MEMORANDUM DECISION

APPELLANT PRO SE

Nathan C. Cook
Michigan City, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

George P. Sherman
Supervising Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Nathan C. Cook,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent.

October 21, 2021

Court of Appeals Case No. 20A-PC-2290

Appeal from the Grant Superior Court

The Honorable Jeffrey D. Todd, Judge

Trial Court Cause No. 27D01-1711-PC-16

Baker, Senior Judge.

Statement of the Case

[1] Nathan C. Cook appeals from the post-conviction court's denial of his petition for post-conviction relief. We affirm.

Issues

[2] Cook raises nine issues, which we consolidate and restate as:

I. Whether the post-conviction court erred in rejecting Cook's claim of ineffective assistance of trial counsel.

II. Whether the post-conviction court erred in rejecting Cook's claim of ineffective assistance of appellate counsel.

III. Whether the post-conviction court erred in denying Cook's requests for admissions, his subpoena requests, and his requests for production of documents.

Facts and Procedural History

[3] The facts of Cook's case, as stated in his direct appeal, are as follows:

> On April 20, 2006, undercover Marion Police Officer Robert Moore ("Officer Moore") arrived at a Marion residence after arranging with Gary Brown ("Brown") to purchase cocaine in a controlled buy. Cook, who was also at the residence, placed the cocaine on a digital scale. The scale indicated that the cocaine weighed over twenty grams. The men agreed to a price for the cocaine, and Officer Moore handed Cook $700. Cook placed the cocaine in a plastic baggie and gave the baggie to Officer Moore.
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> Officer Moore then met Grant County Sherriff's Deputy Tom Fleece ("Deputy Fleece") at another location and gave him the baggie of cocaine he had purchased from Cook. Tests performed at the Indiana State Police Lab determined that the substance was cocaine, with a net weight of 17.98 grams.
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> On March 5, 2007, the State charged Cook with Class A felony dealing in cocaine and Class A felony conspiracy to commit dealing in cocaine. A jury trial was held from April 13 to April 15, 2009. . . . After the first day of the trial, Cook failed to appear, and his defense counsel could not locate him.

Cook v. State, No. 27A02-1403-CR-211, *1 (Ind. Ct. App. Feb. 24, 2015) (footnote omitted).

[4] The trial continued in Cook's absence, over the objection of his counsel. Officer Moore testified, but some of his testimony was not recorded due to a malfunction in the courtroom's recording equipment. In addition, two bench conferences involving the trial judge and counsel were not recorded. During trial, witnesses Detective John Kauffman, Deputy Fleece, Detective Mark Stefanatos, and Brown identified Cook via a photograph, over the objections of Cook's attorney.[1]

[5] On the second day of trial, the State revealed for the first time that the cocaine in question had been mistakenly destroyed by a police evidence clerk two years prior. Cook's counsel moved for a mistrial, but the trial court denied the motion. The State presented other evidence to establish the existence and weight of the cocaine, including photographs, a lab report, and witness testimony. Cook's counsel raised a continuing objection to the State's alternate evidence of the cocaine. He also submitted a proposed jury instruction on the destruction of evidence, but the trial court rejected it.

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[1] Detective Kauffman further testified that he had recognized Cook in the courtroom during jury selection. In addition, Detective Stefanatos testified that during the drug buy he had recognized Cook from prior unspecified encounters.

[6] A jury determined Cook was guilty as charged. At the State's request, the trial court issued a warrant for Cook's arrest, over the objection of Cook's counsel.

[7] The decision from Cook's direct appeal further provides:

> Nearly five years [after the jury verdict], on February 14, 2014, Cook, who had been living in Minnesota under a false identity, was arrested for driving while impaired. Authorities in Minnesota discovered the arrest warrant that had been issued after Cook failed to appear for his trial and Cook was arrested. The trial court held Cook's sentencing hearing on March 17, 2014, after which it ordered Cook to serve two concurrent terms of fifty years in the Department of Correction.
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> Cook filed his Notice of Appeal, and pursuant to Appellate Rule 31, the trial court held a hearing on the missing portion of the record containing Officer Moore's testimony. Cook submitted a statement of the evidence, which included the court reporter's log notes containing summaries of Officer Moore's testimony. The log notes indicated that during Officer Moore's testimony, Cook made an objection challenging the accuracy of one of the scales used to measure the drugs Cook sold to Officer Moore. The log notes also show that Cook's objection was overruled. Cook's statement of the evidence noted that both the deputy prosecutor assigned to the case and Cook's defense counsel had submitted affidavits stating that they had no recollection of the substance of Officer Moore's testimony.

