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IN THE
COURT OF APPEALS OF INDIANA

VIRGIL HALL, III,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 27A04-0812-PC-740
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE GRANT CIRCUIT COURT
The Honorable Mark E. Spitzer, Judge
Cause No. 27C01-0501-PC-1

August 14, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-petitioner Virgil Hall, III, appeals the denial of his petition for post-conviction relief. Hall argues that he received the ineffective assistance of trial and appellate counsel and that new evidence was discovered during the post-conviction proceedings that necessitates a new trial. Finding no error, we affirm.

FACTS

The underlying facts, as described by this court in Hall's direct appeal, are as follows:

> In December of 1999, Hall married Kelli Fetterhoff ("Fetterhoff"), the mother of three-year-old Peyton Fetterhoff ("Peyton") and five-year-old Hunter Fetterhoff ("Hunter"). Four months thereafter, Hall and Fetterhoff had a son, Devon Hall ("Devon").
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> On the morning of May 25, 2000, Fetterhoff went into town to run errands with Devon, while Hall stayed home to do lawn work and watch over Peyton and Hunter. At 11:04 a.m., Hall called Ted Flannigan, the deputy chief of the Mill Township Fire Department, and asked for assistance because Peyton "fell off a swing." When Ted Flannigan arrived, he was immediately concerned that Peyton's situation was serious and told Hall to call an ambulance. Hall called an ambulance and informed the dispatcher that his child fell off a swing.
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> Peyton was transported to Marion General Hospital, where he was examined by Dr. Jeffrey Yablong ("Dr. Yablong"). Hall also advised Dr. Yablong that Peyton fell off a swing. Dr. Yablong observed that Peyton had a number of obvious and severe injuries; Peyton was non-responsive to commands, lethargic, had a fracture on his skull, a large amount of swelling, noticeable injuries to his torso, and deviated eyes.
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> Due to the severity of Peyton's injuries, he was taken by helicopter to Riley Hospital in Indianapolis. Peyton's condition was critical when he arrived; he was not moving and had low blood pressure and a high heart rate. Peyton eventually died because his brain became so swollen that its blood supply was cut-off.
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> Dr. Dean Hawley ("Dr. Hawley") performed Peyton's autopsy. Peyton's autopsy revealed that he had suffered at least three separate injuries to his head, one on each side and one on the back. The

autopsy also revealed that Peyton had a laceration to the ligament that holds his head to his cervical spine, a severe injury to his chest, another injury to his abdomen, and yet another severe injury to his scrotum.

On June 5, 2000, Hall was charged by information with murder, a felony. On December 29, 2000, the State added a neglect of a dependent resulting in serious bodily injury, as a Class B felony, count to Hall's charging information.

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Jury trial began on February 6, 2001. During trial, the State objected to a portion of the testimony offered by Hall's medical expert, Dr. Lawson Bernstein ("Dr. Bernstein"). The trial court excused the jury and held an evidentiary hearing on the admissibility of Dr. Bernstein's testimony. After the hearing, the trial court held Dr. Bernstein's testimony inadmissible because of his limited expertise.

At trial, Hall recanted his initial explanation of Peyton's injuries. Hall testified that he had placed Peyton on a workbench and, while he was using his electric weed eater, pulled on the weed eater's extension cord to unloosen a kink in the cord. Hall stated that as he pulled on the cord, he accidentally struck Peyton, who was sitting behind him, knocking Peyton off the bench, and causing Peyton to hit a dog cage before hitting the floor. Hall claimed the reason he told doctors and emergency personnel Peyton fell off a swing was because he was afraid people would feel he was not a responsible parent if the truth were known.

During trial, the State produced evidence from several doctors that indicated Peyton's injuries were inconsistent with those caused from falling off a swing. Also, Dr. Tres Scherer ("Dr. Scherer"), a pediatric surgeon who examined Peyton at Riley Hospital, testified that (1) Peyton's injuries were similar to those caused by intentional trauma, (2) a fall from a table, then to another object, and then to the floor would not be capable of causing Peyton's injuries, and (3) Peyton's injuries were consistent with having been inflicted contemporaneously on the morning of the day he was treated at Riley Hospital.

