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ATTORNEY FOR APPELLANT:

CAROLINE B. BRIGGS
Lafayette, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

ELLEN H. MEILAENDER
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

JAMES JOHNSON,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 52A04-0803-PC-154

APPEAL FROM THE MIAMI CIRCUIT COURT
The Honorable Bruce C. Embrey, Judge
The Honorable Rosemary Higgins Burke, Judge
Cause Nos. 52C01-0010-CF-79 & 52C01-0411-PC-11

May 6, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

During James Johnson's belated direct appeal of his convictions for attempted murder, attempted voluntary manslaughter, and robbery, he filed a *Davis/Hatton* petition, which this Court granted. Johnson then filed a petition for post-conviction relief. The post-conviction court largely denied relief. Johnson now appeals the denial of post-conviction relief and reinstates his direct appeal. Finding that Johnson has failed to establish prosecutorial misconduct, that any confrontation violation is harmless, and that either *Blakely* does not apply or there is no violation, we conclude that Johnson is not entitled to any relief on his direct appeal claims. As for Johnson's post-conviction claims, we conclude that he received the effective assistance of counsel and that he was not denied the right to an appeal. We therefore affirm.

Facts and Procedural History

The facts most favorable to the verdicts reveal that in the early morning hours of October 7, 2000, James Johnson, Gale Field,¹ and Wayne Hornbuckle went to the Kokomo, Indiana, trailer of April Rainbolt and Frank Snow to purchase cocaine from Terrance² Sheard, a friend of Snow from Indianapolis who occasionally sold cocaine out of the trailer. After ingesting the cocaine, Johnson, Field, and Hornbuckle left the trailer and went to Hornbuckle's house, where they formulated a plan to rob Snow of his money

¹ The court reporter wavers throughout the trial transcript between two different spellings of Gale's last name, Field and Fields. However, Field himself makes clear that his last name is spelled Field. Tr. p. 219.

² There is a discrepancy in the trial transcript regarding the spelling of Sheard's first name. On one page alone, the court reporter spells Sheard's first name in three different ways: Terrance, Terence, and Terrence. See Tr. p. 290. The hospital records, which Sheard signed, reflect that Sheard's first name is spelled Terrance.

and cocaine. According to the plan, Johnson armed himself with a loaded .22 caliber gun, and Field armed himself with a .44 magnum. Around 5:30 a.m., the group returned to the trailer, where Hornbuckle cut the phone lines and slashed the tires on Rainbolt's car while Johnson and Field knocked on the front door of the trailer.

Upon entering the trailer, Johnson asked Snow if he could purchase more cocaine. Snow said that he would have to check with Sheard, who was in the back bedroom with a woman. As Snow entered the back bedroom to ask Sheard, he heard a "pop" and realized that he had been shot in the back. Tr. p. 284. Snow immediately turned around and asked Johnson, "What did you shoot me for?" *Id.* Snow then fell against the wall and onto the bed. Snow heard another "pop," which was Sheard being shot in the neck. Johnson approached Snow and asked, "Where's it at?" *Id.* at 286. When Snow said, "What?" Johnson clarified, "The drugs and the money." *Id.* Snow said, "I don't know." *Id.* At this point, the woman who had been with Sheard interrupted and said, "It's in [Sheard's] pockets." *Id.*

When Johnson returned to the living room, Field, who had been holding Rainbolt and another man at gunpoint, asked Johnson if he had the dope and the money, and Johnson responded "yes." Johnson showed Field about an ounce of cocaine. Johnson then pushed his gun into Field's hand and told him to "do" Rainbolt and the other man. *Id.* at 212. Johnson ran out of the trailer. Field, however, did not shoot Rainbolt and the other man. Instead, he followed Johnson out of the trailer. The group then met back up in the car and drove off. While in the car, Johnson said that he had shot both Snow and Sheard and thought that Sheard was dead.