Id.

[8] On appeal, Cook claimed reversible error arising from the missing portion of Officer Moore's testimony. He further asked the Court to review his sentence

under Indiana Appellate Rule 7(B). A panel of this Court affirmed the trial court's judgment and declined to revise Cook's sentence. *Id*.

[9] In November 2017, Cook filed a petition for post-conviction relief. He amended his petition in March 2020. Cook filed a request for production of documents, which the post-conviction court denied. He also filed requests for admissions directed at the State of Indiana and Gary Brown, which the court denied. Finally, Cook filed several requests for witness subpoenas, and the court granted some and denied others. Cook filed separate motions for summary judgment and summary disposition, both of which the post-conviction court denied.

[10] On July 23, 2020, the post-conviction court held an evidentiary hearing. Witnesses included Cook's trial attorney and appellate attorney, as well as the prosecuting attorney. The court later issued findings of fact and conclusions of law denying Cook's petition. Cook filed a motion to reconsider, which the post-conviction court denied. This appeal followed.

Discussion and Decision

I. Standard of Review

[11] Post-conviction proceedings are civil matters in which a petitioner must establish claims by a preponderance of the evidence. *Wilkes v. State*, 984 N.E.2d 1236, 1240 (Ind. 2013). "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 are res judicata.[2] *Allen v. State*, 749 N.E.2d 1158, 1163 (Ind. 2001).

[12] 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 court. *Id.* We review the court's factual findings for clear error but do not defer to its conclusions of law. *Wilkes*, 984 N.E.at 1240. 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*.

[13] In addition, Cook challenges the post-conviction court's rulings on discovery issues. Courts are accorded broad discretion in ruling on discovery matters, and we will affirm their determinations absent a showing of clear error and

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[2] Cook argues, among other claims, that the prosecutor committed misconduct in his original criminal case by: (1) failing to preserve evidence; (2) failing to disclose a witness' criminal record; and (3) failing to correct allegedly false testimony by two witnesses. These claims of freestanding error are waived. *See Pruitt v. State*, 903 N.E.2d 899, 926 (Ind. 2009) (claims of prosecutorial misconduct waived for failure to raise them in a direct appeal).

resulting prejudice. *Pannell v. State*, 36 N.E.3d 477, 493 (Ind. Ct. App. 2015), *trans. denied*.

II. Cook's Trial Counsel

[14] Cook argues the post-conviction court should have determined that his trial counsel made substantial errors which deprived him of a fair trial. In considering claims of ineffective assistance of trial counsel, we have stated:

> 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.

Cole v. State, 61 N.E.3d 384, 387 (Ind. Ct. App. 2016) (citations omitted), *trans. denied*. If we can dispose of an ineffective assistance claim on the question of prejudice, we need not address whether counsel's performance was deficient. *Helton v. State*, 907 N.E.2d 1020, 1023 (Ind. 2009).

[15] We strongly presume counsel provided adequate assistance and exercised reasonable professional judgment in all significant decisions. *Weisheit v. State*, 109 N.E.3d 978, 983 (Ind. 2018). Further, "counsel is afforded considerable discretion in choosing strategy and tactics and those decisions are entitled to

deferential review." *Id.* Counsel's conduct is assessed based on facts known at the time and not through hindsight. *Cole*, 61 N.E.3d at 387.

