

Case Summary and Issues

Vanessa Thompson appeals the denial of her petition for post-conviction relief. On appeal, Thompson raises three issues, which we restate as 1) whether the post-conviction court properly concluded the State had not suppressed evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963); 2) whether alleged false and misleading testimony by two of the State's witnesses warrant a new trial; and 3) whether Thompson received ineffective assistance of trial counsel. We affirm, concluding that the post-conviction court did not improperly reject Thompson's Brady claim, that alleged false and misleading testimony by two of the State's witnesses does not warrant a new trial, and that Thompson did not receive ineffective assistance of counsel.

Facts and Procedural History

Our supreme court's opinion in Thompson v. State, 765 N.E.2d 1273, 1274 (Ind. 2002), provides a brief overview of the evidence admitted during Thompson's trial, but we wish to elaborate. On October 19, 1998, the body of sixteen-year-old Shanna Sheese was discovered in a vacant lot on the near eastside of Indianapolis. A pathologist concluded that Sheese had been struck in the head at least three or four times by a heavy object "that was relatively flat but could have been slightly curved" and that these blows caused Sheese's death. Transcript of Trial at 341. At the time her body was discovered, Sheese had been dead for at least two days and possibly as long as three or four days.

After a series of interviews over the next several months, the lead detective in the case, Roy West, began focusing his investigation on Thompson; her girlfriend, Alexa Whedon; and her boyfriend, Malcolm Wilson. The information gleaned from these

interviews suggested the three murdered Sheese either because Thompson was angry at Sheese for having had sex with Wilson or because Sheese had not paid Wilson for crack cocaine she purchased from Thompson, who sold the drugs on Wilson's behalf.¹ Based on this information, on March 2, 1999, the State charged Thompson with murder, a felony.²

From September 18 to 20, 2000, the trial court presided over a jury trial. Because there was an absence of physical evidence linking Thompson to Sheese's murder, the State attempted to prove Thompson's guilt primarily through the testimony of four witnesses: Susan Miller, Davida Altmeyer, Pamela Nave, and Gail Davis. With the exception of one observation by Altmeyer discussed below, the testimony of Miller and Altmeyer concerned incriminating statements made by Thompson around the time Sheese's body was discovered. Specifically, Miller testified she was discussing Sheese's death with Whedon at an acquaintance's house when Thompson entered and told Whedon she "shouldn't be talking about things in front of other people." Id. at 277. According to Miller, Thompson then stated that she was glad Sheese was dead and that Sheese "shouldn't have fucked with Malcolm." Id.

Altmeyer testified that on one night around the time Sheese's body was discovered, she was walking toward Wilson's truck to purchase crack cocaine from him. As she approached, Altmeyer observed a pair of white tennis shoes in the truck's bed that

¹ The probable cause affidavit discusses these interviews in further detail. See id. at 40-42.

² The State also charged Wilson and Whedon with murder on the same date, and they were tried and convicted in March of 2000 and November of 1999, respectively. Our supreme court affirmed those convictions on appeal, Wilson v. State, 765 N.E.2d 1265, 1273 (Ind. 2002); Whedon v. State, 765 N.E.2d 1276, 1280 (Ind. 2002), and this court recently affirmed the denial of Whedon's petition for post-conviction relief, Whedon v. State, 900 N.E.2d 498, 506 (Ind. Ct. App. 2009), trans. pending.

were similar to those she had seen Sheese wearing. Altmeyer thought the shoes were attached to a body, but she was not certain because a tarp covered most of the bed. At that point, Thompson, who had been sitting in the passenger seat of the truck, pulled the tarp over the shoes and said, “She saw, she saw,” to which Wilson replied, “No she didn’t cause if she says anything, we know where it came from.” Id. at 297. Altmeyer also testified that at an unspecified time at her mother’s house, Thompson told Altmeyer that she struck Sheese on the head, that the blow rendered Sheese unconscious, and that Wilson helped her dispose of Sheese’s body.

The testimony of Nave and Davis concerned incriminating statements Thompson made to them while Thompson was confined at the Marion County Jail. Specifically, Nave testified Thompson stated she “had hurt somebody really bad for [Wilson] and that she would kill for him.” Id. at 396. Davis’s testimony was more explicit; she testified that one night when she and Thompson were in bed together, Thompson stated she “crushed [Sheese’s] head in with a brick” because Wilson told her to “get rid of the girl.” Id. at 466. According to Davis, the following then occurred: “She was just looking up and she asked me, [‘]did I know what it was like to kill someone[?’] and then she told me how warm the blood was – how the blood was warm on her hands and how she would never forget that.” Id. at 468.

The jury found Thompson guilty, and the trial court entered a judgment of conviction based on the jury’s finding. Our supreme court affirmed Thompson’s conviction on direct appeal. Thompson, 765 N.E.2d at 1276.

