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IN THE
COURT OF APPEALS OF INDIANA

RANDY S. JOHNSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A04-1104-PC-196
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Robert R. Altice, Jr., Judge
The Honorable Amy J. Barbar, Magistrate
Cause No. 49G02-0512-PC-219976

October 11, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Randy S. Johnson appeals the post-conviction court's denial of his petition for post-conviction relief. Johnson raises one issue which we revise and restate as whether Johnson was denied the effective assistance of trial counsel. We affirm.

The relevant facts as discussed in Johnson's direct appeal follow:

> In July of 2003, Melissa Handlon[1] and Candice Hoffman shared an apartment in a four-unit building, located on Villa Avenue in Indianapolis. The building consisted of two apartments on the second level and two on the first level. Handlon and Hoffman lived in one of the upstairs apartments, and Johnson lived in the other upstairs apartment. The apartments had windows at the front of the building, with a porch roof directly under the windows, spanning the length of the building's façade. Before the events of this case, the screen covering the front window of Handlon and Hoffman's apartment "was ripped a little bit but it was not ripped to where someone could get in or out of that window or where you could even tell that it was ripped." (Tr. 219). The only entrance to the apartment shared by Handlon and Hoffman was at the top of an exterior staircase.
>
> Prior to July 29, 2003, Hoffman had never met Johnson. Late that afternoon, Handlon and Hoffman left their apartment to buy a belt for their vacuum cleaner. They met Johnson outside the apartment and started talking with him. Johnson volunteered to fix the vacuum cleaner and went to Handlon and Hoffman's apartment, where he fixed the vacuum. While Johnson was at their apartment, Handlon and Hoffman discussed walking to the liquor store. Johnson offered to give them a ride to the liquor store if they would buy him some beer. Handlon and Hoffman agreed. At some point, Johnson let Handlon and Hoffman use the telephone in his apartment since they did not have a phone. Johnson spent some time at Handlon and Hoffman's apartment, where the three talked and drank alcohol. Handlon, Hoffman and Johnson continued to socialize during the evening, going back and forth between their apartments. At approximately 12:45 a.m. on July 30, 2003, Hoffman left the apartment, locking the door after she left. Handlon remained home.

[1] Handlon's first name is spelled "Malissa" in the trial transcript and probable cause affidavit and "Melissa" in the parties' briefs and other portions of the record.

Around 6:00 a.m. on July 30, 2003, when Hoffman returned home, she realized that the door to the apartment was unlocked, despite having locked it when she left the night before. It did not, however, appear as if the door had been forced open. After entering the apartment, Hoffman noticed Handlon's shoes in the hallway and her purse in the living room, even though she "was suppose[d] to be at work." (Tr. 206). When Hoffman entered the bedroom, she discovered Handlon, lying on the bed. Hoffman then "ran outside for somebody to call the police." (Tr. 207).

Officer Henry Castor of the Indianapolis Police Department arrived at Handlon and Hoffman's apartment shortly after receiving a dispatch about a "possible D.O.A." or "[d]ead on arrival" and secured the scene. (Tr. 45). While securing the apartment and its rooms, Officer Castor observed a pair of men's underwear in the bedroom.

Detectives Robert Flack and Marcus Kennedy responded to the scene after receiving a report of a homicide. During the investigation on July 30, 2003, Detective Flack spoke with Johnson, whom officers considered either a "potential witness or maybe someone having some information," since he lived next door to the crime scene. (Tr. 101). Johnson informed Detective Flack that during the evening of July 29, 2003, he met Handlon and Hoffman outside of the apartment building, and they asked him to take them to the liquor store, which he did. Johnson told Detective Flack that after the three returned home, Handlon and Hoffman visited his apartment, where they ate and talked on the phone. Johnson denied ever being in Handlon and Hoffman's apartment.

Detective Flack again interviewed Johnson approximately one hour later because Detective Flack "felt like [Johnson] wasn't being completely honest with some of the answers he had given . . . earlier." (Tr. 104). During the second interview, Johnson admitted to having been in Handlon and Hoffman's apartment during the evening of July 29, 2003. Johnson told Detective Flack that he left the women's apartment at approximately 11:00 p.m.

Hoffman remained at the apartment to assist with the police's investigation—"[t]o make sure that nothing was missing" or "out of place . . . ." (Tr. 221, 222). Hoffman informed the police that the window screen had a larger rip than before. Detective Kennedy noted that the screen was ripped enough to "allow full access" through the window. (Tr. 442).

