MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Justin Brabson,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent.

December 20, 2021

Court of Appeals Case No. 21A-PC-1160

Appeal from the Hendricks Superior Court

The Honorable Mark A. Smith, Judge

Trial Court Cause No. 32D04-1812-PC-5

Bailey, Judge.

Case Summary

[1] Pro-se petitioner Justin Brabson ("Brabson") appeals the denial of his petition for post-conviction relief, which challenged his conviction for Murder, a felony.[1] We affirm.

Issues

[2] Brabson presents three issues for review:

I. Whether the post-conviction evidence established that the State withheld material exculpatory evidence at trial;

II. Whether Brabson was denied the effective assistance of trial counsel; and

III. Whether Brabson was denied the effective assistance of appellate counsel.

Facts and Procedural History

[3] The underlying facts were recited on direct appeal as follows:

> Brabson and his older brother, Christopher, lived together in an apartment in Brownsburg, Indiana. On June 9, 2016, Brabson shot his brother eleven times with a semi-automatic Beretta loaded with hollow point bullets. One shot struck Christopher's aorta. Other shots struck his fingers, forearm, elbow, and pelvic

[1] Ind. Code § 35-42-1-1.

> region. The fatal shot was execution-style to the back of Christopher's head, severing his brain stem.
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> Police were called to the scene and discovered Christopher's body on the kitchen floor. They began to search and found Brabson's Toyota Camry abandoned on the side of the road. In the Camry, officers found a card that read, "Defensive Shooting Concepts," receipts for ammunition, and a fully-loaded magazine that was consistent with a magazine for a Beretta. In the trunk, they found a silhouette from a shooting range with ninety-one shots in it, focusing on the heart and head areas. Police found Brabson at a nearby motel where he had registered under a different name.
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> A jury found Brabson guilty of murder, and Brabson stipulated to the firearm enhancement. The trial court sentenced Brabson to sixty-two years executed for his murder conviction, which was enhanced by ten years by the use of a firearm for an aggregate sentence of seventy-two years.

Brabson v. State, No. 32A05-1707-CR-1678, 2017 WL 10669185, slip op. at 1 (Ind. Ct. App. Jan. 23, 2018), *trans. denied*. Brabson appealed, challenging only the appropriateness of his sentence, which was affirmed. *Id.* at 2.

[4] On December 7, 2018, Brabson filed a pro-se petition for post-conviction relief. On the same day, the State Public Defender was appointed to represent Brabson. After investigation, the State Public Defender withdrew representation. On December 22, 2020, Brabson filed his amended petition for post-conviction relief, alleging prosecutorial misconduct and ineffective assistance of trial and appellate counsel. On May 17, 2021, a post-conviction

hearing was conducted. On May 20, 2021, the post-conviction court entered an order denying Brabson relief. Brabson now appeals.

Discussion and Decision

Standard of Review

[5] Post-conviction proceedings afford petitioners a limited opportunity to raise issues that were unavailable or unknown at trial and on direct appeal. *Wilkes v. State*, 984 N.E.2d 1236, 1240 (Ind. 2013). Post-conviction proceedings are civil in nature, and petitioners bear the burden of proving their grounds for relief by a preponderance of the evidence. *Id*. We accept the post-conviction court's findings of fact unless they are clearly erroneous, but we do not defer to its conclusions of law. *State v. Hollin*, 970 N.E.2d 147, 151 (Ind. 2012). We may not reweigh the evidence or assess the credibility of the witnesses. *Id*. at 150.

Alleged Brady Violation

[6] At the crime scene, the coroner removed a pocketknife from Christopher's front pants pocket, and it was photographed lying on a kitchen table. It was not transported along with the body to the autopsy, as was customary, nor was it collected as potential evidence. Rather, it was used by an investigator to cut drywall in the search for bullet casings. Brabson claims that this pocketknife was potential exculpatory evidence withheld by the State, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963).

[7] The state has an affirmative duty to disclose evidence favorable to a criminal defendant. *See Kyles v. Whitely*, 514 U.S. 419, 432, (1995) (citing *Brady*, 373 U.S. at 83). In *Brady*, the United States Supreme Court held: "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. To prevail on a claim that the prosecution failed to disclose exculpatory evidence, a defendant must establish: (1) that the prosecution suppressed evidence; (2) that the evidence was favorable to the defense; and (3) that the evidence was material to an issue at trial. *See Farris v. State*, 732 N.E.2d 230, 232-33 (Ind. Ct. App. 2000). Evidence is material only "'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Kyles*, 514 U.S. at 433-34 (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985) (opinion of Blackmun, J.)). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Farris*, 732 N.E.2d at 233.

