MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Kyle DeHart,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent.

September 20, 2021

Court of Appeals Case No. 20A-PC-2277

Appeal from the Kosciusko Circuit Court

The Honorable Michael W. Reed, Judge

Trial Court Cause No. 43C01-1806-PC-3

Darden, Senior Judge.

Statement of the Case

[1] Following the conclusion of the evidentiary hearing on a Petition for Post-Conviction Relief, the petitioner, Kyle DeHart, appeals from the court's order denying him relief from his convictions of two counts of felony-murder and one

count of obstruction of justice, resulting in a 110-year sentence. He argues that the post-conviction court erred by failing to find ineffective assistance of both trial and appellate counsel. We affirm.

Issues

[2] DeHart asks the following restated questions:

I. Did trial counsel render ineffective assistance of counsel by: a) failing to object to references to DeHart's criminal history in violation of the order in limine; b) failing to insist on a proper instruction on accomplice liability, including "mere presence" language; c) failing to impeach a witness for the State; and d) failing to object to a portion of the State's rebuttal closing argument?

II. Did appellate counsel render ineffective assistance of counsel by failing to adequately argue that the trial court abused its discretion by denying DeHart's motion for a separate trial?

Facts and Procedural History

[3] The facts placing DeHart at the scene of the murders and describing DeHart's conduct before, during, and after the murders were largely testified to at trial by co-defendant Thomas Hursey, a person DeHart became friends with while in prison in 2013 and 2014. Hursey had prior convictions for theft, possession of methamphetamine, and at the time of trial had four pending felonies, including a pending charge for burglary. At trial, he testified that he had worked as a confidential informant to receive reduced sentences in some of his cases and, had even admitted that he asked law enforcement to arrest the mother of his child, "so she'll actually think about being a mother to her daughter." Trial Tr.

Vol. III, p. 91. Hursey was released from prison on January 16, 2015. Because he knew that he would likely be returning to prison soon on other criminal matters, he spent most of his time smoking marijuana, drinking alcohol, and texting girls. He was doing just that when the events leading up to the commission of the instant crimes resulting in convictions of DeHart occurred.

[4] On February 17, 2015, DeHart texted Hursey at his home. Hursey responded, went outside, and got into DeHart's Ford Taurus, which was registered in DeHart's mother's name. They left to purchase some beer using Hursey's ID. After purchasing the beer at the Lassius Handy Dandy, they placed the beer in DeHart's black bag in the car. DeHart then drove to a Comfort Inn Hotel in Warsaw. Brandon Woody came downstairs from the hotel room and the three carried partying items, including DeHart's black bag with beer, up to the room where Woody's girlfriend and her friend were waiting. Hursey was at the hotel for a short period before he drove home in DeHart's car, which the group considered to be a "community car." *Id.* at 111. Woody, DeHart, and the girls drank alcohol and smoked marijuana most of the night. The friend of Woody's girlfriend left the hotel room later that night.

[5] The next morning, Hursey drove DeHart's car back to the hotel after DeHart texted him to return. Woody and Hursey joined DeHart in the downstairs breakfast area of the hotel. Detective Joshua Spangle of the Kosciusko County Sheriff's Department, who was also a member of the Kosciusko County Major Crime Scene Task Force, later obtained surveillance video from the Comfort Inn Hotel showing Woody, DeHart, and Hursey downstairs together at the

hotel that morning. DeHart's black bag was also seen in that surveillance video along with screen shots taken from that surveillance video. Woody's girlfriend remained upstairs in the hotel room, which had been reserved in her name.

[6] DeHart, Woody, and Hursey left the hotel and drove to the BMV because DeHart possessed only a prison-issued ID and needed to get a regular ID.[1] They then spent time at DeHart's parents' house, texting girls, signing on to Facebook, drinking alcohol, and smoking marijuana. Hursey unpacked DeHart's black bag, placing the beer in a mini fridge below the bar or in a closet behind the bar in the lower level of the house.

[7] DeHart picked up his friend and co-worker Jacob Larkin, and Larkin spent some time with the trio at DeHart's house smoking some of the "really good" medicinal marijuana Larkin had purchased from Woody's former girlfriend, Tara Thornburg. Trial Tr. Vol. V, p. 132. Woody and his current girlfriend texted throughout the day. As far as his current girlfriend knew, Woody and DeHart were together and had plans later that evening to go to Mishawaka to take some money to DeHart's ex-girlfriend ("DeHart's Ex-Girlfriend"), the

[1] Arlen Miller testified at trial that while bicycling on March 11, 2015, he saw a wallet containing photo identification lying five to ten feet from the side of a road. He recognized the photo of DeHart from media coverage of the murder suspects and telephoned police about his discovery. This evidence and testimony was admitted by stipulation for the sole evidentiary purpose of "corroborating the testimony of Thomas Hursey that he took [DeHart] to the BMV to get an ID on February 18, 2015 because [DeHart] had lost his driver's license." Trial Tr. Vol. V, p. 31.

mother of DeHart's young daughter. Woody sent his girlfriend a picture text of himself at DeHart's home that evening.

[8] Larkin testified that the four of them left DeHart's house at around 6:00 or 7:00 p.m. and they met DeHart's Ex-Girlfriend at the One-Stop Gas Station down the street from her grandparents' home after arriving in Mishawaka. DeHart got into DeHart's Ex-Girlfriend's car and Larkin drove DeHart's car, following them to a McDonald's where they waited. After a while, DeHart rejoined the three in the car and they drove back to DeHart's house.

[9] After arriving at DeHart's home, they stood around a table, smoking marijuana and were having a good time in "the man's room"[2] when DeHart asked Larkin if he was ready to go home. *Id.* at 133. Larkin said "yeah" that he was ready and retrieved some tools he had left in DeHart's garage because he needed them for work the next day. *Id.* at 137. Larkin, Hursey and Woody got into the car and waited for about five minutes for DeHart to come out of the house. While they were waiting, Larkin, who was in the driver's seat, detected that the mood of the men had changed, describing it as being "tense," and "weird." *Id.* at 139. Because DeHart was the only one Larkin really trusted, he kept his tools in his

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[2] The man's room was described by Larkin as

> It is located, there is two (2) garage bays, one with two (2) car garage and a single car garage was located all the way of the back of that garage. And then you kind of walk through a service door and then there's that man room. And you can walk out the back. But that's where it located on the end of the house, through that garage.

Id. at 133-34.

lap in case he was "jumped" by the others, who were riding in the back. *Id.* When DeHart came out of the house, he was carrying his black bag. *Id.* at 140. They left Larkin at his home around 11:37 or 11:47 p.m., before returning to DeHart's home.

