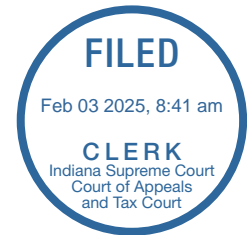


MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision is not binding precedent for any court and may be cited only for persuasive value or to establish res judicata, collateral estoppel, or law of the case.



IN THE Court of Appeals of Indiana

Jwan L. Hardin,
Appellant-Petitioner

v.

State of Indiana,
Appellee-Respondent

February 3, 2025

Court of Appeals Case No.
24A-PC-579

Appeal from the Elkhart Circuit Court

The Honorable Michael A. Christofeno, Judge

Trial Court Cause No.
20C01-1801-PC-8

Memorandum Decision by Judge Weissmann
Judges Vaidik and Foley concur.

Weissmann, Judge.

- [1] When Jwan L. Hardin was 16 years old, he shot and killed another teen, Dezjuan Sanders (the victim), in Elkhart County. After being charged with murder, Hardin entered into a plea agreement under which he pleaded guilty to murder and was sentenced to 55 years imprisonment, with 10 years suspended to probation. Hardin later petitioned for postconviction relief, arguing, among other things, that his trial counsel was ineffective and the factual basis for his guilty plea was inadequate. The postconviction court (P-C Court) rejected these arguments, and Hardin appeals. We affirm.

Facts

- [2] In 2015, Hardin left school, armed himself, and then walked to the area where the victim was located. The victim, accompanied by another juvenile, D.B., followed Hardin while trying to discuss Hardin's attack on them the day before. As Hardin walked away, Hardin said that "he didn't want to do this, don't make me do this." Prior Case Tr. Vol. II, p. 140. When the victim grabbed Hardin on the shoulder to turn him around, Hardin fatally shot him. D.B. revealed the details of the shooting while giving a recorded statement to police about an hour later.
- [3] The State charged Hardin with murder. Five months later, Hardin, represented by a public defender (trial counsel), pleaded guilty to murder pursuant to a plea agreement calling for a sentence of 55 years imprisonment, with 10 years suspended. At the time of the killing, the sentence for murder ranged from 45 to

65 years imprisonment, with an advisory sentence of 55 years imprisonment. Indiana Code § 35-50-2-3 (2014). The plea agreement therefore called for the minimum executed sentence and for the advisory sentence overall. At the guilty plea hearing, the trial court advised Hardin of his rights and the nature of the charge. Hardin affirmed he understood the charge and then admitted to knowingly killing Sanders.

[4] The presentence investigation report (PSI) attributed the following statement to Hardin: “[Sanders] swung at me, so I turned around, closed my eyes, and shot him, then ran.” App. Vol. II, p. 70. The trial court sentenced Hardin to 55 years imprisonment, with 10 years suspended to probation, as specified in the plea agreement.

[5] In his later petition for post-conviction relief, Hardin alleged his guilty plea was not knowing, intelligent, or voluntary due to his mental status—specifically, his still developing brain, traumatic childhood, and untreated attention deficit hyperactive disorder (ADHD). Hardin also claimed that he received ineffective assistance of counsel when his trial counsel failed to request a psychological evaluation of him, misadvised him regarding self-defense and lesser included offenses, failed to inform him about alternative juvenile sentencing, and gave misleading advice about his culpability and a potential criminal gang sentencing enhancement. Finally, Hardin claimed the factual basis supporting his guilty plea was defective.

- [6] At the post-conviction hearing, conducted over four days spanning 26 months, Hardin presented expert medical testimony indicating that his traumatic background and untreated ADHD affected his decision-making abilities. This testimony also suggested Hardin's untreated ADHD impacted his behavior.
- [7] Between the last two evidentiary hearings, Hardin sought to amend his petition for post-conviction relief, which, by then, was four years old. Through the amendment, Hardin hoped to raise a new ineffective assistance of counsel claim alleging inadequate investigation. The P-C Court, which had granted three earlier amendments, partly denied this final amendment request.
- [8] The P-C Court later denied Hardin's petition for post-conviction relief. Hardin appealed but then requested this Court remand to allow him to request the P-C Court take judicial notice of the PSI so it might be part of the record on appeal. This Court granted Hardin's motion and ordered the P-C Court, upon taking judicial notice, to issue new findings limited to the effect of the PSI on Hardin's ineffective assistance of counsel claims.
- [9] On remand, the P-C Court determined that it had considered the PSI in its original ruling and that Hardin's request to take judicial notice was moot. Still, the P-C Court agreed to allow both parties to submit supplemental proposed findings of fact and conclusions of law specifically addressing the relationship between Hardin's statements in the PSI and his ineffective assistance of counsel claims. The P-C Court ultimately issued an amended order denying Hardin's petition for post-conviction relief.

