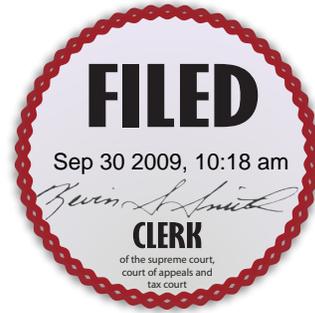


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



APPELLANT PRO SE:

ATTORNEYS FOR APPELLEE:

**EDWARD E. JEMISON**  
Pendleton, Indiana

**GREGORY F. ZOELLER**  
Attorney General of Indiana

**IAN McLEAN**  
Deputy Attorney General  
Indianapolis, Indiana

---

**IN THE  
COURT OF APPEALS OF INDIANA**

---

EDWARD E. JEMISON, )  
 )  
Appellant/Petitioner, )  
 )  
vs. ) No. 20A03-0811-PC-547  
 )  
STATE OF INDIANA, )  
 )  
Appellee/Respondent. )

---

APPEAL FROM THE ELKHART CIRCUIT COURT  
The Honorable Terry C. Shewmaker, Judge  
Cause No. 20C01-0007-PC-52

---

**September 30, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BRADFORD, Judge**

Appellant/Petitioner Edward E. Jemison challenges the post-conviction court's denial of his petition for post-conviction relief ("PCR"). Upon appeal, Jemison claims that he received ineffective assistance of both trial and appellate counsel. We affirm.

### **FACTS AND PROCEDURAL HISTORY**

Our opinion in Jemison's direct appeal instructs us as to the underlying facts leading to this post-conviction appeal:

The facts most favorable to the verdict reveal that on the morning of July 2, 2000, Jemison and his girlfriend, Jennifer Holloway, arrived at her mother's home to pick up Holloway's infant son. Holloway, who was visibly upset, exited the vehicle, approached her mother, Connie Kelly, and told her that she did not want to leave with Jemison. Kelly told her daughter to go inside with her son, and she tried to explain to Jemison that she would bring Holloway and her son to his house later that day. Jemison became outraged and attempted to enter the home several times. Kelly repeatedly told Jemison to leave; however, Jemison refused. Jemison then broke into the home and brutally beat both Holloway and Kelly. Following the beatings, he drug Holloway, who was unconscious, from the home and left with her in his GeoTracker. Police chased the vehicle and eventually arrested Jemison.

The State charged Jemison with burglary, battery causing serious bodily injury, criminal confinement, and resisting law enforcement. A jury found him guilty of these charges. The trial court sentenced Jemison to sixty-one years' imprisonment.

*Jemison v. State*, No. 20A05-0106-CR-253 (Ind. Ct. App. Jan. 15, 2002).

In Jemison's direct appeal, this court concluded that Jemison's convictions for the burglary and criminal confinement of Holloway violated the Indiana constitutional prohibition against double jeopardy and remanded the matter with instructions for the trial court to reduce Jemison's confinement conviction to a Class D felony conviction and to sentence Jemison accordingly. *Id.* The judgment of the trial court was affirmed in all other regards. *Id.* Jemison filed a petition for transfer, which was unanimously denied by the

Indiana Supreme Court. On May 2, 2002, the trial court amended its original judgment, sentencing Jemison to one and one-half years for the Class D felony confinement conviction.

On April 14, 2003, Jemison filed a petition seeking post-conviction relief. Jemison subsequently filed several amended petitions, all of which were answered by the State. The post-conviction court conducted an evidentiary hearing on Jemison's amended petition on May 7, 2008. On July 3, 2008, the post-conviction court issued an order denying Jemison's request for post-conviction relief. Jemison now appeals.

### **DISCUSSION AND DECISION**

Post-conviction proceedings are civil in nature. *Stevens v. State*, 770 N.E.2d 739, 745 (Ind. 2002). Therefore, in order to prevail, a petitioner must establish his claims by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); *Stevens*, 770 N.E.2d at 745. When appealing from a denial of a petition for post-conviction relief, a petitioner must convince this court that the evidence, taken as a whole, "leads unmistakably to a conclusion opposite that reached by the post-conviction court." *Stevens*, 770 N.E.2d at 745. "It is only where the evidence is without conflict and leads to but one conclusion, and the post-conviction court has reached the opposite conclusion, that its decision will be disturbed as contrary to law." *Godby v. State*, 809 N.E.2d 480, 482 (Ind. Ct. App. 2004), *trans. 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). We therefore accept the post-conviction court's findings of fact unless they are clearly erroneous but give no deference to its conclusions of law. *Id.*

