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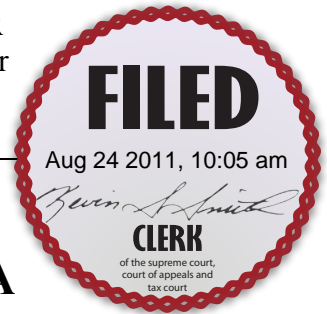
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**IN THE
COURT OF APPEALS OF INDIANA**

STATE OF INDIANA,)
)
 Appellant,)
)
 vs.)
)
 STEVEN HOLLIN,)
)
 Appellee.)

No. 69A05-1101-PC-113

APPEAL FROM THE RIPLEY CIRCUIT COURT
The Honorable Carl H. Taul, Judge
Cause No. 69C01-0802-PC-001

August 24, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

The State of Indiana appeals from the Ripley Circuit Court's grant of Steven Ray Hollin's petition for post-conviction review. On appeal, the State claims that the post-conviction court erred in concluding that Hollin was deprived of the effective assistance of trial counsel and that the trial court erred in concluding that the prosecutor in Hollin's trial engaged in misconduct.

We reverse and remand.

Facts and Procedural History

In Hollin's direct appeal, our supreme court set forth the facts underlying Hollin's convictions as follows:

Eighteen-year-old Steven R. Hollin was released from jail on November 1, 2005. Less than a week later, he and Nathan Vogel ("Vogel") devised a plan to burglarize homes in a rural portion of Ripley County, Indiana. They planned to knock upon doors to locate unoccupied homes, from which they would steal money. On the morning of November 8, 2005, the two men ventured out by foot along a road in Ripley County. The first residence they approached was occupied. A woman answered the door, and to avoid suspicion Hollin and Vogel asked for directions to Greensburg, Indiana. They then left and continued their search for an unoccupied house. The next home they reached appeared to be empty. To be certain, Hollin and Vogel knocked upon both the front and back doors before entering the garage and proceeding into the kitchen. While Hollin remained in the kitchen, Vogel entered a bedroom. Vogel took a camera bag containing approximately six hundred dollars. The two then left the home, walking back toward town. At this point, the woman who had provided directions to Greensburg noticed them and called police to report this suspicious activity.

Batesville Police Department Lieutenant Jeff Thielking responded to the call and recognized Hollin. He became suspicious about the possibility of criminal activity because, although it was approximately sixty-six degrees outside, Vogel wore a heavy winter coat and appeared to be hiding something inside of it. Vogel asserted that their car had broken down along the road, but Lieutenant Thielking had not seen any disabled vehicles in the vicinity. Lieutenant Thielking also knew of several recent burglaries in the

area. Noting the name of Al Wuestefeld on the camera bag Vogel was carrying, Lieutenant Thielking arrested both men. A telephone call to the Wuestefeld residence confirmed that it had been burgled. Hollin and Vogel subsequently confessed.^[1]

Hollin v. State, 877 N.E.2d 462, 463-64 (Ind. 2007).

The State initially charged Hollin with Class B felony burglary of a dwelling and Class D felony theft and also alleged that Hollin was an habitual offender. Id. at 464. The State later amended the charges to a single count of conspiracy to commit Class B felony burglary of a dwelling. Id. The State charged Hollin's companion, Vogel, with Class B felony burglary and Class D felony theft. Vogel entered into a plea agreement with the State whereby he would plead guilty to Class D felony theft and the burglary charge would be dismissed. On February 21, 2006, Vogel was sentenced pursuant to his plea agreement to 545 days, with all time not already served suspended to probation. If Vogel successfully completed his probation, his felony conviction was to be reduced to a Class A misdemeanor conviction.

Shortly thereafter, on May 16, 2006, Vogel was charged in neighboring Decatur County with Class C felony battery with a deadly weapon. As a result, the State filed a petition to revoke Vogel's probation in Ripley County. The State also filed a petition to revoke Vogel's probation in Decatur County, where Vogel had been convicted of Theft pursuant to a plea agreement with terms similar to those in the Ripley County Case.

¹ Hollin now claims that, although he admitted to being in the house, he never actually admitted that he intended to steal anything when they entered the house.

In July 2006, after the State amended the charge against Hollin to conspiracy to commit burglary, the Ripley County deputy prosecutor, Ryan King (“King”) met with Vogel in jail. Vogel had originally claimed that Hollin was unaware of Vogel’s theft until after they had left the burglarized home. In jail, however, Vogel told King that Hollin had agreed with him to look for houses to burglarize.

