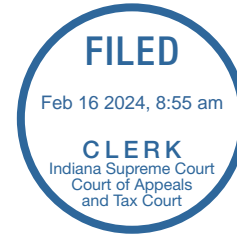


# MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision is not binding precedent for any court and may be cited only for persuasive value or to establish res judicata, collateral estoppel, or the law of the case.



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# IN THE COURT OF APPEALS OF INDIANA

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Hassan Aljarah,  
*Appellant-Petitioner*

v.

State of Indiana,  
*Appellee-Plaintiff.*

February 16, 2024

Court of Appeals Case No.  
22A-PC-2077

Appeal from the Elkhart Circuit  
Court

The Honorable Teresa L. Cataldo,  
Special Judge

Trial Court Cause No.  
20C01-1503-PC-14

**Memorandum Decision by Judge Pyle**

Judges Vaidik and Mathias concur.

**Pyle, Judge.**

## **Statement of the Case**

[1] Hassan Aljarah (“Aljarah”) appeals the post-conviction court’s denial of his petition for post-conviction relief. Aljarah argues that the post-conviction court erred by denying his claims of ineffective assistance of trial counsel.

Concluding that Aljarah has failed to meet his burden of showing that the post-conviction court erred, we affirm the post-conviction court’s judgment.

[2] We affirm.

## **Issue**

Whether the post-conviction court erred by denying post-conviction relief to Aljarah.

## **Facts**

[3] Aljarah was born in Iraq, and his native language is Arabic. Aljarah moved to the United States in 1996 or 1997. Abdulhussain Alfartusi (“Alfartusi”) was also born in Iraq, and his native language is Arabic. Alfartusi moved to the United States in 1997. Aljarah and Alfartusi had once seen each other in a refugee camp before they both had moved to the United States. Aljarah and Alfartusi met again in 2009 and then got to know each other socially.

[4] The relevant facts of Aljarah’s underlying offense, as set forth by this Court in Aljarah’s direct appeal, are as follows:

On November 3, 2009, Aljarah and Alfartusi became involved in an argument that spanned several phone calls. Eventually, the two met in the parking lot of a nearby Meijer store. Alfartusi stood outside while his family shopped inside the store. When Aljarah arrived, he drove up to Alfartusi and told him to come around the side of the building. As Alfartusi approached the rendezvous spot, Aljarah was standing outside his pickup truck with the driver's door open in front of him and the window down.

When he was about fifty feet away, Alfartusi asked Aljarah what he wanted, and Aljarah said nothing. Alfartusi noticed a gun in Aljarah's hand, and in a split second, Aljarah placed his gun on his open truck window and shot Alfartusi.

As Alfartusi lay in the parking lot, Aljarah drove over to him, got out of his truck, and said, "I told you I kill you. I kill you. Is good for you now." Tr. at 110-11. Surveillance video showed Aljarah's truck as it sped out of the parking lot. Police arrived shortly thereafter, and Alfartusi identified Aljarah as his shooter. Alfartusi sustained serious wounds to his neck and back, resulting in the loss of use of his legs and confinement to a nursing home.

*Aljarah v. State*, No. 20A03-1111-CR-541, at \*1 (mem.) (Ind. Ct. App. June 12, 2012). When an officer arrived at the scene, he noticed a knife on the ground near Alfartusi's body. The police interviewed Aljarah, and that interview was conducted in English. The police officer asked Aljarah if he wanted to have an interpreter, and Aljarah declined the offer. During that interview, Aljarah told the police that he had not been at the Meijer and had not been involved in the shooting. Instead, Aljarah claimed that he had been at a friend's house.

- [5] The State charged Aljarah with class A felony attempted murder in November 2009. Thereafter, Aljarah, by counsel, filed a motion to reduce his bond. During the scheduled February 2010 bond hearing, Aljarah moved to continue the hearing so that he could have an Arabic interpreter present. The trial court then provided an Arabic interpreter for Aljarah during a hearing the subsequent week. However, during the bond reduction hearing in April 2010, Aljarah informed the trial court that he wanted to proceed without the interpreter and that he “underst[oo]d enough English for the bond reduction [hearing].” (Direct Appeal App. Vol. 1 at 8). The trial court denied Aljarah’s motion to reduce his bond.
- [6] In August 2010, Aljarah filed a motion for leave to file a belated notice of alibi, and the trial court held a hearing on his motion. During the hearing, Aljarah informed the trial court that he needed an interpreter. The trial court continued the hearing until a few days later. During that later hearing, the trial court used the Language Line Translator provided by the Indiana Supreme Court to provide an Arabic interpreter. The trial court granted Aljarah’s request to file a belated notice of alibi.
- [7] In July 2011, Aljarah’s counsel withdrew, and the trial court appointed public defender Jeffrey Majerek (“Trial Counsel Majerek”) to represent Aljarah. Trial Counsel Majerek represented Aljarah during the remaining pre-trial proceedings, jury trial, and sentencing hearing.

