

Case Summary

Robert D. Storey appeals the post-conviction court's denial of his petition for post-conviction relief. Specifically, he contends that both his trial and appellate counsel were ineffective for failing to challenge the admission of his co-defendant's testimony at trial by transcript as opposed to live testimony because it violated his confrontation rights under both the United States and Indiana Constitutions. Finding that trial counsel did object, and thus preserved the issue for appeal, we conclude that there is no ineffective assistance of trial counsel. And finding any violation of Storey's confrontation rights to be harmless, we conclude that the issue is not significant, obvious, and clearly stronger than those issues that appellate counsel presented on direct appeal; therefore, there is no ineffective assistance of appellate counsel. Accordingly, we affirm.

Facts and Procedural History

The underlying facts in this case are taken from this Court's opinion following Storey's retrial:

On July 21, 2003, area residents noticed an unfamiliar maroon vehicle and two men by a cornfield near Glen Graber's ("Graber") Elkhart, Indiana, farm. After being notified, Graber's son, Kenneth, went to the field to investigate. Soon thereafter, Graber and a neighbor joined up with Kenneth, and the men observed two sets of footprints leading into the cornfield and in close proximity to a nearby tank, later found to contain anhydrous ammonia, which is commonly used in the production of methamphetamine. Simultaneously, the men observed a maroon car in the area, which they followed into Millersburg before deciding to return to the cornfield. While en route back to the cornfield, they called the Elkhart County Sheriff's Department and Eugene Moser ("Moser"), another neighbor. Moser met Graber and the other men at the edge of the field while they waited for the officers to arrive. While waiting for the officers, Storey emerged from the cornfield wearing heavy clothing on a warm day and sweating profusely. Startled at the sight of the men, Storey explained that he was looking for his dog and then began walking toward an adjacent

railroad. When Kenneth followed, Storey ran and hid in some tall grass. Deputy Sheriff Jason Reaves arrived on the scene and quickly apprehended Storey. The police and others eventually found several items in the field used to manufacture methamphetamine, including containers, Drano cans, ether, batteries that were cut apart, liter bottles, and jars containing an orange-pink substance. Additionally, the authorities found finished methamphetamine weighing a total of 34.789 grams and unfinished methamphetamine that, if finished, would have yielded approximately twenty-eight grams.

Storey v. State (“*Storey II*”), 875 N.E.2d 243, 246-47 (Ind. Ct. App. 2007), *trans. denied*.

The State charged Storey with possession of methamphetamine in excess of three grams with intent to deliver and manufacture of methamphetamine in excess of three grams. Storey’s first trial resulted in convictions on both counts that were later reversed on direct appeal due to a violation of Storey’s Fifth Amendment right to counsel. *Storey v. State* (“*Storey I*”), 830 N.E.2d 1011, 1021 (Ind. Ct. App. 2005). Although we found that the error was not harmless, because there was sufficient evidence to support the conviction, we remanded for a new trial. *Id.* at 1021-22.

A second trial was then held. Although not mentioned in *Storey II*, at Storey’s retrial his co-defendant Joseph Caron testified against him by transcript instead of live testimony, even though Caron was present in the courtroom. The trial court handled Caron’s testimony in this manner because Caron was examined outside the presence of the jury and stated multiple times that he would not testify against Storey because he feared for his life when he returned to prison. Eventually, the trial court was able to put Caron under oath outside the presence of the jury, and both the State and defense counsel examined him. In summary, Caron testified that although he was with Storey in the cornfield on the day in question, he did not see Storey handle any of the items found in

the field, he did not see any methamphetamine, and he did not know what was going on in the field. A transcript of Caron's testimony (with the references to the fear of his life redacted) was then prepared and read to the jury. Storey was again convicted of both counts. The trial court sentenced him to forty-five years on each count and ordered the sentences to be served concurrently.

On appeal, Storey's appellate counsel raised the following issues: (1) whether his convictions violated Indiana's Double Jeopardy Clause; (2) whether the trial court abused its discretion in finding and weighing the aggravating and mitigating circumstances; and (3) whether his sentence was inappropriate. We explained that although Caron's convictions for possession of methamphetamine in excess of three grams with intent to deliver and manufacture of methamphetamine in excess of three grams resulted in a double jeopardy violation, *Caron v. State*, 824 N.E.2d 745, 753-54, 754 n.6 (Ind. Ct. App. 2005), *trans. denied*, Storey's same convictions did not because the State carefully parsed out the evidence supporting each charge, which did not happen in Caron's case. *Storey II*, 875 N.E.2d at 248-50. We also found no merit to Storey's sentencing challenges. *Id.* at 250-53.