Doug Boxler, a crime scene specialist with the Indianapolis-Marion County Forensic Service Agency (the "Crime Lab"), collected several items from the apartment, including the pair of men's underwear from the bedroom. Judith Macechko, a forensic scientist at the Crime Lab, collected samples from the underwear to determine whether the wearer's skin cells, from which DNA could be extracted, were deposited on the underwear.

An analysis of the skin cells collected from the underwear resulted in a DNA profile "consistent with a single source of unknown male." (Tr. 375). Thus, a DNA analyst with the Crime Lab entered the DNA profile into the Indiana State Police Laboratory's DNA database, referred to as CODIS,[2] which contains a number of DNA profiles. The DNA profile obtained from the underwear samples matched Johnson's DNA profile contained in CODIS. A blood test later confirmed the match.

After confirming that Johnson's DNA was on the underwear found in Handlon's bedroom, Detective Kennedy conducted an interview with Johnson on December 21, 2005. Initially, Johnson told Detective Kennedy that the only time he went to the women's apartment on July 29, 2003 was to bring them a stereo. Johnson denied leaving a pair of his underwear in the apartment. After further questioning, however, Johnson admitted that he went to the women's apartment to return some hot sauce. Johnson later acknowledged that he may have gone to the women's apartment to try and have sex with Handlon, but "she didn't give [him] none [sic] . . . ." (Ex. Vol. II, p. 133). Johnson denied entering Handlon's apartment through the front window, asserting that Handlon let him in her apartment, but acknowledged that he had crawled through his own window and onto the porch roof in the past. Johnson admitted to going into Handlon's bedroom, where he took his pants off to "show her [his] thing . . . ." *Id.* Johnson told Detective Kennedy that he left the apartment because Handlon "didn't want to do nothin' . . . ." (Ex. Vol. II, p. 137). According to Johnson, Handlon told him to "'just go ahead and leave,'" which he did; Johnson stated that he locked the door to the apartment as he left. (Ex. Vol. II, p. 146). Johnson stated that he must have forgotten to put his underwear back on before he left the apartment because he "was high." (Ex. Vol. II, p. 144). Also during the interview, Johnson admitted to having carried box cutters during the summer of 2003. Johnson, however, denied touching Handlon.

[2] CODIS is an acronym for the Federal Bureau of Investigations Combined DNA Indexing System.

> Dr. Dean Hawley, a forensic pathologist with the Indiana University School of Medicine, performed the autopsy on Handlon. The autopsy revealed that Handlon "died as a result of stab wounds of the neck, chest and her extremities." (Tr. 248). Dr. Hawley "found fourteen stab wounds" and determined that the stab wounds "could all have been made with the same instrument." (Tr. 254). Dr. Hawley determined that the deepest stab wound was "four and a half inches deep," but the blade which made the wound "could [have] be[en] shorter than that," depending on the force with which instrument struck the skin. (Tr. 255). Dr. Hawley opined that "a lot of force was used," given that one of Handlon's ribs was "cut completely through by" a blade. (Tr. 256). Dr. Hawley concluded that the blade, which made Handlon's injuries, was "characteristic[] of a knife blade as opposed to a fragment of glass or a pair of scissors"; was "at least three and a half or four inches long"; and sharpened on at least one side. (Tr. 257-58). Dr. Hawley characterized the instrument as "a sharp but durable cutting instrument capable of going through the bone." (Tr. 258).
>
> Dr. Hawley did not find "injuries of forcible sexual assault . . . ." (Tr. 271). Dr. Hawley also swabbed Handlon's mouth, vagina and anus for evidence. The swabs tested negative for seminal material or spermatozoa.

Johnson v. State, No. 49A05-0611-CR-664, slip op. at 2-7 (Ind. Ct. App. October 19, 2007).

On December 22, 2005, the State charged Johnson with murder. Id. at 7. During the jury trial, Roberta Sue Sharp, Johnson's ex-girlfriend, testified that she lived in the Villa Avenue apartment with Johnson from March of 2002 until early July of 2003. Sharp testified that during this time, Johnson worked in the maintenance and housekeeping department of a department store. Sharp testified that one of the items Johnson carried and used for work was a box cutter, approximately "four to six inches" in length. Trial Transcript at 279. As to the length of the blade, Sharp testified that "[f]ully extended it could have been as long as the box cutter, two to four inches, maybe longer"

but "[a]t least two" inches. Id. at 280. Sharp also testified that Johnson had trouble achieving or maintaining an erection and "[i]f we couldn't complete what we were doing, he want[ed] to keep trying and I didn't and he would get an attitude with me." Id. at 281. When asked, "what type of attitude," Sharp answered: "Disgusted, what you would call pouting in a woman, I don't know what you would call it in a man, just a negative attitude." Id.

