

Case Summary

Sajjad Quayim Rasheed appeals the post-conviction court's denial of his petition for post-conviction relief. We affirm.

Issues

On appeal, Rasheed raises several issues, which we restate as:

- I. whether he was denied the effective assistance of trial counsel; and
- II. whether he was denied the effective assistance of appellate counsel.

Facts

The facts, as stated in Rasheed's direct appeal, follow:

On April 4, 2005, three men, Rasheed, Kirby Oliver ("Oliver"), and Carl Major ("Major"), traveled together in a borrowed vehicle to the home of David Williams ("Williams") and Lorna Zaber. Upon arriving, they retrieved weapons from the trunk of the vehicle and sneaked up to the front door of the house. Williams was a well-known drug dealer who Rasheed believed was interfering with Rasheed's own drug business.

In the front room of the house were Williams, Darryl Mosley, Andrew Espinoza, Brittany Holt, and Lindsay Davidson. Williams saw Rasheed, Oliver, and Major on the front porch and ran to the back of the house. The men kicked open the door, entered the house, and fired their weapons into the air, ordering everyone to the floor. Rasheed asked for Williams and was directed to the back of the house. Rasheed found Williams in the back of the house and demanded drugs and money. He then shot Williams in the head.

Next, Mosley was taken to the back of the house where Rasheed and Oliver demanded drugs. After giving them a large rock of cocaine, Mosley was shot in the head. Rasheed and Oliver returned to the front room where Rasheed shot Espinoza, Holt, and Davidson in the back of the head as they lay on the ground.

During this time, the neighbors noted a strange car in the alley. They also heard gunshots, yelling, and screaming from Williams's house. Two witnesses saw men in an altercation in the back room of the house and heard a gunshot. One of those witnesses heard more yelling and screaming from the front of the house, followed by gunshots.

Oliver and Major left the house and started towards the car, but when neighbors shined lights on them, they ran the other way into a wooded area. Rasheed also ran into the woods with them. Another witness saw three men run into the woods from the house. The men discarded clothing and guns as they ran from the scene. A different witness saw the three men walking together on a nearby street. Oliver and Majors were later arrested in separate locations. Rasheed evaded law enforcement and was not arrested immediately.

When officers arrived at Williams's house, they discovered Davidson and Holt dead and Espinoza died shortly thereafter before medical help arrived. Williams and Mosley survived with serious gunshot wounds to their heads. The police found three different caliber shell casings in the house. They also found three different gloves and three different guns in the nearby wooded area.

Rasheed v. State, No. 45A05-0703-CR-163, slip op. at 1-2 (Ind. Ct. App. May 30, 2008), trans. denied.

Oliver pled guilty to three counts of murder, and he was sentenced to an aggregate sentence of forty-five years. Major was convicted of aggravated battery and three counts of murder in the perpetration of robbery. He was sentenced to an aggregate sentence of 175 years. We affirmed his convictions and sentence on direct appeal, and our supreme court denied transfer. Major v. State, 873 N.E.2d 1120 (Ind. Ct. App. 2007), trans. denied.

The State charged Rasheed with three counts of felony murder and two counts of Class A felony attempted murder. Rasheed's first trial ended with a hung jury. At his

second trial, Rasheed was represented by Lemuel Stigler. Rasheed was found guilty as charged at the second trial. The trial court imposed an aggregate 270-year sentence.

Rasheed's appellate counsel, Paul Stanko, filed a direct appeal on Rasheed's behalf, arguing that the evidence was insufficient to sustain his convictions. We affirmed Rasheed's convictions, and our supreme court denied transfer.

In 2009, Rasheed filed a petition for post-conviction relief, which he later amended. In his amended petition, Rasheed argued that he was denied the effective assistance of trial and appellate counsel for numerous reasons. After evidentiary hearings, the post-conviction court entered findings of fact and conclusions thereon denying Rasheed's petition for post-conviction relief. Rasheed now appeals.

