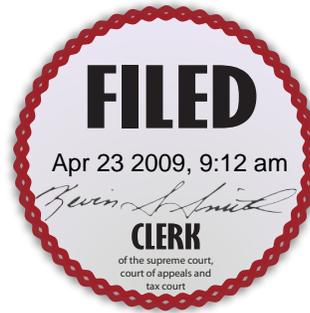


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

GLENN L. HEPP,)

Appellant-Petitioner,)

vs.)

No. 64A03-0806-PC-284

STATE OF INDIANA,)

Appellee-Respondent.)

APPEAL FROM THE PORTER SUPERIOR COURT
The Honorable William E. Alexa, Judge
Cause No. 64D02-0801-PC-589

April 23, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Following an unsuccessful direct appeal of a burglary conviction, Glenn Hepp filed a petition for post-conviction relief. The post-conviction court denied his petition, and Hepp now appeals. Specifically, Hepp contends that the post-conviction court erred in refusing to consider his freestanding challenge to the sufficiency of the evidence sustaining his conviction and that the post-conviction court erred in determining that Hepp's trial and appellate counsel were not ineffective. Concluding that Hepp's freestanding sufficiency claim is waived and that Hepp was not prejudiced by the errors he alleges, we affirm the post-conviction court.

Facts and Procedural History

The underlying facts of this case, taken from this Court's opinion on direct appeal, are as follows:

On July 18, 2001, Renee Deperio fell asleep in her living room. At around 4:00 a.m., Deperio heard her front door open and she called out "hello." She heard the door stop moving and she got up to investigate. She found the screen door propped open but she did not see anyone and police found no usable fingerprints.

Sandra Michaels left her front door unlocked so her boyfriend could let himself in. At around 4:20 a.m., Michaels was awakened when someone grabbed her right breast and squeezed. She initially assumed it was her boyfriend. When her breast was squeezed again, she turned and saw a large man holding a flashlight. She sat up and the intruder ran from the house.

Michaels called the police and gave them a detailed description. The following morning, she went to the Chesterton Police Station to view a photo lineup. After viewing the photos for 30 to 45 minutes she narrowed her choice to two persons, then selected Hepp after she saw a full body photograph of him. *Hepp admitted he entered Michaels' home looking for a purse or money.*

Hepp was charged with burglary as a Class B felony and sexual battery, a Class D felony, with respect to the incident at Michaels' home. He was charged with attempted burglary, a Class B felony, with respect to

the entry of Deperio's home. At trial Hepp moved for judgment on the evidence with respect to the sexual battery count and the trial court granted his motion. The court instructed the jury that the sexual battery count was withdrawn from its consideration. The jury found Hepp guilty of only the burglary of Michaels' home.

Hepp was sentenced on July 2, 2004. The trial court found as aggravating circumstances that Hepp had a criminal history, prior attempts to rehabilitate him had failed, he was on probation at the time of the offense, and Hepp's crime involved "a degree of care and planning." The trial court found no mitigating circumstances, and sentenced Hepp to twenty years. The presumptive sentence for a Class B felony is 10 years.

Hepp v. State, No. 6A04-0409-CR-507, slip op. at 2-3 (Ind. Ct. App. Aug. 31, 2005) (emphasis added) (citations and footnotes omitted). Hepp appealed, arguing on direct appeal that the trial court erred in giving a jury instruction that mentioned an offense the court had withdrawn from the jury's consideration and that the trial court improperly enhanced his sentence. This Court affirmed his conviction and sentence. *Id.*, slip op. at 8.

In January 2008, Hepp, *pro se*, filed a petition for post-conviction relief in Porter Superior Court in Porter County, the county of his conviction. After holding a hearing, the post-conviction court denied Hepp's petition in June 2008 in an Order containing findings of fact and conclusions of law. Hepp then filed a notice of appeal from the post-conviction court's decision. After briefing had commenced in the Porter County proceedings, in October 2008 Hepp filed a Verified Petition for Writ of Habeas Corpus in Miami Circuit Court in Miami County, the county of his incarceration. The Miami Circuit Court dismissed the habeas petition because it appeared to the trial court that the petition was actually for post-conviction relief. In its Order dismissing Hepp's petition, the court instructed Hepp to file the proper documentation to initiate a request for post-

conviction relief in the county where he was convicted. Hepp then filed a notice of appeal of the Miami Circuit Court's decision and briefing commenced in that proceeding. In December 2008, our Court granted Hepp's motion to consolidate the two proceedings for appellate purposes. We now turn to Hepp's contentions on appeal.