The State introduced and the court admitted, without objection, an interview of Johnson conducted by Indianapolis Police Detective Marcus Kennedy on December 21, 2005. During the interview, Johnson indicated that his friend Bo, who was deceased at the time of the interview, was at his house at some point on the night of the murder. During the interview, the following exchange occurred:

> Q There's another problem, too, is – Bo told me that it was still dark outside it was startin' to get light when you called him. Do you remember doin' that? And you supposedly told him that, "Hey, you remember those girls that were over here last night? One of them's dead." This is before we even found her.
>
> A. Mm-mm. (No) I didn't call and tell him that.
>
> Q. Well, that's – I've got a statement from Bo and Bo's sayin' that.
>
> A. I don't know. I know –
>
> Q. You don't remember callin' Bo and sayin' anything like that?
>
> A. Mm-mm. (No) Check my phone message (inaudible).
>
> Q. You got a phone message sayin' somethin' like – ?
>
> A. I said you got my phone lists.

Q. Right. But, I mean, this is what Bo was sayin' and Bo's your friend.

A. I know.

Q. And it hurt Bo to tell me that, too, because he didn't want to tell you – tell me at first.

A. I called him – I think I called him at – right after you all got there.

Q. Okay.

A. I didn't call before you all got there.

Q. He's sayin' it was a couple hours after he left.

A. Well, see, Bo get drunk all the time, so.

Q. Right.

A. Bo, you know – he's lyin'.

[Q]. So you did call him and tell him one of the girls was dead?

A. Yeah, I called him.

State's Exhibit 84 at 138-139. At one point during the interview, Detective Kennedy stated: "Alrighty. And I've gotta – call the family and explain to them somethin'. And like I said, I'm not sure if they'll buy what you're sayin'." Id. at 142.

Also during the interview, Johnson initially indicated that Handlon just laid down after he exposed himself. When asked whether Handlon seemed upset because he "took [his] thing out," Johnson said: "Maybe so." Id. at 146. Johnson then said, "Probably so." Id. Johnson then stated that Handlon said, "Just go ahead and leave," in a "nice, normal

way." Id. Johnson then stated that he put his clothes on, went down the steps, locked the door, and went home. At that point, the following exchange occurred:

Q. That ain't gonna fly, Randy. Won't fly.

A. That's what I think, I don't know.

Q. That ain't gonna fly.

A. So you're sayin' I – that I killed her?

Q. It looks that way. And you understand why it looks that way.

Id. at 147. A juror asked if the jury could hear or be told Bo's statements, and the court indicated outside the presence of the jury that it was not going to ask that question of Detective Kennedy.

The jury found Johnson guilty of felony murder, and the court sentenced him to sixty-five years in the Department of Correction. Johnson, slip op. at 7-8. On direct appeal, Johnson argued that the State did not present sufficient evidence to sustain his conviction and the trial court erred in sentencing him. Id. at 2. This court affirmed. Id.

On January 20, 2009, Johnson filed a *pro se* petition for post-conviction relief. On August 31, 2010, Johnson by counsel filed a motion to amend his petition for post-conviction relief, which the court granted. Johnson alleged that he was denied the effective assistance of counsel where his trial counsel "failed to object to and/or request the trial court to give an admonishment regarding to the admission of State's exhibits 83B and 84, the taped recording of Johnson's statement taken by Detective Kennedy on December 21, 2005, and the typed transcription of the recorded statement." Appellant's

Appendix at 45. On November 17, 2010, the court held a hearing on Johnson's petition. Johnson presented no witnesses. The court denied Johnson's petition for post-conviction relief. The post-conviction court's order states:

