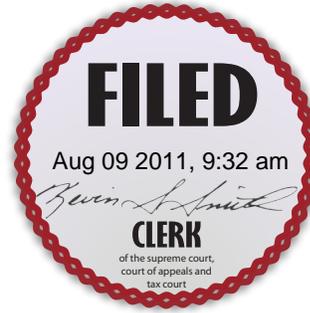


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



APPELLANT PRO SE:

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**IN THE  
COURT OF APPEALS OF INDIANA**

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TOMMY D. FORD, )  
 )  
Appellant-Petitioner, )  
 )  
vs. ) No. 45A05-1009-PC-610  
 )  
STATE OF INDIANA, )  
 )  
Appellee-Respondent. )

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APPEAL FROM THE LAKE SUPERIOR COURT  
The Honorable Thomas P. Stefaniak, Judge  
Cause No. 45G04-0808-PC-7

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**August 9, 2011**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**NAJAM, Judge**

## STATEMENT OF THE CASE

Tommy D. Ford, pro se, appeals the post-conviction court's denial of his petition for post-conviction relief. Ford raises five issues for our review:

1. Whether his trial counsel was ineffective for failing to object to improper closing argument regarding Ford's failure to testify at trial.
2. Whether his trial counsel was ineffective for failing to investigate State's witness Rodney Williams.
3. Whether his trial counsel was ineffective for failing to object to the admission of deposition testimony by State's witness Sade Robinson.
4. Whether his trial counsel was ineffective for failing to offer into evidence the entire deposition testimony of Ronell Simmons.<sup>1</sup>
5. Whether his trial counsel was ineffective for failing to prepare Ford to testify at trial.

We affirm.

## FACTS AND PROCEDURAL HISTORY

On October 19, 2006, Ford was convicted of murder for the shooting death of Christian Hodge.<sup>2</sup> Ford appealed his conviction, alleging that the trial court had abused its discretion by admitting certain hearsay evidence through the excited utterance exception and that his sentence was inappropriate in light of the nature of his offense and his character. In a memorandum decision, this court affirmed on both issues. Ford v. State, 45A03-0701-CR-[20] (Ind. Ct. App. October 23, 2007).

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<sup>1</sup> The record on appeal includes various spellings of Simmons' first name. We employ the spelling used by the court reporter for his deposition offered at the post-conviction hearing as Defendant's Exhibit 1.

<sup>2</sup> Ford was convicted after a second trial. His first trial had ended in a mistrial.

On August 1, 2008, Ford filed a pro se petition for post-conviction relief. Subsequently, a public defender entered an appearance but later filed a motion to withdraw, which the post-conviction court granted. Ford then hired private counsel, who filed a second amended petition for post-conviction relief on August 21, 2009. On October 7, Ford by counsel filed a third amended post-conviction petition.<sup>3</sup>

On January 10, 2010, the court held an evidentiary hearing on Ford's third amended petition. At the conclusion of the hearing, the court ordered the parties to submit proposed findings and conclusions. On August 31, the court entered its findings and conclusions, which provide in relevant part:

1. On November 3, 2005, [Ford] was charged with the murder of Christian Hodge.
2. Attorney Kevin Milner represented [Ford] and the case proceeded to jury trial on May 15, 2006. The jury deadlocked, however, and the court declared a mistrial.
3. A second trial began on October 16, 2006. The jury found Ford guilty of murder.
4. The evidence presented at trial is best summarized in the memorandum decision of the Indiana Court of Appeals:  
The facts of this case are summarized in our decision on Ford's direct appeal:

On November 1, 2005, Ford visited Glen Park in Gary and encountered an acquaintance, James Grace. Ford talked with Grace and drank vodka with one of Grace's friends. Grace told Ford that he needed a place to store his vehicle. Ford offered to show Grace his garage as a possible storage location. Ford left his car at the park and rode with Grace to Ford's home. As the two men approached Ford's house, they passed fifteen-year-old Christian Hodge, who was seated on a front-yard retaining wall on the property next door. Ford and

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<sup>3</sup> Ford has not included in the record on appeal a copy of any of his petitions for post-conviction relief.

Hodge greeted each other. When Ford and Grace entered Ford's house, Ford said to Grace, "I can't stand that mother fucker. I'll be back." Tr. at 78. Ford left the house, and Grace heard a popping sound shortly thereafter. He looked outside and saw Hodge lying in the street. Ford came back inside the house and said to Grace, "I got to get the fuck out of here, and meet me down—meet me at the end of the alley and pick me up." *Id.* at 87. Grace got into his truck and drove away. He soon located a police officer and led him back to the crime scene. Hodge had suffered one gunshot wound to the back of his head, and he died the next day.

At the crime scene, Gary Police Officer Daniel Quasney spoke with witness Ronell Simmons, who appeared to be "upset, in disbelief, and in a state of shock." *Id.* at 246. Simmons stated that he had seen the victim talking to a black male in a black hooded sweatshirt. He stated that the man pulled out a gun and shot Hodge in the head and then walked away.

