have been sustained because the comments did not constitute prosecutorial misconduct.

[55] Arguments made by attorneys at trial are not evidence, *Bass v. State*, 947 N.E.2d 456, 462 (Ind. Ct. App. 2011), *trans. denied*, and here the trial court so instructed the jury in its preliminary and final instructions, *see Direct Appeal App. Vol. 1* at 124, 139. Even so, the State must confine closing argument to comments based on evidence in the record. *Lambert*, 743 N.E.2d at 734. The post-conviction court found each challenged comment was supported by specific evidence in the record. Although Minor interprets the evidence differently, the State did not have to honor or advance an interpretation favorable to Minor. Based on our review of the record, we cannot say the evidence unerringly and

unmistakably leads to a conclusion opposite that reached by the post-conviction court.

[56] The post-conviction court did find the following comment to be misconduct to which trial counsel should have objected:

> Don't be dissuade [sic] by these lessers [sic] of . . . reckless homicide which is . . . the same level of a crime as a forgery – writing a bad check.

Direct Appeal Tr. Vol. 4 at 28. The court concluded "had trial counsel objected, the objection would have been sustained and [the] jury likely admonished to disregard the inappropriate comments." *See Appellant's App. Vol. 2* at 225. But the court also found Minor failed to meet his burden to show prejudice from the failure to object.

[57] When there is misconduct, the question becomes whether the misconduct placed the defendant in a position of grave peril. *Collins v. State*, 966 N.E.2d 96, 106 (Ind. 2012). "The gravity of peril is measured by the probable persuasive effect of the misconduct on the jury's decision rather than the degree of impropriety of the conduct." *Id.* (quoting *Cooper v. State*, 854 N.E.2d 831, 835 (Ind. 2006)). Minor contends he was placed in grave peril because the comment "played on the juror's [sic] emotions, and encouraged them to reject reckless homicide, as a lesser included offense, for a reason that had nothing to do with Minor's guilt or innocence." *Appellant's Br.* at 46.

[58] We agree with the post-conviction court that Minor failed to meet his burden to show prejudice. Evidence Damien was hit by multiple bullets, two members of the Williams group—including Damien—were shot, and Minor and Gray moved along the street and continued to fire as members of the Williams group ran away from the gunfire contradicted a claim of recklessness. Thus, as the post-conviction court found, Minor was not placed in a position of grave peril because there is not a reasonable probability the jury would have convicted Minor of reckless homicide but for the State's inappropriate comment.

5. Failure to Highlight a Critical Fact during Closing Argument

[59] Minor next asserted his trial counsel were ineffective for failing to note during closing argument that Damien was shot in the abdomen, a fact Minor claims "supported the self-defense claim, and corroborated Minor's testimony." *Appellant's Br.* at 47. The post-conviction court concluded Minor failed to show prejudice; that is, he failed to show the jury would have reached a different result had this fact not been omitted from counsel's closing argument. *See PCR App. Vol. 1* at 226; *see also Baer v. State*, 942 N.E.2d 80, 91 (Ind. 2011) (noting failure to satisfy either the performance or the prejudice prong of the ineffective assistance inquiry causes a claim to fail and therefore an ineffective assistance claim can be disposed of on the prejudice prong alone).

[60] Minor asserts the post-conviction court applied the wrong prejudice standard because it stated Minor failed to show the jury *would have found him not guilty* of murder rather than assessing whether there was a *reasonable probability* the result would have been different. *See Appellant's Br.* at 47. Whether the post-

conviction court merely used inaccurate terminology or actually applied an erroneous standard, we owe no deference to its legal conclusion about prejudice. *See Coleman*, 741 N.E.2d at 700.

[61] The post-conviction court's findings highlighted evidence presented during trial of the fact Damien was shot in the abdomen, signifying he was facing Minor and Gray at some point. The jury heard testimony the Williams group was facing the SUV before the shooting began. The State presented evidence that Damien was shot in the stomach, including through the coroner's report and the testimony of the forensic pathologist who conducted the autopsy. And the State acknowledged Damien was shot in the stomach during its closing argument.

[62] Further, trial counsels' file includes notes about "good facts" and "bad facts" from the trial and an outline of closing argument. A reasonable inference from these documents is the omission was a strategic choice. It appears from the outline counsel considered making a reference to "[s]hooting direction of wounds support self defense[.]" *PCR Ex. Vol. 2* at 480–81. One of the good facts counsel identified was the gunshot wound to Damien's abdomen, but one of the bad facts was the gunshot wound to Damien's back was inconsistent with self-defense. *See id.* at 479. Ultimately, counsel did not reference the abdominal wound during closing. Minor did not take the opportunity during the post-conviction hearing to ask Harrison why this fact was omitted. Thus, we consider this decision a strategic choice that does not amount to ineffective assistance of counsel. *See Garrett v. State*, 602 N.E.2d 139, 142 (Ind. 1992)

("Tactical choices by trial counsel do not establish ineffective assistance of counsel even though such choices may be subject to criticism or the choice ultimately prove detrimental to the defendant.").

