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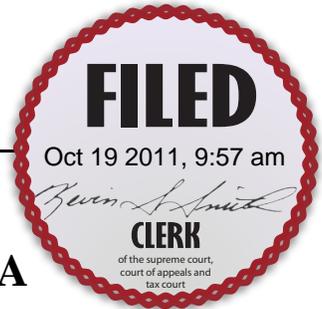
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**IN THE
COURT OF APPEALS OF INDIANA**

JAMES LEE,)
)
Appellant-Petitioner,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Respondent.)

No. 49A04-1103-PC-152

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Mark D. Stoner, Judge
Cause No. 49G06-0804-PC-87611

October 19, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

In 2008, James Lee was convicted of robbing a woman at gunpoint and unlawful possession of a firearm by a serious violent felon. He received a thirty-four-year sentence for these crimes. In 2009, his convictions and sentence were affirmed on direct appeal. Lee then filed a petition for post-conviction relief, alleging that his trial counsel was ineffective in failing to object to evidence identifying him as the robber and in failing to impeach the victim with statements regarding the robber's description and the duration of the robbery. The post-conviction court denied the petition, and Lee appealed. Finding no error, we affirm.

Facts and Procedural History

Another panel of this Court recited the following facts in Lee's direct appeal:

Around 5:30 a.m. on April 9, 2008, Lori May was walking to her vehicle in Indianapolis when Lee forced May into her vehicle, pointed a gun at her stomach, and ordered her to take him to an ATM. May protested that she had no cash or an ATM card, and after Lee examined the contents of her purse and vehicle, he stole some cigarettes and fled.

May alerted the police and provided them with a description of Lee. Within a short period of time, two men matching that description were stopped, but May excluded them. Several days later, May examined hundreds of pictures of potential suspects, but did not identify Lee.

On April 18, 2008, May saw Lee standing on the corner of Fourteenth and Pennsylvania Streets as she was driving home. Lee also saw May and made a mock shooting gesture with his hand as she drove passed him. May alerted the police, but they were unable to apprehend Lee that day. On April 20, 2008, May once again saw Lee standing on the same corner and called the police, who later detained Lee after he had fled.

On April 24, 2008, the State charged Lee with robbery, a class B felony, carrying a handgun without a license, a class A misdemeanor with a class C felony enhancement, and possession of a firearm by a serious violent felon, a class B felony. At Lee's jury trial, which commenced on June 30, 2008, May

testified that during the offenses, Lee was “almost eerily calm, like he was very comfortable [with] what he was doing.” Tr. p. 26. In addition, the jury submitted a question to Officer Shirey asking him whether Lee looked similar to the two men that May had previously excluded as suspects. Over Lee’s objection, Officer Shirey testified that Lee closely resembled the second suspect shown to May.

The jury found Lee guilty of robbery and carrying a handgun without a license, a class A misdemeanor. Lee waived his right to a jury trial on the class C felony enhancement to carrying a handgun without a license and on possession of a firearm by a serious violent offender. The bench trial for both offenses was continued until the sentencing hearing, which commenced on July 10, 2008. The trial court found sufficient evidence to support the enhancement and to convict Lee of possession of a firearm by a serious violent offender; however, the trial court merged the two offenses.

Lee v. State, No. 49A05-0808-CR-494, slip op. at 1 (Ind. Ct. App. Apr. 14, 2009) (footnote omitted), *trans. denied*.

In his direct appeal, Lee challenged the propriety of a jury instruction and the admission of Officer Shirey’s aforementioned testimony, as well as his sentence. This Court found no error and affirmed Lee’s convictions and sentence.

On July 22, 2009, and June 18, 2010, Lee filed petitions for post-conviction relief (the first pro se and the second by counsel), alleging that his trial counsel was ineffective in failing to object to evidence identifying him as the robber and in failing to impeach May with statements regarding the robber’s description and the duration of the robbery. The post-conviction court held an evidentiary hearing on November 4, 2010. On March 1, 2011, the court issued an order denying Lee’s petition that contains the following pertinent findings of fact and conclusions of law:

FINDINGS OF FACT

....