Ford's first trial, in which Simmons testified, ended in a mistrial on May 18, 2006. During the second trial, the State alleged that Simmons was unavailable to testify and moved for admission of Simmons's prior testimony. The trial court denied the State's request. The State later moved to admit Officer Quasney's testimony recounting Simmons's statements at the crime scene. The trial court admitted this evidence pursuant to Indiana Evidence Rule 803(2), the excited utterance exception to the hearsay exclusion rule. *See* Ind. Evidence Rule 801(c) (" 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."); Ind. Evidence Rule 802 ("Hearsay is not admissible except as provided by law or by these rules.").

The jury found Ford guilty as charged.

Ford v. State, 45A03-0701-CR-[20] ([Ind. Ct. App.] October 23, 2007).

5. The court sentenced Ford to fifty years in the Department of Correction.
6. Ford raised two issues on direct appeal:

- I. Whether the trial court abused its discretion by admitting certain hearsay evidence through the excited utterance exception, and
- II. Whether the sentence was inappropriate in light of the nature of his offense and his character.

7. On October 23, 2007, the Indiana Court of Appeals affirmed the conviction and sentence. Id.

8. Ford filed a pro[ ]se petition for post-conviction relief on August 1, 2008. The office of the Indiana State Public Defender entered an appearance on September 2, 2008, but ultimately withdrew representation pursuant to Rule PC 1(9)(c).<sup>11</sup>

[Footnote: Rule PC 1(9)(c) states, in relevant part: “Counsel shall confer with petitioner and ascertain all grounds for relief under this rule . . . [.] In the event that counsel determines the proceeding is not meritorious or in the interests of justice . . . counsel shall file with the court counsel’s withdrawal of appearance . . . [.]”

9. [Ford] hired private counsel who amended the petition raising the following claims:

- (1). That Ford was denied the effective assistance of trial counsel;
- (2). That the State failed to prove Ford guilty beyond a reasonable doubt;
- (3). That the State failed to timely disclose that certain witnesses from the first trial would not be present at the second trial and that one of the witnesses had been in contact with missing witness “Tony” one month before the second trial; and finally,
- (4). That Ford was denied the effective assistance of appellate counsel.

10. At the hearings on the petition, the court took judicial notice of the post-conviction file and the related trial file under cause number 45G04-0511-MR-00011. The court received the Record of Proceedings and heard the testimony of numerous witnesses. The Petitioner presented the testimony of trial and appellate counsel as well as the testimony of Michael Edwards, a former inmate of the Lake County Jail who was incarcerated with Ford around the time of Ford’s first trial. [Ford] also presented the

testimony of several of his relatives. Finally, Ford admitted exhibits to which we will refer as necessary in our findings and conclusions as P.E. (Petitioner's Exhibit).

11. Ford's trial attorney has practiced law for twenty-seven years litigating over five hundred jury trials. He represented Ford at both of the jury trials.

12. Prior to the second trial, the State informed counsel that certain witnesses from the first trial would not be presented, including Sade Robinson and Ronell Simmons. P.E. 2.

13. The State informed counsel and the trial court that Robinson was unavailable because she had just given birth some three weeks prior to trial, lived in the State of Michigan and was breast-feeding the newborn. P.E. 3.

14. Based on the evidence presented at the first trial, and the outcome thereof, counsel was very pleased that Robinson would not be present at the second trial. In counsel's opinion, Robinson testified poorly at the first trial and counsel was concerned that she would have improved her testimony in anticipation of the second trial. Therefore, in counsel's words, he "did back flips" when the State moved to use her testimony from the first trial.

15. The State also moved to admit the testimony of Ronell Simmons from the first trial asserting that Simmons was unavailable. Tr. 6-38. Trial counsel felt that Simmon[s'] testimony was damaging to the defense because Simmons identified the defendant in the first trial. Therefore, counsel had no interest in finding Simmons or having him testify. Counsel objected to the State's motion arguing that Simmons was not unavailable. Id. The court denied the State's motion ruling that the State had failed to prove unavailability. Tr. 38.

16. Interestingly, defense counsel later sought to admit Simmons' pre-trial deposition as evidence in the case. Tr. 266. The State objected that the deposition was hearsay. Tr. 268. The court reminded the defense that the court had found Simmons was not unavailable. Tr. 269. Ultimately, the court ruled the witness unavailable to the defense, the proponent of the deposition, under I.R.E. 804(a)(5),<sup>1</sup> and held that the defense could introduce the deposition as long as the entire deposition were admitted. Tr. 278. Because some parts of the deposition were harmful to the defense, counsel decided not to introduce it.

[Footnote: Under I.R.E. 804(a)(5), the declarant of a statement is unavailable if the declarant "is absent from the hearing and the proponent

of a statement has been unable to procure the declarant's attendance by process or other reasonable means."']

17. Ford told counsel he wanted to testify. However, having heard Ford's version of events, counsel deemed it preposterous and concluded Ford should not testify.

18. As the trial neared completion, the court questioned Ford about whether he would testify:

THE COURT: [Trial counsel] indicated that you will not be testifying in your trial on this matter; is that correct, sir?

DEFENDANT: Yes, sir.

THE COURT: And, Mr. Ford, you've had an opportunity to consult with your attorney regarding the decision to testify; is that correct?

