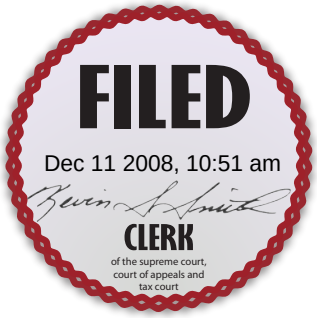

APPELLANT PRO SE:

CHRISTOPHER HOGAN
Michigan City, Indiana

ATTORNEYS FOR APPELLEE:

STEPHEN R. CARTER
Attorney General of Indiana
Indianapolis, Indiana

JOBY D. JERRELLS
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

CHRISTOPHER HOGAN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A04-0801-PC-38
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Jane Woodward Miller, Judge
Cause No. 71D02-0405-PC-19

DECEMBER 11, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARTEAU, Senior Judge

STATEMENT OF THE CASE

Petitioner-Appellant Christopher Hogan ("Hogan") appeals from the post-conviction court's order denying Hogan's petition for post-conviction relief.

We affirm.

ISSUES

Hogan presents the following restated issues for our review:

I. Whether Hogan received ineffective assistance of trial counsel when counsel failed to exercise a peremptory challenge to remove a juror.

II. Whether Hogan received ineffective assistance of trial counsel when counsel failed to object to the trial court's use of aggravating factors when sentencing Hogan.

FACTS AND PROCEDURAL HISTORY

In Hogan's direct appeal, we found the following facts:

> On December 16, 2001, South Bend Police Officer Ray Wolfenbarger was on routine patrol when he observed a person, later identified as Hogan, driving a vehicle without headlights or tail lights. The officer activated his emergency lights and attempted to stop Hogan, but Hogan pulled away. The officer then shined his police spotlight into the back window of the vehicle. When Hogan failed to stop, the officer activated his siren. Hogan then led Officer Wolfenbarger on a chase, during which Hogan drove at high speeds, failed to stop at stop signs, and nearly struck other vehicles. The chase ended when Hogan's vehicle struck a street pole.
>
> Next, Officer Wolfenbarger drew his weapon, ran toward the vehicle, and ordered Hogan to show his hands. When he observed movement inside the vehicle, he, again, ordered Hogan to show his hands. Hogan then started to climb out one of the vehicle's windows, and the officer attempted to push him back inside the vehicle. At that point, Hogan shot the officer twice. Officer Wolfenbarger backed away from the vehicle, and Hogan shot him again. Hogan then fled from the scene.
>
> Another officer arrived shortly thereafter and discovered Officer Wolfenbarger on the ground. Officer Wolfenbarger provided a description of his shooter and explained that he ran south. Approximately twenty

> minutes after other officers established a perimeter in the area, they apprehended Hogan, who matched Officer Wolfenbarger's description, kneeling by a vehicle. Following his arrest and while incarcerated, Hogan had a monitored telephone conversation with his father during which he made incriminating statements regarding his involvement in the shooting.
>
> The State charged Hogan with attempted murder, resisting law enforcement, and carrying a handgun without a license. On May 17, 2002, the jury found him guilty of all charges, and on June 24, 2002, the trial court sentenced him to fifty years for Count I, attempted murder, three years for Count II, resisting law enforcement, and one year for Count III, carrying a handgun without a license. The court further ordered that he serve the sentence in Count I consecutive to the sentences in Counts II and III, and the sentence in Count II concurrent with the sentence in Count III, for a total of fifty-three years.

Hogan v. State, No. 71A05-0212-CR-627, slip op. 2-3 (Ind. Ct. App. July 16, 2003), 792 N.E.2d 105 (Ind. Ct. App. 2003). We affirmed Hogan's conviction.

On May 10, 2004, Hogan filed a *pro se* petition for post-conviction relief, which he later amended. In his petition, Hogan alleged that he had received ineffective assistance of trial counsel. After the hearing on Hogan's petition, the post-conviction court entered findings of fact and conclusions of law denying Hogan's petition. This appeal followed.

DISCUSSION AND DECISION

On appeal, Hogan alleges that he received ineffective assistance of trial counsel. First, Hogan argues that trial counsel should have exercised a peremptory strike to remove the deputy prosecutor's second cousin from the panel. Second, Hogan argues that trial counsel should have objected to the trial court's use of aggravators when sentencing Hogan.