Analysis

Rasheed appeals the post-conviction court's denial of his petition for post-conviction relief. A court that hears a post-conviction claim must make findings of fact and conclusions of law on all issues presented in the petition. Pruitt v. State, 903 N.E.2d 899, 905 (Ind. 2009) (citing Ind. Post-Conviction Rule 1(6)). "The findings must be supported by facts and the conclusions must be supported by the law." Id. Our review on appeal is limited to these findings and conclusions. Id. Because the petitioner bears the burden of proof in the post-conviction court, an unsuccessful petitioner appeals from a negative judgment. Id. (citing P-C.R. 1(5)). "A petitioner appealing from a negative judgment must show that the evidence as a whole 'leads unerringly and unmistakably to a conclusion opposite to that reached by the trial court.'" Id. (quoting Allen v. State, 749 N.E.2d 1158, 1164 (Ind. 2001), cert. denied). Under this standard of review, "[we] will

disturb a post-conviction court's decision as being contrary to law only where the evidence is without conflict and leads to but one conclusion, and the post-conviction court has reached the opposite conclusion." Id.

Rasheed argues that both his trial and appellate counsel were ineffective. To prevail on a claim of ineffective assistance of counsel, a petitioner must demonstrate both that his or her counsel's performance was deficient and that the petitioner was prejudiced by the deficient performance. Ben-Yisrayl v. State, 729 N.E.2d 102, 106 (Ind. 2000) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984)), cert. denied. A counsel's performance is deficient if it falls below an objective standard of reasonableness based on prevailing professional norms. French v. State, 778 N.E.2d 816, 824 (Ind. 2002). To meet the appropriate test for prejudice, the petitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068. Failure to satisfy either prong will cause the claim to fail. Grinstead v. State, 845 N.E.2d 1027, 1031 (Ind. 2006). Most ineffective assistance of counsel claims can be resolved by a prejudice inquiry alone. Id.

I. Trial Counsel

Rasheed argues that his trial counsel was ineffective because he: (A) failed to impeach Oliver with the benefit of his plea bargain; (B) failed to object to Officer Samuel Abegg's testimony about Major's statement to Officer Abegg as a hearsay statement under Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354 (2004); (C) failed to

impeach Officer Abegg with a prior inconsistent statement; (D) failed to impeach Darryl Mosley with a prior inconsistent statement; (E) failed to impeach Danielle Jackson with a prior inconsistent statement; (F) failed to object to the admission of prior consistent statements made by David Williams and Narval Rogers; (G) failed to object to preliminary instruction 9 and final instruction 13; (H) failed to properly summarize the evidence favorable to Rasheed during closing arguments and failed to object to the State's comments during closing arguments; and (I) failed to present testimony by Major.

A. Impeachment of Oliver

Rasheed first argues that his trial counsel was ineffective because he failed to impeach Oliver with the benefit of his plea bargain. The jury saw Oliver's plea agreement and was aware that Oliver received a sentence of concurrent terms of forty-five years and the dismissal of other charges in exchange for his truthful testimony against Rasheed and Major. Rasheed, however, contends that his trial counsel should have made the jury aware that Oliver was originally facing a penalty of up to 295 years.

The post-conviction court addressed this argument and found:

9. At trial, the State questioned Oliver about the deal he had struck with the State and the plea agreement was admitted into evidence. Tr. p. 1096-1101.
10. On cross-examination, Rasheed's attorney questioned the actual number of years that Oliver would serve if he maintained good behavior. Tr. 1103. Oliver agreed that since his sentences would be served concurrently he would be released in twenty-two and one-half years for three counts of murder. Id.