In the meantime, Rainbolt ran to the back bedroom and saw that both Snow and Sheard had been shot. Rainbolt tried to call 911, but the phone line was dead. Rainbolt then tried to take Snow in her car to the hospital, but her tires had been slashed. Snow was eventually taken to St. Joseph Hospital in Kokomo, where he was seen by Dr. Louis A. Hahn, an emergency room physician. Dr. Hahn examined Snow and determined that he had a gunshot wound to his abdomen and back that had punctured his left kidney, spleen, and colon. After consulting with two other doctors, they decided to lifeline Snow to Methodist Hospital in Indianapolis, where his left kidney and spleen were removed. Sheard was also taken to the emergency room at St. Joseph Hospital, where he was examined by another emergency physician, Dr. John Ayres, and then also lifelined to Methodist Hospital.

The State charged Johnson with two counts of attempted murder and two counts of Class A felony robbery. Following a jury trial, Johnson was convicted of attempted murder (Sheard), attempted voluntary manslaughter (Snow), and both counts of Class A felony robbery. After vacating one of the robbery convictions on double jeopardy grounds, the trial court imposed consecutive thirty-five year sentences on the remaining three Class A felony convictions, for an aggregate term of 105 years.

In 2003, Johnson initiated a belated direct appeal.³ On April 15, 2003, Johnson filed a Petition for Remand in order to file a petition for post-conviction relief pending appeal. Appellant's App. p. 35. Johnson alleged that he "ha[d] grounds for relief which create[d] a substantial likelihood of securing relief in the trial court" and that "if the trial

³ Johnson's direct appeal was dismissed. See *Johnson v. State*, No. 52A05-0204-CR-159 (Ind. Ct. App. Aug. 15, 2002) (order).

[c]ourt grant[ed] relief, the issues on appeal would be moot.” *Id.* Specifically, Johnson wanted to present evidence that despite Snow’s trial testimony that Johnson shot him in the back, Snow’s medical records, which Johnson’s defense counsel did not introduce at trial (despite the fact that the State had given them to defense counsel during discovery), showed a diagram with a bullet entry wound drawn on the front of a human body and a bullet exit wound drawn on the back of a human body. On June 2, 2003, this Court entered the following order:

1. The Appellant’s Petition for Remand to file a petition for post-conviction relief is granted.
2. This Appeal is terminated and this cause is remanded to the Miami Circuit Court for the purpose of the Appellant filing in that court a petition for post-conviction relief and for that court’s plenary consideration of said petition;
3. The Clerk of Miami County is ordered to file a copy of this order and thereafter to cause the same to be spread of record in Cause No. 52C01-0010-CF-79 of the Miami Circuit Court.

Johnson v. State, No. 52A02-0303-PC-178 (Ind. Ct. App. June 2, 2003) (order).

Following this order, Johnson filed a petition for post-conviction relief in 2004, which he amended in 2005. A hearing was then held. On July 26, 2007, the post-conviction court entered findings of fact and conclusions of law denying relief on all claims except that it reduced Johnson’s robbery conviction to a Class B felony on double jeopardy grounds.

On October 24, 2007, the trial court re-sentenced Johnson on Class B felony robbery to twenty years and ordered that sentence to be served consecutive to his other two sentences. Johnson now appeals.

Discussion and Decision

Johnson now appeals the denial of his petition for post-conviction relief and also raises some freestanding issues. This is proper, as Johnson utilized the *Davis/Hatton* procedure, which is outlined in Indiana Appellate Rule 37. This procedure was thoroughly explained in *Slusher v. State*, 823 N.E.2d 1219 (Ind. Ct. App. 2005), based upon a request to “develop an additional evidentiary record” after a direct appeal was initiated:

[T]he proper procedure is to request that the appeal be suspended or terminated so that a more thorough record may be compiled through the pursuit of post-conviction proceedings. This procedure for developing a record for appeal is more commonly known as the *Davis/Hatton* procedure. See *Hatton v. State*, 626 N.E.2d 442, 443 (Ind. 1993); *Davis v. State*, 267 Ind. 152, 368 N.E.2d 1149, 1151 (1977). As we explained, the *Davis/Hatton* procedure involves a termination or suspension of a direct appeal already initiated, upon appellate counsel’s motion for remand or stay, to allow a post-conviction relief petition to be pursued in the trial court. If the appellate court preliminarily determines that the motion has sufficient merit, the entire case is remanded for consideration of the petition for post-conviction relief. If, after a full evidentiary hearing the post-conviction relief petition is denied, the appeal can be reinitiated. Thus, in addition to the issues initially raised in the direct appeal, the issues litigated in the post-conviction relief proceeding can also be raised. This way, a full hearing and record on the issue will be included in the appeal. If the petition for post-conviction relief is denied after a hearing, and the direct appeal is reinstated, the direct appeal and the appeal of the denial of post-conviction relief are consolidated.