[8] Some of the State's witnesses acknowledged that the pocketknife at issue was not handled in a routine manner. Detective Jennifer Barrett testified that the pocketknife "should have gone with the body" and she thought the task was "overlooked." (Tr. Vol. IV, pgs. 27, 29.) Crime scene investigator Tiffany Stewart opined, in hindsight, that she would have collected the pocketknife as potential evidence. One investigator recalled using the pocketknife to cut into drywall. Notwithstanding the irregularities, however, the existence of the

pocketknife was not kept secret from Brabson. The pocketknife was depicted in the State's photographs disclosed to the defense. Also, Christopher's father testified that Christopher habitually carried a clip-on pocketknife. Although Brabson now refers to the pocketknife as a weapon and obliquely suggests Christopher might have wielded it in an encounter with Brabson, causing him fear, Brabson specifically waived the defense of self-defense at the outset of trial. Accordingly, self-defense was not an issue at trial and thus the pocketknife was neither exculpatory nor material evidence. Brabson did not establish a *Brady* violation.

Effectiveness of Trial Counsel

[9] Effectiveness of counsel is a mixed question of law and fact. *Strickland v. Washington*, 466 U.S. 668, 698 (1984). We evaluate Sixth Amendment claims of ineffective assistance under the two-part test announced in *Strickland*. *Id.* To prevail on an ineffective assistance of counsel claim, a defendant must demonstrate both deficient performance and resulting prejudice. *Dobbins v. State*, 721 N.E.2d 867, 873 (Ind. 1999) (citing *Strickland*, 466 U.S. at 687). Deficient performance is that which falls below an objective standard of reasonableness. *Strickland*, 466 U.S. at 687; *see also Douglas v. State*, 663 N.E.2d 1153, 1154 (Ind. 1996). Prejudice exists when a claimant demonstrates that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *see also Cook v. State*, 675 N.E.2d 687, 692 (Ind.

1996). The two prongs of the *Strickland* test are separate and independent inquiries. *Strickland*, 466 U.S. at 697. Thus, "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice ... that course should be followed." *Id*.

[10] We "strongly presume" that counsel provided adequate assistance and exercised reasonable professional judgment in all significant decisions. *McCary v. State*, 761 N.E.2d 389, 392 (Ind. 2002). Counsel is to be afforded considerable discretion in the choice of strategy and tactics. *Timberlake v. State*, 753 N.E.2d 591, 603 (Ind. 2001). Counsel's conduct is assessed based upon the facts known at the time and not through hindsight. *State v. Moore*, 678 N.E.2d 1258, 1261 (Ind. 1997). We do not "second-guess" strategic decisions requiring reasonable professional judgment even if the strategy in hindsight did not serve the defendant's interests. *Id.* In sum, trial strategy is not subject to attack through an ineffective assistance of counsel claim, unless the strategy is so deficient or unreasonable as to fall outside the bounds of what is objectively reasonable. *Autrey v. State*, 700 N.E.2d 1140, 1141 (Ind. 1998).

[11] According to Brabson, his trial counsel performed deficiently by failing to: obtain co-counsel; make proper pretrial motions; call needed expert and lay witnesses; lodge appropriate evidentiary objections; and proffer relevant jury instructions. Brabson also faults his counsel for directing a witnesses' attention to a document indicating that Brabson was receiving unemployment benefits and for inaccurately suggesting, in closing argument, that the State had the burden of proving motive. We will address these contentions in turn.

[12] Pretrial Performance of Counsel. Brabson contends that his trial counsel was too inexperienced to adequately pursue a murder defense and had thus assured Brabson and Brabson's father that co-counsel would be hired. But Brabson elicited no evidence at the post-conviction hearing to support his claim that he was promised co-counsel; nor does he explain how the absence of co-counsel prejudiced his defense. A bald assertion without showing prejudice does not establish ineffectiveness. *Strickland*, 466 U.S. at 697.

[13] Brabson also asserts that his trial counsel should have secured documents from a mental health care provider to "help trial counsel investigate any medical issues [Brabson] was dealing with at the time." Appellant's Brief at 11. Again, however, Brabson fails to develop his bald assertion.

