ATTORNEY FOR APPELLANT:

RITA PARSONS
Berry and Parsons, P.C.
Goshen, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

MICHAEL GENE WORDEN
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

RANDAL L. PRYOR,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 20A03-0912-PC-615
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ELKHART CIRCUIT COURT
The Honorable Terry C. Shewmaker, Judge
Cause No. 20C01-0012-CF-128

October 19, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Randal L. Pryor appeals the denial of his petition for post-conviction relief. Pryor was convicted following a jury trial of conspiracy to commit murder. He claims his trial counsel rendered ineffective assistance by (I) failing to interview and subpoena a potential witness, (II) failing to request individual juror interrogations following exposure to allegedly prejudicial material, (III) failing to impeach two State's witnesses, (IV) failing to object to an attempted murder jury instruction, and (V) failing to object to opinion testimony from the victim witness. 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:

> Pryor lived in Goshen, Indiana, with his wife, Leslie. In September of 2000, Pryor met Shawna Spradlin at his place of employment. Pryor and Spradlin began spending time together outside work and eventually began dating. Pryor and Spradlin wanted to have a more permanent relationship; however, they were unable to do so because of Leslie. On at least two different occasions during October and early November, Pryor said "that he wanted [Leslie] dead."
>
> At some point, Pryor asked Spradlin whether she knew of someone who would "do a hit," which Spradlin understood to mean kill someone. Spradlin, in turn, asked her brother, Chad Reneau, if he knew of someone who would do a hit. Reneau told Spradlin that he would see what he could do. A few days later, Spradlin informed Pryor that Reneau had located a person who would kill someone. In late November, Spradlin informed Pryor that it would probably be cheaper if Reneau did it himself. Spradlin and Reneau began having conversations about killing Leslie before Christmas because Pryor and Spradlin wanted to be together. Reneau agreed that he would kill Leslie.
>
> On December 16, 2000, Spradlin took Reneau in her car to Pryor's house. Pryor told them that he did not care how or when his wife was killed, but he wanted her killed. Pyror told them that his wife would get off

> work to come home about eight o'clock that night. As Spradlin and Reneau were leaving Pryor's house, Pryor shook Reneau's hand, smiled, and said, "I hope everything goes all right."
>
> Reneau, dressed in dark coveralls and carrying a crescent wrench and a survival knife with a six and a half inch blade, went to Pryor's home at eight o'clock. Reneau checked out the area and then waited for Leslie to arrive home. When Leslie arrived home, she checked the mailbox and walked to the front door. Leslie was on the porch when Reneau hit her in the face with the wrench. Reneau dropped the wrench and then stabbed Leslie seventeen times with the knife. When a neighbor across the street began yelling, Reneau ran away. After the neighbor came over to help Leslie, Pyror came out of the house. While pacing on the porch steps, Pryor said a few times, "I'm going to kill him." Leslie suffered a punctured lung and a broken cheekbone, but did not die.

Pryor v. State, No. 20A03-0107-CR-240, slip op. at 2-4 (Ind. Ct. App. July 18, 2002) (citations omitted).

The State charged Pryor with Class A felony attempted murder and Class A felony conspiracy to commit murder. A jury found Pryor guilty on both counts. The trial court entered judgment of conviction for only attempted murder and sentenced Pryor to forty-eight years in the Department of Correction. Pryor's conviction was reversed on appeal due to a fundamental jury instruction error. On remand, the trial court entered judgment of conviction on the conspiracy count and again sentenced Pryor to a term of forty-eight years. The judgment and sentence were affirmed on appeal.

Pryor next sought post-conviction relief alleging ineffective assistance of counsel. Pryor alleged that trial counsel was ineffective for (I) failing to interview and subpoena a potential witness, (II) failing to request individual juror interrogations following exposure to allegedly prejudicial material, (III) failing to impeach two State's witnesses, (IV) failing to object to the attempted murder jury instructions, and (V) failing to object to the victim's opinion testimony that Pryor was involved in the attempted murder. The post-

conviction court convened a hearing on Pryor's petition. Pryor introduced only two exhibits: the Court of Appeals opinion from his first direct appeal and a transcript of Leslie's trial testimony. Only Pryor and his mother testified at the post-conviction hearing. The post-conviction court issued findings of fact and conclusions of law denying Pryor's petition for relief. Pryor 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 thereon 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*. 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). 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*. 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).

I. Failure to Investigate and Subpoena a Potential Witness

Pryor argues that trial counsel should have interviewed and subpoenaed Elkhart County Jail employee Margaret Miller.

Miller apparently worked in the jail's psychology department and counseled Pryor while he was incarcerated pretrial. Pryor believed that Miller also spoke with codefendants Reneau and Spradlin.

