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IN THE
COURT OF APPEALS OF INDIANA

RUMERO ZIEBELL,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 82A01-1012-PC-694
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE VANDERBURGH SUPERIOR COURT
The Honorable Robert J. Pigman, Judge
Cause No. 82D03-0311-PC-14

October 19, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Rumero Ziebell appeals the denial of his petition for post-conviction relief. We affirm in part, reverse in part, and remand.

Issues

Ziebell raises three issues, which we restate as:

I. whether the prosecutor committed misconduct;

II. whether he received ineffective assistance of trial counsel; and

III. whether he received ineffective assistance of appellate counsel.

Facts

On direct appeal, we described the relevant facts as follows:

> On March 19, 2001, the State charged Ziebell with three counts of dealing in methamphetamine and one count of dealing in marijuana. Ziebell thought that a "snitch" named Mackey was involved in the charges. Transcript at 116. In fact, Mackey was not the confidential informant. However, in late May of 2001, Ziebell told [Allan] Gross and Dean Everett that he wanted to kill Mackey and offered Gross or Everett $1500 to do so. Everett agreed to kill Mackey.
>
> On May 27, 2001, Everett and Ronald Mackey were driving in Mackey's van. The evidence at trial demonstrated that Ziebell, Everett, and Gross actually intended to kill Dallas Mackey, Ronald's brother, and mistook Ronald for Dallas. Ziebell and Gross followed the van. After stopping, Mackey was removed from the van and severely beaten. Mackey was then put back into the van, and Everett drove him to Kentucky. Everett then shot Mackey in the head with Ziebell's shotgun. Ziebell and Gross drove Everett back to Indiana. Ziebell admitted that he participated in Mackey's murder.

Ziebell v. State, 788 N.E.2d 902, 906 (Ind. Ct. App. 2003).

Initially, Ziebell was represented by Verdelski Miller, who also represented Ziebell on the drug-related charges. After the trial on the drug-related charges and three weeks before the murder trial, Miller withdrew, and John Clouse was appointed to represent Ziebell. Clouse and his associate, Ivan Arnaez, prepared for trial. On the morning of trial, after Ziebell moved to represent himself, Clouse withdrew without objection, and Arnaez represented Ziebell at trial.

In 2002, Ziebell was convicted of murder, Class A felony conspiracy to commit murder, Class B felony criminal confinement, and Class C felony battery and was found to be an habitual offender. The trial court sentenced Ziebell to ninety-five years, which included the habitual offender enhancement, on the murder conviction, fifty years on the conspiracy conviction, twenty years on the confinement conviction, and eight years on the battery conviction. The trial court ordered the murder and conspiracy sentences to be served concurrently and the remaining sentences to be served consecutively for a total sentence of 123 years. The trial court also ordered this sentence to be served consecutive to a sentence imposed in another case.

On direct appeal, Ziebell was represented by Clouse and Arnaez, who challenged the admission of photographs of the crime scene and injuries to the victim, the admission of evidence relating to his prior drug dealing, the denial of his motion for mistrial, the constitutionality of the habitual offender statute, the trial court's decision to require him to be present during the habitual offender phase of the trial, the trial court's decision to let Miller testify to his identity during the habitual offender phase of the trial, and whether the trial court committed fundamental error by commenting on his failure to testify.

Ziebell's convictions were affirmed. See Ziebell, 788 N.E.2d at 915. However, one of the judges on the panel dissented in part, concluding that double jeopardy barred Ziebell's convictions for murder and conspiracy to commit murder. Ziebell, 788 N.E.2d at 915-16 (Sullivan, J., concurring in part and dissenting in part).

In 2003, Ziebell filed a petition for post-conviction relief. The petition was amended several times, and hearings were held on the petition in 2007 and throughout 2009 and 2010, during which Ziebell was initially represented by counsel and eventually appeared pro se with standby counsel. On December 1, 2010, the post-conviction court denied the petition. Ziebell now appeals pro se.

Analysis

"The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence." Kubsch v. State, 934 N.E.2d 1138, 1144 (Ind. 2010). Because a petitioner appealing the denial of post-conviction relief is appealing from a negative judgment, to prevail on appeal, the 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. Further, although we do not defer to a post-conviction court's legal conclusions, the 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.