[10] After their arrival, Hursey went to the man's room, while Woody and DeHart went upstairs in the house for approximately fifteen to twenty minutes. When Woody and DeHart rejoined Hursey, DeHart told him that they were "trying to go pick up some weed." Trial Tr. Vol. III, p. 47. DeHart then said to Hursey, "[J]ust so you know we don't intend on paying for these trees," in other words, the marijuana. *Id.* at 48. Hursey testified at trial that "it was established that DeHart and Woody planned on rolling Thornburg. So, basically talk her out of her weed, promise to pay her and later not do it." *Id.* at 49. And Hursey did not realize at the time that DeHart and Woody planned to tape her up and slit her throat. DeHart had packed a roll of duct tape and a utility knife in his black bag.

[11] Sometime after midnight, they arrived at Thornburg's grandmother's house where Thornburg lived, when DeHart noticed Thornburg's boyfriend Joshua Knisely's vehicle parked outside and said "[O]ld boy's here." *Id.* Woody replied, "I ain't worried about him." *Id.* The three walked across an alley to the house. Woody was carrying DeHart's black bag containing a roll of duct tape and a utility knife. Woody knocked on the door and Thornburg let them in, leading them upstairs to her bedroom where she kept her supply of marijuana. Thornburg was very familiar with Woody because they had dated

when they were in high school. Knisely was asleep on the bed and Thornburg told them to be quiet because Knisely had to be at work early in the morning. After Woody pushed a dog out of the room and locked the door behind him, he, Thornburg, DeHart, and Hursey sat down and smoked marijuana together. DeHart and Woody sat at the end of the bed, Hursey sat in a chair by the door, and Thornburg sat in another chair.

[12] After they had finished smoking, Thornburg asked the men what they wanted. Woody asked her how much marijuana she had. When she replied that she had about an ounce, Woody told her he wanted all of it. She asked him if he had the money to cover it, and he replied that he did. At some point she checked her ledger and made a notation in it, then weighed the marijuana and handed it to him in a bag. Woody took the bag, and turned and gave the marijuana to DeHart, winking at him when he did so. DeHart took the bag of marijuana and put it inside his coat. When Thornburg asked for the money, Woody responded that it was in the car. Thornburg stuck out her hand, gesturing for the marijuana to be returned, and said "I'm not gonna fall for this." *Id.* at 51.

[13] Woody then removed a glove from his hand, revealing a latex glove underneath. He then reached into his sweatpants and drew a 9mm caliber pistol as he stood up, pulling back the slide. Thornburg started to scream. DeHart and Hursey both immediately jumped up when they saw the gun and headed for the door. Hursey turned around and saw Woody strike Thornburg

in the face "and then fire[d] a shot. Tara was sitting in the chair and she fell backwards motionless." *Id.* at 52.

[14] When Hursey looked back again, he saw a "blood dot on her. I thought that's where she had been shot." *Id.* After he saw that Knisely was awake, Hursey opened the door and ran out, stepping on Knisely's dog in the process. DeHart followed closely behind Hursey; both ran out of the house, and jumped off the porch. At that time Hursey heard another gun shot. Hursey and DeHart ran to the car and jumped inside after DeHart unlocked it. After a moment, Woody jumped in the car and the three sped off.

[15] Down the street in an upstairs apartment, Sean Brenneman and his six-year-old son had awakened at around 12:15 a.m. due to "a lot of noise." *Id.* at 32. After calming his son back to sleep, Brenneman heard "two car doors slam" and then "tires screeching away." *Id.* at 33. While Brenneman was trying to go back to sleep, he saw "the red and blue lights of a police car screeching around the corner." *Id.* Brenneman further testified that he did not actually see anything other than the lights of the police car.

[16] Meanwhile, as DeHart drove back to his house, he slowed down, opened the car window, and threw his shoes into a ditch. Woody also threw something out of a window. At one point, Woody exited the car and put his gun in a trashcan that was on the street awaiting trash pickup. Officers later searched the landfill but never found the gun.

[17] According to 911 records, at 12:29 a.m. on February 19, 2015, Thornburg called and told the 911 dispatcher that Woody had knocked her out and shot her boyfriend. Officer Joe Denton of the Syracuse Police Department, who was also a member of the Kosciusko County Major Crime Scene Task Force, was the lead crime scene investigator. When he arrived at the scene, he found Thornburg lying in a pool of her own blood on the first floor of the house, suffering from an apparent gunshot wound to her head. Officer Denton, who was assisted by Indiana State Police Trooper Tim Carpenter, took photographs, collected evidence, and drew diagrams of the scene. Thornburg told Officer Denton that Woody shot her and that "they're gone," but did not identify the others. Trial Tr. Vol. V, p. 192.

[18] Syracuse Police Officer Mike Bumbaugh, who was backing up Officer Denton, found Knisely dead from an apparent gunshot wound in the upstairs bedroom. Officer Bumbaugh also assisted Corporal Shively of the Kosciusko County Sheriff's Department with a K-9 and followed tracks leading south from the house.

[19] In the meantime, after DeHart, Hursey, and Woody returned to DeHart's house, they burned items connected to the crimes, such as clothes, shoes, gloves, hats, and the bag that the marijuana was packaged in. According to Hursey, Woody cut the soles from his shoes before burning them. Woody then dumped items out of DeHart's black bag onto the table. After the utility knife hit the table, Woody remarked to DeHart, "gee, the duct tape is missing." Trial

Tr. Vol. III, p. 57. DeHart asked Woody where it was and made him search for it. Woody said it was either "in the car or the house or the alley." *Id.* at 58.

[20] Hursey testified that DeHart told Woody he "was stupid," and he "just took two lives for an ounce of weed." *Id.* Woody replied, "the girl was panicking. She was getting too loud." *Id.* Woody said he "thought she was going to wake up the grandma that was at the residence," or that they believed was at the residence. *Id.* "[I] panicked and shot her," after striking her in the face. *Id.* Woody also said that when DeHart and Hursey "ran out of the room the gun had jammed," and he "dropped all rounds except for the last one on the floor." *Id.* He said that when he shot Knisely in the head, he saw "his brains fly out with the last bullet." *Id.*

[21] While DeHart, Woody, and Hursey smoked a blunt, they heard the sound of a helicopter. Hursey said, "man that's a medevac helicopter," and guessed out loud that one of the victims must still be alive. *Id.* at 60. Woody responded that it was not possible because he shot Thornburg in the face and he had shot Knisely in the head. He said, "It's been 45 minutes, guarantee they're dead. Guarantee they bled out. I guarantee they're dead." *Id.*

[22] Knisely was killed instantly, and Thornburg died later from the gunshot wound to the head. In Thornburg's bedroom, police found spent and unspent 9mm caliber rounds, a glove, and in the chair Hursey had occupied, they found a roll of duct tape. After the snow had melted, somewhere near the road between Thornburg's and DeHart's houses, officers found a pair of black New Balance

shoes in the area Hursey had described as where DeHart had thrown them out. At DeHart's house, they found items of burnt clothes, shoes, and a black nylon bag.

