

## MEMORANDUM DECISION

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### ATTORNEY FOR APPELLANT

Scott H. Duerring  
South Bend, Indiana

### ATTORNEYS FOR APPELLEE

Theodore E. Rokita  
Attorney General of Indiana  
Jodi Kathryn Stein  
Supervising Deputy Attorney  
General  
Indianapolis, Indiana

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## IN THE COURT OF APPEALS OF INDIANA

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Jason Reeves,  
*Appellant-Petitioner,*

v.

State of Indiana,  
*Appellee-Respondent.*

August 18, 2021

Court of Appeals Case No.  
20A-PC-2025

Appeal from the St. Joseph  
Superior Court

The Honorable Jane Woodward  
Miller, Judge

Trial Court Cause No.  
71D01-1510-PC-41

**Pyle, Judge.**

## Statement of the Case

- [1] Jason Reeves (“Reeves”) appeals the post-conviction court’s denial of his petition for post-conviction relief (“PCR”). On appeal, Reeves argues that he received ineffective assistance of trial counsel and that newly discovered evidence entitles him to a new trial. Concluding that Reeves was not denied effective assistance of trial counsel and that the newly discovered evidence does not necessitate a new trial, we affirm the post-conviction court’s judgment.
- [2] We affirm.

### Issue

Whether the post-conviction court erred in denying Reeves’ petition.

### Facts

- [3] The facts of the underlying offense, as found by this Court, are as follows:

During April of 2006, a man invaded the home of Kay DeBerry [(“DeBerry”)], Reeve’s [sic] mother, and shot her several times. DeBerry survived and identified Devon Groves (“Groves”) as the person who shot her. Reeves expressed his belief that there was a plot against him and his family, including his minor child, who had been present during DeBerry’s shooting. Reeves assembled a group that included his brothers Terry Waddell (“Waddell”) and Jermaine Reeves (“Jermaine”), and a family friend, Larry Mitchell (“Mitchell”). Reeves drove to South Bend in a rented vehicle, looking for Groves.

Reeves drove around for about two hours, trying to locate Groves, who was not at home. Eventually, Reeves stopped his vehicle outside an apartment rented by one of Grove’s [sic] cousins. He

remained in the vehicle but allowed Mitchell to take his gun. Waddell, Jermaine, and Mitchell went to look through the apartment window. After some discussion among the group about seeing a person believed to be Groves moving around inside the apartment, Mitchell fired three shots through the window. Tragically, sixteen-year-old Ja-Vonda Tharbs [(“Tharbs”)] was struck and killed. Groves was not inside the apartment.

*Reeves v. State*, No. 71A03-0909-CR-441, slip op. at 1 (Ind. Ct. App. Mar. 12, 2010).

[4] In July 2008, the State charged Reeves with conspiracy to commit murder. The information was later amended to include a charge of murder. Reeves’ jury trial occurred in June 2009. At trial, Reeves presented an alibi defense that he had been at the home of his then-girlfriend, Clover Smith (“Smith”), at the time of the shooting. Mitchell, who had been convicted of Tharbs’ murder in 2007, and Carlos Foster (“Foster”), who had been staying at Smith’s home on the night of Tharbs’ murder, testified against Reeves. The jury found Reeves guilty as charged. At the subsequent sentencing hearing, the trial court entered a judgment of conviction for murder and sentenced Reeves to sixty-five (65) years in the Department of Correction. Thereafter, on direct appeal, Reeves argued that: (1) he was entitled to a mistrial when Mitchell referenced Reeves’ arrest for murder in an unrelated death; and (2) his sentence was inappropriate. This Court affirmed his conviction and sentence in March 2010.

[5] In October 2015, Reeves filed a pro se petition for PCR. Reeves’ petition was amended by counsel in August 2018. In the amended petition, Reeves alleged multiple grounds of ineffective assistance of counsel. Specifically, Reeves

alleged that his trial counsel was ineffective for failing to: (1) investigate the potential testimony of Anthony Lyons (“Lyons”) and Izell Robinson (“Robinson”), who had been incarcerated with Mitchell and testified at Mitchell’s trial about statements Mitchell had made about Reeves’ presence at the murder scene; and (2) call Lyons, Robinson, and Smith as witnesses.