Dr. Thomas G. Luerssen ("Dr. Luerssen"), a pediatric neurosurgeon who also examined Peyton at Riley Hospital, testified that a fall of five or six feet may be able to fracture a child's skull but would not be capable of

> harming a child's brain and only a fall from an extreme height—one to two stories—could have caused the type of brain injury Peyton received.
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> Dr. Hawley, who performed Peyton's autopsy, testified that injuries similar to Peyton's laceration of the ligament that holds his head to his cervical spine typically occur when the head is thrown violently forward and Peyton's injuries to his chest, abdomen, and scrotum were consistent with those caused by punches or kicks.
>
> Hall called a photogrammetry[1] expert to testify about the width of the bars on the dog cage that Peyton allegedly hit as he allegedly was falling from the workbench. This expert testified that the width of the injuries on Peyton's head were consistent with the width of the bars on the dog cage. . . .
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> The jury found Hall guilty of murder, a felony, and neglect of a dependent resulting in serious bodily injury, as a Class B felony. The trial court sentenced Hall to sixty-five years in the Department of Correction for murder, a felony, and three years for neglect of a dependent, as a Class D felony, with the sentences to run concurrently.

Hall v. State, 796 N.E.2d 388, 391-93 (Ind. Ct. App. 2003) (internal citations omitted), trans. denied. In Hall's direct appeal, he raised a number of issues, including the exclusion of Dr. Bernstein's testimony. This court concluded that the exclusion of his testimony was an abuse of discretion, but further concluded that the error was harmless:

> Considering all of the evidence in the case, we find the error limiting Dr. Bernstein's testimony sufficiently minor so as not to have affected Hall's substantial rights. Peyton's treating physician and the pathologist who performed Peyton's autopsy both testified that Peyton died as a result of multiple blunt force trauma. In light of the concurring testimony of the physicians who treated Peyton and performed his autopsy, it is unlikely that the jury would have found that Peyton died from a different cause. For this reason, we conclude that the error

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[1] Photogrammetry is "[t]he technique of using photographs to obtain measurements of what is photographed . . . ." The New Shorter Oxford English Dictionary 2193 (Thumb ed. 1993).

> excluding Dr. Bernstein's theory of Peyton's death did not interfere with Hall's substantial rights.

Id. at 400 (internal citation omitted). Ultimately, the Hall court affirmed Hall's convictions.

On April 20, 2006, Hall filed an amended petition for post-conviction relief, arguing, among other things, that his trial and appellate counsel were ineffective and that there was newly discovered evidence requiring a new trial.[2] Following a hearing, the post-conviction court denied Hall's petition. Hall now appeals.

DISCUSSION AND DECISION

I. Standard of Review

The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); Perry v. State, 904 N.E.2d 302, 307 (Ind. Ct. App. 2009), trans. denied. When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. Perry, 904 N.E.2d at 307. On review, we will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. Id. Post-conviction procedures do not afford petitioners with a "super appeal." Richardson v. State, 800 N.E.2d 639, 643 (Ind. Ct. App. 2003). Rather, they create a narrow remedy for subsequent collateral challenges to convictions that must be based upon grounds enumerated in the post-conviction rules. Perry, 904 N.E.2d at 307; see also P-C.R. 1(1).

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[2] Hall's original petition was filed on January 4, 2005.

II. Ineffective Assistance of Trial Counsel

A. Standard

When evaluating a claim of ineffective assistance of counsel, we apply the two-part test articulated in Strickland v. Washington, 466 U.S. 668 (1984). Pinkins v. State, 799 N.E.2d 1079, 1093 (Ind. Ct. App. 2003). First, the defendant must show that counsel's performance was deficient. Strickland, 466 U.S. at 687. This requires a showing that counsel's representation fell below an objective standard of reasonableness and that the errors were so serious that they resulted in a denial of the right to counsel guaranteed to the defendant by the Sixth and Fourteenth Amendments. Id. at 687-88. Second, the defendant must show that the deficient performance resulted in prejudice. Id. To establish prejudice, a defendant must show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. If a claim of ineffective assistance can be disposed of by analyzing the prejudice prong alone, we will do so. Wentz v. State, 766 N.E.2d 351, 360 (Ind. 2002).