Pryor provides no indication of what Miller would have revealed at trial and/or how her testimony would have been admissible. We are therefore left with no basis to find deficient performance or prejudice from counsel's failure to call her.

II. Failure to Request Individual Juror Interrogations Following Exposure to Allegedly Prejudicial Material

Pryor argues that trial counsel should have requested that the trial court individually question jurors about their exposure to allegedly prejudicial material.

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

> During the trial, one of the jurors drew a cartoon and circulated it to other members of the jury. That cartoon was entitled, "Most typical scene in court." The cartoon depicted the judge sitting at the bench with the prosecutor and defense counsel standing before him. Defense counsel was pointing and shaking his finger at the judge and saying, "I object . . . I object . . . I object . . . ." The prosecutor was resting her head on her hands and a bubble caption demonstrated that she was thinking, "Yeh Yeh We know."
>
> Based upon this cartoon, Pryor requested a mistrial. Rather than grant the mistrial, the trial court questioned and admonished the jury as follows:
>
> > Be seated ladies and gentlemen.
> >
> > I'm going to direct inquiries to the regular members of the jury and to the alternates at this time. Ladies and gentlemen, there was a drawing prepared by one member of the jury, as I'm told, and I'm also told that each of you or most of you or all of you have at one time or another examined this drawing. This is my question to each of you: Any of you who examined this drawing, will it in any way prejudice you one way or another for or against any party? If it will so prejudice you, would you raise your hand at this time.
> >
> > I see no one raising their hand of the regular jurors or the alternate jurors.
> >
> > All right. Let me ask you another question, again, to all of the jurors: Will this drawing in any way play a part in your deliberation as to the guilt or innocence of the Defendant in this case? If it will, raise your hand.
> >
> > I see no one raising their hand.
> >
> > Ladies and gentlemen, I'm going to order you at this time to disregard the drawing and to let it play absolutely no part in your deliberations in this case.

In addition, the trial court filed a written order denying the motion for mistrial, which included the following language:

> The jurors are interrogated and each juror including alternates indicate that they are not prejudiced by examination of said drawing of juror no. 6 and that they will not let said drawing play any part in their deliberations. Thereafter, the Court admonishes each juror including the two (2) alternates to disregard the drawing (Exhibit B) and to let it play no part in their deliberations whatsoever. All jurors indicate they will abide by the Court's admonition. Thereafter, and outside of the presence of the jury, the Defendant's motion for a mistrial is denied for the reason that the Court determined no prejudice existed with any juror and further for the reason that said drawing did not relate to the evidence but rather to objections made in the course of the trial. The Court notes that instruction number 24 given by the Court to the jury is curative of the issue raised by objections made by counsel and for this reason and these reasons the Court denies the Defendant's motion for mistrial.

Additionally, final instruction number twenty-four provided, in pertinent part:

> It is both the duty and obligation of the attorney for each side to object when the other side offers testimony or other evidence which the attorney believes is not properly admissible. Counsel also have the right and duty to ask the Court to make rulings of law and to request conferences at the bench out of the hearing of the jury when necessary. All of those questions of law must be decided by the Court. You should not show any prejudice against either party because the attorney objected to the admissibility of evidence, or asked for a conference out of the hearing of the jury or asked the Court for a ruling on the law because it is their duty to do so.

Pryor, slip op. at 5-6 (citations omitted). Pryor argued on direct appeal that the trial court abused its discretion by denying his motion for a mistrial. Pryor also claimed that the trial court should have questioned jurors individually about their exposure to the cartoon. This Court held as follows:

> When a trial court admonishes the jury to disregard an event at trial, the admonishment is usually considered to have cured any error such that a mistrial is not required. *Hazzard v. State*, 642 N.E.2d 1368, 1370 (Ind.

1994). Despite the trial court's admonishment and the jury instruction, Pryor claims that the trial court abused its discretion by denying his motion for a mistrial because the trial court did not strictly follow the procedure outlined in *Lindsey v. State*, 260 Ind. 351, 295 N.E.2d 819 (1973).

In *Lindsey*, our supreme court outlined the remedial measures that should have been taken by a trial court when improper or prejudicial material has possibly come to the attention of the jury:

> Upon a suggestion of improper and prejudicial publicity, the trial court should make a determination as to the likelihood of resulting prejudice, both upon the basis of the content of the publication and the likelihood of its having come to the attention of any juror. If the risk of prejudice appears substantial, as opposed to imaginary or remote only, the court should interrogate the jury collectively to determine who, if any, has been exposed. If there has been no exposure, the court should instruct upon the hazards of such exposure and the necessity of avoiding exposure to out-of-court comment concerning the case. If any of the jurors have been exposed, he must be individually interrogated by the court outside the presence of the other jurors, to determine the degree of exposure and the likely effect thereof. After each juror is so interrogated, he should be individually admonished. After all exposed jurors have been interrogated and admonished, the jury should be assembled and collectively admonished, as in the case of a finding of "no exposure."