[14] Brabson claims that he asked trial counsel to request a change of venue, but trial counsel did not comply with the request. Indiana Rule of Criminal Procedure 12 provides in relevant part:

> In criminal actions and proceedings to enforce a statute defining an infraction, a motion for change of venue from the county shall be verified or accompanied by an affidavit signed by the criminal defendant or the prosecuting attorney setting forth facts in support of the constitutional or statutory basis or bases for the change.

Brabson has suggested that he was entitled to a change of venue from the county on account of publicity related to his role as an Uber driver. A defendant requesting a change of venue on such grounds must show "actual proof of community bias or prejudice." *Bauer v. State*, 456 N.E.2d 414, 417

(Ind. 1983). "Mere knowledge of the crime does not necessarily produce veniremen who cannot fairly judge the appellant, based upon the evidence adduced at trial." *Id.* Brabson has not produced any evidence, in post-conviction proceedings, to indicate that a motion for a change of venue from the county would have been granted, had trial counsel elected to so move.

[15] After Brabson's vehicle was found abandoned, police officers conducted a canine search of nearby weeds and discovered a semi-automatic handgun that was later linked to Christopher's death. Brabson appears convinced that his trial counsel, by a timely pretrial motion, could have successfully suppressed evidence of this handgun. Brabson points out, accurately, that the handgun was not recovered as a result of the execution of a search warrant targeted to weapons. But he fails to acknowledge that the handgun had been discarded. Abandoned property is subject to lawful seizure without a warrant. *Gooch v. State*, 834 N.E.2d 1052, 1053 (Ind. Ct. App. 2005), *trans. denied*. As such, counsel's omission of a motion to suppress was not deficient performance.

[16] As a final challenge to trial counsel's pretrial performance, Brabson claims that trial counsel should have "written a pre-trial motion for summary judgment/defects in the prosecution based on the errors committed during search and seizure." Appellant's Brief at 18. Brabson asserts that his grounds for this motion are that crime scene investigators violated his rights under the United States Constitution by moving Christopher's pocketknife, allowing a neighbor to linger at the crime scene, and permitting excessive comings and goings of officers. To the extent that Brabson is suggesting his counsel could

have made a summary judgment motion pursuant to Indiana Trial Rule 56 (which permits "a party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment" to move for judgment in his favor), this is not an avenue for relief in criminal prosecutions. To the extent that Brabson is suggesting his counsel should have filed a motion to dismiss under Indiana Code Section 35-34-1-4 (which sets forth grounds for dismissing an indictment or information), he fails to develop a cogent argument in this regard. Thus, any such claim is waived pursuant to Indiana Appellate Rule 46.

[17] Performance related to trial evidence. Brabson asserts that trial counsel failed to present appropriate witnesses. For example, he claims that "trial counsel should have provided a forensic pathologist to help verify the prosecution expert's testimony on how the shooting occurred" and "trial counsel should have called other family members, co-workers, friends from my church, experts, or other witnesses to establish in the jurors' minds that I am known to be a non-violent person." Appellant's Brief at 16. Brabson testified in his own defense; when he was cross-examined, Brabson personally corroborated the testimony of the pathologist who testified in the State's case-in-chief. That is, Brabson conceded that he fired thirteen shots and eleven of those struck his brother. Brabson, Brabson's father, and a family friend each testified that Christopher and Brabson had enjoyed a relationship that was not typically acrimonious. A clear picture emerged: although the brothers had physically fought on rare occasions, Brabson did not have a history of aggression but, for reasons known only to himself, Brabson ambushed Christopher in their shared kitchen and

emptied his recently purchased semi-automatic weapon. Brabson does not explain how a different outcome might have ensued at trial had counsel called additional witnesses.

[18] Brabson also faults trial counsel for his failure to object to State's Exhibits 252 and 253, photographs of a Huntington Bank ATM receipt that depict Brabson's withdrawal of $400.00 shortly before he killed Christopher and fled. The State contended that the funds withdrawal was evidence of Brabson's premeditation while Brabson contended that the withdrawal was made at that time because he owed $300.00 to Christopher as his share of the rent. Brabson now observes that there would have been no necessity for an explanation to the jury had the bank receipt been excluded.

[19] In order to prove ineffective assistance due to the failure to object, the petitioner must prove that an objection would have been sustained and that he was prejudiced thereby. *Middleton v. State*, 64 N.E.3d 895, 901 (Ind. Ct. App. 2016). Officers executing a search warrant upon one of Brabson's vehicles had taken the ATM receipt, although the search warrant did not include documents as items to be seized. The prosecutor elicited officer testimony that the omission of documents as an object of the search was an apparent oversight, inconsistent with the language of a different search warrant executed for other property searched in Brabson's case. Nonetheless, because the seizure was outside the parameters of the search warrant for that specific vehicle, an objection may well have been sustained. But we are not persuaded that Brabson was prejudiced by

the failure to object to a bank receipt, given his admission to shooting Christopher eleven times.