With her direct appeal remedies exhausted, Thompson filed a pro se petition for post-conviction relief on April 16, 2001, which was supplemented by amendments with the assistance of counsel on June 29 and November 21, 2006. Thompson's amended petition sought relief on three grounds: 1) that the State suppressed evidence in violation of Brady v. Maryland; 2) that the State failed to correct alleged false and misleading testimony by Detective West and Davis; and 3) that Thompson received ineffective assistance of trial counsel. On January 24 and September 19, 2007, the post-conviction court conducted a hearing on Thompson's petition. During the hearing, the post-conviction court admitted several documents into evidence and heard testimony from Thompson's trial counsel; the State's deputy prosecutor, Stanley Kroh; Detective West; and Davis's girlfriend, Deseriee Landers, who was confined at Marion County Jail around the same time as Davis and Thompson.³ On July 21, 2008, the post-conviction court entered findings of fact and conclusions of law denying relief. Thompson now appeals.

Discussion and Decision

I. Standard of Review

To obtain relief, a petitioner in a post-conviction proceeding bears the burden of establishing her claims by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5). We accept the post-conviction court's findings of fact unless they are clearly erroneous, but we do not defer to the post-conviction court's conclusions of law. Martin v. State, 740 N.E.2d 137, 139 (Ind. Ct. App. 2000), trans. denied. Moreover, when the

³ Davis was not available to testify at the hearing, having passed away on November 20, 2000, due to a drug overdose. See Petitioner's Exhibit H. The record does not indicate why other trial witnesses, such as Miller, Altmeyer, and Nave, did not testify at the post-conviction hearing.

petitioner appeals from a denial of relief, the denial is considered a negative judgment and therefore the petitioner must establish “that the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court.” Stevens v. State, 770 N.E.2d 739, 745 (Ind. 2002), cert. denied, 540 U.S. 830 (2003).

II. Brady Claim

Thompson argues the post-conviction court’s conclusion that the State did not suppress evidence in violation of Brady v. Maryland is clearly erroneous. Thompson’s argument is based on evidence allegedly suppressed by the State that Thompson claims could have been used to impeach the testimony of Davis, Altmeyer, and Nave. Because the State’s case turned in large part on witness credibility (recall there was no physical evidence linking Thompson to Sheese’s death), Thompson contends these missed impeachment opportunities prevented the jury from accurately judging the credibility of these witnesses and warrant a new trial.

We discuss Thompson’s argument and the suppressed evidence in further detail below, but first note some rules governing Brady claims. In Brady, the United States Supreme Court held “that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” 373 U.S. at 87. To prevail on a Brady claim, the defendant must establish three elements: 1) that the evidence is favorable to the accused, because it is either exculpatory or impeaching; 2) that the evidence must have been suppressed by the State, either willfully or inadvertently; and 3) that the evidence was material to an issue at trial. Turney v. State,

759 N.E.2d 671, 675 (Ind. Ct. App. 2001) (citing Strickler v. Greene, 527 U.S. 263, 281-82 (1999)), trans. denied.

Several points on the element of materiality are worth emphasizing. First, “[e]vidence is ‘material’ only if there is a ‘reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.’” Minnick v. State, 698 N.E.2d 745, 755 (Ind. 1998) (quoting United States v. Bagley, 473 U.S. 667, 685 (1985)), cert. denied, 528 U.S. 1006 (1999). Second, “reasonable probability” does not concern “whether the defendant would more likely than not have received a different verdict with the [suppressed] evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.” Kyles v. Whitley, 514 U.S. 419, 434 (1995). Third, a reviewing court must first examine the suppressed evidence individually, and then consider whether its cumulative effect is material. Id. at 437 n.10. If a defendant prevails in a Brady claim, the remedy is to grant a new trial. Turney, 759 N.E.2d at 675 (citing Kyles, 514 U.S. at 434-36).

With these rules in mind, we examine the alleged Brady evidence as it pertains to each witness, initially considering whether the evidence was suppressed by the State and, if so, whether it is favorable to Thompson. If the evidence is favorable, we then consider whether the cumulative effect of such evidence was material to an issue at Thompson’s trial.

A. Gail Davis

Thompson argues that three letters written by Davis to Deputy Prosecutor Kroh (or the Marion County Prosecutor's office generally) during her confinement⁴ at Marion County Jail constitute Brady evidence. The letters are undated, but it can be inferred from statements therein that the first letter was written during Davis's confinement at Marion County Jail from February 5 to June 21, 1999, see Petitioner's Exhibit T, at 2 (Davis's jail records file jacket stating her dates of confinement), and that the second and third letters were written after Whedon's trial in November 1999, but before Thompson's trial, which at that time was scheduled for December 6, 1999.⁵ There is no dispute these letters were suppressed, so we proceed to determine whether they were favorable to Thompson.

