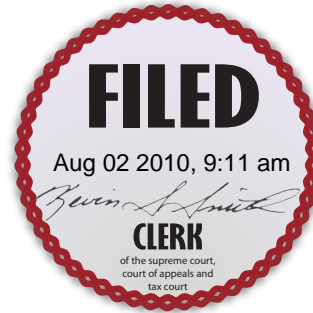


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

SEAN RICH,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 49A04-0910-PC-561

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Mark A. Jones, Judge Pro Tempore
Cause No. 49G05-9803-PC-037613

August 2, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Sean Rich appeals the denial of his petition for post-conviction relief. Rich was convicted following a jury trial of burglary, theft, and two counts of criminal confinement. The trial court sentenced him to an aggregate term of ninety-three years. Rich claims his trial counsel rendered ineffective assistance by (1) not moving to suppress an eyewitness's pretrial identification, (2) failing to request a mistrial following the introduction of uncharged misconduct evidence, (3) failing to offer rebuttal testimony to discredit physical evidence introduced by the State, (4) failing to call an expert to testify that an accomplice's confession was coerced and untruthful, and (5) failing to object to the trial court's sentencing determinations. Rich further claims that appellate counsel was ineffective for (6) not challenging the sufficiency of the evidence and (7) failing to raise ineffective assistance of trial counsel on direct appeal. We find no ineffective assistance and affirm the judgment of the post-conviction court.

Facts and Procedural History

The underlying facts as reported in this Court's memorandum decision on direct appeal are as follows:

This case arises from events culminating in the deaths of Dr. C. Frederick Mathias, the senior pastor at [Northminster] Presbyterian Church in Indianapolis, and his wife of forty years, Cleta. The facts favorable to the verdicts show that Rich was a member of the church and served as an usher when he was suspected of taking cash and checks written to the church by parishioners. Rich was told he could no longer usher or receive the offering and that neither he nor his sister would receive financial assistance to attend an approaching youth conference.

On Saturday, December 14, 1996, Rich was at the church when he was asked to assist other boys in moving carpet from the Mathias home on North Dean Road to the church. The boys carried the carpet from the

basement of the home, through the garage, and into Dr. Mathias's car. Rich told one of the boys that he did not like Dr. Mathias.

The next day, December 15, Rich asked his friend, Paul Brightman, if he wanted to burglarize a house. Rich explained that he had been to a house that had some "nice stuff." Around 9:45 or 10:00 p.m., the two met. Brightman drove his truck; Rich arrived on foot. They went to the Mathias house, jumped a fence, and entered the house through a garage door. Both wore gloves, and Brightman carried an unloaded handgun Rich had given him.

Brightman went to the upstairs bedrooms where he rummaged through drawers, a closet, and a jewelry box. He took a small pocketknife. At some point, Brightman heard noises and went downstairs to investigate, kicking and killing the Mathiases' cat on the way. Brightman discovered Dr. and Mrs. Mathias had arrived home, and he saw Rich standing in front of them. Approaching from behind, Brightman used the handgun to hit first Mrs. Mathias and then Dr. Mathias. Brightman urged Rich to leave, but Rich resisted because the Mathiases knew him. Using wire, the two tied the Mathiases' hands behind their backs. The evidence is in conflict regarding which of the two males then retrieved an ax from the garage and who struck each of the Mathiases in their heads with that instrument. It is known with reasonable medical certainty that Dr. and Mrs. Mathias died from wounds inflicted by the ax and that the ax remained imbedded in Dr. Mathias's head.

Meanwhile, Brightman searched Mrs. Mathias's purse, and Rich took cash from Dr. Mathias's wallet. Brightman saw Rich go upstairs, holding an item in his hands. Brightman left, followed by Rich, who was in possession of money and "bayonets." Sometime after 10:40 p.m., two witnesses saw a young male resembling Rich walking down the side of Dean Road.