At Hollin’s jury trial, his trial counsel, John Kellerman II (“Kellerman”), stated in his opening statement that if Vogel testified that “this was some kind of plan, this will be the first time he’s come up with that story,” suggesting that Kellerman did not know of Vogel’s statement to King that Hollin had agreed with Vogel to look for houses to burglarize. Tr. p. 120. Vogel proceeded to testify that he and Hollin had agreed the night before the burglary to find a home to burglarize. Vogel acknowledged that he had pleaded guilty as a result of the break-in, but Kellerman did not inquire on cross-examination as to the specifics of Vogel’s plea agreement. Vogel also acknowledged that he had been convicted of theft in Decatur County after he and Hollin had been arrested in the present case. Kellerman did not inquire into Vogel’s pending Class C felony battery charge or the pending petitions to revoke Vogel’s probation in both Ripley and Decatur counties.

The statement Hollin gave to the police was played to the jury; in this statement, Hollin told the police that he and Vogel approached a house to use the telephone and knocked on the back door. When no one responded, the two went through an unlocked side door into the kitchen, where Hollin waited for approximately two minutes while Vogel went elsewhere in the house. When Vogel returned to the kitchen, he was carrying

a small backpack and told Hollin that they should leave. Hollin's trial testimony was mostly consistent with this account: he claimed that he thought Vogel knew the residents of the home, and that Vogel did not respond when he asked Vogel what was going on. He claimed that he only realized the full extent of what had happened when Vogel showed him the items he had taken from the house. Hollin specifically denied having any plan to break into the house with Vogel.

Before cross-examining Hollin, deputy prosecutor King argued to the trial court that Hollin's three prior convictions for auto theft were admissible to impeach his credibility under Evidence Rule 609, and were admissible to show Hollin's intent under the intent exception to Evidence Rule 404(b). Kellerman agreed and made no objection when King introduced evidence of Hollin's prior convictions. On redirect, however, Kellerman elicited from Hollin that he was only sixteen and seventeen years old at the time of his convictions, that he admitted his guilt in those cases, and that he fled to avoid arrest. Kellerman's theory was that Hollin knew when he was committing a crime, but had not fled when approached by the police in the present case because he had not committed a crime.

On re-cross, King elicited from Hollin that, despite being a teenager, Hollin was waived into adult court because of his juvenile record. King also emphasized that Hollin had been released from jail only seven days before being arrested in the present case. In its closing argument, King argued that Hollin's prior auto theft convictions and the fact that he had just been released from jail were evidence of Hollin's intent. King also claimed that Vogel had no reason to lie because he had pleaded guilty.

The jury found Hollin guilty of conspiracy to commit burglary and found him to be an habitual offender. At the sentencing hearing, the trial court found Hollin's prior criminal history to be an aggravating factor and found his young age to be a mitigating factor. The court then sentenced him to the maximum term of twenty years for the conspiracy conviction, enhanced by twenty years for the habitual offender adjudication, for an aggregate sentence of forty years.

On direct appeal, Hollin argued that it was fundamental error for the trial court to admit evidence of his criminal history and that the trial court erred in sentencing him. A panel of this court rejected these arguments in an unpublished memorandum decision.² Our supreme court granted transfer and summarily affirmed this court as to the evidentiary issue, but concluded that Hollin's forty-year sentence was inappropriate. Hollin, 877 N.E.2d at 464-65. The court revised Hollin's sentence for burglary to the advisory term of ten years, plus an additional ten years for the habitual offender enhancement. Id. at 465-66. Thus, Hollin's sentence was reduced from a total of forty years to a total of twenty years.

On February 25, 2008, Hollin filed a *pro se* petition for post-conviction relief. Hollin was appointed counsel, and counsel filed an amended petition on August 16, 2010. The amended petition alleged that Hollin had received ineffective assistance of trial counsel, that Hollin had been denied due process when the State failed to disclose to the defense the existence of Vogel's pending criminal charge and petitions to revoke

² Hollin v. State, No. 69A01-0609-CR-401 (Ind. Ct. App. Mar. 29, 2007), trans. granted.

probation, and that the prosecutor engaged in misconduct when it argued to the jury that Vogel had no motive to lie because “his case was over,” despite knowing about the pending charges and petitions to revoke probation. The post-conviction court held a hearing on Hollin’s petition on December 13, 2010, at which King and Kellerman testified.