B. Countering the State's Medical Evidence

Hall first argues that his trial attorneys were ineffective for the ways in which they dealt with the State's medical evidence. Specifically, he argues that they should have done a better job of rebutting and questioning the State's medical experts, that they failed to conduct adequate pretrial discovery on medical issues, and that they failed to offer alternate causes of Peyton's death.

1. State's Expert Testimony

Turning first to the manner in which trial counsel dealt with the State's medical experts, the post-conviction court provided a useful overview of the testimony at issue and the witnesses' qualifications:

> The testimony of Dr. Tom Luerssen, Professor of Neurosurgery at Indiana University School of Medicine and pediatric neurosurgeon at Riley Children's Hospital; and Dr. Tres Scherer, pediatric trauma surgeon and director of the Kiwanis Riley Regional Pediatric Trauma Program at Riley Hospital reveals both the extensive qualifications these experts possessed on the issue of pediatric trauma and pediatric surgery and the scientific principles upon which their testimony rested. Further, each was a treating physician of the victim.
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> Drs. Luerssen and Sherer's [sic] testimony corroborated the testimony of Dr. Dean Hawley, the board certified forensic pathologist who performed the autopsy and testified for the State. Rather than "mimicking" Dr. Hawley (as alleged by [Hall]) the testimony of Drs. Luerssen, Sherer [sic] and MGH emergency physician Dr. Yablong complimented the opinions of the pathologist and rebutted the theory advanced by [Hall] at trial.
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> Drs. Luerssen, Sherer [sic], Yablong and Hawley testified to the multiple injuries suffered by Peyton that in their opinion were inconsistent with either [Hall's] swing set accident or garage accident accounts. The doctors were specific in their testimony that Peyton suffered not only a deadly brain injury but injuries on many parts of his body, including the chest, abdomen and groin that could not be explained by a fall. Further, they testified that the traumatic injuries they observed were likely not caused by medical treatment or any bleeding disorder. Each physician testified from the background of an extensive experience in the treatment of traumatic injuries. In the case of Drs. Luerssen and Sherer [sic], that experience included the treatment of hundreds of children with head injuries at Riley Children's Hospital, a Level 1 Trauma Center. The Court concludes that each was qualified to testify, and therefore, counsel was not ineffective in failing to challenge them as a witness.

PCR Order p. 8-9.[3] Initially, we note that it is evident that these witnesses were qualified to testify as experts, and any objection to the contrary would certainly have been overruled.

Although Hall's arguments are somewhat unfocused,[4] he emphasizes repeatedly that the State's witnesses concluded that, in their experience, Peyton's injuries could not have been caused by an accidental short fall. Specifically, (1) Dr. Scherer testified that falling off of a swing was inconsistent with Peyton's injuries because a severe energy force is required to cause that type of injury; (2) Dr. Luerssen testified that in his experience, children could even fall from five or six feet and may fracture their skulls but would sustain no brain injury as Peyton did; and (3) both doctors testified that injuries similar to Peyton's are generally caused by high-speed motor vehicle crashes or intentional trauma.

Hall contends that, in fact, it is possible that an accidental short fall could have caused the child's injuries and argues that his attorneys were ineffective for failing to question the experts on this matter. Initially, we note that his attorneys cross-examined both doctors at length and challenged them regarding the cause of death and also presented a photogrammetry expert, who testified that the width of the injuries on Peyton's head were consistent with the width of the bars on the dog cage. It was for the jury to evaluate the

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[3] Hall failed to include the post-conviction court's order in his appendix; therefore, we will cite to the order's internal pagination and note that it is attached to the back of the appellant's brief. In the future, we strongly urge counsel to pay closer heed to the rules of appellate procedure. See Ind. Appellate Rule 50(A)(2)(b) (requiring that the appellant's appendix contain a copy of the appealed judgment or order).

[4] Hall spends several pages of his brief arguing that evidence related to shaken baby syndrome should not be admissible, which is puzzling, inasmuch as the State's experts herein were unanimous in their conclusion that Peyton's injuries were caused by blunt force trauma to the head, chest, and abdomen rather than being shaken. Consequently, we will not address the irrelevant arguments related to shaken baby syndrome.

competing theories and make the ultimate conclusion.[5] Furthermore, even if Hall's attorneys had objected to this testimony, the objection would have been overruled, inasmuch as this testimony is neither speculative nor false. Instead, it is based on the wealth of experience of these two witnesses. Therefore, we cannot say that trial counsel was ineffective on this basis.