Just before 11:00 p.m., neighbors of the Mathiases awoke, noticed smoke at the Mathias residence, and called "911." While waiting for help, one neighbor investigated and discovered the Mathiases' bodies. The neighbor also noticed what appeared to be a can of charcoal starter fluid on the family room floor and a box of matches near the door. Firefighters responded and suppressed the fire. They observed that the master bedroom had been ransacked and at least one other bedroom had been searched. The coroner arrived at 12:10 a.m. and determined that Dr. and Mrs. Mathias had died very recently.

The Mathiases' eldest son flew to Indianapolis, examined the house, and noticed items missing from his parents' home, including pieces of his mother's jewelry; two of his father's rings, one with a red stone; a small pocket knife; a letter opener which resembled a small "medieval sword"; his father's wallet; and several watches. Two days after the murders, police executed a search warrant at the Rich residence and found the handgun

used on December 15 under Rich's mattress. No stolen property was recovered.

Approximately two weeks after the murders, Rich told his friend Derek Ridgeway about the incident. Rich showed Ridgeway a man's ring with a red stone that he said Brightman had given him to sell. Rich told his girlfriend that detectives had asked him about the Mathias murders, and he said "he did it." More specifically, Rich admitted that he and Brightman had gone to the Mathias home to commit burglary and that he had taken two rings, a topaz and a garnet.

When police first questioned Brightman about the incident, he claimed he knew nothing. Brightman told a Marion County Grand Jury that he was with his fiancé on the night of December 15, 1996. On January 26, 1998, police arrested Brightman on an unrelated charge and again questioned him about the Mathias murders. Between January 27 and February 5, 1998, Brightman gave six statements to police implicating Rich and himself in the offenses.

Rich v. State, No. 49A02-0203-CR-229, slip op. at 2-5 (Ind. Ct. App. March 7, 2003) (citations omitted).

The State charged Rich with two counts of murder, two counts of felony murder, burglary, two counts of criminal confinement, arson, two counts of battery, theft, and cruelty to an animal. A jury found Rich guilty of burglary, theft, and both counts of criminal confinement. The jury acquitted Rich of animal cruelty and deadlocked on the remaining charges. Rich was sentenced to an aggregate term of ninety-three years.

Rich appealed. He claimed that he deserved a new trial based on newly discovered evidence, that the trial court improperly instructed the jury on criminal confinement, and that his burglary and confinement convictions violated Indiana's double jeopardy prohibition. The Court of Appeals reduced one of Rich's criminal confinement convictions to avoid double jeopardy but affirmed in all other respects. *Id.* at 16.

Rich later sought post-conviction relief alleging ineffective assistance of counsel. He claimed in part that trial counsel were ineffective for (1) not moving to suppress an

eyewitness's pretrial identification, (2) failing to request a mistrial following the introduction of uncharged misconduct evidence, (3) failing to offer rebuttal testimony to discredit physical evidence introduced by the State, (4) failing to retain an expert to testify that Brightman's confessions were involuntary, and (5) failing to object to the trial court's sentencing determinations. He further claimed that appellate counsel rendered ineffective assistance by (6) not challenging the sufficiency of the evidence and (7) failing to raise ineffective assistance of trial counsel on direct appeal. The post-conviction court convened four hearings, and Rich offered testimony from roughly five witnesses. The post-conviction court issued findings of fact and conclusions of law denying Rich's petition for relief. Rich now appeals.

Discussion and Decision

The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); *Fisher v. State*, 810 N.E.2d 674, 679 (Ind. 2004). When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. *Fisher*, 810 N.E.2d at 679. On review, we will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. *Id.* The post-conviction court in this case entered findings of fact and conclusions of law in accordance with Indiana Post-Conviction Rule 1(6). A post-conviction court's findings and judgment will be reversed only upon a showing of clear error—that which leaves us with a definite and firm conviction that a mistake has been made. *Id.* The post-conviction court is the sole

judge of the weight of the evidence and the credibility of witnesses. *Id.* We accept findings of fact unless clearly erroneous, but we accord no deference to conclusions of law. *Id.*