Discussion and Decision

Hepp, *pro se*, contends that the post-conviction court erred in denying his petition for post-conviction relief. The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. *Henley v. State*, 881 N.E.2d 639, 643 (Ind. 2008); *Whedon v. State*, 900 N.E.2d 498, 203-04 (Ind. Ct. App. 2009). When appealing the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. *Id.* To prevail on appeal from the denial of post-conviction relief, a petitioner must show that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. *Id.* at 643-44. Further, the post-conviction court in this case made findings of fact and conclusions of law in accordance with Indiana Post-Conviction Rule 1(6). Although we do not defer to the post-conviction court's legal conclusions, "[a] post-conviction court's findings and judgment will be reversed only upon a showing of clear error—that which leaves us with a definite and firm conviction that a mistake has been made." *Id.* (quoting *Ben-Yisrayl v. State*, 729 N.E.2d 102, 106 (Ind. 2000), *reh'g denied*). The post-conviction court is the sole judge of the weight of the evidence and the credibility of the witnesses. *Fisher v. State*, 810 N.E.2d 674, 679 (Ind. 2004).

As an initial matter, we note that we consolidated the Porter County proceedings and the Miami County proceedings for appellate purposes. The Miami Circuit Court dismissed Hepp's habeas petition with instructions to file in Porter County because it appeared to the court that the petition, which attacked the validity of Hepp's conviction, contained claims for post-conviction relief."¹ See Indiana Post-Conviction Rule 1(1)(c). Because the claims in the habeas petition were not properly presented to and then considered by the post-conviction court in Porter County, they are not before us on appeal. See *Pruitt v. State*, --- N.E.2d ---, 2009 WL 884784 (Ind. Mar. 31, 2009) ("In his petition for post-conviction relief, Pruitt did not raise the claim that trial counsel failed to investigate and discover the fact that he was referred to special education in eighth grade. The post-conviction court . . . therefore did not discuss this claim in its order, and it is not available for this Court's review."). The issues before the Porter Superior Court, however, are available for us to consider, and it is to these issues that we now turn.

Hepp raises several issues, which we restate as follows. First, Hepp raises a freestanding claim that the evidence is insufficient to support his conviction. Hepp argues that the post-conviction court abused its discretion by refusing to allow him to argue this issue at his post-conviction hearing. Next, Hepp contends that his trial counsel was ineffective for failing to alert the trial court that the State failed as a matter of law to present sufficient evidence to support Hepp's conviction and for failing to make a

¹ Hepp does not argue on appeal that the Miami Circuit Court should have transferred the petition to a court in Porter County rather than dismissing and instructing him to refile. If the trial court had transferred the petition, the Porter County court may have determined that Indiana Post-Conviction Rule 1(12), which governs successive petitions for post-conviction relief, applied. See *Martin v. State*, 901 N.E.2d 645, 647 (Ind. Ct. App. 2009).

hearsay objection during the testimony of the police detective who witnessed Hepp's confession. Finally, Hepp contends that his appellate counsel was ineffective for failing to raise a sufficiency of the evidence claim on direct appeal.

I. Freestanding Claims

First, Hepp argues that the evidence is insufficient to support his conviction and that the post-conviction court abused its discretion by refusing to allow him to argue this issue at his post-conviction hearing.² In post-conviction proceedings, claims that are known and available at the time of direct appeal, but are not argued, are waived. *Timberlake v. State*, 753 N.E.2d 591, 597 (Ind. 2001), *reh'g denied*. They cannot be subsequently raised in the post-conviction setting.

Hepp's freestanding challenge to the sufficiency of the evidence was known and available for direct appeal and is therefore not available on post-conviction review. *Id.*³ The trial court did not abuse its discretion by refusing to consider this claim.

II. Ineffective Assistance of Counsel Claims

² Hepp also contends that the trial court erred by refusing to allow him to "expand the record" regarding his sufficiency of the evidence claim. Appellant's Br. p. 14. It is unclear whether Hepp uses this phrase to mean that the trial court should have considered his freestanding sufficiency claim along with the ineffective assistance of counsel claims or if Hepp is arguing that he should have been permitted to introduce new evidence. To the extent that Hepp is arguing that he should have been permitted to introduce new evidence, this claim is waived for failure to make a cogent argument. *See Wingate v. State*, 900 N.E.2d 468, 475 (Ind. Ct. App. 2009).

³ Additionally, Hepp contends for the first time in his reply brief on appeal that Detective Charles Adkins' testimony regarding his confession should have been excluded as overly prejudicial, that the photo array Michaels used to identify him was unduly suggestive, that trial counsel was ineffective for failing to object to the confession as overly prejudicial and the photo array as unduly suggestive, and that appellate counsel was ineffective for failing to argue completely and effectively that the evidence was insufficient to support his burglary conviction, presumably for failing to raise arguments regarding the admission of the confession and the use of the photo array. These claims are waived in this appeal by Hepp's failure to present them in his appellate brief. *Bunch v. State*, 778 N.E.2d 1285, 1290 (Ind. 2002).