STANDARD OF REVIEW

A petitioner has the burden of establishing the grounds for relief alleged in his petition for post-conviction relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5). Because Hogan is appealing the denial of his petition for post-conviction relief, he stands in the position of one appealing from a negative judgment. *See Willoughby v. State*, 792 N.E.2d 560, 562 (Ind. Ct. App. 2003). On appeal, we will not reweigh the evidence or reassess the credibility of the witnesses. *Id*. We will not reverse the post-conviction court's decision unless the petitioner shows that the evidence is without conflict and leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. *Id*. We accept the post-conviction court's findings of fact unless they are clearly erroneous, but we do not defer to the post-conviction court's legal conclusions. *Fisher v. State*, 810 N.E.2d 674, 679 (Ind. 2004).

There is a strong presumption that counsel rendered effective assistance and made all significant decisions in the exercise of reasonable professional judgment. *Walker v. State*, 779 N.E.2d 1158, 1161 (Ind. Ct. App. 2002). As for counsel's performance, we give considerable deference to counsel's discretion in choosing strategy and tactics. *Id*. Accordingly, a petitioner must show more than isolated poor strategy, bad tactics, a mistake, carelessness or inexperience; the defense as a whole must be inadequate. *Law v. State*, 797 N.E.2d 1157, 1162 (Ind. Ct. App. 2003). To prevail on a claim of ineffective assistance of counsel, Hogan must show (1) that counsel's performance fell below an objective standard of reasonableness as determined by prevailing professional norms, and (2) that the lack of reasonable representation prejudiced him. *See Shane v. State*, 769 N.E.2d 1195, 1200 (Ind. Ct. App. 2000). Essentially, Hogan must show that but for

counsel's deficient performance, the result of the proceedings would have been different. *See Law*, 797 N.E.2d at 1161. We will find prejudice when the conviction or sentence has resulted from a breakdown of the adversarial process that rendered the result unjust or unreliable. *Id*. at 1161-62. If we can easily dismiss an ineffectiveness claim based upon the prejudice prong, we may do so without addressing whether counsel's performance was deficient. *Id*. at 1162.

I. Use of Peremptory Challenge

Hogan argues that his trial counsel rendered ineffective assistance by failing to use a peremptory challenge to remove a juror counsel previously sought to have removed for cause.

The post-conviction court found that on the first morning of trial, the potential jurors were asked, *en masse,* if they had knowledge of the case. *Finding of Fact #20; Appellant's Br.*at 16. Those who raised their hands were questioned in groups of four to six about the extent of their knowledge of the case. *Id*. Juror No. 20, David Szumski, was among those questioned. *Id*.

The trial court noted that Juror No. 20's name, David Szumski, was similar to Deputy Prosecuting Attorney David Szumski's name, and inquired about the relationship between the two. *Finding of Fact #21; Appellant's Br.* at 16. Juror No. 20 replied that he and the deputy prosecuting attorney were second cousins. *Id*. Juror No. 20 also indicated that he had read about the case in the newspaper. *Id*.

Trial counsel challenged Juror No. 20 for cause based on their family relationship, but the trial court denied the challenge. *Finding of Fact #22; Appellant's Br.* at 16.

Traditional jury selection resumed after the initial questioning of the groups of jurors who had indicated prior knowledge of the case had ceased. *Finding of Fact #23; Appellant's Br*. at 17. Juror No. 20 was questioned in the first of the traditional rounds, and he indicated that his relationship with his cousin would not influence his decision in the case, and that he held a mild resentment toward an out-of-state police officer who had ticketed him in the past. *Id*. Juror No. 20 also stated that he promised to be fair to Hogan, and if the State proved Hogan guilty, he could render that verdict. *Id*. The juror stated that while he felt the criminal justice system works, he believed that police officers, although doing a good job, were a little too powerful. *Id*. Hogan's counsel did not exercise a peremptory challenge to remove Juror No. 20. *Finding of Fact #24; Appellant's Br.* at 17.

On the second day of trial, prior to the introduction of evidence, the trial court revisited the issue of Juror No. 20's service on the jury. *Finding of Fact #27; Appellant's Br*. at 17. The trial court suggested removing Juror No. 20 because of his family relationship to the deputy prosecuting attorney; however, Hogan's counsel objected noting that he based his jury selection on the belief that Juror No. 20 would serve on the jury. *Findings of Fact #28, 29; Appellant's Br.* at 17-18. Hogan's counsel stated that "If I wanted him off, I would have exercised a peremptory." *Finding of Fact #30; Appellant's Br.* at 18. Juror No. 20 remained on the panel. *Finding of Fact #31; Appellant's Br.* at 18.

