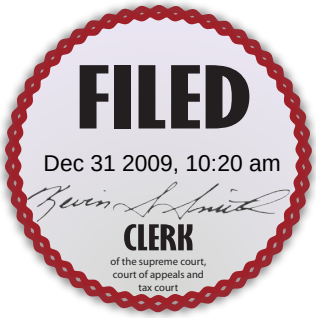

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IN THE COURT OF APPEALS OF INDIANA

JOSHUA L. WARNER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A03-0905-PC-238
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Roland W. Chamblee, Jr., Judge
Cause No. 71D04-0210-PC-34

December 31, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Joshua L. Warner appeals the post-conviction court's denial of his petition for post-conviction relief. Specifically, he contends that he received ineffective assistance of both trial and appellate counsel. Finding both counsel effective, we affirm.

Facts and Procedural History

The underlying facts of this case, taken from the Indiana Supreme Court's opinion in Warner's direct appeal, are as follows:

> The evidence at trial revealed that Warner assaulted [Jennifer] Rokop in her South Bend home on the morning of May 28, 1999. Rokop's five-year-old daughter [S.] was awakened by the attack. [S.] went downstairs and observed a man near her mother. [S.] dressed herself and walked a quarter mile to her father's apartment. Her father called the police, who found Rokop lying on the floor when they arrived. Rokop died from a knife wound that severed her windpipe and partially severed her jugular vein.
>
> The State charged Warner with Rokop's murder. On the second day of his first trial, the State disclosed additional footprint evidence that had been inadvertently overlooked. Warner moved for mistrial, which the court granted. Before the second trial began, the State asserted that it had discovered new evidence that Warner's crime also involved an attempted robbery. The State amended its information soon thereafter, adding charges of felony murder and attempted robbery.
>
> A jury found Warner guilty on all three counts and the court sentenced him to consecutive terms of fifty-five years for murder and ten years for attempted robbery.

Warner v. State, 773 N.E.2d 239, 242 (Ind. 2002). The trial court dismissed the felony murder conviction on double jeopardy grounds.

Warner raised several issues on direct appeal, including: (1) whether the trial court erred in permitting the State to add charges of felony murder and attempted robbery after mistrial; (2) whether his retrial constituted double jeopardy; (3) whether the police

violated the Fourth Amendment by improperly seizing evidence from a trash can next to his house and by searching his premises with a warrant not supported by probable cause; (4) whether the jurors engaged in misconduct during voir dire; and (5) whether the trial court erred in denying his request to postpone his sentencing. Our Supreme Court found that the trial court erred by allowing the State to amend the charging information to add new counts of felony murder and attempted robbery after Warner exercised his right to a fair trial and therefore vacated the attempted robbery conviction. *Id.* at 243-44. The Court otherwise affirmed the trial court.

Warner filed a *pro se* petition for post-conviction relief in 2002, which was amended by counsel in 2006. A hearing was held in 2008, and the post-conviction court entered findings of fact and conclusions of law denying relief in May 2009. Warner now appeals.

Discussion and Decision

Warner appeals the denial of his 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. *Henley v. State*, 881 N.E.2d 639, 643 (Ind. 2008). When appealing the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. *Id.* To prevail on appeal from the denial of post-conviction relief, a petitioner must show that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. *Id.* at 643-44. Further, the post-conviction court in this case made findings of fact and conclusions of law in accordance with Indiana Post-Conviction Rule 1(6). Although we

do not defer to the post-conviction court's legal conclusions, "'[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.* at 644 (quoting *Ben-Yisrayl v. State*, 729 N.E.2d 102, 106 (Ind. 2000), *reh'g denied*). The post-conviction court is the sole judge of the weight of the evidence and the credibility of the witnesses. *Fisher v. State*, 810 N.E.2d 674, 679 (Ind. 2004).