* * * * *

12. The law permits a jury to hear the maximum number of years a cooperating witness avoided by striking a deal with the State. Jarrett v. State, 498 N.E.2d 967, 968 (Ind. 1986). Furthermore, if a defense attorney fails to inform a jury that a witness has been granted use immunity he may be found ineffective; this is because the potential culpability of a witness in the crime at issue is relevant to a determination of the witness's credibility. J.J. v. State, 858 N.E.2d 244 (Ind. Ct. App. 2006). In Rasheed's case, neither the State nor the defense calculated the maximum number of years Oliver was originally facing. As previously discussed however, both the State and the defense elicited testimony from Oliver concerning the benefit of his bargain with the State. Furthermore, Oliver's plea agreement was introduced as an exhibit. In addition, defense counsel confronted Oliver with the fact that he would only serve twenty-two and one-half years for the commission of the three murders in consideration of his testimony in Rasheed's trial. We conclude that the jury was sufficiently aware of the incentives given to secure Oliver's testimony. Therefore, defense counsel did not perform below prevailing norms in this matter.

App. pp. 107, 115.

In support of his argument, Rasheed cites Jarrett v. State, 498 N.E.2d 967 (Ind. 1986), which held that it was reversible error for the trial court to refuse to permit cross examination of two witnesses regarding potential penalties they would have faced if they had not entered into plea bargains and agreed to testify against the defendant. Rasheed also relies on J.J. v. State, 858 N.E.2d 244, 251-52 (Ind. Ct. App. 2006), which held that trial counsel was deficient for failing to inform the jury that a witness was testifying pursuant to the grant of use immunity. Neither case mandates a finding that trial counsel here was ineffective. Jarrett merely held that cross examination regarding possible pre-

plea agreement sentences was permitted; it did not hold that the failure to perform such cross examination was deficient performance by trial counsel. Further, J.J. is inapplicable here because both Rasheed's trial counsel and the State discussed the plea agreement with Oliver during his testimony.

We agree with the post-conviction court that Rasheed failed to demonstrate that his trial counsel was ineffective on this basis. The jury was well aware that Oliver had entered into a plea agreement, would receive only a forty-five-year sentence, and other charges would be dismissed in exchange for his testimony against Rasheed and Major. The post-conviction court's conclusion that trial counsel was not deficient is not clearly erroneous.

B. Objection to Officer Abegg's Testimony About Major's Statement

Rasheed argues that his trial counsel was ineffective because he failed to object to Officer Abegg's testimony about Major's statement to Officer Abegg as a hearsay statement under Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354 (2004). Under Crawford, "the admission of a hearsay statement made by a declarant who does not testify at trial violates the Sixth Amendment if (1) the statement was testimonial and (2) the declarant is unavailable and the defendant lacked a prior opportunity for cross-examination." Howard v. State, 853 N.E.2d 461, 465 (Ind. 2006).

During the second trial, Officer Abegg testified that, after the shooting, he attempted to stop two men near the scene of the murders. A taller man, later identified as Major, stopped, but a shorter man ran away. Officer Abegg was asked what he said to Major, and Officer Abegg responded that he "initially asked who his friend was, why his

friend took off his [sic] running.” Trial Tr. p. 825. The State then asked, “Does he indicate who that was?” Id. Rasheed’s trial counsel strenuously objected on several grounds.

First, his counsel argued that the answer was hearsay. The State responded that Officer Abegg would testify that Major said, “come back Jay.”¹ Id. at 826. The State contended that Major’s words were not hearsay because they were a command. Rasheed’s trial counsel argued that it would result in a violation of Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620 (1968).² The State responded that Major’s statement was not a post-commission confession and that Bruton was inapplicable. Rasheed’s counsel also argued that the statement was “testimonial” and complained that he was unable to cross examine Major regarding the statement. Id. at 833-34.

The trial court found that the statement was not hearsay because it was a command, that it was not testimonial, and that Bruton did not apply. Over trial counsel’s objection, Officer Abegg then testified that Major said he knew the other man as “Jay.” Id. at 840. Officer Abegg told Major to “call his boy back,” and Major yelled, “Come back Jay.” Id. at 840-41. On cross examination, Rasheed’s trial counsel pointed out that this conversation had not been included in the police report.

¹ Rasheed’s nickname was Jay.