[8] Trial Counsel Majerek had at least twelve pre-trial meetings with Aljarah at the jail. Aljarah repeatedly told Trial Counsel Majerek that he had not been at the Meijer and had not been involved in the shooting. During about six of these jail meetings, Trial Counsel Majerek brought along Clyde Brown (“Investigator Brown”), who was a private investigator with the public defender’s office. During Trial Counsel Majerek’s and Investigator Brown’s meetings with Aljarah, Aljarah spoke English, and neither counsel nor the investigator had any difficulty communicating with Aljarah. Aljarah gave Investigator Brown the name of an alibi witness, but Investigator Brown’s investigation of that alibi revealed that it was not credible. When Investigator Brown informed Aljarah of the issue with the alibi, Aljarah gave the investigator an alternative alibi. Investigator Brown’s investigation of that alibi also revealed that it was not credible. Additionally, Trial Counsel Majerek and Investigator Brown showed Aljarah the Meijer surveillance video, which showed Aljarah’s distinctive white truck driving away from the scene. Nevertheless, Aljarah insisted that he had not been at the scene and had not been involved in the crime.

[9] In October 2011, the trial court held a two-day jury trial. The trial court provided and swore in Wade Soloman (“Trial Interpreter”) as the trial interpreter for Aljarah.<sup>1</sup> Trial Interpreter had been born in Iraq, and his native language is Arabic. Trial Interpreter moved to the United States in 1994. Trial Interpreter translated for the United States military in Iraq from 2004 to 2007.

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<sup>1</sup> At the time of the trial, Trial Interpreter went by the name of Huwaidy Saleh Alsaadon.

During that time, he translated from Arabic to English and from English to Arabic. The trial was the first time Trial Interpreter had interpreted for a trial. At the time of the trial, Trial Interpreter had not been certified by Indiana as a court interpreter.

[10] The trial court had Aljarah and Trial Interpreter confirm that they were able to communicate with and understand each other. The trial court also had Aljarah confirm that he could understand the trial court through the use of the interpreter. Additionally, the trial court instructed Aljarah that if there was something that he did not understand during the trial, then he should raise his hand and notify his counsel or the court. The trial court told Aljarah that the court would assume that Aljarah understood what was occurring during the trial proceedings unless he stopped the proceedings to let the court know otherwise, and Aljarah agreed. The trial court instructed Trial Interpreter to interpret everything that was said for Aljarah.

[11] Trial Counsel Majerek then asked Aljarah some questions about his ability to understand English. Specifically, he asked Aljarah whether he had understood what had been said in the courtroom that morning, and Aljarah agreed that he had understood. Trial Counsel Majerek also established on the record that he and Investigator Brown had met several times with Aljarah at the jail and that they had communicated in English during those meetings. Trial Counsel Majerek also had Aljarah confirm that they had been able to communicate in English and that Aljarah had asked Trial Counsel Majerek about any meaning of something that he had not understood, such as the word exculpatory. Trial

Counsel Majerek further instructed Aljarah to ask for assistance if he did not understand something during the trial, and Aljarah agreed to do so.

- [12] Aljarah’s defense at trial was that the State would be unable to prove the requisite specific intent to kill beyond a reasonable doubt. Trial Counsel Majerek did not raise self-defense as a defense because Aljarah had insisted that he had been neither at the scene nor involved in the shooting.
- [13] During the trial, Aljarah’s ex-girlfriend testified that she had been with Aljarah when he had been arguing on the phone with Alfartusi and that “she had never before seen [Aljarah] display such anger.” *Aljarah*, No. 20A03-1111-CR-541 at \*1. Alfartusi testified to the facts of the offense as set forth above. Alfartusi also testified that when he had seen Aljarah with a gun, he had pulled out his fishing knife and opened it.
- [14] “Because [Alfartusi’s] native language is Arabic and he could not read or write in English, his testimony was difficult to understand.” *Id.* “As a result, the trial court had to ask repeatedly for clarification.” *Id.* During Alfartusi’s cross-examination, he testified regarding the argument that he and Aljarah had had. Trial Counsel Majerek asked Alfartusi about the reason for the argument, and Alfartusi responded, “[Aljarah] sometime fight with (indiscernible) his friend, and I don’t bring gun, you know, (indiscernible) and kill him too. (indiscernible) fight with him one time.” (Direct Appeal Tr. Vol.1 at 116). The trial court stated that Alfartusi’s response needed clarification, and the trial court instructed Alfartusi to repeat his answer and speak slower so that

everyone would understand him. Alfartusi stated, “I say this a problem before him with your friend.” (Direct Appeal Tr. Vol.1 at 116). The trial court then asked, “There was a problem before with [Aljarah] and his friend[,]” and Alfartusi responded, “Yeah, him. And he tried to kill him too.” (Direct Appeal Tr. Vol.1 at 116-17).