A. Trial Counsel's Pretrial Investigation of the Case

[16] Cook claims his trial counsel should have contacted two potential witnesses prior to trial because they would have helped to exonerate him, and that counsel should have sought an independent analysis of the weight and chemical makeup of the cocaine. Effective representation of a criminal defendant necessarily requires "adequate pretrial investigation and preparation." *McKnight v. State*, 1 N.E.3d 193, 200 (Ind. Ct. App. 2013). However, given that we avoid judging an attorney's performance through hindsight, we apply "a great deal of deference to counsel's judgments." *Id.* at 200-01. Further, establishing failure to investigate as a ground for ineffective assistance of counsel requires going beyond the trial record to show what an investigation, if undertaken, would have produced. *Id.* at 201.

[17] During post-conviction proceedings, Cook identified James Ricks and Tyice Simpson Chapman as two witnesses that his counsel should have interviewed before trial. Cook concedes that Ricks died prior to the post-conviction hearing, and Cook did not present any other evidence to establish what a pretrial investigation of Ricks would have revealed.

[18] By contrast, Chapman testified at the post-conviction hearing. She claimed she had entered the room during the drug transaction. Chapman further claimed

that Brown, not Cook, had weighed the cocaine, and that she did not see Cook hand anything to Moore.

[19] Cook's allegation that his trial counsel should have questioned Chapman fails on the issue of prejudice. Chapman did not witness the entire transaction. Further, Brown testified during trial that the transaction occurred in a bedroom with the door closed, and none of the women who were in the house at that time entered the room during the transaction. Finally, the State's case was supported by multiple witnesses and a recording of the deal. There is ample independent evidence to sustain Cook's convictions, and as a result he has failed to prove that an investigation of Chapman by his attorney would have changed the outcome of the trial.

[20] We next turn to Cook's claim that his trial counsel should have independently investigated the cocaine. At the post-conviction hearing, Cook presented no evidence to show that the substance was anything other than cocaine, as claimed by the State. Although an independent pretrial investigation would have revealed the State's inadvertent destruction of the cocaine, providing counsel with advanced notice of the issue, Cook failed to demonstrate that such prior knowledge would have changed the trial's outcome. The State was not required to prove its case through the cocaine itself. The State instead presented other evidence, including testimony from a former chemist from the Indiana State Police Laboratory, who had identified and weighed the drug. In addition, Cook's counsel vigorously questioned the State's witnesses about the

destruction of the cocaine and argued to the jury during closing arguments that the absence of the cocaine was grounds for a verdict of not guilty. Thus, Cook failed to establish he was prejudiced by the absence of a pretrial investigation of the cocaine.

B. Trial Counsel and the State's Offer of a Plea Agreement

[21] Cook next claims the State had offered him a plea agreement with a twenty-year maximum sentence. He further claims he would have accepted the offer, but his trial counsel failed to tell him about it. As a general rule, criminal defense attorneys have a duty to inform their clients of plea agreements proffered by the prosecution, and failure to do so constitutes ineffective assistance of counsel. *Dew v. State*, 843 N.E.2d 556, 568 (Ind. Ct. App. 2006) (quotation omitted), *trans. denied*.

[22] During the post-conviction hearing, Cook discussed several written plea offers with his trial counsel, but he did not offer any of them as exhibits. The exhibit volume of the post-conviction transcript does not include any written plea offer. However, Cook has included in his Appellant's Appendix an unsigned document that appears to be an offer of a plea agreement, with a maximum sentence of twenty years. Assuming without deciding that the document is valid, Cook's claim nonetheless fails because he did not testify under oath at the post-conviction hearing. He instead chose to question other witnesses, and his statement in passing that he would have accepted a plea agreement with a twenty-year maximum sentence is not competent evidence.

