APPELLANT PRO SE:

KENDRICK MORRIS
Pendleton, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

JODI KATHRYN STEIN
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

KENDRICK S. MORRIS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0610-PC-880
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Robert Altice, Judge
The Honorable Amy Barbar, Magistrate
Cause No. 49G02-0105-CF-108789

January 30, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

Kendrick S. Morris appeals the post-conviction court's denial of his petition for post-conviction relief. Morris raises two issues, which we consolidate and restate as whether Morris was denied the effective assistance of trial and appellate counsel. We affirm.

The relevant facts as stated in Morris's direct appeal follow:

> On April 14, 2001, then thirteen-year-old Tiara McGinty was about to leave her home on Carrollton Avenue in Indianapolis when she observed two men dressed in black, hooded shirts standing on the porch holding guns. The front door of the residence was open but the screen door was closed. Tiara was standing inside the house behind the screen door when the men began shooting at the door. Tiara turned to fall on the ground, and the men shot her in the legs and back. One bullet entered one of her thighs and exited out the other thigh. Another bullet entered her back, hit her lung, bruised her heart, broke her rib, hit her liver and lodged in her stomach. She had surgery to remove the bullet in her stomach and was hospitalized for eighteen days.
>
> During an interview with Indianapolis Police Detective Jeffrey Wager, Tiara identified Morris as one of the shooters. Detective Wager later interviewed LeShaun Mickens, Tiara's cousin and an eyewitness to the shooting. During an audiotaped statement, Mickens also identified Morris as one of the shooters.
>
> The State charged Morris with attempted murder, aggravated battery, and unlawful possession of a firearm as a serious violent felon. At trial, Mickens repudiated her out-of-court statement and stated that she could not identify the persons involved in the shooting. She further testified that Detective Wager told her the identity of the shooters and asked her to lie.
>
> At that point, the State sought to introduce Mickens's out-of-court statement. Morris's counsel moved to suppress the statement, alleging that it was coerced, was improper impeachment evidence, and, contrary to the State's contention, was not admissible under Indiana Evidence Rule 801(d). The court held a hearing outside the jury's presence, listened to the taped statement, and heard testimony from Detective Wager. Following the hearing, the court found that Mickens's statement was not coerced and admitted the tape into evidence. Subsequently, the State played the tape for the jury. Then, during the State's direct examination of Detective Wager, he testified regarding his May 14, 2001 interview with Mickens and the statement he took from her. Morris's counsel objected on the same grounds

> articulated during the suppression hearing, and the trial court allowed the detective's testimony.
>
> Larry Beverly and Anthony McGinty also testified at trial. Beverly testified, in relevant part, that he often stayed at the residence on Carrollton Avenue where Tiara was shot. He further stated that he knew Morris and the other co-defendants and that prior to the shooting, he had told them not to come to the residence on Carrollton Avenue anymore. The State asked Beverly whether Morris and the others were angry when he told them not to come around the house, and Beverly stated that they were not. The State then used two pretrial statements Beverly had given to police to impeach his testimony.
>
> McGinty testified, in part, that he is Tiara's uncle and lives at the Carrollton Avenue residence. He explained that the defendants had stayed overnight at his house on several occasions. He also testified that the day before the shooting, he told Morris and the other two defendants that they could not come over to his house anymore. When McGinty denied the State's suggestion that he backed the defendants "out onto [his] front porch" and told them they could not come over, the State used a pretrial statement McGinty had given to an officer to impeach his statement. McGinty also denied making a statement to the officers that Morris and the defendants were mad when he told them they could not come to his house anymore. Again, the State impeached his testimony with a pretrial statement. Morris's counsel did not object to the State's use of Beverly and McGinty's pretrial statements. The jury found Morris guilty as charged[.]

Morris v. State, No. 49A05-0205-CR-225, slip op. at 2-4 (Ind. Ct. App. Feb. 5, 2003).

On direct appeal, Morris argued that: (1) the trial court erred by allowing the State to use Mickens's prior statement as substantive evidence and by allowing the State to read portions of Beverly and McGinty's pretrial statements; (2) the evidence was insufficient to prove that he specifically intended to kill Tiara; and (3) the State failed to present sufficient evidence to rebut his alibi defense. Id. at 2. We rejected Morris's arguments and affirmed his convictions. Id. at 11.