Reeves also alleged that his appellate counsel was ineffective for failing to raise appellate issues regarding: (1) accomplice liability instruction for murder; and (2) sufficiency of evidence.<sup>1</sup> In addition, Reeves claimed he had received newly discovered evidence in the form of an affidavit executed in 2014 by Pearlina Driver (“Driver”), Mitchell’s aunt, who stated that Mitchell had called her and informed her that he had lied during his testimony against Reeves.<sup>2</sup>

[6] The post-conviction court held three hearings in September 2019, November 2019, and July 2020. At the hearings, Driver, DeBerry, Jermaine, Waddell, Smith, Reeves, Sydney Bolden, a mutual friend of Reeves and Mitchell, and Julie Verheye (“Attorney Verheye”), Reeves’ trial attorney, testified. Mitchell appeared at the July 2020 hearing by video but refused to testify. Additionally, despite being served with subpoenas, Lyons and Robinson failed to appear.

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<sup>1</sup> Reeves does not raise the ineffective assistance of appellate counsel issue on appeal.

<sup>2</sup> In August 2020, after the post-conviction hearings had been completed, Driver executed a second affidavit. In this affidavit, Driver repeated the main assertion that Mitchell had stated that he had lied, but she also stated that she had received three letters written by Mitchell. Two of the letters were addressed to Reeves, and the other letter was addressed to Mitchell’s cousin. In the letters, Mitchell claimed that he had lied about Reeves’ involvement in the murders as retaliation against Waddell implicating him in Tharbs’ murder. After the final post-conviction hearing, and by agreement of the parties, the affidavit and three letters were admitted by the post-conviction court as part of Reeves’ newly discovered evidence claim.

[7] On its own motion, the post-conviction court took judicial notice of the records of: (1) Reeves' direct appeal; (2) Waddell's and Jermaine's guilty pleas; (3) Smith's perjury conviction, the basis of which came from testimony given during Mitchell's trial; and (4) Mitchell's direct appeal. The post-conviction court also admitted into evidence Lyons' and Robinson's testimony from Mitchell's trial. The parties also stipulated to testimony Lyons would have given had he testified. In their stipulation, the parties agreed, in relevant part, to the following:

1. On April 17, 2007, Anthony Lyons was interviewed by Detective James Taylor concerning information he had regarding the homicide of Javonda Tharbs.

2. Anthony Lyons was incarcerated in the St. Joseph County Jail where he met Larry [ ] Mitchell.

\* \* \*

4. Mitchell told Anthony Lyons that the night of the shooting[,] he had been drinking with two other males by the names of [Jermaine] and [Waddell].

\* \* \*

7. Mitchell told Anthony Lyons that after the shooting[,] they had made a phone call to [Reeves] and told him what had happened.

8. Mitchell told Anthony Lyons that during the phone call to [Reeves] that he ([Reeves]) told the three of them to bury the gun.

(App. Vol. 2 at 174).

[8] In October 2020, the post-conviction court denied Reeves' petition. The post-conviction court found that Reeves had failed to meet his burden of proof regarding his ineffective assistance of trial counsel claims. Specifically, in

relation to Reeves' claims for failure to investigate Lyons and Robinson and call them as witnesses, the court found that Lyons' and Robinson's testimony would have only served to impeach Mitchell's trial testimony and that Reeves had failed to show prejudice resulting from trial counsel's decision not to call them as witnesses. Additionally, the court found that Attorney Verheye's decision to not call Smith to testify was supported by her testimony that she had been concerned regarding Smith's perjury conviction and potential as a reluctant witness. Finally, the post-conviction court found that Reeves' newly discovered evidence was merely impeaching, not worthy of credit, and not likely to produce a different result at trial. Reeves now appeals.

## Decision

[9] Reeves argues that the post-conviction court erred in denying his PCR petition. Specifically, he argues that: (1) he was denied the effective assistance of trial counsel; and (2) newly discovered evidence entitles him to a new trial. We address each contention in turn.

[10] Post-conviction proceedings afford petitioners a limited opportunity to raise issues that were unavailable or unknown at trial and direct appeal. *Pannell v. State*, 36 N.E.3d 477, 485 (Ind. Ct. App. 2015), *trans. denied*. Such proceedings are not "super appeals" through which convicted persons can raise issues that they failed to raise at trial or on direct appeal. *Id.* Post-conviction proceedings are civil in nature, and petitioners bear the burden of proving their grounds for relief by a preponderance of the evidence. *Id.* A party appealing from a

negative judgment must establish that the evidence is without conflict and, as a whole, unmistakably and unerringly points to a conclusion contrary to the post-conviction court's decision. *Conner v. State*, 711 N.E.2d 1238, 1244 (Ind. 1999), *reh'g denied, cert. denied*.