I. Prosecutorial Misconduct

Ziebell argues that the prosecutor committed misconduct by withholding evidence and misleading the jury to believe that Ronald was thought to be the informant and was

the intended victim. Ziebell contends that he believed Dallas was the informant and that he knew Dallas had committed suicide before Ronald was murdered. In support of this contention, Ziebell points out that he twice rejected plea offers in the drug case after Dallas's death and before Ronald's murder. Ziebell asserts that he rejected the plea offers because he believed Dallas could no longer testify against him. Ziebell also argues that he would not initiate a plan to kill Dallas knowing Dallas was already dead.

According to Ziebell, police officers involved in the case colluded with the prosecutor "to fabricate a theory" and that witnesses "had to be instructed how to testify as there was no evidence to support the State's theory that Ron Mackey was the intended victim." Appellant's Br. pp. 11, 12. Ziebell also claims that the prosecutor withheld, apparently from the jury, exculpatory evidence. Ziebell seems to be referring to statements in the probable cause affidavit, the State's theories in the drug trial and in Everett's murder trial, testimony by Miller regarding why Ziebell rejected the plea offers in the drug case, and a purported plea offer made to a witness in the murder case. Ziebell asserts, "Without access to the State's evidence prior to trial, the jury was forced to conclude that Ron Mackey was the intended victim as the fact Dallas Mackey's association with the murder was completely concealed from the jury." Id. at 12.

It is well-settled that post-conviction proceedings provide defendants with the opportunity to raise issues that either were not available on direct appeal or were not known at the time of the original trial. State v. Hernandez, 910 N.E.2d 213, 216 (Ind. 2009). Claims that are available on direct appeal but not presented are not available for post-conviction review. Id.

These allegations of prosecutorial misconduct relate to Ziebell's own theory of the case based on his knowledge of Dallas's death. Although this claim was available, it was not asserted on direct appeal. Thus, Ziebell is foreclosed from raising this claim in a post-conviction proceeding. See id.

Even if the allegation of prosecutorial misconduct is not waived, Ziebell has not established prosecutorial misconduct. On this issue, the post-conviction court found that the prosecutor, "did not withhold evidence, did not mislead the jury, did not conduct himself in an unethical way, and did not commit prosecutorial misconduct at the Petitioner's trial." PCR Order p. 5. The court concluded:

> While noting the possibility of an occasional inaccurate or vague reference concerning the intended victim, on the whole the Court finds no evidence that [the prosecutor] had any plan to conceal evidence and convolute the facts such that the jury would convict a man known by [the prosecutor] to be innocent. The evidence establishes the Petitioner's complicity in the victim's murder, why he was killed is not determinative.

Id. at 16.

On appeal, Ziebell provides no standard for reviewing this allegation of prosecutorial misconduct and no analysis of his claim under that standard. See Stephenson v. State, 742 N.E.2d 463, 482 (Ind. 2001) ("In reviewing a claim of prosecutorial misconduct, we first determine whether the prosecutor engaged in misconduct, and then determine whether that misconduct, under all of the circumstances, placed the defendant in a position of grave peril to which the defendant should not have been subjected."), cert. denied, 534 U.S. 1105, 122 S. Ct. 905. Moreover, Ziebell does

not address the post-conviction court's findings and conclusions or show that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. Without such argument or analysis, Ziebell has not established that the post-conviction court's judgment is clearly erroneous.

II. Ineffective Assistance of Trial Counsel

Ziebell also argues that he received ineffective assistance of trial counsel. "To establish a post-conviction claim alleging the violation of the Sixth Amendment right to effective assistance of counsel, a defendant must establish before the post-conviction court the two components set forth in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984)." Kubsch, 934 N.E.2d at 1147. First, a defendant must show that counsel's performance was deficient by establishing 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. (quoting Strickland, 466 U.S. at 687, 104 S. Ct. at 2064). A defendant must also show that the deficient performance prejudiced the defense by establishing there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. "Further, counsel's performance is presumed effective, and a defendant must offer strong and convincing evidence to overcome this presumption." Id.

A. Inconsistent Theories

Much of Ziebell's brief is devoted to showing that Arnaez was ineffective for not adequately presenting Ziebell's theory of the case. According to Ziebell, he would not

have conspired to and killed Dallas, who he believed was the informant, because he knew Dallas had committed suicide before Ronald was killed. In support of this argument, Ziebell contends that he rejected plea offers in the drug case after Dallas's death and before Ronald's death because he believed that Dallas was dead and could no longer testify against him.