² In Bruton, the United States Supreme Court held that, in a joint trial, admission of one defendant’s confession that implicates another defendant is a violation of the second defendant’s Sixth Amendment right to confront witnesses. Fayson v. State, 726 N.E.2d 292, 294 (Ind. 2000). The confessing defendant cannot be required to take the stand, and the result is a denial of the other defendant’s right to cross-examine. Id.

The post-conviction court rejected Rasheed's argument and found that Rasheed's counsel objected to Officer Abegg's testimony because it was hearsay, the statement was testimonial hearsay, Rasheed's right to confrontation would be violated, and the admission would violate Bruton. The post-conviction court then found:

Rasheed alleges trial counsel [was] ineffective for failing to object to Samuel Abegg's testimony about Carl Major's statement at the scene of his arrest. Rasheed argues that counsel should have objected to the admission of the testimony because it was hearsay, violated Rasheed's right to confrontation and violated the holding in Bruton. As previously discussed in paragraph 11 of our Findings, counsel did object on these bases. Id. at 825-838. The claim therefore, lacks merit.

App. p. 116.

Although his trial counsel did not specifically mention Crawford, he did object that the testimony was hearsay, that it was testimonial, and that he was unable to cross examine Major, which are the underlying Crawford objections. Because he did object, his performance was not deficient.

Moreover, even if trial counsel's objection was inadequate and his performance was deficient, Rasheed has failed to demonstrate that he was prejudiced. The statement tended to show that Rasheed was the third person involved in the murders. However, Oliver testified that he was involved in the murders with Rasheed and Major. Oliver and Major were both apprehended near the scene of the murders. The green vest alleged to belong to Rasheed was found near the scene, along with the car that he had rented. Additionally, while Rasheed was incarcerated, he admitted to Jackson and McNeil, fellow inmates and friends, that he was involved in the murders. Given this evidence,

any error in the admission of Major's statement to Officer Abegg was harmless, and Rasheed was not prejudiced by his trial counsel's alleged failure to object.

C. Failure to Impeach Officer Abegg with Prior Inconsistent Statement

Rasheed also argues in his summary of the argument that his trial counsel was ineffective for failing to impeach Officer Abegg with a prior inconsistent statement, specifically his testimony from the first jury trial. In his argument section, Rasheed seems to assert that his trial counsel should have admitted Officer Abegg's prior testimony during his objection at the second trial. With no analysis, Rasheed contends: "If he had presented Abegg's prior testimony, the court would have excluded Major's statement because it would have been proven to be testimonial." Appellant's Br. p. 25. The post-conviction court analyzed Officer Abegg's testimony at the first trial compared to his testimony at the second trial. The post-conviction court concluded that the testimony was not inconsistent and that "[d]efense counsel did not perform deficiently in declining to attempt impeachment under these facts." App. p. 117. On appeal, Rasheed does not explain how the post-conviction court's finding was erroneous. Given the lack of cogent argument and the lack of analysis regarding the post-conviction court's finding, we conclude that Rasheed waived this argument. See Ind. Appellate Rule 46(A)(8).

D. Failed to Impeach Mosley with Prior Inconsistent Statement

Next, Rasheed argues that his trial counsel was ineffective for failing to impeach Mosley, one of the victims, with a prior inconsistent statement. At the second trial, Mosley testified that three men were involved in the incident and that one of the men was shorter and was wearing a green vest. During his testimony, Mosley never specifically

identified any of the men involved in the incident. The prior statement at issue here was a statement that Mosley made to the police approximately one month after he was shot. In that statement, Mosley claimed that he was “100 percent sure” that Rasheed, Oliver, and Major were involved in the shootings. Ex. p. 117. However, Mosley was not “100 percent sure” that Oliver shot him; he thought it could have been Rasheed that shot him.

Id.