[23] Even if the purported plea agreement is considered valid, and if Cook's unsworn statement that he would have accepted a twenty-year sentence is also considered valid, Cook did not prove that his counsel failed to convey the plea offer to him. To the contrary, trial counsel testified that he did not have any memory of the offer, but he habitually transmitted the State's plea agreements to his clients. Counsel stated, "I don't believe I've ever sat on a plea agreement or not go [sic] it to the client." PCR Tr. p. 27. The post-conviction court, as the finder of fact, was permitted to credit counsel's statement of his standard procedure. *See* Ind. Evid. R. 406 (evidence of a person's habit may be admitted to prove that the person acted in accordance with the habit on a particular occasion); *see also Gonzalez v. Ritz*, 102 N.E.3d 910, 916 (Ind. Ct. App. 2018) (evidence that a person always stopped and looked both ways at intersections while riding her bicycle was potentially admissible as proof of a habit), *trans. denied*. The post-conviction court did not err in denying Cook's claim.

C. Trial Counsel and Photographic Identification of Cook

[24] Cook claims the State used an inappropriate procedure when its witness Robert Moore identified him using a single photograph, as opposed to a lineup of several photographs. Cook frames the procedure as an inappropriate "out-of-court" identification, Appellant's Br. p. 16, that his counsel should have investigated, but there is no evidence that Moore identified Cook prior to trial via a photograph. Instead, Moore and several other witnesses identified Cook

during trial using a photograph because Cook was absent during the presentation of evidence.

[25] Cook's claim of ineffective assistance with respect to the State's use of a single photograph fails on the element of deficient performance. When Cook failed to appear for trial on the morning of the second day, the State proposed to have its witnesses identify Cook via a single photograph. Cook's counsel objected, claiming that identifying Cook via a single photograph would be too suggestive. Counsel instead asked the trial court to order the State to assemble a photographic array for witnesses to use when identifying Cook. The trial court overruled the objection and later acknowledged that counsel had raised a continuing objection. As a result, counsel did all that was necessary to fully raise the issue for the court's consideration and preserve it for appellate review. Cook does not point to anything else counsel could have done during trial. The post-conviction court did not err in rejecting Cook's claim.

D. Trial Counsel and Continuance of the Trial

[26] When the State disclosed on the second day of Cook's trial that an evidence clerk had inadvertently destroyed the cocaine two years prior to trial, Cook's counsel moved for a mistrial, which the trial court denied. Further, when the State offered other evidence to prove the existence and nature of the cocaine, Cook's counsel objected to that evidence.

[27] Cook argues that his counsel should have also, or in the alternative, requested a continuance to investigate the circumstances of the cocaine's destruction and to allow Cook to hire another counsel. We disagree. Cook's trial counsel testified that he chose not to request a continuance as a matter of strategy, explaining that he thought the better option was to inform the jury about the destruction of the cocaine and to attempt to instruct the jury on the effects of destruction of evidence. We will not second-guess counsel's strategic decisions. *See Barker v. State*, 508 N.E.2d 795, 797 (Ind. 1987) ("The decision to . . . request a continuance is one of trial strategy, and will not be an indication of ineffective assistance of counsel absent an express showing to the contrary").

[28] In addition, Cook has failed to show that his attorney's failure to request a continuance resulted in prejudice to his case. During the post-conviction hearing, Cook did not present any evidence as to what a further investigation, or the hiring of a different attorney, would have revealed, if his trial counsel had requested and received a continuance. The post-conviction court did not err in rejecting this claim.

E. Trial Counsel and Evidence of the Weight of the Cocaine

[29] At trial, the State offered State's Exhibit 8, a lab report that stated the weight of the cocaine. The State also presented testimony from a chemist about the report. Cook argues his trial counsel should have objected to this evidence for lack of evidentiary foundation because the State had failed to demonstrate that

the scales that were used to weigh the cocaine at the laboratory had been properly calibrated and certified.[3]

[30] When 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. *Cole*, 61 N.E.3d at 387. Cook was obligated to present evidence to the post-conviction court demonstrating that the scales were not properly calibrated before and after the chemist weighed the cocaine. Cook did not present any evidence relevant to the calibration of the scales. As a result, he failed to show that an objection to Exhibit 8 and the chemist's testimony would have been granted, and thus he did not show trial counsel performed deficiently. The post-conviction court did not err in denying this claim.

III. Appellate Counsel

[31] The standard of review for a claim of ineffective assistance of appellate counsel is the same as that for trial counsel. *Massey v. State*, 955 N.E.2d 247, 257 (Ind.