King testified that he knew about the petition to revoke Vogel’s probation that had been filed in Ripley County. He also admitted that “in all likelihood,” the pending Class C felony battery charge in Decatur County had been discussed in his pre-trial meetings with Vogel, but he could not remember if he knew about the pending Decatur County petition to revoke probation. Kellerman testified that his sister, Amy Streater (“Streater”), who was also Kellerman’s law partner, had represented Vogel on his Decatur County felony charge, but had withdrawn her representation before Hollin’s trial. After Streater’s withdrawal, she helped Kellerman represent Hollin and even sat at the defense table during Hollin’s trial. Streater testified at the post-conviction hearing that she had negotiated Vogel’s plea terms in the probation case. She admitted that “there had to be some communication” with her brother for her to have withdrawn from Vogel’s case. P.C. Tr. p. 109. Kellerman testified that his defense theory was that Hollin had no intent to commit theft inside the home when he entered it and that he made no objection to the introduction of Hollin’s prior convictions because he did not think they could be kept out. He even went as far as stating that he may have offered some of the evidence himself had the State not done so. After the parties submitted proposed findings and conclusions, the

trial court adopted Hollin’s proposed findings and conclusions on February 3, 2011, thus granting Hollin’s petition for post-conviction relief. The State now appeals.

Standard of Review

Our supreme court has recently explained that post-conviction proceedings “are not super-appeals and provide only a narrow remedy for subsequent collateral challenges.” State v. Cooper, 935 N.E.2d 146, 148 (Ind. 2010). ““The petitioner has the burden of establishing his grounds for relief by a preponderance of the evidence.”” Id. at 148-49 (quoting Ind. Post-Conviction Rule 1(5)). When the petitioner appeals the denial of a petition for post-conviction relief, we apply a negative judgment standard of review. See Henley v. State, 881 N.E.2d 639, 643 (Ind. 2008). However, when the State appeals a judgment granting a petition for post-conviction relief, we review using the standard in Indiana Trial Rule 52(A):

On appeal of claims tried by the court without a jury or with an advisory jury, at law or in equity, the court on appeal shall not set aside the findings or judgment unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses.

Cooper, 935 N.E.2d at 149 (citing State v. Dye, 784 N.E.2d 469, 470 (Ind. 2003)). “Clearly erroneous review is a review for sufficiency of evidence.” Id. Under this standard, we neither reweigh the evidence nor determine the credibility of witnesses; instead, we consider only the evidence that supports the judgment and the reasonable inferences that can be drawn therefrom. Id. We will reverse only on a showing of “clear error.” Id.

We do not defer to the trial court when a “clearly erroneous” judgment results from application of the wrong legal standard to properly found facts. State v. Holmes, 728 N.E.2d 164, 169 (Ind. 2000). Nor are we bound by the trial court’s characterization of its results as a “finding of fact” or a “conclusion of law”; instead, “we will look past these labels to the substance of the judgment and review a legal conclusion as such even if the judgment wrongly classifies it as a finding of fact.” Id.

I. Ineffective Assistance of Counsel

In Timberlake v. State our supreme court summarized the law regarding claims of ineffective assistance of trial counsel:

A defendant claiming a violation of the right to effective assistance of counsel must establish the two components set forth in Strickland v. Washington, 466 U.S. 668 (1984). First, the defendant must show that counsel’s performance was deficient. 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 the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Counsel is afforded considerable discretion in choosing strategy and tactics, and we will accord those decisions deference. A strong presumption arises that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. The Strickland Court recognized 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. Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective. The two prongs of the Strickland test are separate and independent inquiries. Thus, [i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed.

753 N.E.2d 591, 603 (Ind.2001) (citations and quotations omitted).

The post-conviction court concluded that Hollin’s trial counsel was ineffective for failing to object to the State’s introduction of evidence regarding Hollin’s prior convictions. On appeal, the State claims this was erroneous because evidence of the prior convictions was admissible under Evidence Rules 609 and 404(b). We address each of these rules in turn.

A. Evidence Rule 609

Indiana Evidence Rule 609(a) provides:

For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime or an attempt of a crime shall be admitted but only if the crime committed or attempted is (1) murder, treason, rape, robbery, kidnapping, burglary, arson, criminal confinement or perjury; or (2) a crime involving dishonesty or false statement.