In 2008 Storey filed a *pro se* petition for post-conviction relief, which was amended by counsel in 2009, alleging ineffective assistance of both trial and appellate counsel. Specifically, Storey asserted that his trial counsel was ineffective for failing to object to the use of Caron's testimony at trial by transcript and that the use of Caron's testimony deprived him of his confrontation rights under both the United States and Indiana Constitutions. Storey then alleged that appellate counsel was ineffective for

failing to raise this issue on direct appeal. Following a hearing, the post-conviction court entered findings and conclusions denying relief. They provide, in pertinent part:

6. In this case, [defense counsel] testified that he went through the discovery and that he talked with [Storey] about the case. [Defense counsel's] theory of defense was that the drugs and the methamphetamine laboratory did not belong to [Storey]. [Defense counsel] stated that although he did not interview Caron prior to trial, he remembered that his impression was that Caron's live testimony might have a materially adverse impact on [Storey]. Moreover, [defense counsel] knew that the court sometimes excused the jury to hear testimony if there was a possibility that the testimony may result in a mistrial. Therefore, [defense counsel] agreed to hear Caron's testimony outside the presence of the jury because he feared Caron would blurt out something unfairly prejudicial about [Storey]. After Caron testified, a transcript was prepared and both parties reviewed it to redact inadmissible testimony. Then, an individual working with the prosecutor's office read the part of Caron during the reading of the redacted testimony. *[Defense counsel] did object to Caron's testimony being read during trial, and the court overruled the objection.* Not only did [defense counsel] have a full and complete opportunity to cross-examine Caron, [Storey] had the right of confrontation in open court, just outside the presence of the jury. Further, during its case-in-chief, the State introduced previous sworn testimony from Don McKay, Indiana State Police, in lieu of McKay's live testimony, and [Storey] had no objection and alleged no error for [defense counsel] failing to object to this testimony. [Defense counsel] is an experienced trial lawyer, practicing for over seven years in several counties in Northern Indiana. In addition to having a private practice, [defense counsel] worked as a public defender in Elkhart County, Indiana and St. Joseph County, Indiana and averaged approximately 16-18 jury trials each year. [Defense counsel] testified that he used out of jury testimony many times in his practice to avoid prejudice to defendants. In this case, Caron feared for his life, and this may have come through in live testimony as prejudicial to [Storey]. In the redacted version of Caron's testimony, there were no references to fear of his life. [Defense counsel] used his experience and professional judgment in making strategic choices he deemed were in [Storey's] best interest. [Defense counsel] was afforded a full and fair opportunity to probe Caron's testimony and [Storey's] right to confront the witness was satisfied. [Storey] has failed to meet his burden of proving ineffective assistance of trial counsel.

8. Because [Storey] did not meet his burden of proving ineffective assistance of trial counsel, he also cannot meet the burden of proving ineffective assistance of appellate counsel based on appellate counsel's

failure to raise this argument on appeal. . . . [Appellate counsel] testified that he chose to raise the issues of double jeopardy, improper sentence enhancements, and inappropriate sentence on direct appeal. [Appellate counsel] testified that he did not raise confrontation issues with Caron's testimony because he believed the Record properly reflected an agreement between the parties to the court's prescribed treatment of Caron's testimony. [Appellate counsel] also stated that the Record reflected that Caron was questioned and fully and completely cross examined, and that *he felt any issue regarding the testimony would be, at best, harmless.* [Appellate counsel] consulted with [Storey] and made a strategic decision as to what issues to raise on appeal. Moreover, the court had the power to control the method of interrogation pursuant to Ind. R. Evid. 611. In this instance, the court preserved [Storey's] right to confront Caron in a manner which minimized the risk of prejudice to [Storey] and protected the witness. For these reasons, the confrontation issue cannot be deemed significant, obvious, or clearly stronger than the issues presented on appeal. Accordingly, [Storey] has failed to meet his burden of proving ineffective assistance of appellate counsel.

Appellant's App. p. 70-72 (emphases added). Storey now appeals the denial of post-conviction relief.