10. Lee was represented during [trial] proceedings by Matthew Jeziorski (“Jeziorski”) and David Hurley (“Hurley”) of the Marion County Public Defender Agency.

....

20. Lee alleges that his trial counsel’s performance was deficient for not objecting to and/or moving to suppress witness May’s identification evidence as the product of a suggestive identification procedure. He further alleges counsel should have impeached May with her different descriptions about the robber’s facial hair, her description of the robber as being dark skinned, and the length of time the robbery lasted.

....

22. The robbery occurred before sunrise around 5:40 a.m. There was lighting from an interstate I-65 off ramp and the apartment building.^[1] The individual approached May from behind and he was wearing a hood on his head. The hood was pulled up, but did not cover his face.

23. Based upon the evidence presented at trial, the Court finds that May the [sic] ample opportunity to view the robber at the time of the crime.

24. Following the robbery, May provided a description of the robber to responding law enforcement officers. She described the person as a black male, six feet tall, medium thin build, and wearing a black puffy jacket with a dark blue or black hood under the coat.

25. At trial, May described the robber as being an African-American male, dark skinned, 6’0” to 6’3”, a medium or thin build, unkempt or scraggly facial hair, and wearing a black puffy jacket with a dark blue or black hood underneath.

26. May’s separate on scene and in court description[s] of the robber largely matched the descriptions given in two pretrial statements. In her

¹ May also testified that her vehicle’s interior lights were on. See Trial Tr. at 25 (“The lighting in my car, my dome light is up at the very front of the car. There is two of them [sic].”).

pretrial statement of April 22, 2008, May indicated she looked at the robber's face when she was sitting in her car. Her description of the robber was as follows:

Yeah, he was a, uh, African-American male. He's probably about six, six foot tall approximately. 'Cause his head came, uh, I drive a Blazer, two door Blazer. It's not four wheel drive. His head came approximately into the door frame. He had, uh, kind of a scrappy looking mustache. His skin was, uh kind of bumpy. Uh, he had on a black, uh, it was either black or navy down jacket. It was very dark in color with a hoodie on underneath it. Uh, you could see a little bit of his hair sticking out from under, uh, uh, the front of the hood.

27. At her deposition on June 23, 2008, May described the robber as being dark skinned with a rough, pock marked complexion, unkempt facial hair, and wearing dark pants, a dark colored down jacket, and a dark hoodie underneath. She testified that about an inch of the man's hair stuck out from underneath the hoodie.

28. May testified at trial that the robbery took about ten minutes but "seemed like an hour." Jeziorski questioned whether the event could have taken place during a shorter period of time but May responded, "I doubt it. I doubt it."

29. May called 911 on her cell phone after the robbery and the police were dispatched at 5:40 a.m.

30. Defense counsel did not impeach May or present evidence on whether the robbery may have taken less than ten minutes. Detective James Vaughn ("Vaughn") interviewed May by phone the day after the robbery and met with her two days after that. In the probable cause affidavit Vaughn prepared, May stated that between 5:38 and 5:40 a.m. she was approached by a black male pointing a handgun at her who demanded, "Get in the car and give me what you got." The robbery was dispatched at approximately 5:40 a.m.

31. Defense counsel did not ask May if she told Vaughn or another officer the robbery started around 5:38 a.m. Defense counsel did not ask Vaughn if May stated she went out to her car between 5:38 and 5:40 a.m.

32. May saw Lee again on April 17 or 18 on the corner of 14th Street and Pennsylvania when she was driving home. Lee was wearing a green khaki

outfit and his hair looked the same as when he robbed May. May told her husband, “That’s the guy that held me up.” She made eye contact with Lee and he made a shooting motion. Her husband phoned 911. They drove by a second time and the man started screaming at them. They waited for the police, but no one arrived.