Next, Hepp contends that he received ineffective assistance of trial and appellate counsel. As we understand it, Hepp's argument regarding effectiveness of trial counsel is that his trial counsel was ineffective for failing to submit a motion for judgment on the evidence at the conclusion of the State's case-in-chief for the burglary count or to submit a motion to correct errors at the conclusion of trial to persuade the trial court that there was insufficient evidence to support his burglary conviction. Hepp also argues that his trial counsel was ineffective for failing to object to the testimony of Detective Adkins that Hepp confessed to having the intent to steal money or a purse when he entered Michaels' home. As for his claim regarding appellate counsel, Hepp argues that counsel was ineffective for failing to raise a sufficiency of the evidence claim on direct appeal.

One exception to the waiver rule for claims that are known and available at the time of direct appeal is the argument that a defendant was deprived of the right to effective counsel as guaranteed by the Sixth Amendment to the United States Constitution. *Singleton v. State*, 889 N.E.2d 35, 38 (Ind. Ct. App. 2008). We review the effectiveness of both trial and appellate counsel under the two-part test provided by *Strickland v. Washington*, 466 U.S. 668 (1984). *See Culvahouse v. State*, 819 N.E.2d 857, 859 (Ind. Ct. App. 2004), *trans. denied*. A claimant must demonstrate that counsel's performance fell below an objective level of reasonableness based upon prevailing professional norms and that the deficient performance resulted in prejudice. *Strickland*, 466 U.S. at 687-88. "Prejudice occurs when the defendant demonstrates that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Grinstead v. State*, 845 N.E.2d 1027, 1031 (Ind.

2006) (quoting *Strickland*, 466 U.S. at 694). We presume that counsel rendered effective performance, and a defendant must offer strong and convincing evidence to overcome this presumption. *Loveless v. State*, 896 N.E.2d 918, 922 (Ind. Ct. App. 2008) (citing *Overstreet v. State*, 877 N.E.2d 144, 152 (Ind. 2007), *reh'g denied*), *trans. denied*. “[A] court need not determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.” *Strickland*, 466 U.S. at 697. “If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed.” *Id.*

A. Trial Counsel

Hepp argues first that he received ineffective assistance of trial counsel. Specifically, Hepp contends that his trial counsel was ineffective because counsel “failed to object to the conviction and sentence without sufficient evidence of the requisite underlying felony element” Appellant’s Br. p. 10. We construe this argument as one that trial counsel should have made a motion for judgment on the evidence or filed a motion to correct error because the State failed to present sufficient evidence to sustain Hepp’s conviction for burglary.

In order to convict Hepp of burglary, the State had to prove that Hepp broke and entered the building or structure of another person with the intent to commit a felony therein. Ind. Code § 35-43-2-1. The offense is a Class B felony if the building is a dwelling. I.C. § 35-43-2-1(1)(B)(i). Hepp argues that the State was unable to prove intent to commit a felony within the dwelling because the sexual battery charge was

dismissed after his trial counsel made a motion for judgment on the evidence on this count.

Hepp is correct that the sexual battery charge against him was dismissed before the jury began deliberations. But the State introduced at trial evidence that Hepp entered Michaels' home with intent to commit a different felony—namely, theft—within the home.⁴ *See* Ind. Code § 35-43-4-2(a) (“A person who knowingly or intentionally exerts unauthorized control over property of another person, with intent to deprive the other person of any part of its value or use, commits theft, a Class D felony.”). During her direct examination, Michaels identified Hepp as the man who had entered her home and grabbed her. Trial Tr. p. 178. Detective Adkins of the Chesterton Police Department testified that, during his interrogation, Hepp confessed that “he had gone by Sandy Michaels' house and noticed that the door was open, main door was open, . . . [h]e then went inside and was looking for a purse or money.” *Id.* at 305-06. This was sufficient evidence of Hepp's intent to commit theft when he entered Michaels' residence. Proof of burglary with intent to commit theft does not require proof of a successful theft, but only proof of intent to commit theft. *Campbell v. State*, 732 N.E.2d 197, 208 n.6 (Ind. Ct. App. 2000). Additionally, the State was not required to charge or convict Hepp of theft to secure a burglary conviction. *See Moffatt v. State*, 542 N.E.2d 971, 975 (Ind. 1989) (“Thus, to obtain a conviction for burglary, it is not necessary for the State to prove the defendant committed theft or any other felony because the burglary is completed upon breaking and entering with intent to commit a felony.”); *Jones v. State*, 519 N.E.2d 1233,

⁴ Both the charging information and the jury instructions included intent to commit theft as an alternative to sexual battery as the felony underlying the burglary charge.