In 2003, Morris filed a petition for post-conviction relief, which he later amended in 2006. Morris alleged that he received ineffective assistance of trial counsel because

trial counsel failed to object to Tiara's out-of-court and in-court identifications and that he received ineffective assistance of appellate counsel because appellate counsel failed to raise on appeal the trial court's denial of his motion for a mistrial regarding prosecutorial misconduct. After an evidentiary hearing, the post-conviction court denied Morris's petition for post-conviction relief as follows:

> 2. The Petitioner is entitled to no relief as to his claim of an improperly suggestive photo array. Ms. McGinty had noted that two of the men who were present on that day were wearing black hooded sweatshirts. The Detective for the Indianapolis Police Department prepared a six person photo array for Ms. McGinty in which the Petitioner was wearing a black hooded sweatshirt. Ms. McGinty identified Morris from the photo array as one of the two men carrying guns on the day of her shooting. Petitioner claims this tainted the victim's in court identification. The Indiana Supreme Court uses a totality of the circumstances test to when a suggestive photo array is alleged.
>
> > Where a trial court has admitted evidence of pretrial and in-court identification of a person accused of a crime, the reviewing court must determine, under the totality of the circumstances, whether the pretrial confrontation was so suggestive and conducive to irreparable mistaken identification as to deny the accused due process of law under the Fourteenth Amendment. In making this determination, the reviewing court must decide whether law enforcement officials conducted the out-of-court procedures in such a fashion as to lead the witness to make a mistaken identification.
>
> *Goudy v. State*, 689 N.E.2d 686, 693 (Ind. 1997)(internal citations omitted).
>
> It should be noted that relevant Indiana case law as of 2004 revealed no reported case where our courts have held that a photo array was impermissibly suggestive. *J.Y. v. State*, 816 N.E.2d 909, 913 (Ind. Ct. App. 2004). Our Supreme Court provides further guidance in opinions in *Harris v. State*, 716 N.E.2d 406, (Ind. 1999, and *Farrell v. State*, 622 N.E.2d 488 (Ind. 1993). In *Harris*, the

defendant asserted on appeal that the photo array at issue was impermissibly suggestive "because (1) he was the sole person depicted in the array wearing a white shirt, and (2) only he and one other person are depicted in the array with hairstyles that resemble dreadlocks." Id. at 410. Whether the procedure employed was unnecessarily suggestive in a particular case is to be determined under the totality of the circumstances. *Id.* The supreme court has held that a photo array is *not* impermissibly suggestive if the defendant "does not stand out so strikingly in his characteristics that he virtually is alone with respect to identifying features." *Farrell v. State*, 622 N.E.2d 488, 494 (Ind. 1993).

Was the identification process conducted in such a way that it created a substantial likelihood of irreparable misidentification? *See, J.Y., id*. This is not a case of a mugging or purse snatch where the victim gets only a brief glimpse of a stranger attacking. This a case where the victim knows the attacker well. The value of the photo array for identification purposes was minimal at best. Given the time the victim and Petitioner had been acquainted, it is unlikely the clothing worn in the array would confuse the victim and cause her to identify the wrong person. *See, Williams v. State*, 774 N.E.2d 889 (Ind. 2002). The victim knew the Petitioner (also known as "Kenny Mac"). R. 125. She knew him well because he had visited her house "mostly every day" over a period of six months and would sometimes spend the night. R. 128, 129. She was clear in her testimony at trial that she saw Petitioner outside her home with a gun right before she was shot. R. 131. Also, she noted that she was clear that it was Petitioner who was the one who shot her from the day that she first was able to speak to Detective Wager. R. 180. She told Det. Wager it was the Petitioner who shot her before he ever showed her an array. T.R. 345, 400.

In addition, another witness, LeShaun Mickens, originally identified the Petitioner as the shooter only to change her testimony at trial. This testimony was impeached by her earlier taped statement. R. 270. The victim's uncle, Anthony McGinty, testified that he had told Petitioner and his co-defendants that they were no longer welcome at the house on the day before the shooting. R. 311. All of this identification evidence was used to identify the Petitioner at trial and it was independent of the photo array identification. Under the totality of the circumstances test, it can be shown that she knew the Petitioner, had contact with him almost every day for six months, others placed him at the crime scene and he had reason to be upset with the occupants of the household. The photo array was not overly suggestive nor did it cause Petitioner any prejudice at trial.

3. [ ] Before turning to the individual claim of Petitioner, the Court notes Counsel met with potential witnesses, deposed witnesses, filed discovery motions, notice of alibi, filed motion to exclude evidence, made objections to evidence, motion in limine, motion for a mistrial, motion for a judgment on the evidence and conducted a closing argument consistent with the theory of the case. (Case Chronology).

