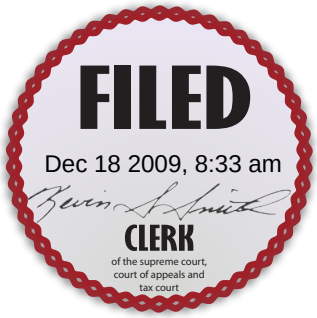

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IN THE
COURT OF APPEALS OF INDIANA

BRIAN JOHNSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0903-PC-267
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Mark D. Stoner, Judge
Cause No. 49G06-0302-PC-026961

DECEMBER 18, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Senior Judge

STATEMENT OF THE CASE

Defendant-Appellant Brian Johnson appeals from the denial of his petition for post-conviction relief. We affirm.

ISSUES

The following issues are dispositive:

I. Whether Johnson was denied effective assistance of trial counsel.

II. Whether the post-conviction court improperly rejected Johnson's proffered evidence.

FACTS AND PROCEDURAL HISTORY

On February 19, 2003, the State charged Johnson with one count of murder and one count of Class A felony attempted murder. Johnson appealed his convictions, raising issues of improper jury instruction, failure to instruct, and prosecutorial misconduct. This court affirmed in an unpublished memorandum decision. *See Johnson v. State*, No. 49A04-0404-CR-198 (Ind. Ct. App. March 31, 2005). In our memorandum decision, we stated the following facts:

> On February 5, 2003, and the early morning hours of February 6, 2003, Johnson drove around with an acquaintance, James Watkins. Johnson wanted to exchange a food stamp card for drugs. The two men stopped at Watkins' house. While Watkins was in his house, Johnson began talking to Latonya Williams. Johnson and Williams left in Johnson's car. When Watkins learned that they had left, he ran after them. Watkins caught up with them and tried to get in the car to retrieve a crack pipe. Watkins and Johnson began to argue, and Watkins eventually got in the backseat of the car. The men starting arguing again, and Watkins hit Johnson in the head with a pair of pliers. Watkins and Johnson got out of the car and continued to argue. Williams also exited the car and began walking away. Watkins hit the back windshield with the pliers, and it shattered.

> Watkins left Johnson and the car and tried to catch up with Williams, who was walking in the middle of a snow covered street. As Watkins was trying to catch up with Williams, Johnson came speeding around the corner in his car, revved the engine, and tried to hit Watkins. Watkins jumped between two parked cars and Johnson drove his car over the curb.
>
> Watkins continued to walk in Williams' direction while Johnson turned the car around. Johnson was driving toward Watkins and Williams when Watkins turned and began walking down an alley. Johnson could not stop and turn down the alley because of the snow. Johnson then hit Williams, who was still walking in the road. Williams died as a result of her injuries.

Memorandum Decision at 2-3.

Johnson subsequently sought post-conviction relief, which was denied. He now appeals.

DISCUSSION AND DECISION

I. Assistance of counsel

A. Exculpatory Evidence

Johnson claims that his counsel and the prosecutor withheld exculpatory evidence consisting of evidence of his "intoxication and state of mind." "Exculpatory" is defined as "[c]learing or tending to clear from alleged fault or guilt; excusing." *Wade v. State*, 718 N.E.2d 1162, 1166 (Ind. Ct. App. 1999), *trans. denied.* The scope of the State's duty to preserve exculpatory evidence is limited to evidence "that might be expected to play a significant role in the suspect's defense." *Noojin v. State*, 730 N.E.2d 672, 675 (Ind. 2000) (quoting *California v. Trombetta*, 467 U.S. 479, 488-89, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984)).

In order to prove ineffective assistance of trial counsel, a defendant must overcome a heavy burden, as there is a strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable judgment. *Carr v. State*, 728 N.E.2d 125, 132 (Ind. 2000). A defendant must show that (1) defense counsel's representation fell below an objective standard of reasonableness, and (2) that there is a reasonable probability that the result of the proceeding would have been different but for defense counsel's inadequate representation. *Id.* at 131(citing *Strickland v. Washington*, 466 U.S. 668, 697-88, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). Our supreme court has held that if an ineffectiveness claim can be dismissed on the ground of lack of sufficient prejudice, then an appellate court need not address whether trial counsel's performance was deficient. *Helton v. State*, 907 N.E.2d 1020, 1023 (Ind. 2009).

Here, Johnson presented only unsubstantiated allegations that his counsel and the prosecutor withheld evidence of his mental state. This mental state included Johnson's use of crack cocaine and other intoxicants on the day of the murder, the stress he was experiencing, Watkins hitting him in the head, and Watkins damaging his vehicle. Johnson concludes that the evidence established a diminished capacity that excused him from the murder and attempted murder convictions.

Johnson testified at trial that he had been smoking crack cocaine the entire day before the crime occurred. He also testified that he consumed six to nine beers that evening. (Tr. at 372-83). Johnson further testified that Watkins hit him and used vice

grips to smash the rear window of Johnson's car. (Tr. at 385). Pictures of Johnson's injuries and of damage to the car were entered into evidence and viewed by the jury. Johnson testified that after he gained his composure from being hit in the head, he began to drive his car, saw Watkins, got out of his car, and began knocking on the door of a nearby house in an effort to get help in recovering money that Watkins had taken from him. (Tr. at 386). He also testified that he made a 180 degree turn and was distracted by the glass imploding in his car. He testified that he never saw Latonya Williams. (Tr. at 393).

Johnson's testimony is evidence of his mental state during the time before, during, and after the murder and attempted murder. There is no indication that exculpatory evidence was withheld. Thus, there is no indication of prejudice.