DEFENDANT: Yes, sir.

THE COURT: And, sir, you're deciding not to testify. Is that a decision that you are making after consultation with your attorney?

DEFENDANT: Yes, sir.

THE COURT: Has anybody promised you anything to get you to not testify in this matter?

DEFENDANT: No, Your Honor.

THE COURT: Is anybody in any way forcing you to not testify in this matter?

DEFENDANT: No, Your Honor.

THE COURT: You're making this decision on your own with the guidance of your attorney; is that correct?

DEFENDANT: Yes, Your Honor.

THE COURT: And do you have any questions of me, sir, before we conclude this hearing?

DEFENDANT: No.

Tr. 433-34.

19. During closing arguments, defense counsel challenged the State's case asserting that the State had not sustained [its] burden of proof and had failed to present any reasonable explanation as to why Ford would shoot Hodge. Tr. 446-51.

20. In [its] final closing argument, the state acknowledged the defendant's right to remain silent but pointed out that only a perpetrator can ever know why he has acted as he has.

Sometimes we'll never know why crimes were committed. Someone who could—now, let me phrase this correctly, he never has to say a single word, a single word. It's the State's burden to prove that he committed this crime beyond a reasonable doubt, but what happens when you have crimes, when you have one or two people there who can possibly talk and tell you what happened and one of them's dead? One of them's dead. Who else are we going to get that information from? The next possible source is the person who committed the offense. If that person who committed the offense don't talk [sic], how would we ever know? We would speculate. Does it mean the person wasn't shot and killed, it didn't happen?

It happened, and that's what we have to prove to you, not why it happened.

Tr. 479-80.

21. Based on the testimony of appellate counsel we find that counsel has practiced law since being barred in 1982. At the time of this appeal in 2007, therefore, he had practiced law for approximately twenty-five years. Counsel has served as an appellate public defender since 1993 and handled hundreds of appeals. In this case he read the entire record which consists of the clerk's record and trial transcript, identified the issues he thought merited pursuit and researched accordingly. He ultimately raised two issues he thought appropriate. He opined that the State's comments during closing arguments did not present an appealable issue because the defense

did not contemporaneously object to them. The State's failure to present witness Sade Robinson might have presented an appealable issue had the defense objected but in fact, the defense agreed to the use of her prior testimony. Finally, appellate counsel indicated that trial counsel's failure to introduce the deposition testimony of Ronell Simmons did not raise an appealable issue for two reasons; first, the advisability of using the testimony depended upon [its] content and trial counsel's assessment of that content and, second, the possible appealable issue would be one of ineffective assistance of counsel the raising of which on direct appeal is disfavored by the appellate courts and risky for the defendant. As appellate counsel explained, if ineffective assistance of counsel is raised on direct appeal then the defendant is foreclosed from raising the claim on post-conviction relief. Since a direct appeal is necessarily limited to those issues that appear on the face of the record, a defendant who litigates ineffectiveness on direct appeal loses the opportunity to develop facts outside the record to support his claim, an opportunity that is realized by raising the issue on post-conviction relief.

22. We shall make any other necessary factual findings within our conclusions of law.

#### Conclusions of Law

1. Post-conviction proceedings are civil in nature and [Ford] bears the burden of proving the claims raised therein by a preponderance of the evidence. Helton v. State, 907 N.E.2d 1020, 1023 (Ind. 2009); Stevens v. State, 770 N.E.2d 739, 745 (Ind. 2002); Rule PC 1(5).

2. Post-conviction procedures do not afford the convicted an opportunity for a "super-appeal." See Ben-Yisrayl v. State, 729 N.E.2d 102, 105 (Ind. 2000), reh'g denied. Post-[c]onviction procedures create a narrow remedy for a subsequent collateral challenge to convictions that must be based on ground[s] enumerated in the post-conviction rules. Williams v. State, 724 N.E.2d 1070, 1076 (Ind. 2000).

3. Claims that were known and available on direct appeal but were not raised are deemed waived, with the exception of a claim of ineffective assistance of counsel which may be raised for the first time in a petition for post-conviction relief. Woods v. State, 701 N.E.2d 1208, 1221 (Ind. 1998), cert. denied, 528 U.S. 861, 120 S. Ct. 150 (1999). Therefore, although [Ford] did not raise a claim of ineffective assistance of counsel on direct appeal, it is not waived for our review.

4. Even if framed as fundamental error, free-standing claims are not available for post-conviction review. Sanders v. State, 765 N.E.2d 591, 592 (Ind. 2002).

5. To prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that he suffered prejudice as a result of the deficient performance. Williams v. State, 706 N.E.2d 149, 154 (Ind. 1999) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

6. The reviewing court strongly presumes that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Bieghler v. State, 690 N.E. 188, 192 (Ind. 1997), cert. denied, 119 S. Ct. 550 (1998). A defendant must offer strong and convincing evidence to overcome the presumption of effective representation. Saylor v. State, 765 N.E.2d 535, 549 (Ind. 2002).

7. To establish prejudice, "[t]he defendant must show 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 v. Washington[,] 466 U.S. 668, 694 (1984).