[63] Because the fact that Damien was shot in the abdomen was fully before the jury for its consideration and counsel's notes suggest a reasoned decision to omit that fact during closing, we conclude Minor failed to meet his burden to show there is a reasonable probability the result of the proceeding would have been different had trial counsel mentioned this fact one more time during closing argument.

6. Cumulative Trial Error

[64] Although the post-conviction court concluded cumulative error was waived for failure to raise it in his petition for relief, Minor contends cumulative error is "an inherent part of the analysis when a court finds more than one instance of deficient performance by counsel." *Appellant's Br.* at 48.

[65] Without expressly adopting Minor's position, we will address whether there was cumulative error here. Cumulative prejudice due to counsel's errors may render a result so unreliable as to necessitate reversal, but generally, trial errors that do not justify reversal separately also do not justify reversal when taken together. *Weisheit*, 109 N.E.3d at 992. Minor's cumulative error argument presupposes counsel erred in every aspect he raised. But the post-conviction court identified only two errors by trial counsel and in each case, the post-

conviction court found Minor failed to prove prejudice from the errors. Minor is entitled to no relief on this claim.

7. Failure to Object at Sentencing

[66] Finally, Minor alleged his trial counsel were ineffective for failing to object at sentencing to the trial court's imposition of consecutive sentences despite finding the mitigators outweighed the aggravators. The post-conviction court reviewed caselaw and determined "the trial court would not have been required by law to impose a concurrent sentence had counsel objected to consecutive sentences for the murder and attempted murder charges. Therefore, counsel's performance was not deficient in failing to object[.]" *PCR App. Vol. 2* at 231.

[67] Indiana Code Section 35-50-1-2(c) permits trial courts to determine whether multiple sentences are to be served concurrently or consecutively by considering aggravating and mitigating circumstances. Generally, when the trial court finds aggravators and mitigators balance, it may not impose consecutive sentences. *Wentz v. State,* 766 N.E.2d 351, 359 (Ind. 2002). Still, we have observed there is "no basis for holding that a trial court is restricted to a one-step balancing process when sentencing a defendant for multiple crimes" and "it is permissible for a trial court to consider aggravators and mitigators in determining the sentence for each underlying offense and then to independently consider aggravators and mitigators in determining whether to impose concurrent or consecutive sentences." *Frentz v. State*, 875 N.E.2d 453, 472 (Ind. Ct. App. 2007), *trans. denied*. And the "aggravating circumstance of multiple victims generally suffices to support consecutive sentences." *Lewis v. State*, 116 N.E.3d

1144, 1156 (Ind. Ct. App. 2018), *trans. denied*. Thus, in *Lopez v. State*, this Court affirmed advisory but consecutive sentences for two counts of murder because despite the trial court finding the aggravators and mitigators were in equipoise, the court "based its imposition of consecutive sentences upon [the] free-standing aggravating factor" of multiple victims. 869 N.E.2d 1254, 1259 (Ind. Ct. App. 2007), *trans. denied*.

[68] In this case the trial court found the mitigators outweighed the aggravators, but the same principle applies. In *Diaz v. State*, we observed:

> [A] sentencing court cannot determine that aggravating and mitigating circumstances *are in equipoise or are cumulatively mitigating* for the purpose of setting the length of a defendant's sentence, then reverse direction and find the very same aggravators and mitigators as applied to the very same convictions to be cumulatively aggravating for the purpose of imposing consecutive sentences.

839 N.E.2d 1277, 1280 (Ind. Ct. App. 2005) (emphasis added). In *Gross v. State*, the trial court imposed two mitigated sentences for murder but ordered them to be served consecutively. 22 N.E.3d 863, 867 (Ind. Ct. App. 2014), *trans. denied*. In doing so, the trial court did not state the aggravators and mitigators were in equipoise or the mitigators outweighed the aggravators, but the defendant argued the trial court "had to find the mitigating circumstances outweighed the aggravating circumstances" to impose the individual less-than-advisory sentences and argued the trial court abused its discretion in imposing consecutive sentences. *Id.* at 869. We held the trial court did not abuse its

discretion because it provided its reason for the decision to impose less-than-advisory sentences—namely, the defendant's mental condition and history—and then considered additional circumstances when it imposed consecutive sentences—including that there had been two victims. *Id.* at 870.

[69] Here, after identifying aggravators and mitigators for purposes of determining the length of each sentence, the trial court separately identified multiple victims as an aggravator for purposes of imposing consecutive sentences. Notably, the trial court had *not* identified multiple victims as an aggravator in determining the length of Minor's sentences for murder and attempted murder.