After the first day of evidence was presented, the trial court asked Hogan's counsel about Juror No. 20's status on the panel. *Finding of Fact #32; Appellant's Br.* at

18. The trial judge noted the state of the law regarding implied bias and offered to have Juror No. 20 removed as a juror. *Id*. After consulting with Hogan, Hogan's counsel stated that "[t]he defendant will stand on the record previously made." *Finding of Fact #33; Appellant's Br*. at 18. Hogan's counsel was aware that if he did not use a peremptory challenge on Juror No. 20 when the challenge for cause was denied, he would waive the issue on appeal. *Finding of Fact #34; Appellant's Br.* at 18.

Hogan argues that, "Indiana courts have consistently reversed convictions where implicitly biased jurors served." *Appellant's Br*. at 9. However, the grant or denial of a challenge to a juror is within the discretion of the trial court, and this court will interfere only if the decision is illogical or arbitrary. *See Woolston v. State*, 453 N.E.2d 965, 968 (Ind. 1983). A juror's relationship with one of the parties may raise a presumption of implied bias. *Id*. If a defendant uses a peremptory challenge to strike the problematic juror and does not complain that the use of this peremptory challenge prevented him from challenging another juror who was later seated, the defendant has not shown prejudice and any error will be found to be harmless. Furthermore, a defense counsel's failure to exhaust his peremptory challenges in a criminal proceeding constitutes a waiver of any error occasioned by the trial court's refusal to excuse a juror for cause. *See Foresta v. State*, 413 N.E.2d 889, 890 (Ind. 1980).

Indeed, not every error requires a reversal. Reversible error occurs only when the error has prejudiced defendant. *Woolston*, 453 N.E.2d at 968. We will find prejudice when the conviction or sentence has resulted from a breakdown of the adversarial process that rendered the result unjust or unreliable. *Law*, 797 N.E.2d at 1161-62. Here, the

victim of the murder attempt testified at trial against Hogan. Hogan made a telephone call from jail in which he implicated himself in the crime charged. Since the evidence against Hogan was strong, it is highly unlikely that the outcome would have been any different had Hogan's counsel used a peremptory challenge to strike Juror No. 20.

Last, we note that Hogan's counsel turned down the trial court's final offer to remove the juror for cause after consulting with Hogan. Hogan seems to argue on appeal that he did not consult with counsel about using a peremptory challenge to remove the juror. *Appellant's Br*. at 10. We decline the invitation to reweigh the evidence. The record supports the post-conviction court's conclusion that the decision to allow Juror No. 20 to remain on the jury was a matter of trial strategy, and that Hogan has not shown prejudice. The post-conviction court did not err.

II. Sentencing

After the jury found Hogan guilty as charged, the trial court sentenced Hogan to an aggregate term of fifty-three years. Hogan argued to the post-conviction court that he received ineffective assistance of counsel because his attorney did not object to the aggravating factors found by the trial court in imposing Hogan's sentence.

The trial court issued a fifteen-page sentencing memorandum in which it listed statutory aggravating and mitigating factors considered when imposing Hogan's sentence. Hogan argued to the post-conviction court that his attorney should have anticipated *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), and objected to the use of aggravating factors in sentencing that were not determined by a jury.

Hogan was sentenced on June 25, 2002, in the present matter. *Finding of Fact #42*; *Appellant's Br*. at 19. Hogan's direct appeal of his case was decided on July 16, 2003. *See Hogan v. State*, No. 71A05-0212-CR-627 (Ind. Ct. App. July 16, 2003), 792 N.E.2d 105 (Ind. Ct. App. 2003). Our supreme court stated in *Smylie v. State,* 823 N.E.2d 679, 690 (Ind. 2005), that the United States' Supreme Court established a new rule in *Blakely*, extending *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000). The new rule would apply to all cases pending on direct review at the time that *Blakely* was announced in which the sentencing issue was adequately preserved for appellate review. *Smylie*, 823 N.E.2d at 682.

Hogan's counsel did raise a sentencing issue in Hogan's direct appeal, unsuccessfully challenging the sentence as manifestly unreasonable, and the result of a minimization of mitigating factors. This court rejected the claim, finding that none of the aggravating factors were challenged on appeal. *Slip op.* at 11-12. *Blakely* became the law in 2004, and Hogan's direct appeal was already decided by that time. Thus, the law announced in *Blakely* was not available to Hogan. "An attorney is not required to anticipate changes in the law and object accordingly" in order to be considered effective. *Smylie*, 823 N.E.2d at 690 (quoting *Fulmer v. State*, 523 N.E.2d 754, 757-58 (Ind. 1988)). The post-conviction court correctly concluded that Hogan's counsel effectively represented him during sentencing.

Affirmed.

BARNES, J., and BROWN, J., concur.