33. The Court takes judicial notice of the fact that the intersection of 14th Street and Pennsylvania Street in Indianapolis is approximately two (2) blocks north of May’s apartment building located at 12** N. Pennsylvania Street.

34. On April 20, 2008, May was driving home again when she saw Lee on the same corner wearing the same clothes. May described that Lee had “real scruffy” facial hair which was a bit more grown out. May and Lee locked eyes and he nodded his head at her.

35. May’s husband called the police and remained on the line until officers arrived. May believed that officers arrived approximately five to ten minutes thereafter. Officers stopped Lee and handcuffed him. A show-up identification then ensued.

36. May was in a police car twenty to twenty-five feet away when she identified Lee as the robber. May identified Lee as he was sitting handcuffed on a bench. Upon cross examination of Officers Joel Reiersen and Dewayne Gaddis, Jeziorski pointed out to the jurors that Lee was the only black male wearing a green shirt to be viewed by May.

37. May did not express any doubt to the officers as to the identification of Lee as the assailant.

38. Evidence about May’s subsequent show-up identification of Lee on April 20, 2008 was admitted without objection.

39. Without objection from trial counsel, May made an in court identification of Lee as the man who robbed her in the parking lot of her apartment building at 12** North Pennsylvania Street on April 9, 2008.

40. At the time of the evidentiary hearing, Jeziorski had been an attorney with the Marion County Public Defender Agency for six (6) years. He was initially appointed to represent Lee in this case. Hurley later entered his appearance as co-counsel and assisted Jeziorski at trial. Hurley had been admitted to practice law in the State of Indiana since 1979.

41. Through discovery, Jeziorski obtained a copy of the probable cause affidavit and May's April 22, 2008 pre-trial statement to law enforcement.

42. Jeziorski also deposed May prior to trial.

43. Jeziorski acknowledged at [the] hearing that the State's case rested solely on the testimony of May. His trial preparation focused on how Lee was developed as a suspect.

44. Jeziorski considered challenging the show-up identification via a motion to suppress. In determining whether the show-up identification of Lee was unduly suggestive, Jeziorski considered the facts of the case, including the fact that Lee was handcuffed at the time and that several days had passed between the robbery and the show-up.

45. In his professional opinion, Jeziorski believed that while there were some inconsistencies in May's identification of Lee, those discrepancies did not establish a legal basis for suppressing the identification evidence. As such, Jeziorski made the strategic decision not to file a motion to suppress.

46. Jeziorski decided not to object to the in court identification of Lee by May.

47. The defense theory was that May was mistaken in her identification. To that end, Jeziorski developed a case strategy that centered on casting doubt on May's ability to make the identification.

48. At trial, Jeziorski enacted this strategy by focusing his questioning on the weaknesses in [sic]

49. May's identification, such as her limited opportunity to view her assailant and the lighting conditions.

50. Jeziorski did not consider May's perception of time, or the true length of time of the robbery, to have been crucial to the jury's determination of guilt.

51. Lee argues that May's identification testimony should have been impeached with the fact that he is not a dark skinned African-American.

52. The Court has viewed the Petitioner in open court and examined his book-in photograph which was admitted at trial as State's Exhibit 4. While the

Court may choose to say that Lee is of medium complexion, the Court cannot say that no witness would identify him as dark skinned.

53. The book-in photograph depicts Lee as having facial hair which might be deemed scraggly or unkempt. The evidence does not lead to the conclusion that May gave varying descriptions of the robber's facial hair. The Court finds her descriptions to be consistent.

....

CONCLUSIONS OF LAW

55. Post-conviction relief is a collateral attack on the validity of a criminal conviction, and the petitioner carries the burden of proof. *Timberlake v. State*, 753 N.E.2d 591, 597 (Ind. 2001). This collateral challenge to the conviction is limited to the grounds enumerated in the post-conviction rules. *Id.*, citing Ind. Post-Conviction Rule 1(1).