[70] To show ineffective assistance for failing to object, Minor was required to show the objection would have been sustained if made and he was prejudiced by the failure. *See Gibson*, 133 N.E.3d at 694. As in *Gross*, the trial court's decision to sentence Minor to mitigated but consecutive sentences does not constitute an abuse of discretion and the trial court would not have been obligated to sustain an objection to the consecutive sentences had one been made. The post-conviction court did not clearly err in determining counsel's performance at sentencing was not deficient.

Appellate Counsel

[71] Minor also claims his appellate counsel was ineffective for failing to raise the trial court's imposition of consecutive sentences as an issue in his direct appeal. The post-conviction court determined "had appellate counsel challenged [the] imposition of consecutive sentences on appeal, it is more probable than not that

the Court of Appeals would have upheld the trial court's decision[.]" *PCR App. Vol. 2* at 231. Accordingly, the court found appellate counsel's omission of the issue did not constitute deficient performance.

[72] Claims that appellate counsel were ineffective fall into three general categories of constitutionally deficient performance: "(1) denial of access to an appeal; (2) waiver of issues; and (3) failure to present issues well." *Hollowell v. State*, 19 N.E.3d 263, 270 (Ind. 2014). Minor's claim falls in the second category.

[73] Ineffective assistance is rarely found in waiver-of-issues claims because deciding which issues to raise "is one of the most important strategic decisions to be made by appellate counsel." *Reed v. State*, 856 N.E.2d 1189, 1196 (Ind. 2006). We therefore defer to appellate counsel's choice of issues for appeal "unless such a decision was unquestionably unreasonable." *Bieghler v. State*, 690 N.E.2d 188, 194 (Ind. 1997), *cert. denied*. To prove deficient performance, Minor needed to show the unraised sentencing issue was significant and obvious from the face of the record and was clearly stronger than the issues presented. *Id.* (citing *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986)).

[74] "In crafting an appeal, counsel must choose those issues which appear from the face of the record to be most availing." *Hampton v. State*, 961 N.E.2d 480, 492 (Ind. 2012). Here, appellate counsel, through her affidavit, stated she considered raising a challenge to Minor's sentence on appeal but "[a]fter researching the issue, . . . did not think it would lead to appellate relief[.]" *PCR Exhibits Vol. 1* at 26; *see also PCR (Conventional) Ex. Vol. 2* at 76 (appellate

counsel's notes about possible issues, including consecutive sentences). She believed the issues she did raise were "more compelling." *Id.* As discussed above, *see supra* ¶¶ 66–70, had the issue been raised it would not have succeeded. It was not clearly stronger than the issues appellate counsel chose to present, and counsel's choice was not unquestionably unreasonable. The post-conviction court did not err in denying Minor relief on this issue.

Denial of Due Process

[75] Finally, Minor alleged he was denied due process and a fair trial when the State knowingly presented false testimony—Detective Lehn's testimony that Tony Tate had not seen anything. A conviction based on the State's knowing use of false evidence violates a defendant's Fourteenth Amendment right to due process. *Giglio v. United States*, 405 U.S. 150, 153–55 (1972). The post-conviction court addressed the merits of this argument and concluded Minor failed to prove the State presented or failed to correct false testimony. *See Appellant's App. Vol. 2* at 232–34. However, we conclude this issue was foreclosed from consideration in post-conviction proceedings.

[76] Minor claims he is entitled to a new trial because the State knowingly presented false testimony from Detective Lehn. Specifically, he claims Detective Lehn's testimony was in "direct conflict" with Tony's statement. *Appellant's Br.* at 54. Trial counsel had the transcript of Tony's recorded statement on which this claim of false testimony is based but did not object to Detective Lehn's testimony. The probable cause affidavit was part of the direct appeal record and the transcript of Tony's statement was included in trial counsels' file which

was presumably provided to appellate counsel. Thus, this alleged false testimony was known and available both at trial and on direct appeal. "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." *Reed v. State*, 866 N.E.2d 767, 768 (Ind. 2007) (internal quotation marks omitted).

[77] Because no objection was made at trial and the issue was not presented as fundamental error on direct appeal, this freestanding claim of error is foreclosed on post-conviction. *See Overstreet v. State*, 877 N.E.2d 144, 149 n.1 (Ind. 2007) (declining to address petitioner's due process claim about the State's use of false evidence when reviewing denial of post-conviction relief because the issue was known and available at the time of defendant's direct appeal), *cert. denied*.

Conclusion

[78] Applying our standard of review to Minor's appeal in this case, we conclude the post-conviction court's judgment is not clearly erroneous and Minor has not shown the existence of clear error—that which leaves us with a definite and firm conviction that a mistake has been made. We therefore affirm the post-conviction court's denial of Minor's petition for post-conviction relief.

[79] Affirmed.

Crone, J., and Felix, J., concur.