8. Absent evidence in support of a petitioner's claim of ineffective assistance of counsel, a court can infer that counsel would not corroborate the allegations. Dickson v. State, 533 N.E.2d 586, 589 (Ind. 1989); Mays v. State, 790 N.E.2d 1019, 1021-22 (Ind. Ct. App. 2003); Lockart v. State, 627 N.E.2d 1350, 1353 (Ind. Ct. App. 1994).

9. Although a decision by counsel may ultimately detriment [sic] his client, detriment itself does not establish that counsel was ineffective if counsel's decision was deliberate, strategic or tactical. Fugate v. State, 608 N.E.2d 1370 (Ind. Ct. App. 1993).

10. Ford claims he was denied effective assistance of trial counsel because his attorney failed to:

- a. permit Ford to testify as Ford requested;
- b. object to testimony given by Sade Robinson at Ford's prior trial;
- c. object to the testimony of Dr. Young Kim;
- d. offer into evidence the deposition and first trial testimony of Ronell Simmons;

- e. make an effective post-trial presentation that the State had failed to prove Ford guilty beyond a reasonable doubt;
- f. object to the State's comment on Ford's failure to testify.

\* \* \*

12. We conclude that Ford freely and voluntarily waived his right to testify as evidenced by his responses to the court when questioned.

13. We conclude that counsel's decision to stipulate to the testimony of Sade Robinson was reasoned and strategic.

14. We conclude that counsel's decision to forego admission of the deposition of Ronnell [sic] Simmons was reasoned and strategic.

15. We conclude that counsel's final argument to the jury included the assertion that the State had failed to sustain [its] burden of proof. Counsel supported this assertion by a lengthy review of the evidence that was logical, reasoned and appropriately impassioned. . . .

16. Trial counsel did not object to certain arguments of the State during its final closing argument. Tr. 479-80.

17. The Supreme Court has held that "[t]he use for impeachment purposes of petitioner's silence, at the time of arrest and after receiving Miranda Warnings, violated the Due Process Clause of the Fourteenth Amendment." Doyle v. Ohio, 426 U.S. 610, 49 L.Ed.2d 91, 96 S. Ct. 2240 (1976). The Doyle reasoning likewise prohibits the use of a defendant's silence as affirmative proof in the State's case in chief. Wainwright v. Greenfield, 474 U.S. 284, 295 n.13, 88 L.Ed.2d 623, 106 S. Ct. 634 (1986). This is because the use of a defendant's post-Miranda silence is a due process violation.

18. Prosecutors are[,] however, entitled to respond to allegations and inferences raised by the defense during trial even if the State's comments would, under other circumstances, be objectionable. Dumas v. State, 803 N.E.2d 1113, 1118 (Ind. 2004); see also Morgan v. State, 755 N.E.2d 1070, 1074 (Ind. Ct. App. 2001) (trial counsel was not ineffective for failing to object to the prosecutor's closing argument in a murder prosecution; although the prosecutor commented on the defendant's post-Miranda silence, the defendant's testimony and closing argument opened the door to the prosecutor's comments).

19. During his closing argument, Ford’s attorney challenged the State’s failure to present any reasonable explanation as to why Ford would shoot Hodge. Tr. 446-51. The State responded by arguing that the law does not require the State to prove motive because, absent testimony from the person who committed a murder, this would often be impossible. We conclude that the comments by the State were responsive to the arguments of the defense. They did not constitute a Doyle violation. Therefore, had the defense objected to the State’s comments, the objection would not have been sustained. Defense counsel’s failure to make an objection that had no hope of being sustained did not fall below prevailing norms of practice. Accord Schaefer v. State, 750 N.E.2d 787, 792 (Ind. Ct. App. 2001) (in order to show that a trial attorney was ineffective in failing to object to the admission of evidence, the post-conviction petitioner must show that the trial court would have had to sustain the objection).

20. The performance of trial counsel did not fall below prevailing professional norms. [Ford] was not denied the effective assistance of trial counsel.

\* \* \*

Judgment: The Petition for Post-Conviction Relief is denied. . . .

Judgment at \*1-\*13.<sup>4</sup> Ford now appeals.

## DISCUSSION AND DECISION

### Standard of Review

Ford appeals the post-conviction court’s denial of his petition for relief. As we have often stated:

Post-conviction procedures do not afford a petitioner with a super-appeal, and not all issues are available. Timberlake[ v. State], 753 N.E.2d [591, 597 (Ind. 2001)]. Rather, subsequent collateral challenges to convictions must be based on grounds enumerated in the post-conviction rules. Id. If an issue was known and available, but not raised on direct appeal, it is waived. Id. If it was raised on appeal, but decided adversely, it is res judicata. Id.

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<sup>4</sup> Ford included in his Appellant’s Brief a copy of the court’s findings and judgment denying his petition for post-conviction relief. Such is in compliance with Appellate Rule 46(A)(10). However, Ford did not include a copy of the findings and judgment in his appendix, as required by Appellate Rule 50(A)(2)(b). Thus, we must cite to the findings and judgment separately as “Judgment at \*\_\_.”