56. In order to prevail on his post-conviction claim that his Sixth Amendment right to effective assistance of counsel was violated, Petitioner must establish the two components from *Strickland v. Washington*, 466 U.S. 668 (1984). *Wesley v. State*, 788 N.E.2d 1247, 1252 (Ind. 1003) (citing *Williams v. Taylor*, 529 U.S. 362, 390 (2000) (parallel citations omitted)).

57. First, Petitioner must show defense counsel's performance was deficient, which "requires showing that counsel's representation fell below an objective standard of reasonableness and that counsel made errors so serious that counsel was not functioning as 'counsel' guaranteed to the defendant by the Sixth Amendment." *Id.* (citing *Strickland*, 466 U.S. at 687-88). This objective standard of reasonableness is based on "prevailing professional norms." *Id.*

58. Second, Petitioner must show the deficient performance prejudiced the defense. *Id.* Prejudice is proven by showing counsel's errors were so serious as to deprive the defendant of a fair trial, a failing so severe as to render the result unreliable. *Id.* In other words, Petitioner must show there is a reasonable probability that, but for counsels' unprofessional errors, the result of his trial would be different. *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* Furthermore, the two prongs are separate and independent inquiries, and if a court can "dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice ... that

course should be followed.” *Timberlake*, 753 N.E.2d at 603 (citing *Williams v. State*, 706 N.E.2d 149, 154 (Ind. 1999) (quoting *Strickland*, 466 U.S. at 697)).

59. There is a strong presumption that trial counsel rendered effective assistance and made all significant decisions in the exercise of reasonable professional judgment, and the burden falls on Petitioner to overcome the presumption. *Gibson v. State*, 709 N.E.2d 11, 13 (Ind. Ct. App. 1999).

60. First, Lee alleges that his trial counsel’s was [sic] deficient for not objecting to and/or moving to suppress evidence about Lori May’s identification because it was the product of a suggestive identification procedure. To prevail on an ineffective assistance of counsel claim based upon counsel’s failure to file motions or object on a defendant’s behalf, it must be demonstrated that such motions or objections would have been successful. *Danks v. State*, 733 N.E.2d 474, 489 (Ind. Ct. App. 2000).

61. “A show-up procedure may be so unnecessarily suggestive and so conducive to irreparable mistake as to constitute a violation of due process of law under the Fourteenth Amendment.” *Hubbell v. State*, 754 N.E.2d 884, 892 (Ind. 2001) (citing *Stovall v. Denno*, 388 U.S. 293, 302, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967), *overruled on other grounds by Griffith v. Kentucky*, 479 U.S. 314, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987)).

62. Whether a particular show-up identification was unduly suggestive is determined by examining the totality of the circumstances surrounding the identification including: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness’s degree of attention; (3) the accuracy of his or her prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation. *Towne v. State*, 915 N.E.2d 1048 (Ind. Ct. App. 2009) (citing *Lyles v. State*, 834 N.E.2d 1035, 1044-45 (Ind. Ct. App. 2005), *trans. denied*).

63. That Lee was the only African-American male present, was the only non-police officer, was the only person clothed in a green shirt, and was handcuffed at the time of the show-up is not necessarily dispositive of this issue. The Indiana Supreme Court has previously held that one-on-one confrontations, such as the type employed here, are not *per se* improper. See *Gray v. State*, 563 N.E.2d 108, 110 (Ind. 1990) (show-up identification not unduly suggestive where defendant was only black person at scene not wearing police uniform, was in handcuffs, and was identified at a location different from where robbery occurred); *Towne*, 915 N.E.2d at 1048 (show-up

identification not unduly suggestive where single black male wearing clothes matching description was apprehended less than half a mile from robbery and returned to the store for identification);^[2] *Lyles*, 834 N.E.2d at 1045 (show-up identification not unduly suggestive where defendant was only black person present and was presented for identification in handcuffs standing between two police officers at the end of a line of police cars); *Adkins v. State*, 703 N.E.2d 182, 185 (Ind. Ct. App. 1998) (show-up identification not unduly suggestive where defendant was only person present who was not a police officer, was in handcuffs, and stood next to police car), *trans. denied*.