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[3] The prosecutor also offered State's Exhibit 11, an evidence sheet which listed the weight of the cocaine. Cook argues that his trial counsel failed to object to the lack of calibration of the scales, but he is incorrect. When the prosecutor offered Exhibit 11 for admission, Cook's trial counsel stated: "We'll object. There's no evidence these scales are certified or considered to be accurate." Trial Tr. Vol. 2, p. 298. We need not address this exhibit further.

Cook argues his counsel should have also objected to Brown's trial testimony about the weight of the cocaine, claiming the State failed to show that the scales used during the drug transaction were calibrated. This claim fails because Brown did not testify as to the precise weight of the cocaine, but rather as to his understanding of how much cocaine the undercover officer had agreed to buy from Cook.

Ct. App. 2011). That is, the petitioner must show that counsel's performance was deficient in that counsel's representation fell below an objective standard of reasonableness and that but for appellate counsel's deficient performance, there is a reasonable probability that the result of the appeal would have been different. *Id.* at 257-58. Ineffective assistance of appellate counsel claims fall into three categories: (1) denial of access to an appeal; (2) waiver of issues; and (3) failure to present issues well. *Carter v. State*, 929 N.E.2d 1276, 1278 (Ind. 2010).

A. Appellate Counsel and Unrecorded Bench Conferences

[32] Cook's appellate counsel obtained a certified statement of evidence to address a gap in the recording of Officer Moore's testimony. Cook argues that the certified statement should have also included two bench conferences that were not recorded: one that occurred during jury selection, after Cook's trial counsel objected to one of the prosecutor's questions to potential jurors as "trying his case" (Trial Tr. Vol. II, p. 91); and the second, which occurred during Detective Kauffman's testimony, after Cook's trial counsel objected to the use of a single photograph to identify Cook.

[33] Cook cites to *McCary v. State*, 739 N.E.2d 193 (Ind. Ct. App. 2000), in support of his claim, but the opinion in that case was vacated on transfer by the Indiana Supreme Court. *McCary v. State*, 761 N.E.2d 389 (Ind. 2002). In any event, Cook bore the burden of proving during post-conviction proceedings that certified statements of the omitted recordings would have affected the outcome

of his direct appeal. If the certified statements would not have affected the outcome, then he could not have been prejudiced by his appellate counsel's failure to procure them.

[34] Cook did not present any evidence at the post-conviction hearing as to what occurred during the unrecorded bench conferences. He did not question his trial counsel about them. Moreover, the circumstances surrounding the unrecorded conferences suggest that if they had been included in the certified statement of evidence, they would not have affected the outcome of Cook's appeal. Nothing about Cook's trial counsel's objection to the prosecutor's question during jury selection points to the existence of an error that would have merited a new trial. In addition, Cook's trial counsel argued at length on the record against using a single photograph to identify Cook, and it is unclear what the contents of the unrecorded bench conference would have added. The post-conviction court did not err in rejecting this claim of ineffective assistance of appellate counsel because Cook failed to prove prejudice resulting from appellate counsel's failure to obtain certified statements of the evidence.

B. Appellate Counsel and Jury Instruction on Destruction of Evidence

[35] During trial, Cook's counsel offered a jury instruction related to the State's destruction of the cocaine two years before trial. The trial court refused the proposed jury instruction, and Cook argues his appellate counsel should have raised the jury instruction issue on appeal.

[36] When a petitioner claims appellate counsel should have raised different issues, we consider "whether the unraised issues were significant and obvious upon the face of the record. If so, [we] then compare these unraised obvious issues to those raised by appellate counsel, finding deficient performance only when ignored issues are clearly stronger than those presented." *Bieghler v. State*, 690 N.E.2d 188, 194 (Ind. 1997) (internal quotation omitted). As always, the petitioner must also demonstrate prejudice, which is to say that there is a reasonable probability that the failure to raise the issues changed the outcome of the proceeding. *Id.* (quotation omitted). When reviewing a trial court's acceptance or rejection of a proposed jury instruction, we consider whether the instruction states the law correctly, whether it is supported by record evidence, and whether its substance is covered by other instructions. *Pattison v. State*, 54 N.E.3d 361, 365 (Ind. 2016).