FINDINGS OF FACT

* * * * *

> 4. In addition to the factual and procedural history found by the Indiana Court of Appeals, its analysis of the weight of evidence in this case is also important to the resolution of this Petition and is as follows:
>
> > Here, the record reveals that Johnson and Handlon lived in adjoining apartments, with a front porch roof spanning the width of both apartments, from which the apartments could be accessed. The record also reveals that Johnson was the last person seen with Handlon. Furthermore, officers discovered underwear in Handlon's bedroom and later traced that underwear to Johnson. Although Johnson initially denied knowledge of the underwear and having gone to Handlon's apartment, he later admitted to having gone to her apartment, hoping to have sex with her. Johnson further admitted to having left his underwear in the apartment. The record also reveals that Handlon died from multiple stab wounds, made with a knife blade consistent with that used for box cutters. Johnson admitted to having carried a box cutter at the time Handlon was murdered, and Sparks testified that she had seen Johnson carrying a box cutter during this time. Furthermore, Johnson stated that he could access the porch roof from his apartment, and the State presented evidence that the screen covering Handlon's window had been torn. Given these facts, we find that the State presented sufficient evidence that Johnson murdered Handlon.
>
> * * * * *
>
> 8. In addition to the facts outlined above, the appellate record contains State's exhibits 83B and 84, which is a redacted recording and a redacted transcription, respectively, of Johnson's December 21, 2005 statement to Det. Marcus Kennedy. In the course of his interview of Johnson, Detective Kennedy told Johnson "There's another problem, too, is – Bo told me that

it was still dark outside it was startin' to get light when you called him. Do you remember doin' that? And you supposedly told him that, "Hey, you remember those girls that were over here last night? One of them's dead." This is before we even found her." [State's Exhibit 84 p. 138-139]. Det. Kennedy told Johnson that he was going to have to call the victim's family, and he wasn't sure if the family would believe what Johnson was saying. [State's Exhibit 84 p. 142]. Also, during continued further questioning of Johnson's story and in response to Johnson telling a version of his story that was contradicted by known physical evidence, Detective Kennedy pointed out the contradiction and stated to Johnson, "That ain't gonna fly, Randy, won't fly." [State's Exhibit 84 p. 147]. In response, Johnson asked "So you're sayin' I – that I killed her?" Detective Kennedy responded "It looks that way. And you understand why it looks that way." *Id*.

* * * * *

CONCLUSIONS OF LAW

[W]hen trial counsel is not called as a witness to testify at a hearing for post-conviction relief to support the defendant's argument, the post conviction court may infer that the trial counsel would not have corroborated the defendant's allegations. As Johnson failed to present any evidence from his two trial attorneys the Court infers that counsel would not support [Johnson's] claims.

Johnson complains that his attorney should have objected or requested that the trial court give an admonishment to the jury regarding certain statements that Det. Kennedy made during [Johnson's] December 21, 2005 statement. As noted above, in the statement, Kennedy referenced the victim's family and commented on the physical evidence in relation to Johnson's version of the facts. Johnson now claims that these statements were inadmissible hearsay. Johnson also claims that the statements violated Indiana Evidence Rule 704(b) because they were Detective Kennedy's personal opinion regarding Johnson's guilt. Johnson further claims that his attorney should have objected to the Detective's recital of Bo's statements as inadmissible hearsay.

* * * * *

In support of his claim that his counsel erred by not objecting to certain portions of State's Exhibits 83B, Johnson cites *Smith v. State* [721

N.E.2d] 213 (Ind.1999). In *Smith*, the court held it was the trial court committed reversible error by not excluding portions of the defendant's statement where the interviewing detective related the "fact" that "half of the people at the jail's [sic] called me wanting to tell me that you did it," *Id.* at 216 and another statement by the detective that another person had given also made statements implicating the defendant. The Court held that admitting these statements was error, because they were bare assertions of truth. (*See*, however, Justice Shepard's concurring opinion wherein he says "I view this as[']cumulative effect['] reversal based on a number of errors that would not lead to reversal if they stood alone . . . in an otherwise cleaner record, I would not expect such a critical, post-hoc dissection of the open-ended Q&A that occurs daily in interrogation rooms").

Smith also complained of another statement by the detective where he inferred that others looking at the evidence would not believe the defendant's story and would have believed that the defendant was guilty. *Id.* Regarding admission of this exchange, the Supreme Court cited *Strong v. State*, 538 N.E.2d 924, 928 (Ind.1989), in holding that admitting this exchange was not error because it was not an assertion of fact, rather it was a comment designed to elicit a response from the defendant. In *Strong*, a detective commented on the implications of the physical evidence, and thus effectively invited the defendant to comment on how that evidence made his story appear.