64. Here, eleven (11) days elapsed between the robbery and the show-up identification. However, Lee overlooks the fact that in the intervening time between the crime and identification, May saw Lee again in the same general area on two separate occasions. The show-up on April 20, 2008 took place within a short time after May spotted Lee and called the police. “Identifications of a freshly apprehended suspect have been held to be not unnecessarily suggestive despite the suggestive factors unavoidably involved in such confrontations because of the value of the witness’s observation of the suspect while the image of the offender is fresh in his mind.” *Lewis v. State*, 554 N.E.2d 1133, 1135 (Ind. 1990).

65. Even if the Court were to conclude that the robbery did not last ten minutes as May maintained, she, nonetheless, had ample opportunity to view her assailant at the time of the crime. There is nothing in the record which leads to the conclusion that May’s degree of attention was lacking. Her physical description of the robber to law enforcement on April 9, 2008 largely matches the description of Lee. May’s identification of Lee on April 20, 2008 was unequivocal.

66. The Court concludes that the show-up identification procedure employed here was not unduly suggestive.

67. Even assuming the Court’s conclusion is in error, May’s subsequent in court identification of Lee as the robber would still have been admissible as the State established by clear and convincing evidence that an independent

² Lee correctly observes that *Towne* “is a memorandum decision which cannot be cited as precedent.” Appellant’s Br. at 12 (citing Ind. Appellate Rule 65(D)). Nevertheless, we conclude that the post-conviction court’s citation to *Towne* is merely an oversight that does not affect the validity of its conclusion, which is supported by citations to several published cases. Lee suggests that conclusion 63 is erroneous because those cases are “factually distinguishable.” *Id.* Factual distinctions do not affect the validity of the legal principle for which those cases are cited, namely, that one-on-one confrontations are not per se improper. Lee has cited no cases holding otherwise.

basis for the in court identification existed. *Wethington v. State*, 560 N.E.2d 496, 502 (Ind. 1990). A properly admitted in court identification will in most cases render harmless the erroneous admission of a suggestive pretrial identification. *Id.* at 503.

68. “Factors relevant to the determination of whether an independent basis exists to support the admission of the in-court identification are the amount of time the witness was in the presence of the perpetrator and the amount of attention the witness had focused on him, the distance between the two and the lighting conditions at the time, the witness’s capacity for observation and the opportunity to perceive particular characteristics of the perpetrator, the lapse of time between the crime and the subsequent identification, the accuracy of any prior descriptions, the witness’s level of certainty at the pre-trial identification and the length of time between the crime and the identification.” *Id.* As recited above, the fact that May had not one but three separate opportunities to observe Lee over a period of eleven days supports the conclusion that May had an independent basis for May’s identification of Lee as the robber.

69. Lee has not demonstrated that [he] was harmed by his counsel’s failure to object to the identification evidence. Nor has he shown that such an objection would have produced a different result at trial. He is not entitled to relief here.

70. Next, Lee argues that his counsel rendered ineffective assistance by failing to impeach May on her claim that the robbery lasted ten minutes in length. He also argues that counsel should have impeached May over her inconsistent physical descriptions of Lee’s facial hair, and the fact that Lee is not a dark skinned African-American.

71. The nature and extent of cross-examination is a matter of strategy that is almost exclusively left to trial counsel. *Waldon v. State*, 684 N.E.2d 206, 208 (Ind. Ct. App. 1997), *trans. denied*. Ineffective assistance is not found, even when a strategic or tactical determination by counsel turned out to be detrimental to the client’s case. *State v. Moore*, 678 N.E.2d 1258, 1261 (Ind. 1997). Trial counsel’s performance is presumed to be effective and the Petitioner must introduce strong evidence to overcome that presumption. *Overstreet v. State*, 877 N.E.2d 144, 152 (Ind. 2007).