[15] The trial court had counsel for both parties approach the bench, and “an off-the-record discussion was held.” (Direct Appeal Tr. Vol.1 at 117). Thereafter, the trial court stated that defense counsel had raised an objection that “the answer was not responsive to the question” and that the State had agreed. (Direct Appeal Tr. Vol.1 at 117). The trial court sustained the objection and informed the jury that “[t]here [had been] an issue with respect to understanding” and that Alfartusi’s response would be “stricken from the record.” (Direct Appeal Tr. Vol.1 at 117). The trial court then admonished the jury to “disregard the answer to the extent they understood any of it given by the witness.” (Direct Appeal Tr. Vol. 1 at 117).

[16] The jury convicted Aljarah as charged. During Aljarah’s sentencing hearing, Trial Interpreter also served as the interpreter for Aljarah. At the beginning of the sentencing hearing, Aljarah confirmed that he had had an interpreter during his jury trial, that the trial court had asked him “many times” whether he had understood the proceedings, and that each time Aljarah had told the trial court that he had understood. (Direct Appeal Tr. Vol. 2 at 41). Aljarah made his sentencing statement of allocution in English without the use of the interpreter. The trial court specifically noted that “[t]he record should reflect that [Aljarah]



[had] made his allocution statement without the benefit of the translator” and that Aljarah had “stated it clearly and concisely in English, clearly understood by the Court what he [had] said.” (Direct Appeal Tr. Vol. 2 at 59). At the conclusion of the sentencing hearing, the trial court imposed a sentence of forty-four (44) years to be served at the Indiana Department of Correction.

[17] Thereafter, Aljarah filed a direct appeal. He argued that the trial court had erred in its handling of Alfartusi’s testimony, which he argued had equated to testimony regarding a prior bad act under Indiana Evidence Rule 404(b). Aljarah also argued that the trial court had abused its discretion by failing to declare a mistrial following Alfartusi’s testimony. Our Court held that Aljarah had waived his argument regarding Rule 404(b) because he had not objected on that basis at trial. *Aljarah*, No. 20A03-1111-CR-541 at \*2. Additionally, we held that Aljarah had waived his mistrial argument because the record did not indicate that he had requested a mistrial and that he had failed to show any error, fundamental or otherwise, in the trial court’s handling of Alfartusi’s testimony. *Id.* at \*3-4. Accordingly, we affirmed Aljarah’s conviction.

[18] Aljarah initially filed a pro se petition for post-conviction relief in March 2015 but then withdrew it in 2016. Subsequently, in December 2019, Aljarah, by counsel, refiled his petition for post-conviction relief. In his petition, Aljarah alleged that his trial counsel had rendered ineffective assistance of counsel by failing to: (1) secure an interpreter for Aljarah to communicate with Trial Counsel Majerek; (2) secure a competent and certified interpreter for the trial; (3) request an interpreter for the victim witness’ trial testimony; (4) allow

Aljarah to testify; (5) request a jury instruction on self-defense; and (6) request a jury instruction on battery as a lesser-included offense.<sup>2</sup>

[19] The post-conviction court held two days of post-conviction hearings in February 2022. The post-conviction court provided Aljarah with an Arabic interpreter for the post-conviction hearings (“Post-Conviction Interpreter”). The post-conviction court verified that Aljarah understood Post-Conviction Interpreter. On the first day of hearings, when the post-conviction court asked Post-Conviction Interpreter to interpret the administration of the oath, Aljarah responded in English and without having the words translated. During the post-conviction hearing, Aljarah gave some of his testimony in English and answered questions without the need of translation from the post-conviction interpreter.

[20] During the post-conviction hearing, Aljarah testified on his own behalf. He also presented four other witnesses, including Trial Counsel Majerek; Investigator Brown; Trial Interpreter; and Enrica Ardemagni (“Ardemagni”). Aljarah offered into evidence the record from his direct appeal,<sup>3</sup> an audio recording of his jury trial, the CV for Ardemagni, and the 2019 Language Access Plan for the Indiana Judicial Branch (“Language Access Plan”). The

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<sup>2</sup> In Aljarah’s post-conviction petition, he also asserted that his trial counsel had rendered ineffective assistance by making an improper argument during closing argument. He does not, however, raise this claim in this post-conviction appeal.

<sup>3</sup> This direct appeal record included the trial transcript, appendix volumes, exhibit volume, all appellate briefs, and his presentence investigation report.