In this case, a review of the statements that Johnson complains of demonstrates that they are more in the nature of the type approved in *Smith* and *Strong*, rather than those that were disapproved by *Smith*. Det. Kennedy's first statement clearly invited him to reflect on how his statement would appear to the victim's family, and thus was designed to elicit a response that was focused on the known facts. Similarly the second statement that Johnson focuses on was, even more clearly, a comment on how the physical evidence reflected on Johnson's story. Johnson's responses to the Detective's comments makes absolutely manifest that the intent was to elicit a response, rather than make some impermissible factual assertion. Consequently the Court must hold that even if trial counsel had objected to the admission of the highlighted portions of the statement, it is unlikely that such an objection would have been sustained. Most likely, the court would have overruled the objection and admonished the jury regarding the purpose of the statements, as illustrated in *Strong*.

Additionally, the Court further finds that it is entirely plausible that trial counsel could have reasonably viewed the detective's statements as being essentially harmless, in light of other, undisputedly admissible portions of the statement. Thus counsel could have made the strategic decision to focus efforts on other portions of the case. Counsel did have certain portions of the statement redacted, i.e. the words "he's violent," reference to a burglary charge, "when I was in the joint," and an inaudible portion. (Trial Tr. p. 413, 414-416, 423-424). That counsel wanted the statement to come in for strategic reasons seems borne out by the record, such as where during cross-examination, trial counsel got Det. Kennedy to admit that the physical evidence also supported Johnson's version of the facts (Trial Tr. p. 449), and counsel's emphasis on the statement during her final argument as containing reasonable explanations from Johnson. Without trial counsel's testimony during the PCR evidentiary hearing, the Court must assume that the trial counsel had a considered strategic reason for not objecting to the highlighted portions of the statement.

On the other hand, the statements made by Det. Kennedy about what "Bo" said, do appear to be clearly inadmissible hearsay. Had trial counsel objected, the Court would most likely have sustained the objection and either redacted the statement or given the jury an admonishment. The Court finds that counsel did err in failing to object or request an admonition.

However, the inquiry does not end there. Johnson still has the burden to show that but for counsel's error, there is a reasonable probability that the results of the proceedings would be different. From a review of the record, it is clear, that even if trial counsel had objected and if the court would have sustained such an objection, the result would not likely have changed. [Johnson] argues that it is clear Bo's statements were considered by the jury because the jury requested to see Bo's statement. The record shows that the juror question referring to Bo's statement came from a written question from one juror following Det. Kennedy's testimony that was not asked by the Court. Trial Tr. p. 462. The Court cannot infer from that question alone that Det. Kennedy's recitation of Bo's statements had the devastating effect argued by [Johnson]. Beyond an unsupported assertion, Johnson has not presented any evidence or argument that the results of the proceedings would be different. Viewing all evidence as a whole, [Johnson] fails to show a reasonable probability of a different result. In contrast, as the facts found by the Indiana Court of Appeals indicate, the evidence was strong that Johnson had murdered Handlon, without any

> reference to the objectionable statement. Therefore, Johnson has also not carried his burden to show that trial counsel's error was prejudicial to his case.

Id. at 84-95 (internal citations omitted).

Before discussing Johnson's allegations of error, we note the general standard under which we review a post-conviction court's denial of a petition for post-conviction relief. The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. Fisher v. State, 810 N.E.2d 674, 679 (Ind. 2004); Ind. Post-Conviction Rule 1(5). When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. Fisher, 810 N.E.2d at 679. On review, we will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. Id. Further, the post-conviction court in this case entered findings of fact and conclusions thereon in accordance with Indiana Post-Conviction Rule 1(6). Id. "A post-conviction court's findings and judgment will be reversed only upon a showing of clear error – that which leaves us with a definite and firm conviction that a mistake has been made." Id. In this review, we accept findings of fact unless clearly erroneous, but we accord no deference to conclusions of law. Id. The post-conviction court is the sole judge of the weight of the evidence and the credibility of witnesses. Id.

The issue is whether Johnson was denied the effective assistance of trial counsel. To prevail on a claim of ineffective assistance of counsel, a petitioner must demonstrate

both that his 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), reh'g denied), reh'g denied, cert. denied, 534 U.S. 830, 122 S. Ct. 73 (2001). 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. Perez v. State, 748 N.E.2d 853, 854 (Ind. 2001). Failure to satisfy either prong will cause the claim to fail. French, 778 N.E.2d at 824. Most ineffective assistance of counsel claims can be resolved by a prejudice inquiry alone. Id.

