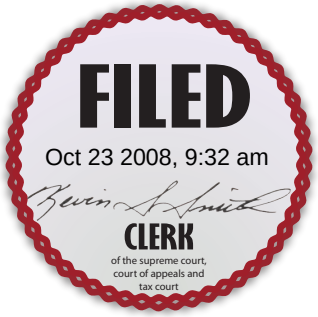

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IN THE
COURT OF APPEALS OF INDIANA

NELSON J. MARKS,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 49A02-0806-PC-529
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Mark D. Stoner, Judge
The Honorable Jeffrey Marchal, Master Commissioner
Cause No. 49G06-0209-PC-235795

October 23, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-petitioner Nelson J. Marks appeals the denial of his petition for post-conviction relief. Marks contends that the post-conviction court erroneously concluded that he did not receive the ineffective assistance of trial counsel. Specifically, Marks argues that his trial attorney should have objected to an eyewitness identification of Marks because the photo array provided by the police was allegedly unduly suggestive. Finding no error, we affirm.

FACTS

The underlying facts, as stated in Marks's direct appeal, are as follows:

> Nelson was married to Jacqueline (Jackie) Marks. They resided in Indianapolis with their daughter and Jackie's child of a previous relationship. Nelson was employed as a Team Leader at Meijer and Jackie was a manager at McClure's Gas Station. In August 2002, Nelson informed his manager at Meijer that he was struggling with a cocaine addiction. Nelson was allowed to stay on as a team leader but was directed to treatment programs. Nelson's participation in treatment was irregular.
>
> Due in part to Nelson's drug addiction, the marriage became unstable. Jackie had decided to separate from Nelson and had made arrangements with her sister, Edna Gardner (Edna), to move to Indianapolis from Texas to help Jackie with the children. Jackie had informed Edna that the marriage was in trouble because Nelson was taking money from the family to support his drug habit. On September 4, 2002, Nelson drove Jackie to the airport so that Jackie could fly to Texas and drive back with Edna. While at the airport, Nelson and Jackie argued and Jackie struck Nelson several times. Airport Police Officer, Seth Carlson (Carlson), investigated the incident. Jackie admitted that she struck Nelson but explained that she had done so because Nelson had spent the money she gave him for the household on drugs. Nelson admitted to Carlson that he had recently smoked crack. Jackie was arrested for striking Nelson. Their daughter, who was with them at the time, was not released to Nelson because Carlson believed it would not be safe since Nelson had admitted smoking crack cocaine recently.

On September 5, 2002, Marion County Deputy Sheriff Kevin Newman (Newman) was dispatched to a Shell gas station at Westlane and Michigan Rd. There, Newman met Nelson, who told him that Jackie had broken the rear window in their car. Newman went to the couple's residence where he met Jackie. Newman noted that Jackie was upset and talking loudly. Jackie explained she had just been released from jail for striking Nelson, and that Nelson was attempting to take both of the couple's cars, and she broke the window in an effort to stop him. To calm the situation, Newman told Nelson to let Jackie have one of the cars, which he did.

Later on September 5, 2002, Nelson sought and received a restraining order against Jackie which prohibited her from among other things, being at the marital home. On the same day, Jackie flew to Texas to get her sister Edna, but before doing so, she arranged for a new apartment for herself, the children and her sister.

On September 7, 2002, as Jackie was on her way back from Texas with Edna, Nelson called Jackie's cell phone and Edna answered. Nelson explained, if they called when they were close to the apartment, they could come there and he would leave. Jackie and Edna did not call when they were close, fearing that Nelson would leave with their daughter. When Jackie and Edna arrived at the apartment, Nelson was there. When Nelson opened the door, Jackie did not speak to him but walked past him to check on their daughter. Nelson gave Edna the keys to the apartment and said that he was leaving. After Nelson left, Jackie and her family began moving her things to the new apartment. During the move, a Marion County Deputy Sheriff arrived because Nelson had called and said that Jackie was violating the restraining order. Jackie was arrested, again. After she was released, Nelson called her seeking to reconcile. Jackie refused and informed Nelson that she was divorcing him.