[10] In this amended order, the P-C Court again rejected Hardin's claim that his guilty plea was not knowing, intelligent, and voluntary. It determined that the plea hearing was conducted properly and that the guilty plea transcript showed Hardin understood the nature of the charge, his rights, and the consequences of pleading guilty. The court concluded Hardin's youth and ADHD did not render his plea unknowing or involuntary.

[11] The P-C Court also determined that trial counsel was not ineffective. Trial counsel developed a thoughtful strategy based on the facts and his professional judgment, according to the P-C Court. It found that trial counsel properly considered and discussed self-defense with Hardin but reasonably determined inadequate evidence supported this potential defense. The Court also found that trial counsel reasonably determined that lesser included offenses of murder were unsupported by the evidence. Trial counsel did not improperly pressure Hardin to plead guilty and did not offer misleading advice to Hardin as to culpability or the potential gang enhancement, according to the court.

[12] The P-C Court further found that Hardin's admissions at the plea hearing provided a sufficient factual basis for his guilty plea. The court viewed Hardin's statements in the PSI suggesting that he shot the victim without aiming did not establish Hardin's guilty plea to murder involuntary or that Hardin did not understand the elements of murder. Hardin appeals that judgment.

Discussion and Decision

[13] On appeal, Hardin challenges the P-C Court’s findings that he received effective assistance of counsel. He also argues that the factual basis for his guilty plea accepted by the trial court was inadequate. Finally, Hardin challenges both the P-C Court’s exclusion of the statement of D.B.—the victim’s companion and witness to the killing—to police and its refusal of Hardin’s belated request to amend his post-conviction petition. Throughout these arguments, Hardin weaves in his claim that his youth, ADHD, and traumatic childhood negatively impacted his understanding of the proceedings and his guilty plea.

[14] Because post-conviction proceedings are civil in nature, Hardin bore the burden of proving the allegations in his post-conviction petition by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5). A petitioner appealing from a judgment denying post-conviction relief “must establish that the evidence, as a whole, unmistakably and unerringly points to a conclusion contrary to the post-conviction court’s decision.” *Gibson v. State*, 133 N.E.3d 673, 681 (Ind. 2019) (quoting *Ben-Yisrayl v. State*, 738 N.E.2d 253, 258 (Ind. 2000)). Failure to meet this “rigorous standard of review” will result in an affirmance of the post-conviction court’s judgment. *Dewitt v. State*, 755 N.E.2d 167, 169-70 (Ind. 2001). We conclude that Hardin has not cleared this hurdle.

I. Ineffective Assistance of Counsel Claim

[15] “The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to counsel and mandates ‘that the right to counsel is the

right to the effective assistance of counsel.’” *Bobadilla v. State*, 117 N.E.3d 1272, 1279 (Ind. 2019) (quoting *Strickland v. Washington*, 466 U.S. 668, 686 (1984)).

We apply the well-established, two-part *Strickland* test when reviewing an ineffective assistance of counsel claim by a defendant who pleaded guilty. *Id.* at 1280. Under this test, “[t]he defendant must prove: (1) counsel rendered deficient performance, meaning counsel’s representation fell below an objective standard of reasonableness as gauged by prevailing professional norms; and (2) counsel’s deficient performance prejudiced the defendant., i.e., but for counsel’s errors the result of the proceeding would have been different.” *Id.*

[16] Hardin argues that his trial counsel provided ineffective assistance by misadvising him about applicable law and by failing to request that Hardin undergo a psychological evaluation. This substandard attorney performance, according to Hardin, led him to plead guilty when he otherwise would have gone to trial. Hardin contends the P-C Court found no ineffective assistance of counsel because it applied the wrong standard.