Warner contends that he received ineffective assistance of both trial and appellate counsel. We review the effectiveness of trial and appellate counsel under the two-part test provided by *Strickland v. Washington*, 466 U.S. 668 (1984). *Martin v. State*, 760 N.E.2d 597, 600 (Ind. 2002); *Bieghler v. State*, 690 N.E.2d 188, 192-93 (Ind. 1997), *reh'g denied*. A claimant must demonstrate that counsel's performance fell below an objective level of reasonableness based upon prevailing professional norms and that the deficient performance resulted in prejudice. *Strickland*, 466 U.S. at 687-88. "Prejudice occurs when the defendant demonstrates that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Grinstead v. State*, 845 N.E.2d 1027, 1031 (Ind. 2006) (quoting *Strickland*, 466 U.S. at 694). "A reasonable probability arises when there is a 'probability sufficient to undermine confidence in the outcome.'" *Id.* (quoting *Strickland*, 466 U.S. at 694). We presume that counsel rendered effective performance, and a defendant must offer strong and convincing evidence to overcome this presumption. *Loveless v. State*, 896 N.E.2d 918, 922 (Ind. Ct. App. 2008) (citing *Overstreet v. State*, 877 N.E.2d 144, 152 (Ind. 2007), *reh'g denied*, *cert. denied*, 129 S. Ct. 458 (2008)), *trans. denied*.

I. Trial Counsel

A. Probable Cause Affidavit for Search Warrant

Warner contends that his trial counsel was ineffective for failing to object to the false and misleading material evidence contained in the probable cause affidavit to search his home. On direct appeal, Warner argued that the search warrant used to discover his bloody clothing hidden in the garbage was not supported by probable cause. Our Supreme Court set forth in its direct appeal opinion that when the police sought the search warrant, it possessed the following information: (1) a bloody crime scene in which Rokop's jugular vein was partially severed; (2) statements from Rokop's friends that Rokop and Warner had dated a year earlier; and (3) stained gauze from Warner's residence that tested positive for the presence of blood. The Court concluded that given this information, the judge "had a substantial basis for concluding that a fair probability existed that contraband or evidence of the crime would be found at Warner's residence." *Warner*, 773 N.E.2d at 246. The Court noted, however, that the probable cause affidavit supporting the search warrant was not included in the record. *Id.* at 246 n.4. Nevertheless, the Court found that testimony at trial revealed that, at the very least, this information was known to the police before seeking the search warrant, and it was reasonable to conclude that this information supported the affidavit. *Id.*

Now, on post-conviction, Warner tweaks the argument to avoid the doctrine of res judicata. *See Timberlake v. State*, 753 N.E.2d 591, 597 (Ind. 2001) ("If an issue was raised on direct appeal, but was decided adversely, it is res judicata."), *reh'g denied*. Warner argues that his trial counsel was ineffective for failing to object to some false and

misleading information contained in the probable cause affidavit to search his house and that had the trial court been made aware of this false and misleading information, it would not have issued the search warrant.

The request for a search warrant is necessarily made *ex parte*. *Stephenson v. State*, 796 N.E.2d 811, 815 (Ind. Ct. App. 2003), *reh'g denied*, *trans. denied*. Thus, to preserve the basic notions of due process, a defendant can defeat the validity of a search warrant if he can establish by a preponderance of the evidence that "a false statement knowingly and intentionally, or with a reckless disregard for the truth, was included by the affiant in the warrant affidavit, . . . [and the] remaining content is insufficient to establish probable cause" for the search. *Id.* (quoting *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978)). If the defendant meets this burden, the search warrant must be voided and the fruits of the search must be excluded to the same extent as if the probable cause was lacking on the face of the affidavit. *Id.* Mistakes and inaccuracies in a search warrant affidavit will not defeat the reliability of the affidavit so long as such mistakes were innocently made. *Lundquist v. State*, 834 N.E.2d 1061, 1072 (Ind. Ct. App. 2005); *see also Mitchell v. State*, 745 N.E.2d 775, 785 (Ind. 2001).

Detective Bruce Villwock penned the probable cause affidavit to search Warner's house in this case, and it provides:

> The reasons and grounds for affiant's belief that there is probable cause for searching said premises are as follows:
>
> On this date, May 28th, 1999 at or around 3:30 to 3:45 AM, a female white was found murdered in her residence inside 3810 Langley Dr. in South Bend, Indiana. Further that during the Special Crimes Unit investigation into this homicide, it was learned that one of the former boyfriends, a Josh Warner of 620 N. Hill St., in South Bend, Ind. fit the

physical description given to Investigators with the Special Crimes Unit. Further the affiant was informed by persons that were close friends of the victim, that this Josh Warner had had some confrontations with the victim in the past over money that the victim was owed by this Josh Warner.