Petitioner claims his counsel was ineffective because he failed to object to the photo array. Counsel repeatedly attacked the identification of his client. T.R. at 167, 169, 170, 181 (cross of Tiara); T.R. at 265 (cross of Mickens); T.R. at 318 (cross of McGinty); T.R. at 424-430, 437-438 (cross of Det. Wager).

As noted earlier, the victim knew the Petitioner, he had stayed at her house almost every day for a period of six months, and she was unwavering in her identification of him as the shooter. Counsel's strategy was clearly to attack how the State presented Mickens' testimony. Even the finest, most experienced criminal defense attorneys may not agree on the ideal strategy or the most effective way to represent a client. . . . Thus, counsel's representation is not rendered ineffective by isolated mistakes, poor strategy, inexperience and bad judgment. . . . Given the standard required to show that identification should be suppressed and the complete absence of any evidence that any identification from Tiara was coerced or suggested, the Court finds counsel did not perform deficiently by failing to file a motion to suppress Petitioner's identification. "[T]rial counsel is not ineffective for not attempting a futile endeavor." *Allen v. State*, 686 N.E.2d 760, 780 (Ind. 1997).

The Petitioner had failed to demonstrate prejudice from counsel's decision. The entire trial revolved around identification issues. Counsel vehemently pursued all viable lines of attack on identification.

4. [ ] The Petitioner has not shown any prejudice by appellate counsel's issue selection strategy. A significant portion of the trial was focused on the identification issue and the motion to suppress the impeachment testimony. Petitioner has not shown the omitted issues to be stronger arguments than what was raised by appellate counsel. He has not shown any prejudice suffered by appellate counsel's decision as well. The Petitioner is entitled to no relief as to this claim.

Appellant's Appendix at 84-90.

The issue is whether Morris was denied the effective assistance of trial and appellate counsel. Before discussing Morris's allegations of error, we note the general standard under which we review a post-conviction court's denial of a petition for post-conviction relief. The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. Fisher v. State, 810 N.E.2d 674, 679 (Ind. 2004); Ind. Post-Conviction Rule 1(5). When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. Id. 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. Further, the post-conviction court in this case entered findings of fact and conclusions thereon in accordance with Indiana Post-Conviction Rule 1(6). Id. "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. In this review, we accept findings of fact unless clearly erroneous, but we accord no deference to conclusions of law. Id. The post-conviction court is the sole judge of the weight of the evidence and the credibility of witnesses. Id.

To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate both that his counsel's performance was deficient and that he 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, 104 S. Ct. 2052, 2064 (1984), reh'g denied), reh'g denied, cert. denied, 534 U.S. 830, 122 S. Ct. 73 (2001). A counsel's

performance is deficient if it falls below an objective standard of reasonableness based on prevailing professional norms. French v. State, 778 N.E.2d 816, 824 (Ind. 2002). To meet the appropriate test for prejudice, the defendant 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." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068. Failure to satisfy either prong will cause the claim to fail. Id.

A. *Trial Counsel*.

Morris argues that his trial counsel was ineffective because he failed to move to suppress or object to Tiara's out-of-court and in-court identification of Morris as one of the shooters. Specifically, Morris contends that Tiara's out-of-court identification was based upon an unnecessarily suggestive photo array and the in-court identification was tainted by the suggestive out-of-court procedures.

During direct examination of Detective Wager, he testified that he interviewed Tiara in the hospital on April 24th and, at that time, Tiara identified "Kenny Mac" as one of the shooters. Detective Wager showed her a photo array, and Tiara identified "Kenny Mac" as Morris. Morris argues that the photo array was unnecessarily suggestive because Morris is shown wearing a dark hooded sweatshirt and Tiara testified that her assailants were wearing black "hoodies" which were pulled up over their heads. Transcript at 129-130.

Due process of law under the Fourteenth Amendment to the United States Constitution requires suppression of testimony about a pre-trial identification when the

procedure employed is unnecessarily suggestive. J.Y. v. State, 816 N.E.2d 909, 912 (Ind. Ct. App. 2004), trans. denied. Otherwise, the defendant is subjected to the unacceptable risk that the identification process was conducted in such a way that it created a substantial likelihood of irreparable misidentification. Id. Whether the procedure employed was unnecessarily suggestive in a particular case is to be determined under the totality of the circumstances. Id. The Indiana Supreme Court has held that a photo array is not impermissibly suggestive if the defendant "does not stand out so strikingly in his characteristics that he virtually is alone with respect to identifying features." Id. (quoting Farrell v. State, 622 N.E.2d 488, 494 (Ind. 1993)).