Language Access Plan explained that Indiana had “created a Court Interpreter Certification Program” in 2002. (Ex. Vol. 1 at 40).

[21] Aljarah called Ardemangi as an expert witness. Ardemangi, who is a certified court interpreter in the Spanish language and had been on the advisory committee for the Language Access Plan, testified regarding the process for becoming a certified court interpreter in Indiana. Ardemangi acknowledged that it was “not mandatory” for Indiana courts to use certified interpreters but that it was a “best practice.” (Tr. Vol. 2 at 74). The Language Access Plan also provided that there was “no requirement that only certified . . . interpreters must be used in all court proceedings” but that the Indiana Supreme Court “strongly encourage[d] trial courts, as a best practice, to use certified interpreters[.]” (Ex. Vol. 1 at 48). Ardemangi also testified that it was against the “best practices” for an interpreter to interpret during a trial for multiple days or for longer than a two-hour time span. (Tr. Vol. 2 at 78). Ardemangi, however, acknowledged that the decision regarding the use of an interpreter rested with the trial judge, not the attorney. Ardemangi had not reviewed the transcript from Aljarah’s trial, and she acknowledged that she had no idea whether the interpretation in Aljarah’s trial had been done correctly.

[22] During the post-conviction hearing, Aljarah testified that he had had difficulty communicating with Trial Counsel Majerek prior to trial. Aljarah testified that he had asked counsel to get an interpreter but that counsel had refused. Aljarah testified that Trial Counsel Majerek had met with him at the jail on only five occasions for a limited time period. Additionally, Aljarah testified that he had

given names of alibi witnesses to Trial Counsel Majerek. Aljarah acknowledged that his defense, prior to and at trial, was that he had not been at the Meijer and that he had not shot Alfartusi. However, Aljarah asserted that, after he had heard Alfartusi testify during trial, he had told Trial Counsel Majerek that he had been at the Meijer and that he had shot Alfartusi. Aljarah testified that he had wanted to provide self-defense testimony that Alfartusi had come at him with a knife. According to Aljarah, Trial Counsel Majerek had told Aljarah that he needed to stay with his story that he had not been at the crime scene. Additionally, Aljarah claimed that Trial Counsel Majerek had refused to let Aljarah testify and had told him that either Trial Counsel Majerek or the trial court would put duct tape on his mouth if he tried to testify. Furthermore, Aljarah testified that he had told Trial Interpreter, during the trial, that he had difficulty understanding the interpreter.

[23] Aljarah’s post-conviction counsel questioned Trial Counsel Majerek and Investigator Brown about Aljarah’s claims of ineffective assistance of counsel. In regard to Aljarah’s claim based on the failure to secure an interpreter for Aljarah to communicate with counsel, Trial Counsel Majerek testified that he and Aljarah had had more than a dozen pre-trial meetings at the jail and that Investigator Brown had accompanied Trial Counsel Majerek to the jail for six of those meetings. Trial Counsel Majerek testified that he “never” had any problems communicating and conversing with Aljarah. (Tr. Vol. 2 at 185). Additionally, Trial Counsel Majerek testified that he and Aljarah “used to joke about things.” (Tr. Vol. 2 at 171). Investigator Brown also testified that

Aljarah had “spoke[n] good English” and had “understood everything” that the investigator and trial counsel had said. (Tr. Vol. 2 at 141). Investigator Brown further testified that “[n]ever, during any of our meetings, did [Aljarah] ever say *I don’t understand what you’re saying.*” (Tr. Vol. 2 at 141-42) (emphasis in original). Investigator Brown also explained that Aljarah had been involved in the trial strategy, had asked questions, and had given names of potential alibi witnesses to the investigator.

[24] Additionally, Trial Counsel Majerek testified about the defense strategy for Aljarah’s trial. He explained that there had been difficulty with that strategy because Aljarah had asserted that he had not been at the crime scene, had not shot at Alfartusi, and that his truck had not been the truck depicted in the Meijer surveillance video. Trial Counsel Majerek testified that, despite the evidence that showed that Aljarah had been at the scene, Aljarah’s denials had “never changed” and had continued “right up to the end[.]” (Tr. Vol. 2 at 159). Trial Counsel Majerek also testified that Aljarah had “denied it throughout” and had “had alibis, which kept changing when they [had fallen] apart.” (Tr. Vol. 2 at 159). Trial Counsel Majerek and Investigator Brown both testified that Aljarah had given them multiple alibis, but they then had discovered that the alibis were not credible. In addition, Trial Counsel Majerek testified that Aljarah’s assertion that he had not been present at the scene and had not been involved in the shooting had precluded counsel from asserting a claim of self-defense. Trial counsel explained that, as a result, the trial strategy was to argue

that there was no evidence that Aljarah had the specific intent to kill and that the State could not prove its case beyond a reasonable doubt.