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. *Ben-Yisrayl v. State*, 729 N.E.2d 102, 106 (Ind. 2000) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)), *reh'g denied*. Failure to satisfy either prong will cause the claim to fail. *French v. State*, 778 N.E.2d 816, 824 (Ind. 2002). Counsel's performance is deficient if it falls below an objective standard of reasonableness based on prevailing professional norms. *Id.* Counsel is afforded considerable discretion in choosing strategy and tactics, and we will accord those decisions deference. *Timberlake v. State*, 753 N.E.2d 591, 603 (Ind. 2001), *reh'g denied*. A strong presumption arises that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Id.* To meet the appropriate test for prejudice, the petitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Perez v. State*, 748 N.E.2d 853, 854 (Ind. 2001). If we can dismiss an ineffective assistance claim on the prejudice prong, we need not address whether counsel's performance was deficient. *Helton v. State*, 907 N.E.2d 1020, 1023 (Ind. 2009).

The standard of review for a claim of ineffective assistance of appellate counsel is the same as for trial counsel. *Reed v. State*, 856 N.E.2d 1189, 1195 (Ind. 2006). There are three basic ways in which appellate counsel may be considered ineffective: (1) when counsel's actions deny the defendant his right of appeal; (2) when counsel fails to raise issues that should have been raised on appeal; and (3) when counsel fails to present claims adequately and effectively such that the defendant is in essentially the same position after appeal as he would be had counsel waived the issue. *Grinstead v. State*, 845 N.E.2d 1027, 1037 (Ind. 2006). The decision of what issue or issues to raise on appeal is one of the most important strategic decisions made by appellate counsel. *Bieghler v. State*, 690 N.E.2d 188, 193 (Ind. 1997). Thus, we give considerable deference to appellate counsel's strategic decisions and will not find deficient performance in appellate counsel's choice of some issues over others when the choice was reasonable in light of the facts of the case and the precedent available to counsel at the time the decision was made. *Taylor v. State*, 717 N.E.2d 90, 94 (Ind. 1999). To establish deficient performance for failing to raise an issue, the petitioner must show that the unraised issue was "clearly stronger" than the issues that were raised. *Bieghler*, 690 N.E.2d at 194.

I. Failure to Seek Suppression of Pretrial Identification

The State called eyewitness James Smith to help place Rich at the scene of the crime. Smith testified that between 10:30 and 11 p.m. on the night of the murders, he and his wife were driving south on Dean Road. Smith saw a young man on the east side of the road also heading south. This was unusual. People seldom walked along Dean Road

because it was tree-lined and not suited for foot traffic. Smith could see the pedestrian was slender and approximately 5'10" to 6' tall. He was wearing a baseball cap with the bill in the front, but Smith did catch a glimpse of his face. A few days later, after hearing about the burglary on the news, Smith and his wife recalled the suspicious pedestrian and contacted the Marion County Sheriff's Department. Sergeant Gray came to Smith's house. Sergeant Gray showed Smith a photograph of Rich's church confirmation class. The photograph depicted sixteen people—both males and females, youths and adults. Rich was pictured in the lower left corner taking a knee. Sergeant Gray asked Smith if any of the people in the photograph looked like the pedestrian from Dean Road. Smith could not provide a positive identification, but he picked out Rich as resembling the pedestrian based on the oval shape of his face. Defense counsel did not object to Smith's testimony recounting the photo identification.

Rich argues that trial counsel were ineffective for failing to seek suppression of Smith's photo identification testimony.

The Due Process Clause of the Fourteenth Amendment requires suppression of testimony concerning a pretrial identification when the procedure employed is impermissibly suggestive. *Swigert v. State*, 749 N.E.2d 540, 544 (Ind. 2001). A photographic array is impermissibly suggestive if it raises a substantial likelihood of misidentification given the totality of the circumstances. *Id.* Factors to be considered in evaluating the likelihood of a misidentification include: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the

accuracy of the witness's prior description of the criminal; and (4) the level of certainty demonstrated by the witness. *Parker v. State*, 698 N.E.2d 737, 740 (Ind. 1998).