[23] Woody was the first to be arrested by the police. Indiana State Police Trooper Neil Hodges later testified about the surveillance video and photographs he had obtained—after the murders had taken place and Woody's arrest—showing Woody in DeHart's car in the parking lot of a gas station in Mishawaka. A female friend of Hursey's testified that Woody came to her apartment in Warsaw at approximately 5:30 a.m. on February 19, 2015, using a special knock that only Hursey would use to get her to open the door. He pulled out a half-gallon freezer bag of marijuana and smoked part of it in her presence. She was eight months pregnant at the time and made him leave her apartment. Before he left, she gave him a coat to wear because it was cold outside, and he was wearing only jeans and a sweatshirt. DeHart was later arrested at his ex-girlfriend's grandparents' home shortly after Woody was arrested.

[24] The State charged Hursey, Woody and DeHart with the murders, specifically alleging that DeHart "did knowingly or intentional[ly] commit or attempt to commit robbery, and while committing it" Knisely and Thornburg were killed. Direct Appeal App. Vol. IV, p. 20. DeHart also was charged with obstruction of justice for his concealment of evidence linking him to the crime. DeHart's family hired Lawrence Hansen to represent him at trial.

[25] Prior to trial, the State moved to join Woody, Hursey, and DeHart's trials; which the trial court initially granted. Later, Hansen and DeHart discussed and agreed upon an alibi defense, and Hansen moved to separate DeHart's trial from his co-defendants' trial. In partially granting the motion, the court ruled that the State could choose 1) a joint trial with Hursey, excluding his out-of-court statement about DeHart, 2) a joint trial with Hursey with the DeHart references redacted from his statement, or 3) a separate trial for Hursey. The State chose a separate trial for Hursey.

[26] Hansen also filed a motion in limine which the court granted, ordering the exclusion of evidence referencing DeHart's prior convictions and bad character traits. The court ordered the State to request permission to present such evidence outside the presence of the jury and to warn its witnesses to follow the court's order.

[27] DeHart and Woody's trial lasted five days. Hansen's opening statement emphasized that the State's case was based upon one person's identification of DeHart and thus hinged on Hursey's testimony. Hansen testified at the evidentiary hearing that his strategy was to discredit Hursey by showing that he had a criminal history and that he had made deals in the past in order to receive leniency in his criminal cases. More specifically, Hansen said he "wanted to disparage Hursey. I want him in prison. I want him in jail. So that I can attack him and if I object and it's sustained, I'm not going to be able to go after Hursey on that." PCR Tr. Vol. I, p. 17. Hansen argued to the jury the fact that "we only know beyond a reasonable doubt that one person was there, Thomas

Hursey. Thomas Hursey is the one who will say he was there." Trial Tr. Vol. III, p. 12.

[28] Hansen's strategy was to convince the jury that Hursey has,

> made this up. My argument to the jury was that there was two people there at this killing it was Woody and Hursey. I even had a witness who testified regarding hearing two doors slam and the car took off. So I wanted to place Hursey there [in prison] and I want as much garbage on Hursey as I could get.

PCR Tr. Vol. I, p. 18. In support thereof, Hansen further argued "I've got to establish that [Hursey] is doing anything he can to cut a deal on his own cases and throw [DeHart] under the bus." *Id.* at 19.

[29] At trial, Hansen cross-examined the State's witnesses and called Scott DeHart, DeHart's adoptive father, to testify as an alibi witness. Scott was a longtime schoolteacher, and coach, who was a model citizen with no criminal history. Scott had a Master's degree in Secondary Education from Indiana University and had been teaching and coaching for approximately 28 years by the time of trial. During closing argument, Hansen commented on the State's theory of the evidence that DeHart was "falsely accused by Thomas Hursey," and after listing every witness, further highlighted to the jury that Hursey was the only witness who placed DeHart at the scene of the murders. Trial Tr. Vol. VI, pp. 46, 47-54. Hansen further argued that the State's theory only worked if you substituted Hursey for DeHart in the version of events as told by Hursey. He also argued that Hursey admitted that he was there at the scene and wondered aloud why Hursey had not yet been convicted in relation to the crime.

[30] At the conclusion of the trial, DeHart was convicted of all counts and sentenced to an aggregate sentence of 110 years. Subsequently, he was represented by Hansen in his direct appeal. On appeal, Hansen, challenged: 1) the sufficiency of the evidence, 2) the denial of the motion for a separate trial, 3) the admission of the rap-songs, and 4) the admission of evidence of a gun displayed by Woody during a rap-song performance during which the gun jammed. *See* Direct Appeal Appellee's Br. p. 2. A panel of this Court affirmed DeHart's convictions. *See DeHart v. State*, No. 43A03-1611-CR-2594, 2017 WL 2927437 (Ind. Ct. App. July 10, 2017), *trans. denied*. In so doing, we found that there was sufficient evidence to support his convictions; that the trial court did not abuse its discretion by denying the motion for a separate trial (noting that there was no cited authority to support the claim); although, however, we found that the trial court abused its discretion by admitting the rap-song evidence, including testimony about the rap-song performance by Woody where his gun jammed, it was harmless error. *Id.* at *3-*7.

[31] DeHart sought post-conviction relief and, in his amended petition, asserted that he had received ineffective assistance of both trial and appellate counsel as it related to Hansen's performance in both. Therefore, the trial court set the matter for an evidentiary hearing. At the evidentiary hearing, DeHart offered the CCS from DeHart's Ex-Girlfriend's criminal case concerning her involvement in an obstruction of justice charge and the order dismissing her case. The State objected to the order because it was not mentioned in the petition. After briefing on the issue, the post-conviction court sustained the

State's objection, admitting and considering only evidence that DeHart's Ex-Girlfriend had a charge pending at the time of DeHart's trial. The post-conviction court denied DeHart's petition on November 13, 2020. DeHart now appeals.

Discussion and Decision

Standard of Review

[32] "Post-conviction proceedings do not provide criminal defendants with a 'super-appeal.'" *Garrett v. State*, 992 N.E.2d 710, 718 (Ind. 2013). Rather, they provide a narrow remedy to raise issues that were not known at the time of the original trial or were unavailable on direct appeal. *Id.* Issues available but not raised on direct appeal are waived, while issues litigated adversely to the defendant on direct appeal are res judicata. *Pruitt v. State*, 903 N.E.2d 899, 905 (Ind. 2009).

[33] A petitioner who has been denied post-conviction relief appeals from a negative judgment. *Saunders v. State*, 794 N.E.2d 523, 526 (Ind. Ct. App. 2003). A post-conviction court's denial of relief will be affirmed unless the petitioner shows that the evidence leads unerringly and unmistakably to a decision opposite to that reached by the post-conviction court. *Id.* We review the post-conviction court's factual findings for clear error, but do not defer to its conclusions of law. *Wilkes v. State*, 984 N.E.2d 1236, 1240 (Ind. 2013). We will not reweigh the evidence or judge the credibility of the witnesses. *Hinesley v. State*, 999 N.E.2d 975, 981 (Ind. Ct. App. 2013), *trans. denied*.