Based on this theory, Ziebell claims that Arnaez improperly failed to call Miller to testify regarding Ziebell's decision to reject the plea offers in the drug case, failed to object to comments by the prosecutor in the opening statement indicating that Ziebell believed Ronald was the informant, failed to object to the State's inconsistent and contradictory theories between Ziebell's murder trial, his drug trial, and Everett's murder trial, failed to prepare and present a defense based on this theory, failed to object to testimony of police officers indicating that Ziebell believed Ronald was the informant, and failed to object to the State's alleged misrepresentation of factual and material evidence to the jury, which he describes as prosecutorial misconduct and a "Brady violation." Appellant's Br. p. 35.

These arguments are based on the assumption that Arnaez was aware that Ziebell knew of Dallas's death before Ronald's death occurred. Arnaez repeatedly testified at the post-conviction relief hearing that he did not remember Ziebell telling him that Ziebell knew Dallas was dead before Ronald was killed. Even if Arnaez did know that Ziebell was aware of Dallas's death prior to Ronald's, Arnaez testified at the hearing that his strategy was not to focus on mistaken identity of the victim but to establish that the State

did not prove its case by poking holes in the State's case. Regarding Arnaez's strategy, the post-conviction court found:

> Attorney Arnaez's strategy focused on discrediting testimony by witnesses in order to show that the State could not prove beyond a reasonable doubt that Petitioner committed the offenses charged. Attorney Arnaez believed this strategy presented a more effective defense than Petitioner's theory that he did not mistake Ron Mackey for Dallas Mackey (the confidential drug informant) and, therefore, Petitioner would not have committed the murder of Ron Mackey. He followed this strategy in part because the State did not have to prove a motive for the murder. Thus, Petitioner's defense that he had no motive to murder Ron Mackey would not have succeeded. Attorney Arnaez testified that he had believed the defense was successful in that he poked holes in all the prosecution witness testimony and successfully tied it all together in closing. He was surprised when the jury convicted Petitioner because he felt there was reasonable doubt.

PCR Order p. 3.

Because trial counsel is afforded considerable discretion in choosing strategy and tactics, a strong presumption arises that counsel rendered adequate assistance. Reed v. State, 866 N.E.2d 767, 769 (Ind. 2007). Given the facts of this case, this was a reasonable strategy where, at most, Ziebell's theory of the case would have shown a lack motive, and the State was not required to prove motive. See Bunch v. State, 697 N.E.2d 1255, 1257 (Ind. 1998) (concluding that instruction was not erroneous because State was not required to prove a motive for murder or arson).

Further, these arguments are not framed in relation to our standard of review of the denial of a post-conviction relief petition and are devoid of an analysis of the post-conviction court's findings and conclusions. In light of the standard of review, Ziebell

has not established that the evidence leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court.

B. Failure to Investigate

Ziebell makes several arguments regarding Arnaez's investigation of the case. It is undisputed that effective representation requires adequate pretrial investigation and preparation. Badelle v. State, 754 N.E.2d 510, 538 (Ind. Ct. App. 2001), trans. denied. However, it is well-settled that we should resist judging an attorney's performance with the benefit of hindsight. Id. As such, "When deciding a claim of ineffective assistance of counsel for failure to investigate, we apply a great deal of deference to counsel's judgments." Boesch v. State, 778 N.E.2d 1276, 1283 (Ind. 2002).

1. Alibi Defense

Ziebell argues that Arnaez was ineffective for failing to timely file an alibi defense and for failing to investigate the alleged alibi defense. In support of this argument, Ziebell makes factual assertions regarding proposed witnesses and events that were not supported by any evidence other than his own self-serving assertions at the post-conviction relief hearing. Moreover, Arnaez testified that, when he and Clouse were appointed to the represent Ziebell three weeks before trial, Clouse did not move for a continuance to pursue an alibi defense because Ziebell indicated he wanted to proceed with trial. Arnaez also testified that he contacted the people Ziebell told him to contact as part of his investigation of the case but that he could not remember the conversations with those people.

The post-conviction court concluded, "Attorney Arnaez was not ineffective for failing to present an alibi defense when no credible witness was available to substantiate one. In fact, Petitioner was also unable to secure the appearance of the alleged alibi witness (purportedly Tim Wilson) at the PCR hearing so this Court is unable to even make a determination that an alibi defense would have been available." PCR Order p. 13.

In the absence of any evidence supporting this claim, Ziebell has not established that Arnaez's decision not to pursue an alibi defense fell below an objective standard of reasonableness or that he was prejudiced by that decision.