Slusher, 823 N.E.2d at 1222 (some internal citations omitted).

Because Johnson appeals the denial of his petition for post-conviction relief following the filing of a *Davis/Hatton* petition in his belated direct appeal, his direct appeal and the appeal of the denial of his petition for post-conviction relief are consolidated.⁴ We therefore separate the issues in this opinion accordingly.

⁴ In his brief, Johnson argues that the post-conviction court erred by not addressing his direct appeal issues. Johnson misunderstands how the *Davis/Hatton* procedure works. The post-conviction

I. Direct Appeal Issues

A. Prosecutorial Misconduct

Johnson contends that the prosecutor committed prosecutorial misconduct for knowingly using false or perjured testimony when Snow testified at trial that Johnson shot him in the back because the prosecutor had in his possession medical records (which were disclosed to the defense during discovery) showing that Snow had been shot in the front and not in the back.⁵ Specifically, the medical records consist of a diagram contained within Snow's St. Joseph Hospital Emergency Physician Record that depicts a bullet entry wound drawn on the front of a human body and a bullet exit wound drawn on the back of a human body. *See* Appellant's App. p. 87-88. Johnson argues that whether Snow was shot in the front or back matters because his theory at trial was that Snow "bum-rushed" him when he entered the back bedroom and there was a struggle over the gun, during which Snow was shot in the front.

In reviewing Johnson's claim of prosecutorial misconduct, we utilize a two-step analysis: (1) whether the prosecutor engaged in misconduct, and if so, (2) whether that misconduct, under all the circumstances, placed the defendant in a position of grave peril to which he or she should not have been placed. *Coleman v. State*, 750 N.E.2d 370, 374 (Ind. 2001); *Wright v. State*, 690 N.E.2d 1098, 1110 (Ind. 1997), *reh'g denied*. The

court only addresses the claims that may be raised under the post-conviction rules. Once the case is consolidated, this Court addresses both the direct appeal issues and the issues raised in the appeal of the denial of post-conviction relief.

As this appeal demonstrates, there may be some factual overlap. That is, a defendant can raise a freestanding issue in the direct appeal and then re-couch that very issue as ineffective assistance of trial counsel in the post-conviction proceeding.

⁵ Johnson later re-couches this argument in terms of ineffective assistance of counsel.

“gravity of peril” is measured by the “probable persuasive effect of the misconduct on the jury’s decision, not on the degree of impropriety of the conduct.” *Wisehart v. State*, 693 N.E.2d 23, 57 (Ind. 1998) (quoting *Kent v. State*, 675 N.E.2d 332, 335 (Ind. 1996)), *reh’g denied*.

A prosecutor may not stand mute while testimony known to be false is received into evidence. *Birkla v. State*, 263 Ind. 37, 323 N.E.2d 645, 648 (1975). “The function of the prosecution in our adversary system of criminal justice is to insure that justice prevails, not to procure convictions at any cost.” *Id.*, 323 N.E.2d at 648. Thus, prosecutorial use of perjured testimony invokes the highest level of appellate scrutiny. *Sigler v. State*, 700 N.E.2d 809, 813 (Ind. Ct. App. 1998), *reh’g denied, trans. denied*. The prosecutor’s duty to insure that a conviction is not based on perjured testimony also applies where the false testimony bears on the credibility of a State’s witness. *Birkla*, 323 N.E.2d at 648. A conviction may not stand where there is any reasonable likelihood that false testimony could have affected the judgment of the jury. *Gordy v. State*, 270 Ind. 379, 385 N.E.2d 1145, 1146 (1979).