I. Ineffective Assistance of Counsel

[34] DeHart alleges ineffective assistance of both trial and appellate counsel in this appeal. When reviewing claims of ineffective assistance of counsel, we have stated the following:

> We evaluate claims of ineffective assistance under the two-part test originally set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). A petitioner must demonstrate that his or her counsel performed deficiently, resulting in prejudice. Counsel renders deficient performance when his or her representation fails to meet an objective standard of reasonableness. Prejudice exists when a petitioner demonstrates that, if not for counsel's deficient performance, there is a reasonable probability that the result would have been different. A petitioner must prove both parts of the test, and failure to do so will cause the claim to fail.
>
> We strongly presume counsel provided adequate assistance and exercised reasonable professional judgment in all significant decisions. Counsel's conduct is assessed based on facts known at the time and not through hindsight.

Cole v. State, 61 N.E.3d 384, 387 (Ind. Ct. App. 2016) (citations omitted), *trans. denied.*

[35] We apply the same standard of review to claims of ineffective assistance of appellate counsel as we apply to claims of ineffective assistance of trial counsel. *Walker v. State*, 843 N.E.2d 50, 57 (Ind. Ct. App. 2006), *trans. denied*.

[36] DeHart hired Lawrence Hansen to represent him at trial and on his direct appeal. Once again, this case illustrates "the danger in being represented by the same counsel at trial and on appeal. This practice could be dangerous because

'it is unreasonable to believe that counsel would [] raise [] the question of his own competency [on] appeal.'" *Benson v. State*, 780 N.E.2d 413, 418 n.3 (Ind. Ct. App. 2002), *trans. denied* (quoting *Askew v. State*, 500 N.E.2d 1219, 1220 (Ind. 1986)). That said, the evidence in the instant case revealed that Hansen had been practicing law since 1989 and had been a criminal defense attorney for approximately 15 years, including working as a public defender in Hamilton County. During that period, he had tried between 15 to 20 major felony jury trials while there. At the time of the evidentiary hearing, Hansen had accepted a position with the Marion County Prosecutor's Office as a team leader on the sentence modification committee and is one of 12 homicide prosecutors; wherein, he has the responsibility of supervising 15 deputy prosecuting attorneys.

A. Trial Counsel

[37] DeHart contends that his trial counsel rendered ineffective assistance in four ways. We begin our analysis by acknowledging that it has been long settled that DeHart was not entitled to "perfect representation, only a 'reasonably competent attorney.'" *See Harrington v. Richter*, 562 U.S. 86, 110 (2011) (citing *Strickland*, 466 U.S. at 687). We address each of DeHart's contentions in turn.

1. Objections to Order in Limine Violations

[38] On March 3, 2016, Hansen filed a pre-trial motion in limine with the trial court, seeking to exclude references to evidence of DeHart's prior convictions, character traits, and uncharged misconduct. *See* Direct Appeal Appellant's

App. Vol. III, pp. 45-47. The trial court granted the motion and ordered the State not to mention or refer to such evidence directly or indirectly in front of the jury and to caution its witnesses to follow the court's order. *Id.* at 34-35.

[39] Normally, our analysis would involve a discussion about whether the petitioner has demonstrated that had his counsel objected, the trial court would have sustained the objection. *See Cole*, 61 N.E.3d at 387 ("Where, as here, a claim of ineffective assistance is based on counsel's failure to object, the petitioner must demonstrate that if an objection had been made, the trial court would have had no choice but to sustain it."). In this case, the trial court likely would have sustained the objection if made based on its initial ruling on the motion in limine. Instead, DeHart asks us to determine whether Hansen's decision not to object to references about DeHart's prior criminal history in violation of the order in limine was a reasonable strategy.

[40] Hansen's testified that his strategy was to present an alibi defense in hope that the jury would give more favorable weight and credibility to Scott DeHart's testimony than to that of Hursey, a criminal known for trying to give information in exchange for leniency in his own criminal cases. The strategy follows that if Hansen could convince the jury that DeHart was not at the scene of the murders, then any references to DeHart's criminal history by Hursey were not worth emphasizing to the jury by objecting. As stated above, Hansen testified that he needed to have evidence that Hursey had an extensive criminal history and was in jail which would allow him to impeach Hursey. He believed that the ability to impeach Hursey with his criminal history and him being a

confidential informer, and the fact that he testified, or would testify, that he had given evidence to law enforcement in the past for reduced charges or sentences in his own criminal matters, was worth the risk of the collateral damage that might ensue in his references to DeHart in the process. Although other counsel might choose a different tactic and might choose to object and seek enforcement of the trial court's order in limine, Hansen's decision was a matter of trial strategy and tactics after taking into consideration the particular facts and circumstances of the case.

[41] As Hansen stated, Hursey was the only person who could place DeHart at the scene of the murders, and who could testify to DeHart's activity before and after the crimes. He felt that he needed to discredit Hursey in order to drive home his argument that it was Hursey who was at the crime scene and the one doing and committing the acts that he testified that DeHart had committed. Additionally, DeHart and Woody were tried together. Woody's counsel effectively impeached Hursey with his criminal history before Hansen's cross-examination of him. Therefore, after a "very lengthy" deposition of Hursey before trial, Hansen relied on his trial strategy to allow the jury to see Hursey's bias by showing his access to DeHart in jail and his need "to cut his own deal to get out." PCR Tr. Vol. I, pp. 17, 19.

[42] There were also references to DeHart's "prison issued ID," and the fact that Woody and DeHart had "caught cases" together. Trial Tr. Vol. III, pp. 42, 81. Hansen testified at the hearing that he did not want to "over-object" and that he "didn't want to necessarily draw too much attention and [make it] look like it

was a troublesome matter." PCR Tr. Vol. I, pp. 18-19. Moreover, Woody's counsel's objection to the reference that they had caught cases together was sustained, therefore, DeHart had already benefited from that ruling on Woody's counsel's objection.

[43] "Counsel is afforded considerable discretion in choosing strategy and tactics and we will accord that decision deference." *Randolph v. State*, 802 N.E.2d 1008, 1013 (Ind. Ct. App. 2004), *trans. denied*. "Reasonable strategy is not subject to judicial second guesses." *Burr v. State*, 492 N.E.2d 306, 309 (Ind. 1986). 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 which, at the time and under the circumstances, seems best." *Whitener v. State*, 696 N.E.2d 40, 42 (Ind. 1998).

[44] "Just because counsel is unable to pursue a reasonable defensive strategy as effectively as he or she wanted to does not mean that the plan was a bad plan." *McCullough v. State*, 973 N.E.2d 62, 76 (Ind. Ct. App. 2012). Furthermore, "[t]here is no constitutional requirement that a defense attorney be a flawless strategist or tactician." *Woodson v. State*, 961 N.E.2d 1035, 1042 (Ind. Ct. App. 2012). Such is the case here.

[45] DeHart has not established that the post-conviction court erred by concluding that Hansen's performance in this regard was not deficient.