The post-conviction court concluded:

As defense counsel pointed out in his testimony at the post-conviction hearing, Mosley also told the police, in the same statement, that it could also have been Rasheed who shot him. Counsel’s decision to forego impeachment was strategic and did not fall below prevailing professional norms. Furthermore, although Mosely was able to describe many of the events that occurred during the shooting, he did not identify any of the shooters at Rasheed’s trial. Id. at 942-1026. Therefore, there was no identification before the jury to impeach.

App. p. 116.

As the State points out, Rasheed would have gained nothing by the introduction of Mosley’s prior statement. At the second trial, Mosley did not identify Rasheed as one of the men involved in the incident, but in the prior statement, Mosley identified Rasheed as being involved and possibly being the person who shot him. Clearly, it is not deficient performance for a trial counsel to avoid impeachment with a prior statement that would have incriminated the defendant. See Wisehart v. State, 693 N.E.2d 23, 46 (Ind. 1998) (holding that trial counsel’s performance was not deficient where impeachment of the witness “would have provided the jury with an additional incriminating statement,

thereby elevating the potential (to Wisehart's detriment) for the jury to believe Wisehart's confession"), cert. denied. The post-conviction court's finding on this issue was not clearly erroneous.

E. Failure to Impeach Danielle Jackson with Prior Inconsistent Statement

Rasheed argues that his trial counsel should have impeached Danielle Jackson with his prior inconsistent statement from his testimony during the first trial. Rasheed contends that his trial counsel should have questioned Jackson about his testimony in the first trial, where Jackson testified that while he was incarcerated with Rasheed, Rasheed informed him that he shot three of the people and Oliver shot one person.

At the second trial, Jackson again testified that he had conversations with Rasheed regarding the murders. Rasheed told Jackson that he was involved with the murders with Oliver and Major because Williams's drug business was interfering with his own. He told Jackson "they" shot a few people and then ran through the woods, but the other two men did not make it back home. Trial Tr. p. 1140. Jackson said that Rasheed was concerned about fingerprints in the gloves and shoes that were on his balcony. Rasheed's trial counsel cross examined Jackson, brought up his plea agreements, and discussed discrepancies between his testimony and his initial statement to the police. In fact, during cross examination, Rasheed's trial counsel also discussed some discrepancies between Jackson's testimony and his testimony at the first trial.

Rasheed argues that, if the jury had known about Jackson's earlier testimony, it would have impacted Oliver's credibility because Oliver testified that he did not shoot anyone. The post-conviction court disagreed and found:

Jackson testified at the second trial that Rasheed told him “they,” referring to Oliver, Major and Rasheed, shot the people. Tr. 1140. At the first trial Jackson testified that Rasheed told him only Oliver and Rasheed shot the victims. PE 4, p. 855. Although the testimony is inconsistent concerning Major’s alleged involvement, it is consistent in asserting Rasheed’s involvement. Furthermore, we find that counsel’s decision to forego impeachment on this point was strategic. As counsel explained, he considered such impeachment a two-edged sword. The jury might have construed the impeachment to place Rasheed at the scene. Certainly the fact that Jackson previously testified that Rasheed was present and shot individuals would corroborate Jackson’s testimony. We conclude that counsel’s decision was a tactical one. Furthermore, we are not persuaded that the failure to impeach Jackson on this inconsistency made a difference in the outcome of the trial. We conclude that Rasheed was not prejudiced by counsel’s decision.

App. pp. 117-18.

Again, Rasheed has not discussed the post-conviction court’s finding or explained how the finding is erroneous. At the post-conviction hearing, trial counsel testified that asking Jackson about the prior testimony would have been a “double-edged sword” because Rasheed’s expected testimony would have been undermined. PCR Tr. p. 37. As the State points out, “[i]t would hardly help Petitioner’s case any to introduce testimony that Petitioner had previously claimed responsibility for personally shooting three of the victims.” Appellee’s Br. p. 21. Our supreme court has held that “the method of impeaching witnesses is a tactical decision and a matter of trial strategy that does not amount to ineffective assistance.” Kubsch v. State, 934 N.E.2d 1138, 1151 (Ind. 2010). The impeachment of Jackson was a tactical decision, and Rasheed has failed to show that

his trial counsel was deficient. The post-conviction court's finding on this issue is not clearly erroneous.