Perjury is committed when a witness makes “a false, material statement under oath or affirmation, knowing the statement to be false or not believing it to be true.” Ind. Code § 35-44-2-1; *Carter v. State*, 738 N.E.2d 665, 672 (Ind. 2000). Confused or mistaken testimony is not perjury. *See Timberlake v. State*, 690 N.E.2d 243, 253 (Ind. 1997) (“While the knowing use of perjured testimony may constitute prosecutorial misconduct, contradictory or inconsistent testimony by a witness does not constitute

perjury.”), *reh’g denied*; *Dunnuck v. State*, 644 N.E.2d 1275, 1280 (Ind. Ct. App. 1994) (“Confusion and inconsistencies are insufficient to prove perjury.”), *trans. denied*.

Johnson has failed to show that the prosecutor knew that Snow’s testimony that he was shot in the back was false or even that Snow’s testimony was false. Snow, who was certainly in the best position to know where he was shot, testified at trial that he was shot in the back. Dr. Hahn, the emergency room physician who treated Snow at St. Joseph Hospital, testified at trial that Snow had gunshot wounds to his abdomen and back but did not specify the entry and exit points in his trial testimony. Notably, Johnson did not follow-up on cross-examination to pin down the entry and exit points. Johnson now points to Snow’s medical records to prove that he was shot in the front. However, the fact that the diagram depicts a front entry point does not prove that Snow was, in fact, shot in the front. It is certainly possible that the diagram is incorrect. Though the physician’s signature is difficult to decipher, it appears that Dr. Hahn filled out the report. *See* Appellant’s App. p. 89. Nurses and doctors who fill out such reports are not forensic pathologists who have been trained in distinguishing the differences between entry and exit wounds. As such, Johnson has only demonstrated inconsistency in the evidence regarding whether Snow was shot in the front or in the back. This in no way proves that Snow perjured himself at trial. Moreover, this does not prove that the prosecutor knew this and deliberately remained silent. Johnson’s prosecutorial misconduct claim fails.

B. Confrontation Rights

Johnson next contends that his confrontation rights under the United States and Indiana Constitutions were violated because Dr. Ayres testified at his trial via a

videotaped deposition. It is apparent from Dr. Ayres' deposition that it was a trial deposition, and not a discovery deposition, requested by the State due to Dr. Ayres' busy schedule. *See* Tr. p. 310, 311. Nevertheless, Dr. Ayres indicated during the deposition that he would honor a subpoena to appear at trial. *Id.* at 311. Because it was a trial deposition, Johnson's attorney vigorously cross-examined Dr. Ayres and raised objections during the deposition. Right before the videotape of Dr. Ayres' deposition was played for the jury at Johnson's trial, the trial court stated:

Ladies and gentlemen, let me explain the use [of the] videotaped deposition. Some people are very difficult to get into courtrooms. Doctors are probably the hardest because of their schedules. Rather frequently lawyers take depositions, either . . . videotaped depositions or simply verbal depositions and they are shown or read in the courtroom. The witness is placed under oath the same as they would be in a courtroom and questioned by both sides just as they would be in a courtroom. So you should consider the videotaped deposition of Dr. Ayres to be the same as live testimony from Dr. Ayres as if it were coming from the stand here today.

Id. at 299. Johnson did not object to the playing of the videotape at trial.⁶

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him" "The essential purpose of the Sixth Amendment right of confrontation is to ensure that the defendant has the opportunity to cross-examine the witnesses against him." *Howard v. State*, 853 N.E.2d 461, 465 (Ind. 2006) (citing *State v. Owings*, 622 N.E.2d 948, 950 (Ind. 1993)). Article I, § 13 of the Indiana Constitution provides: "In all criminal prosecutions the accused shall have the right to meet the witnesses face to face." The Indiana Constitution recognizes that there is something unique and important

⁶ Johnson raises this issue as ineffective assistance of counsel below.

in requiring the face-to-face meeting between the accused and the State's witnesses as they give their trial testimony. *Brady v. State*, 575 N.E.2d 981, 988 (Ind. 1991).