Post-conviction proceedings do not afford a petitioner with a super-appeal, and not all issues are available. *Timberlake v. State*, 753 N.E.2d 591, 597 (Ind. 2001). A claim of ineffective assistance of trial counsel is properly presented in a post-conviction proceeding if such claim is not raised on direct appeal. *Id.* A claim of ineffective assistance of appellate counsel is an appropriate issue for post-conviction review. *Id.*

### **I. Waiver of Claims Not Properly Raised on Post-Conviction Review**

Again, not all issues are available for post-conviction review. *Id.* As a general rule, most free-standing claims of error are not available in a post-conviction proceeding because of the doctrines of waiver and res judicata. *Id.* at 597-98. For instance, “[i]f an issue was known and available, but not raised on direct appeal, it is waived.” *Id.* at 597. Likewise, “[i]f an issue was raised on direct appeal, but was decided adversely, it is res judicata.” *Id.*

Here Jemison raises two issues that were known and available, but not raised, at the time of his direct appeal. Specifically, Jemison claims that the trial court erred in giving an *Allen*-type charge<sup>1</sup> to the jury, and that it abused its direction in admitting certain evidence allegedly relating to Jemison’s character. Because these claims were known and available, but not raised, at the time of Jemison’s direct appeal, these claims are waived and thus not available for post-conviction review. *Id.*

### **II. Ineffective Assistance of Counsel**

---

<sup>1</sup> An “*Allen*-type charge” is a supplemental charge given to a potentially deadlocked jury informing the jury that the jurors “had a duty to decide the case if they could consciously do so,” and that, although the verdict must be agreed to by all jurors, each juror should examine the question presented with candor and with proper regard and deference to the opinions of his fellow jurors. *See Allen v. United States*, 164 U.S. 492, 501 (1896).

### A. Standard of Review

The right to effective counsel is rooted in the Sixth Amendment to the United States Constitution. *Taylor v. State*, 840 N.E.2d 324, 331 (Ind. 2006). “The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel’s playing a role that is critical to the ability of the adversarial system to produce just results.” *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 685 (1984)). “The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper function of the adversarial process that the trial court cannot be relied on as having produced a just result.” *Strickland*, 466 U.S. at 686.

A successful claim for ineffective assistance of counsel must satisfy two components. *Reed v. State*, 866 N.E.2d 767, 769 (Ind. 2007). Under the first prong, the petitioner must establish that counsel’s performance was deficient by demonstrating that counsel’s representation “fell below an objective standard of reasonableness, committing errors so serious that the defendant did not have the ‘counsel’ guaranteed by the Sixth Amendment.” *Id.* We recognize that even the finest, most experienced criminal defense attorneys may not agree on the ideal strategy or most effective way to represent a client and therefore under this prong, we will assume that counsel performed adequately, and will defer to counsel’s strategic and tactical decisions. *Smith v. State*, 765 N.E.2d 578, 585 (Ind. 2002). Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective. *Id.* Under the second prong, the petitioner must show that the deficient performance resulted in prejudice. *Reed*, 866 N.E.2d at 769. A petitioner may show prejudice by demonstrating that there is “a reasonable probability (*i.e.* a probability

sufficient to undermine confidence in the outcome) that, but for counsel's errors, the result of the proceeding would have been different." *Id.*

A petitioner's failure to satisfy either prong will cause the ineffective assistance of counsel claim to fail. *See Williams v. State*, 706 N.E.2d 149, 154 (Ind. 1999). Therefore, if we can resolve a claim of ineffective assistance of counsel based on lack of prejudice, we need not address the adequacy of counsel's performance. *See Wentz v. State*, 766 N.E.2d 351, 360 (Ind. 2002). Further, the same standard applies to claims of ineffective assistance of trial counsel and claims of ineffective assistance of appellate counsel. *Burnside v. State*, 858 N.E.2d 232, 238 (Ind. Ct. App. 2006).

## **B. Ineffective Assistance of Trial Counsel**

Jemison argues that his trial counsel was ineffective for several reasons. We will address each in turn.