In reviewing the judgment of a post-conviction court, appellate courts consider only the evidence and reasonable inferences supporting the post-conviction court's judgment. Hall v. State, 849 N.E.2d 466, 468 (Ind. 2006). The post-conviction court is the sole judge of the evidence and the credibility of the witnesses. Id. at 468-69. Because he is now appealing from a negative judgment, to the extent his appeal turns on factual issues [the petitioner-appellant] must convince this court that the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court. See Timberlake, 753 N.E.2d at 597. We will disturb the decision only if the evidence is without conflict and leads only to a conclusion contrary to the result of the post-conviction court. Id.

Lindsey v. State, 888 N.E.2d 319, 322 (Ind. Ct. App. 2008), trans. denied; see also Sawyer v. State, 679 N.E.2d 1328, 1328 (Ind. 1998) (“having once litigated his Sixth Amendment claim concerning ineffective assistance of counsel, [the petitioner-appellant] is not entitled to litigate it again[] by alleging different grounds.”).

### **Issue One: Closing Argument**

Ford first contends that he was denied effective representation because his trial counsel failed to object to the State's allegedly improper remarks during closing argument. Specifically, Ford alleges that the State violated his Fifth Amendment right to remain silent because it improperly referred to Ford's failure to testify at trial and that his trial counsel was ineffective for not objecting to that remark.<sup>5</sup> We first consider whether the State's comments during its closing argument violated Ford's constitutional right to remain silent.

In Doyle v. Ohio, 426 U.S. 610 (1976), the United States Supreme Court held that, under the Fourteenth Amendment, a prosecutor may not use the silence of a defendant

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<sup>5</sup> In his appellate brief, Ford also asserts that the State's closing argument violated his rights under the Sixth Amendment. But Ford does not support his argument under the Sixth Amendment by citation to any supporting authority or further analysis. As such, his Sixth Amendment argument is waived. See Ind. Appellate Rule 46(A)(8)(a).

who has been arrested and Mirandized to impeach the defendant. Doyle, 426 U.S. at 619.

Our supreme court has further explained the rule as follows:

[T]he prosecution may not use a defendant's decision to stand mute in order to create an inference of guilt—a proposition fleshed out in a number of decisions. See United States v. Tenorio, 69 F.3d 1103 (11th Cir. 1995); United States v. Kallin, 50 F.3d 689 (9th Cir. 1995); Williams v. Zahradnick, 632 F.2d 353 (4th Cir. 1980); Henson v. State, 514 N.E.2d 1064 (Ind. 1987); White v. State, 647 N.E.2d 684 (Ind. Ct. App. 1995). The Court expanded this holding in Wainwright[ v. Greenfield], 474 U.S. 284 (1986),] to bar use of the defendant's decision to remain silent and to request an attorney as evidence that the defendant was rational, and not insane as was claimed at trial. See also Lynch, 632 N.E.2d [341,] 342 [Ind. 1994]; Wilson, 514 N.E.2d [282,] 284 [Ind. 1987]. In all these cases, the prosecution used the silence or the request for counsel itself to implicate the defendant in some way.

\* \* \*

[I]n Doyle and Wainwright the prosecution used the act of the defendant's silence or the fact of the request for counsel itself as indicative of guilt or damaging to credibility. As the Seventh Circuit noted in describing Doyle analysis, the central constitutional inquiry is “the particular use to which the post-arrest silence is being put. . . . Doyle does not impose a prima facie bar against any mention whatsoever of a defendant's right to request counsel, but instead guards against the exploitation of that constitutional right by the prosecutor.” Lindgren v. Lane, 925 F.2d 198, 202 (7th Cir. 1991) (no Doyle error where the “inadvertent mention of petitioner's request for counsel was not argued to the jury nor was it ever used to impeach petitioner”); see also United States v. Higgins, 75 F.3d 332, 333 (7th Cir. 1996) (“A statement such as ‘I told the suspect that he could remain silent, and he did’ does not ask the jury to infer guilt from silence.”). Cf. Greer v. Miller, 483 U.S. 756, 764, 107 S. Ct. 3102, 97 L. Ed. 2d 618 (1987) (no Doyle error where after improper question about defendant's silence prosecutor was not permitted to make “specific inquiry or argument” respecting the silence). . . .

Willsey v. State, 698 N.E.2d 784, 792-93 (Ind. 1998) (emphases added). But Doyle also does not impose a prima facie bar against mentioning a defendant's silence. See id.

Here, the State did not run afoul of Doyle when it referred to Ford's silence in direct response to a defense theory and when that use was not used to indicate the defendant's guilt or damage his credibility. See Willsey, 698 N.E.2d at 793. In closing, Ford argued:

If for any reason [Ford] did have a motive to kill this boy, why do it then and under those circumstances? Why not wait? Criminals have one thing in common, all of them. They don't want to get caught. Nobody wants to get caught, because nobody wants to go to jail. And so when a criminal commits a crime, not only is his goal to complete the crime but it's also to get away with it.

According to the State, [Ford] at like one in the afternoon on a bright sunny day with witnesses everywhere—you heard from the witnesses. There were people on the street milling about. It's a pleasant day. He's going to go in front of his house in broad daylight with a bunch of people on the street and put a bullet in this kid's head, and he's going to figure he's going to get away with it? How in the world is he going to get away with this? There's people everywhere. It would be absolute suicide to commit a crime under those facts.

