



Bryce D. Pope (“Pope”) appeals the denial of his petition for post-conviction relief from his convictions for two counts of murder<sup>1</sup> and one count of robbery<sup>2</sup> as a Class A felony. He raises the following restated issues:

- I. Whether Pope received the effective assistance of trial counsel during the guilt phase of his trial because he claims that his counsel failed to properly investigate and present evidence supporting his defense and to obtain the necessary testimony of an alibi witness and during the penalty and sentencing phases of his trial, where the sentence sought was life without parole (“LWOP”); and
- II. Whether Pope received the effective assistance of appellate counsel because he contends that his counsel failed to challenge the State’s late filing of the LWOP request and failed to raise claims of prosecutorial misconduct.

We affirm.

### **FACTS AND PROCEDURAL HISTORY**

The facts supporting Pope’s conviction as set forth on his direct appeal are as follows:

The facts most favorable to the verdict show that Pope was a neighbor of Richard [(“Richard”)] and Sara [(“Sara”)] Dergins. He was a friend of the Dergins’ teenage son and at times spent the night at the Dergins’ home. Pope was aware the couple kept large sums of money in the house. In the afternoon hours of August 29, 1997, Pope, along with sixteen-year-old Aaron Thomas [(“Thomas”)], went to the Dergins’ home purportedly to return a hand tool that Pope had borrowed earlier. Pope was armed with a .38 caliber revolver, and Thomas was armed with a .380 caliber semi-automatic pistol. When [Richard] answered the door, Pope produced the handgun and ordered him back into the house. When [Richard] pleaded “you don’t want to do this,” Pope responded “shut up and where’s the money at.” R. at 755-56. After ordering [Richard] throughout the house at gunpoint, Pope retrieved a black pouch containing an undetermined amount

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<sup>1</sup> See Ind. Code § 35-42-1-1.

<sup>2</sup> See Ind. Code § 35-42-5-1.

of cash. Pope then ordered both Richard and Sara . . . to lie face down on the floor and fired his weapon. Arriving on the scene police recovered two .35 caliber bullets which were designed to be fired from a .38 caliber revolver but could not have been fired from a .380 caliber semi-automatic pistol. A subsequent autopsy revealed that both Richard and Sara died as a result of a gunshot wound to the back of the head. Later bragging to a friend about the events of the day Pope proclaimed, "I'm a murderer." R. at 690.

*Pope v. State*, 737 N.E.2d 374, 376-77 (Ind. 2000).

When Pope knocked on the Dergins' door, Richard was on the telephone with his insurance agent, Cheryl Allen ("Allen"). Allen and her colleague, Paul van Gorder ("van Gorder"), heard Richard answer the door and a conversation that started out friendly, but turned hostile and ended with commands and shots being fired. Allen called 911 on another line and sent the police to the Dergins' home, while she and van Gorder listened to the situation at the Dergins' home on the open line. Allen and van Gorder stayed on the line until the police and medics arrived.

Richard was a very cautious man and kept his home locked at all times. He was not likely to allow a stranger to enter the home. He also kept a large amount of cash in a safe in the home as well as a coin collection. The cash, coin collection, and Richard's wedding ring were missing after the robbery. The Dergins' younger son was once good friends with Pope, had him over to the house often, and had told Pope about the cash Richard kept in the safe. The hip pouch that Sara used as a purse was also missing.

When the police arrived at the Dergins' home, they found no sign of forced entry. The gunshot wounds that the Dergins suffered indicated that they were shot at close range, but that an object had been placed between the gun and the victims. A crime scene

technician found chunks of potato around the room where the victims were found and knew that some sources suggested using a potato as a silencer over the barrel of a gun. The officers found two .35 caliber bullets at the Dergins' home, which could have been fired from the .38 caliber revolver that Pope was carrying, but not from the .380 caliber semi-automatic pistol that Thomas was carrying.