### **1. Failure to Fully and Accurately Inform Jemison of a Guilty Plea Offer Allegedly Tendered by the State**

Jemison first contends that his trial counsel was ineffective because counsel failed to fully and accurately inform him of a guilty plea offer allegedly tendered by the State. Ordinarily, criminal defense attorneys have a duty to inform their clients of plea agreements proffered by the prosecution, and the failure to do so constitutes ineffective assistance of counsel under the Sixth and Fourteenth Amendments. *Dew v. State*, 843 N.E.2d 556, 568 (Ind. Ct. App. 2006), *trans. denied*. "Such a duty encourages sound practice by criminal defense attorneys, protects the fundamental rights of their clients, and ensures the integrity of the guilty plea process." *Id.* However, in light of *Strickland*, a petitioner alleging that his

trial counsel was ineffective for failing to inform him of a plea offer is not relieved of the burden of establishing by a preponderance of the evidence that counsel acted unreasonably by failing to inform him of the plea offer and that, but for counsel's actions, there was a reasonable probability that he would have accepted the plea offer. *Id.*

Jemison challenges the post-conviction court's determination that Jemison's trial counsel was not ineffective for allegedly failing to inform Jemison of all plea offers extended by the State. Jemison claims that his trial counsel failed to inform him that the State had extended a plea offer of thirty years of incarceration in exchange for Jemison's guilty plea. The post-conviction court, however, was under no obligation to believe Jemison's claim, and nothing in the record indicates that such an offer was ever proffered by the State.<sup>2</sup> Further, Jemison's trial counsel testified during the post-conviction proceedings that although he did not remember specifically how he communicated any plea offers "except to tell [Jemison] what the offer was" and he did not remember exactly what the offer was, he knew that Jemison was fully aware of the evidence and that Jemison was committed to going to trial and not pleading guilty. PCR Tr. p. 16. Trial counsel further testified that it was his general practice to inform his clients about all plea offers extended by the State and that he had no reason to believe that he did not follow this practice in Jemison's case.

In light of the lack of proof that the State ever extended a thirty-year plea offer to Jemison's trial counsel, trial counsel's testimony that he had no reason to believe that he

---

<sup>2</sup> The evidence indicates that the State extended Jemison a plea offer of forty-five years of incarceration in exchange for his guilty plea. The record further indicates that Jemison was fully aware of and rejected this offer.

deviated from his usual practice of informing his criminal clients of all plea offers extended by the State, and trial counsel's testimony that Jemison was committed to going to trial and not pleading guilty, we conclude that Jemison has failed to show that the post-conviction court's denial of Jemison's petition for post-conviction relief on the grounds that his trial counsel failed to inform him about a plea offer allegedly extended by the State was clearly erroneous. Therefore, the post-conviction court correctly denied Jemison's claim for relief on this claim.

## **2. Failure to Object to the State's Alleged Misconduct During Trial<sup>3</sup>**

Jemison next contends that his trial counsel was ineffective for failing to object to the State's alleged misconduct during trial. Specifically, Jemison claims that trial counsel failed to object to the deputy prosecutor's allegedly improper statement during opening argument that Holloway would "testify today to what really happened." Jemison claims that this statement was improper because it allegedly "vouched for the credibility" of Holloway. However, to the extent that Jemison claims that the deputy prosecutor committed misconduct for allegedly "vouching" for Holloway's credibility, Jemison has failed to develop this claim with an argument supported by cogent reasoning and citation to authorities pursuant to Indiana Appellate Rule 46(A)(8)(a). As such, Jemison has waived this argument for

---

<sup>3</sup> As is discussed above, to the extent that Jemison claims that the post-conviction court erred in failing to find that the State committed misconduct at trial, this claim, to the extent it exists, was known and available, but not raised, on direct appeal, and thus is waived. *Timberlake*, 753 N.E.2d at 597. Therefore, we will only consider this claim so far as it relates to Jemison's contention that he received ineffective assistance of counsel at trial. Furthermore, to the extent that Jemison claims that the State's alleged misconduct amounted to fundamental error, such a claim is not available for post-conviction review because the fundamental error exception to the contemporaneous objection rule applies only to direct appeals. *Sanders v. State*, 765 N.E.2d 591, 592 (Ind. 2002).

appellate consideration. *See Davis v. State*, 835 N.E.2d 1102, 1113 (Ind. Ct. App. 2005) (providing that failure to make a cogent argument results in waiver), *trans. denied*; *see also* Ind. Appellate Rule 46(A)(8)(a) (requiring that contentions in appellant’s brief be supported by cogent reasoning and citations to authorities, statutes, and the appendix or parts of the record on appeal).