[25] Investigator Brown also testified that the defense strategy was “pretty limited because [the State] had a pretty solid case against [Aljarah].” (Tr. Vol. 2 at 138). Investigator Brown testified that he and Trial Counsel Majerek had reviewed the video from the Meijer surveillance camera and had explained to Aljarah how the video, which showed Aljarah’s distinctive pickup truck, had placed him at the scene. Investigator Brown testified that the “biggest problem” for the defense strategy was that Aljarah “absolutely denied being there” at the scene of the crime. (Tr. Vol. 2 at 141). Aljarah had been “adamant that he was never there” and had asserted that he “had no participation in it[.]” (Tr. Vol. 2 at 141).

[26] Aljarah’s post-conviction counsel questioned Trial Counsel Majerek about Aljarah’s claim that counsel had failed to secure a competent and certified interpreter for the trial. Trial Counsel Majerek testified that he had not been involved in obtaining Trial Interpreter as the interpreter for trial. Trial Counsel Majerek could not recall if he had known that Trial Interpreter had not been certified at the time of trial. Trial Counsel Majerek testified that, nevertheless, his understanding was that it was not mandatory for an interpreter to be certified. Additionally, Trial Counsel Majerek testified that the trial court had gone through all the same questioning of Trial Interpreter as the court usually did with certified interpreters and that the trial court had verified that Trial Interpreter and Aljarah could communicate and understand each other. Trial

Counsel Majerek also testified that Aljarah had never told him during trial that he did not understand the proceedings. (Tr. Vol. 2 at 194).

[27] Post-conviction counsel asked Trial Counsel Majerek if he had been concerned about Trial Interpreter's ability to interpret when Trial Interpreter had told the trial court that Aljarah's trial was the first time he served as a trial interpreter. Trial Counsel Majerek stated that he was not concerned and that it "[h]as to be a first time every time for somebody[.]" (Tr. Vol. 2 at 185). Trial Counsel Majerek further stated that Aljarah and Trial Interpreter "seemed to communicate well in Arabic" and that had been counsel's "main concern at the time." (Tr. Vol. 2 at 185).

[28] Trial Interpreter testified that he had sat at the table with Aljarah during Aljarah's trial, that he had been able to communicate with Aljarah, and that he had interpreted for Aljarah to the best of his ability. Trial Interpreter testified that he did not recall Aljarah ever saying that he did not understand the interpretation of the proceedings. Trial Interpreter acknowledged that, at times during the trial, there may have been a word in English that had multiple Arabic words for it.

[29] Furthermore, Trial Counsel Majerek disputed Aljarah's assertion that counsel had refused to allow Aljarah to testify. Trial Counsel Majerek denied that he had told Aljarah that he could not testify or that someone would put duct tape on his mouth if he had tried to testify. Trial Counsel Majerek also testified that Aljarah had never told him during trial that he had changed his story to admit

that he had actually been at the crime scene and had shot Alfartusi. Trial Counsel Majerek explained that his “standard practice” was to advise clients that the decision to testify was their own decision, and Investigator Brown confirmed Trial Counsel Majerek’s procedure for discussing a defendant’s decision to testify. (Tr. Vol. 2 at 172). Trial Counsel Majerek testified that it had been Aljarah’s “choice” not to testify at trial. (Tr. Vol. 2 at 169).

[30] In regard to Aljarah’s claim that trial counsel had rendered ineffective assistance by failing to request jury instructions on battery and self-defense, Trial Counsel Majerek testified that he would not have requested such instructions because Aljarah had “stuck” to his assertion that he had not been at the crime scene. (Tr. Vol. 2 at 170). Additionally, Trial Counsel Majerek testified that he did not request a self-defense instruction because no witnesses had testified about self-defense and because Aljarah had decided not to testify. When post-conviction counsel asked Trial Counsel Majerek why he had had questioned some witnesses about the existence of a knife found close to Alfartusi on the ground, Trial Counsel Majerek explained that he had questioned witnesses about the presence of the knife even though there was no self-defense testimony because the insertion of the evidence about the knife would have “implanted in the mind of the jury that . . . [Alfartusi was] a bad guy . . . [and that Alfartusi] was up to no good[.]” (Tr. Vol. 2 at 169). Trial Counsel Majerek testified that he had tried to “paint [Alfartusi] as a bad guy” so that “maybe it would be easier for the jury to go with the theory that . . . [the State] hadn’t proven [its] case[.]” (Tr. Vol. 2 at 180).