2. Defense Witnesses

Ziebell also argues that trial counsel did not interview any defense witnesses, move for the appointment of an investigator to locate those witnesses, or present his claim of actual innocence to the jury. Ziebell claims that he had no motive for killing Ronald because he believed Dallas was to be the informant and he had known the Mackeys for more than ten years and would not have mistaken Ronald for Dallas.

On appeal, other than Miller's testimony, Ziebell does not identify any other overlooked defense witnesses. Miller's testimony at the post-conviction relief hearing indicates that Ziebell believed Dallas was the informant and that Ziebell turned down a plea offer because of Dallas's death. As we have already discussed, Arnaez's strategy was to poke holes in the State's case, not to focus on whether Dallas or Ronald was an informant in the drug case. Further, it could have been a strategic decision by Arnaez not to call Miller because doing so would have drawn attention to the drug-related charges, evidence of which Arnaez sought to keep out during the trial.

Regarding this allegation, the post-conviction court found that Clouse and "Attorney Arnaez reviewed the State's case information and met with Petitioner a number of times. Attorney Arnaez also interviewed all witnesses and received and reviewed the State's complete investigation file in an attempt to develop the strongest defense for Petitioner." Id. at 2. The post-conviction court concluded "no evidence in the record or evidence presented at the PCR hearing that counsel omitted any critical steps in the investigation or trial preparation stages, regardless of time constraints." Id. at 13. In light of these findings, Ziebell has not shown that Arnaez's representation fell below an objective standard of reasonableness.

3. Allan Gross's and Everett's Statements

Ziebell also argues that Arnaez was ineffective for failing to communicate with him during the pretrial investigation, for failing to provide him with a copy of Allan's and Everett's statements to police, for failing to introduce these statements into evidence, and for failing to cross-examine these witnesses regarding their statements.[1] Ziebell claims that these statements "were relevant and material evidence that not only exonerated Ziebell but were also directly contradictory to the State's theory of the prosecution." Appellant's Br. p. 26.

Ziebell did not offer any statement by Allan into evidence at the post-conviction relief hearing and the prosecutor testified at the hearing that he did not recall Allan

[1] Ziebell's allegations that trial counsel failed to make a motion for discovery, that the State failed to produce discovery evidence prior to trial, and that trial counsel failed to timely interview him are bald assertions not supported by citations to the appendix or parts of the record and are waived. See Ind. Appellate Rule 46(A)(8)(a).

making any type of statement in the case. Without evidence regarding the content of Allan's alleged statement, we cannot address this claim further.

As for Everett's statement, it appears that Arnaez was aware of Everett's statement to police and it was made part of the record at the post-conviction relief hearing. Everett's statement included a confession to the murder and contained extensive details regarding Ziebell's initiation of and involvement in the crime. Although Everett did not clearly identify which Mackey was the intended victim and made repeated references to the victim as "the guy," PCR Ex. 28, the decision not to admit Everett's statement, which clearly implicated Ziebell in the commission of the crime, or to call Everett and Allan as witnesses was a reasonable trial strategy, which we will not second guess.

Further, even if Ziebell did request a copy of Everett's statement from one of the three attorneys of who represented him during the trial preparation stage of the proceedings, he has not established that he did not receive a copy of the statement or that he was prejudiced by trial counsel's failure to provide him with a copy of that statement. This claim fails.

C. Failure to Object

Ziebell makes several arguments based on Arnaez's failure to object during trial. "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." Kubsch, 934 N.E.2d at 1150.

1. Opening Statement

Ziebell claims that Arnaez failed to object to the prosecutor's opening statement, "which introduced facts not in evidence and mislead [sic] the jury into believing that Ron Mackey was the informant and intended victim for the instant murder case." Appellant's Br. p. 22. Ziebell also references a portion of the statement in which the prosecutor describes Ziebell as "the evil individual and calculating killer of a totally innocent individual . . . ." Trial Tr. p. 29. He contends Arnaez should have objected to these misleading and prejudicial statements.

Even if we were to construe the prosecutor's opening statements in the manner in which Ziebell urges, he has not established that an objection would have been sustained. First, "It is well established that statements made by the attorneys—in opening statements, closing arguments or otherwise—are not evidence." Bradford v. State, 675 N.E.2d 296, 301 (Ind. 1996). Moreover, the very nature of the State's obligation in a criminal prosecution is to present a case that adversely influences the jury against the defendant. See, e.g, Richmond v. State, 685 N.E.2d 54, 55-56 (Ind. 1997) (observing that "all relevant evidence is 'inherently prejudicial' in a criminal prosecution").