[17] We conclude the P-C Court, after first reciting the incorrect standard, ultimately applied the correct one. We also find that the evidence supports the P-C Court’s determination that Hardin failed to prove that his counsel was ineffective.

A. Burden of Proof

[18] At the beginning of its analysis of the ineffective assistance of counsel issue, the P-C Court stated that Hardin’s claim must be analyzed under *Segura v. State*, 749 N.E.2d 496 (Ind. 2001). In *Segura*, our Supreme Court ruled: “[I]n the case

of [ineffective assistance of counsel] claims related to a defense or failure to mitigate a penalty, it must be shown that there is a reasonable probability that a more favorable result would have [been] obtained in a competently run trial.” *Id.* at 507.

[19] But in a later decision, our Supreme Court rejected that portion of *Segura*, ruling that in the context of a guilty plea, the petitioner establishes prejudice from counsel’s deficient performance in advising about a defense by demonstrating a “reasonable probability that [the petitioner] would have rejected the guilty plea and insisted on going to trial instead.” *Bobadillo*, 117 N.E.3d at 1284. In making this showing, petitioners “cannot simply say they would have gone to trial.” *Id.* The petitioners “must establish rational reasons supporting why they would have made that decision.” *Id.*

[20] Despite first citing *Segura*, the P-C Court ultimately relied on the correct *Bobadillo* standard. The court determined that the evidence did not support a finding that, but for the alleged errors, Hardin would not have pleaded guilty and would have instead insisted on trial. This statement is consistent with *Bobadillo*. Thus, the P-C Court ultimately reached and applied the proper standard.

[21] Moreover, the change in standard only implicates the prejudice prong of the ineffective assistance of counsel analysis. The P-C Court’s ruling that trial counsel’s performance in advising Hardin was not substandard was dispositive of Hardin’s ineffective assistance of counsel claim, meaning the court need not

have reached the prejudice prong or even applied *Bobadillo*. Given these circumstances, we find the P-C Court's improper citation to *Segura* is, at most, harmless error.

B. Alleged Misadvice on Self-defense

[22] Hardin claims the P-C Court erred in concluding that trial counsel was not ineffective in advising him on self-defense. We conclude that the evidence supports the court's conclusion.¹

[23] At the time of the shooting, the self-defense statute provided that a

person is justified in using reasonable force against any person to protect the person . . . from what the person reasonably believes to be the imminent use of unlawful force. However, a person: (1) is justified in using deadly force; and (2) does not have a duty to retreat; if the person reasonably believes that that force is necessary to prevent serious bodily injury to the person . . . or the commission of a forcible felony.

¹ Hardin also claims the P-C Court misstated the facts underlying his self-defense claim by stating that Hardin "found himself" at the victim's home and that Hardin was "stopped in front of the house standing there." App. Vol. II, p. 144. The P-C Court also ruled that D.B. and the victim "approached [Hardin], and from behind[,] one of them supposedly touched [Hardin] on the shoulder." *Id.* at 143.

In fact, the evidence available to trial counsel showed that the victim and his companion, D.B., followed Hardin away from the home before the confrontation occurred and that either the victim or D.B. touched Hardin on the shoulder. Trial counsel explained that the home where the incident occurred was not the victim's residence, although it was the home where the victim was located that day. Although the P-C Court erroneously identified the home as the victim's, the P-C Court also correctly stated that the home was the one where the victim was located immediately before the shooting. *Id.* We view any of these misstatements as harmless in the full context of the P-C Court's evaluation of Hardin's self-defense claim.

Ind. Code § 35-41-3-2(c) (2015). “Serious bodily injury,” for these purposes, meant “bodily injury that creates a substantial risk of death or that causes” “serious permanent disfigurement,” “unconsciousness,” “extreme pain,” “permanent or protracted loss or impairment of the function of a bodily member or organ,” or “loss of a fetus.” Ind. Code § 35-31.5-2-292. A forcible felony is “a felony that involves the use or threat of force against a human being, or in which there is imminent danger of bodily injury to a human being.” Ind. Code § 35-31.5-2-138.

[24] The self-defense statute in effect at the time of the shooting also provided,

[n]otwithstanding subsection[] (c) . . . , a person is not justified in using force if . . . (2) the person provokes unlawful action by another person with intent to cause bodily injury to the other person; or (3) the person has entered into combat with another person or is the initial aggressor unless the person withdraws from the encounter and communicates to the other person the intent to do so and the other person nevertheless continues or threatens to continue unlawful action.