2. Accomplice Liability Instruction

[46] As part of Hansen's investigation of DeHart's defense, including Hursey's deposition, he spoke with DeHart and DeHart's father, Scott. After DeHart had reviewed and discussed the matter, he agreed with Hansen's conclusion that the best defense strategy was an alibi defense. To that end, Hansen filed a notice of alibi, with Scott testifying as an alibi witness. As previously noted, Scott, who was the adoptive father of DeHart, had a Master's degree in Secondary Education from Indiana University and had been teaching and coaching for approximately 28 years by the time of trial, and had no criminal history.

[47] He testified that on the night of February 18, 2015, he saw DeHart at home at approximately 11:00 p.m., but did not see Woody or Hursey there. He recalled the more detailed timeline of events based on that evening's television schedule. In particular, he remembered that at 11:20 p.m., when there is a change between reporting on the weather and sports on the news, he placed some clothing in the washer. In doing so, he had to pass through the area of DeHart's bedroom where he saw DeHart getting ready for bed. According to Scott, DeHart was lying in bed ten minutes later when Scott passed back through toward his own bedroom just as Jimmy Fallon's program had begun. Scott recalled that Sigourney Weaver was Fallon's guest that night. And shortly after midnight, as Scott again passed through the area again to tend to the laundry, he heard DeHart in the kitchen and told him "to quiet down a little bit," to which DeHart responded, "Sorry." Trial Tr. Vol. VI, p. 11. Scott

returned to his bedroom at about 12:30 a.m. when Seth Meyers' program was on. As he returned to the bedroom, he heard DeHart in the bathroom.

[48] Scott's testimony was offered in contradiction to Hursey's testimony placing DeHart with Hursey and Woody before and after the murders, as well as at the scene of the murders. This became a prime credibility issue for consideration of and resolution by the jury.

[49] DeHart now argues that Hansen should have requested the addition of "mere presence" language to the accomplice liability instruction given at his trial.[3] However, Hansen's defense appears to have been a strategy based on all or nothing, relying on the matter of credibility. Either the jury chose to believe DeHart's father Scott, or they believed Hursey. At the hearing, when Hansen was asked whether he considered requesting that mere presence language be included in the accomplice liability instruction, he replied, "Absolutely not." PCR Tr. Vol. I, p. 6.

[50] Hansen testified that his strategic reason for not requesting the language was,

> Alibi was the defense that he was not there. That would've been a conflicting argument in other words to say my client wasn't there but if you don't believe that then if he was there his mere presence didn't have anything to do with it. I think that's fool hardy[sic] with a jury. You, you need a clearer defense and the

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[3] "An accomplice need not participate in each and every element of a crime to be convicted of it." *Alvies v. State*, 905 N.E.2d 57, 61 (Ind. Ct. App. 2009). "While mere presence at the scene of the crime is insufficient to establish accomplice liability, presence may be considered along with the defendant's relation to the one engaged in the crime and the defendant's actions before, during, and after the commission of the crime." *Id.*

> defense from Mr. DeHart and his father that he wasn't there he was at home.

Id. Additionally, he testified that mere presence language "would be inconsistent, and it would in my opinion place my credibility at issue with the jury and why would they believe anything I say then?" *Id.* at 15.

[51] In *Grinstead v. State*, 845 N.E.2d 1027, 1036 (Ind. 2006), our Supreme Court held that the failure to request mere presence language in an accomplice liability instruction did not constitute deficient performance where "[t]here was no reason for counsel to make the request." Grinstead's own testimony was sufficient to uphold his conviction of murder under accomplice liability; therefore, an instruction including mere presence language was unnecessary. Here, Scott's testimony established DeHart's alibi defense. The jury was left to choose between Scott's testimony and Hursey's testimony. As in *Grinstead*, there was no reason for Hansen to make the request. The jury was left to decide whether DeHart was at the scene at all.

[52] Hansen's all-or-nothing strategy left him in a situation analogous to that of counsel who chooses not to tender a lesser included offense instruction. On the other hand, if Hansen had requested mere presence language in the instruction, he tacitly would be conceding the possibility of DeHart's presence at the scene. Then he would be faced with the State's counter argument. Furthermore, there was other evidence that the State might use to connect DeHart to the crime; i.e.) the shoes that were thrown from the car, the black bag that was partially burned, clothing that was partially burned, and the attempt to hide things.

Furthermore, the evidence showed that DeHart brought supplies to be used in the robbery in his black bag and took the marijuana from Thornburg's home after the murders. Additionally, evidence showed that he helped hide or destroy objects and clothing used in and associated with the murders. Because the trial court was not "compelled as a matter of law" to include the language in the instruction, there is no showing of deficient performance by counsel's failure to request that language. *See Lambert v. State*, 743 N.E.2d 719, 739 (Ind. 2001) (citing *Williams v. State*, 706 N.E.2d 149, 161 (Ind. 1999)). Moreover, in *Autrey v. State*, 700 N.E.2d 1140, 1141 (Ind. 1998), our Supreme Court concluded that the failure to offer a lesser included offense instruction was not deficient performance because "[t]he all or nothing strategy employed by counsel was appropriate and reasonable based on the facts in [the] case." Given Hursey's testimony and circumstantial evidence of DeHart's guilt, we conclude that the post-conviction court did not err by finding counsel's strategy to be reasonable.

[53] Last, DeHart notes that Hansen erred in his discussion concerning foreseeability in his closing argument. During closing argument, Hansen walked through the court's instructions with the jury. Regarding Instruction Number 12, Hansen discussed the jury's options when considering whether DeHart and Hursey should have foreseen that when robbing Thornburg there was a likelihood that Thornburg and Knisley might be killed or put in danger of being killed. His discussion of foreseeability that Woody would pull a gun out and kill them was phrased as,

> I wanted to discuss instruction number 12. Where the defendant should have foreseen that the commission of or an attempt to commit a contemplated felony would likely create a situation which would expose another person to the danger of death and where the death, in fact, occurs was foreseeable, you may find that the creation of the dangerous situation is [an] immediate contribution to the victim's killing. So in other words, you've got to discuss foreseeability. The State's evidence was nobody expected that gun to come out. They were going to trick her, remember, Thomas Hursey. That doesn't mean you kill somebody. That doesn't mean you beat them up. That doesn't mean you hurt them. You trick them. So it's not foreseeable. If you believe Hursey, Hursey and Kyle had no idea. We didn't know this was coming cause [sic] we were just going to roll her. We were going to trick her. It's not foreseeable then. *Again, my position is, Kyle's not there.* Instruction 13 references the natural and probable consequences of events. Again, it's very similar to the prior instruction. What is the natural and probable consequences of trying to trick someone. *Again, my position is DeHart is not there.* But if you follow the State's evidence, this instruction they have failed to show the natural and probable consequences of a trick resulting in somebody getting shot.

Trial Tr. Vol. VI, pp. 61-62 (emphasis added). Hansen's commentary about foreseeability was a reasonable strategy which summarized the State's theory of the evidence, twice punctuated by his assertion of DeHart's alibi defense.

[54] The post-conviction court did not err by concluding that DeHart had failed to establish ineffectiveness on this ground.