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. Id. at 913. Among other factors the court may consider are: (1) the manner and form in which the police asked the witness to identify the suspect and the witness's interpretation of their directives; and (2) whether the police focused on the defendant as the prime suspect, either by their attitude or the makeup of the photo array. Id.

Our review of the photo array reveals that, despite the fact that he is wearing a dark colored sweatshirt in the photo array and Tiara described her assailants as wearing black "hoodies," the photo array is not unnecessarily suggestive under the totality of the circumstances. The photo array showed pictures of six men. Two of the men in the photo array were wearing hooded dark colored sweatshirts, and another two of the men

were wearing dark colored jackets with collars. Each of the men is African American with similar short hair and similar skin tone. The fact that Morris is wearing a dark colored sweatshirt in the photo array does not make him "stand out so strikingly in his characteristics that he virtually is alone with respect to identifying features." J.Y., 816 N.E.2d at 912.

Moreover, Tiara had known "Kenny Mac" for about six months, he was friends with her uncle, and he often stayed at Tiara's house. Tiara first told Detective Wager that one of the assailants was Kenny Mac. Tiara then looked at the photo array and identified Morris as Kenny Mac. Thus, Tiara was not identifying her assailant from the photo array. Rather, she was identifying Kenny Mac from the photo array. Under the totality of the circumstances, the photo array was not impermissibly suggestive. See, e.g., Lowery v. State, 640 N.E.2d 1031, 1042 (Ind. 1994) (holding that a photo array was not unnecessarily suggestive where the victim knew her assailant but did not know his name), reh'g denied, cert. denied, 516 U.S. 992, 116 S. Ct. 525 (1995).

Morris has failed to demonstrate that an objection to Tiara's out-of-court and in-court identification would have been sustained or that his trial counsel was defective for failing to object. Consequently, the post-conviction court's denial of Morris's ineffective assistance of trial counsel claim is not clearly erroneous. See, e.g., id.; Carter v. State, 738 N.E.2d 665, 674-675 (Ind. 2000) (agreeing with "the post-conviction court that there is no likelihood that the result of Carter's trial would be any different if the [photo] array had been more limited"); Glotzbach v. State, 783 N.E.2d 1221, 1225 (Ind. Ct. App. 2003)

(holding that the petitioner "failed to establish that, but for trial counsel's failure to file the motion to suppress, the result of the proceedings would have been different").

B. *Appellate Counsel.*

Morris argues that his appellate counsel was ineffective because he failed to argue on direct appeal that the trial court abused its discretion by denying his motion for a mistrial. The motion for a mistrial related to comments made by the prosecutor during the questioning of Detective Jeffrey Wager. During direct examination of Detective Wager, he testified that he interviewed Tiara in the hospital on April 24th and, at that time, Tiara identified "Kenny Mac" as one of the shooters. Detective Wager showed her a photo array, and Tiara identified "Kenny Mac" as Morris.

Morris's counsel later cross examined Detective Wager with the contents of his confidential supplemental case report as follows:

> Q. And actually she speculated she thought it might be these guys, isn't that correct?
> A. No, sir.
> Q. Well, let me show you your statement . . .
>
> [Morris's counsel]: . . . I'm on page six at the bottom . . .
>
> Q. . . . She speculated she thinks it might be these guys. She didn't say it was these guys, she didn't say Kenny Mac she speculated it might be a couple of these guys, is that correct?
> A. No. What it was stating was . . . [ ] This involves the entire investigation of other matters . . .
> Q. Okay.
> A. . . . involving another shooting.
> Q. Okay. So she's not speculating when she stated "it was probably," she's not speculating when she says that, is that correct?
> A. She's speculating on the other shooting.

Transcript at 424-425. Later, during recross examination, Morris's counsel asked the following questions:

> Q. April 24th your notes, She was unable to see the face due to the hoodies and possibly something across their eyes, correct?
> A. Yes.
> Q. Is it fair to say that nowhere in your notes on April 24, does it say Tiara said Kenny Mac shot her? That's not in here, is it?
> A. Is says so right here in these notes.
> Q. But . . .
> A. Those are two different things, that's . . .
> Q. Well, I appreciate that. This document that I'm looking at, it's a confidential report - - doesn't it?
> A. Yes.
> Q. For official police use only?
> A. Yes.
> Q. In fact, you were a little honked off that Barb Crawford inadvertently gave us this report, weren't you?
> A. That's correct.
> Q. Yeah. Because the Defense lawyers aren't suppose to see this, are we?
> A. That's correct.