Ind. Code § 35-41-3-2(g) (2015).

[25] The evidence available to trial counsel before Hardin’s guilty plea indicated that Hardin and the victim had prior altercations that merely left Hardin with small headaches, a bloody nose, bruises, and minor pain. Yet the evidence showed that on the day before the shooting, Hardin attacked the victim and threatened to kill him. The next day, Hardin left school, armed himself at his home, and then walked near the home where the victim was located. As the victim and

D.B. followed Hardin and tried to speak to him about Hardin's attack the day before, Hardin said that "he didn't want to do this, don't make me do this." Prior Case Tr. Vol. II, p. 140. When the victim grabbed Hardin's shoulder, Hardin drew his gun and shot the unarmed victim.

[26] Based on this evidence, trial counsel determined that a self-defense claim was not viable for Hardin. Trial counsel thought the evidence suggested that Hardin provoked the violence and thus was not eligible to claim self-defense. Trial counsel also was concerned that Hardin's statements to the victim could be viewed as gang related.

[27] The P-C Court reasonably viewed trial counsel's conclusions as reasonable strategic decisions supported by the evidence. Strategic or tactical decisions by trial counsel do not support a claim of ineffective assistance of counsel. *Humphrey v. State*, 73 N.E.3d 677, 683 (Ind. 2017). This is so because we afford great deference to trial counsel's discretion to choose strategy and tactics. *Id.* Hardin has failed to show that the P-C Court clearly erred in determining that trial counsel's strategy and advice on the issue of self-defense was reasonable under the circumstances.

C. Failure to Advise Hardin About Lesser Included Offenses

[28] Hardin next claims the P-C Court erroneously ruled that trial counsel was not deficient for failing to advise Hardin about lesser included offenses—specifically, voluntary manslaughter and involuntary manslaughter. The P-C Court noted trial counsel's testimony that he believed no grounds for

involuntary manslaughter existed under these facts. Trial counsel supported this view by testifying that the evidence showed that Hardin had attacked the victim the day before, specifically armed himself before seeking out the victim, made statements suggesting a shooting might happen, and then shot the unarmed victim when the victim touched him.

[29] Trial counsel also believed voluntary manslaughter was unavailable because these same facts showed that Hardin did not act in sudden heat. *See generally Isom v. State*, 31 N.E.3d 469, 486 (Ind. 2015) (ruling that sudden heat exists when a defendant is “provoked by anger, rage, resentment, or terror, to a degree sufficient to obscure the reason of an ordinary person, prevent deliberation and premeditation, and render the defendant incapable of cool reflection”).

[30] Although Hardin disputes whether voluntary manslaughter was a viable lesser included offense, the facts point to Hardin’s premeditation, which negates any claim of sudden heat. *See Carmack v. State*, 200 N.E.3d 452, 460 (Ind. 2023). Unlike sudden heat, premeditation is “the deliberate formation of an intent to perform a future act.” *Id.* (citing *Curriu v. State*, 497 N.E.2d 1045, 1047 (Ind. 1986)). The precise duration between the inception of intent and the killing “need not be appreciable to constitute premeditation” and “may be as instantaneous as successive thoughts.” *Id.* Whether premeditation exists depends on the circumstances of the offense, but its presence, “even if nearly instantaneous, negates any notion of sudden heat.” *Id.*

[31] Hardin's actions in leaving school, arming himself, and walking to the area where the victim was located reasonably support an inference of premeditation. Hardin's statements to the victim immediately before the killing also suggest his prior contemplation of the killing. Hardin therefore has failed to show that the P-C Court clearly erred when it determined that trial counsel reasonably viewed these lesser included offenses as unavailable to Hardin.

D. Alleged Misadvice About Sentencing Possibilities

[32] Hardin also challenges the P-C Court's ruling that trial counsel did not misadvise Hardin about alternative juvenile sentencing or a gang-related sentencing enhancement.

i. Alternative Juvenile Sentencing

[33] Hardin argues that his trial counsel inappropriately declined to advise him about alternative juvenile sentencing under Indiana Code § 31-30-4-2 (2015). This statute gives trial courts discretion to impose more lenient sentences for offenders under the age of 18 who are waived to adult court on felony charges. Ind. Code § 31-30-4-2(a), (b) (2015). The trial court may impose a suspended sentence and order the juvenile's placement in an Indiana Department of Correction juvenile facility until the juvenile successfully completes the placement. Ind. Code § 31-30-4-2(b) (2015).