72. Although, Jeziorski did not attempt to use the probable cause affidavit as impeachment regarding the time issue, counsel did cross examine May on that point and suggested that her perception of time was incorrect. As for Lee’s facial hair, May used several descriptive terms: unkempt, scraggly,

scraggly and scrappy. The Court is not persuaded by Lee's claim that her various descriptions were inconsistent. Even assuming one might view Lee's complexion as something other than dark skinned, counsel's failure to press Lee on this point does not lead to the conclusion that a different result would have been achieved. The jury had ample opportunity to view Lee during trial and determine if May's description of him as a dark skinned African-American was accurate. Lee is entitled to no relief on this claim.

73. Lee has failed to carry his burden of proving he was denied the effective assistance of trial counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution.

74. The law is with the State of Indiana and against the Petitioner.

Appellant's App. at 18-30 (citations to transcript and exhibits omitted).

Discussion and Decision

Lee now appeals the denial of his petition for post-conviction relief. Our standard of review is well settled:

A petitioner who has been denied post-conviction relief faces a rigorous standard of review on appeal. The post-conviction court's denial of relief will be affirmed unless the petitioner shows that the evidence leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court. A petitioner has the burden of establishing the grounds for relief by a preponderance of the evidence. Indiana Post-Conviction Rule 1(5). A petitioner is therefore in the position of appealing from a negative judgment.

This court will not disturb the denial of relief unless the evidence is without conflict and leads to but one conclusion, and the post-conviction court reached the opposite conclusion. Furthermore, this court accepts the post-conviction court's findings of fact unless they are clearly erroneous. We consider only the probative evidence and reasonable inferences therefrom that support the post-conviction court's determination, and we will not reweigh the evidence or judge witness credibility.

West v. State, 938 N.E.2d 305, 309 (Ind. Ct. App. 2010) (quotation marks and some citations omitted), *trans. denied* (2011).

We review ineffective assistance of counsel claims under the two-part test in *Strickland v. Washington*, 466 U.S. 668 (1984). *Taylor v. State*, 929 N.E.2d 912, 917 (Ind. Ct. App. 2010), *trans. denied*.

To prevail, a petitioner must demonstrate both that counsel's performance was deficient and that the petitioner was prejudiced by the deficient performance. Failure to satisfy either prong will cause the claim to fail. Counsel's performance is deficient if it falls below an objective standard of reasonableness based on prevailing professional norms. 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.

Id. at 918 (citations omitted); *see also McCary v. State*, 761 N.E.2d 389, 392 (Ind. 2002) (“Even the best and brightest criminal defense attorneys may disagree on ideal strategy or the most effective approach in any given case.”). “To meet the appropriate test for prejudice, the petitioner 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.” *Taylor*, 929 N.E.2d at 918 (citation omitted).

I. Failure to Object to Identification Evidence

Lee first contends that trial counsel was ineffective in failing to object to evidence identifying him as the robber.

To establish ineffective assistance for counsel's failure to object, a petitioner must show that the trial court would have sustained the objection had it been made and that the petitioner was prejudiced by the failure to object. Stated another way, the petitioner must demonstrate that had the objection been made, the trial court would have had no choice but to sustain it.

Id. (citation omitted). “Trial counsel is not ineffective if he fails to make a ‘fruitless’ objection.” *McKnight v. State*, 612 N.E.2d 586, 588 (Ind. Ct. App. 1993) (citation omitted), *trans. denied*.

Specifically, Lee contends that “he was denied the effective assistance of trial counsel when counsel did not object to and/or move to suppress May’s in-court identification of Lee and evidence about her show-up identification as being the product of a suggestive identification procedure.” Appellant’s Br. at 14. We note that “it is well settled that where a witness had an opportunity to observe the perpetrator during the crime, a basis for in-court identification exists, independent of the propriety of pre-trial identification.” *Adkins v. State*, 703 N.E.2d 182, 185 (Ind. Ct. App. 1998). That said, we first address Lee’s challenges to the pre-trial identification.