F. Failure to Object to Admission of Prior Consistent Statements

Rasheed argues that his trial counsel was ineffective because trial counsel failed to object during redirect to the admission of prior consistent statements made by David Williams and Narval Rogers regarding the height of one of the perpetrators of the shooting. The post-conviction court found that Rasheed's trial counsel had in fact objected to the admission of the prior consistent statements and that Rasheed's claims were "not supported by the record." App. p. 118.

On appeal, Rasheed does not mention or address his trial counsel's objections to the admission of the prior consistent statements. Citing Bassett v. State, 895 N.E.2d 1201, 1213-14 (Ind. 2008), cert. denied, Rasheed contends that his trial counsel should have argued that the prior consistent statements were limited to rehabilitating the witnesses and could not be considered as substantive evidence. Our review of the record reveals that Rasheed's trial counsel did in fact object to the State's redirect based on the prior consistent statements, but the basis for the objections is not entirely clear. However, even if his trial counsel should have objected that the statements could not be considered as substantive evidence and failed to do so, Rasheed has not demonstrated how he was prejudiced by this alleged deficiency. The height evidence was cumulative because Mosley also testified that one of the perpetrators of the shootings was shorter than the others. Rasheed has not demonstrated that he was entitled to post-conviction relief on this basis.

G. Failure to Object to Instructions

Rasheed also argues that his trial counsel was ineffective for failing to object to preliminary instruction 9 and final instruction 13, which provided, in part:

You should attempt to fit the evidence to the presumption that the defendant is innocent and to the theory that every witness is telling the truth. You should not disregard the testimony of any witness without a reason and without careful consideration. However, if you find that the testimony of a witness is so unreasonable as to be unworthy of belief, or if you find so much conflict between the testimony of the witnesses that you can not [sic] believe all of them, then you must determine which of the witnesses you will believe and which of them you will disbelieve.

App. pp. 138, 149.

According to Rasheed, this instruction was erroneous under Gantt v. State, 825 N.E.2d 874 (Ind. Ct. App. 2005). In Gantt, the jury indicated during deliberations that there was a “disagreement as to whether you must believe one witness or the other.” Gantt, 825 N.E.2d at 875. The trial court brought the jury back and gave it a lengthy instruction over the defendant’s objection. In particular, the trial court said, “if you find so much conflict between the testimony of two or more witnesses that you cannot believe each of them, then you must decide. You must decide which witnesses you will believe and which you will disbelieve.” Id. at 878. We found that giving the instruction during deliberations was reversible error because:

[It] was an erroneous statement of the law and invaded the province of the jury to determine credibility and accept or reject evidence as it sees fit. When two witnesses give contradictory accounts, it is not true that the jury must believe one or the other. The jury may choose to believe neither witness, believe aspects of the testimony of each, or believe

the testimony but also believe in a different interpretation of the facts than that espoused by the witnesses, among other possibilities. The trial court's instructions may have led the jury to believe that it was required to adopt wholesale one witness's account over another's.

Id. Because the evidence consisted primarily of the victim's testimony versus the defendant's testimony, we concluded that the focus in deliberations was "necessarily the credibility of these two witnesses" and that the error was not harmless. Id. at 879.

The post-conviction court found that Gantt was inapplicable because "Rasheed's culpability did not hinge on the uncorroborated testimony of a single witness and the jurors expressed no confusion over weighing the evidence or judging the credibility of the witnesses." App. p. 119. Further, the post-conviction court found that "even if this particular instruction contained an error, the instructions as a whole did not mislead the jury or prejudice the Petitioner's substantial rights." Id. Finally, the post-conviction court found that Rasheed failed to show that an objection to the instruction would have been sustained.