In the first letter, Davis asks Kroh to contact jail officials and request that Davis have contact with her girlfriend, Deseriee Landers, who also was confined at the jail, but apparently in a different cellblock at the time Davis wrote the letter:

This is Gail Davis from the Marion County Jail. The last we spoke, I asked you to contact Jail Records and take [Deseriee Landers's] name off my card and my name off her card.⁶ Because of this Murder Trial I agreed to testify for, my wife's and my life for the moment is chaos. The officers are not letting us go to any classes, church, school, recreation or just any

⁴ Davis was confined at Marion County Jail for violating her probation in relation to a Class C felony burglary conviction.

⁵ A jury panel had been selected and sworn for Thompson's December 6, 1999, trial, but the trial was continued at the last minute when the prosecution received word that Whedon was interested in testifying. See Tr. of Trial at 19-20; Post-Conviction Transcript at 82 (January 24, 2007, hearing).

⁶ The "card" to which Davis refers is a jail location card, which is a document that lists other inmates with whom the inmate cannot have contact. Davis's jail location card lists Thompson and Whedon, apparently for safety purposes (an inmate scheduled to testify against another inmate could well jeopardize her safety), as well as Landers and several other inmates. See Petitioner's Ex. T, at 3. According to Landers, she and Davis were listed on each other's card because jail officials discovered they were a couple. See Post-Conviction Tr. at 13 (January 24, 2007, hearing); see also Petitioner's Ex. T, at 5 (jail incident report stating that on April 12, 1999, Davis and Landers were discovered in a cellblock together and that "these two are to be separated at [a]ll times").

contact at all. You said you would take care of this by going to jail records. Well the officers say that the cards have not changed. I have tried writing to jail records and everything I can think of, and all to no avail.

My wife ([Deseriee Landers]) has less than 2 wks. in jail and I would like to spend at least a few days with her before she leaves.

We don't know when we'll see each other again.

If you could give Officer Lowe a phone call and tell her about the situation, she said she would except [sic] that from you or a call from Jail Records to update our cards. Please Mr. Kroh I really need your help ASAP.

Petitioner's Exhibit G at 1-2 (emphasis in original). Thompson argues that had the first letter not been suppressed, it could have been used to impeach Davis's testimony that she never received any favors from the State, let alone requested any. See Tr. of Trial at 491, 493. Thompson further argues that such impeachment would not only have damaged Davis's credibility, but also given Thompson room to argue to the jury that the State acceded to Davis's request in the hope of receiving favorable testimony. For its part, the post-conviction court rejected these arguments based on a finding that Davis "was not given special favors at the Marion County Jail." Appellant's Appendix at 196.

We note initially that the post-conviction court's finding does not preclude Thompson's argument to the extent she contends the first letter would have impeached Davis's testimony that she never requested favors from the State. In other words, that Davis did not receive favors does not preclude impeachment of Davis's testimony that she never requested them. Accordingly, we agree with Thompson that the first letter could have been used to impeach Davis's testimony that she never requested favors from the State. See Tr. of Trial at 493 (Davis testifying on re-direct examination: "I never asked you for anything. I never once asked you to bring me a pack of cigarettes. I never

asked for nothing. I never asked you for anything because I don't want anything from you").

The post-conviction court's finding also is deficient to the extent it precludes Thompson's argument that the State attempted to accommodate her request. Kroh testified at the post-conviction hearing that although he lacked "any specific recollection" regarding whether he contacted the jail in response to receiving the first letter, he went on to state that "[i]f [Davis] had asked us to do that, we would have looked into it" Post-Conviction Tr. at 60 (January 24, 2007, hearing). Jail records support an inference that Kroh "looked into" this request; Davis's interview record indicates Kroh met with Davis on April 14, 1999, petitioner's ex. T, at 4, and the following day a jail official transferred Davis from cellblock 2L to 2A, *id.* at 12.

Thompson's argument falls short, however, to the extent she argues the first letter shows Davis actually received the requested favor. On that point, there is no evidence Landers was assigned to cellblock 2A at the time of Davis's April 15th transfer and, more to the point, Landers testified at the post-conviction hearing that she and Davis were in the same cellblock at one point, separated when jail officials learned they were a couple, briefly reunited, but separated again when jail officials realized the reunion was an oversight:

Q Were you incarcerated in the Marion County Jail at the same time that Gail Davis was incarcerated there?

A At one point, yes.

Q When you were at the Marion County Jail, were you making any efforts to try to see Gail Davis?

A Actually we were in the same – I call them modules. I don't know how – you guys call them pods or something different, but we were in the same unit together.