Further, as the post-conviction court correctly observed:

> It is a reasonable strategic choice for defense counsel not to object to a comment during opening or closing argument in order to avoid drawing undue attention to the comment. Lambert v. State, 743 N.E.2d 719, 737 (Ind. 2001), cert. denied. Plus, the Court finds that nothing excessively inflammatory in the State's opening statement. Virtually all arguments have some hyperbole and overstatement, fleeting remarks of this very nature are very common and not so prejudicial as to deny the Petitioner a fair trial.

PCR Order p. 13. This claim fails.

2. Phyllis Gross's Testimony and Statements

At trial Phyllis Gross, Allan's wife, testified that she had overheard a conversation between Ziebell, Everett, and Allan in which they agreed to beat someone up so that he could not testify against Ziebell in a drug case and that on the night of the murder the three men picked her up and drove to an isolated area where she observed a blood spot and a shoe. She also testified that Everett said they beat a guy up, and Everett and Ziebell were going to pour bleach on the spot and get rid of the shoe. Phyllis testified that Ziebell offered Everett and Allan $1500 for their assistance. During the trial, the State used Phyllis's testimony from a prior proceeding to show inconsistencies in her trial testimony, and two statements she had given to police regarding the incident were admitted into evidence. Arnaez objected to Phyllis's testimony on hearsay and various other grounds and objected to the admission of her statements to police on hearsay grounds.

Ziebell argues that the admission of Phyllis's statements to police was improper. Ziebell acknowledges that Arnaez objected to the statements on hearsay grounds and that out-of-court statements of coconspirators made during the pendency of the conspiracy are admissible. See Ind. Evidence Rule 801(d)(2)(E) (explaining that a statement is not hearsay if it is offered against a party and is a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy). He argues, however, that Arnaez should have objected to the admission of the statements on Sixth Amendment grounds because the conspiracy had ended and that Arnaez should have asked the trial court to

redact the references to statements by Allan and Everett.[2] Ziebell also argues that the State improperly used Phyllis's testimony from another proceeding as substantive evidence instead of as impeachment evidence and that Arnaez should have objected to the admission of this prior testimony and asked for a limiting instruction. Finally, Ziebell asserts that Phyllis's trial testimony regarding what she had overheard was inadmissible post-conspiracy hearsay and claims that Arnaez failed to properly object.

In its order, the post-conviction court concluded:

> allowing hearsay testimony within Phyllis Gross's prior statements and testimony was, at most, an isolated error and quite possible a strategic choice to enter associated evidence in support of the defense's theories. This is especially true considering Attorney Arnaez's cross examination of Phyllis Gross which raised issues regarding inconsistent statements and her credibility. Regardless, it appears that Attorney Arnaez did object to the hearsay, and his objection was not sustained by the Court.

Id. at 14.

In light of Arnaez's unsuccessful hearsay objections, among others, and his strategy to discredit Phyllis by pointing out inconsistencies to the jury, we cannot not say that Arnaez's failure to object on the bases Ziebell now proposes fell below an objective standard of reasonableness. Moreover, Ziebell provides no analysis regarding the post-conviction court's order, let alone establishing that the evidence as a whole leads

[2] It is unclear why Ziebell considers these statements to be inadmissible as they relate to Phyllis's testimony, while in another section of his appellate brief he argues that Arnaez was ineffective for not admitting Allan's alleged statement and Everett's statement to police regarding the commission of the crime.

unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. This argument is unavailing.

3. Letters

Ziebell argues that Arnaez was ineffective for not objecting to the admissibility of letters Ziebell purportedly wrote from jail and for not consulting a handwriting expert. Ziebell contends he informed Arnaez that he did not write the letters and that there is no substantial and reliable evidence to show that he had written them. The letters appear to be written to Phyllis and describe how certain witnesses might testify on behalf of Allan and Ziebell and against Everett. At trial, a police officer testified regarding the letters. Over the course of thirty pages of the transcript, this officer explained his training in handwriting analysis and how he analyzed the letters to conclude they were written by Ziebell. Arnaez objected to the admission of the letters on relevancy, improper impeachment, and foundation grounds, and those objections were overruled. Also at trial, Ziebell's ex-wife testified that she recognized the handwriting in the letters as Ziebell's.