3. Impeachment of DeHart's Ex-Girlfriend

[55] Next, DeHart argues that Hansen's performance at trial was deficient because he did not impeach the mother of DeHart's daughter, with charges she faced

related to this case. DeHart argues, "[a]t no point during trial was [DeHart's Ex-Girlfriend's] pending charge brought to the jury's attention." Appellant's Br. p. 11. Apparently, for her efforts to aid DeHart, DeHart's Ex-Girlfriend was charged with obstruction of justice as a Level 6 felony for lying to police about DeHart's whereabouts on the night of the murders. However, on direct examination of her, the State addressed DeHart's Ex-Girlfriend's behavior which caused a criminal charge to be filed against her. Thus, the purpose behind impeaching her was met even though the fact that a charge had been filed was not explicitly stated in depth during the trial.

[56] DeHart's Ex-Girlfriend and his daughter lived with DeHart's Ex-Girlfriend's grandparents in Mishawaka. DeHart's Ex-Girlfriend testified that she met DeHart when she was thirteen or fourteen years old, and their daughter was six years old at the time of trial. DeHart called DeHart's Ex-Girlfriend on February 18, 2015 "and said he wanted to come to see me and our daughter. I said it was okay. He normally did, so it was no big deal." Trial Tr. Vol. V, p. 177. She further testified that DeHart "brought me the money for our daughter's school." *Id.* at 178.

[57] DeHart's Ex-Girlfriend had initially provided an alibi for DeHart by telling police that she was with DeHart on the evening of February 18, 2015 through

February 19, 2015, and that she had not seen Woody.[4] Woody was found in the car registered to DeHart's mother at the time of his arrest. DeHart was arrested on outstanding warrants at DeHart's Ex-Girlfriend's grandparents' home shortly after Woody's arrest. DeHart's mother's text message history revealed that DeHart's Ex-Girlfriend had sent the following messages, "emergency" and "they are here" to her at around the time of DeHart's arrest at her grandparents' home. PCR Ex. Vol. I, p. 9.

[58] On March 4, 2015, DeHart's Ex-Girlfriend admitted that she lied to police about being with DeHart at the time of the murders. She told police that she met DeHart at approximately 9:00 a.m. on Friday, February 19, 2015, at the One-Stop Gas Station in Mishawaka, where she had also met him the night before and drove him to her grandparents' home where he was later arrested.

[59] At trial, the State asked DeHart's Ex-Girlfriend why she initially lied to police. She testified that she had lied to her grandparents about being with him on the night of February 18, 2015, because she had gone to a friend's house to drink alcohol. DeHart's Ex-Girlfriend was not yet twenty-one years old at that time. Her story to police about being with DeHart was consistent with the story she told her grandmother, yet both were lies. Thus, the State had already presented to the jury her testimony which cast doubt upon her credibility.

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[4] The facts in this paragraph and the next come from the probable cause affidavit relating to the charge filed against DeHart's Ex-Girlfriend. The affidavit was admitted during the post-conviction relief hearing but was not admitted during DeHart's trial.

[60] DeHart's Ex-Girlfriend was then asked to identify shoes police found by the side of the road. She testified on direct examination that she thought they belonged to Scott DeHart. On cross-examination, she admitted that she had never seen DeHart wear the shoes, and she was "just like 85% sure" that Scott DeHart wore white New Balance shoes. Trial Tr. Vol. V, p. 185. However, the shoes found by the police were black and were a different size than what DeHart wore.

[61] During the evidentiary hearing, the State noted that Hansen had testified on cross-examination that the first time he spoke with DeHart's Ex-Girlfriend that she was very emotional. She stated in advance to him that she was going to cry upon being questioned. "You told me. I'm going to cry." *Id.* at 184. DeHart's Ex-Girlfriend acknowledged she was going to try not to cry, "[b]ut it's going to happen." *Id.* He testified during the evidentiary hearing that,

> When I met with [DeHart's Ex-Girlfriend] prior to her testimony she just sobbed constantly and I was very concerned that when she got up here she would do the same thing and just sob relentlessly and have the jury upset that we were picking on the his [sic], the mother of his child. And, but in case I'm forgetting something I'm sure counsel will let me know but yeah (yes) if, she's not even sure that those shoes are in DeHart's house, she really doesn't hurt me that bad.

PCR Tr. Vol. I, p. 22.

[62] The State asked Hansen if he thought that DeHart's Ex-Girlfriend was "the only witness that humanized [DeHart] [sic] made him good," and that "her testimony overall was helpful" to DeHart's case, wherein, Hansen replied,

> I would prefer that she had not been here at all. But if she humanizes [DeHart]. Talks about that he's a good dad. Talks about that she cares about him. Makes him a, a, a daddy. And doesn't tie him to the piece of physical evidence it doesn't hurt that bad. I would rather the State not have any witnesses, of course.

Id. at 27.

[63] "It is well settled that the nature and extent of cross-examination is a matter of strategy delegated to trial counsel." *Myers v. State*, 33 N.E.3d 1077, 1101 (Ind. Ct. App. 2015), *trans. denied*. Here, Hansen chose not to risk alienating the jury by engaging in harsh cross-examination that could likely be perceived as badgering the mother of DeHart's child and whose testimony had not really harmed DeHart's alibi defense. The fact that a criminal charge against DeHart's Ex-Girlfriend was not brought before the jury; however, the facts that she had lied to police and her grandparents were placed before the jury. We cannot say that Hansen's performance was deficient or that it resulted in prejudice to DeHart's case. Thus, the post-conviction court did not err.

4. No Objection to Closing Argument Rebuttal

[64] Next, DeHart claims that Hansen's performance was deficient because he did not object to the State's closing argument in rebuttal wherein the State referred to inflammatory rap songs. DeHart directs us to the holding in *Ryan v. State*, 9 N.E.3d 663, 671 (Ind. 2014) ("'It is misconduct for a prosecutor to request the jury to convict a defendant for any reason other than his guilt.'") (citing *Cooper v. State*, 854 N.E.2d 831, 837 (Ind. 2006) (quoting *Coleman v. State*, 750 N.E.2d 370, 375 (Ind. 2001))).