- Q Did there come a time when you were separated from her?
- A Yes. They moved me across the hall.
- Q And then were any efforts made by you to try to get back in the same pod as she?
- A Actually no, because they knew that we were a couple. Somebody had let officers know that we were a couple, and, therefore, they separated us.
- Q Do you know whether Gail was making any efforts to try to get back in the same pod as you?
- A I don't know that she was, but I know that we had been moved back into the same pod at one point, and then when they realized their mistake, they separated us again.

Post-Conviction Tr. at 13 (January 24, 2007, hearing). Thompson claims this testimony shows “that [Landers] and Davis were separated at the jail because they were a couple, but that they were later allowed to be together.” Appellant’s Brief at 21; see also Appellant’s Reply Brief at 3 (“[Landers] testified that she and Davis were separated at the jail at some point, but allowed back together for a trial.”). But the critical point undermining Thompson’s claim is Landers’s acknowledgement that her reunion with Davis was not the result of Kroh’s efforts, but merely an oversight by jail officials. The post-conviction court’s finding that Davis “was not given special favors at the Marion County Jail,” appellant’s app. at 196, was therefore not clearly erroneous, which means the first letter could not have been used to impeach Davis’s testimony in that regard.

The second and third letters are addressed to “whom it may concern,” petitioner’s ex. G, at 3, and the “Prosecutor’s Office, Stanley Kohn [sic] or whom it may concern” id. at 4, respectively, and catalogue Davis’s dissatisfaction with the delay in receiving a transfer back to Rockville Correctional Facility from the Marion County Jail after

testifying in Whedon's trial in November 1999,⁷ as well as the jail officials' failure to give her regular doses of medication to treat her bi-polar disorder. The second letter states in relevant part:

I am writing to plead to you to take me back to Rockville today. I do not think I will be able to come back here in Dec [sic] for the 2nd Trial.^[8]

The conditions here are too much for me to handle. I have been here for 5 days and in that time I have not eaten. I am very hungry. I am paranoid about the food.

The Showers have nets and bugs and it is filthy and the laundry smells. This Block is so loud I can't think. The women are having open sex and the air smells pretty bad. Chaos is 24 hrs a day.

I am a phyc [sic] patient as you well know and I have been given the wrong medication and for the past few days, no medication at all.

I only have 27 days til [sic] my release date and I don't want to do them under these conditions. Sorry this place is unbearable.

Id. at 3 (emphases in original). The third letter reads in relevant part:

I Gail Davis withdraw my testimony in the case against Vanessa Thompson. I will not testify for the State of Indiana for or against her.

I do not want to be transported from Rockville Correctional Facility to be involved in this case what so ever. I will not speak in this trial.

I have been treated and subjected to unspeakable conditions while testifying against Alexa Wheton [sic].

It has been over a week now and still I have had no medication for my disorder, and I am beginning to manic out. I have had no food, nor do I have a change of clothing or hygienes [sic].

I was Promised I would be taken back to Rockville after the trial Tuesday Nov. 23rd and here it is Friday Nov. 26th and I am still here at the Marion County Jail. I was promised I would not spend the Thanks[.]giving holiday here yet here I sit. The showers have mold, nets and bugs, and I cannot take these conditions.

I feel used and abandoned by the prosecutors [sic] office. I have done nothing but cooperate even when it has indconvienced [sic] I will not be treated this way again therefore I will not testify in the Trial against

⁷ The record indicates Davis was transferred from the Marion County Jail to the Indiana Women's Prison on June 21, 1999. See Petitioner's Ex. T, at 2. Davis was then apparently transferred from the Indiana Women's Prison to Rockville Correctional Facility at some point between June 21, 1999, and Whedon's trial in November 1999.

⁸ Davis was referring to Thompson's trial, which was scheduled for December 6, 1999, at the time she wrote the letter. See supra, note 5.

Vanessa Thompson. I am very angry, disappointed and hurt. I have never lied during this investigation and do not appreciate being lied to.

I wish you nothing but the best and may Justice prevail.

...

It is now Tuesday Nov. 30 1999 that I mail this letter. I am still here at Marion County Jail.

Id. at 4-5 (emphasis in original). Thompson argues the impeachment value of the second and third letters is two-fold. First, citing Davis's complaints that she had not been receiving medication to treat her bi-polar disorder, Thompson contends these complaints could have been used to further the defense's theory that Davis experienced delusional thoughts in the absence of medication, which in turn would strengthen the defense's argument that the jury should not believe her testimony. We agree with Thompson that the second and third letters could have been used to impeach Davis's testimony in this manner.