On September 10, 2002, Nelson called his store manager and informed him that he was quitting his job. On September 13, he turned in the keys to the apartment and moved out. Nelson drove north on Interstate 65 and near Crown Point, he apparently stopped to urinate on the side of the road and was cited by State Trooper Dale Turner (Turner) for parking on the highway. Turner noticed that Nelson was nervous and sweaty. He noticed that Nelson was wearing Nike Air Jordan athletic shoes. Nelson continued to drive north on Interstate 65 and stopped in Merrillville, where he checked

> into the Dollar Inn Motel. Carmen Salgado, an employee of the Dollar Inn, testified that Nelson's vehicle was not at the motel the night of September 14 and she did not see his car again until "Sunday morning, 7:30 to 8:00," on September 15. (Tr. 677). Nelson came into the Dollar Inn office and checked out at 8:00 a.m.
>
> On Sunday, September 15, 2002, Jackie had arrived at McClure's for work at 5:10 a.m. Before relieving Loretta Tyson at the gas station, Jackie followed her usual routine as manager. She inventoried the merchandise, and noted the items to be restocked. Jackie then went to the storage barn, a freestanding structure next to the gas station, to get the items she wanted to restock. Jamie Fessler and Greg Strickland, employees of Kroger, which is located within the same shopping plaza as McClure's, were outside on break at approximately 5:20 a.m., when they heard several popping sounds come from McClure's. They saw an African-American "medium build male 6 foot" tall running from the storage shed. (Tr. 360). Tyson also testified to hearing popping sounds coming from the direction of the shed. She further testified that she looked toward the shed and saw Nelson looking at her and then he ran away. After Nelson ran away, Fessler and Strickland went to the shed and saw a woman lying on the floor. She appeared to be dead and the police were called. Jackie had been shot multiple times, with several gunshot wounds to the head. Jackie had $1400 dollars on her person when she was killed, and nothing was stolen from the shed.
>
> Nelson was charged with murder and carrying a handgun without a license. He was tried by a jury from August 25-29, 2003. Nelson was convicted of both counts. At the sentencing hearing family members testified before the trial court sentenced Nelson to sixty-five years for murder and one year for carrying a handgun without a license.

Marks v. State, No. 49A02-031-CR-908, slip op. 2-5 (Ind. Ct. App. June 21, 2005). A panel of this court affirmed Marks's conviction but remanded for resentencing. Marks's sentence was subsequently modified to a term of fifty-five years imprisonment.

On November 29, 2005, Marks filed a petition for post-conviction relief, arguing, among other things, that he had received the ineffective assistance of counsel because his

trial attorney had failed to object to or move to suppress Tyson's identification of Marks as the man who she had seen running from the shed. The post-conviction court held two hearings on Marks's petition and denied the petition on June 4, 2008, finding in relevant part as follows:

> 7. The principle [sic] eyewitness for the State on the issue of identification was Loretta Tyson. Tyson was a cashier at McClure's gas station and the decedent was her supervisor. On September 15, 2002, Jacqueline arrived for work around 5:10 a.m. and began to gather inventory from an adjacent storage shed. After Jacqueline went into the storage shed, Tyson heard four or five loud thumps. On direct examination the following colloquy took place:
>
> Q. Will you tell the jury what you saw?
>
> A. I seen Nelson Marks come out of our shed. And he looked over there at me. And I looked at him and he took off running straight.
>
> ***
>
> 8. Tyson then called 911 to report the shooting. When asked why she did not tell the dispatch operator that it was Nelson Marks whom she had seen, Tyson replied, "Loss for words. I don't know." Tyson placed a second call to 911 to relay to the operator that [they] had found someone lying in the shed who may have been dead. Again, Tyson did not give the name Nelson Marks. Tyson explained, "It wasn't that type of conversation. I just told them that my manager was in there, I think she's in there dead. And they told me to calm down, calm down, and that they would send someone."
>
> 9. Officer Kevin Newman arrived at the McClure's gas station. . . . Newman recalled the incident involving [Marks] and [Jacqueline] on September 5th for which he had been the responding officer. Newman asked Tyson to give a description of the man she saw, then asked if the suspect was Nelson Marks. Tyson said, "Yeah."
>
> 10. Later that same morning, Tyson gave a taped statement to Detective Mark Albert. In that statement she identified Nelson Marks by name as the person she saw leave the shed. Tyson also confirmed [Marks] as the suspect after the taped statement had concluded. Tyson