Pope and Thomas went to Shawnte Carswell's ("Carswell") apartment on the night of the murders with a large amount of cash, marijuana, and liquor. Later in the evening, Pope told Henry Smith ("Smith") that, "I'm a killer" and that he had used a potato on his .38 special as a silencer, but that it "didn't work." *Trial Tr.* at 690-91. The next day, Pope and Thomas went shopping and purchased new shoes and clothes.

After Smith learned that the police were looking into Pope's involvement in the crime, he requested to meet with the officers secretly. When Smith met with the officers, he crawled into the back of the patrol car, lay on the floor, and acted afraid to look up. Smith told the officers that Pope had told Smith that he was a killer and that he had used a potato as a silencer. The officers found the fact about the potato interesting because it was a fact not released to the public.

On September 16, 1997, the State charged Pope with two counts of murder, two counts of felony murder, and one count of robbery as a Class A felony. Pope filed a "Notice of Alibi Defense" on October 10, 1997 and included the names Charmaine Croom ("Croom") and Newton Arnold ("Arnold") in the list of witnesses. *Appellant's App.* at 40-41. Pope filed a motion for speedy trial on January 20, 1998, and his trial was set for April 21, 1998. On April 8, 1998, the State filed its "Application for Life Without

Parole,” which was approved by the trial court on April 13, 2008 after a hearing. *Id.* at 67-68. Pope objected to this application, but did not explain how it would prejudice his defense. *Trial Tr.* at 202-05. Pope and his trial counsel, Donald Swanson (“Swanson”), decided to go ahead with the trial instead of requesting a continuance because of the LWOP application.

At trial, Swanson pursued Pope’s alibi defense and cross-examined Thomas regarding the deal he had received from the State in exchange for his testimony. Swanson had Pope’s mother and brother testify about Pope’s whereabouts on the morning of the crime. Swanson also produced the testimony of Caymon Abercrombie (“Abercrombie”) that, on his way home from school on the day of the crime, he had seen Pope and Arnold changing tire rims, but was not sure of the day of the week or the actual date of the crime. *Trial Tr.* at 821-25. Abercrombie did not respond to the police’s attempts to contact him before the trial, but he did speak to Pope’s mother, who had given him a ride to the trial that day. *Id.* at 826, 828-29.

Pope testified in his own defense and asserted his innocence. *Id.* at 905. He denied committing the crimes and claimed he spent the afternoon with Arnold. *Id.* at 905-09. On cross, the State asked Pope why Carswell “does not remember you spending the night?” *Id.* at 912. Swanson objected, and the objection was sustained. *Id.* The State also inquired about Arnold, who did not testify at the trial, and no objection was made by Swanson. *Id.* at 914-15. Pope testified on cross that everyone whose testimony contradicted his was lying. *Id.* at 915-18.

In its closing argument, the State referred to the fact that Pope's alibi witness, Arnold, did not appear at trial to testify. *Id.* at 1004. Swanson objected to this argument. *Id.* The trial court told the jury that the trial court would instruct the jury as to the law and also "that what the attorneys are saying to you in opening and closing are not evidence. That you have heard the evidence and you must rely on your memory of the testimony of the witnesses and the evidence that was presented." *Id.* at 1005-06. At the conclusion of the trial, the jury found Pope guilty of all the charges and found aggravating circumstances allowing a recommendation of a sentence of LWOP. *Id.* at 1036, 1083-84. At sentencing, the trial court found that Pope's felony murder convictions merged into his murder conviction, and sentenced him to LWOP for each murder conviction and fifty years for his Class A felony robbery conviction, all to be served consecutively to each other. *Id.* at 1116.