Here, we need not determine whether Johnson's right of confrontation was violated due to Dr. Ayres failing to appear at trial because, even assuming it was, Johnson's argument is still unavailing. The denial of the right of confrontation is harmless error where the evidence supporting the conviction is so convincing that a jury could not have found otherwise. *Garner v. State*, 777 N.E.2d 721, 725 (Ind. 2002). Johnson alleges that he would have questioned Dr. Ayres about Snow's medical records, which included a diagram showing a bullet entry wound to the front of his body and not to the back of his body as Snow testified at trial. However, Dr. Ayres was *not* Snow's treating physician in the emergency room. Dr. Hahn was.⁷ Instead, Dr. Ayres treated Sheard. Therefore, Dr. Ayres could not have provided any information about whether Snow was shot in the front or in the back. Dr. Hahn, however, testified in person at Johnson's trial, and Johnson had a full opportunity to question Dr. Hahn about whether the bullet entered the front or back of his body and did not do so. Because it would not have made any difference whether Dr. Ayres testified in person in relation to Snow's injuries, any confrontation violation is harmless.

C. Blakely

⁷ Johnson argues that Dr. Ayres' name appears on a page in Snow's medical records; therefore, Dr. Ayres must have been Snow's doctor. Just because Dr. Ayres' name appears in the many pages of Snow's medical records does not mean that Dr. Ayres treated Snow in the emergency room. Dr. Ayres was on call in the emergency room at the time Snow was brought in; therefore, it is no surprise that his name appears on a page in Snow's medical records. Dr. Ayres was clear in his testimony that he treated Sheard. Likewise, Dr. Hahn was clear in his testimony that he treated Snow. Moreover, it appears that Dr. Hahn signed the very medical records to which Johnson now points. *See* Appellant's App. p. 89.

Johnson contends that his sentence violates *Blakely v. Washington*, 542 U.S. 296 (2004). Under *Blakely*, a trial court may not enhance a sentence based on additional facts unless those facts are either (1) a prior conviction; (2) facts found by a jury beyond a reasonable doubt; (3) facts admitted by the defendant; or (4) facts found by the sentencing judge after the defendant has waived *Apprendi* rights and consented to judicial factfinding. *Robertson v. State*, 871 N.E.2d 280, 286 (Ind. 2007) (citing *Blakely*, 542 U.S. at 310).

With respect to Johnson's thirty-five year sentences for Class A felony attempted murder and attempted voluntary manslaughter, Johnson is barred from raising a *Blakely* claim. Johnson initiated a direct appeal in 2002, but that appeal was dismissed. Johnson then initiated a belated direct appeal pursuant to Post-Conviction Rule 2 in 2003. In *Gutermuth v. State*, the Indiana Supreme Court held that *Blakely* is not retroactive for Post-Conviction Rule 2 belated appeals because such appeals are neither "pending on direct review" nor "not yet final" under *Griffith v. Kentucky*, 479 U.S. 314 (1987). *Gutermuth*, 868 N.E.2d 427, 435 (Ind. 2007). Because Johnson's belated direct appeal was brought under Post-Conviction Rule 2, he cannot challenge his attempted murder and attempted voluntary manslaughter sentences under *Blakely*.

As for Johnson's robbery conviction, we note that in 2007 he was re-sentenced for a Class B felony to twenty years.⁸ When a trial court resents a defendant on a "pre-*Blakely* conviction" in a "post-*Blakely* world," the trial court should comply with the

⁸ We note that the sentencing statute in effect at the time a crime is committed governs the sentence for that crime; therefore, the former presumptive sentencing scheme applies. *Gutermuth*, 868 N.E.2d at 431 n.4.

requirements of *Blakely*. *Rogers v. State*, 878 N.E.2d 269, 274 (Ind. Ct. App. 2007), *trans. denied*. In re-sentencing Johnson to the maximum term of twenty years, the trial court found as aggravators that he had been involved in the criminal justice system since the age of twelve; he had been on probation and violated it; he had one felony conviction for theft and seven misdemeanor convictions; and he was under the influence of drugs at the time of this offense, even though he had undergone substance abuse treatment through the probation department and failed. The trial court identified no mitigators, and Johnson himself offered none.