Thompson's second contention concerning the impeachment value of the second and third letters requires some additional background. At trial, the defense called Laura Dowdell, who testified that during a ride back to Rockville Correctional Facility on December 7, 1999, she heard Davis bragging about how she had "Scott Newman⁹ in the bag and she was going to get what she wanted or she wasn't going to testify." Tr. of Trial at 517. Davis testified she never made such a statement. See id. at 480-81. Thompson contends, however, that Davis's threats not to testify in the third letter corroborate Dowdell's testimony and, by implication, impeach Davis's. We agree with Thompson that the third letter could have been used to impeach Davis's testimony in this manner.

⁹ Newman was the Marion County Prosecutor at that time.

To summarize the impeachment value of the three letters, we conclude the first letter could have been used to impeach Davis's testimony that she never requested favors and to argue that the State attempted to accommodate her request, but not to impeach Davis's testimony that she actually received the requested favor from the State. Regarding the second and third letters, we conclude they could have been used to strengthen the defense's theory that Davis experienced delusional thoughts in the absence of medication and to impeach Davis's testimony that she denied threatening not to testify if she was not transferred quickly to Rockville Correctional Facility.

2. Davida Altmeyer and Pamela Nave

The alleged Brady evidence concerning Altmeyer and Nave concern plea agreements the two executed with the State based on a series of unrelated charges that were filed between November 1998 and July 1999. We discuss these agreements and the circumstances relating to them below, but note initially that “[a] prosecutor must disclose to the jury any agreement made with a witness and any promises, grants of immunity, or rewards offered in return for testimony.” Rubalcada v. State, 731 N.E.2d 1015, 1024 (Ind. 2000). This obligation to disclose “arises when there is a confirmed promise of leniency in exchange for testimony, but preliminary discussions are not subject to mandatory disclosure.” Id.; see also Todd v. Schomig, 283 F.3d 842, 849 (7th Cir. 2002) (“Without an agreement, no evidence was suppressed, and the state’s conduct, not disclosing something it did not have, cannot be considered a Brady violation.”), cert. denied, 537 U.S. 846 (2002).

Regarding Altmeyer, on November 10, 1998, the State charged her with Class D felony possession of cocaine. The parties entered into a plea agreement on November 8, 1999, under which Altmeyer agreed to plead guilty, and the State agreed to cap Altmeyer's sentence at sixty days executed and 305 days suspended and to dismiss a notice of probation violation. The trial court accepted the agreement on the same day, entered a judgment of conviction as a Class A misdemeanor under the alternative misdemeanor sentencing statute, and sentenced Altmeyer to sixty days executed and 305 days suspended. On March 3, 1999, the State charged Altmeyer with Class D felony possession of cocaine and Class A misdemeanor possession of marijuana. On April 3, 1999, the State charged Altmeyer with Class A misdemeanor possession of paraphernalia. On May 27, 1999, the State charged Altmeyer with Class A misdemeanor possession of marijuana and Class B misdemeanor public intoxication. Finally, on July 24, 1999, the State charged Altmeyer with Class D felony prostitution. In three plea agreements, Altmeyer agreed to plead guilty to Class D felony possession of cocaine, Class D felony prostitution, and Class A misdemeanor possession of marijuana relating to the March 3, 1999, charge. In exchange, the State agreed to dismiss the remaining charges, have the sentences served concurrently, and cap the total executed term at 730 days. On June 1, 2000, the trial court accepted the plea agreements and sentenced Altmeyer to 730 days executed for Class D felony possession of cocaine, 730 days executed for Class D felony prostitution, and 365 days executed for Class A misdemeanor possession of marijuana, all to be served concurrently. See Petitioner's Exhibits O-5 and P-2.

Regarding Nave, on December 18, 1998, the State charged her with Class C felony burglary and Class D felony theft. On June 22, 1998, the parties entered into a plea agreement under which Nave agreed to plead guilty to the burglary charge, and the State agreed to dismiss the theft charge and cap the executed portion of Nave's sentence at one year. At a sentencing hearing on July 20, 1999, however, the trial court noted that Nave's sentence was nonsuspendable below two years (i.e., she had to serve at least two years executed), apparently because she was pleading guilty to a Class C felony and less than seven years had elapsed since her release from probation. See Ind. Code § 35-50-2-2(b)(2); Petitioner's Exhibit L, at 27-31. Thereafter, the parties entered into a new plea agreement under which Nave agreed to plead guilty to Class D felony theft, and the State agreed to dismiss the burglary charge and cap the executed portion of Nave's sentence at one year. On August 3, 1999, the trial court sentenced Nave pursuant to the new plea agreement to a term of 148 days executed and thirty-two days suspended.