[34] Trial counsel testified that he did not discuss this alternative sentencing option with Hardin because trial counsel thought such leniency was not a possibility in Hardin's case. Trial counsel noted that he had never seen local courts employ

this option and believed, based on his experience, that the trial court would not consider it. Hardin offers no grounds for finding that alternative juvenile sentencing was a realistic option for his intentional killing. Accordingly, we reject Hardin’s claim that the P-C Court clearly erred in finding that trial counsel did not misadvise Hardin by failing to alert him to the alternative juvenile sentencing options.

ii. Gang Enhancement

[35] The P-C Court also did not clearly err in concluding that trial counsel did not misadvise Hardin when counsel told him that he could face a possible sentencing enhancement based on his gang affiliation. Under subsections (b) and (d) of Indiana Code § 35-50-2-15 (2015), a defendant’s sentence for a felony offense may be enhanced if the state shows beyond a reasonable doubt that the defendant: (1) knowingly or intentionally was a member of a criminal gang while committing the offense; and (2) committed it “at the direction of or in affiliation with a criminal gang” or “with the intent to benefit, promote, or further the interests of a criminal gang, or for the purposes of increasing the person’s own standing or position with a criminal gang.”

[36] Hardin argues that because the State had not sought or threatened this gang enhancement, trial counsel wrongly advised Hardin to consider its effect in deciding whether to accept the plea agreement. But Hardin’s claim is defective in two ways. First, trial counsel testified that he did not offer the gang enhancement to Hardin as a reason to accept the plea agreement. Trial counsel simply advised Hardin that the State could seek the gang enhancement—an

action that the P-C Court correctly found to be reasonable under the circumstances.

- [37] Second, Hardin does not dispute the P-C Court’s finding that the State could have sought the enhancement if Hardin had rejected the plea agreement. Thus, the State’s failure to file the necessary pleadings does not mean that trial counsel erred in advising Hardin that the State could still do so. Trial counsel knew the evidence showed that both Hardin and the victim were members of gangs. Under these circumstances, the P-C Court did not clearly err in finding counsel reasonably advised Hardin of the possibility of a gang-related sentencing enhancement.

E. Failure to Seek a Psychological Evaluation

- [38] In his final ineffective assistance of counsel claim, Hardin asserts that trial counsel’s inadequate investigation prompted trial counsel’s failure to seek a psychological evaluation of Hardin. If trial counsel had investigated more extensively and sought the evaluation, Hardin claims counsel would have discovered “compelling evidence for use during [plea] negotiations” and could have come to a more “informed decision regarding whether the alternative juvenile sentencing statute was obtainable.” Appellant’s Br., p. 58.
- [39] This argument turns on the idea that Hardin could have obtained a better result—that is, alternative juvenile sentencing—if trial counsel had requested a psychological evaluation. We already have ruled that the P-C Court did not clearly err in determining that trial counsel reasonably assessed alternative

juvenile sentencing as unavailable under these facts. Hardin also has not shown that, even with a psychological evaluation, the State would have offered a plea agreement better than the minimum executed sentence for murder under these facts.

[40] In any case, the P-C Court found that trial counsel reasonably did not pursue a psychological evaluation because his dealings with Hardin and Hardin's family, as well as the facts of the underlying killing, did not suggest Hardin's incompetency. And once trial counsel had negotiated a fixed term plea agreement calling for the minimum term of imprisonment for the only offense supported by the facts—murder—counsel did not investigate further any mitigating circumstances because they would not impact the fixed sentence. The P-C Court therefore found trial counsel was not ineffective for failing to seek a psychological evaluation of Hardin. We find no clear error in this determination.

II. The Factual Basis Was Adequate

[41] Hardin also challenges the P-C Court's finding of an adequate factual basis for his guilty plea. A trial court "shall not enter judgment upon a plea of guilty . . . unless it is satisfied from its examination of the defendant or the evidence presented that there is a factual basis for the plea." Ind. Code § 35-35-1-3(b).