Discussion and Decision

Storey 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.* at 644 (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).

Storey contends that both his trial and appellate counsel rendered ineffective assistance. We review the effectiveness of trial and appellate counsel under the two-part test provided by *Strickland v. Washington*, 466 U.S. 668 (1984). *Martin v. State*, 760 N.E.2d 597, 600 (Ind. 2002); *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). We presume that counsel rendered effective performance, and a defendant must offer strong and convincing evidence to overcome this presumption. *Loveless v. State*, 896 N.E.2d 918, 922 (Ind. Ct. App. 2008) (citing *Overstreet v. State*, 877 N.E.2d 144, 152 (Ind. 2007), *reh’g denied*), *trans. denied*.

I. Trial Counsel Ineffectiveness

Storey first contends that his defense counsel was ineffective for allowing Caron's transcript testimony to be presented to the jury in lieu of Caron's live testimony, thus violating Storey's confrontation rights under both the United States and Indiana Constitutions.

When it became apparent that Caron was not willing to testify at Storey's trial because of fear for his life, the trial court excused the jury and brought him into the courtroom. Tr. p. 147. After Caron twice said he could not testify because he was in fear of his life, the trial court was finally able to put him under oath. *Id.* at 149-50. Caron answered some initial questions, such as that he was housed at Pendleton Correctional Facility for methamphetamine charges relating to this case, but then said that he would not "testify against Mr. Storey for fear of my life." *Id.* at 151. Caron later repeated, "I cannot testify against Robert Storey for fear of my life. Where I'm housed." *Id.* at 155. Caron again emphasized that he refused to testify against Storey for fear of his life. *Id.* at 156. When Caron indicated that he would not answer a specific question, the trial court ordered him to do so. Caron still refused. The court explained the penalties for not answering, including being found in contempt of court. Caron said that he understood the penalties but he had to think about his family. Caron then concluded that he was still refusing to answer the question because he was in fear of his life, and the trial court found him in contempt of court and sentenced him to thirty days in jail. *Id.* at 157-58. The court gave Caron an opportunity to explain himself. Caron said that he was in fear of his life because when he "go[es] back to population, it's . . . a real world scenario down

there. People are beat all the time, a lot of times resulting in death. . . . And when you mark somebody as a snitch or a cop for coming back and testifying for the State and go back to population, that's what happens." *Id.* at 159. "I cannot testify against Mr. Storey on this. I can't go back and be involved in that gang bang." *Id.* at 160. The trial court later vacated the contempt finding and sentence. Appellant's App. p. 102-03.

Nevertheless, Caron went on to answer several questions from the State. *See* Tr. p. 160-173. Defense counsel then proceeded to cross-examine Caron. *Id.* at 173-74. The trial court stated on the record:

The record should reflect that the witness has answered the questions posed to him by [the State]. *The record also reflects . . . that [defense counsel] has had a full and complete opportunity to cross examine the . . . witness, Mr. Caron. Correct, [defense counsel]?*

[DEFENSE COUNSEL]: *Yes.*

THE COURT: Correct, [State]?

[THE STATE]: Yes, your Honor.

Id. at 175 (emphasis added).

A transcript was then prepared of Caron's testimony with the multiple references to the fear of his life redacted. The trial court continued:

[A] discussion has been held with respect to the testimony of Joseph Caron and a transcript has been prepared. Mr. Caron is not going to testify live. Both counsel and the Court have expressed the same concern that is we do not want to have Mr. Caron making any statements in the presence of the jury that would put the defendant in a position where he could not recover. Such as, fear of retaliation or anything like that. In light of that fact, the transcript has been prepared. It's covering 11 pages, some parts have been marked out, my understanding that counsel have agreed on the parts that are marked out. Correct [defense counsel]?

[DEFENSE COUNSEL]: Yes, we have, your Honor.

THE COURT: Correct, [State]?

[THE STATE]: Yes, your Honor.

THE COURT: So, [State], I believe you're going to have Mr. Joel Williams come in and he will read the part of Mr. Caron, you will play yourself, and [defense counsel] will read himself . . . , correct?