Hall also focuses on the testimony of Dr. Hawley,[6] who performed Peyton's autopsy. Hall emphasizes that, at the post-conviction hearing, he offered the testimony of Dr. John Plunkett, who disagreed with Dr. Hawley's conclusions regarding the cause of Peyton's bruises and death. That Dr. Plunkett disagreed with Dr. Hawley does not establish, as contended by Hall, that Dr. Hawley's testimony was inaccurate and misleading. It also does not establish that trial counsel was ineffective for failing to allege that Dr. Hawley's testimony was false, and we decline to find ineffective assistance on this basis.

Hall also argues that Drs. Scherer and Luerssen relied impermissibly on Dr. Hawley's conclusions because of "a phenomena known as 'conformity effect.'" Appellant's Br. p. 16

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[5] Hall improperly includes a sufficiency of the evidence argument in this appeal, contending that "[t]he evidence in this case does not prove beyond a reasonable doubt that Peyton's death was non-accidental." Appellant's Br. p. 22. He makes many other thinly veiled sufficiency arguments throughout the brief. We will not address any insufficiency arguments herein. See Bahm v. State, 789 N.E.2d 50, 60 (Ind. Ct. App. 2003) (observing that because claims of insufficient evidence are available on direct appeal, sufficiency arguments are not available in post-conviction proceedings).

[6] In Hall's statement of facts, he mockingly introduces Dr. Hawley as "Forensic Pathologist a/k/a 'God,'" implies that Dr. Hawley fabricated his professional qualifications, states that Dr. Hawley "seems to have a fixation with cadaver anuses and sometimes observes anal trauma where none exists," grumbles that Dr. Hawley "crowned himself psychic," and, finally, brands Dr. Hawley as "Evidentiary-God-Incarnate[.]" Appellant's Br. p. 6-8. This vituperative language has no place anywhere in an appellate brief, least of all in the statement of facts. The overall tone of this brief is abusive, unprofessional, and offensive, and we strongly urge counsel to eliminate the personal insults from her future appellate work. It is not only unseemly—it is unpersuasive and counterproductive to the overall arguments being made.

n.17. This argument is pure conjecture and we will not find ineffective assistance based on trial counsel's decision not to object to the testimony on this basis.

2. Pretrial Discovery

Hall also contends that his attorneys failed to conduct adequate pretrial discovery on the medical evidence offered by the State and possible causes of Peyton's death. Hall admits, however, that his attorneys "spent considerable time with Dr. Scherer and Dr. Luerssen [prior to trial]," appellant's br. p. 28, merely complaining that, in the end, counsel failed to establish that malpractice occurred. That, however, does not mean that counsel was ineffective. And as noted above, trial counsel hired and presented its own expert witnesses, including Dr. Bernstein and a photogrammetry expert. Under these circumstances, we cannot conclude that Hall's attorneys were ineffective based on pretrial discovery.

3. Mannitol

Next, Hall argues that his trial attorneys were ineffective because they failed to investigate and present to the jury evidence regarding the transfusion of a drug called Mannitol into Peyton's body in the hours before his death. Hall contends that Mannitol caused Peyton's blood pressure and pulse to drop significantly, caused his heart to slow down, and, ultimately, led to his death.

At the post-conviction hearing, Hall offered the testimony of Dr. Thomas Schweller to support this theory. The post-conviction court observed that Dr. Schweller was only "minimally qualified as an expert" and

> presented testimony which the Court finds suspect at best. . . . Dr. Schweller's practice focuses on occupational disability. He does not

> treat patients who have received traumatic brain injuries. He candidly admitted that he is not an expert in the technical aspect of treatment of individuals with traumatic brain injuries. Nonetheless, he criticized the treatment of the trauma team based upon his reading of abstracts of two articles on the protocol for the administration of Mannitol. The Court does not find Dr. Schweller's testimony to be persuasive.

PCR Order p. 10. We will not second-guess the post-conviction court's assessment of this witness.