[65] As we discussed in DeHart's original appeal, this Court found that the trial court erred by admitting the rap-song evidence over Hansen's objections.[5] The facts revealed the testimonial evidence came in through Nelson Blocher, a purported friend of both DeHart and Woody. Blocher testified that the pair had performed some rap songs for him in the past. In particular, he testified that he was "pretty sure" the song "What's Beef?" was written by Woody "before 2012" and that only Woody's voice was heard on the recording. Trial Tr. Vol. IV, p. 4; Trial Tr. Ex. Vol. VII, State's Ex. 16. He said that he thought both DeHart and Woody had performed the song in the past. He also testified about a song titled, "KD freestyle Feb. 17." Trial Tr. Ex. Vol. VII, State's Ex. 18. As for that song, Blocher stated that both Woody and DeHart's voices were on the recording, but that he did not know who wrote the lyrics or when the rap song was written. The recording of the third song, "Or Naw (remix)," contained both Woody and DeHart's voices, according to Blocher, but he did not know who wrote it; although he recalled hearing Woody perform it before the murders. Trial Tr. Vol. IV, p. 19, Trial Tr. Ex. Vol. VII, State's Ex. 19. At least one of the rap songs included lyrics about shooting someone in the face with a 9mm gun, using duct tape to cover a person's mouth, and references to marijuana. Woody previously had performed the rap songs, wherein he

[5] Hansen objected on the following grounds: 1) the lyrics were cumulative; 2) they were irrelevant and therefore inadmissible; 3) the probative value was substantially outweighed by the danger of unfair prejudice; 4) that "What's Beef ?" was written too remotely in time to the offense; 5) and the other songs lacked foundational elements. Trial Tr. Vol IV, p. 20. Hansen also joined in Woody's counsel's argument that the recordings and lyrics were inadmissible prior bad acts. *Id.* at 24.

displayed a handgun that dropped the gun clip. John VanderReyden also testified that during a rap performance, Woody had pulled a gun from his pants, and during the performance attempted to load the handgun, but the magazine "fell onto the ground." Tr. Vol. V, p. 61. When he tried to chamber a round, there was a "failure to feed." *Id.* at 64.

[66] This Court, in concluding that the trial court erred by admitting the evidence, observed that,

> Robbing and killing drug dealers is not unheard of in our society, nor is rapping about such activities, which is not illegal. The mere fact that Woody and DeHart rapped about stealing marijuana and shooting someone in the face before they robbed and killed Thornburg (and Knisely, who was in the wrong place at the wrong time) has only the slightest tendency to prove that they committed robbery and murder.

DeHart, 2017 WL 2927437, at *6. After acknowledging the "songs' profanity-laden glorification of violence, drugs, and sex," which had "minimal probative value" of one's guilt and "was substantially outweighed by a danger of unfair prejudice," the Court concluded that "there is no substantial likelihood that the erroneously admitted evidence contributed to DeHart's convictions." *Id.* at *6, *7.

[67] In Hansen's closing argument, he summarized the State's evidence regarding rap songs as follows:

> Nelson Blocher talking about rap songs. The State believes that this is somehow motive. I struggle to comprehend how this is motive. Especially relative to Kyle. Kyle doesn't write the

> songs. He's present on two recordings. The rapper that we heard was Woody and according to Hursey, Woody's the one that had the gun. Woody's the one that pulled the triggers. I understand that may be in doubt but according to the State's own evidence, Woody's the one that did this. So playing rap or liking rap music does not make one a killer. It has nothing to do with this. It definitely has nothing to do with this relative to Kyle DeHart.

Trial Tr. Vol. VI, pp. 57-58.

[68] During rebuttal of its closing argument, the State responded to Hansen's closing argument by arguing the following:

> Rap songs, totally agree. I listen to Glen Miller. I'm not as old as my grandfather but I love Glen Miller. Rap songs, just cause [sic] you like rap songs doesn't mean you're a killer. But if you make your rap songs and you put in your own lyrics; you're kinda telling us what kind of a person you are that will commit this type of a crime and tell us specifics in the lyrics and they lived it out. They actually lived out their fantasy. Isn't that sick? These guys are wired differently because of that.

Id. at 71.

[69] DeHart maintains that Hansen was deficient because he should have objected to the State's argument in rebuttal because "[t]he objection counsel should have made was that it was improper for the prosecution to encourage the jury to convict DeHart for reasons other than his guilt." Appellant's Reply Br. p. 12. He further argues that Hansen was deficient in that "[c]ounsel's concern should not have been whether to draw more attention to the evidence but rather ensuring that the jury knew that they were not to base a verdict of guilty on

evidence unrelated to the crime or the defendants' perceived low moral character." Appellant's Br. p. 44.

[70] At the evidentiary hearing, Hansen was asked if he considered objecting to the State's references to the rap songs during closing argument. He testified that he did object as noted.

> I objected several times to the rap songs and I believe even on appeal the Court of Appeals agreed with me and said it should not have occurred but it was not reversible error. So, yes and yes.

PCR Tr. Vol. I, p. 8. He then was asked if he considered asking for a limiting instruction. Hansen replied,

> I don't like limiting instructions because limiting instructions say hey, don't, don't scratch your nose and then people just start scratching their nose. So, I made my objection. I was overruled. The Court of Appeals agreed with me but I wasn't going to drive it home that this really hurt us so bad even though it was a song. So[,] no I didn't.

Id. at 8-9.

[71] Here, Hansen was unsuccessful in making prior objections to the admission of the recordings and transcriptions of the lyrics to the rap songs. The trial court ruled that its decision was based on precedent. *See Bryant*, 802 N.E.2d at 498-99. It is clear from Hansen's testimony that he decided not to pose a continuing objection as a matter of strategy due to his earlier unsuccessful attempts to have the evidence excluded.

[72] Additionally, the State is "entitled to respond to allegations and inferences raised by the defense even if the prosecutor's response would be otherwise objectionable." *Dumas v. State*, 803 N.E.2d 1113, 1118 (Ind. 2004). Here, Hansen argued that the rap songs did not establish a motive for the murders, especially as it pertained to DeHart because he did not write the music. The evidence reflected that "What's Beef?" was written by Woody, and that Blocher testified that he did not know who wrote "KD Freestyle Feb. 17" and "Or naw (remix)." The prosecutor argued that it was merely responding to argument by counsel for Woody and DeHart about how to interpret the rap-song evidence. The post-conviction court did not err when it concluded that Hansen's performance was not deficient in this regard since this Court had previously ruled that the trial court had erred in admitting the rap songs, but such was harmless error.

[73] We conclude that the post-conviction court, following this Court's ruling in DeHart's direct appeal, did not err when it found that DeHart's counsel's performance was not deficient in the manner he suggests. Further, given the overwhelming amount of other evidence against DeHart, there was no prejudice shown by the jury's verdict.

II. Appellate Counsel

[74] DeHart contends that Hansen rendered ineffective assistance on appeal by failing to make a stronger argument about the trial court's allegedly erroneous decision to deny the motion for separate trials. We have recognized three categories of appellate counsel ineffectiveness: 1) denying access to an appeal,

2) failing to raise issues; and 3) failing to present issues competently. *See Timberlake v. State*, 753 N.E.2d 591, 604 (Ind. 2001). Here, DeHart's challenge is to the latter category: failure to present issues competently.

[75] Seizing on the language from our opinion on direct appeal and the direct appeal brief, DeHart claims that he was denied effective representation because Hansen "cite[d] no authority to support" his claim that he "was prejudiced by the introduction of evidence against Woody which would not be admissible in a trial against DeHart alone." *DeHart*, 2017 WL 2927437 * 3; Direct Appeal Appellant's Br. p. 24. The primary evidence at issue raised was the admissibility of the recording and lyrics of the rap songs.