The trial court properly identified Johnson's convictions and probation violations as aggravators under *Blakely*. *See Robertson*, 871 N.E.2d at 287. Because it is clear from the re-sentencing transcript that these were the main aggravators upon which the trial court relied, there is no *Blakely* violation.⁹ To the extent that Johnson argues that his consecutive sentences violate *Blakely*, the United States Supreme Court recently held that consecutive sentences do not implicate *Blakely*. *Oregon v. Ice*, 129 S. Ct. 711, 714-15 (2009). We therefore affirm Johnson's sentence.

II. Denial of Post-Conviction Relief

⁹ After articulating the aggravators and lack of mitigators, pronouncing sentence, and advising Johnson of his right to appeal his sentence for robbery and right to a public defender, the trial court, almost as an afterthought, said:

Okay. I guess I also want to make a record of the fact that another aggravating factor is that there was a rather violent fight out in the hall right after the jury verdict had been brought in and it required the filing of a use of force statement by the police because of their involvement. It look[s] like S[e]rge[a]nt Tim Miller of the Indiana State Police filed a Use of Force Report following the um . . . his trial.

Re-Sentencing Hr. Tr. p. 8-9. Because the trial court mentioned the fight after sentencing Johnson, it appears that it had no bearing on Johnson's sentence. To the extent that the trial court considered the fight as an aggravator in sentencing Johnson, given Johnson's criminal history and probation violations, we can say with confidence that the trial court would have imposed the same sentence had it considered only the proper aggravators. *See Robertson*, 871 N.E.2d at 287.

Johnson also appeals the denial of post-conviction relief. The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. *Henley v. State*, 881 N.E.2d 639, 643 (Ind. 2008). When appealing the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. *Id.* To prevail on appeal from the denial of post-conviction relief, a petitioner must show that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. *Id.* at 643-44. Further, the post-conviction court in this case made findings of fact and conclusions of law in accordance with Indiana Post-Conviction Rule 1(6). Although we do not defer to the post-conviction court’s legal conclusions, “[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.* (quoting *Ben-Yisrayl v. State*, 729 N.E.2d 102, 106 (Ind. 2000), *reh’g denied*). The post-conviction court is the sole judge of the weight of the evidence and the credibility of the witnesses. *Fisher v. State*, 810 N.E.2d 674, 679 (Ind. 2004).

A. Ineffective Assistance of Counsel

Johnson contends that his trial counsel was ineffective on two grounds. We review the effectiveness of trial counsel under the two-part test provided by *Strickland v. Washington*, 466 U.S. 668 (1984). *Bieghler v. State*, 690 N.E.2d 188, 192-93 (Ind. 1997), *reh’g denied*. A claimant must demonstrate that counsel’s performance fell below an objective level of reasonableness based upon prevailing professional norms and that the deficient performance resulted in prejudice. *Strickland*, 466 U.S. at 687-88.

“Prejudice occurs when the defendant demonstrates that ‘there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” *Grinstead v. State*, 845 N.E.2d 1027, 1031 (Ind. 2006) (quoting *Strickland*, 466 U.S. at 694). A reasonable probability arises when there is a “probability sufficient to undermine confidence in the outcome.” *Id.* (quoting *Strickland*, 466 U.S. at 694).

Johnson first argues that his defense counsel was ineffective for “stand[ing] mute while Frank Snow told the jury he was shot in the back. Clearly the medical records were in defense counsel’s possession.” Appellant’s Br. p. 13. Johnson is referring to Snow’s medical records that contain a diagram depicting a bullet entry wound to the front of Snow’s body. Defense counsel testified at the post-conviction hearing that he did not think it was beneficial to introduce Snow’s medical records during trial because they contained information that would have damaged Johnson’s case. P-C Tr. p. 39. As the post-conviction court acknowledged, Snow’s medical records “demonstrated graphically the serious bodily injury sustained by Snow.” Appellant’s App. p. 145 (Paragraph 9). As such, the post-conviction found:

At the post-conviction hearing, trial counsel testified that his strategy at trial was to create reasonable doubt by focusing on inconsistent testimony and the character of the State’s witnesses. From an evidentiary perspective, no evidence existed that contradicted the fact that Johnson went into the bedroom with a .22 caliber handgun and the two occupants of the room were subsequently shot. Both the prosecutor and the defense attorney were seasoned trial lawyers, and recognized that the task at trial on attempted murder was to persuade the jurors on the issue of intent. Introducing medical records that underscore the seriousness of the wounds could potentially induce sympathy for the victims and make evident the intent of Johnson. The verdicts of the jury indicate that counsel’s strategy met with some success as Johnson was found guilty of a lesser included offense with regard to Snow.