recognized [Marks] as she had seen him at the McClure's gas station on previous occasions and had said hello to him.

11. Following the interview, Albert came to Tyson's second job and showed her two photo arrays which contained [Marks's] picture. On direct examination, . . . [t]he following colloquy occurred:

> A. . . . So [I] instruct[ed] her to take a careful look, look at all the people in the photos, do not, don't pick out Nelson Marks because he's Nelson Marks. Pick out who you saw leave the storage shed where Jackie Marks was murdered.
>
> ***
>
> A. It's—usually it's a pretty, in my experience it's a pretty good indicator watching people's eyes when they look at photo arrays. Hers moved to the photo of Nelson Marks right away . . . And then her gaze just settled on a photo of Nelson Marks. . . .
>
> ***
>
> A. My observations of her she's staring for about 15 or 20 seconds just looking at the one photo. . . . Her head kind of goes down [and] her shoulders kind of drop and she starts, starts crying.
>
> Q. What did you do?
>
> A. I asked her is the man that you saw come out of the storage shed where Jackie was murdered, do you see his picture there?
>
> Q. What did she say?
>
> A. She said I'm not sure.
>
> Q. After she said that, what did you do?
>
> A. I took the photo [away] from her and talk[ed] to her to try to calm her down a little bit.
>
> ***
>
> Q. What happened after that?

A. And I produced when she calmed down some I produced another photo array containing a photo of Nelson Marks.

Q. And what happened then?

A. I placed it down. She looked at each one. And then pointed to the photo of Nelson Marks and said it's him. . . . [S]he said that's the man I saw leave the storage shed.

Q. How long did it take for [her] to do that[?]

A. When I placed the second array, several seconds.

12. Attorney Lukemeyer vigorously cross[-]examined Tyson on her ability to identify [Marks] as the man she saw coming out of the shed. However, Tyson remained steadfast in her identification of [Marks], explaining: "Before he took off running he looked over there at me and I had a good look, matched eyes, and that's when he took off running straight."

13. . . . The Court does not find that Albert, through words or actions, improperly suggested to Tyson whom she should select from the photo arrays. As discussed above, Tyson had already named Nelson Marks as the suspect prior to having seen the photo arrays.

14. Based upon a review of the entire record, the Court finds that Tyson was able to make an independent identification of [Marks] as the man she [saw] running from the storage shed, due to her familiarity with [Marks]. Tyson was able to relay this information to law enforcement shortly after the incident and before viewing photo arrays containing [Marks's] picture. At trial, Tyson did not waiver in her identification of [Marks] despite a thorough cross-examination by defense counsel.

***

CONCLUSIONS OF LAW

***

Based upon the totality of the circumstances as found above, the Court concludes that the pre-trial identification procedures employed in this case were not impermissibly suggestive in such a[] way as to

> create a substantial likelihood of irreparable misidentification. The critical fact here is that Tyson knew [Marks] prior to the date of the murder. Based on her previous interaction with [Marks], Tyson had an independent basis for both the out-of-court and in-court identifications of him. Thus, the value of the photo arrays for identification purposes was negligible as Tyson identified [Marks] by name before Detective Albert ever showed her the arrays.
>
> That Officer Newman asked Tyson if the man she saw was indeed Nelson Marks does not, in the Court's opinion, obviate her later identification of [Marks] . . . . Nor does the Court conclude that the procedures employed by Albert in showing Tyson the two photo arrays were constitutionally impermissible. The record does not support [Marks's] claim that law enforcement officers essentially told Tyson that Marks was the person she witnessed at the scene.
>
> Although counsel did not file a motion to suppress or raise an objection to either the in-court or out-of-court identification of [Marks], counsel's cross-examination and theory of defense was calculated to raise doubts about the legitimacy of Tyson's claim that i[t] was [Marks] she saw running from the storage shed. . . .