The post-conviction court concluded that “[t]he record in [Thompson's] case does not substantiate her claim that any agreements in exchange for testimony existed between the prosecutor and either Pamela Nave or Davida Altmeyer.” Appellant's App. at 198. Regarding Altmeyer, Thompson argues her plea agreements were made in exchange for favorable testimony because the trial court improperly sentenced her to concurrent, as opposed to consecutive, terms. Specifically, Thompson claims that because Altmeyer was initially arrested in March 1999 for the Class D felony cocaine charge, released, and arrested again in July 1999 for the Class D felony prostitution charge, she should have been sentenced to consecutive terms for those offenses pursuant to Indiana Code section

35-50-1-2(d)(2): “If, after being arrested for one (1) crime, a person commits another crime . . . while the person is released . . . the terms of imprisonment for the crimes shall be served consecutively” Altmeyer may well have received a sentence that violated this statute, but that hardly means the State procured such a sentence in exchange for favorable testimony. Accordingly, the post-conviction court’s conclusion with respect to the plea agreements Altmeyer received is not clearly erroneous, which means the State did not suppress such evidence.

Thompson makes a stronger argument that Nave’s plea agreement was in exchange for favorable testimony. Thompson cites testimony and documentary evidence from the post-conviction hearing indicating that after the trial court informed the parties that Nave’s sentence was nonsuspendable below two years, Detective West, at the request of Nave’s counsel, told Kroh to contact the deputy prosecutor assigned to Nave’s case to inform him of Nave’s “status as a witness in this case.” Post-Conviction Tr. at 23 (September 19, 2007, hearing). Kroh, however, testified that although he “very well may have” spoken to the deputy prosecutor about Nave, he lacked any “specific recollection.”¹⁰ Post-Conviction Tr. at 66 (January 24, 2007, hearing).

Several reasonable inferences can be drawn from this evidence. The first – the one Thompson urges – is that Kroh contacted the deputy prosecutor and told him to go easy on Nave because she was a witness, and that the deputy prosecutor in turn told Nave that he would let her plead guilty to Class D felony theft as opposed to Class C felony burglary because she was a witness in Thompson’s case, implying that the State expected

¹⁰ The same is true of Nave’s counsel and the deputy prosecutor assigned to her case – neither recall any specific discussions with Kroh about Nave’s status as a witness in Thompson’s case. See Petitioner’s Exhibit I (affidavit of Nave’s counsel) and J (affidavit of deputy prosecutor assigned to Nave’s case).

favorable testimony in exchange for the plea agreement. The problem for Thompson, however, is that this is not the only reasonable inference to be drawn from the evidence. On the one end, the evidence supports an inference that Kroh did not contact the deputy prosecutor at all (neither Kroh nor the deputy prosecutor remember discussing the matter) or, toward the other end, he might have contacted the deputy prosecutor, but the deputy might have offered the plea agreement to Nave without communicating his knowledge that she was a witness in Thompson's case, which undermines a conclusion that the plea agreement was in exchange for testimony. In that respect, we reiterate that the State's duty to disclose is triggered when the promise is in exchange for testimony. See Rubalcada, 731 N.E.2d at 1024. The post-conviction court declined to view Nave's plea agreement as an agreement in exchange for testimony, and given that the evidence supported several reasonable inferences in addition to the one Thompson urges, we cannot say the post-conviction court's finding is clearly erroneous. Accordingly, as with Altmeyer's plea agreements, we conclude Nave's plea agreement was not suppressed by the State.¹¹

3. Materiality

Having concluded the three letters written by Davis are the only evidence that was both favorable to Thompson and suppressed by the State, we now examine whether there is a reasonable probability the result of Thompson's trial would have been different if the evidence was disclosed, see Minnick, 698 N.E.2d at 755, with the understanding that "reasonable probability" means a verdict worthy of confidence, not "whether the

¹¹ Because we conclude the State did not suppress this evidence, we do not address the State's argument under Ransom v. State, 850 N.E.2d 491, 499 (Ind. Ct. App. 2006), that Thompson failed to exercise due diligence to discover Altmeyer's and Nave's plea agreements.

defendant would more likely than not have received a different verdict with the [suppressed] evidence,” Kyles, 514 U.S. at 434. As mentioned above, the letters could have been used to impeach Davis’s testimony that she never requested favors from the State, to show the State attempted to accommodate Davis’s request, to strengthen the defense’s theory that Davis experienced delusional thoughts in the absence of medication for bipolar disorder, and to impeach Davis’s testimony that she denied threatening not to testify unless she received a quick transfer to Rockville Correctional Facility following Whedon’s trial in November 1999.