Transcript at 449-50. And in its closing, the State argued:

What happened here was somebody got shot and killed, and let's go with that for a second. He said the State would have you to believe at [sic] how it's so highly unlikely that someone would go out there, shoot [the victim] in daylight when witnesses are present. Am I making that up? Am I making up the fact that [the victim] got shot and killed in broad daylight with witnesses present? Am I making that up? It happened. Somebody did it. Why not him?

We even have witnesses to tell you who that somebody was. It was Tommy Ford. We have issues such as whether or not Sade lied. "I can't recall." It's up to you to use your best recollection. We have misrepresentations and we have misdirection going on here. He wants you to consider everything other than what you heard from that stand. Misdirection, he wants you to consider motive. Forget the fact that you heard witnesses say what they said.

Sometimes we'll never know why crimes were committed. Someone who could—now, let me phrase this correctly, he never has to say

a single word, a single word. It's the State's burden to prove that he committed this crime beyond a reasonable doubt, but what happens when you have crimes, when you have one or two people there who can possibly talk and tell you what happened and one of them's dead? One of them's dead. Who else are we going to get that information from? The next possible source is the person who committed the offense. If that person who committed the offense don't [sic] talk, how would we ever know? We would speculate. Does it mean the person wasn't shot and killed, it didn't happen?

It happened, and that's what we have to prove to you, not why it happened. It happened. He was shot and killed by Tommy Ford by way of our witnesses. . . .

Id. at 479-980.

Ford argues that the State's reference in closing argument to Ford's right to remain silent was error because, "even if the prosecutor's response was invited[, though it was not,] it does not excuse the misconduct that violated Ford's 5th [A]mendment right to remain silent." Appellant's Brief at 9 (alteration in original). In essence, Ford contends that a prosecutor may never comment on a defendant's silence. But, as illustrated above, that is not the law. See id.

In any event, the prosecutor in this case did not comment on Ford's failure to testify in a manner that violated Doyle. Instead, the prosecutor, responding to Ford's closing argument statement that the State had not proved a motive for the killing, referred to a defendant's right to remain silent but also noted that sometimes a defendant is the only one who could testify to a motive. The State further pointed out that it need not even prove motive. The State did not refer to Ford's silence, nor did the mention of his silence reflect on his guilt, innocence, or credibility. As such, the State's reference to the right to remain silent did not violate Ford's right under the Fifth Amendment.

In order to prevail on a claim of ineffective assistance due to the failure to object, the defendant must show an objection would have been sustained if made. Overstreet v. State, 877 N.E.2d 144, 155 (Ind. 2007) (citing Wrinkles v. State, 749 N.E.2d 1179, 1192 (Ind. 2001)). Because the State's closing argument mention of the right to remain silent did not violate Doyle or Ford's Fifth Amendment right, the trial court would have overruled an objection had Ford's trial counsel made one to the State's remark. Because Ford has not shown that his trial counsel's objection to the State's closing argument remark would have been sustained, Ford has not demonstrated that his trial counsel was ineffective for failing to make that objection. See id.

### **Issue Two: Investigating a Witness**

Ford next contends that his trial counsel was ineffective for failing to investigate a witness, Rodney Williams. We initially observe, again, that Ford has not included a copy of any of his petitions for post-conviction relief filed in the post-conviction court. Without those petitions, and citations to the relevant parts of the record on appeal, we would normally be unable to determine whether Ford has preserved an issue for review. Here, however, the post-conviction court detailed the issues presented:

10. Ford claims he was denied effective assistance of trial counsel because his attorney failed to:
  - a. permit Ford to testify as Ford requested;
  - b. object to testimony given by Sade Robinson at Ford's prior trial;
  - c. object to the testimony of Dr. Young Kim;
  - d. offer into evidence the deposition and first trial testimony of Ronell Simmons;

- e. make an effective post-trial presentation that the State had failed to prove Ford guilty beyond a reasonable doubt;
- f. object to the State's comment on Ford's failure to testify.

Judgment at 9.

Issues not raised in the petition for post-conviction relief may not be raised for the first time on post-conviction appeal. See Ind. Post-Conviction Rule 1(8) (“All grounds for relief available to a petitioner under this rule must be raised in his original petition.”); Allen v. State, 749 N.E.2d 1158, 1171 (Ind. 2001). According to the trial court's Judgment, Ford did not argue to the post-conviction court that his trial counsel was ineffective for failing to investigate witness Rodney Williams. And Ford has not directed us to any part of the record to show that he raised that issue to the post-conviction court. Because Ford did not preserve that issue by arguing it to the post-conviction court, the issue is waived. See id.