[20] With respect to trial counsel's failure to object to admission of an unredacted bank statement or police photographs taken of Brabson in his underwear, we reach a like conclusion. Brabson contends that his banking records did not show criminality, but a listed charge for services at Indy Counseling was confusing to the jury and suggestive of his having a mental illness. The photographs, which depicted a lack of physical injuries on Brabson's body, arguably were irrelevant because self-defense was not at issue. Had counsel objected, the trial court may have excluded some of these materials or may have permitted some redaction to bank records. That said, however, in light of the overwhelming evidence of Brabson's guilt, counsel's failure to object to such potentially confusing, embarrassing, or irrelevant materials does not undermine our confidence in the trial outcome.

[21] Brabson also takes issue with his trial counsel's decision to proffer into evidence a document showing that Brabson had been receiving unemployment benefits. In Brabson's view, "this document made it seem to the jury I was struggling to earn money, that I couldn't support myself, and that I was living off the government." Appellant's Brief at 25. Trial counsel did not direct the jury's attention to the fact that Brabson had received some unemployment benefits. Rather, counsel highlighted the fact that the document had not been seized, to support a challenge to the thoroughness of the police search. It is well-established that trial strategy is not subject to attack through an ineffective

assistance of counsel claim unless the strategy is so deficient or unreasonable as to fall below the objective standard of reasonableness. *Garrett v. State*, 602 N.E.2d 139, 142 (Ind. 1992). This is so even when "such choices may be subject to criticism or the choice ultimately prove detrimental to the defendant." *Id.* Brabson has not shown that his trial counsel's decision to use the unemployment document for illustrative purposes fell outside the objective standard of reasonableness.

[22] Jury Instructions. Defense counsel successfully requested that the trial court instruct the jury on reckless homicide. Brabson now argues that his trial counsel was ineffective because he secured the reckless homicide instruction rather than an involuntary manslaughter instruction.

[23] Indiana Code Section 35-42-1-5 provides: "A person who recklessly kills another human being commits reckless homicide, a Level 5 felony." Indiana Code Section 35-41-2-2(c) provides: "A person engages in conduct 'recklessly' if he engages in the conduct in plain, conscious, and unjustifiable disregard of harm that might result and the disregard involves a substantial deviation from acceptable standards of conduct." Brabson points to his testimony that he was attempting to pull a prank on his brother when he fired the first shot (entering Christopher's chest) and he concedes: "if a person is pulling a prank on someone with a firearm, this would be defined as criminal recklessness." Appellant's Brief at 20.

[24] Notwithstanding his apparent concession that a reckless homicide instruction was consistent with his version of events, Brabson claims that the evidence was more consistent with an involuntary manslaughter instruction. That said, he fails to develop a cogent argument as to his entitlement to an involuntary manslaughter instruction or defense counsel's alleged deficiency in this regard. And we are mindful that "a tactical decision not to tender a lesser included offense does not constitute ineffective assistance of counsel, even where the lesser included offense is inherently included in the greater offense." *Autrey v. State*, 700 N.E.2d 1140, 1141 (Ind. 1998).

[25] Finally, Brabson faults his trial counsel for failing to persuade the trial court that a proffered voluntary manslaughter instruction was appropriate. A person who knowingly or intentionally kills another human being while acting under sudden heat commits voluntary manslaughter. Ind. Code § 35-42-1-3. Sudden heat is a mitigating factor that the State must prove in addition to the elements of murder. *Suprenant v. State*, 925 N.E.2d 1280, 1283 (Ind. Ct. App. 2010), *trans. denied*. If there is no serious evidentiary dispute over sudden heat, it is error for a trial court to instruct a jury on voluntary manslaughter in addition to murder. *Id.* "Sudden heat" is characterized as anger, rage, resentment, or terror sufficient to obscure the reason of an ordinary person, preventing deliberation and premeditation, excluding malice, and rendering a person incapable of cool reflection. *Dearman v. State*, 743 N.E.2d 757, 760 (Ind. 2001). Anger alone is not sufficient to support an instruction on sudden heat. *Wilson v. State*, 697 N.E.2d 466, 474 (Ind. 1998).