Turning first to Davis’s bipolar disorder, the defense elicited a concession from Davis that she occasionally sold medication designed to treat her bipolar disorder to inmates during her confinement at the Marion County Jail. The defense also called a clinical neuropsychologist as an expert, who testified generally that when an individual diagnosed with bipolar disorder does not take such medication, it makes the individual more susceptible to psychotic symptoms such as hallucination and delusional thinking. Davis’s second and third letters certainly strengthen that part of the defense’s case, but they do not otherwise make significant inroads. For example, beyond the evidence presented to the jury, the letters do not suggest Davis was delusional when she notified Detective West of Thompson’s incriminating statements. As such, we agree with the post-conviction court that the letters would merely have been “cumulative” of other evidence the defense presented regarding Davis’s bipolar disorder. Appellant’s App. at 199.

Similarly, we are skeptical the letters would have significantly impacted the trial to the extent they were used to impeach Davis's testimony that she never requested favors from the State and that she denied threatening not to testify unless she received a quick transfer to Rockville Correctional Facility. Given that the State attempted, but ultimately failed to accommodate either request, a reasonably skilled prosecutor could have strengthened the State's attempt to portray Davis as forthright by arguing she was testifying against Thompson despite such failures. Stated differently, although the letters indicated Davis was requesting favors, in one instance to the point of threatening not to testify at Thompson's trial, her testimony notwithstanding that she did not receive those favors hardly would have helped Thompson's case.

On appeal from the denial of a petition for post-conviction relief, the petitioner bears a heavy burden of establishing that the evidence leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court. Stevens, 770 N.E.2d at 745. The post-conviction court concluded Davis's letters "do not meet the materiality test." Appellant's App. at 199. For the foregoing reasons, we are not convinced the evidence leads unerringly and unmistakably to a contrary conclusion. Accordingly, we conclude the post-conviction court properly concluded the State did not suppress evidence in violation of Brady v. Maryland.

III. Failure to Correct Alleged False and Misleading Testimony

Thompson argues the post-conviction court improperly declined to grant a new trial on the ground that the State failed to correct false and misleading testimony by Detective West and Davis. "[A] defendant is entitled to a new trial if he can establish

that the prosecutor intentionally or inadvertently failed to correct materially false testimony relevant to the credibility of a key government witness.” Ross v. Heyne, 638 F.2d 979, 986 (7th Cir. 1980) (citing Giglio v. United States, 405 U.S. 150 (1972); Napue v. Illinois, 360 U.S. 264 (1959)). In this context, “materially false” invokes the same type of materiality review as a Brady claim. Giglio, 405 U.S. at 154.

Thompson cites the following examination of Detective West as the first instance of the State’s failure to correct false testimony:

Q [(by the trial court)] . . . With respect to some of the people that you interviewed, particularly Pamela Nave, Rayetta Thomas,¹² Davida Altmeyer, and any other individuals, at any time did you as a police officer or law enforcement officer make any promises to them or indicate that they would receive any benefit for their answering your questions or assisting you?

A Never.

...

Q [(by the State)] Just related to the any promises to any witnesses question, Detective, in relation to that, no one who’s testified in this trial has been promised anything; is that right?

A Not to my knowledge, no.

Q By you. Are you aware of me promising any of these witnesses anything?

A No.

Tr. of Trial at 449, 450. For the second instance, Thompson cites Davis’s testimony denying she asked for favors from the State: “I never asked you for anything. I never once asked you to bring me a pack of cigarettes. I never asked for nothing. I never asked you for anything because I don’t want anything from you.” Id. at 493.

Thompson claims both of these exchanges should have been corrected by the State because Davis’s first letter contains a request for a favor, which the State tried to accommodate. We fail to see how that makes Detective West’s testimony false – he

¹² Rayetta Thomas is Altmeyer’s mother.

testified he never told any of the witnesses beforehand he or she would receive a benefit for testifying – and although Davis’s first letter contradicted her testimony, we have already concluded that fact, if presented to the jury, would have been immaterial. Accordingly, we conclude the post-conviction court did not improperly refuse to grant Thompson a new trial on such grounds.

IV. Ineffective Assistance of Trial Counsel

Thompson argues the post-conviction court improperly rejected two claims of ineffective assistance of counsel. To establish a violation of the right to effective counsel as guaranteed by the Sixth Amendment, the petitioner must establish both prongs of the test set forth in Strickland v. Washington, 466 U.S. 668 (1984). Wesley v. State, 788 N.E.2d 1247, 1252 (Ind. 2003). First, the petitioner must show counsel was deficient. Id. “Deficient” means that counsel’s errors fell below an objective standard of reasonableness and were so serious that counsel was not functioning as “counsel” within the meaning of the Sixth Amendment. Id. Second, the petitioner must show that counsel’s deficiency resulted in prejudice. Id. Prejudice exists if “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Strickland, 466 U.S. at 694. We need not address whether counsel’s performance was deficient if we can resolve a claim of ineffective assistance based on lack of prejudice. Wentz v. State, 766 N.E.2d 351, 360 (Ind. 2002).