Even if we assumed without deciding that the pretrial identification was inadmissible and that counsel performed deficiently by not moving to suppress it, Rich still fails to persuade us that he was prejudiced as a result. The exclusion of Smith's testimony likely would have had little impact on the jury's verdicts. First, Smith's identification was weak and equivocal. Smith could not positively identify Rich as the pedestrian spotted on Dean Road. All he could say was that Rich resembled him. Second, Smith's testimony placed Rich only in the extended vicinity of the crime. Smith did not testify, for example, that the subject he identified was in or around the Mathias home. Finally, the strength of the State's remaining evidence was overwhelming. Brightman testified that he and Rich committed the burglary together. Rich made admissions to several people implicating himself in the crimes. Rich was in possession of Dr. Mathias's stolen ring, and police found the handgun used during the burglary under Rich's mattress. The State also produced substantial evidence of Rich's means, motive, and opportunity to commit the crimes charged. We find no reasonable probability that, but for counsel's alleged omission, the outcome of the proceeding would have been different. We therefore find no prejudice and no ineffective assistance.

II. Failure to Request Mistrial on Account of Uncharged Misconduct Evidence

Rich was allegedly stealing checks from Dr. Mathias's church before the incident in question. At one point in 1996, Dr. Mathias confronted Rich and accused him of stealing the church's money. The defense moved in limine to exclude any evidence of

Rich's suspected check theft. In particular, the defense's motion sought to exclude evidence that (1) Dr. Mathias accused Rich of stealing checks and money from the church collection plate, (2) Rich had checks in his possession that were made out to the church, and (3) Rich had attempted to cash some of the checks. The trial court permitted the State to introduce evidence of Dr. Mathias's accusations. However, the court prohibited introduction of any other check-theft evidence unless a hearing was first convened outside the presence of the jury. The defense called Rich's father Walter to testify. Walter claimed that he was surprised when Dr. Mathias accused Rich of stealing checks in 1996. With no prior warning, the State cross-examined Walter as follows:

Q. All right. Now, November 7, 1995, Mr. Rich, you made a report to Deputy Clifton Johnson of the Marion County Sheriff's Department indicating that your daughter, Stacie, who just testified, had told you that in fact, she had seen checks from Northminster Church in the possession of your son, Sean Rich; isn't that correct?

A. I believe there was a conversation about checks, yes.

* * * * *

Q. All right, and when Deputy Johnson got there, you told him, didn't you, that your 16 year-old daughter saw checks in your son's possession which were made out to Northminster Presbyterian Church. Isn't that what you told Deputy Clifton Johnson when he arrived?

A. I do not remember saying Northminster Church.

* * * * *

Q. . . . You knew he wasn't supposed to have checks, he denied anything, so you said, "I'm just going to call the Sheriff's Department about this and they'll straighten it out," and the Sheriff's Department did come.

A. Yes.

Appellant's App. p. 169-71. Defense counsel objected, claiming that the State violated the trial court's in limine order. The State apologized but maintained that defense counsel had opened the door. The trial court agreed that the in limine order had been

violated, but it found that the State's line of inquiry was appropriate and relevant. The court took no remedial action. Defense counsel did not seek a mistrial.

Rich argues that trial counsel rendered ineffective assistance by failing to request a mistrial following the State's cross-examination.

Indiana Evidence Rule 404(b) provides that evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. "It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident" Ind. Evidence Rule 404(b). Rule 404(b)'s list of permissible purposes is illustrative but not exhaustive. *Embry v. State*, 923 N.E.2d 1, 9 (Ind. Ct. App. 2010), *trans. denied*. If logically relevant, evidence of the defendant's uncharged misconduct may be used to attack a defense witness's credibility. *See* 1 Edward Imwinkelried, *Uncharged Misconduct Evidence* § 6:22 (2009); *see also* Ind. Evidence Rule 405(a) (where the accused offers character evidence in his favor, inquiry is allowable into relevant specific instances of defendant's conduct on cross-examination).