### **Issue Three: Deposition Testimony of Sade Robinson**

Ford also contends that his trial counsel was ineffective because he did not object to the admission of deposition testimony by State's witness Sade Robinson. Specifically, he argues:

Robinson's testimony that she saw Ford in the immediate area within seconds of the gunshots and saw him holding a gun was obviously very damaging to the defense. Thus, [trial counsel's] decision not to object cannot be considered sound or reasonable strategy, because the State could prove her unavailability and the objection would have been sustained. This testimony of Robinson was so devastating to the defense that [trial counsel's] failure to object cannot be explained by any reasonable explanation. Had [trial counsel] objected the Court would have had no

choice but [to] sustain the objection, because Robinson was obviously available.<sup>6</sup>

Appellant's Brief at 15.<sup>6</sup>

Although not clear, Ford's argument appears to be twofold. First he insists that Robinson was indeed available for trial. And based on that assertion, he argues that his trial counsel should have objected to the admission into evidence at his second trial of the transcript of testimony she gave at the first trial. But Ford did not appeal the trial court's determination regarding Robinson's availability for trial. As such, he cannot challenge here the trial court's determination that Robinson was not available for trial. Thus, we consider only whether trial counsel was ineffective for failing to object to the admission of prior testimony from an unavailable witness.

Ford contends that his trial counsel should have objected to the admission of the transcript of Robinson's testimony at the first trial merely because it was damaging to Ford's case. But Ford cites no authority, nor is there any such authority, to show that that is a valid basis for objection. And he presents no other argument in support of his contention that trial counsel should have objected to the admission of Robinson's testimony from the first trial. Thus, Ford has not shown that his trial counsel rendered ineffective assistance by failing to object to, and agreeing to the admission of, the transcript of Robinson's testimony from the first trial.

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<sup>6</sup> Ford's argument may be missing a word. To make sense of the quoted material, we construe his argument to be that the State could not prove her unavailability.

#### **Issue Four: Deposition of Ronell Simmons**

Ford contends that his trial counsel rendered ineffective assistance because he did not offer the entire deposition of Ronell Simmons into evidence. Simmons, who had testified at the first trial, was declared unavailable to the defense at the second trial. Ford's trial counsel attempted to offer a portion of Simmons' deposition into evidence, but the trial court ruled that it would only admit the deposition in its entirety. Ford's counsel then decided not to offer Simmons' deposition into evidence. Now Ford argues that the "decision not to admit the entire deposition after he sought to use it for a limited purpose was prejudicial to Ford." Appellant's Brief at 18.

"Tactical decisions are left to trial counsel. These decisions do not render trial counsel's representation ineffective. We will not, after the fact, speculate about whether a different strategy might have been more effective." Sanchez v. State, 675 N.E.2d 306, 311 (Ind. 1996) (citations omitted). Here, Ford's trial counsel initially sought to offer into evidence part of Simmons' deposition to show that Simmons had identified the perpetrator of the shooting as wearing a black hooded sweatshirt with a yellow marking. That clothing differed slightly from what Ford had been wearing at the time of the murder: a black sweatshirt without a hood. However, sometime after the shooting Simmons had reviewed a photo lineup and had identified Ford and another man who looked "the same" as Ford as the shooter. Jury Trial Defendant's Exhibit 1 at 25. And Simmons had testified that the victim, Simmons' cousin, had reported having "got[ten] into it" with Ford a month before the shooting. Id.

Simmons' deposition testimony was damaging as well as potentially helpful to Ford's defense. A matter of trial strategy cannot form the basis for establishing ineffective assistance of trial counsel unless there was no sound basis for not pursuing the strategy. Willsey, 698 N.E.2d at 795 (quotation marks and citation omitted). We will not speculate whether offering the deposition in its entirety might have been a more effective strategy. See Sanchez, 675 N.E.2d at 311. Trial counsel's decision not to offer into evidence Simmons' entire deposition was clearly a matter of trial strategy.

In any event, Simmons' testimony that the perpetrator wore a hooded sweatshirt with a yellow marking was before the jury through the testimony of another witness. Officer Daniel Quasney of the Gary Police Department had arrived at the scene following the shooting and spoke with witnesses, including Simmons. Officer Quasney testified at the second trial as follows:

- Q: Officer, do you recall after having read Defendant's Exhibit 1 whether or not Mr. Simmons advised you that the black hooded sweatshirt had a yellow insignia or stripe on the sleeve?
- A: At this time, I can't recall for sure if he did tell me that or not. I want to say it does refresh my memory a little bit that there possibly was a yellow—he did say something about yellow, but I don't want to say for sure.

Second Trial Transcript at 253-54. Officer Quasney also testified that the black sweatshirt Ford had been wearing at the time of his arrest did not have a hood.

Ford maintains that trial counsel was ineffective because he did not offer Simmons' deposition into evidence in order to place before the jury the evidence that Ford's sweatshirt did not match that described by Simmons. But that evidence was put before the jury through Officer Quasney's testimony. Thus, Ford has not shown that trial

counsel's failure to offer Simmons' entire deposition into evidence prejudiced him. As such, Ford has not shown that trial counsel's assistance was ineffective with regard to the decision not to offer Simmons' entire deposition into evidence.