Pope challenged his convictions and sentence on direct appeal to the Indiana Supreme Court, where he was represented by Patrick E. Chavis ("Chavis") and Susan D. Burke ("Burke"). The following six issues were raised on appeal:

- (1) Did the trial court err in refusing Pope's tendered jury instruction concerning the effect of a prior conviction on witness credibility;
- (2) Did the trial court abuse its discretion in refusing to allow into evidence an exhibit of bullets and related testimony that the bullets may have looked similar to those recovered at the crime scene;
- (3) Was Pope denied a fair trial because the trial court did not supply the jury with a verdict form advising that it could exercise mercy by recommending a term of years even if the State proved beyond a reasonable doubt the statutory elements for [LWOP];

- (4) Did the trial court err in reading an instruction that alleged aggravating circumstances conjunctively as well as alternatively;
- (5) Was the jury properly instructed that the State was required to prove an intentional killing to support one of the aggravating circumstances for [LWOP]; and
- (6) Did the trial court consider non-statutory aggravating circumstances when imposing sentences of [LWOP].

*Pope*, 737 N.E.2d at 376. Our Supreme Court affirmed Pope’s convictions, but remanded the case for clarification of the trial court’s sentencing order. *Id.* at 383. On November 7, 2000, the trial court provided the Supreme Court with a clarification that it did not use non-statutory aggravating circumstances in imposing the sentences of LWOP. *Appellant’s App.* at 223-24.

Pope filed his *pro se* petition for post-conviction relief on March 8, 2002, and after obtaining an attorney, he filed an amended petition on November 16, 2006 and a second amended petition on April 13, 2009. An evidentiary hearing was held on September 25, 2009, and additional evidence, a videotaped deposition, was submitted on November 13, 2009. The trial court issued its “Findings of Fact and Conclusions of Law,” denying Pope’s petition for post-conviction relief on February 7, 2011.<sup>3</sup> Pope now appeals.

### **DISCUSSION AND DECISION**

Post-conviction proceedings do not afford the petitioner an opportunity for a super appeal, but rather, provide the opportunity to raise issues that were unknown or unavailable at the time of the original trial or the direct appeal. *Ben-Yisrayl v. State*, 738

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<sup>3</sup> We commend the post-conviction court on the thoroughness and clarity of its findings and order that have greatly facilitated our appellate review of this matter.

N.E.2d 253, 258 (Ind. 2000), *cert. denied*, 534 U.S. 1164 (2002); *Wieland v. State*, 848 N.E.2d 679, 681 (Ind. Ct App. 2006), *trans. denied, cert. denied*, 549 U.S. 1038 (2006). The proceedings do not substitute for a direct appeal and provide only a narrow remedy for subsequent collateral challenges to convictions. *Ben-Yisrayl*, 738 N.E.2d at 258. The petitioner for post-conviction relief bears the burden of proving the grounds by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5).

When a petitioner appeals a denial of post-conviction relief, he appeals a negative judgment. *Fisher v. State*, 878 N.E.2d 457, 463 (Ind. Ct. App. 2007), *trans. denied*. The petitioner must establish that the evidence as a whole unmistakably and unerringly leads to a conclusion contrary to that of the post-conviction court. *Id.* We will disturb a post-conviction court's decision as being contrary to law only where the evidence is without conflict and leads to but one conclusion, and the post-conviction court has reached the opposite conclusion. *Wright v. State*, 881 N.E.2d 1018, 1022 (Ind. Ct. App. 2008), *trans. denied*. The post-conviction court is the sole judge of the weight of the evidence and the credibility of witnesses. *Lindsey v. State*, 888 N.E.2d 319, 322 (Ind. Ct. App. 2008), *trans. denied*. We accept the post-conviction court's findings of fact unless they are clearly erroneous, and no deference is given to its conclusions of law. *Fisher*, 878 N.E.2d at 463.