[26] Brabson asserts that his trial counsel should have elicited evidence that he and Christopher had physically fought in the past, to support a finding of sudden heat. Some evidence of one such incident was presented at trial – indeed, Brabson testified that the brothers had an altercation at their apartment while they were under the influence of alcohol. But this took place several months before Christopher was killed. Had defense counsel made additional attempts to highlight that altercation, the remote incident would not have given rise to a serious evidentiary dispute as to whether Brabson committed voluntary manslaughter and not murder. Brabson has not established deficient performance of trial counsel with respect to jury instruction.

[27] Closing Argument. In his closing argument, defense counsel stated: "They can't answer the why. They don't have the factual answer of why this act happened. … They have to prove to you the why." (Tr. Vol. V, pgs. 157-59.) This prompted the trial court to advise defense counsel that the State did not bear the burden of proving a motive, and the prosecutor was permitted to address the jury for the limited purpose of "cleaning up" the false impression. (*Id.* at 178.) Brabson now argues: "the fact that the prosecution is allowed to address the jury three times and defense counsel once during closing arguments left the jurors with a positive impression of the prosecution and a negative impression of the defense." Appellant's Brief at 31.

[28] To convict Brabson of murder, as charged, the State was required to prove beyond a reasonable doubt that he knowingly or intentionally killed Christopher. *See* I. C. § 35-42-1-1. The State was not required, as defense

counsel suggested, to prove a motive, and this created a necessity of correction. This was not an ideal presentation of closing arguments. That said, however, "[a] Petitioner is not entitled to a perfect trial, but is entitled to a fair trial, free of errors so egregious that they, in all probability, caused the conviction." *Oliver v. State*, 843 N.E.2d 581, 586 (Ind. Ct. App. 2006), *trans. denied*. We are not persuaded that defense counsel's misstatement in closing argument, to which the trial court appropriately responded, likely changed the outcome of the trial.

[29] In sum, trial counsel's efforts and strategy, although they did not ultimately achieve the result desired by Brabson, were not so unreasonable as to constitute ineffective assistance of counsel. *See Badelle v. State*, 754 N.E.2d 510, 539 (Ind. Ct. App. 2001) (deciding in relevant part that, when trial counsel's efforts were "more than adequate" to support a chosen defense, counsel's decision not to seek out additional witnesses was a judgment call within the wide range of reasonable assistance), *trans. denied*.

Effectiveness of Appellate Counsel

[30] A defendant is entitled to the effective assistance of appellate counsel. *Stevens v. State*, 770 N.E.2d 739, 760 (Ind. 2002). The two-pronged standard for evaluating the assistance of trial counsel first enunciated in *Strickland* is applicable to appellate counsel ineffective assistance claims. *Bieghler v. State*, 690 N.E.2d 188, 192 (Ind. 1997). There are three basic categories of alleged appellate ineffectiveness: (1) denying access to an appeal, (2) waiver of issues, and (3) failure to present issues well. *Id*. at 193-95. Here, Brabson argues that

counsel should have presented arguments to overturn his conviction, implicating the second category. He further argues that appellate counsel did not adequately present the sentencing argument, thus implicating the third category.

[31] Our supreme court has adopted the following test to evaluate the performance prong of appellate counsel's performance: (1) whether the unraised issues are significant and obvious from the record; and (2) whether the unraised issues are "clearly stronger" than the raised issues. *Bieghler*, 690 N.E.2d at 194. If that analysis demonstrates deficient performance by counsel, the court then examines whether "the issues which ... appellate counsel failed to raise, would have been clearly more likely to result in reversal or an order for a new trial." *Id.* (citation omitted).

[32] Brabson first observes that appellate counsel submitted only a ten-page brief. Although he criticizes the brevity, he does not claim that insufficient evidence supports his conviction nor does he develop another issue that appellate counsel might have successfully raised to challenge his conviction. Brabson makes several bald assertions of pretrial, trial, and sentencing error. For example, he argues that State's Exhibit 252, an ATM receipt, was unlawfully seized and "there is a reasonable probability had appellate counsel mentioned this error, the result of the appeal would have been different." Appellant's Brief at 33. He also argues that crime scene investigators denied him due process by their handling of Christopher's pocketknife and permitting a neighbor reentry to the crime scene. Finally, he contends that "appellate counsel should have argued

the sentencing enhancement can be seen as cruel, unusual, and/or vindictive and created improper consecutive sentences."[2] *Id.* at 40. In short, such bald assertions unaccompanied by cogent argument fail to show that appellate counsel performed deficiently by waiving an issue that was significant and obvious from the record. *See* Ind. Appellate R. 46.