* * * * *

Josh Warner was not present when the affiant was at 620 N. Hill, however Miss Matson [Warner's live-in girlfriend] stated he would be back "shortly." I gave her my business card, and requested that she have Josh Warner call me ASAP, and she stated she would. Appx. 3 hours passed, and at that point the affiant and Inv. Cindy Eastman/SBPD went to 620 N. Hill a second time, looking for this Josh Warner, to talk to him. No one answered our knocking on the doors, and no vehicles were observed parked in front of, or in back of 620 N. Hill St. While Inv. Eastman and I were standing at the side (south) door, we observed a gauze type cloth, with what appeared to be a reddish-brown stain on same. This gauze type cloth, was lying on top of several plastic garbage bags, and was in plain view. The garbage bags, and cans, were sitting next to this door, on the west side of the door.

Based on the affiant's 21 years of Police experience, and 10 years as a Detective with the South Bend Police Dept. I felt this could be blood, so I had SCU evidence technician Karl Karch come to 620 N. Hill St. Once at 620 N. Hill St., Technician Karl Karch did a "presumptive" test for human blood. This test proved positive, that human blood was present on this gauze type of material/cloth.

Based on the affiant[']s interviews with relatives, and friends of the victim, who stated tha[t] this Josh Warner had been a boyfriend of the victim's, and that the victim and this Josh Warner had, had severe arguments in the past over money owed the victim, by Josh, and since Josh has failed to contact investigators with the Special Crimes Unit; and since the affiant and Inv. Cindy Eastman, located a bloody gauze type cloth, with human blood on same, outside this Josh Warner's place of domicile, the affiant is requesting a search warrant for the trash bags, and the structure known as 620 N. Hill St. to look for blood evidence in this homicide.

Further the affiant sayeth not.

/s/ Det. Bruce Villwock #336 SBPD/SCU
5/28/99 3:30 PM

P-C Ex. 15. Warner alleges that the alleged false information contained in the above affidavit consists of the following: he was currently or recently involved in a relationship

with Rokop, he had been violent with her, and the blood on the gauze pad was *human* blood. Appellant's Br. p. 12. We address each allegation in turn.

First, Warner points out that Detective Villwock provided in the probable cause affidavit that Warner "had" been a boyfriend of Rokop, "which suggested that he currently or recently had been Rokop's boyfriend." *Id.* at 14. However, Warner says the evidence available to the detective was that Warner and Rokop had dated one year before. Therefore, Warner's argument continues, the judge who issued the search warrant was misled as to the timing of Warner and Rokop's dating relationship to her murder. We first note that the affidavit clearly provides in the opening paragraph that Warner was a "former" boyfriend of Rokop. This statement eliminates any possibility that Rokop and Warner were dating at the time of her death. Moreover, the timing of their dating relationship to the murder was not the primary or sole reason to support the issuance of the search warrant, as Warner fit the physical description of the perpetrator and stole money from Rokop. The statement that Warner "had" been a boyfriend of Rokop is neither a mistake nor an inaccuracy. *Cf. Jaggers v. State*, 687 N.E.2d 180, 185 (Ind. 1997) (statement that marijuana patches were "near" the defendant's house was misleading when they were in fact two and six miles away).

Second, Warner points out that Detective Villwock wrote in the affidavit that he and Rokop "had severe arguments in the past" and "confrontations" over money he owed Rokop. However, Warner says that the witnesses actually told the detective that Warner stole money from Rokop's purse, Warner and Rokop had unspecified problems in the past, and Rokop changed her locks in the past month. Warner claims that "[s]uspected

theft and unspecified problems is much different from personal confrontations and severe arguments." Appellant's Reply Br. p. 2. The State responds that while carelessness may have been demonstrated, there is simply no showing by Warner of a deliberate or reckless disregard for the truth. We agree with the State. *See Mitchell*, 745 N.E.2d at 785 ("The party alleging that the mistakes were not innocent must make a substantial showing that the facts were included in reckless disregard for the truth.").

The link between Warner and Rokop was established by the fact that Warner matched the physical description of the attacker, was her former boyfriend, and was someone with whom the victim had problems concerning money. Thus, there was a strong link between Warner and Rokop despite any carelessness exhibited by the detective in his description of their problems.