Id. at 292. However, just before Caron's testimony was going to be read to the jury, defense counsel objected:

With regard to . . . Mr. Caron's testimony, Mr. Storey has informed me that I am to inform this Court of his objection, *it would be our objection, defense's objection, to that coming in as is through reading it through a transcript of his testimony outside the presence of the jury. Mr. Storey believes that a violation of his confrontation clause in that the jury is not witness to the real Mr. Caron sitting there and answering questions and cross-examination.*¹

Id. at 302-03 (emphasis added). The trial court was taken aback by this objection because the court thought the matter had already been settled:

THE COURT: Well, we already discussed this and it was my understanding that counsel, for both sides, had agreed with me that we should not take the risk of Mr. Caron being in here saying he's afraid of this defendant. Mr. Caron, did, in fact, say that he feared this defendant, he feared for his life, he feared retaliatory action in the event he testified.

[DEFENSE COUNSEL]: To clarify that for the record, your Honor, I don't believe Mr. Caron ever said he was afraid of Mr. Storey. He was afraid of getting down in general population and that being labeled a snitch, he would lose his life.

THE COURT: Well, clearly, the import of it would be that it would be this defendant who would have caused that. That's clear to anyone.

[DEFENSE COUNSEL]: Well, --

¹ Contrary to Storey's argument on appeal, defense counsel's objection is sufficient to preserve the issue under both the United States and Indiana Constitutions.

THE COURT: Did we, or did we not, decide that we should dispense with Mr. Caron as a live witness in the interest of not running any risk of creating error?

[DEFENSE COUNSEL]: *I agree that we – there's a great risk of a mistrial if Mr. Caron is here and testifies. I'm simply stating the obvious that Mr. Storey has an objection to what's – what's occurring for record?*

THE COURT: So, Mr. – Mr. Storey doesn't want this transcript read, he wants Mr. Caron to be here live and give the testimony because he thinks he'll be denied his right of confrontation. Would that be a correct summary?

[DEFENSE COUNSEL]: *That's correct.*

THE COURT: And the record, clearly, reflects that there was a right of confrontation given to Mr. Storey live, right here, in this very courtroom, and the Court made a note at the time of the testimony to this effect. The defendant had a full and complete opportunity for cross-examination by defendant's counsel. I believe I asked that question of you. Are there any questions, [defense counsel], that you wanted to ask that you didn't get a chance to ask?

[DEFENSE COUNSEL]: No, your Honor.

THE COURT: [State], do you have anything to say?

[THE STATE]: Well, your Honor, I think he has had his opportunity to cross-examine Mr. Caron. It is in Mr. Storey's best interest to be able to control the information that comes in through Mr. Caron. If he would try to use Mr. Caron as an objection to conduct a mistrial in this, . . . that would be a big problem at this point. . . .

THE COURT: You had your right of confrontation, Mr. Storey, when the defendant, Mr. Caron, your co-defendant, was here in Open Court. You had a chance to question him, in fact, your counsel did question him. Your counsel now tells me there are no other questions he would desire to ask. You had a right of confrontation, you exercised it. I cannot see how you're prejudiced in any way shape or form by the admission of this testimony. That's one side of the equation.

The other side of the equation is, I think there is a huge risk of the jury getting the wrong impression about you, Mr. Storey, if Mr. Caron blurts out in the presence of the jury that he fears for his life. The innuendo would fall on you, Mr. Storey, the danger to you is great if we let Mr.

Caron testify live. If we use this transcript, we have limited what he says. We have restricted him, we have him down to where he's not saying anything that's going to have the kind of effect on you that would cause a mistrial. I note that there are a number of portions of his testimony that have been deleted. Many of which deal with the threats, fearing for his life, things like that. The part about Mr. Caron being held in contempt has also been deleted. So, your objection is overruled. We're going to complete this trial right now.

Id. at 303-05 (emphases added). The jury was brought in, and Caron's transcript was read into the record.

On appeal, Storey concedes that defense counsel objected on grounds that his confrontation rights were violated and that this objection "obviously preserved" the issue for appellate review (and thus forms the basis for his appellate counsel ineffectiveness claim). Appellant's Reply Br. p. 3, 4, 6, 7, 11; *see also* P-C Tr. p. 46 (appellate counsel conceding at post-conviction hearing that defense counsel's trial objection preserved the issue for appellate review). Even though defense counsel agreed to have Caron examined outside the presence of the jury, he later objected when the transcript was going to be read to the jury in lieu of having Caron testify live in front of the jury. Storey cannot have it both ways—either the issue was preserved for appeal by an objection or it was not.² In light of defense counsel's objection, there is no trial counsel ineffectiveness on this issue. We therefore proceed to address Storey's claim of ineffective assistance of appellate counsel.