A mistrial is appropriate only where the questioned conduct is so prejudicial and inflammatory that it places the defendant in a position of grave peril to which he should not have been subjected. *Morgan v. State*, 903 N.E.2d 1010, 1019 (Ind. Ct. App. 2009), *trans. denied*. The gravity of the peril is measured by the conduct's probable persuasive effect on the jury, not the impropriety of the conduct. *Mickens v. State*, 742 N.E.2d 927, 929 (Ind. 2001). The denial of a motion for mistrial is reviewed on appeal for abuse of discretion. *Stokes v. State*, 922 N.E.2d 758, 762 (Ind. Ct. App. 2010), *trans. denied*.

Here we find neither deficient performance nor prejudice. Counsel did not perform deficiently by declining to request a mistrial, for the evidence at issue was properly admitted by the trial court. The State's check-theft evidence was admissible to show Rich's motive for committing the crimes charged. If Rich was stealing checks and Dr. Mathias had accused him of doing so, Rich would have a retaliatory motive for burglarizing the Mathias home. The line of questioning quoted above was also permissible impeachment evidence. Walter claimed to have been surprised by Dr. Mathias's check-theft accusations, but the State's inquiry showed that Walter was privy to similar allegations made a year before. Even if the check-theft evidence was inadmissible or unfairly prejudicial, the trial court would not have abused its discretion in denying a motion for mistrial. Introduction of evidence that Rich was stealing checks would not have placed Rich in such grave peril as to necessitate a new trial. We find no probability that, had defense counsel sought a mistrial, the trial court would have been required to grant the motion and the outcome of Rich's proceeding would have been different. We therefore find no prejudice and no ineffective assistance.

III. Failure to Rebut State's Physical Evidence

Brightman told police that Rich was wearing dark camouflage pants and black military boots on the night of the burglary. Law enforcement searched Rich's home and recovered a pair of army boots and eight pairs of camouflage pants. The boots contained a microscopic, red-brown stain which tested presumptively for blood. One of eight pairs of pants was also stained, though preliminary blood testing on the pants was inconclusive. The State offered both the boots and stained pants into evidence. The State

alleged Rich was wearing these articles when he burglarized the Mathias home. The defense offered no rebuttal testimony to challenge the evidence and its connection to Rich. At Rich's post-conviction hearing, Rich and his mother Pamela claimed that the camouflage pants actually belonged to Megan Spellman, the mother of Rich's son. They claimed that the stained boots belonged to Rich's Uncle Bryan and were not in Rich's possession until several months after the burglary. Bryan submitted affidavit testimony to the same effect. Rich, Pamela, and Bryan further claimed that they informed defense counsel before trial that the pants and boots were not Rich's. The post-conviction court found these allegations "not credible" and "neither compelling nor convincing." Appellant's App. p. 85, 86. Trial counsel also testified at the post-conviction hearing that they thoroughly investigated the State's evidence in preparation for trial. They did not recall ever learning that the boots and pants belonged to someone other than Rich.

Rich argues trial counsel were ineffective for failing to offer at trial testimony indicating that the stained boots and pants did not belong to him.

Again we find neither deficient performance nor prejudice. Defense counsel investigated the State's physical evidence, and counsel were never told that the articles of clothing seized from Rich's home belonged to Megan Spellman or Uncle Bryan. Rich, Pamela, and Bryan now maintain that the clothes were not Rich's and that they notified defense counsel accordingly. But the post-conviction court discounted these claims as incredible. We afford this assessment deference on appeal and therefore must disregard these new allegations. In short, we cannot say that defense counsel neglected to introduce exculpatory testimony which would have discredited the State's physical

evidence. Assuming for the sake of argument that the pants and boots did not belong to Rich, that counsel were made aware of this, and that counsel performed deficiently by failing to present such testimony at trial, we still would not find Rich was prejudiced as a result of the omission. The State's remaining evidence was formidable, and the clothing was not a significant component of the State's case. Forensic analysts could not even confirm the composition of the clothing stains. We find no reasonable probability that, had jurors heard testimony that the pants and boots belonged to other people, the outcome of Rich's trial would have been different.