Id. at 147 (Paragraph 16). And, as we discussed above, Johnson has failed to prove that the diagram accurately reflected which wound was the bullet entry wound and which wound was the bullet exit wound. This is especially notable given that there was a post-conviction hearing at which Johnson had a great opportunity to prove by expert testimony which wound was the bullet entry wound.

Counsel is afforded considerable discretion in choosing strategy and tactics, and we will accord those decisions deference. *Smith v. State*, 765 N.E.2d 578, 585 (Ind. 2002), *reh'g denied*. A strong presumption arises that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Id.* We recognize that even the finest, most experienced criminal defense attorneys may not agree on the ideal strategy or the most effective way to represent a client. *Id.* Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective. *Id.*

Attempted voluntary manslaughter is not a lesser offense of attempted murder, and both require that the defendant act with the specific intent to kill. *See Harris v. State*, 884 N.E.2d 399, 403-04 (Ind. Ct. App. 2008) (extending *Spradlin* rule to attempted voluntary manslaughter), *trans. denied*. Johnson did not contest that he shot Snow and did not raise a self-defense claim at trial.¹⁰ Rather, at issue was whether Johnson acted with specific intent to kill. And whether Johnson shot Snow through multiple internal organs—through Snow’s front or his back—simply does not impact Johnson’s specific intent to

¹⁰ Defense counsel testified at the post-conviction hearing that his theory at trial was that Snow “bum-rushed” Johnson when he entered the back bedroom and Snow was shot in the front during a struggle over the gun. P-C Tr. p. 38, 43. *See also* Tr. p. 344-45 (defense counsel’s closing argument: Snow “bum-rushes” Johnson, there is a struggle over the gun, and Johnson’s response is “self-protection”).

kill. What does impact whether Snow was shot in the front or in the back is whether Snow was telling the truth when he testified at trial that Johnson shot him in the back. Under these circumstances, it was a reasonable strategic decision for defense counsel not to put Snow's medical records into evidence because of the damaging information they contained about the seriousness of Snow's injuries, which would have had the opposite effect of proving his specific intent to kill. Instead counsel chose to challenge Snow's credibility in other ways, such as highlighting his drug use and dealing. Accordingly, defense counsel was not deficient. Johnson's ineffective assistance of counsel claim on this issue fails.

Johnson next argues that defense counsel was ineffective for not objecting when the State played the videotape of Dr. Ayres' deposition at trial. When asked at the post-conviction hearing why defense counsel "used the deposition in lieu of [Dr. Ayres] actually being there," counsel replied, "I thought it was an effective statement. I thought Dr. Ayres gave us some benefit. Something more that [sic] with the medical records from uh that th[e] emergency room provided us." P-C Tr. p. 39-40. When asked if he had an objection to the State using the videotape, defense counsel said, "No." *Id.* at 40. Defense counsel then clarified that he was present during the deposition and cross-examined Dr. Ayres. *Id.*

Even assuming defense counsel was deficient for not requiring Dr. Ayres' presence at trial, Johnson cannot establish prejudice. As discussed above, Dr. Ayres was not Snow's treating physician in the emergency room. Dr. Hahn was. Therefore, Dr.

Ayres could not have provided any information about whether Snow was shot in the front or in the back. Johnson's ineffective assistance of counsel claim on this issue fails.

B. Adequacy of Appellate Record

As a final matter, Johnson contends that he has been deprived of his constitutional right to an appeal because of a corrupted transcript from his jury trial. It is undisputed that early on, one of the CDs used by the court reporter became corrupted, and the reporter was unable to retrieve information from that CD, which contained part of Snow's testimony and all of the testimony from four other witnesses (Heather Grawcack, Laura Vincent, Wayne Hornbuckle, and Doreen Holler). With the assistance of the company that installed the program, the court reporter was later able to retrieve the information from that CD and then prepared a supplemental transcript.