When considering a claim of ineffective assistance of counsel, a "strong presumption arises that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Morgan v. State, 755 N.E.2d 1070, 1072 (Ind. 2001). "[C]ounsel's performance is presumed effective, and a defendant must offer strong and convincing evidence to overcome this presumption." Williams v. State, 771 N.E.2d 70, 73 (Ind. 2002). Evidence of isolated poor strategy, inexperience, or bad tactics will not support a claim of ineffective assistance of counsel. Clark v. State, 668 N.E.2d 1206, 1211 (Ind. 1996), reh'g denied, cert. denied, 520 U.S.

1171, 117 S. Ct. 1438 (1997). "Reasonable strategy is not subject to judicial second guesses." Burr v. State, 492 N.E.2d 306, 309 (Ind. 1986). "When an ineffective assistance of counsel claim is based on trial counsel's failure to make an objection, the appellant must show that, had a proper objection been made, it would have been sustained." Sauerheber v. State, 698 N.E.2d 796, 807 (Ind. 1998).

Johnson argues that his trial counsel was ineffective for failing to object to inadmissible hearsay statements contained in his interview with the police. Specifically, Johnson points out that "Detective Kennedy told Johnson that [Bo] made a statement to the police that [Bo] received a call from Johnson while it was still dark out and Johnson told him one of the girls was dead and the phone call was before we [the police] found her."[3] Appellant's Brief at 9. Johnson argues "[t]he statements of [Bo] were clearly hearsay." Id. Johnson also argues that "[e]ven if the detective's statements about [Bo's] interview were not admitted for the truth of the matter asserted, counsel should have at least requested a limiting instruction." Id. Johnson characterizes the statements as "devastating to the defense." Id. at 10. Johnson argues that "[Bo's] statement directly implied that Johnson knew Handlon was dead before the police ever knocked on his door, connecting Johnson to the crime, and making Johnson's story that he never touched Handlon unbelievable for the jury." Id.

Johnson also argues that his trial counsel was ineffective for failing to object to Detective Kennedy's statements regarding his personal opinion of Johnson's guilt.

[3] Bracketed text appears in original.

Specifically, Johnson argues that Detective Kennedy's statements that "'[t]here's no doubt [Johnson] went over there that way . . .;' that he had to call the family . . . and he wasn't sure if they'll buy what Johnson was saying; that Johnson's story was not going to fly; and that it looked like Johnson killed that girl, were the detective's opinion as to Johnson's guilt and his opinion on whether Johnson was being truthful." Id. at 11. Johnson cites Ind. Evidence Rule 704(b), which provides: "Witnesses may not testify to opinions concerning intent, guilt, or innocence in a criminal case; the truth or falsity of allegations; whether a witness has testified truthfully; or legal conclusions."

The State admits that "any statement made to the police by 'Bo' that was recounted by Detective Kennedy during his interview of [Johnson] constituted an out-of-court statement," but argues that "the statement involved did not constitute hearsay because it was not offered for the truth of the matter asserted." Appellee's Brief at 12. The State argues that "[t]he truth of whatever 'Bo' told the police was unimportant in relation to the prosecution's reason for admitting the taped interview." Id. at 13. The State argues that "even if counsel should have requested a limiting instruction, or even if the statement constituted hearsay, [Johnson] cannot establish the prejudice prong of his ineffective assistance of counsel claim." Id. at 14. The State argues that "the jury had before it [Johnson's] ever-evolving statements that initially claimed he had never been in the women's apartment to the final admission that he had gone to the victim's bedroom in an attempt to have sex with her, that he removed his pants and showed her his penis, and that he must have accidentally left his underwear there – the latter of which [Johnson]

only admitted when the police confronted him with the fact that his underwear was found in the victim's bedroom." Id. at 14-15.

As to Johnson's argument regarding Detective Kennedy's personal opinion, the State argues that "Detective Kennedy did not *testify* during a criminal trial to [Johnson's] guilt or whether [Johnson] or any witness was telling the truth; rather, [Johnson's] claim is based on what the detective said during an out-of-court interview." Id. at 17. The State also argues that "even if trial counsel should have objected or redacted the statements now argued by [Johnson] as violating Rule 704(b), [Johnson] cannot demonstrate the requisite prejudice for an ineffective counsel claim." Id.