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

We review ineffective assistance of trial counsel claims under the two-prong test set out in *Strickland v. Washington*, 466 U.S. 668 (1984). *Fisher*, 878 N.E.2d at 463. First, the petitioner must demonstrate that counsel's performance was deficient, which



requires a showing that counsel's representation fell below an objective standard of reasonableness and denied the petitioner the right to counsel guaranteed by the Sixth Amendment to the United States Constitution. *Timberlake v. State*, 753 N.E.2d 591, 603 (Ind. 2001), *cert. denied*, 537 U.S. 839 (2002). Second, the petitioner must demonstrate that he was prejudiced by counsel's deficient performance. *Id.* To show prejudice, a petitioner must show that there is a reasonable probability that the outcome of the trial would have been different if counsel had not made the errors. *Id.* A probability is reasonable if it undermines confidence in the outcome. *Id.*

We presume that counsel rendered adequate assistance and give considerable discretion to counsel's choice of strategy and tactics. *Smith v. State*, 765 N.E.2d 578, 585 (Ind. 2002). "Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective." *Id.* "If we can resolve a claim of ineffective assistance of counsel based on lack of prejudice, we need not address the adequacy of counsel's performance. *Fisher*, 878 N.E.2d at 463-64.

#### A. *Guilt Phase*

Pope first argues that his trial counsel, Swanson, was ineffective during the guilt phase of his trial for failing to investigate and present available evidence to support his defense and for failing to secure the necessary testimony of an alibi witness. He contends that these omissions prejudiced him because the evidence against him was weak, and therefore such errors by Swanson must have led to his conviction. Pope asserts that Swanson was ineffective regarding presenting the testimony of three witnesses during his trial, Geoffrey Wade ("Wade"), Croom, and Arnold.

Pope first claims that his trial counsel was ineffective when Swanson failed to have Wade testify at the trial. At trial, Thomas testified that, after he and Pope committed the crimes, they went to the home of “Jeff Ways,” believed to be Wade. *Trial Tr.* at 760. At the post-conviction hearing, Wade testified that Pope and Thomas had not been at his apartment the day of the murders. *PCR Tr.* at 23. He also testified that Swanson had not interviewed him prior to the trial. *Id.* at 22. Pope argues that, had Wade testified at trial, he would have impeached Thomas’s testimony and strengthened the defense case, and it is reasonably likely that the outcome of the trial would have been different.

Even if the jury had heard testimony from Wade that Pope and Thomas had not come to his apartment on the day of the murders, contrary to Thomas’s testimony, we conclude that the post-conviction court properly found that such evidence would not outweigh Thomas’s eyewitness testimony regarding the murders and Smith’s testimony of Pope’s admission of guilt. During Thomas’s testimony at trial, his criminal history was detailed and he was questioned regarding the deal he received for testifying and previous lies he had told the police. *Trial Tr.* at 764, 765-66, 793-94, 795, 799. The jury was also made aware that Thomas had tried to bargain for a better deal in exchange for his testimony on the day he was to testify at trial. *Id.* at 781-82, 793, 808-09. Thomas also testified that he had been drinking and smoking marijuana most of the day at Pope’s house before the crime. *Id.* at 804-05. Therefore, Thomas was thoroughly cross-examined and questioned regarding his credibility.

Further, Wade's testimony would not have overcome the evidence against Pope. Wade's testimony would have impeached Thomas's testimony as to what transpired after the crimes, but not the evidence of Pope's actions during the crime. We conclude that trial counsel was not ineffective in not having Wade testify at trial.

Pope next argues that that his trial counsel was ineffective when he failed to have Croom testify at the trial. Croom is Carswell's cousin and was living with her at the time of the murders. Croom testified at the post-conviction hearing that, on a morning shortly after the murders, she saw Carswell in her bedroom with Pope, both looking as if they had just woken up. *PCR Tr.* at 12-13. As Croom approached Carswell's room, she observed Smith coming out, fully clothed, and looking angry. *Id.* at 12, 15. Croom did not know the status of the relationship between Carswell and Smith, but she knew they later got married and had children together. *Id.* at 13-14. Pope contends that Croom's testimony was necessary to his defense case as it supported his initial statement to police and his alibi and it showed bias of Smith against him.