[11] Where, as here, the post-conviction court made findings of fact and conclusions of law, we cannot affirm the judgment on any legal basis, but rather, must determine if the court's findings are sufficient to support its judgment. *Graham v. State*, 941 N.E.2d 1091, 1096 (Ind. Ct. App. 2011), *aff'd on reh'g*. Although we do not defer to the post-conviction court's legal conclusions, we review the post-conviction court's factual findings under a clearly erroneous standard. *Id.* Accordingly, we will not reweigh the evidence or judge the credibility of witnesses, and we will consider only the probative evidence and reasonable inferences flowing therefrom that support the post-conviction court's decision. *Id.* We must also acknowledge that the judge who presided over Reeves' original trial is also the judge who presided over the post-conviction proceedings, and therefore the post-conviction court's findings and judgment are entitled to greater than usual deference. *See State v. Dye*, 784 N.E.2d 469, 476 (Ind. 2003) (noting that because the judge presided at both the original trial and post-conviction hearing, the judge was in "an exceptional position" to assess weight and credibility of factual evidence and whether defendant was deprived of a fair trial).

## **1. Ineffective Assistance of Trial Counsel**

[12] Reeves first contends that the post-conviction court erred in denying his claim of ineffective assistance of trial counsel. Specifically, he argues that he was denied effective assistance when Attorney Verheye failed to: (1) investigate the potential testimony of Lyons and Robinson; and (2) call Lyons, Robinson, and Smith as witnesses to testify.

[13] We review claims of ineffective assistance of trial counsel under the two-pronged test established in *Strickland v. Washington*, 466 U.S. 668 (1984). The defendant must show that trial counsel’s performance fell below an objective standard of reasonableness based on prevailing professional norms and that there is a reasonable probability that, but for counsel’s errors, the result of the proceeding would have been different. *Moody v. State*, 749 N.E.2d 65, 67 (Ind. Ct. App. 2001), *trans. denied*. “Failure to satisfy either of the two prongs will cause the claim to fail.” *Gulzar v. State*, 971 N.E.2d 1258, 1261 (Ind. Ct. App. 2012) (citing *French v. State*, 778 N.E.2d 816, 824 (Ind. 2002)), *trans. denied*. “Indeed, most ineffective assistance of counsel claims can be resolved by a prejudice inquiry alone.” *French*, 778 N.E.2d at 824. Therefore, if we can dismiss an ineffective assistance claim on the prejudice prong, we need not address whether counsel’s performance was deficient. *Henley v. State*, 881 N.E.2d 639, 645 (Ind. 2008). Moreover, isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective. *Reed v. State*, 866 N.E.2d 767, 769 (Ind. 2007). Because counsel is afforded considerable discretion in choosing strategy and



tactics, a strong presumption arises that counsel rendered adequate assistance.  
*Id.*

### A. Failure to Investigate Witnesses

[14] Reeves claims that his trial counsel failed to properly investigate Lyons and Robinson, who he asserts would have rebutted Mitchell’s trial testimony that Reeves was present at the scene of Tharbs’ murder. “When deciding a claim of ineffective assistance of counsel for failure to investigate, we apply a great deal of deference to counsel’s judgments.” *Boesch v. State*, 778 N.E.2d 1276, 1283 (Ind. 2002), *reh’g denied*. Establishing failure to investigate as a ground for ineffective assistance of counsel requires going beyond the trial record to show what an investigation, if undertaken, would have produced. *McKnight v. State*, 1 N.E.3d 193, 201 (Ind. Ct. App. 2013). “This is necessary because success on the prejudice prong of an ineffectiveness claim requires a showing of a reasonable probability of affecting the result.” *Id.* (quoting *Woods v. State*, 701 N.E.2d 1208, 1214 (Ind. 1998), *cert. denied*).