In any event, even if we were to accept for argument's sake that Mannitol was contraindicated in this case, Hall cannot establish prejudice because any error in this regard would not have changed the outcome of the trial. In other words, based upon the evidence establishing that Peyton's injuries were caused by blunt force trauma, the jury could still have reasonably concluded that Hall's initial actions started the chain of events. To break the chain of criminal responsibility, an intervening cause must be so extraordinary that it would be unfair to hold the defendant responsible for the death. Gibson v. State, 515 N.E.2d 492, 496 (Ind. 1987). Here, Hall has not established that the administration of Mannitol was such an event, given the overwhelming evidence that Peyton was near death when he arrived at the hospital. Therefore, we decline to find ineffective assistance based on his trial attorneys' decision to forego presenting this evidence to the jury.

4. DIC

Hall next argues that his trial attorneys were ineffective for failing to explore the possibility that Disseminated Intravascular Coagulation (DIC), a severe and significant abnormality of Peyton's blood clotting system, caused the child's death. Contrary to Hall's

implication, however, the DIC issue was explored at trial. Dr. Luerssen testified that DIC is a known complication of severe or life-threatening brain injuries. Tr. p. 435-43. Dr. Hawley testified that Peyton's DIC was not any different from that of other patients who received the extent of medical intervention received by Peyton and that, in his opinion, DIC was not the cause of Peyton's death. Id. at 687-88. Dr. Scherer testified that Peyton's severe head injury caused the DIC and that Peyton died because the injury caused his brain to swell to the point that its blood supply was entirely cut off, not because of DIC. Id. at 350.

Moreover, Hall's attorneys offered the testimony of Dr. Lawson Bernstein, who testified at length. In Dr. Bernstein's direct testimony, he explored DIC and the possibility that it had caused the child's death. But the trial court ultimately decided to prohibit Dr. Bernstein from testifying in front of the jury regarding his theory of the cause of Peyton's death—a decision this court found was an abuse of discretion. Hall, 796 N.E.2d at 400. The trial court's ruling notwithstanding, it is evident that Hall's trial attorneys did, in fact, explore the DIC issue at trial. That the jury ultimately decided that it was Hall's actions, rather than DIC, that caused Peyton's death, does not mean that trial counsel were ineffective.

C. Declining to Cross-Examine or Impeach Dr. Hibbard

Dr. Roberta Hibbard, a professor of pediatrics at Indiana University School of Medicine and the director of child protection programs in Marion County, testified for the State. Dr. Hibbard questioned Hall and his wife following Peyton's death. At Hall's trial, Dr. Hibbard testified that Hall told her that Peyton sustained his injuries from falling off of a swing set. Hall's attorneys elected to pass the witness and neither cross-examined her nor

objected to her testimony. He argues that they should have objected to the testimony because he was not given his Miranda[7] rights before speaking to Dr. Hibbard.

There is no evidence that Dr. Hibbard was acting as an agent of law enforcement when she questioned Hibbard. Further, there is no evidence that her questioning of Hall was a custodial interrogation, triggering Miranda requirements. Lamonte v. State, 839 N.E.2d 172, 175 (Ind. Ct. App. 2005). Finally, Dr. Hibbard's testimony was cumulative of other evidence—Dr. Yablong also testified that Hall had told him that Peyton sustained his injuries from a fall off of a swing set. Thus, Hall cannot establish prejudice and we decline to find ineffective assistance on this basis.

D. Preparing for Sentencing Hearing

Next, Hall claims that his attorneys were ineffective based on their preparation for and performance during his sentencing hearing. Hall first argues that one of his attorneys "abandoned" him the day before the sentencing hearing, appellant's br. p. 30, but neglects to mention that the trial court permitted counsel to withdraw and that his other attorney, who had also represented him during trial, continued as counsel. We find no ineffective assistance on this basis.

The remaining attorney called eight witnesses on Hall's behalf at the sentencing hearing. He also presented a lengthy and well-reasoned argument, proffering numerous mitigating factors and arguing for concurrent sentences on the two convictions. The trial

[7] Miranda v. Arizona, 384 U.S. 436 (1968).

court accepted the proffered mitigating circumstances of Hall's age, law-abiding life, and family support, and agreed to impose concurrent sentences.