On appeal, Rasheed argues that the only direct evidence of his involvement with the murders was Oliver's testimony and that the instruction authorized the jury to disregard Rasheed's testimony entirely. However, our review of the record reveals a substantial amount of circumstantial evidence of Rasheed's involvement with the murders. This was not a case where the jury had to determine which of two conflicting witnesses to believe. Even assuming, without deciding, that the instruction was erroneous and that his trial counsel was deficient for failing to object to it, Rasheed has

failed to demonstrate that he was prejudiced. His ineffective assistance of counsel claim on this issue fails.

H. Failures During Closing Arguments

Rasheed argues that his trial counsel was ineffective because he failed to properly summarize the evidence favorable to Rasheed during closing arguments and failed to object to the State's comments during closing arguments. The post-conviction court found that Rasheed had waived the issue because he failed to direct the court to "those portions of the record that would support his claim nor does he identify the comments he deems objectionable to guide" the court in its review. App. p. 120.

On appeal, Rasheed claims that his trial counsel failed to highlight the fact that the "DNA evidence did not match Rasheed." Appellant's Br. p. 32. In fact, during his closing argument, Rasheed's trial counsel did question the DNA evidence and noted that "inconclusive" DNA evidence was not "[b]eyond a reasonable doubt." App. p. 187. Rasheed also claims that his trial counsel should have noted that Oliver avoided a sentence of over two hundred years by agreeing to testify against Rasheed and that Oliver had a positive gunshot residue test. Again, Rasheed's trial counsel in fact discussed discrepancies in Oliver's testimony extensively and questioned his motivations. Finally, Rasheed claims that his trial counsel failed to summarize the evidence of witnesses near the scene who failed to identify Rasheed or, in some cases, a third person with Oliver and Major. Rasheed has failed to specifically identify the testimony that his trial counsel failed to discuss, and we decline to search the record in support of Rasheed's claim. We conclude that Rasheed's claim regarding his trial counsel's closing argument fails.

Rasheed has simply failed to demonstrate that his trial counsel's performance was deficient or that any alleged deficiency resulted in prejudice.

Rasheed also argues that his trial counsel should have objected to the State's closing argument. During closing arguments, the deputy prosecutor stated:

Additionally, ladies and gentlemen, DNA wise, three things, defendant can't be excluded from, the tape on the 223, the five pieces of tape taken off the laser site, the weapon he provides to Kirby. He can't be eliminated from the black stretch glove, which is found at the corner of 41st and Mississippi and he can't be excluded from the vest, the green vest. The green vest he says he got rid of. The green vest that's too big for him.

Ladies and gentlemen, DNA wise you saw the pictures, the [sic] heard the testimony, can't be excluded, can't be excluded, can't be excluded. Ladies and gentlemen, those things sum up to tell you DNA wise that that was his vest, that was the vest he was wearing.

PCR Ex. pp. 213-14. Rasheed argues that his trial counsel should have objected to the last sentence because it mischaracterized and exaggerated the DNA evidence.

Even if Rasheed's trial counsel should have object to this statement, we cannot say that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Oliver testified that Rasheed was involved in the murders and there was significant circumstantial evidence of Rasheed's involvement. The jury was repeatedly informed during testimony and during closing argument that Rasheed could not be excluded as being the source of the DNA. The one alleged misstatement by the deputy prosecutor during closing argument did not result in the necessary prejudice to demonstrate ineffective assistance of counsel.

I. Failure to Call Major as a Witness

Finally, Rasheed argues that his trial counsel was ineffective because he failed to present testimony by Major. Major testified at the post-conviction hearing and “admitted that he told the police detailed facts that incriminated Rasheed in 2005 but now asserts that he was lying and that Rasheed had nothing to do with the murders.” App. p. 112. The post-conviction court did not find “Major to be a credible witness. By virtue of his own testimony and the incongruence of his two versions of events, he either lied to police who were trying to solve a murder or he has lied to this court under oath. His testimony in these proceedings is unworthy of credit.” *Id.* Because Major’s testimony was unworthy of credit, the post-conviction court found that “counsel’s decision to forego the use of it did not prejudice Rasheed.” *Id.* at 120.