[15] According to Reeves, Attorney Verheye’s performance was deficient because “[i]t appears from the evidence that . . . [she] completely overlooked the information provided by [ ] Lyons and [ ] Robinson.” (Reeves’ Br. 17). Our review of the record reveals that during the post-conviction hearing, Attorney Verheye was questioned about the discovery she had reviewed in connection with Reeves’ case. She explained that she had reviewed a summary of a statement given by Robinson about Mitchell and a police report with

information given by Lyons about Mitchell. Because of the passage of ten years since the case, Attorney Verheye could not recall what she did with the information, but she testified that she had been aware of who Lyons and Robinson were, explaining that they had been inmates with Mitchell at some point. Attorney Verheye further testified as follows:

[State]: And to your knowledge, the only thing that [Lyons and Robinson] knew about this case was what Larry [Mitchell] told them in jail?

[Attorney Verheye]: That's correct.

[State]: So, anything they had to say would really just be for impeachment of Larry Mitchell's testimony?

[Attorney Verheye]: That would be correct.

(Tr. 63).

[16] Contrary to Reeves' assertion, Attorney Verheye did not overlook the statements made by Lyons and Robinson. Rather, the testimony at the post-conviction hearing indicates that Attorney Verheye had made a strategic decision not to pursue this evidence any further. *See Kubsch v. State*, 934 N.E.2d 1138, 1151 (Ind. 2010) (explaining that the method of impeaching witnesses is a tactical decision and a matter of trial strategy that does not amount to ineffective assistance), *reh'g denied*. Therefore, we conclude that trial counsel's investigation did not fall below objective standards of reasonableness.

## **B. Failure to Call Witnesses to Testify**

[17] Reeves next argues that Attorney Verheye should have called Lyons, Robinson, and Smith to testify at trial. In the context of an ineffective assistance of counsel claim, the decision of what witnesses to call is a matter of trial strategy and appellate courts do not second-guess that decision. *Curtis v. State*, 905 N.E.2d 410, 415 (Ind. Ct. App. 2009), *trans. denied*; *see also Wrinkles v. State*, 749 N.E.2d 1179, 1200 (Ind. 2001) (stating that the decision of which witnesses to call is “the epitome of a strategic decision”) (citation and quotation marks omitted), *cert. denied*. We will not find counsel ineffective for failure 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*. Moreover, in the case of an uncalled witness, our supreme court has required that the petitioner offer evidence as to what the testimony would have been. *Lee v. State*, 694 N.E.2d 719, 722 (Ind. 1998), *cert. denied*.

[18] Similar to his failure to investigate argument, Reeves claims that Attorney Verheye should have called Lyons and Robinson as witnesses because they would have contradicted Mitchell’s testimony that placed Reeves at the scene of Tharbs’ murder. At Mitchell’s trial, both Lyons and Robinson testified about conversations they had had with Mitchell while incarcerated. Lyons testified that Mitchell had not named Reeves among the individuals present at the time of the shooting and that Mitchell had called Reeves after the shooting. At Mitchell’s trial, Robinson initially testified that Mitchell had told him that Reeves was present at the scene when Tharbs was shot. Later, Robinson testified that Mitchell had stated that Reeves had gotten sick and was not at the

scene. Neither Lyons nor Robinson testified at Reeves' post-conviction hearing.

[19] In its order, the post-conviction court found that Lyons' and Robinson's testimony would have only served to impeach Mitchell's trial testimony and that Reeves had failed to show prejudice resulting from counsel's failure to call the witnesses to testify. We agree with the post-conviction court.

[20] As noted above, our supreme court has previously held that the method of impeaching witnesses is a tactical decision and a matter of trial strategy that does not amount to ineffective assistance. *Kubsch*, 934 N.E.2d at 1151. Here, the record reveals that Mitchell's testimony at Reeves' trial did not go unchallenged. During Attorney Verheye's cross-examination of Mitchell, he conceded that he had hoped to receive a sentence reduction due to his testimony. Mitchell also admitted that he had lied to the police when he had initially been interviewed about Tharbs' murder. Thus, Attorney Verheye elicited evidence to undermine Mitchell's credibility, and Reeves has failed to prove prejudice resulting from trial counsel's decision to not use Lyons and Robinson to impeach Mitchell.<sup>3</sup> See *Badelle v. State*, 754 N.E.2d 510, 539 (Ind. Ct. App. 2001) (noting in relevant part that, when trial counsel's efforts were "more than adequate" to support a chosen defense, counsel's decision not to

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<sup>3</sup> To the extent Reeves argues Mitchell's prior statements would have been admissible not only to impeach Mitchell's credibility but also as substantive evidence that Reeves was not present at the scene, we disagree. Our supreme court has stated that "[o]rdinarily, prior inconsistent statements are used to impeach, not as substantive evidence of the matter reported." *Young v. State*, 746 N.E.2d 920, 926 (Ind. 2001).

seek out additional witnesses was a judgment call within the wide range of reasonable assistance), *trans. denied*.