[42] The primary purpose of a factual basis is to ensure that when a plea is accepted, the trial court has sufficient evidence from which it may conclude that the defendant could have been convicted at trial. *Butler v. State*, 658 N.E.2d 72, 76

(Ind. 1995). An adequate factual basis also establishes “by the defendant’s admission that he understands the nature of the crime and . . . that his guilty plea is an admission that he committed the crime.” *State v. Hammond*, 761 N.E.2d 812, 814 (Ind. 2002) (quoting *Bates v. State*, 517 N.E.2d 379, 381 (Ind. 1988)). “In short, this standard ensures that a person who pleads guilty truly is guilty.” *Butler*, 658 N.E.2d at 76.

[43] Trial courts are given a wide berth in determining whether a factual basis is sufficient. *See id.* at 76-77. “[A] finding of [a] factual basis is a subjective determination that permits a court wide discretion—discretion that is essential due to the varying degrees and kinds of inquiries required by different circumstances.” *Id.*

[44] Hardin first challenges the P-C Court’s finding that “[t]he information in the probable cause affidavit, coupled with [Hardin’s] admission, provides sufficient factual basis for a guilty plea.” App. Vol. II, pp. 1147-48. Although a probable cause affidavit may assist in creating a factual basis, the probable cause affidavit in Hardin’s case was never introduced or even mentioned at his guilty plea hearing. *See State v. Cooper*, 935 N.E.2d 146, 150-51 (Ind. 2010) (citing with approval appellate decisions ruling that the probable cause affidavit plus other evidence created a sufficient factual basis). Hardin contends no other evidence of the crime contributed to the factual basis—a contention with which we disagree.

[45] Our Supreme Court has recognized at least four methods for eliciting evidence to prove a factual basis to support a guilty plea. *Ellis v. State*, 67 N.E.3d 643, 647 n.5 (Ind. 2017) (citing *Rhoades v. State*, 675 N.E.2d 698, 700 n.3 (Ind. 1996)). Three of those methods are: (1) “the defendant’s admission of the truth of the allegations in the information read in open court”; (2) “the defendant’s acknowledgment that he/she understands the nature of the crimes charged and that his/her plea is an admission of those charges”; and (3) “the defendant’s sworn testimony regarding the events underlying the charges [showing] his/her commission of the acts giving rise to the charged crimes.” *Id.*²

[46] All three of these methods were used at Hardin’s guilty plea hearing. The trial court read the allegations in the information to Hardin and then asked him whether he understood “that by pleading guilty to this charge, you’re admitting the truth of all the material facts set forth in the charge.” Prior Case Exhibits Vol. I, p. 12. Hardin replied, “Yes.” *Id.* Hardin also separately admitted to killing the victim, as follows:

THE COURT: All right. Sir, are you telling me on the 14th day of April, 2015, in Elkhart County, Indiana, you knowingly killed another human being?

THE DEFENDANT: Yes.

² The fourth means of establishing a factual basis is through presentation of evidence by the State on the elements of the charged offenses. *Ellis*, 67 N.E.3d at 647 n.5. The State did not pursue this approach in Hardin’s guilty plea hearing.

THE COURT: And are you telling me that person that you killed was a Mr. Sanders?

THE DEFENDANT: Yes.

THE COURT: And Mr. Sanders, uh, languished and died here in Elkhart County as a result of your killing him. Is that correct?

THE DEFENDANT: Yes.

Id. at 6-7.

[47] In response to the trial court's questions, Hardin acknowledged that he understood the charge, and his counsel stated that he was satisfied with the factual basis. *Id.* at 7. Hardin also responded affirmatively when the trial court asked him whether he understood that the State, to prove him guilty of murder, would have to prove that on "April 14, 2015, in Elkhart, County, Indiana, that [Hardin] knowingly killed Mr. Sanders." *Id.* at 10. The court also read the murder statute to Hardin and asked him whether he understood it. Hardin replied affirmatively.

[48] Hardin contends these exchanges were not enough to establish a factual basis because he did not understand the elements of murder. But Hardin's attack on the factual basis misinterprets our Supreme Court's precedent.