The language of Rule 609(a) is mandatory. Britt v. State, 937 N.E.2d 914, 916 (Ind. Ct. App. 2010). That is, the admission of evidence under Evidence Rule 609(a), unlike its federal counterpart, is not subject to Evidence Rule 403, and therefore admission of such evidence is not subject to trial court discretion. Id. (citing Jenkins v. State, 677 N.E.2d 624, 627 (Ind. Ct. App. 1997)). But Evidence Rule 609(a) is limited to those circumstances where the evidence of the prior conviction is being offered “[f]or the purpose of attacking the credibility of a witness.” Id. (quoting Evid. R. 609(a)).

At issue here is whether evidence of Hollin’s prior convictions for auto theft was admissible for impeachment purposes because the convictions were for “crime[s] involving dishonesty or false statement.” Evid. R. 609(a). Hollin claims that his

convictions were not admissible and that Kellerman was ineffective for failing to object to the admission of this evidence.

Our supreme court has long held that, as a general rule, evidence of a prior conviction for theft *is* admissible for impeachment purposes as proof of a crime involving dishonesty or false statement. See Brown v. State, 703 N.E.2d 1010, 1016 (Ind. 1998) (“As a general rule, pursuant to law developed before the codification of Rule 609(a)(2), evidence of prior theft convictions is admissible for impeachment purposes as proof of a crime involving dishonesty or false statement.”) (citing Fletcher v. State, 264 Ind. 132, 136-37, 340 N.E.2d 771, 774 (1976) (“We . . . hold that proof of prior theft convictions are admissible for impeachment purposes under that portion of Ashton which allows proof of crimes involving ‘dishonesty or false statement.’”)); see also Fassoth v. State, 525 N.E.2d 318, 322 (Ind. 1988); Hunt v. State, 455 N.E.2d 307, 317 (Ind. 1983); Geisleman v. State, 274 Ind. 241, 245, 410 N.E.2d 1293, 1296 (1980); McDaniel v. State, 268 Ind. 380, 383, 375 N.E.2d 228, 230 (1978).³

Given this general rule, it is not particularly surprising that Kellerman did not object to the admission of evidence of Hollin’s prior convictions for auto theft. Still, the post-conviction court agreed with Hollin’s claim that Kellerman should have claimed that

³ Many cases from this court have also applied this general rule in both criminal and civil contexts. See Newman v. State, 719 N.E.2d 832, 837 (Ind. Ct. App. 1999); Rowe v. State, 704 N.E.2d 1104, 1108 (Ind. Ct. App. 1999); Perry v. State, 622 N.E.2d 975, 979 (Ind. Ct. App. 1993); Winegar v. State, 455 N.E.2d 398, 401 (Ind. Ct. App. 1983); Posey County v. Chamness, 438 N.E.2d 1041, 1048 (Ind. Ct. App. 1982); Clarkson v. Ind. Dep’t of Ins., 425 N.E.2d 203, 208 (Ind. Ct. App. 1981); Smith v. State, 403 N.E.2d 869, 877 (Ind. Ct. App. 1980); Ottinger v. State, 370 N.E.2d 912, 918 (Ind. Ct. App. 1977); Adams v. State, 174 Ind. App. 165, 167, 366 N.E.2d 692, 694 (1977); Hall v. State, 167 Ind. App. 604, 608, 339 N.E.2d 802, 804 (1976). And even before our supreme court’s decision in Fletcher, this court came to a similar conclusion. See Hall v. State, 167 Ind. App. 604, 608, 339 N.E.2d 802, 804 (1976).

Hollin's prior auto theft convictions arose from a factual situation that did not indicate a lack of truthfulness or veracity. Hollin argues that, under Fletcher, a prior conviction for theft is inadmissible unless the facts of that theft indicate a lack of veracity. This is not entirely accurate.

The Fletcher court "rejected as too cumbersome any procedure which would require the trial court to probe about the record of the witness's prior theft conviction to ascertain the common law equivalent [of the prior theft conviction], prior to admitting any evidence of the conviction at trial." 264 Ind. at 136-37, 340 N.E.2d at 774. The court therefore wrote, "proof of prior theft convictions are [sic] admissible for impeachment purposes." 264 Ind. at 137, 340 N.E.2d at 774. But the Fletcher court also recognized that a too-strict interpretation of the general rule might "allow admission of some theft convictions which arise from factual situations which do not indicate a lack of veracity on the part of the witness." Id. at 137, 340 N.E.2d at 775. "In such cases," the court wrote, "we believe that counsel should make such facts known to the court through a pre-trial motion in limine, supported by appropriate affidavits, thereby allowing the court the opportunity to exclude, in its discretion, any reference to such prior conviction." Id.