Appellant's App. p. 43-55 (internal citations omitted). Marks now appeals.

DISCUSSION AND DECISION

I. Standard of Review

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); McCarty v. State, 802 N.E.2d 959, 962 (Ind. Ct. App. 2004), trans. denied. 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. Post-conviction procedures do not afford petitioners with a "super appeal." Richardson v. State, 800

N.E.2d 639, 643 (Ind. Ct. App. 2003). Rather, they create a narrow remedy for subsequent collateral challenges to convictions that must be based upon grounds enumerated in the post-conviction rules. Id.; see also P-C.R. 1(1).

When evaluating a claim of ineffective assistance of counsel, we apply the two-part test articulated in Strickland v. Washington, 466 U.S. 668 (1984). Pinkins v. State, 799 N.E.2d 1079, 1093 (Ind. Ct. App. 2003). First, the defendant must show that counsel's performance was deficient. Strickland, 466 U.S. at 687. This requires a showing that counsel's representation fell below an objective standard of reasonableness and that the errors were so serious that they resulted in a denial of the right to counsel guaranteed to the defendant by the Sixth and Fourteenth Amendments. Id. at 687-88. Second, the defendant must show that the deficient performance resulted in prejudice. Id. To establish prejudice, a 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. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. To establish ineffective assistance of counsel for failure to object, the petitioner must establish that the trial court would have been required to sustain the objection had it been made. Stephenson v. State, 864 N.E.2d 1022, 1035 (Ind. 2007).

We will not lightly speculate as to what may or may not have been an advantageous trial strategy, as counsel should be given deference in choosing a trial strategy that, at the time and under the circumstances, seems best. Whitener v. State, 696 N.E.2d 40, 42 (Ind. 1998). If a claim of ineffective assistance can be disposed of by

analyzing the prejudice prong alone, we will do so. Wentz v. State, 766 N.E.2d 351, 360 (Ind. 2002).

II. Trial Counsel

Marks argues that his trial attorney should have objected to and/or moved to suppress Tyson's identification of Marks as the man she observed running from the shed on the night of Jackie's murder. The identification of a defendant must comport with due process. Allen v. State, 813 N.E.2d 349, 360 (Ind. Ct. App. 2004). If an out-of-court identification procedure was unduly suggestive, then testimony relating to that identification is inadmissible. Id. We must determine whether, under the totality of the circumstances, the identification process was conducted in such a manner that it created a substantial likelihood of irreparable misidentification. Id. To that end, we must first consider whether the out-of-court procedure was conducted in a fashion that led the witness to make a mistaken identification. Id.

If the answer to that inquiry is affirmative, then we turn to a second query, namely, whether the witness had an independent basis for the in-court identification, rendering the witness's testimony admissible. Id. A panel of this court has explained the factors to be applied in considering whether the witness had an independent basis for the in-court identification:

> the amount of time the witness was in the presence of the defendant; the distance between the two; the lighting conditions; the witness' degree of attention to the defendant; the witness' capacity for observation; the witness' opportunity to perceive particular characteristics of the perpetrator; the accuracy of any prior description of the perpetrator by the witness; the witness' level of

> certainty at the pretrial identification; and the length of time between the crime and the identification.

Hyppolite v. State, 774 N.E.2d 584, 594 (Ind. Ct. App. 2002).

Here, Marks argues that Tyson's identification of him was improper based on two specific occurrences: (1) when Officer Newman asked Tyson whether the man she had seen was Marks; and (2) the circumstances underlying Detective Albert's presentation of the photo array to Tyson.