Finally, Warner points out that Detective Villwock stated in the affidavit that Karch tested the gauze pad and it tested positive for human blood. Karch later testified at trial that the test merely indicated that blood was present, not that it was human blood. However, there is simply no indication that at the time Detective Villwock made the averments in the affidavit, he knew that the blood was not human. Mistakes and inaccuracies in a search warrant affidavit will not defeat the reliability of the affidavit so long as such mistakes were innocently made. *Lundquist*, 834 N.E.2d at 1072. Moreover, the fact that bloody gauze pads were found at Warner's home provides evidence linking him to Rokop's murder.

In any event, even if we excise the above-challenged portions, the probable cause affidavit still supports the granting of the search warrant. *See Franks*, 438 U.S. at 171-

72. That is, the probable cause affidavit alleges that Warner, Rokop's former boyfriend with whom she had problems, matched the description of the victim's attacker. In addition, Warner had not contacted the police as requested. While the police were looking for Warner at his house, they found a bloody gauze pad in plain view. This evidence would lead a person of reasonable caution to believe that evidence of a crime would be discovered at Warner's address. Because the affidavit contains allegations sufficient to constitute probable cause, trial counsel was not ineffective for failing to object to the allegedly false and misleading evidence.

B. Arrest

Warner next contends that his trial counsel was ineffective for failing to challenge his warrantless arrest at his parents' house in LaPorte County and to request suppression of the evidence obtained as a result of his arrest, specifically, his statement to the police that he was at Rokop's house with "T" when "T" killed her. The post-conviction court's findings of fact on this issue provide:

> [T]he Court finds that LaPorte County officers arrested [Warner] at his parent[s'] residence in LaPorte County without a warrant for his arrest being issued . . . .
>
> [T]hat police officers went to the home of [Warner's] parents to arrest him at the request of the St. Joseph County Prosecutor; and in looking through a window, observed a man lying on the floor in front of the television with a shotgun nearby. When police knocked on the door, the man came to the door and answered it. He identified himself as Joshua and was seized to prevent him from retreating into the house. He was arrested and returned to St. Joseph County.

Appellant's App. p. 7. The post-conviction court concluded that "based upon the fact that police were under the belief that [Warner] may have been armed, and having

observed a shotgun in the home, [these] constituted exigent circumstances justifying their seizure of [Warner] and protective sweep of the house." *Id.* at 8.

"In felony cases, arrest warrants are only required when physical entry of a home is necessary to effect the arrest." *Stevens v. State*, 691 N.E.2d 412, 423 (Ind. 1997) (citing *New York v. Harris*, 495 U.S. 14, 17-18 (1990)), *reh'g denied*. According to *Harris*, warrantless arrests outside the home are permissible so long as the arresting officer has probable cause to believe the defendant committed a felony. *Id.* The warrant line is drawn at the entrance of the home because "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *Payton v. New York*, 445 U.S. 573, 585 (1980) (quotation omitted). However, if the arrestee enters the home of a third party, law enforcement officers must obtain a search warrant before entering the home of the third party and making the arrest. *Steagald v. United States*, 451 U.S. 204, 220-21 (1981). A search warrant for the third party's home is not needed if exigent circumstances exist. *Id.* at 221; *see also Minnesota v. Carter*, 525 U.S. 83, 100 (1998) ("So, too, the Court held in *Steagald v. United States*, 451 U.S. 204, 101 S. Ct. 1642, 68 L. Ed. 2d 38 (1981), that, absent exigent circumstances or consent, the police cannot search for the subject of an arrest warrant in the home of a third party, without first obtaining a search warrant directing entry.").

We first note that here, the LaPorte County police officers neither had an arrest warrant for Warner nor a search warrant for Warner's parents' house. In addition, it is unclear from the record whether Warner was inside his parents' house when the officers arrested him. Assuming he was still inside the house and the officers had to breach the

threshold to arrest him, they were justified in doing so. A well-known exigent circumstance is the prevention of bodily harm or death. *McDermott v. State*, 877 N.E.2d 467, 474 (Ind. Ct. App. 2007), *trans. denied*. The record reveals that the officers were trying to locate a murder suspect, not a suspect for a minor crime. When the officers first saw Warner, he was armed with a shotgun. When Warner came to the door unarmed, Detective Sergeant George Ritter was justified in grabbing Warner to prevent him from retreating into the house and arming himself, injuring either himself or the officers. The exigencies of the situation demanded immediate action. In addition, probable cause existed for Warner's arrest: S.'s description of her mother's attacker matched Warner, bloody gauze and bloody clothes were found at Warner's house, and Warner was not home at the time of Rokop's killing. Warner's trial counsel was not ineffective for failing to challenge his warrantless arrest.