[49] Citing *Butler*, 658 N.E.2d at 76-77, Hardin views our Supreme Court as holding that rote inquiries by the trial court, followed by yes or no answers from the defendant, render the factual basis inadequate. But in a later case, the Court made clear that its holding in *Butler* applies only when three requirements are

met: the trial court is relying only on the defendant's testimony to establish a factual basis, the trial court's inquiry is not detailed, and the defendant's responses are yes or no. *Ellis*, 67 N.E.3d at 646-47.

[50] Here, the trial court did not rely solely on Hardin's testimony. It also expressly considered the charging information and the murder statute in determining a factual basis existed. The trial court's inquiry and advisement of rights, while prompting one-word responses from Hardin, was extensive, covering 12 pages of the transcript. The trial court read the charge, including the elements of the offense, and Hardin affirmed his understanding of both the language of the charge and of the murder statute. He also admitted under oath that he knowingly killed Sanders. This is sufficient to establish a factual basis for the plea. *See Oliver v. State*, 843 N.E.2d 581, 588 (Ind. Ct. App. 2006). Given these circumstances, *Butler* does not advance Hardin's claim.³

[51] Although the P-C Court erred in determining that the trial court relied on the probable cause affidavit, we conclude that the record supports the P-C Court's ultimate rejection of Hardin's claim of an inadequate factual basis.⁴

³ A review of both the audio recording and the transcript of the guilty plea hearing shows that Hardin confidently answered the trial court's questions, sometimes after conferring with trial counsel. Hardin stated that he understood the guilty plea, the murder charge, the murder statute, and his rights.

⁴ Hardin contends that his statements in the PSI cast doubt on the factual basis. However, as the P-C Court noted, these statements do not clearly contradict Hardin's admission of guilt at the plea hearing. In any case, a defendant's mere protestations of innocence in a PSI after pleading guilty are not an adequate basis for post-conviction relief. *Moredock v. State*, 540 N.E.2d 1230, 1231 (Ind. 1989).

III. Amendment of Petition and Exclusion of Evidence

[52] Hardin alleges the P-C Court erroneously denied in part his belated motion to amend his post-conviction petition. He also contends the court improperly excluded evidence. The P-C Court had discretion to admit or exclude evidence during the post-conviction hearing and to grant or deny Hardin’s motion to amend his petition that he filed less than 60 days before the evidentiary hearings began. *Badelle v. State*, 754 N.E.2d 510, 521 (Ind. Ct. App. 2001) (evidence); *Tapia v. State*, 753 N.E.2d 581, 586 (Ind. 2001) (quoting Ind. Post-Conviction Rule 1(4)(c), which allows amendment of a post-conviction petition sought within 60 days of an evidentiary hearing only “by leave of the court”).

[53] We review rulings on the admission of evidence and on belated amendments for an abuse of this discretion. *Tapia*, 753 N.E.2d at 586. An abuse of discretion occurs if the trial court’s decision is clearly against the logic and effect of the facts and circumstances before it or if it misinterpreted the law. *Pirant v. State*, 119 N.E.3d 178, 180 (Ind. Ct. App. 2019). We find no abuse of discretion.

A. Partially Rejected Petition Amendment and Excluded Neighbor Testimony

[54] After the third of the four evidentiary hearings on Hardin’s post-conviction petition, he sought to amend his petition to allege, among other things, trial counsel’s ineffectiveness based on counsel’s inadequate investigation. Hardin asserted that trial counsel did not search for or discover Hardin’s neighbor, who would have testified to an attack on Hardin by the victim during the summer before the shooting. Such evidence, according to Hardin, would have enhanced

any self-defense claim by Hardin and made it more likely that Hardin would have gone to trial and not pleaded guilty.

[55] The P-C Court rejected the admission of the neighbor's testimony and partly rejected the inadequate investigation amendment "because the [supporting] facts and evidence were too tenuous." Prior Case App. Vol. II, p. 161. The court found that "the evidence presented in the Motion to Amend did not establish self defense in and of itself." *Id.* Noting that Hardin did not reveal the neighbor to trial counsel, the court ruled that "counsel could not be ineffective for failing to investigate when [Hardin] did not tell him about the circumstances." *Id.* The court also found that Hardin's motion to amend—which ultimately related to Hardin's claim that trial counsel improperly rejected a claim of self-defense and also misadvised Hardin—did not establish the viability of a self-defense claim.