### **Issue Five: Testimony by Ford**

Finally, Ford contends that his trial counsel committed fundamental error and was ineffective because he did not prepare Ford to testify at trial. The right to testify is personal and may not be waived by counsel as a matter of trial strategy. Moore v. State, 655 N.E.2d 1251, 1254 (Ind. Ct. App. 1995) (citing United States v. Curtis, 742 F.2d 1070, 1075 (7th Cir. 1984), cert. denied, 475 U.S. 1064 (1986)). Still, it is not enough for the defendant to merely assert after trial that he wanted to testify and his counsel would not let him. Id. In Correll v. State, 639 N.E.2d 677 (Ind. Ct. App. 1994), this court has discussed the issue by analyzing the opinion in Underwood v. Clark, 939 F.2d 473, 476 (7th Cir. 1991). There, the "more substantial issue" related to Underwood's not testifying was "whether his lawyer did not merely counsel Underwood not to do so but forbade him." Correll, 639 N.E.2d at 681 (internal quotations and citation omitted).

The [Underwood] court looked at the "grave practical difficulty in establishing a mechanism that will protect a criminal defendant's personal right (that is, a right that is not waivable by counsel) to testify in his own behalf without rendering the criminal process unworkable." Because "it is extremely common for criminal defendants not to testify, and there are good reasons for this," the mere assertion after being convicted that "my lawyer wouldn't let me testify" is "insufficient to require a hearing or other action on his claim that his right to testify in his own defense was denied him." Rather, "some substantiation is necessary, such as an affidavit from the lawyer who allegedly forbade his client to testify."

Correll, 639 N.E.2d at 681 (citations omitted).

Here, Ford asserts that he “begged” trial counsel to allow him to testify and that trial counsel told Ford’s family that he would prepare Ford to testify. Appellant’s Brief at 19. We initially note that Ford has not provided citations to the record to support his contention that trial counsel told family that he would prepare Ford to testify. And our review of the record discloses the contrary: both of Ford’s sisters testified at the post-conviction hearing that trial counsel said Ford would not be taking the stand because Ford had a prior arrest for battery. Still, Ford contends that “such a conviction is not among those available to attack the credibility of a witness.” Appellant’s Brief at 19. But, again, Ford does not support this contention with citation to supporting authority. He also states that the conviction was more than ten years old and was therefore inadmissible. Finally, Ford states that he “thought he could not go against” trial counsel’s advice not to testify, and he acknowledges that trial counsel repeatedly said that the State had the burden to prove Ford guilty.

Further, Ford’s trial counsel testified at the post-conviction hearing that Ford’s “version of what had occurred . . . was preposterous. . . . There was no way I could have come close to putting him on the stand to testify as he was going to testify.” Post-Conviction Transcript at 52. As in Correll, trial counsel here decided that Ford’s case would not benefit by his testimony. But he did not testify that he forbade Ford from testifying. And Ford has not alleged that trial counsel forbade him to testify. Without evidence or even allegations of such coercion, Ford has not presented evidence rising “to the level of substantiation required to establish the denial of [his] right to testify in [his] own behalf.” Correll, 639 N.E.2d at 682.

Neither has Ford shown that he was prejudiced by his failure to testify at trial. Ford has not provided any citations to the record, affidavit, or other material to show what his testimony would have been. Without such evidence, “we have no way of determining the impact his testimony might have had.” Moore, 655 N.E.2d at 1251. Ford has not shown that his counsel’s performance fell below an objective standard or that he was prejudiced thereby. Thus, Ford has not shown that trial counsel rendered ineffective assistance by not allowing him to testify.<sup>7</sup>

### **Conclusion**

Ford has not shown that trial counsel’s performance fell below objective standards or that he was prejudiced thereby. Specifically, Ford has not shown that trial counsel should have objected to the State’s mention of Ford’s right to remain silent during closing argument. The State’s remark was in response to Ford’s closing argument reference to the State’s lack of evidence about motive and did not refer to Ford’s silence or the effect of that silence on the appearance of guilt or innocence. And Ford did not argue to the post-conviction court his claim regarding trial counsel’s alleged failure to investigate State’s witness Rodney Williams. Thus, that issue is not properly before us.

Trial counsel’s decision not to object to the deposition testimony of Sade Robinson was a matter of trial strategy, and, in any event, Ford has not shown that he was prejudiced by the admission of that evidence. Nor has Ford shown that trial counsel’s

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<sup>7</sup> In the Judgment, the post-conviction court found that Ford had waived his right to testify by his responses in open court to that effect. Some courts insist that a defendant must have protested his lawyer’s action to the judge during trial, and silence is treated as a waiver. See Underwood, 939 F.2d. at 476; Moore, 655 N.E.2d at 1254 (“trial court does not have a duty to ensure that a defendant’s waiver of the right to testify is voluntary[;] a silent record does not mandate reversal”). We express no opinion on whether Ford’s statement on the record that he knowingly waived his right to testify constitutes a valid and knowing waiver of that right.

decision not to offer the entire deposition of Ronell Simmons either fell below objective standards or resulted in prejudice to the defense. Finally, Ford has not demonstrated or even alleged that trial counsel forbade him from testifying. Nor has he provided any evidence to show how he would have testified. As such, he has not shown that he was prejudiced by trial counsel's failure to put him on the stand. In sum, Ford has not shown that his trial counsel rendered ineffective assistance.

Affirmed.

ROBB, C.J., and CRONE, J., concur.