Id. at 437-438. During the prosecutor's redirect examination, she asked Detective Wager:

> Q. You were irritated with me for discovering that . . .
> A. Yes, ma'am.
> Q. . . . is that right? And you were irritated with me because those notes involve several other incidents in which the Defendants may have been involved?
> [Young's counsel]: Judge, I'm going to object.
> THE COURT: I'll allow it.
> Q. Isn't that correct?
> A. Yes.
> Q. And that is why you were irritated because those other incidents were not directly related to this one?
> A. That's correct.

> [Morris's counsel]: [] I'm going to object to that. I'm going to Move to Strike that, that's not proper redirect examination and it gets into areas that the Court has already told the prosecutor that we're not going to touch.
>
> THE COURT: Okay. Overruled.

Id. at 439.

Later in the trial, Morris's counsel also moved for a mistrial due to the prosecutor's comments on redirect examination. The trial court denied the motion because Morris's counsel "opened the door." Id. at 460. The trial court stated: "It wasn't necessary in the Court's view to tell the detective 'you were upset when we got this report' as if there was some kind of hidden information in it that he didn't want the Defendants to know about and so on. I thought the questions – because that door was opened I thought that the State acted appropriately in that fashion." Id.

Morris argues that his appellate counsel was ineffective for failing to argue on appeal that the trial court abused its discretion by denying his motion for mistrial. Because the strategic decision regarding which issues to raise on appeal is one of the most important decisions to be made by appellate counsel, appellate counsel's failure to raise a specific issue on direct appeal rarely constitutes ineffective assistance. See Taylor v. State, 717 N.E.2d 90, 94 (Ind. 1999). The Indiana Supreme Court has adopted a two-part test to evaluate the deficiency prong of these claims: (1) whether the unraised issues are significant and obvious from the face of the record; and (2) whether the unraised issues are "clearly stronger" than the raised issues. Bieghler v. State, 690 N.E.2d 188, 194 (Ind. 1997), reh'g denied, cert. denied, 525 U.S. 1021, 119 S. Ct. 550 (1998). If this analysis demonstrates deficient performance by counsel, the court then examines whether

the issues that appellate counsel failed to raise "would have been clearly more likely to result in reversal or an order for a new trial." Id.

Morris has failed to demonstrate that he was prejudiced by his appellate counsel's failure to raise the mistrial issue on direct appeal. Morris's trial counsel did not make a timely objection to the prosecutor's statement and did not request an admonishment of the jury. As a result, the issue would have been waived on appeal. See, e.g., Bowlds v. State, 834 N.E.2d 669, 676 n.7 (Ind. Ct. App. 2005) ("Bowlds did not offer a specific and timely objection to the prosecutor's question, request an admonishment, or move for mistrial, his arguments are waived for purposes of his direct appeal."). Thus, Morris's appellate counsel would have been required to argue fundamental error. To constitute fundamental error, the prosecutor's comments would have to constitute error that makes "a fair trial impossible or constitute[s] clearly blatant violations of basic and elementary principles of due process . . . present[ing] an undeniable and substantial potential for harm." Cooper v. State, 854 N.E.2d 831, 835 (Ind. 2006).

Additionally, Morris's counsel opened the door to the prosecutor's questioning. Otherwise inadmissible evidence may be admitted if the defendant has "opened the door." Ortiz v. State, 741 N.E.2d 1203, 1208 (Ind. 2001). However, "the evidence relied upon to 'open the door' must leave the trier of fact with a false or misleading impression of the facts related." Id. Morris's cross examination of Detective Wager left the impression that the detective was angry about defense counsel receiving the confidential report because the report contained evidence that contradicted his testimony. However, the prosecutor clarified that the detective did not want the report released because it

contained evidence regarding other incidents involving the defendants. Consequently, the prosecutor's comments were not misconduct, and even if Morris's appellate counsel had raised the issue, the issue would not have been clearly more likely to result in reversal or an order for a new trial. The post-conviction court's denial of Morris's ineffective assistance of appellate counsel claim is not clearly erroneous. See, e.g., Thomas v. State, 797 N.E.2d 752, 756-757 (Ind. 2003) ("Given the direct testimony of the victim that Thomas sexually assaulted and penetrated her, we cannot conclude that presentation of the omitted impeachment evidence would necessarily have required the post-conviction court to find a reasonable probability that the result of the direct appeal would have been different.").

For the foregoing reasons, we affirm the post-conviction court's denial of Morris's petition for post-conviction relief.

Affirmed.

RILEY, J. and FRIEDLANDER, J. concur