We do not believe that Swanson was ineffective for failing to have Croom testify at trial. Her testimony, at best, indicated that jealousy over Carswell motivated Smith to testify against Pope. However, Croom's testimony did not rebut Smith's knowledge of the fact that Pope used a potato as a silencer, which was a fact not released by the police to the public and showed that Smith possessed real knowledge of the crime. Therefore, even if Croom had testified, her testimony would not have shown that Smith's testimony was false, and Pope was not prejudiced by the fact that she did not testify. We conclude that trial counsel was not ineffective in failing to have Croom testify at trial.

Pope further contends that his trial counsel was ineffective when he failed to have Arnold testify at the trial. When interviewed by the police, Pope stated that he was changing tire rims with Arnold at the time of the murders. Although Swanson did not meet Arnold face-to-face, he testified that he had no reason to doubt his credibility. *PCR Tr.* at 37-38. Swanson testified that he had contacted Arnold's mother in an attempt to try to locate Arnold, but she was not helpful in locating him. *Id.* at 28. Swanson did not depose Arnold's mother in order to obtain Arnold's whereabouts, but believed that Arnold's mother could have located him if she had wanted to locate him. *Id.* at 28, 39-40. Swanson did not request a continuance of the trial date. Pope argues that Swanson was ineffective for failing to ensure Arnold's presence at trial and for failing to seek the trial court's intervention in obtaining Arnold's whereabouts because he was an important witness, and the result of the trial was reasonably likely to have been different if Swanson had done so.

At the post-conviction hearing, Arnold's testimony was that Pope was with him on the day of the murders, helping him to put new rims on his tires, but could not say at what time he met Pope that day. *Pet'r's Ex.* 13 at 9-11, 16. Arnold stated that it took about three hours to put on the rims and to take a trip to Auto Zone to get parts. *Id.* at 17. Arnold assumed that at 3:00 p.m., when the murders occurred, he was either working on his car or riding around in it because when they finished putting on the rims, he and Pope drove around, getting high. *Id.* at 18. Arnold also testified that, after the warrant had been issued for Pope's arrest, he and Pope were "sitting around getting high" and Pope

told him, “that’s the day we went and put on the rims. I was with you all day,” referring to the day of the murders. *Id.* at 20.

We do not believe that Pope has met his burden that the outcome of his trial would have been different if Swanson had been able to locate Arnold to testify. Arnold’s testimony was vague and inconsistent with Pope’s own testimony, which placed them at a different location to change the tire rims, stated that the job only took an hour and a half, and did not mention a trip to Auto Zone. *Trial Tr.* at 907-09. Further, Pope had a witness, Abercrombie, testify that he saw Pope and Arnold together working on the tire rims shortly after 3:10 p.m., but that evidence was not persuasive to the jury. *Id.* at 821-25. The post-conviction court concluded that, even if Arnold had testified, there was only a small possibility that the testimony would be believed in light of Smith’s testimony about the potato silencer, which could have only come from Pope. *Appellant’s App.* at 428. We agree with the post-conviction court and find that trial counsel was not ineffective because there is no reasonable probability that the trial would have had a different result had Swanson been able to locate Arnold to testify at trial.

Pope also contends that the cumulative effect of Swanson’s errors regarding the testimony of Arnold, Croom, and Wade constituted ineffective assistance of counsel during the guilt phase of his trial. “Errors by counsel that are not individually sufficient to prove ineffective representation may add up to ineffective assistance when viewed cumulatively.” *French v. State*, 778 N.E.2d 816, 826 (Ind. 2002) (quoting *Pennycuff v. State*, 745 N.E.2d 804, 816-17 (Ind. 2001)). A conviction based upon an accumulation of

defense attorney errors, when counsel's mistakes do substantial damage to the defense, must be reversed. *Id.* (citing *Williams v. State*, 508 N.E.2d 1264, 1268 (Ind. 1987)).

Here, even if all of the evidence that Pope produced at the post-conviction hearing had been submitted at trial, Pope still would not have overcome the weight of the evidence against him. The testimony of Thomas, who was present when the crimes were committed, and the testimony of Smith, who testified about the potato silencer, which evidence could have only come from Pope, were sufficiently persuasive. There is no reasonable probability that the alleged errors made a difference in the outcome.