² Storey does not argue on appeal that appellate counsel was ineffective for failing to raise the issue as fundamental error because there was no objection at trial.

II. Ineffective Assistance of Appellate Counsel

Storey contends that his appellate counsel was ineffective for failing to argue on direct appeal that his confrontation rights under both the United States and Indiana Constitutions were violated. The Indiana Supreme Court has recognized three types of ineffective assistance of appellate counsel claims, namely: (1) counsel denied the defendant access to appeal; (2) counsel waived issues; and (3) counsel failed to present issues well. *Bieghler*, 690 N.E.2d at 193-95. The second category is the only category applicable here and will lead to a finding of deficient performance only when the reviewing court determines that the omitted issues were significant, obvious, and “clearly stronger than those presented.” *Id.* at 194 (quotation omitted). “[T]he decision of what issues to raise is one of the most important strategic decisions to be made by appellate counsel.” *Id.* at 193 (quotation omitted).

Storey first argues that appellate counsel should have raised the confrontation issue under the United States Constitution and more specifically *Crawford v. Washington*, 541 U.S. 36 (2004). In *Crawford*, the United States Supreme Court held that the Confrontation Clause of the Sixth Amendment to the United States Constitution prohibits admission in a criminal trial of testimonial statements by a person who is absent from trial, unless the person is unavailable and the defendant had a prior opportunity to cross-examine the person. *Fowler v. State*, 829 N.E.2d 459, 464 (Ind. 2005), *reh’g denied, abrogated in part by Giles v. California*, 128 S. Ct. 2678 (2008), *as recognized in Roberts v. State*, 894 N.E.2d 1018 (Ind. Ct. App. 2008), *trans. denied*. There is no claim in this case that Caron’s statements in the transcript were anything other than testimonial

or that defense counsel did not have a prior opportunity to cross-examine Caron outside the presence of the jury. Thus, the issue is whether Caron was unavailable, *see* Appellant's Br. p. 10, and whether this issue was significant, obvious, and clearly stronger than the issues that appellate counsel did raise.

However, we do not even need to address the issue of whether Caron was unavailable. This is because virtually all courts have held that *Crawford* error is not "structural" and therefore apply the *Chapman* standard for harmless error. 30A Charles A. Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 6371.2 (Supp. 2010); *see also Chapman v. California*, 386 U.S. 18, 24 (1967) ("[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."). In Indiana, our courts have applied harmless error to *Crawford* violations. *See McGaha v. State*, --- N.E.2d ---, 2010 WL 1740409 (Ind. Ct. App. Apr. 30, 2010) ("Nonetheless, a denial of the right of confrontation may be harmless error."); *D.G.B. v. State*, 833 N.E.2d 519, 528 (Ind. Ct. App. 2005) ("[A] 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."); *Purvis v. State*, 829 N.E.2d 572, 585 (Ind. Ct. App. 2005), *trans. denied*.

Caron testified on direct examination as follows. He was in a cornfield with Storey on the afternoon of July 21, 2003, in the area of County Road 44. They were alone. Caron saw a tank which he did not bring with him. He also saw trash, rubbish, cans, and a black plastic bag in the cornfield, also none of which he brought with him. Caron went to the cornfield with Storey on two separate occasions, which are the only

two times he went to the field. He did not remember seeing Storey handle any of the items. Caron then denied some damaging facts contained in a written statement given by him, despite the fact that he signed a statement attesting to the written statement's accuracy. Caron said he was in the cornfield for "[m]inutes" both times he was there with Storey. Tr. p. 168. He said he left the cornfield because he did not know what was in the field. Caron and Storey then went their separate ways. When the State asked Caron if he had asked Storey what he was doing, he reluctantly answered "yes." *Id.* at 170-71. The State followed up: "After you asked that question of him, is that when you decided to leave?" *Id.* at 171. Caron answered affirmatively. *Id.* He explained that he was then arrested but he had nothing to do with putting the methamphetamine in the cornfield. Caron confirmed that he was dropped off both times in a maroon car and that he followed Storey into the cornfield. Caron was close enough to the tank that he had a physical reaction from the fumes.