Thus, there is a presumption that a prior conviction for theft is a crime of dishonesty and is admissible to impeach the character of a witness. But this presumption may be rebutted in a pre-trial motion in limine by demonstrating that a particular theft conviction arose from a factual situation which does not indicate a lack of veracity by the witness.

The State argues that there was nothing about Hollin's prior auto theft convictions that would show that they arose from factual situations that did not indicate a lack of veracity on Hollin's part. We agree. Hollin presented no evidence at the post-conviction hearing that would support his contention that the particular facts from which his convictions arose did not indicate a lack of veracity. Hollin did testify at this trial that he was only "joyriding" when he committed his auto thefts. However, we fail to see how this establishes that his convictions arose from particular factual situations do not show a lack of veracity. Cf. Sweet v. State, 498 N.E.2d 924, 927 (Ind. 1986) (trial court did properly prohibit defendant from impeaching witness with prior conviction where State showed, by affidavit, that the prior offense, although arguably attempted theft, was not the type of offense which bespoke a lack of veracity). In fact, the particulars of his prior auto theft convictions indicate quite the contrary. The record clearly establishes that Hollin repeatedly took vehicles that did not belong to him, fled from the police when confronted, took items from one of the cars, and caused damage to two of the cars he stole. This hardly speaks to Hollin's propensity for truthfulness.

Without some showing that his prior auto theft convictions did not bespeak a lack of veracity, the post-conviction court erred in concluding that Hollin's counsel's performance was deficient when he failed to object to the State's use of these prior convictions to impeach his credibility. In other words, the post-conviction court's conclusion that this failure to object constituted ineffective assistance of trial counsel was clearly erroneous.

B. *Evidence Rule 404(b)*

The State also argues that the post-conviction court erred in concluding that Hollin's trial counsel was ineffective for failing to object to the evidence regarding Hollin's prior auto theft convictions based on Evidence Rule 404(b). This rule provides in relevant part:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident

Evidence Rule 404(b) was designed to assure that the State, relying upon evidence of uncharged misconduct, does not punish a person for his character. Rogers v. State, 897 N.E.2d 955, 960 (Ind. Ct. App. 2008), trans. denied (citing Lee v. State, 689 N.E.2d 435, 439 (Ind. 1997)).

The State argues on appeal that the post-conviction court erred in concluding that Hollin's prior auto theft convictions were inadmissible under the "intent" exception to Evidence Rule 404(b). In Wickizer v. State, 626 N.E.2d 795, 799 (Ind. 1993), our supreme court held that the intent exception to Rule 404(b) should be narrowly construed, so that the exception does not swallow the rule. Id.; see also Goldsberry v. State, 821 N.E.2d 447, 455 (Ind. Ct. App. 2005) (summarizing Wickizer holding). Pursuant to this narrow construction, the intent exception "does not authorize the general use of prior conduct evidence as proof of the general or specific intent element in criminal offenses." Wickizer, 626 N.E.2d at 799. Therefore, the Wickizer court held that the intent exception

is available only “when a defendant goes beyond merely denying the charged culpability and affirmatively presents a claim of particular contrary intent.” Id.

Here, Hollin claimed that he and Vogel entered the burglarized home to use the telephone. Hollin testified that he thought Vogel knew the owners of the home and that he simply sat in the kitchen, unaware of Vogel’s theft. Thus, the State argues, Hollin went beyond denying the charged culpability and claimed a particular contrary intent. That is, he did not enter the home with the intent to commit a felony therein. See Ind. Code § 35-43-2-1 (2004) (“A person who breaks and enters the building or structure of another person, *with intent to commit a felony in it*, commits burglary[.]”). Hollin claims, however, that this is not the “intent” at issue because he was convicted of *conspiracy* to commit burglary. Hollin claims that, because he generally denied agreeing with Vogel to commit any crimes, he did not claim any contrary intent.

Regardless of whether evidence of Hollin’s prior convictions for auto theft were admissible to show his intent, we have concluded above that such evidence was admissible to impeach Hollin’s credibility. We therefore cannot say that his trial counsel was ineffective for failing to object to this evidence.