#### *B. Penalty and Sentencing Phases*

Pope argues that he received ineffective assistance of trial counsel during the penalty and sentencing phases of his trial because Swanson failed to seek a psychological evaluation for him. He contends that, because a sentence for LWOP is different than regular sentencing, psychological testimony and an evaluation of Pope would have been helpful. Pope asserts that, had Swanson either sought an evaluation to present such psychological evidence, bifurcated the penalty phase, or requested a continuance to prepare for the penalty phase, such psychological testimony would have likely led to a recommendation against LWOP. He also claims that Swanson could have sought such an evaluation prior to the sentencing itself and presented an expert to the court.

At the post-conviction hearing, Pope presented testimony from Dr. James Cates ("Dr. Cates"), who completed a psychological evaluation of Pope in 2006. In this evaluation, Dr. Cates found minimal evidence of antisocial or psychopathic adjustment and that there was nothing to suggest that Pope had the "moxy" to go forward with the

crimes in this case. *PCR Tr.* at 57, *Pet'r's Ex.* 11 at 5. Dr. Cates's assessment also suggested that Pope did not "have the psychological make-up to commit the cold-blooded crimes of which he was accused." *Pet'r's Ex.* 11 at 10.

The post-conviction court found that, although Dr. Cates's evaluation of Pope would have been relevant during the penalty and sentencing phases of the trial, when weighed against the significant aggravators of multiple murders and intentional killing during the commission of robbery, the evaluation would not have prevented Pope from being sentenced to LWOP. *Appellant's App.* at 429. We agree. Ample evidence was presented at trial that Pope committed multiple murders and intentionally killed the victims during the commission of robbery. We do not believe that Pope had met his burden of showing that a psychological evaluation like the one performed by Dr. Cates would have resulted in a different result during the penalty and sentencing phases of his trial if it had been presented. The post-conviction court did not err in finding that Pope received the effective assistance of his trial counsel on these matters.

## **II. Ineffective Assistance of Appellate Counsel**

Pope argues that he received ineffective assistance of his appellate counsel because his counsel failed to challenge the State's late filing of the LWOP request and failed to challenge prosecutorial misconduct that occurred during the trial. The standard of review for claims of ineffective assistance of appellate counsel is the same as for trial counsel in that the defendant must show appellate counsel was deficient in his or her performance and that the deficiency resulted in prejudice. *Henley v. State*, 881 N.E.2d 639, 644 (Ind. 2008) (citing *Strickland*, 466 U.S. at 686). Ineffective assistance at the

appellate level of proceedings generally falls into three basic categories: (1) denial of access to an appeal; (2) waiver of issues; and (3) failure to present issues well. *Wright v. State*, 881 N.E.2d 1018, 1023 (Ind. Ct. App. 2008) (citing *Bieghler v. State*, 690 N.E.2d 188, 193-95 (Ind. 1997), *cert. denied*, 525 U.S. 1021 (1998)), *trans. denied*.

Pope first contends that his appellate counsel was ineffective for failing to raise the issue of the State's untimely filing of the LWOP request. He claims that, because he had moved for a speedy trial and the LWOP request was filed only two weeks before the trial, he was prejudiced because he was forced to choose between "his speedy trial rights and the right to effective assistance of counsel." *Appellant's Br.* at 23. Because of the late filing of the request, his trial counsel did not have time to properly prepare for the LWOP sentencing. Pope asserts that case law existed to support his contention and therefore believes there was a reasonable likelihood that the result of his appeal would have been different had his appellate counsel raised this issue.