On cross-examination, Caron emphasized that he did not see Storey handle any of the items in the cornfield. "I never did see any meth until I came to court [for my own trial]." *Id.* at 173. Caron again said that he did not know what was going on in the cornfield and that is why he left. Finally, Caron said he was in the cornfield for only minutes.

Storey asserts that the federal confrontation issue is clearly stronger than the issues that appellate counsel presented on direct appeal and that without Caron's testimony, all the evidence that remains is the same evidence that this Court rejected as failing to meet the harmless error test in Storey's first appeal. *See Storey I*, 830 N.E.2d at 1021.

However, in Storey's first appeal, we held that Storey's confession that he purchased the materials for manufacturing methamphetamine, cooked the methamphetamine in the cornfield, and then possessed the methamphetamine should have been suppressed because his Fifth Amendment right to counsel was violated. *Id.* at 1014, 1021. We then held that the State failed to prove that this evidence did not contribute to the conviction in light of the other evidence presented. *Id.* at 1021. Because there was sufficient evidence to support the conviction, we remanded for a retrial. *Id.* at 1021-22.

Here, Caron's testimony is in no way comparable to Storey's confession, which undoubtedly contributed to his conviction in his first trial. In other words, Caron's testimony and Storey's confession are not the same caliber of evidence. Although Caron's testimony placed him with Storey in the cornfield on the day in question near the ingredients which were later found, Caron was very careful in his testimony not to link Storey to the methamphetamine or the ingredients. Appellate counsel testified at the post-conviction hearing that there were several reasons why he did not raise this issue on appeal, one of which was that he "thought it would be extremely difficult to mount an argument where Mr. Storey showed that this was anything other than harmless error[.]" P-C Tr. p. 45. Without Caron's testimony, the evidence shows that a farmer observed an unfamiliar car in the area, two men, and then two sets of footprints leading to a tank containing anhydrous ammonia. Storey later emerged from a cornfield wearing heavy clothing on a warm day and sweating profusely. Startled at the sight of some men, Storey explained that he was looking for his dog and then began walking toward an adjacent railroad. When one of the men followed, Storey ran and hid in some tall grass until he

was apprehended by a deputy sheriff. In the cornfield the deputies found methamphetamine, unfinished methamphetamine, and several ingredients used to manufacture methamphetamine.

The decision of what issues to raise is one of the most important strategic decisions to be made by appellate counsel. Here, appellate counsel considered the confrontation issue but ultimately decided not to raise it for a host of reasons. Not only was appellate counsel concerned about overcoming the harmless error hurdle, but he also thought that if Caron *had* testified, he “was capable of derailing the entire trial at that point” and therefore the trial court devised a good procedure to minimize the risk. *Id.* at 46. We thus decline to find ineffective assistance of appellate counsel for failing to raise the confrontation issue under the United States Constitution.

Storey next argues that appellate counsel should have raised the confrontation issue under the Indiana Constitution, which provides greater protection than the United States Constitution. That is, the Indiana Constitution’s Confrontation Clause includes a face-to-face requirement that is separate from and in addition to the confrontation right afforded by the Sixth Amendment to the United States Constitution. Ind. Const. art. 1, § 13; *Hart v. State*, 578 N.E.2d 336, 337 (Ind. 1991). “The Indiana Constitution recognizes that there is something unique and important 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). The right is not absolute. *Id.* at 987. The standard for reviewing violations of the Indiana Constitution’s Confrontation Clause is harmless error. *See id.* at 989 (“[W]e hold that the trial court erred in admitting T.B.’s

videotaped testimony of March 14, 1987, over appellant's objection that such testimony violated the Confrontation Clause of the Indiana Constitution. Further, we cannot find the admission of this evidence to be harmless as the videotape contained numerous statements incriminating to appellant."); *see also Torres v. State*, 673 N.E.2d 472, 474 n.1 (Ind. 1996) (stating that violations of Indiana constitutional rights are reviewed for harmless error, which is sometimes phrased as whether the error was harmless beyond a reasonable doubt).

For the same reasons as discussed above, that is, Caron's careful attempts not to incriminate Storey and the other evidence presented, we find that any violation of the Indiana Constitution's Confrontation Clause is harmless and therefore conclude that appellate counsel was not ineffective for failing to raise this issue under the Indiana Constitution.

Affirmed.

NAJAM, J., and BROWN, J., concur.