[31] In August 2022, the post-conviction court issued a detailed, twenty-one page order denying post-conviction relief to Aljarah. The post-conviction court concluded that Aljarah had failed to prove his claims of ineffective assistance of trial counsel and summarized its rulings on Aljarah’s claims as follows:

62. In all, [Aljarah] has presented his case alleging that his trial counsel was ineffective due to a language barrier which made it impossible for him to adequately assist counsel in his defense or to have a fair trial. The evidence before the Court does not support this conclusion and the law does not demand it.

[Aljarah] also complains that his trial counsel’s decisions were contrary to [Aljarah’s] wishes, however the testimony supports that counsel’s strategy comported with the evidence and that even if it was not recommended that [Aljarah] testify at trial, counsel never forbade it. Further, contrary to [Aljarah’s] contention, the evidence at trial did not support a lesser[-]included offense instruction or a self[-]defense instruction based on the specific circumstances and counsel’s conversations with [Aljarah] up to and during trial. . . .

(App. Vol. 3 at 241-42).

[32] Aljarah now appeals.

## **Decision**

[33] Aljarah argues that the post-conviction court erred by denying him post-conviction relief on his claims of ineffective assistance of trial counsel. We disagree.

[34] “[P]ost-conviction proceedings do not grant a petitioner a ‘super-appeal’ but are limited to those issues available under the Indiana Post-Conviction Rules.”

*Shepherd v. State*, 924 N.E.2d 1274, 1280 (Ind. Ct. App. 2010), *trans. denied*. “In post-conviction proceedings, the petitioner bears the burden of establishing his claims by a preponderance of the evidence.” *Isom v. State*, 170 N.E.3d 623, 632 (Ind. 2021), *reh’g denied*. “Where, as here, the petitioner is appealing from a negative judgment denying post-conviction relief, he must establish that the evidence, as a whole, unmistakably and unerringly points to a conclusion contrary to the post-conviction court’s decision.” *Id.* (cleaned up).

[35] Aljarah argues that the post-conviction court erred by denying his claims that trial counsel had rendered ineffective assistance of counsel by failing to: (1) secure an interpreter for Aljarah to communicate with Trial Counsel Majerek; (2) secure a competent interpreter for the trial; (3) request an interpreter for the victim witness’ trial testimony; (4) allow Aljarah to testify; (5) request a jury instruction on self-defense; and (6) request a jury instruction on battery as a lesser-included offense. We will address Aljarah’s interpreter claims, testimony claim, and jury instruction claims below.

[36] A claim of ineffective assistance of trial counsel requires a petitioner to show that: (1) counsel’s performance was deficient by falling below an objective standard of reasonableness based on prevailing professional norms; and (2) counsel’s performance prejudiced the defendant such that ““there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”” *Davidson v. State*, 763 N.E.2d 441, 444 (Ind. 2002) (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984), *reh’g denied*), *reh’g denied*, *cert. denied*. “A reasonable probability arises when there is a

‘probability sufficient to undermine confidence in the outcome.’” *Grinstead v. State*, 845 N.E.2d 1027, 1031 (Ind. 2006) (quoting *Strickland*, 466 U.S. at 694). “Failure to satisfy either of the two prongs will cause the claim to fail.” *French v. State*, 778 N.E.2d 816, 824 (Ind. 2002). “Indeed, most ineffective assistance of counsel claims can be resolved by a prejudice inquiry alone.” *Id.* Therefore, if we can dismiss an ineffective assistance claim on the prejudice prong, we need not address whether counsel’s performance was deficient. *Henley v. State*, 881 N.E.2d 639, 645 (Ind. 2008).

[37] Moreover, isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective. *Reed v. State*, 866 N.E.2d 767, 769 (Ind. 2007). Because counsel is afforded considerable discretion in choosing strategy and tactics, a strong presumption arises that counsel rendered adequate assistance. *Id.*

### **Interpreter Claims**

[38] We first address Aljarah’s three claims relating to an interpreter. Our Indiana Supreme Court has explained that there are two types of interpreters that can serve in a criminal proceeding: (1) “defense interpreters, who simultaneously translate English proceedings for non-English-speaking defendants[;]” and (2) “proceedings interpreters, who translate non-English testimony for the whole court.” *Arrieta v. State*, 878 N.E.2d 1238, 1239 (Ind. 2008). “It is axiomatic that a non-English-speaking criminal defendant’s rights cannot be preserved without the assistance of what we have termed a ‘defense interpreter.’” *Id.*

[39] Here, the trial court provided a defense interpreter for Aljarah during his jury trial. Aljarah, however, argues that his trial counsel rendered ineffective assistance of counsel by failing to: (1) secure an interpreter for Aljarah to communicate with Trial Counsel Majerek; (2) secure a competent and certified interpreter for the trial; and (3) request an interpreter for Alfartusi's trial testimony.