This Court has explained that

[d]ue process of law under the Fourteenth Amendment to the United States Constitution requires suppression of testimony about a pre-trial identification when the procedure employed is unnecessarily suggestive. Otherwise, the defendant is subjected to the unacceptable risk that the identification process was conducted in such a way that it created a substantial likelihood of irreparable misidentification. Whether the procedure employed was unnecessarily suggestive in a particular case is to be determined under the totality of the circumstances....

Factors to be considered in evaluating the likelihood of a misidentification include: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness’s degree of attention; (3) the accuracy of the witness’s prior description of the criminal; and (4) the level of certainty demonstrated by the witness.

J.Y. v. State, 816 N.E.2d 909, 912-13 (Ind. Ct. App. 2004) (citations omitted), *trans. denied* (2005).

Lee challenges the post-conviction court's determination in finding 23 and conclusion 65 that May had "ample opportunity" to observe him at the time of the crime, emphasizing that it was dark outside when the crime was committed and that May's pre-trial descriptions of her assailant differed somewhat regarding his appearance.³ Lee's arguments on this point are merely invitations to reweigh the evidence and judge witness credibility in his favor, which we will not do. Moreover, "[i]nconsistencies in identification testimony affect the credibility of the witness, not the admissibility of the identification." *Harris v. State*, 619 N.E.2d 577, 581 (Ind. 1993).

Lee also challenges the post-conviction court's determination in conclusion 66 that "the show-up identification procedure employed here was not unduly suggestive." We agree with the State's assessment of the unusual factual circumstances of this case:

[Lee's] challenge to the pre-trial identification rests on the erroneous premise that a "show-up" identification occurred in this case. It did not. In a typical show-up situation, the witness has provided a description of a perpetrator, the police locate a person matching that description, and the police then bring the witness to view that individual to see if the witness can identify the individual as the perpetrator.^[4] This scenario gives rise to the concern that the circumstances will suggest to the witness that this must be the perpetrator, since the police have detained the person and suggested that perhaps it is the

³ Lee claims that the robber's "face was partially obscured by a hood," Appellant's Br. at 11, but May testified at trial that the hood did not cover any part of his face. See Trial Tr. at 24 ("It was back far enough that he had the little bit of the front of his hair was sticking out [sic]."). We admonish Lee's counsel to refrain from misrepresenting the record.

⁴ The State says,

Thus, there actually were two "show-ups" that occurred in this case on the morning of the robbery – the police stopped two individuals who matched the robber's description and took the victim to view each of them. Both times, however, May, with no hesitation at all, told the officers that they did not have the right man.

Appellee's Br. at 10 n.3 (citations to transcript omitted).

perpetrator, leading the witness to make an incorrect identification. In this case, however, it was the *witness* who saw the perpetrator and who contacted police to tell them that she had seen the man who robbed her. She did not first view him standing handcuffed in a group of police officers. Rather, she saw him standing freely on a street corner in a group of people and immediately recognized him. The police have not engaged in any unduly suggestive procedures when a witness calls them to say that she has just seen a man on the street that she recognizes as the man who robbed her and the police then apprehend that person. When the police brought May to view [Lee] after he was apprehended, they were simply making sure that the man they had caught was the man May had seen and called them about only minutes earlier. *Cf. Neukam v. State*, 934 N.E.2d 198, 201 (Ind. Ct. App. 2010) (holding that the police did not engage in suggestive behavior when the victim told the police who the perpetrator was and the police showed him a photograph simply to make sure that the person they knew by that name was the same person the victim was referring to).

Appellee's Br. at 10-11. Based on the foregoing, we agree with the post-conviction court's determination that May's identification of Lee after his apprehension on April 20 was not unduly suggestive.