[37] In *Nettles v. State*, 565 N.E.2d 1064 (Ind. 1991), the State disclosed that it had inadvertently failed to refrigerate blood samples, and they were unusable by the time they were made available for independent testing by Nettles' expert. Nettles claimed that the trial court erred in rejecting his proposed jury instruction, which would have informed jurors that if they believed the police had "destroyed and/or allowed to deteriorate evidence," then they could infer that the evidence would have been unfavorable to the State and favorable to the accused. *Id.* at 1069. The Indiana Supreme Court rejected Nettles' claim,

concluding that he was required to offer evidence that the State acted willfully and in bad faith, and he had failed to offer such evidence.

[38] Similarly, in Cook's case the police evidence clerk stated that he destroyed the cocaine based on a mistaken belief that all pending cases involving the cocaine had been resolved. Cook's trial counsel proposed a jury instruction as follows:

> In this case, there has been evidence that the police destroyed evidence. If you believe that the State engaged in such conduct, then you may infer that such evidence would have been unfavorable to the State and beneficial to the accused.

PCR Tr. Ex. Vol. p. 8.

[39] Cook presented no evidence at trial or during the post-conviction hearing that the clerk or any other State personnel had destroyed the cocaine in bad faith, such as with the intent to hamper Cook's ability to defend himself. In the absence of any evidence of bad faith, the trial court, like the trial court in *Nettles*, was not obligated to give Cook's proposed instruction. As a result, an appellate challenge to the trial court's ruling would not have prevailed, and the claim was not stronger than the claims Cook's appellate counsel chose to present. The post-conviction court did not err in rejecting Cook's claim of ineffective assistance of appellate counsel on this point.

C. Appellate Counsel and a Double Jeopardy Claim

[40] Cook argues that his convictions of Class A felony dealing in cocaine and Class A felony conspiracy to commit dealing in cocaine violate his federal and state

constitutional protections against double jeopardy. He further claims his appellate counsel should have raised a double jeopardy claim because it would have resulted in one of his convictions being vacated. As the petitioner seeking post-conviction relief, Cook had the burden of showing his double jeopardy claim was significant, obvious, and stronger than the issues counsel presented on appeal. *Bieghler*, 690 N.E.2d at 194.

[41] The Double Jeopardy Clause is applicable to the states through the Fourteenth Amendment. *Grinstead v. State*, 684 N.E.2d 482, 485 (Ind. 1997). The Clause protects defendants from multiple punishments for the same offense. *Id.* (quotation omitted). The test for defining "the same offense" is set forth in *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 182, 76 L. Ed. 306 (1932): "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." We look only to the relevant statutes in applying *Blockburger*, and not the factual elements in the charging information or the jury instructions. *Grinstead*, 684 N.E.2d at 486.

[42] In Cook's case, the versions of the governing statutes that were in effect at the time Cook committed the offenses required proof of at least one fact that the other did not. Specifically, the offense of Class A felony dealing in cocaine required proof that the defendant had manufactured, financed, delivered, or financed the delivery of cocaine, *see* Ind. Code § 35-48-4-1 (2001), while

conspiracy to commit dealing in cocaine did not. Conspiracy required proof of an agreement to commit a felony, *see* Ind. Code § 35-41-5-2 (1977), but dealing in cocaine did not. As a result, Cook's convictions do not violate the Double Jeopardy Clause. *See Grinstead*, 684 N.E.2d at 486 (convictions of murder and conspiracy to commit murder did not violate Double Jeopardy Clause).