[40] Aljarah's first interpreter claim is that Trial Counsel Majerek rendered ineffective assistance by failing to secure an interpreter for Aljarah to communicate with Trial Counsel Majerek. Aljarah asserts that he was unable to effectively communicate with Trial Counsel Majerek prior to trial and that he had told trial counsel that he could not understand him. He contends that he was prejudiced by counsel's failure to get an interpreter because he was not able to raise his claim of self-defense.

[41] In regard to Aljarah's claim based on the failure to secure an interpreter for Aljarah to communicate with counsel, Trial Counsel Majerek testified that he and Aljarah had had more than a dozen pre-trial meetings at the jail and that there had "never" been any communication problems between Aljarah and counsel. (Tr. Vol. 2 at 185). Investigator Brown confirmed that Aljarah had "spoke[n] good English" and had "understood everything" that the investigator and trial counsel had said during pre-trial meetings. (Tr. Vol. 2 at 141). Investigator Brown also explained that Aljarah had been involved in the trial strategy, had asked questions, and had given names of potential alibis to the investigator. Additionally, Trial Counsel Majerek and Investigator Brown

testified that Aljarah had never asserted a claim of self-defense. Instead, Aljarah had asserted that he had not been at the crime scene, had not shot at Alfartusi, and that his truck was not the truck depicted in the Meijer surveillance video. Aljarah had been “adamant that he was never there” and had asserted that he “had no participation in it[.]” (Tr. Vol. 2 at 141).

[42] The post-conviction court determined that trial counsel’s performance was not deficient because Aljarah had failed to prove that he was unable to communicate with counsel because of a language barrier. We agree. Furthermore, Aljarah failed to allege and show that there is a reasonable probability that, but for counsel’s alleged unprofessional errors, the result of the proceeding would have been different. Accordingly, we affirm the trial court’s denial of post-conviction relief on this claim of ineffective assistance of trial counsel. *See French*, 778 N.E.2d at 824 (explaining that a petitioner’s failure to satisfy either of the two prongs for an ineffective assistance of counsel claim will cause the claim to fail).

[43] Next, we turn to Aljarah’s claim that Trial Counsel Majerek rendered ineffective assistance of counsel by failing to secure a competent and certified interpreter for trial. When reviewing this claim, the post-conviction court noted that trial counsel “was not and need not be involved in selecting the interpreter for trial.” (App. Vol. 3 at 237). When concluding that Aljarah was not entitled to relief on this claim, the post-conviction court concluded as follows:

While the Court recognizes and follows the requirement of ensuring that a non-English speaking defendant is provided a

qualified proceedings interpreter, none of Ms. Ardemangi's opinions or recommendations as to the best practices are mandatory or binding on the Court. The trial court adequately vetted [Trial Interpreter] as an interpreter for [Aljarah's] jury trial and determined that he was qualified as an Arabic interpreter. [Aljarah] never objected to the manner in which the Court questioned [Trial Interpreter], never advised the Court that he did not understand the proceedings, and never objected to the manner in which [Trial Interpreter] was translating the proceedings. There has been no showing that [Trial Interpreter] ever said anything at trial that was incomprehensible or where the accuracy or scope of the translation was subject to grave doubt.

(App. Vol. 3 at 235-36).

[44] Aljarah asserts that he was prejudiced because he could have “establish[ed] his defense of self-defense, which likely would have resulted in a different outcome.” (Aljarah's Br. 16). However, there was ample testimony at the post-conviction hearing showing that Aljarah did not assert a claim of self-defense prior to or during trial. Aside from Aljarah's mere assertion that he was prejudiced, he has failed to show that there is a reasonable probability that, but for counsel's alleged unprofessional errors, the result of the proceeding would have been different. Accordingly, we affirm the trial court's denial of post-conviction relief on this claim of ineffective assistance of trial counsel. *See French*, 778 N.E.2d at 824 (explaining that a petitioner's failure to satisfy the prejudice prong of an ineffective assistance of counsel claim will cause the claim to fail).

[45] In the last of Aljarah's interpreter claims, he asserts that Trial Counsel Majerek rendered ineffective assistance of counsel by failing to request a proceedings interpreter for Aljarah's trial testimony. Aljarah occasionally interchanges his argument that trial counsel should have requested an interpreter for Alfartusi with the argument that his trial counsel should have objected to Alfartusi's testimony. However, to demonstrate ineffective assistance of trial counsel for failure to object or failure to make a request to the trial court, a petitioner must prove that an objection would have been sustained or the request would have been granted, and he must also show that he was prejudiced by counsel's failure to make an objection or to file the motion. *See Kubsch v. State*, 934 N.E.2d 1138, 1150 (Ind. 2010), *reh'g denied*. Aljarah failed to prove either.