Jemison also claims that trial counsel failed to object to the deputy prosecutor’s allegedly improper closing argument which was stated as follows: “Knowingly. Did he engage in all of these acts by being aware of [the] high probability that he was doing so? You haven’t heard any evidence to the contrary. There’s none out there.” Trial Tr. pp. 298-99. Jemison claims that this statement was improper because it allegedly “comment[ed] on Jemison’s Fifth Amendment rights.” Appellant’s Br. p. 19. It is improper for the State to invite the jury to infer guilt from the defendant’s exercise of his Fifth Amendment right to refuse to testify. *Moreland v. State*, 701 N.E.2d 288, 293 (Ind. Ct. App. 1998) (citing *Moore v. State*, 669 N.E.2d 733, 739 (Ind. 1996)). “However, ‘[t]he Indiana Supreme Court has indicated that if in its totality the prosecutor’s comment is addressed to other evidence rather than the defendant’s failure to testify, it is not grounds for reversal.’” *Id.* (quoting *Channell v. State*, 658 N.E.2d 925, 932 (Ind. Ct. App. 1995)). “Comment on the lack of evidence by the defense concerning otherwise incriminating evidence against him is proper ‘as long as the State focuses on the absence of any evidence to contradict the State’s evidence and not on the accused’s failure to testify.’” *Id.* (quoting *Martinez v. State*, 549 N.E.2d 1026, 1028 (Ind. 1990)).

Here, the deputy prosecutor, in arguing that there was no evidence refuting the contention that Jemison committed the crimes knowingly, stated “You haven’t heard any evidence to the contrary. There’s none out there.” Trial Tr. pp. 298-99. This comment does not indicate whether Jemison testified at trial and appears to relate to the lack of evidence regarding Jemison’s mental state at the time of the crime, and not on Jemison’s failure to testify. Therefore, we conclude that the post-conviction court’s order denying Jemison’s claim for post-conviction relief on this ground is not clearly erroneous.

### **3. Failure to Question Potential Jurors about Racial Bias or Prejudice during Voir Dire**

Jemison additionally contends that his trial counsel was ineffective because counsel failed to question potential jurors about racial biases or prejudices during voir dire. Jemison has failed to allege and the record is devoid of any indication that any of the potential jurors actually exhibited racial bias for or against Jemison. Rather, Jemison merely presents an unsubstantiated allegation that it was necessary to question potential jurors about racial bias because the Ku Klux Klan is active in northern Indiana.

Jemison’s trial counsel testified during the post-conviction proceedings that he would be surprised if he had not investigated racial bias either collaterally or directly in voir dire because racial bias is an issue that is “in [his] mind.” PCR Tr. p. 28. Counsel indicated that with regards to this issue, “You got to be careful.... I don’t remember specifically, but it’s a very—it’s an area that I try to be thorough on ... I don’t know that I went into that area at all, but I’m always—I’m concerned about it so I get into it in my own way in voir dire.” PCR Tr. pp. 28-29. Counsel stated that addressing race in voir dire was part of his strategy in cases

where race could be an issue. Counsel emphasized, however, that one should be careful when questioning potential jurors about race because some jurors may be personally offended if an attorney comes across as too abrupt or too “in your face” on the issue of race. PCR Tr. p. 49. Counsel also indicated that he had his own ways of identifying whether a potential juror might have a racial bias. (PCR Tr. 49-50) The post-conviction court denied Jemison’s claim that his trial counsel was ineffective for allegedly failing to question potential jurors about racial bias or prejudice. Jemison has failed to show clear error in this regard.

#### **4. Failure to Address Jemison’s Alleged Appearance in Shackles and Handcuffs Before Two Members of the Jury**

Jemison also contends that his trial counsel was ineffective because counsel failed to address Jemison’s alleged appearance in shackles and handcuffs before two members of the jury.

As a general proposition a defendant has the right to appear before a jury without physical restraints, unless such restraints are necessary to prevent the defendant’s escape, to protect those present in the courtroom, or to maintain order during trial. This right arises from the basic principle of American jurisprudence that a person accused of a crime is presumed innocent until proven guilty beyond a reasonable doubt. For this presumption to be effective, courts must guard against practices that unnecessarily mark the defendant as a dangerous character or suggest that his guilt is a foregone conclusion.