Hollin notes, however, that if a witness is impeached based upon a prior conviction, the witness may generally be questioned only about whether he had been convicted of a particular crime, not about the details of that crime. See Banks v. State, 761 N.E.2d 403, 405 (Ind. 2002). In contrast, when evidence of prior bad acts are admitted to counter a claim of contrary intent, details are admissible. See Johnson v. State, 785 N.E.2d 1134, 1139-40 (Ind. Ct. App. 2003) (details of defendant’s prior sexual

history admissible under “knowledge” exception to 404(b)), trans. denied. Hollin therefore claims that, if Kellerman had objected on 404(b) grounds, the details of Hollin’s auto thefts would not have been before the jury.

But even if we assume *arguendo* that Kellerman should have objected to this evidence on 404(b) grounds, we cannot say that Hollin was prejudiced thereby. Although the details of Hollin’s prior auto theft convictions were obviously “prejudicial” to a certain extent, in the context of a claim of ineffective assistance of counsel, Hollin’s burden is to show that there is a reasonable probability, but for the admission of the details of his prior convictions, the result of his trial would be different. See Timberlake, 753 N.E.2d at 603. This is a burden Hollin fails to meet.

Even if Kellerman had been able to keep the jury from hearing the details of Hollin’s prior convictions, the jury would still have been aware that Hollin had three prior convictions for auto theft. We fail to see how keeping the details of these prior convictions from the jury would have had a reasonable probability of changing the result of Hollin’s trial. Indeed, we concluded in Hollin’s direct appeal that admission of his prior convictions was *not* fundamental error considering Vogel’s testimony implicating Hollin. And our conclusion was summarily affirmed by our supreme court in its opinion on transfer in Hollin’s direct appeal. See Hollin, 877 N.E.2d at 464.

Because Hollin has not shown prejudice from his counsel’s alleged deficient performance in failing to object to admission of his prior convictions on 404(b) grounds, he has not shown that he was deprived of the ineffective assistance of trial counsel. The post-conviction court erred in concluding otherwise.

C. Failure to Impeach State's Witness

The State also claims that the trial court erred in concluding that Hollin's trial counsel was ineffective for failing to impeach Vogel with evidence that Vogel had been arrested and charged with battery with a deadly weapon in neighboring Decatur County and, as a result, was facing petitions to revoke his probation in both Decatur and Ripley counties. Had his trial counsel brought this to the jury's attention, Hollin claims, then Vogel's credibility would have been brought into question because he had a motive to curry the State's favor by testifying against and implicating Hollin.⁴

Clearly, Hollin's counsel had the right to question Vogel regarding his plea agreement and any pending charges against him. See Hamner v. State, 553 N.E.2d 201, 203 (Ind. Ct. App. 1990) ("To effectively analyze a witness's credibility, a jury should have before it all the relevant circumstances which cause or induce the witness to testify, including the rewards for such testimony and any promises by the State or prosecuting attorney to grant immunity."). This is true even when there is no formal plea agreement. See id. at 204 (even though there was no written plea agreement, accomplice clearly received some patent benefit for his decision to testify against defendant). The question here, however, is not whether the trial court erred by limiting Hollin's cross-examination

⁴ This claim is interrelated with Hollin's prosecutorial misconduct claim, addressed below. The post-conviction court concluded that, to the extent that Kellerman knew about Vogel's pending charges but failed to use them to impeach Vogel, this constituted ineffective assistance. But the post-conviction court also concluded that the prosecutor committed misconduct by failing to inform Kellerman of Vogel's pending charges. For purposes of this part of our opinion, we assume *arguendo* that Kellerman was aware of these pending charges.

of Vogel, but whether Hollin's counsel was ineffective for failing to question Vogel regarding his pending charges.

In addressing this question, we first note that the jury was made aware that Vogel had pleaded guilty in the instant case. In fact, it was deputy prosecutor King who asked Vogel at trial, "You've plead[ed] guilty, haven't you," to which Vogel responded, "Yes, sir." Trial Tr. p. 97. Further, Kellerman questioned Vogel about a prior theft charge to which Vogel had pleaded guilty. Thus, the jury was well aware that Vogel had been convicted of crimes of dishonesty, and had reason to question his credibility. Further, Vogel had initially denied that Hollin knew about his plan to take items from the home, but, after pleading guilty, changed his story to implicate Hollin.