In its order, the post-conviction court rejected this claim of ineffective assistance of counsel, stating "counsel was not deficient in failing to present a handwriting expert to examine the purported letters of Petitioner because the letters would still have been admitted. Arguments that the letters were not written by Petitioner went to weight rather than admissibility." Id. at 14. Ziebell cites no authority contradicting the post-conviction court's conclusion that the letters were admissible. Without more, Ziebell has not established that he was prejudiced by Arnaez's representation on this issue.

4. Foundation for Prior Bad Acts

Ziebell contends that Arnaez failed to object to evidence relating to the prior drug charges on the proper basis. According to Ziebell, Arnaez "failed to object to the admission of alleged drug charges as lacking any foundation, had counsel done so then the Court and the jury would have recognized that the prosecutor was deliberately concealing the fact that Dallas Mackey was believed to be the confidential informant and the intended victim." Appellant's Br. p. 33.

Although Ziebell frames this argument in terms of a foundation objection, its substance relates to Indiana Evidence Rule 404(b). Arnaez objected on Rule 404(b) grounds at trial, and the objection was overruled. Further, the issue of the admissibility of this evidence under Rule 404(b) was raised on direct appeal, and we determined that this evidence was admissible and that the related motion for mistrial was properly denied. See Ziebell v. State, 788 N.E.2d 902, 909 (Ind. Ct. App. 2002). Ziebell has not established that a foundation objection or a Rule 404(b) objection would have been sustained, and this claim of ineffective assistance of counsel fails.

5. Ziebell's Statement to Police

Ziebell argues that Arnaez should have moved to suppress and objected to the admission of his confession. At trial, one of the police officers investigating the case testified that when he questioned Ziebell about the crime after Mirandizing him, Ziebell confessed. According to the police officer, Ziebell's statement was not recorded because Ziebell declined to give a taped statement. Ziebell contends there was no reliable or substantial evidence demonstrating that he confessed and makes a general reference to

police trickery. Ziebell, however, fails to establish a legal basis for a motion to suppress or objection and provides no factual basis to show that such a motion or objection would have been successful.

When questioned by Ziebell about the confession at the post-conviction relief hearing, Arnaez stated, "I read the record. I heard the testimony. I didn't believe it was an illegal confession." PCR Tr. p. 201. The post-conviction court concluded, Ziebell "has not shown that the trial court would have suppressed his statements for any reason had trial counsel moved to suppress them. Counsel was not deficient, and thus this ineffective assistance of counsel claim fails." PCR Order p. 14. Without more, Ziebell has not established that Arnaez was ineffective for not moving to suppress or objecting to his confession.

6. Chumley's Testimony

At trial, Edward Chumley, a witness for the State with criminal charges pending, testified against Ziebell. Chumley testified that Ziebell had talked with him about getting rid of the snitch in his drug case. Chumley referred to the snitch as "Mr. Mackey." Trial Tr. p. 116. At the post-conviction relief hearing, Chumley testified that he lied at trial.

Ziebell asserts that the prosecutor failed to disclose that he had offered Chumley a plea agreement in exchange for Chumley's false testimony and failed to disclose that Chumley had allegedly been arrested for burglarizing Ziebell's home. Ziebell claims that Arnaez failed to investigate the circumstances of Chumley's testimony and failed to challenge the alleged prosecutorial misconduct. Ziebell also contends that Arnaez should

have informed the jury that Chumley was facing, as Ziebell calculates it, up to 100 years in prison at the time he testified against Ziebell.

The post-conviction court unequivocally rejected Chumley's testimony as a basis for post-conviction relief, when it found:

> The Court gives this testimony no weight as the demeanor of the witness was so poor that no reasonable person would credit his testimony. This Court has never seen a witness pander to a party the way this witness did. From his facial expressions, body language, tone of voice and general deportment while on the witness stand it was obvious to anyone who saw this testimony that Chumley was on the stand to say whatever the Petitioner wanted him to say.

PCR Order p. 6.

Regardless of whether we review this claim as one of prosecutorial misconduct or ineffective assistance of counsel, it is clear that Chumley's testimony at the post-conviction relief hearing was not credible and did not provide a factual basis for either claim. See Hall v. State, 849 N.E.2d 466, 468-69 (Ind. 2006) ("The post-conviction court is the sole judge of the evidence and the credibility of the witnesses."). Further, our review of the records shows that at trial the State questioned Chumley regarding his criminal history and Arnaez questioned Chumley regarding whether he believed his testimony would help him in his other cases. Ziebell has not established that Chumley's post-conviction relief hearing testimony provided a basis for either claim.