[46] During the post-conviction hearing, Trial Counsel Majerek acknowledged that he had not requested the trial court to use an interpreter for Alfartusi's trial testimony. Aljarah now contends that trial counsel's failure to request an interpreter prejudiced him because it impeded his ability to challenge Alfartusi's credibility. Aljarah also asserts that he was prejudiced because he had told Trial Counsel Majerek that he wanted to testify that he had acted in self-defense. However, Aljarah has failed to allege or show that there was a reasonable probability that, but for counsel's alleged unprofessional errors, the result of the proceeding would have been different. Because Aljarah has failed to demonstrate that trial counsel rendered ineffective assistance, we affirm the post-conviction court's denial of post-conviction relief on this claim.

### **Testimony Claim**

- [47] We next address Aljarah’s claim that Trial Counsel Majerek rendered ineffective assistance of counsel by failing to allow Aljarah to testify. Specifically, Aljarah asserts that he wanted to testify that he had shot Alfartusi in self-defense.
- [48] The post-conviction court heard conflicting testimony on this claim during the post-conviction hearing. Specifically, Aljarah asserted that he had told trial Trial Counsel Majerek that he wanted to testify, and Trial Counsel Majerek testified that Aljarah had never told counsel that he wanted to testify at trial and that Aljarah had always denied his presence at the crime scene and involvement in the shooting. The post-conviction court determined that Trial Counsel Majerek testimony was “more credible” than Aljarah’s testimony on this issue. (App. Vol. 3 at 241). As a result, the post-conviction court concluded that Aljarah had failed to prove this claim of ineffective assistance of counsel.
- [49] “The post-conviction court is the sole judge of the evidence and the credibility of the witnesses.” *Hall v. State*, 849 N.E.2d 466, 468-69 (Ind. 2006). The post-conviction court’s decision to credit Trial Counsel Majerek’s version of events over Aljarah’s is a straightforward credibility determination by the post-conviction court, and it is one that Aljarah has failed to demonstrate is clearly



erroneous. Accordingly, we affirm the post-conviction court's judgment on this claim.<sup>4</sup>

### **Jury Instruction Claims**

[50] Lastly, we also affirm the post-conviction court's denial of Aljarah's claims that Trial Counsel Majerek rendered ineffective assistance of counsel by failing to tender jury instructions on battery and self-defense. Trial strategy, including the decision regarding whether to request a jury instruction, is not subject to attack through an ineffective assistance of counsel claim, "unless the strategy is so deficient or unreasonable as to fall outside of the objective standard of reasonableness." *Autrey v. State*, 700 N.E.2d 1140, 1141 (Ind. 1998). "Counsel is afforded considerable discretion in choosing strategy and tactics, and we will accord those decisions deference." *Timberlake v. State*, 753 N.E.2d 591, 603 (Ind. 2001), *reh'g denied, cert. denied*.

[51] When reviewing this claim, the post-conviction court concluded that Aljarah had failed to prove his claim because the testimony during the post-conviction hearing showed that Aljarah had remained steadfast in his assertion that he had

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<sup>4</sup> Aljarah also appears to attempt to raise a freestanding claim that he did not knowingly waive his right to testify. Aljarah has waived this argument because he did not raise such a claim in his post-conviction petition. *See Allen v. State*, 749 N.E.2d 1158, 1171 (Ind. 2001) ("Issues not raised in the petition for post-conviction relief may not be raised for the first time on post-conviction appeal."), *reh'g denied, cert. denied*. Moreover, this issue would not be available in his post-conviction proceeding because it would have been known and could have been raised on direct appeal. *See Reed*, 866 N.E.2d at 768 (explaining that only issues not known at the time of trial or issues not available on direct appeal may be properly raised through post-conviction proceedings).

not been at the Meijer and had not shot Alfartusi. The post-conviction court concluded that a request for jury instructions on battery and self-defense would have been contrary to Trial Counsel Majerek’s asserted trial strategy. *See Potter v. State*, 684 N.E.2d 1127, 1135 (Ind. 1997) (explaining that a defendant is entitled to a jury instruction on a defense only if it has some foundation in the evidence); *see also Williams v. State*, 706 N.E.2d 149, 161 (Ind. 1999) (explaining that “failure to submit an instruction is not deficient performance if the court would have refused the instruction anyway”), *reh’g denied, cert. denied*. Because trial counsel’s decision not to tender jury instructions on battery and self-defense was consistent with a reasonable trial strategy, we affirm the post-conviction court’s denial of post-conviction relief to Aljarah on this claim. *See Reed*, 866 N.E.2d at 769 (explaining that counsel is afforded considerable discretion in choosing strategy and tactics and that a strong presumption arises that counsel rendered adequate assistance).

[52] Affirmed.

Vaidik, J., and Mathias, J., concur.