This issue then became compounded when only a small portion (6 out of 178 pages) of the supplemental transcript, which was labeled Petitioner's Exhibit 6 at the post-conviction hearing, was transferred to this Court on appeal. As a result, the State filed a motion with this Court to compel the court reporter to transmit the entire supplemental transcript. On December 4, 2008, this Court ordered the return of the transcript to the court reporter with instructions "to correct the transcript," "re-certify that the transcript is complete," and "re-file the corrected transcript." *Johnson v. State*, Cause No. 52A04-0803-PC-154 (Ind. Ct. App. Dec. 4, 2008) (order). On December 19, 2008, the Court Reporter of the Miami Superior Court filed an affidavit stating that a representative for appellate defense counsel checked out the entire Exhibit 6 for well over five months. The court reporter then received a phone call from appellate counsel stating

that during the process of a move, the transcript was lost. Counsel later advised the court reporter on different dates that parts of the transcript were found, and those portions (that is, a mere six pages) were then returned to the clerk.

Johnson argues in his brief (which was presumably filed before the transcript was lost and well before the court reporter's December 2008 affidavit) that there are portions missing from the transcript. Specifically, Johnson cites to his mother's testimony at his 2006 post-conviction hearing that, based on her memory of his 2001 jury trial when compared to the transcript and supplemental transcript, there are still portions of testimony missing from Hornbuckle, Snow, and Sheard as well as from her own testimony from Johnson's 2002 sentencing hearing. However, at the post-conviction hearing, the State doubted the relevancy of this "missing" testimony and agreed as follows:

All these things that uh . . . [t]he mother testified to that are missing from the transcript that some[how] are relevant I will stipulate that those should be in the transcript as she testified to them as being a fact.

P-C Tr. p. 121. After reviewing the transcript (before it was lost), the post-conviction court made the following finding:

Johnson has alleged in his petition that he was deprived of his right to appeal and a full appellate record because the record of the proceedings was corrupted. At some point the record was recovered and the transcript appears to be complete. If any loss of the transcript occurred, the court finds that it is minimal and relates only to the testimony of Wayne Hornbuckle. The court concludes that Johnson has not been deprived of his right to appeal.

Appellant's App. p. 146 (Paragraph 12).

Johnson has not been denied his right to appellate review. The only evidence that Johnson has presented is the testimony from his own mother who claims to remember specific testimony from a trial some five years earlier. Her testimony is contradicted by the representations of the court reporter that the transcript is complete and by the post-conviction court's own assessment after reading the entire transcript as to whether it reads as though anything is missing. In addition, the transcript we now have on appeal is 438 pages plus 6 out of 178 pages from the supplemental transcript. This is a large transcript.

Moreover, Johnson has failed to undertake any efforts to reconstruct the alleged missing portions of the transcript according to the procedure set forth in either Indiana Appellate Rule 31 or 32. For example, Appellate Rule 31(A) provides:

If no Transcript of all or part of the evidence is available, a party or the party's attorney may prepare a verified statement of the evidence from the best available sources, which may include the party's or the attorney's recollection. The party shall then file a motion to certify the statement of evidence with the trial court or Administrative Agency. The statement of evidence shall be attached to the motion.

In light of the large, usable transcript we do have, the State's stipulation to Mother's evidence, the post-conviction court's finding regarding the transcript's completeness (before it was lost), and Johnson's failure to follow either Appellate Rule 31 or 32, we conclude that Johnson has not been deprived of his right to an appeal. *See, e.g., Ben-Yisrayl v. State*, 753 N.E.2d 649, 658-662 (Ind. 2001), *reh'g denied*.

As for the fact that we only have 6 out of the 178 pages of the supplemental transcript on appeal, this is due to the fault of Johnson's appellate attorney. Notably,

Johnson's appellate attorney has not responded to the court reporter's December 2008 affidavit. Therefore, we assume the lack of these pages is inconsequential to our review.

Affirmed.

RILEY, J., and DARDEN, J., concur.