1235 (Ind. 1988) (“The prosecutor may charge a defendant with all the elements of burglary without charging the specific acts which prove the ‘intent to commit a felony’ element. Proof of the theft is mere evidence showing intent to commit theft; it is not required to plead or prove an element of burglary.”). Thus, Hepp cannot show he was prejudiced by trial counsel’s failure to make a motion for judgment on the evidence or a motion to correct errors.

However, Hepp contends that trial counsel was ineffective for failing to object to Detective Adkins’ testimony, presented during the State’s case-in-chief, that Hepp had confessed to having intent to steal, as incredibly dubious hearsay. If counsel had objected and the testimony was excluded, Hepp argues, there would not have been sufficient evidence to sustain his burglary conviction. In order to prove ineffective assistance of counsel due to the failure to object, a defendant must prove that an objection would have been sustained if made and that he was prejudiced by the failure. *Wrinkles v. State*, 749 N.E.2d 1179, 1192 (Ind. 2001). As for Hepp’s hearsay arguments, his statements to Detective Adkins were admissible as statements by a party-opponent because they were statements made by Hepp and offered against Hepp at trial. Ind. Evidence Rule 801(d)(2)(A); *Amos v. State*, 896 N.E.2d 1163, 1168 (Ind. Ct. App. 2008), *trans. denied*. Thus, a hearsay objection to Detective Adkins’ testimony would not have been sustained, and Hepp cannot show he was prejudiced in this regard.

As for Hepp’s incredible dubiousity challenge to Detective Adkins’ testimony, this argument is more properly considered in regard to the effectiveness of appellate counsel rather than trial counsel because the incredible dubiousity rule is a tool whereby a

reviewing court under very limited circumstances may impinge upon the fact-finder's responsibility to judge witness credibility. *See Jacobs v. State*, 802 N.E.2d 995, 998 (Ind. Ct. App. 2004). As such, we will discuss this argument below.

Because the State introduced sufficient evidence that Hepp entered Michaels' home with intent to commit a felony within it, any motion for judgment on the evidence would have been denied. As such, Hepp cannot show ineffective assistance of counsel in this regard. *See Jenkins v. State*, 809 N.E.2d 361, 374 (Ind. Ct. App. 2004), *trans. denied*. Nor has Hepp demonstrated how he was harmed by trial counsel's failure to file a motion to correct error. Thus, Hepp cannot show ineffective assistance of trial counsel in this regard either. *See Berry v. State*, 561 N.E.2d 832, 840 (Ind. Ct. App. 1990). The post-conviction court did not err in concluding that Hepp did not receive ineffective assistance of trial counsel.

B. Appellate Counsel

Finally, Hepp argues that his appellate counsel was ineffective for failing to present a sufficiency of the evidence argument on appeal. For all the reasons described above, Hepp cannot show he was prejudiced by the failure to argue insufficient evidence on appeal. However, we now address the argument that appellate counsel should have argued that the evidence was insufficient to support Hepp's conviction because Detective Adkins' testimony regarding Hepp's confession was incredibly dubious.

The incredible dubiousity rule applies where a sole witness presents inherently contradictory testimony that is equivocal or the result of coercion and there is a complete lack of circumstantial evidence of the defendant's guilt. *James v. State*, 755 N.E.2d 226,

231 (Ind. Ct. App. 2001), *trans. denied*. “[A]pplication of this rule is rare and . . . the standard to be applied is whether the testimony is so incredibly dubious or inherently improbable that no person could believe it.” *Stephenson v. State*, 742 N.E.2d 463, 497 (Ind. 2001) (citation omitted).

We find nothing contradictory or equivocal about Detective Adkins’ testimony. Nor does the lack of a recording of the confession make Detective Adkins’ testimony incredibly dubious, as Hepp claims. Further, Michaels’ identification of Hepp as the man in her home served to corroborate in part Detective Adkins’ testimony that Hepp confessed to entering Michaels’ home with intent to steal. *See Gregory v. State*, 885 N.E.2d 697, 705 (Ind. Ct. App. 2008) (finding that trial witness’s testimony that defendant had agreed with witness to make methamphetamine was corroborated in part by store surveillance video depicting defendant buying methamphetamine-making supplies), *trans. denied*. As a result, Hepp cannot show prejudice because of appellate counsel’s failure to argue on appeal that Detective Adkins’ testimony was incredibly dubious or that the evidence was otherwise insufficient to sustain his burglary conviction. The post-conviction court did not err in concluding that Deckard did not receive ineffective assistance of appellate counsel.

Affirmed.

RILEY, J., and DARDEN, J., concur.