Id. at 358-359, 295 N.E.2d at 824. On appeal, Pryor argues that the trial court was required to question each of the jurors individually outside the presence of the other jurors. Given the facts herein, we disagree.

Assuming arguendo all of the jurors were exposed to the cartoon drawn by juror six, the trial court was not required to interrogate jurors individually unless "the risk of prejudice appeared substantial, as opposed to imaginary or remote only." *See id.* The cartoon at issue did not concern evidentiary matters. Rather, it concerned procedural matters, specifically objections to the admission of evidence. The final instructions to the jury included an instruction that informed the jury that attorneys had a duty to object to the admission of improper evidence and that the jury should not be prejudiced for or against a party because of objections. In addition, the trial court questioned the jury as a group regarding whether any of them would be prejudiced by the cartoon and admonished them to ignore the cartoon. A trial court has discretion to determine what steps to take when possibly prejudicial material comes to light during a trial. *Dupree v. State*, 712 N.E.2d 1076, 1080 (Ind. Ct. App. 1999) (quoting *Lindsey*, 295 N.E.2d at 824). Because the likelihood of prejudice to Pryor was only remote, the

> steps that the trial court took were sufficient to alleviate any prejudice. *See Dupree*, 712 N.E.2d at 1080. Consequently, because Pryor cannot demonstrate that he was placed in substantial peril by the cartoon, the trial court did not abuse its discretion when it denied his motion for a mistrial. *See id.*

Pryor, slip op. at 6-8 (footnote omitted).

Pryor now maintains that trial counsel rendered ineffective assistance by failing to move for individual juror questioning. But there is no basis to find Pryor was prejudiced on account of counsel's alleged omission. This Court reviewed the substantive issue on direct appeal and found that the trial court was not required to interrogate jurors individually. A timely motion therefore would have been unavailing. Moreover, Pryor sets forth no evidence showing that individual interrogations would have revealed proof of jury prejudice and that remedial measures would have ultimately produced a different outcome at trial. We thus find no prejudice and no ineffective assistance.

III. Failure to Impeach Reneau and Spradlin

Pryor argues that trial counsel "failed to properly impeach witness Chad Reneau." Appellant's Br. p. 13. Counsel "should have also admitted the depositions of [Spradlin] and [Chad] to prove them not credible for their testimony given on the stand." Tr. p. 19.

Pryor offers no explanation as to how Reneau and Spradlin could have been impeached at trial. He has furnished neither the transcripts of their trial testimony nor the depositions which counsel allegedly should have introduced. Accordingly, Pryor is unable to sustain any showing of deficient performance or prejudice.

IV. Failure to Object to Attempted Murder Jury Instructions

Pryor next argues that counsel was ineffective for failing to object to the trial court's instructions on attempted murder.

This Court reviewed the attempted murder instructions on direct appeal, found them fundamentally erroneous, and reversed Pryor's attempted murder conviction on those grounds. Accordingly, Pryor cannot now establish that he was prejudiced by trial counsel's omission.

V. Failure to Object to Leslie's Opinion Evidence

Pryor finally argues that trial counsel should have objected to allegedly improper testimony from victim Leslie Vance.

Leslie testified that she believed Pryor "was involved" in her attempted murder. Tr. p. 775. When asked why she thought so, Leslie responded, "Just the way he had acted previous to this. The fact that he hadn't been with me. It just made sense to me." *Id.* at 764.

Pryor alleges that this testimony constituted inadmissible opinion evidence and that trial counsel rendered ineffective assistance by failing to object to it. Even if we assume without deciding that the foregoing testimony was improper, Pryor still fails to establish that he was prejudiced by counsel's alleged omission and by the subsequent admission of Leslie's testimony. Pryor did not furnish his trial record to the post-conviction court. He tendered only a transcript of Leslie's testimony along with the opinion from his first direct appeal. We are therefore unable to evaluate the State's remaining evidence and assess whether, but for counsel's alleged failure to successfully

exclude Leslie's testimony, a reasonable probability exists that the outcome of Pryor's trial would have been different. Accordingly, on this sparse record, Pryor is unable to meet his burden of proof in showing prejudice.

For the reasons stated, we conclude that Pryor has failed to sustain a showing of ineffective assistance by trial counsel, and the post-conviction court did not err by denying Pryor's petition for post-conviction relief.

Affirmed.

MAY, J., and ROBB, J., concur.