[76] Hansen's "Motion For Severance From Co-Defendants" included the argument that DeHart would "be denied his Sixth Amendment right to cross-examination if incriminating statements made by a co-defendant are introduced and the co-defendant does not testify." Direct Appeal App. Vol. III, p. 41. Hansen cited *Bruton v. United States*, 391 U.S. 123 (1968), which holds that in a joint trial, the admission of one defendant's confession facially incriminating and implicating another defendant is a violation of the second defendant's right to confront witnesses. 391 U.S. at 124-26. However, "violations of the right of cross-examination do not require reversal if the State can show beyond a reasonable doubt that the error did not contribute to the verdict." *Fayson v. State*, 726 N.E.2d 292, 294 (Ind. 2000) (citing *Delaware v. VanArsdall*, 475 U.S. 673, 684 (1986)). "Violations of the right to cross-examine are subject to harmless-error analysis." *Smith v. State*, 721 N.E.2d 213, 219 (Ind. 1999). Hansen further

argued in his motion for severance that DeHart's substantial rights would be prejudiced due to "mutually antagonistic defenses." Direct Appeal App. Vol. III, p. 41.

[77] The trial court gave the State three options for consideration in response to Hansen's motion for a separate trial and the State chose to try Hursey separately from DeHart and Woody's joint trial. As for Hansen's argument that the defenses of Woody and DeHart were mutually antagonistic, this Court has already decided that they were not. *See DeHart*, 2017 WL 297437 at * 3 ("In this case, the parties' defenses were not mutually antagonistic, and acceptance of one party's defense would not have precluded the acquittal of the other: Woody blamed Hursey for the murders, and DeHart claimed that he was at home that night.").

[78] As for Hansen's claims regarding the introduction of evidence against Woody that would not be admissible in a separate trial against DeHart, in our opinion deciding DeHart's direct appeal, we noted that the claims were not supported by authority. *See id.* The evidence that DeHart now argues ran afoul of *Bruton,* and which he now asserts that Hansen should have more forcefully argued on direct appeal are the lyrics and recordings of the rap songs introduced by the State against Woody and DeHart, and which this Court found to be admitted in error. In support thereof, DeHart stated, "Woody did not testify at trial and was never subject to cross-examination, yet his statements in the rap songs were placed into evidence and used against DeHart." Appellant's Reply Br. p. 15.

[79] At trial, the State argued that the exhibits containing the transcribed lyrics and the recordings of the rap songs "What's Beef?" "KD freestyle Feb. 17," and "Or naw (remix)" were admissible to show "both intent and motive of both of the Defendants." Trial Tr. Vol. IV, p. 24. The trial court ruled that the admissibility of the evidence was "probably the right thing to do," and cited *Bryant*, 802 N.E.2d 486. In resolving the issue of the admissibility of the recordings and lyrics, we distinguished the facts in DeHart's case from that in *Bryant*. In *Bryant*, the defendant was accused of murdering his stepmother Carol and putting her body in the trunk of her car. As evidence of intent, the State sought to introduce rap songs either composed or plagiarized by Bryant including references to the police not being able to identify a person when that person's body is pulled out of the trunk of "my car." 802 N.E.2d at 498. A panel of this Court held that,

> [i]nasmuch as Carol's body was recovered from the trunk of her car, and Bryant had driven that vehicle for several days visiting friends and telling them that he was the owner, the reference in the exhibits to finding a body in the trunk of "my car' made it more probable that Bryant killed Carol and placed her body in the trunk. Thus, such evidence was relevant, and the trial court did not abuse its discretion in admitting the exhibits on this basis.

Id.

[80] In contrast, in DeHart's direct appeal, we held that,

> [i]n this case, however, the contested evidence has considerably less probative value as to whether Woody and DeHart committed the charged crimes. Woody wrote "What's Beef?" more than three years before the murders, and Blocher either did

> not know or did not testify about when or by whom the other songs were written or when they were recorded. The songs do not specifically mention Thornburg, nor do they mention Woody and DeHart's original plan to slit her throat with a utility knife; according to Hursey, Woody said that he shot Thornburg because he "panicked[.]" Tr. Vol. 3 at 58. Thus, the songs' references to handguns and shootings are significantly less prescient and probative than they might appear.

DeHart, 2017 WL 2927437 at *6.

[81] As noted in the Court's decision, the rap songs do not specifically mention Thornburg or the original plan to slit her throat with a utility knife while robbing her of her marijuana. We held that the admission of the recordings and lyrics was erroneous, but that the error was harmless, concluding that "we are satisfied that there is no substantial likelihood that the erroneously admitted evidence contributed to DeHart's convictions." *Id.* at *7.

[82] The Confrontation Clause of the Sixth Amendment applies to "testimonial statements." *Crawford v. Washington*, 541 U.S. 36, 43-54 (2004). Therefore, *Bruton* "protect[s] co-defendant[s] from testimonial confessions of other co-defendants." *Brown v. Brown*, 847 F.3d 502, 506 (7th Cir. 2017). That said, the rap songs are not testimonial statements made by Woody. A statement is testimonial when, "in light of all the circumstances, viewed objectively, the 'primary purpose' of the conversation was to 'creat[e] an out-of-court substitute for trial testimony." *Ohio v. Clark*, 576 U.S. 237, 245 (2015).

[83] Hansen could not have argued on direct appeal that Woody wrote the lyrics to the rap songs primarily to create trial testimonial statements. Based upon the evidence, nor could he have argued that Woody wrote the rap songs before the murders to effectively preserve his testimony for trial. As indicated above, this Court has already concluded that the rap songs did not predict the murders. *See DeHart* 2017 WL 2927437 at *6. The post-conviction court did not err by failing to find that Hansen's performance in this regard was deficient.

[84] If a claim of ineffective assistance of counsel can be disposed of by analyzing the prejudice alone, we will do so. *See Benefield v. State*, 945 N.E.2d 791, 797 (Ind. Ct. App. 2011). Here we find that Hansen's failure to more strenuously argue on direct appeal, with citation to authority, that the trial court erred by failing to grant DeHart's motion in full, did not result in prejudice to DeHart. Hansen objected in order to exclude evidence of the lyrics of rap songs, and we agreed with him on direct appeal that the evidence was erroneously admitted; however, notwithstanding, this Court concluded that the error in its admission was harmless. A trial court's decision to grant or deny motions for a separate trial is reviewed for an abuse of discretion. *See Jones v. State*, 421 N.E.2d 643, 645 (Ind. 1981). Further, "[t]o show an abuse of discretion, an appellant must show that in light of what occurred at trial, the denial of a separate trial subjected him to actual prejudice." *Peck v. State*, 563 N.E.2d 554, 557 (Ind. 1990). Here, DeHart has not made that showing. As a result, we therefore conclude that DeHart did not receive ineffective assistance of appellate counsel.

Conclusion

[85] In conclusion, DeHart has failed to establish that the post-conviction court erred by finding that he received effective assistance of trial or appellate counsel. For the foregoing stated reasons, we affirm the decision of the post-conviction court.

[86] Affirmed.

Kirsch, J., and Tavitas, J., concur.