Thompson first claims counsel was ineffective for not impeaching Davis with an alleged prior inconsistent statement. At trial, Davis testified Thompson told her she

“crushed [Sheese’s] head in with a brick.” Tr. of Trial at 467. In her February 26, 1999, statement to Detective West, the following exchange occurred:

- Q. Did [Thompson] ever go into any detail about what happened to the girl, or who was present when she died?
- A. All I know, she, the closest that I got for a visual is a brick. Malcolm, Darrell, and [Whedon] were all there, and something about crushing this girl’s head in, that’s as far as I got as a visual, I don’t know if it’s true, I don’t know.

Petitioner’s Exhibit F, at 14.

Even assuming Thompson’s counsel’s failure to impeach Davis with this statement constitutes deficient performance, we fail to see how the deficiency resulted in prejudice. As the post-conviction court found, Davis’s statement arguably “would have strengthened the State’s case by emphasizing the use of a brick as the murder weapon,” appellant’s app. at 202, and we add our own observation that the statement appears fairly consistent with Davis’s trial testimony in that both describe the murder weapon and the manner in which Sheese was killed. Thompson attempts to sidestep this finding by contending that Davis’s reference to a “visual” is proof she was suffering from hallucinogenic thinking and fantasized her conversation with Thompson. Yet Thompson offers no evidence to support this contention, and in the absence of such evidence, we cannot say counsel’s assumed deficiency resulted in prejudice, let alone conclude the post-conviction court clearly erred in that regard.

Thompson’s second ineffective counsel claim concerns counsel’s failure to object to several statements by the prosecutor during closing argument that Thompson contends constitute “personally vouching for [] jailhouse informants to the great disadvantage of the defense.” Appellant’s Br. at 37. During his closing argument, Deputy Prosecutor

Kroh stated that witnesses such as Altmeyer, Nave, and Davis did not receive any benefit in exchange for their testimony. During his rebuttal to the defense's closing argument, Kroh made the following statements:

We are presenting to you young ladies who have the conscience and they have the courage and they have the strength to speak to you about what they know and now you know how difficult it was for them to do that and what they have to go through for the truth to come out and I defy anyone to say that any of these ladies had a motive for doing anything but coming in here and telling the truth about what they know about this woman killing a 16 year old girl. There's just absolutely no reason for any of them to come in here and tell you anything but what the defendant told them and the defense is asking you to speculate.

...

Good solid police work is what solved this case and the goodness and the conscience of the people like Davida Altmeyer, Gail Davis, Pam Nave and Susan Miller. Against all odds and against every possible thing they could ever get to gain – as Gail Davis said it, she's not getting anything. If anything she's getting a headache out of this whole thing and I will tell you that's an underestimate by her part I'm asking you to honor the courage of Davida Altmeyer and Gail Davis and Pam Nave and Susan Miller

Tr. of Trial at 677, 680, 682.

To establish that counsel was deficient, Thompson must show the trial court would have sustained a proper objection. Parish v. State, 838 N.E.2d 495, 503 (Ind. Ct. App. 2005). Our supreme court has observed that “a prosecutor may comment on the credibility of the witnesses as long as the assertions are based on reasons which arise from the evidence.” Cooper v. State, 854 N.E.2d 831, 836 (Ind. 2006) (quoting Lopez v. State, 527 N.E.2d 1119, 1127 (Ind. 1988)). Instances where a prosecutor's commentary on witness credibility is impermissible include a statement of opinion that a witness is telling the truth. Schlomer v. State, 580 N.E.2d 950, 957 (Ind. 1991); see also Cowan v.

State, 783 N.E.2d 1270, 1277 (Ind. Ct. App. 2003) (“[I]t is improper for a prosecutor to personally vouch for a witness in an argument.”), trans. denied.

The post-conviction court concluded an objection to Kroh’s statements would not have been sustained because “[t]here was no indication that Kroh had any information other than what had been presented to the jury and that he was commenting on the sufficiency of the evidence.” Appellant’s App. at 204. The general thrust of Kroh’s statements begin by pointing out that Altmeyer, Davis, and Nave had not received a benefit in exchange for their testimony. Kroh then uses that point to argue that the absence of any benefit is a good reason to believe such testimony. We fail to see how such an argument, based as it is on evidence that the witnesses did not receive benefits, constitutes Kroh’s personal opinion. Accordingly, because Thompson cannot establish that Kroh was “personally vouching” for the witnesses, it follows that an objection would not have been sustained, which means Thompson’s counsel was not ineffective.

Conclusion

The post-conviction court did not improperly reject Thompson’s Brady claim, alleged false and misleading testimony by two of the State’s witnesses does not warrant a new trial, and Thompson did not receive ineffective assistance of counsel.

Affirmed.

CRONE, J., and BROWN, J., concur.