To the extent that Johnson attacks his trial counsel's failure to object, we observe that such a decision may have been a reasonable trial strategy as not to draw the jury's attention to certain statements, and trial strategy is not subject to attack through an ineffective assistance of counsel claim, unless the strategy is so deficient or unreasonable as to fall outside of the objective standard of reasonableness. Autrey v. State, 700 N.E.2d 1140, 1141 (Ind. 1998). "Technically correct objections may be seen as obstruction or may only serve to unduly emphasize some piece of evidence." Hicks v. State, 557 N.E.2d 677, 679 (Ind. Ct. App. 1990). "Strategy to reach the overall goal may on occasion suggest bypassing other objections." Id. We will not lightly speculate as to what may have been an advantageous trial strategy, as counsel should be given deference in choosing a strategy that, at the time and under the circumstances, seems best. Whitener v. State, 696 N.E.2d 40, 42 (Ind. 1998). Here, Johnson did not submit any

testimony of his trial counsel at the post-conviction hearing. "Where trial counsel is not presented in support, the post-conviction court may infer that trial counsel would not have corroborated appellant's allegations." Dickson v. State, 533 N.E.2d 586, 589 (Ind. 1989). Because Johnson did not call his trial counsel as a witness at the post-conviction hearing, there is no evidence as to why counsel made the decision he did. Thus, the court was entitled to infer that counsel would not have corroborated Johnson's allegations. See Owens v. State, 464 N.E.2d 1277, 1280 (Ind. 1984) (holding that the court was entitled to infer that counsel would not have corroborated petitioner's allegation of incompetency where petitioner failed to produce the testimony of trial counsel and holding that "[w]ithout the benefit of counsel's testimony here, we will conclude that counsel's decision was a tactical judgment and not necessarily indicative of ineffective representation").

Even assuming that the performance of Johnson's trial counsel was deficient, Johnson has failed to show that he was prejudiced by the deficiencies. Initially, we observe that Johnson's claims involve the admission of certain statements made during his interview while the record involves over eighty exhibits and a jury trial covering three days.[4] Further, "[t]he improper admission of hearsay evidence . . . does not require reversal where, excluding the erroneously admitted hearsay evidence, there remains ample evidence to sustain the conviction." Snellgrove v. State, 569 N.E.2d 337, 344 (Ind. 1991). The record reveals that Johnson initially denied ever being in Handlon and

[4] We note that the trial court did not allow the jury to examine the transcripts following the playing of the interview.

Hoffman's apartment and then admitted in a second interview to having been in Handlon and Hoffman's apartment. Johnson's DNA was found on the underwear in the bedroom. In a later interview, Johnson initially stated that he did not leave his underwear in Handlon's apartment and that he did not attempt to have sex with either Handlon or Hoffman. Detective Kennedy eventually asked, "Did you go over there and try to have sex with her," and Johnson answered, "I might have probably did." State's Exhibit 8 at 132. Johnson then stated that he "said [he] want[ed] to . . . show her my thing and I took my pants off." Id. at 133. Johnson then stated that he took hot sauce over to Handlon's apartment and asked her if she wanted to "do it," took of his pants and "showed it off." Id. at 134. Johnson stated, "And then I was gettin' ready to put my underpants back on. I guess (inaudible) I don't know what happened." Id. at 135. Johnson stated that he stayed in Handlon's bedroom for three or four minutes and was touching himself during that time. Johnson then stated that Handlon said, "Just go ahead and leave," in a "nice, normal way," and that he put his clothes on, went down the steps, locked the door, and went home. Id. at 146. Handlon died from multiple stab wounds, made with a knife blade consistent with that used for box cutters, and Johnson admitted to having carried a box cutter at the time Handlon was murdered. Johnson also admitted that he had been out on the roof at one point, and the State presented evidence that the screen covering Handlon's window had been torn. Based upon the record, we cannot conclude that there is a reasonable probability that the result of the proceeding would have been different but for trial counsel's inadequate representation. See Young v. State, 746 N.E.2d 920, 927

(Ind. 2001) (finding no reasonable probability that the result of the proceeding would have been different if the defendant's trial counsel had performed adequately).

For the foregoing reasons, we affirm the post-conviction court's denial of Johnson's petition for post-conviction relief.

Affirmed.

BAKER, J., and KIRSCH, J., concur.