Lee further contends that the post-conviction court erred in determining in conclusion 67 that "the State established by clear and convincing evidence that an independent basis for the in court identification existed." Our supreme court has said that

Factors relevant to the determination of whether an independent basis exists to support the admission of the in-court identification are the amount of time the witness was in the presence of the perpetrator and the amount of attention the witness had focused on him, the distance between the two and the lighting conditions at the time, the witness's capacity for observation and opportunity to perceive particular characteristics of the perpetrator, the lapse of time between the crime and the subsequent identification, the accuracy of any prior descriptions, the witness's level of certainty at the pre-trial identification and the length of time between the crime and the identification.

Wethington, 560 N.E.2d at 503. Again, Lee's arguments regarding these factors, which the post-conviction court addressed to some degree at various points in its decision, are

essentially impermissible invitations to reweigh evidence and judge witness credibility in his favor. As such, they do not establish that the post-conviction court's conclusion is clearly erroneous. For example, Lee complains that "May's description of the robber's facial hair differed from one statement to the next." Appellant's Br. at 14. We agree with the State that the adjectives that May used to describe the robber's facial hair "are all synonyms and she was consistently describing someone with short facial hair that was not neatly groomed." Appellee's Br. at 14.

In sum, Lee has failed to establish that either the pre-trial or the in-court identification evidence was inadmissible, and thus he has failed to establish that trial counsel was ineffective in failing to object to that evidence.⁵

II. Failure to Impeach Victim

Lee also contends that trial counsel was ineffective in failing to impeach May regarding "her different descriptions about the robber's facial hair" and in not presenting "evidence to contradict May's testimony she spent ten minutes with the robber." Appellant's Br. at 16. With respect to the former, Lee specifically challenges the post-conviction court's findings 26 and 53 and conclusion 72. We have already addressed the alleged discrepancies in May's descriptions of the robber's facial hair. In short, trial counsel was not ineffective in failing to "impeach" May with her usage of synonyms to describe the robber's facial hair.

⁵ Consequently, we need not address Lee's similar challenges to finding 32 and conclusions 64 and 69.

See Carr v. State, 728 N.E.2d 125, 132 (Ind. 2000) (finding no ineffective assistance in counsel’s failure to impeach based on “tangential inconsistencies”).

Lee again challenges conclusion 72 in contending that trial counsel was ineffective in failing to use the probable cause affidavit to impeach May’s testimony that the robbery lasted approximately ten minutes. The probable cause affidavit, which was prepared by Detective Vaughn, indicates that May “stated that between 5:38AM and 5:40AM, she was going to her red Blazer that was parked in the parking lot” and was confronted by a black male with a “light scruffy beard ... pointing a black handgun at her” who told her to ““get in the car and give me what you got.”” Trial App. at 13 (capitalization altered). The affidavit also indicates that police officers received a report of the robbery “at approximately 5:40AM.” *Id.* Lee contends that he was harmed by counsel’s failure to use the affidavit to impeach May “because the State’s case was based on May’s credibility in identifying Lee as the robber” and “[t]he longer May had to observe the robber increased her ability to accurately describe and later identify him.... The State took advantage of counsel’s deficient performance by relying on May’s uncontradicted testimony to argue she had ten minutes to observe the robber.” Appellant’s Br. at 17-18.

Contrary to Lee’s suggestion, we agree with the State that May could not have been “very effectively impeached with a statement prepared by a third party.” Appellee’s Br. at 17. Moreover, as the post-conviction court noted in conclusion 72, trial counsel did cross-examine May regarding the duration of the robbery and “suggested that her perception of time was incorrect.” In any event, regardless of whether the robbery lasted two minutes or

ten minutes, May had ample opportunity to observe her assailant at close range during the robbery, and Lee has failed to establish that there is a reasonable probability that the result of the trial would have been different if trial counsel had impeached May with the probable cause affidavit. As such, he has failed to establish ineffective assistance of counsel. Therefore, we affirm the denial of his petition for post-conviction relief.

Affirmed.

BAILEY, J., and MATHIAS, J., concur.