Even if we assume that Kellerman's performance was deficient for not further inquiring into the details of Vogel's guilty plea and the pending charges, we are unable to agree with the post-conviction court that, had this additional impeachment evidence been presented to the jury, the result of the proceeding would have been different. The jury had plenty of reason to question Vogel's credibility, yet still chose to discredit Hollin's story. Nor was this an unreasonable choice. Hollin, himself a repeat thief, claimed that he and Vogel needed to use a telephone to ask for a ride and knocked on the door of a house. When no one answered the door, Hollin testified that he innocently followed Vogel into the house through a side door and waited patiently in the kitchen, wholly unaware that Vogel was stealing items from the house. We fail to see how further impeachment of Vogel's already questionable credibility would have resulted in a

different result. We therefore conclude that the post-conviction court clearly erred in concluding that Hollin was denied the effective assistance of trial counsel.

II. Prosecutorial Misconduct

The State also claims that the post-conviction court erred in determining that deputy prosecutor King engaged in misconduct. Specifically, the post-conviction court found that King engaged in misconduct by failing to disclose to defense counsel Kellerman that Vogel was facing a pending charge in Decatur County for battery with a deadly weapon and petitions to revoke his probation in both Decatur and Ripley counties. The court also found that King committed misconduct when he informed the jury that Vogel's case was "over with," when he was still facing a pending felony battery charge and petition to revoke probation in Decatur County and a petition to revoke probation in Ripley County.

To review a claim of prosecutorial misconduct, we determine first if the prosecutor actually engaged in misconduct; if so, we then determine whether the misconduct, under all of the circumstances, placed the defendant in a position of "grave peril" to which he would not otherwise have been subjected. Cooper v. State, 854 N.E.2d 831, 835 (Ind. 2006). "[T]he correct procedure is to request the trial court to admonish the jury. If the party is not satisfied with the admonishment, then he or she should move for mistrial." Id. The failure to request an admonishment or to move for a mistrial results in waiver of the issue. Id. Where a claim of prosecutorial misconduct has not been properly preserved, the defendant must establish not only the grounds for the misconduct but also the additional grounds for fundamental error. Id.

Here, Kellerman made no objection to the prosecutor's statements, did not request an admonishment, and did not move for a mistrial. Thus, the issue was waived. See id. Nor can Hollin claim fundamental error in a post-conviction proceeding. As explained in Sanders v. State, 765 N.E.2d 591, 592 (Ind. 2002), claims of fundamental error are unavailable in post-conviction proceedings because the fundamental error exception to the contemporaneous objection rule applies only to direct appeals. In contrast to direct appeals, "[i]n post-conviction proceedings, complaints that something went awry at trial are generally cognizable only when they show deprivation of the right to effective counsel or issues demonstrably unavailable at the time of trial or direct appeal." Id.

Thus, we may address Hollin's complaint of prosecutorial misconduct only to the extent that this issue was demonstrably unavailable at the time of trial or direct appeal.⁵ Even if we assume *arguendo* that Hollin's trial counsel was unaware of Vogel's pending charges due to the State's failure to disclose such charges,⁶ Hollin does not prove or even allege how his claims of prosecutorial misconduct were demonstrably unavailable to him on direct appeal. Without such a showing, the post-conviction court erred in addressing this issue as a free-standing claim of error. See Minnick v. State, 698 N.E.2d 745, 750-51 (Ind. 1998) (where defendant failed to present issues of Brady violation and other prosecutorial misconduct on direct appeal, the issues were forfeited for purposes of post-conviction review, except to the extent that the claims could support claim of ineffective

⁵ We have addressed above the claim that Hollin's counsel was ineffective for failing to cross-examine Vogel with regard to these charges.

⁶ See note 4, supra.

assistance of appellate counsel);⁷ see also Taylor v. State, 922 N.E.2d 710, 715 (Ind. Ct. App. 2010) (noting well-settled rule that “a free-standing claim of fundamental error is not available in post-conviction proceedings.”), trans. denied.

Conclusion

The post-conviction court clearly erred in concluding that Hollin’s trial counsel provided ineffective assistance, and Hollin’s free-standing claims of prosecutorial misconduct were not properly presented in a post-conviction proceeding. We therefore reverse the judgment of the post-conviction court and remand with instructions to deny Hollin’s petition for post-conviction relief.

Reversed and remanded.

KIRSCH, J., and VAIDIK, J., concur.

⁷ Hollin has made no claim that his appellate counsel was ineffective.