*Overstreet v. State*, 877 N.E.2d 144, 160 (Ind. 2007) (citations omitted). However, the Indiana Supreme Court has long determined that a defendant is not automatically entitled to relief based on jurors momentarily seeing a defendant in restraints while being transported about the courthouse. *Id.* at 162; *Underwood v. State*, 535 N.E.2d 507, 518 (Ind. 1989); *Smith v. State*, 475 N.E.2d 1139, 1144 (Ind. 1985).

Here, Jemison claims that two members of the jury saw him in restraints while he was being transported from the county jail to the courtroom. However, the post-conviction court was under no obligation to believe Jemison's claim. Although Jemison claims to have immediately notified his trial counsel, his trial counsel testified at the post-conviction proceedings that he had no independent recollection of Jemison ever notifying him that Jemison had been seen by jury members while in restraints. In addition, nothing in either the trial record or the PCR records supports Jemison's claim that he was ever seen in restraints by any members of the jury. Jemison has failed to show clear error in the post-conviction court's denial of his petition for post-conviction relief on the grounds that his trial counsel failed to object to his allegedly having been seen in shackles and handcuffs by two members of the jury.

In sum, Jemison has failed to raise any claim that has undermined our confidence in the outcome of his trial. The post-conviction court properly denied Jemison's claim of ineffective assistance of trial counsel.

### **C. Ineffective Assistance of Appellate Counsel**

Jemison also argues that his appellate counsel was ineffective for several reasons. We will address each in turn.

#### **1. Failure to Challenge the Alleged Use of an Improper Aggravator for Sentencing Purposes on Direct Appeal**

Jemison contends that his appellate counsel was ineffective because counsel failed to challenge the use of an allegedly improper aggravating factor for sentencing purposes on direct appeal. Jemison, however, has failed to present a cogent argument in support of this

contention. The failure to make a cogent argument results in waiver, and as such, Jemison has waived this claim on appeal. *See Davis*, 835 N.E.2d at 1113 (providing that failure to make a cogent argument results in waiver); *see also* Ind. Appellate Rule 46(A)(8)(a) (requiring that contentions in appellant’s brief be supported by cogent reasoning and citations to authorities, statutes, and the appendix or parts of the record on appeal).

## **2. Failure to Raise an Argument Relating to Trial Counsel’s Alleged Ineffective Assistance on Direct Appeal**

Jemison next contends that his appellate counsel was ineffective because counsel failed to raise a claim relating to trial counsel’s alleged ineffective assistance on direct appeal. Jemison, however, has failed to present a cogent argument in support of this contention. Again, the failure to make a cogent argument results in waiver, and as such, Jemison has waived this claim on appeal. *See Davis*, 835 N.E.2d at 1113 (providing that failure to make a cogent argument results in waiver); *see also* Ind. Appellate Rule 46(A)(8)(a) (requiring that contentions in appellant’s brief be supported by cogent reasoning and citations to authorities, statutes, and the appendix or parts of the record on appeal).

## **3. Failure to Object to the State’s Alleged Misconduct During Trial.<sup>4</sup>**

Jemison also contends that his appellate counsel was ineffective because counsel failed to object to the State’s alleged misconduct during trial. Specifically, Jemison claims that his appellate counsel failed to challenge the deputy prosecutor’s above stated allegedly improper closing argument on direct appeal. For the reasons discussed above in section

---

<sup>4</sup> For the reasons stated in footnote 3 of this opinion, we will review Jemison’s claim relating to the State’s alleged misconduct only as it relates to the alleged ineffective assistance of Jemison’s appellate counsel.

II.B.2., we conclude that the post-conviction court's order denying Jemison's claim for post-conviction relief on this ground is not clearly erroneous.

Jemison has failed to raise any claim that has convinced us that the result of his appeal would have been different had his appellate counsel chosen to raise additional issues on direct appeal. The post-conviction court properly denied Jemison's claim of inefficient assistance of appellate counsel. We therefore conclude that Jemison did not receive ineffective assistance of trial or appellate counsel. The denial of the post-conviction relief is affirmed.

The judgment of the post-conviction court is affirmed.

BAILEY, J., and VAIDIK, J., concur.