7. Double Jeopardy

Ziebell claims that his van was seized and sold by the State prior to trial. Ziebell claims that Arnaez failed to thoroughly investigate and object to the State's actions. He

contends that had Arnaez raised this double jeopardy claim, "the Court would have been obligated to dismiss charges as Ziebell had already been punished before trial when the State deliberately confiscated Ziebell's van which it subsequently sold." Appellant's Br. p. 39.

Although Ziebell provides citation to legal authority regarding the propriety of a forfeiture, he provides no legal authority to support his argument that a forfeiture precludes a subsequent criminal conviction. Without such, he has not established that any such objection would have sustained and that Arnaez's representation fell below an objective standard of reasonableness. This claim is unsuccessful.

III. Ineffective Assistance of Appellate Counsel

The standard for gauging appellate counsel's performance is the same as that for trial counsel; therefore, to prevail on an ineffective assistance of counsel claim, Ziebell must show both deficient performance and resulting prejudice. See Pruitt v. State, 903 N.E.2d 899, 928 (Ind. 2009). "Ineffective assistance of appellate counsel claims fall into three categories: (1) denial of access to an appeal; (2) waiver of issues; and (3) failure to present issues well." Carter v. State, 929 N.E.2d 1276, 1278 (Ind. 2010). Ziebell's claims largely involve allegations of waiver.

To prevail on a claim about appellate counsel's failure to raise an issue, the first prong of the Strickland test requires Ziebell to show from the information available in the trial record or otherwise known to appellate counsel that appellate counsel failed to present a significant and obvious issue and that this failure cannot be explained by any reasonable strategy. See id. Our supreme court has approved the two-part test used by

the Seventh Circuit to evaluate these claims: (1) whether the unraised issues are significant and obvious from the face of the record and (2) whether the unraised issues are "clearly stronger" than the raised issues. Id.

As an initial matter, at the conclusion of many of his arguments relating to trial counsel, Ziebell states only that appellate counsel did not raise the issue on appeal. These bare assertions, without legal analysis, result in the waiver of these issues. See Ind. Appellate Rule 46(A)(8)(a) ("The argument must contain the contentions of the appellant on the issues presented, supported by cogent reasoning. Each contention must be supported by citations to the authorities, statutes, and the Appendix or parts of the Record on Appeal relied on . . . .").

Some of Ziebell's other arguments include slightly more developed allegations, including that appellate counsel should have challenged the admission of Phyllis's unredacted statements, the admission of the letters, the inconsistent theories, and the foundation of the prior bad acts evidence on appeal. With the exception of one irrelevant citation, none of these conclusory allegations are supported legal analysis sufficient to establish ineffective assistance of appellate counsel. Therefore, we address only the ineffective assistance of appellate counsel claims that Ziebell raises separately from the ineffective assistance of trial counsel claims.

A. Self-Representation

Ziebell argues that appellate counsel should have raised the issue of the trial court's denial of his motion to proceed pro se filed on the morning of trial. Ziebell contends that had this court been apprised of the fact that counsel had been assigned less

than three weeks before trial was scheduled to begin, we would agree that his motion was timely filed.

To the contrary, we have observed, "the right to self-representation must be asserted within a reasonable time prior to the first day of trial." Campbell v. State, 732 N.E.2d 197, 204 (Ind. Ct. App. 2000). As our supreme court has observed, "morning-of-trial requests are per se untimely." Moore v. State, 557 N.E.2d 665, 669 (Ind. 1990). In light of this precedent, it is unlikely that this argument would have been successful on appeal. Ziebell has not shown that appellate counsel were ineffective for not raising this issue on appeal.

B. Conflict Between Arnaez and Ziebell

Ziebell argues that Arnaez was ineffective as appellate counsel for failing to raise the issue of the alleged conflict between him and Ziebell after Ziebell expressed his disapproval of Arnaez's trial strategy at the sentencing hearing. Ziebell also summarily asserts that Arnaez failed to assert any ineffective assistance of trial counsel claims on direct appeal. Ziebell, however, has not established that either of these claims would have been successful on direct appeal.