Hall insists, however, that the trial court considered inappropriate aggravators and that trial counsel was ineffective for failing to object. The aggravators considered by the trial court were: (1) Peyton's age; (2) Hall was in a position of trust with Peyton; (3) Hall's prior juvenile adjudication for criminal recklessness; (4) Peyton's death resulted from the mistreatment of an infant; and (5) the nature and extent of Peyton's injuries.[8]

Hall argues that his attorney should have objected to the use of Peyton's age as an aggravator because it is an element of one of the offenses of which he was convicted—neglect of a dependent. This court has held, however, that the age of a very young victim could be used as an aggravator in determining the sentence for neglect of a dependent because the statute merely requires that the victim be under the age of eighteen years. Kile v. State, 729 N.E.2d 211, 214 (Ind. Ct. App. 2000) (affirming neglect sentence where court considered six-year-old victim's age as an aggravator). Here, Peyton was three years old at the time of his death. Consequently, we find that counsel was not ineffective for failing to object on this basis.

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[8] Hall argues that "the trial court erred in using 'reduced sentence would depreciate' factor as an aggravator," appellant's br. p. 30, but a review of the record reveals that the trial court did not, in fact, consider this aggravator. Moreover, Hall states that "the trial court erred in using community, societal, and social considerations, thereby engaging in social activism during sentencing," id., but does not elaborate or make a cogent argument on this issue. Finally, Hall contends that the trial court erred by considering aggravators that "relied upon false and ambiguous medical testimony," id. at 31, but we have already addressed Hall's arguments relating to the State's medical evidence and have not found it lacking. We decline to find trial counsel's decision to decline to object to sentencing based upon these factors constituted ineffective assistance.

Hall also insists that his attorney should have objected to the use of his juvenile adjudication as an aggravator, though he does not state what he believes the basis for such an objection would have been. In fact, it is explicitly permitted by statute for a trial court to consider a defendant's history of delinquent juvenile behavior as an aggravating circumstance, and we see no error on this basis. Ind. Code § 35-38-1-7.1(a)(2).

Finally, Hall argues that the remaining two aggravators—that Peyton's death resulted from the mistreatment of an infant and the nature and circumstances of the crime—overlap impermissibly. Even if we were to accept for argument's sake that there is an impermissible overlap and that the trial court should have considered one, but not both, of these aggravating factors, we find any error was harmless because the same sentence would have been justified based upon the remaining aggravators. Therefore, Hall cannot establish prejudice as a result of his attorney's failure to object.[9]

III. Ineffective Assistance of Appellate Counsel

A. Standard

Claims of ineffective assistance of appellate counsel are reviewed using the same standard applicable to claims of trial counsel ineffectiveness. Bieghler v. State, 690 N.E.2d

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[9] To the extent that Hall argues that the rule announced in Blakely v. Washington should apply to his case, he is mistaken. 542 U.S. 296 (2004). Hall's jury trial took place in 2001 and this court's opinion was published in 2003, before the United States Supreme Court had even granted certiorari in Blakely. Under these circumstances, it is unquestionable that Blakely does not apply herein. See Smylie v. State, 823 N.E.2d 679, 690-91 (Ind. 2005) (holding that Blakely applied retroactively to all cases on direct review at the time Blakely was announced). Thus, neither trial nor appellate counsel were ineffective for failing to raise an argument based upon a case that had not yet been decided. Similarly, given that certiorari had not yet been granted when Hall's appeal was briefed, Hall is incorrect that his attorney should have requested a continuance until Blakely was decided.

188, 193 (Ind. 1997). These claims generally fall into three categories: (1) denying access to the appeal, (2) waiver of issues, and (3) failure to present issues well. Id. at 193-95.

The decision of what issue or issues to raise on appeal is one of the most important strategic decisions made by appellate counsel. Id. at 193. Thus, ineffectiveness is rarely found when the issue is the failure to raise a claim on direct appeal. Id. In evaluating the performance prong of appellate counsel's performance, we consider whether the unraised issues are significant and obvious from the record and whether the unraised issues are "clearly stronger" than the issues that were presented. Id. at 194. If that analysis demonstrates deficient performance by counsel, the court then examines whether "the issues which . . . appellate counsel failed to raise, would have been clearly more likely to result in reversal or an order for a new trial." Id.