On appeal, Rasheed argues the post-conviction court’s finding that Major was not credible was erroneous. In his statement to the police, Major identified Rasheed as the third man involved in the murders and claimed that Rasheed actually shot the victims. Rasheed admits that Major “recanted each aspect of his statement [to the police] during the PCR hearing.” Appellant’s Br. p. 37. Rasheed’s trial counsel testified at the post-conviction hearing that he did not call Major to testify because he could not reach an agreement with Major’s counsel regarding Major testifying for Rasheed. Major also testified that his appellate attorney did not want him to testify at Rasheed’s trial.

“Whether a witness’ testimony at a postconviction hearing is worthy of credit is a factual determination to be made by the trial judge who has the opportunity to see and hear the witness testify.” *State v. McCraney*, 719 N.E.2d 1187, 1191 (Ind. 1999). The

post-conviction court found that Major's testimony regarding Rasheed's innocence was unworthy of credit, and we cannot reweigh the evidence or judge Major's credibility on appeal. Given Major's lack of credibility, Rasheed cannot show that Major's trial testimony would have been helpful or that he was prejudiced by his trial counsel's failure to call Major as a witness.

II. Appellate Counsel

Rasheed argues that his appellate counsel was ineffective because he failed to argue on appeal that Officer Abegg's testimony regarding Major's statement to him was inadmissible hearsay and violated Rasheed's confrontation rights pursuant to Crawford. Because the strategic decision regarding which issues to raise on appeal is one of the most important decisions to be made by appellate counsel, appellate counsel's failure to raise a specific issue on direct appeal rarely constitutes ineffective assistance. See Taylor v. State, 717 N.E.2d 90, 94 (Ind. 1999). The Indiana Supreme Court has adopted a two-part test to evaluate the deficiency prong of these claims: (1) whether the unraised issues are significant and obvious from the face of the record; and (2) whether the unraised issues are "clearly stronger" than the raised issues. Bieghler v. State, 690 N.E.2d 188, 194 (Ind. 1997), cert. denied, 525 U.S. 1021, 119 S. Ct. 550 (1998). If this analysis demonstrates deficient performance by counsel, the court then examines whether the issues that appellate counsel failed to raise "would have been clearly more likely to result in reversal or an order for a new trial." Id.

Rasheed argues that his appellate counsel should have argued on appeal that Officer Abegg's testimony regarding Major's statement, "come back Jay," was

inadmissible under Crawford. Trial Tr. at 826. Rasheed claims that Major's statement was testimonial and Major was unavailable for cross examination. The post-conviction court rejected Rasheed's argument. Similarly, we find Rasheed's argument unavailing.

Even if Rasheed could demonstrate that his appellate counsel was deficient for failing to present the Crawford argument, Rasheed cannot demonstrate that the Crawford argument would have been clearly more likely to result in reversal or an order for a new trial. As we noted when discussing this issue in the context of ineffective assistance of trial counsel, the statement tended to show that Rasheed was the third person involved in the murders. However, Oliver testified that he was involved in the murders with Rasheed and Major. Oliver and Major were both apprehended near the scene of the murders. The green vest alleged to belong to Rasheed was found near the scene, along with the car that he had rented. Additionally, while Rasheed was incarcerated, he also admitted to Jackson and McNeil, fellow inmates and friends, that he was involved in the murders. Given this evidence, any error in the admission of Major's statement to Officer Abegg was harmless, and Rasheed was not prejudiced by his appellate counsel's failure to raise the issue.

Conclusion

Rasheed failed to show that the post-conviction court's findings and conclusions thereon regarding his ineffective assistance of trial and appellate counsel claims were clearly erroneous. We affirm.

Affirmed.

ROBB, C.J., and BRADFORD, J., concur.