[33] Brabson also asserts that appellate counsel was ineffective for her failure to challenge trial counsel's performance. But had appellate counsel done so, this would have prevented a later *Strickland* challenge in post-conviction proceedings. *See Woods v. State*, 701 N.E.2d 1208, 1210 (Ind. 1998) ("If ineffective assistance of trial counsel is raised on direct appeal, it will be foreclosed in postconviction proceedings."). Ineffectiveness issues commonly "require additional record development to assess either the competence of the attorney or the prejudice resulting from the claimed error." *Id.* at 1212. Thus, raising a direct appeal issue of ineffectiveness of trial counsel is not generally a preferable strategy. We discern no reason why it would be so in this case.

[34] Appellate counsel raised a single issue, specifically, that Brabson's sentence is inappropriate under Indiana Appellate Rule 7(B). Indiana Appellate Rule 7(B) provides: "The Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is

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[2] We observe that a firearm enhancement is not a consecutive sentence. *See Cooper v. State*, 940 N.E.2d 1210, 1215 (Ind. Ct. App. 2011) (finding a sentencing enhancement to be cumulative punishment rather than a penalty for a separate offense), *trans. denied*.

inappropriate in light of the nature of the offense and the character of the offender." Brabson contends that his appellate counsel should have presented a more vigorous argument to secure a sentence reduction. Claims of inadequate presentation of issues are almost always unsuccessful, for the reasons explained by our Indiana Supreme Court in *Bieghler*:

> First, these claims essentially require the reviewing tribunal to review specific issues it has already adjudicated to determine whether the new record citations, case references, or arguments would have had any marginal effect on their previous decision. Thus, this kind of ineffectiveness claim, as compared to the others mentioned, most implicates concerns of finality, judicial economy, and repose while least affecting assurance of a valid conviction.
>
> Second, an Indiana appellate court is not limited in its review of issues to the facts and cases cited and arguments made by the appellant's counsel. We commonly review relevant portions of the record, perform separate legal research, and often decide cases based on legal arguments and reasoning not advanced by either party. *See, e.g., Gregory-Bey v. State*, 669 N.E.2d 154, 158 (Ind. 1996) (finding potential double jeopardy issue not addressed by either party and ordering a remand). While impressive appellate advocacy can influence the decisions appellate judges make and does make our task easier, a less than top notch performance does not necessarily prevent us from appreciating the full measure of an appellants['] claim, *see, e.g., Ingram v. State*, 508 N.E.2d 805, 808 (Ind. 1987) (while brief was not "of the highest quality," it "sufficiently enabled the court to reach the issues"), or amount to a "breakdown in the adversarial process that our system counts on to produce just results," *Strickland*, 466 U.S. at 696, 104 S. Ct. at 2069.

690 N.E.2d at 195.

[35] As to the nature of Brabson's offense, appellate counsel acknowledged its gravity but argued that there was nothing additionally remarkable about the offense that would militate toward a near-maximum sentence. As for Brabson's character, appellate counsel emphasized Brabson's complete lack of criminal history and his mental health diagnosis of an adjustment disorder with mixed anxiety and a depressed mood. It is unclear what, if any, additional mitigating evidence was available to appellate counsel to strengthen her argument.

[36] And this Court could not ignore the evidence of record. In affirming the seventy-two-year sentence, the Court explained its holding as follows:

> The nature of Brabson's offense warrants an enhanced sentence for a number of reasons:
>
> First, he shot and killed his brother without provocation.
>
> Second, he shot his brother eleven times, the last of which was execution-style to the back of his brother's head.
>
> Third, he used hollow point bullets which cause maximum injury.
>
> Fourth, he practiced shooting by firing numerous shots into the head and heart of a cut-out human target on the day before he killed his brother.
>
> Finally, he fled the murder scene, knowing that he had killed his brother.

> Similarly, Brabson's character supports the imposition of an enhanced sentence. Mental health experts testified that he was fully aware of his actions, did not exhibit any mental illness that would impair his culpability, and was apathetic about having killed his brother. At no point, did Brabson apologize for having killed his brother.

Brabson, slip op. at 1. Brabson has not shown that appellate counsel was ineffective for failure to adequately present an issue raised.

Conclusion

[37] Brabson has not shown a *Brady* violation. Brabson has not established that he was denied effective assistance of trial or appellate counsel.

[38] Affirmed.

Mathias, J., and Altice, J., concur.