As for the interaction between Officer Newman and Tyson at the scene of the crime, the record reveals that although Tyson did not initially tell the police that the person running from the shed was Marks, she did remark that the person looked familiar to her because of his slender build. Tyson added that although it was dark, "the build and everything . . . just cued me in on [Marks.]" Tr. p. 434. Tyson's description of the person running from the shed matched the description two other eyewitnesses had given to Officer Newman and matched the officer's recollection of Marks's appearance. Based on the eyewitness descriptions, Officer Newman's independent recollection of Marks's appearance, and Officer Newman's recollection of a previous incident between Marks and Jackie, it was reasonable for Officer Newman to ask Tyson if the man she had seen was Marks.

Turning to Detective Albert's presentation of the photo array to Tyson, we observe that our Supreme Court has held that a photo array is impermissibly suggestive only where the array is accompanied by verbal communications or the photographs in the display include graphic characteristics that distinguish and emphasize the defendant's

photograph in an unusually suggestive manner. Bell v. State, 622 N.E.2d 450, 455 (Ind. 1993), overruled on other grounds by Jaramillo v. State, 823 N.E.2d 1187 (Ind. 2005). As for the photo arrays themselves, they both show bald black men. In one array, all of the men are wearing glasses; in the other array, none of them are wearing glasses. There are individuals other than Marks appearing in both arrays. Thus, we cannot conclude that the photographs in the display include graphic characteristics that distinguish and emphasize Marks's photograph in an unusually suggestive manner.

As for the interaction between Detective Albert and Tyson, the record reveals that he explicitly cautioned her against selecting a photograph merely because she recognized Marks. When Tyson examined the first photo array, she became very upset and was unable to answer when Detective Albert asked her if she recognized the man running from the shed. Rather than pressing her, he took the array off of the table, helped her to calm down, and after she became more composed, he placed the second array in front of her. She identified Marks within seconds. Detective Albert also testified that it was evident that Tyson recognized the photographs of Marks instantly, inasmuch as her eyes focused on his picture in the array almost immediately. As a whole, we do not find this to be an unusually suggestive identification process.

Furthermore, we note that Tyson had an independent basis to identify Marks at trial. She was familiar with him because she had seen him before at the station a few times and had said "hi" to him. Tr. p. 434. On the night in question, although it was dark, she recognized his slim build. At trial, Tyson never wavered in her identification of Marks as the man who she had seen running from the shed, testifying that "[b]efore he

took off running he looked over there at me and I had a good look, matched eyes, and that's when he took off running straight." Tr. p. 457. Having examined the totality of these circumstances, we find that the identification process was not unduly suggestive.

Therefore, even if Marks's trial attorney had objected to Tyson's out-of-court or in-court identification of Marks, the trial court would not have been required to sustain the objection. We also note that although Marks's attorney neither objected to nor moved to suppress Tyson's identification, the attorney thoroughly cross-examined Tyson, Officer Newman, and Detective Albert regarding Tyson's identification and the identification process. It was trial counsel's prerogative to elect to conduct an extensive cross-examination of the witnesses rather than raising a likely futile objection based on the identification procedure. Thus, we conclude that counsel's trial performance was not deficient on this basis.

Additionally, we note briefly that even if we were to have found that the attorney's performance had been deficient, Marks would be unable to establish prejudice given the other evidence supporting his conviction. Specifically, the evidence revealed that a pair of Marks's shoes matched a shoe print found on the pants Jackie was wearing when she died and on some papers found in her apartment. Additionally, Marks was upset because Jackie was about to leave him and was unwilling to reconcile. One witness noticed a change in Marks's demeanor shortly before Jackie was murdered. Finally, Marks was unable to establish his whereabouts on the night Jackie was killed. This circumstantial evidence alone would have sufficed to support Marks's conviction. Thus, he could not

have established prejudice as a result of the admission of Tyson's identification of him as the man running from the shed.

The judgment of the post-conviction court is affirmed.

MATHIAS, J., and BROWN, J., concur.