[43] Turning to Cook's claim under the Indiana Constitution, article 1, section 14 provides: "No person shall be put in jeopardy twice for the same offense." At the time Cook committed his offenses, Indiana courts applied a two-part test for Indiana double jeopardy claims, asking if "'with respect to either the statutory elements of the challenged crimes or the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense.'" *Lee v. State*, 892 N.E.2d 1231, 1233 (Ind. 2008) (quoting *Richardson v. State*, 717 N.E.2d 32, 49 (Ind. 1999)).[4]

[44] The "statutory elements" test is substantially equivalent to the federal double jeopardy analysis set forth in *Blockburger*. *Lee*, 892 N.E.2d at 1233. Having already determined that Cook's convictions do not violate the *Blockburger* analysis, we turn to the "actual evidence" test. To show that two challenged offenses constitute the same offense under the actual evidence test, a defendant

[4] The Indiana Supreme Court overruled the *Richardson* standard in *Wadle v. State*, 151 N.E.3d 227 (Ind. 2020), but we consider the standard that was in effect at the time Cook committed his offenses.

must demonstrate a reasonable possibility that the evidentiary facts used by the factfinder to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense. *Spivey v. State*, 761 N.E.2d 831, 832 (Ind. 2002). We must identify the essential elements of each of the challenged crimes and evaluate the evidence from the jury's perspective, considering where relevant the jury instructions, argument of counsel, and other factors that may have guided the jury's determination. *Id.* The Indiana Supreme Court, in applying the *Richardson* same evidence test, had "not found a double jeopardy violation when the fact supporting a first charge could theoretically have served as the overt act of a conspiracy charge, but the jury was instructed on additional facts supporting an overt act." *Lee*, 892 N.E.2d at 1235-36.

[45] In the charging information, which the trial court read to the jury, the State alleged that Cook committed Class A felony dealing in cocaine by delivering cocaine in an amount over three grams. The State further alleged that Cook committed Class A felony conspiracy to commit dealing in cocaine by agreeing with Ricks and Brown to commit the felony, and he and/or his coconspirators committed one or more of the following overt acts: (1) Ricks called the undercover officer to arrange the deal; (2) Brown called Cook as a backup plan when an initial source of the cocaine failed to show up; and (3) the officer, Brown, and Ricks drove to Cook's residence, picked him up, and took him to Ricks' residence, where Cook and the officer carried out the transaction. The

court instructed the jury that the State had to prove "one or more" of the overt acts. Trial Tr. Ex. Vol. p. 59.

[46] During closing arguments, the prosecutor told the jury, "[A] lot of this testimony and evidence is going to go to both counts." Trial Tr. Vol. 2, p. 82. He nonetheless argued Cook committed Class A felony dealing in cocaine based on Officer Moore and Brown's testimony that Cook handed cocaine to Officer Moore. By contrast, the prosecutor stated that the overt acts necessary to prove Class A felony conspiracy to commit dealing in cocaine included Brown's testimony that he called Cook to set up the deal, as well as Brown traveling to Cook's house with Officer Moore, and, finally, Cook producing the cocaine for sale to Officer Moore.

[47] One of the facts supporting the first charge (Cook giving the cocaine to Officer Moore) could have also served as the overt act supporting the conspiracy charge, but the State presented evidence and argument on other potential overt acts, and the trial court's instructions authorized the jury to find any one of several bases for the overt act element. Under these circumstances, claiming that the jurors "latched on to exactly the same facts" is speculative at best. *Lee*, 892 N.E.2d at 1236. We conclude that if Cook's appellate counsel had raised a double jeopardy claim under the Indiana Constitution, the claim would have failed. For this reason, the post-conviction court did not err in rejecting Cook's claim of ineffective assistance of appellate counsel.

IV. The Post-Conviction Court's Discovery Decisions

[48] In a post-conviction proceeding, "[a]ll rules and statutes applicable in civil proceedings including pre-trial and discovery procedures are available to the parties . . . ." Ind. Post-Conviction Rule 1(5). However, post-conviction relief proceedings are a quasi-civil remedy for the presentation of errors unknown or unavailable at the time of trial or direct appeal. *Pannell*, 36 N.E.3d at 493. A second opportunity to discover the same evidence that was, or could have been, discovered prior to the original criminal trial will typically be precluded. *Id.*

A. Denial of Subpoenas

[49] Cook argues that the post-conviction court erred in rejecting his requested subpoenas for several witnesses. A post-conviction court may issue a subpoena requested by a pro se petitioner if: (1) the petitioner states the reasons a witness' testimony is required and the substance of the witness' testimony; and (2) the court determines that the testimony would be "relevant and probative." Ind. Post-Conviction Rule 1(9)(b). "Post-conviction proceedings are not designed to permit attacks on witness credibility, but rather to address issues demonstrably unavailable at trial and on direct appeal." *Rondeau v. State*, 48 N.E.3d 907, 915 (Ind. Ct. App. 2016), *trans. denied*.