B. Impeachable Offenses

Johnson also claims that his counsel and the prosecutor withheld Watkins' criminal history. Again, Johnson presented nothing more than his unsubstantiated allegations concerning this allegation. At trial, the prosecutor discussed Watkins' criminal history with the trial court for the purpose of determining whether there were any impeachable offenses under *Ashton v. Anderson*, 258 Ind. 51, 279 N.E.2d 210, 216 (Ind. 1972). During Watkins' testimony, Johnson's trial counsel cross-examined him concerning the impeachable offenses, which consisted of two theft convictions. Indeed, when Johnson's counsel asked him about whether he had been convicted of theft, Watkins replied, "I've been convicted of a lot of things." (Tr. at 215). He subsequently

admitted to the two theft convictions. (Tr. at 216). Thus, Johnson's trial counsel placed the evidence of impeachable offenses before the jury. There is no prejudice here.

C. Failure to Present A Defense

Johnson contends that trial counsel was ineffective in failing to present a defense involving his alleged diminished capacity at the time he committed murder and attempted murder. He further contends that counsel was ineffective in not obtaining assistance from a licensed mental health professional.

What defense to present is a matter of trial strategy, which is not subject to attack through an ineffective assistance claim, unless the strategy is so deficient or unreasonable as to fall outside of the objective standard of reasonableness. *Autry v. State*, 700 N.E.2d 1140, 1141 (Ind. 1998). We will not lightly speculate as to what may have been an advantageous trial strategy, as counsel should be given deference in choosing a strategy that, at the time and under the circumstances, seems best. *Whitener v. State*, 696 N.E.2d 40, 42 (Ind. 1998).

Here, the post-conviction court found:

> Petitioner consulted with his counsel before trial and participated fully in the preparation of his defense. Based upon his interaction with Petitioner, counsel did not believe that any mental health issues existed which would require the assistance of a licensed mental health professional.
>
> In preparation for trial, counsel drove to the crime scene in order to assess the lighting at night. Counsel compared the deposition testimony of certain witnesses with prior statements made by those witnesses to law enforcement. Counsel used his best professional efforts to develop an adequate defense to the charges.

> From a reading of the record, counsel formulated and presented alternative defense theories that Petitioner was not identified as the driver of the vehicle used in the commission of the offenses, and failing that, he did not act with specific intent to kill.
>
> ***
>
> In sum, Petitioner's trial counsel subjected the State's case to meaningful adversarial testing. Counsel's performance did not fall below an objective standard of reasonableness based on prevailing professional norms.

(Appellant's Appendix at 32-34).

The post-conviction court's findings are supported by the transcript of the post-conviction hearing. Our examination of the record does not show ineffective assistance in developing a trial strategy.

D. Failure to Investigate

Johnson contends that his trial counsel failed to investigate the facts of the case and discover witnesses that would have been helpful in proving his innocence. Counsel is effective in this regard if reasonable, thorough investigation is made, or if reasonable professional judgment supports limitations on the extent of the investigation. *Parish v. State*, 838 N.E.2d 495, 500 (Ind. Ct. App. 2005), *trans. denied*. A defendant claiming that trial counsel's pre-trial preparation was inadequate must make a showing that the outcome of the case likely would have been different if additional investigation had occurred. *Boesch v. State*, 778 N.E.2d 1276, 1284 (Ind. 2002).

Johnson fails to establish what viable facts that trial counsel failed to develop that would have been relevant to case strategy. He further fails to show how additional

investigation would have led to acquittal. Indeed, as trial counsel testified during the post-conviction hearing, additional investigation, in the form of canvassing the neighborhood, would have had no effect on the defense. In short, Johnson's contentions are unsupported and trial counsel was effective.

II. ADMISSION OF EVIDENCE

Johnson attempted to introduce documentary evidence at the post-conviction hearing. While the post-conviction court admitted the original trial record, the Appellant's Brief, an addendum to the brief, and the Appellee's brief, it refused to admit excerpts of copies of statements, copies of depositions, copies of trial testimony, and other incomplete or irrelevant documents.

The exclusion of evidence in a post-conviction proceeding is within the post-conviction court's sound discretion, and we will reverse only upon a showing of an abuse of discretion. *Hyppolite v. State*, 774 N.E.2d 584, 600 (Ind. Ct. App. 2002), *trans. denied*. Johnson was acting pro se in presenting his post-conviction claims, and it has long been held that pro se litigants are subject to the same standard as any attorney admitted to the practice of law. *See Smith v. State*, 822 N.E.2d 193, 203 (Ind. Ct. App. 2005), *trans. denied*.

The documentary evidence that Johnson refers to on appeal was part of his proffered Exhibit 2, which was a combination of written material, including the materials mentioned above. When the trial court denied admission of the exhibit, Johnson did not attempt to separate the wheat (if any) from the chaff and request admission of admissible

documents. The post-conviction court did not abuse its discretion in denying the admission of Exhibit 2.

Affirmed.[1]

VAIDIK, J., and BRADFORD, J., concur.

[1] Post-conviction relief is not a substitute for a direct appeal; rather, the post-conviction rules create a narrow remedy for these collateral challenges to convictions. *Martin v. State*, 760 N.E.2d 597, 599 (Ind. 2002). The purpose of a petition for post-conviction relief is to raise issues unknown or unavailable to a defendant at the time of the original trial and appeal. *Lockhart v. State*, 632 N.E.2d 374, 375 (Ind. Ct. App. 1994), *trans. denied*. To the extent that Johnson raises any free standing issues, they are waived. *See Martin, id.*