C. Evidentiary Harpoon

Warner argues that his trial counsel was ineffective for failing to object to "evidentiary harpoons from the prosecution." Appellant's Br. p. 19. The State told the jury during opening statements that Warner told another inmate, Vernardo Malone, that he went to Rokop's residence to obtain money for drugs, took a knife to force Rokop to give him money, and snapped and killed Rokop when she resisted. The State said Malone would testify at trial, but Malone ended up not testifying. During Warner's closing argument, defense counsel asked the jury why Malone did not testify. Then, during the State's closing argument, the State confirmed that Malone and Cindy Guest did not testify. When the State began to further explain why Guest did not testify,

defense counsel objected. Trial Tr. p. 2378. A sidebar was conducted wherein a discussion was held concerning another witness, Tracy Vervynckt. The trial court ruled that the State could explain why Vervynckt did not testify because defense counsel "opened [his] own [can of] worms." *Id.* at 2379. The State then continued its closing argument, explaining why Vervynckt did not testify. The State also explained that it did not think it was necessary to have Malone testify because another witness, Anna Marie Johnson, testified about some of the same things. *Id.* at 2381. That is, Johnson testified that Warner had told her the motive for the murder was robbery. Defense counsel did not object to the State's explanation of why Malone did not testify at trial.

"An evidentiary harpoon involves the deliberate use of improper evidence to prejudice the defendant in the eyes of the jury." *Lucio v. State*, 907 N.E.2d 1008, 1010 n.2 (Ind. 2009). Because arguments of counsel are not evidence, *see Blunt-Keene v. State*, 708 N.E.2d 17, 19 (Ind. Ct. App. 1999), Warner's claim that he was subject to an evidentiary harpoon from the State is not precise. Instead, Warner's argument must be that his defense counsel was ineffective for failing to object to instances of prosecutorial misconduct regarding Malone. Even assuming, however, that defense counsel was deficient for not objecting to portions of the State's closing argument regarding why it did not call Malone at trial, Warner can show no prejudice. First, as the post-conviction court found, Warner has failed to establish that the State knew at the time of its opening statement that Malone would not testify. *See* Appellant's App. p. 12 n.8. Moreover, as our Supreme Court found on direct appeal when evaluating the harm to Warner from a juror's omission on a questionnaire:

> Rokop's daughter described a lone assailant substantially similar to Warner's appearance; Warner's knife was embedded in Rokop's neck; he admitted being at the scene of the crime; and police found Warner's clothes covered with Rokop's blood hidden in his trash. We see very little likelihood that the juror's omitted response in any way affected the verdict.

Warner, 773 N.E.2d at 247. Likewise, we find that Warner has failed to prove that he was prejudiced by the State's explanation as to why it did not call Malone during trial. Warner provides no evidence of the State's motive at the time it said Malone would testify at trial, and the evidence of Warner's guilt is strong. Warner's trial counsel was not ineffective for failing to challenge the State's closing argument regarding Malone.

II. Appellate Counsel

Finally, Warner contends that his appellate counsel was ineffective. Specifically, he argues that his appellate counsel was ineffective for failing to argue on direct appeal that the probable cause affidavit for the search warrant of his house contained false and misleading information and for failing to argue that he was illegally arrested without a warrant. Where we determine that a defendant did not receive ineffective assistance of trial counsel, the defendant "can neither show deficient performance nor resulting prejudice as a result of his appellate counsel's failure to raise [these] argument[s] on appeal." *Davis v.* State, 819 N.E.2d 863, 870 (Ind. Ct. App. 2004), *trans. denied.* Warner's ineffective assistance of appellate counsel claims thus fail.

Affirmed.

RILEY, J., and CRONE, J., concur.