IV. Failure to Retain Expert on the Voluntariness of Accomplice's Confession

Accomplice Brightman gave several statements to the police implicating himself and Rich in the burglary. Tape recordings of these statements were admitted into evidence. Brightman also testified against Rich at trial. The defense cross-examined Brightman on the voluntariness of his confessions. The defense elicited evidence that when Brightman spoke with the police, officers shined light in his eyes, threatened to kill him by lethal injection, and deprived him of sleep. The defense did not call an expert witness to testify that Brightman's statements were involuntary. At Rich's post-conviction hearing, Rich and his mother Pamela claimed that before trial, a forensic psychologist named Stan Walters had offered to review the tape recordings of Brightman's confessions. Walters was never retained by the defense to serve as an expert witness.

Rich argues trial counsel rendered ineffective assistance for failing to retain and call an expert “who could testify that the co-defendant’s confession was coerced and false.” Appellant’s Br. p. 19.

Again we find neither deficient performance nor prejudice. First, Rich does not explain who the purported expert was, what his anticipated testimony would have revealed, and how his opinions would have been admissible at trial. In any event, the decision as to which witnesses to call was a matter within the professional judgment and strategic discretion of defense counsel. Counsel did not call the supposed expert witness but instead cross-examined Brightman on the voluntariness of his confession. The defense was thus able to introduce evidence that police coerced Brightman’s statements and that the confessions were untruthful. We cannot say counsel’s tactics were anything less than professional, nor can we say the outcome of Rich’s trial would have been different if the confession expert had been called to testify. We find no ineffective assistance.

V. Failure to Raise Objections at Sentencing

Rich argues trial counsel rendered ineffective assistance by failing to object to the trial court’s findings at sentencing. Rich claims the trial court considered several improper aggravating circumstances and failed to consider his proffered mitigators.

Indiana trial courts are required to enter sentencing statements whenever imposing sentences for felony offenses. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh’g*, 875 N.E.2d 218. A sentencing statement must include a reasonably detailed recitation of the trial court’s reasons for imposing a particular sentence. *Id.* If

the trial court finds aggravating or mitigating circumstances, it must identify all such significant circumstances and explain why each has been determined to be mitigating or aggravating. *Id.* The trial court may abuse its discretion in sentencing if the record does not support the reasons given for imposing the sentence, or the sentencing statement omits reasons that are clearly supported by the record and advanced for consideration, or the reasons given are improper as a matter of law. *Id.* at 490-91.

Generally speaking, “[c]ounsel need not object to preserve a sentencing error for review.” *Reed*, 856 N.E.2d at 1194. Our appellate courts review many claims of sentencing error—including improper consideration of an aggravating circumstance or failure to consider a proper mitigating circumstance—without insisting that the claim first be presented to the trial judge. *Kincaid v. State*, 837 N.E.2d 1008, 1010 (Ind. 2005).

Here Rich claims that trial counsel were ineffective for failing to object to the trial court’s sentencing determinations—namely its consideration of various aggravators and failure to consider his proposed mitigators. But Rich fails to demonstrate that, had counsel voiced the desired objections at sentencing, the trial court would have reached a different decision and calculated a more lenient sentence. Nor did trial counsel’s failure to object prejudice Rich’s appellate review. Appellate counsel could have appealed the sentence for abuse of discretion even in the absence of express objections. For these reasons, we find no ineffective assistance.

VI. Failure to Challenge Sufficiency of the Evidence on Direct Appeal

Rich next argues that appellate counsel was ineffective for failing to challenge the sufficiency of the evidence on direct appeal. Rich claims counsel should have invoked

the “incredible dubiousity rule” and argued that Brightman’s testimony was too inherently improbable to sustain Rich’s convictions.