We judge the reasonableness of appellate counsel's strategic decisions based upon precedent that was available at the time the brief was filed. *Williamson v. State*, 798 N.E.2d 450, 454 (Ind. Ct. App. 2003), *trans. denied*. In *Games v. State*, 535 N.E.2d 530 (Ind. 1989), *cert. denied*, 493 U.S. 874 (1989), our Supreme Court, in discussing the requirements of a death penalty application, which procedure is contained in the same statute as a LWOP application, stated that a belated death penalty request will be improper if it operates to prejudice a defendant's substantive rights. 535 N.E.2d at 535. "The element of prejudice to defendant's substantial rights is not shown by the fact that he is ultimately convicted or receives the penalty sought." *Id.* "The issue is whether



defendant's opportunity for a fair trial was detrimentally affected by the denial of procedural opportunities for the ascertainment of truth to which he otherwise would have been entitled." *Id.* at 535-36.

To the extent that Pope is arguing that evidence from a psychological evaluation would have been persuasive during his penalty phase, we conclude he has not met his burden. As we have previously determined, although a psychological evaluation of Pope would have been relevant during the penalty and sentencing phases of the trial, when weighed against the significant aggravators of multiple murders and intentional killing during the commission of robbery, the evaluation would not have prevented Pope from being sentenced to LWOP. *Appellant's App.* at 429. Ample evidence was presented at trial that Pope committed multiple murders and intentionally killed the victims during the commission of robbery. Pope has not shown that he was denied access to an opportunity to seek the truth by the State's later filing of the LWOP request. Had Pope's appellate counsel raised this issue on direct appeal, the outcome would not have been different.

Pope next argues that his appellate counsel was ineffective for failing to raise a claim of prosecutorial misconduct in his direct appeal. He contends that the State committed misconduct when it cross-examined him regarding witnesses who did not testify and again mentioned such witnesses during its closing argument. He asserts that these actions demonstrated an effort to shift the burden of production to him and prejudice him. Because his appellate counsel failed to challenge such prosecutorial misconduct in his direct appeal, this constituted ineffective assistance.

It is improper for a prosecutor to suggest that a defendant shoulders the burden of proof in a criminal case. *Stephenson v. State*, 742 N.E.2d 463, 483 (Ind. 2001), *cert. denied*, 534 U.S. 1105 (2002). “However, a prosecutor’s improper statements suggesting a defendant’s failure to present witnesses may be cured by the trial court advising the jury that the defendant was not required to prove his innocence or to present any evidence.” *Id.* When reviewing a claim of prosecutorial misconduct on direct appeal, this court employs a two-step analysis. *Reynolds v. State*, 797 N.E.2d 864, 868 (Ind. Ct. App. 2003). We must first consider whether the prosecutor engaged in misconduct, and we then consider all the circumstances of the case to determine whether the misconduct placed the defendant in a position of grave peril to which he should not have been subjected. *Id.* “The gravity of the peril is determined by considering the probable persuasive effect of the misconduct on the jury’s decision, rather than the degree of the impropriety of the conduct.” *Sanders v. State*, 724 N.E.2d 1127, 1131 (Ind. Ct. App. 2000).

Here, the post-conviction court found that, although the State committed misconduct by cross-examining Pope about witnesses who did not testify and by referring to that failure in its closing argument, such misconduct did not rise to the level of reversible misconduct. *Appellant’s App.* at 430. The State’s misconduct was cured by the trial court’s instructions to the jury that Pope did not have the burden to prove his innocence and that the State had the burden to prove Pope guilty beyond a reasonable doubt. *Trial Tr.* at 1027-28. Additionally, when Pope objected to the State’s comment during closing argument, the trial court informed the jury that it would instruct the jury as

to the law and that what the attorneys said during opening and closing arguments was not evidence. *Id.* at 1005. Had Pope's appellate attorneys raised the issue of prosecutorial misconduct on direct appeal, they would have had to persuade the Supreme Court that the State's comments placed Pope in a position of grave peril to which he should not have been subjected even when considering Thomas's firsthand account of Pope's actions and Smith's testimony regarding Pope's admissions. We do not believe that Pope's appellate counsel was ineffective for failing to raise the claim of prosecutorial misconduct on direct appeal.

Affirmed.

BAKER, J., and BROWN, J., concur.