Further, the reviewing court must consider the totality of an attorney's performance to determine whether the client received constitutionally adequate assistance, and "should be particularly sensitive to the need for separating the wheat from the chaff in appellate advocacy, and should not find deficient performance when counsel's choice of some issues over others was reasonable in light of the facts of the case and the precedent available to counsel when that choice was made." Id.

B. Jury Instructions

Hall argues that his appellate counsel should have argued that the trial court erred by declining to instruct the jury on reckless homicide and voluntary and involuntary

manslaughter.[10] Given that Hall's theory of the case was that Peyton's death was purely accidental, there was no evidence supporting a jury instruction that related to reckless homicide. As for voluntary manslaughter, the factor that distinguishes this offense from murder is that the defendant killed "while acting under sudden heat." Ind. Code § 35-41-1-3. Here, however, there was no evidence of sudden heat; as noted above, Hall's theory at trial was that Peyton fell accidentally. Thus, there was no basis for this instruction to be given.

Under certain circumstances, a trial court should instruct a jury on a lesser-included offense of the crime charged. Wright v. State, 658 N.E.2d 563, 566-67 (Ind. 1995) (holding that if the offense is inherently or factually included in the charged offense and there is a serious evidentiary dispute regarding any element distinguishing the two offenses, a jury instruction is warranted). Involuntary manslaughter is not an inherently lesser-included offense of murder. Ketcham v. State, 780 N.E.2d 1171, 1177 (Ind. Ct. App. 2003). It may, however, be factually included if the charging information alleges that a battery accomplished the killing. Id. Here, although the charging information does not explicitly allege that a battery accomplished the killing, it is evident that the State's theory of prosecution was precisely that.

Thus, we must consider whether there is a serious evidentiary dispute regarding any element that distinguishes the two offenses. A person commits involuntary manslaughter when he kills another human being while committing battery. Ind. Code § 35-42-1-4(c)(3).

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[10] Hall also argues that appellate counsel should have raised arguments relating to causation, negligence, and notice of alibi, but fails to offer any cogent argument on these issues. Thus, we decline to address them.

Here, the State argued that Hall intended to kill Peyton when he battered him and Hall argued that he neither battered Peyton nor killed him. Under these circumstances, we find that there was no serious evidentiary dispute regarding whether Hall intended to kill or merely batter Peyton—he denied doing either one. Thus, appellate counsel was not ineffective for failing to raise an argument on this issue.

C. Sufficiency

Next, Hall argues that appellate counsel should have argued that the evidence was insufficient to support the convictions. At the post-conviction hearing, counsel explained that he was concerned that the record did not support such a challenge and that a sufficiency of the evidence challenge is a red flag for a weak appeal. Furthermore, he stated that he preferred to focus on what he believed to be the stronger claims. We may not and will not second-guess this strategic decision, and decline to find ineffective assistance on this basis.

D. Dr. Bernstein's Testimony

Appellate counsel argued that the trial court erred by excluding Dr. Bernstein's testimony from the jury, and, in fact, this court agreed, though it found the error to be harmless. Hall argues that appellate counsel should have provided an argument based in federal law in addition to state law on this issue. Given that counsel succeeded with the argument he made, we do not find him ineffective for deciding to forego an argument based in federal law. Furthermore, Hall does not explain why a decision based in federal law would have led this court to conclude the error was anything other than harmless. Therefore, we decline to find ineffective assistance for this reason.

E. Prosecutorial Misconduct

Hall argues that appellate counsel should have argued that the prosecutors committed misconduct by presenting "questionable and sometimes false medical testimony," going so far as to accuse Dr. Hawley of committing "blatant perjury[.]" Appellant's Br. p. 34. Hall neither supports these serious accusations nor develops an argument as to how these statements constituted prosecutorial misconduct. Therefore, we decline to address this argument.

IV. Newly Discovered Evidence

Finally, Hall argues that there was newly discovered evidence that necessitated a new trial. He never, however, explains what this new evidence is. In fact, all of the evidence he describes has existed throughout the duration of these proceedings, including during pretrial discovery, and most of this evidence was actually discussed during his trial. Therefore, we decline to order a new trial on this basis.

The judgment of the post-conviction court is affirmed.

FRIEDLANDER, J., and RILEY, J., concur.