In reviewing a sufficiency of the evidence claim, the appellate court does not reweigh the evidence or assess the credibility of the witnesses. *Treadway v. State*, 924 N.E.2d 621, 639 (Ind. 2010). Rather, the court looks to the evidence and reasonable inferences drawn therefrom that support the verdict and will affirm the convictions if there is probative evidence from which a reasonable jury could have found the defendant guilty beyond a reasonable doubt. *Id.*

The “incredible dubiousity rule” provides that in rare cases, where “a sole witness presents inherently improbable testimony and there is a complete lack of circumstantial evidence,” the appellate court may impinge upon the fact-finder’s function to judge the credibility of a witness. *Love v. State*, 761 N.E.2d 806, 810 (Ind. 2002). For testimony to be so inherently improbable that it is disregarded on the basis of incredible dubiousity, “the witness must present testimony that is inherently contradictory, wholly equivocal or the result of coercion, and there must be a complete lack of circumstantial evidence of the defendant’s guilt.” *Clay v. State*, 755 N.E.2d 187, 189 (Ind. 2001). “[A]pplication of this rule is rare and . . . the standard to be applied is whether the testimony is so incredibly dubious or inherently improbable that no reasonable person could believe it.” *Stephenson v. State*, 742 N.E.2d 463, 498 (Ind. 2001) (quotation omitted).

Here we find no ineffective assistance by appellate counsel for foregoing an incredible dubiousity argument. The incredible dubiousity doctrine would have been unavailing to Rich on direct appeal. The State’s case did not rest on the testimony of a

single witness. The State introduced a litany of other evidence at trial, including the admissions of Rich himself, physical evidence linking him to the burglary, and circumstantial evidence of Rich's means, motive, and opportunity to commit the crimes charged. Accordingly, the incredible dubiousity rule would have been inapplicable and would have afforded no relief. We find neither deficient performance nor prejudice.

VII. Failure to Raise Ineffective Assistance on Direct Appeal

Rich finally argues that appellate counsel rendered ineffective assistance by failing to raise ineffective assistance of trial counsel on direct appeal.

A post-conviction proceeding is the preferred forum for adjudicating ineffective assistance claims. *Rogers v. State*, 897 N.E.2d 955, 964 (Ind. Ct. App. 2008), *trans. denied*. The reason is that these claims often require the development of new facts not present in the trial record. *Id.* at 964-65. Although a defendant may choose to present a claim of ineffective assistance of counsel on direct appeal, if he so chooses, the issue will be foreclosed from collateral review. *Id.* at 965.

When a claim of ineffective assistance is directed at appellate counsel for failing fully and properly to raise and support a claim of ineffective assistance of trial counsel, a defendant faces a compound burden on post-conviction. *Ben-Yisrayl v. State*, 738 N.E.2d 253, 261-62 (Ind. 2000). If the claim relates to issue selection, the defendant on post-conviction must demonstrate that appellate counsel's performance was deficient and that, but for the deficiency of appellate counsel, trial counsel's performance would have been found deficient and prejudicial. *Id.* at 262. Thus, the defendant's burden before the post-

conviction court was to establish the two elements of ineffective assistance of counsel separately as to both trial and appellate counsel. *Id.*

Here we find no ineffective assistance of appellate counsel for declining to raise ineffective assistance of trial counsel on direct appeal. Claims of ineffective assistance are supposed to be litigated in post-conviction proceedings. There is almost never a tactical reason to bring such allegations on direct appeal, and there certainly was no reason in this case. Rich's ineffective assistance claims required no fewer than four evidentiary hearings, and he wound up offering testimony from at least five witnesses to support his post-conviction petition. Had appellate counsel raised the ineffective assistance claims on direct appeal, Rich would have developed no evidentiary record to support his arguments and would have forfeited any further collateral review. For the foregoing reasons, Rich fails to meet any burden—let alone the compound burden described above—in demonstrating ineffective assistance of appellate counsel.

Affirmed.

NAJAM, J., and BROWN, J., concur.