[50] Cook claims the court should have approved his subpoena for Gary Brown, who was present for the drug transaction, pleaded guilty to conspiracy to deal in cocaine in connection with the transaction, and testified for the State at

Cook's trial. Cook argues Brown's testimony was needed at the post-conviction hearing "to testify to what agreement the State made with him." Appellant's Br. p. 24. But Brown testified at trial about his plea agreement, and the agreement was provided to the jury. The testimony and agreement demonstrate that Brown did not receive any specific benefit from the State in exchange for his testimony against Cook. Cook's attorney had ample opportunity to cross-examine Brown about his plea agreement.

[51] To the extent Cook intended to argue during the post-conviction hearing that Brown lied at trial, post-conviction proceedings are not a venue to relitigate a trial witness' credibility. Cook further argues, "[It's] possible Brown would've also recanted his original testimony." Appellant's Br. p. 24. Cook's speculation as to Brown's possible testimony does not meet Post-Conviction Rule 1(9)(b)'s requirement of demonstrating that a subpoena would produce relevant and probative evidence. Appellant's Br. p. 24.

[52] Next, Cook claims the post-conviction court should have allowed him to subpoena Detective Kauffman, so that he could have asked Kauffman about Brown's alleged history of false statements. Again, it is not appropriate in post-conviction proceedings to relitigate a trial witness' credibility. Such a claim amounts to an inappropriate attempt to challenge the jury's verdict and is not relevant to Brown's claims of ineffective assistance of counsel. The court did not abuse its discretion in denying these two subpoena requests.

B. Denial of Requests for Admission

[53] Cook claims the post-conviction court should not have barred his requests for admissions to the State and to Brown, arguing that the admissions would have shown that Brown "received a deal," Appellant's Br. p. 25, thereby casting doubt on Brown's truthfulness.

[54] Requests for admissions may be appropriate in post-conviction proceedings. However, a party may serve a request for admissions only on another party. Ind. Trial Rule 36(A). Brown was not a party to Cook's case, merely a witness. As a result, the post-conviction court did not abuse its discretion in denying Cook's request for admissions to Brown.

[55] Turning to the State, it appears Cook's purpose in seeking the admissions was to relitigate Brown's trial testimony that he did not receive any specific benefit from the State in exchange for his testimony against Cook. Such a purpose is irrelevant to Cook's claims of ineffective assistance of counsel. The post-conviction court did not abuse its discretion in denying Cook's request for admissions to the State.

C. Denial of Request for Production of Documents

[56] Cook claims the post-conviction court should not have denied his request to compel documents and other materials from the State, which he claims would have shown the State "failed to turn over material evidence" prior to trial. Appellant's Br. p. 26. We have already determined that Cook's freestanding

claim of prosecutorial misconduct is not cognizable in this post-conviction proceeding because it could have been raised on direct appeal. *See Myers v. State*, 33 N.E.3d 1077, 1115 (Ind. Ct. App. 2015) (claim of prosecutorial misconduct arising from alleged presentation of false evidence was procedurally barred because it could have been addressed on appeal), *trans. denied*. His request to compel is related to his procedurally defaulted prosecutorial misconduct claim, and as a result the request was not relevant to the issues properly presented in his post-conviction proceeding. The post-conviction court did not abuse its discretion in denying Cook's request to compel discovery materials.

Conclusion

[57] For the reasons stated above, we affirm the judgment of the post-conviction court.

[58] Affirmed.

Bailey, J. and Robb, J., concur.