[21] Finally, Reeves argues that Attorney Verheye was ineffective for failing to call Reeves' former girlfriend, Smith, as a witness. The decision of what witnesses to call is a matter of trial strategy and appellate courts do not second-guess that decision. *Curtis*, 905 N.E.2d at 415. Here, Attorney Verheye testified at the post-conviction hearing that she had interviewed Smith and had listed her as an alibi witness. Attorney Verheye explained that she "felt there might be some danger to calling [Smith] as a witness." (Tr. 64). She explained that the risks of calling Smith included her perjury conviction based on testimony she had given during Mitchell's trial and Smith's potential as a reluctant witness. Based on the above, we conclude Attorney Verheye's decision to not call Smith as a witness was strategic, which we will not second-guess. *See Curtis*, 905 N.E.2d at 415. Accordingly, her decision was not so unreasonable as to constitute ineffective assistance of counsel.

## **2. Newly Discovered Evidence**

[22] Reeves' final argument challenges the post-conviction court's denial of his PCR petition on the basis of newly discovered evidence. Newly discovered evidence mandates a new trial when a defendant demonstrates that: (1) the evidence has been discovered since trial; (2) it is material and relevant; (3) it is not cumulative; (4) it is not merely impeaching; (5) it is not privileged or incompetent; (6) due diligence was used to discover it in time for trial; (7) it is

worthy of credit; (8) it can be produced upon a retrial of the case; and (9) it will probably produce a different result at trial. *Whedon v. State*, 900 N.E.2d 498, 504 (Ind. Ct. App. 2009), *trans. granted, summarily aff'd*. “We ‘analyze[ ] these nine factors with care, as the basis for newly discovered evidence should be received with great caution and the alleged new evidence carefully scrutinized.’” *Id.* (quoting *Taylor v. State*, 840 N.E.2d 324, 330 (Ind. 2006)). “The petitioner for post-conviction relief bears the burden of showing that *all* nine requirements are met.” *Id.* (emphasis in original).

[23] In its order, the post-conviction court found that Reeves had failed to establish all nine factors. Specifically, the post-conviction court found that Reeves had failed to establish factors four, seven, and eight. Because the nine factors are written in the conjunctive, we need only address whether the alleged newly discovered evidence is not merely impeaching evidence. *See id.*

[24] Impeachment is defined as “[t]he act of discrediting a witness, as by catching the witness in a lie or by demonstrating that the witness has been convicted of a criminal offense.” *Taylor*, 840 N.E.2d at 330 n.1 (quoting Black’s Law Dictionary 768 (8th ed. 2004)). Evidence that destroys or obliterates the testimony upon which a conviction was obtained is not appropriately considered as merely impeaching evidence. *Bunch v. State*, 964 N.E.2d 274, 291 (Ind. Ct. App. 2012), *reh’g denied, trans. denied*.

[25] During Reeves’ trial, Mitchell implicated Reeves in Tharbs’ murder by placing him at the scene. Mitchell appeared at the post-conviction hearing but refused

to testify. Following the post-conviction hearings, Reeves submitted three letters Mitchell had allegedly written wherein Mitchell claimed that he had lied about Reeves' involvement. We agree with the post-conviction court that this evidence is merely impeaching of his own trial testimony. It does nothing more than undermine his credibility and is not freestanding evidence of Reeves' innocence. Moreover, Mitchell's recantation does not destroy or obliterate the testimony upon which Reeves' conviction was obtained. As noted by the post-conviction court, "Foster's testimony coupled with the cell phone records, Reeves' motive to kill[,] and the inference that could be drawn from Reeves' initial lies to the police, provide evidence more than sufficient to sustain Reeves' conviction." (App. Vol. 3 at 30 n.23). Accordingly, the post-conviction court did not err in denying Reeves relief on this issue. *See Dye*, 784 N.E.2d at 476.

### **3. Conclusion**

[26] In sum, we conclude that Reeves failed to establish that he had received ineffective assistance of trial counsel or that newly discovered evidence necessitated a new trial. Accordingly, we affirm the judgment of the post-conviction court.

[27] Affirmed.

Najam, J., and Tavitas, J., concur.