[56] At the time of the proposed amendment, the evidentiary presentations were nearing completion. Trial counsel already had testified and had not been asked about the neighbor. And the neighbor's testimony related to events at least six months before the shooting. Such testimony therefore was tangential to any claim of self-defense.

[57] Both in the P-C Court and on appeal, Hardin has failed to show how trial counsel could be ineffective for failing to investigate the neighbor when Hardin did not even reveal that such a witness existed. Given these circumstances, Hardin has not established that the trial court's decision in excluding the

neighbor's testimony and partly denying the amendment is against the logic and effect of the facts before it or that it misinterpreted the law.

B. Limited D.B.'s Statement to Police

Hardin claims the statement of the victim's juvenile companion, D.B., relating the details of the killing to police an hour after the shooting was admissible as substantive evidence under the excited utterance exception to the hearsay rule. The P-C Court admitted D.B.'s statement only to impeach trial counsel's testimony and not as substantive evidence. The parties agree that D.B.'s statement was hearsay, which is defined as an out-of-court statement offered in evidence to prove the truth of the matter asserted. Ind. Evidence Rule 801(c). Hearsay is inadmissible unless it falls under an exception to the hearsay rule. Ind. Evidence Rule 802.

[58] One such exception is found in Indiana Evidence Rule 803(2) (Excited Utterance Rule), which applies to “[a] statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.” The party seeking admission of hearsay under the Excited Utterance Rule must show: (1) a startling event; (2) a statement made by the declarant while under the stress of excitement caused by the event; and (3) a relationship between the statement and the event. *Chambliss v. State*, 119 N.E.3d 182, 189 (Ind. Ct. App. 2019). The second requirement is at issue.

[59] The event and utterance need not be contemporaneous to have been made under the stress of the excitement of the event to qualify. *Id.* But the time

between the event and utterance is a factor to consider when determining whether the statement was spontaneous and unrehearsed. *Id.* “The longer the time between an event and an utterance, the greater the likelihood that the statement is a narrative of past events instead of an excited utterance.” *Id.* “Whether a statement constitutes an excited utterance is a factual determination subject to a clearly erroneous standard of review.” *Id.*

[60] D.B. gave his videotaped statement to police in a police interview room one hour after the shooting. D.B., then in eighth grade, appeared calm and unemotional while giving his statement to the detective. He had an abrasion on his elbow from crawling during the shooting but otherwise lacked any visible physical injuries. Midway through the interview, the officer asked D.B. whether he was okay, and D.B. responded affirmatively.⁵ Given this evidence, the P-C Court did not abuse its discretion in finding that D.B.’s statement, taken at a different location an hour after the killing, was not admissible under the Excited Utterance Rule.

⁵ Hardin also claims that D.B.’s statement was admissible as the statement of a party opponent (the State) because the State “adopted” D.B.’s statements in the probable cause affidavit. Appellant’s Br., p. 64. *See generally* Ind. Evidence Rule 801(d)(2) (providing that, “[n]otwithstanding Rule 801(c), a statement is not hearsay if: . . . the statement is offered against an opposing party and: . . . (B) is one the party manifested that it adopted or believed to be true”). The P-C Court rejected this claim after finding that the State, at most, adopted only a small portion of D.B.’s statement in the probable cause affidavit. Hardin did not offer a redacted version of D.B.’s statement during post-conviction proceedings. On appeal, he does not refute the P-C Court’s view that Indiana Evidence Rule 801(d)(2) does not authorize the entirety of D.B.’s statement. Accordingly, Hardin has not shown he is entitled to relief under Rule 801(d)(2).

- [61] But even if D.B.'s statement was admissible as an excited utterance, no reversible error occurred because the content of his statement was cumulative to other evidence. Trial counsel testified to the essential parts of D.B.'s testimony. The exclusion of cumulative evidence is harmless. *Spaulding v. Harris*, 914 N.E.2d 820, 830 (Ind. Ct. App. 2009). We find no abuse of discretion.⁶
- [62] As Hardin has not established reversible error, we affirm the P-C Court's judgment.

Vaidik, J., and Foley, J., concur.

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⁶ Hardin also claims that cumulative error justifies reversal of the P-C Court's decision. As we reject Hardin's claims of individual errors, no cumulative error occurred.