"To establish a conflict of interest amounting to a Sixth Amendment violation, Appellant must show that counsel actively represented conflicting interests that adversely affected his performance. The mere possibility of a conflict of interest is insufficient to justify reversal of a conviction." Coleman v. State, 694 N.E.2d 269, 273 (Ind. 1998). Our supreme court recently addressed a claim similar to Ziebell's and observed that, where counsel's failure to pursue potential witnesses was not due to any division of

loyalties but instead to counsel's neglect of the case, the defendant failed to allege even a potential conflict of interest. Johnson v. State, 948 N.E.2d 331, 334 (Ind. 2011). The court went on to explain that, even assuming this ordinary case of attorney neglect constituted a conflict of interest, "the only cases in which the U.S. Supreme Court has applied these 'conflict of interest' rules are those where counsel is conflicted because he or she is actively representing multiple parties with conflicting interests ('multiple representation')." Id. at 334-35. The court held that, because Johnson did not allege that trial counsel's loyalties were divided between Johnson and another client, he failed to establish that counsel was burdened with a conflict of interest sufficient to trigger the Sixth Amendment duty of inquiry. Id. at 335.

At most, Ziebell has shown he was dissatisfied with Arnaez's trial strategy. He has not established that an actual conflict existed and, therefore, has not shown that such a claim would have been successful on direct appeal.

As for the allegations of Arnaez's failure to raise his own ineffectiveness on direct appeal, any such claim would have been unsuccessful. "Arguing one's own ineffectiveness is not permissible under the Rules of Professional Conduct." Caruthers v. State, 926 N.E.2d 1016, 1023 (Ind. 2010) (citing Ind. Professional Conduct Rule 1.7(a); Etienne v. State, 716 N.E.2d 457, 463 (Ind. 1999)). "Because trial counsel are poorly positioned to critique their own performance or to proclaim it deficient, a defendant should not be foreclosed from ever having a fresh set of eyes consider and argue the effectiveness of his or her trial counsel." Etienne, 716 N.E.2d at 463. Thus, although there may be circumstances in which an ineffectiveness claim is sufficiently clear that

immediate review is appropriate, under most circumstances we will not entertain a claim of ineffectiveness of counsel presented on appeal by the same attorney who tried the case. Id. Following this reasoning, Ziebell has not established that an ineffective assistance counsel claim by Arnaez relating to his own performance at trial would have been successful on direct appeal.

C. Jurisdiction

Ziebell claims that appellate counsel failed to raise a jurisdictional issue where Ronald died in Kentucky, and "[t]here was no substantial evidence that any criminal actions occurred in Indiana." Appellant's Br. p. 47. Because Ziebell does not support this argument with cogent legal analysis or citation to authority, it is waived. App. R. 46(A)(8)(a).

D. Petition to Transfer

Ziebell contends that appellate counsel were ineffective for not filing a petition to transfer based on Judge Sullivan's vote concurring in part and dissenting in part. Ziebell contends that Judge Sullivan correctly concluded that double jeopardy principles prohibited convictions for both murder and conspiracy to commit murder and that, had a transfer petition been filed, our supreme court would have granted transfer and reversed the conspiracy conviction.

Regarding the murder conviction, Ziebell was charged with knowingly killing Ronald by shooting him. The conspiracy charge alleged that the men agreed to commit murder and performed one or more over acts in furtherance of the conspiracy: (1) Everett lured Ronald from home and drove him to another location where they repeatedly struck

him with a weapon; (2) one or more of them placed Ronald's body in a van and drove him to Kentucky; or (3) one or more of them shot Ronald in the head with a shotgun. The jury was instructed accordingly.

On direct appeal, the majority relied on our supreme court's opinion in Long v. State, 743 N.E.2d 253 (Ind. 2001), in which the court upheld convictions for murder and conspiracy to commit murder. The Long court observed:

> To establish that two challenged offenses constitute the same offense under the actual evidence test and thus violate the Indiana Double Jeopardy Clause, the defendant must demonstrate a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense.

Long, 743 N.E.2d at 260. The Long court held:

> In view of the extensive evidence of the protracted criminal episode and the court's instructions which clearly authorized any one of several bases for finding the overt act element, we find no sufficiently substantial likelihood that the jury relied on the evidence of the abduction by removal to establish the overt act element of the conspiracy charge. The possibility is remote and speculative and therefore not reasonable. Because there is no reasonable possibility that the jury used the same evidentiary facts to establish the essential elements of both criminal confinement and conspiracy to commit murder, we reject Long's claim that his convictions on these counts violated the Indiana Double Jeopardy Clause.

Id. at 261.

On Ziebell's direct appeal, the majority concluded:

> Strong evidence of each overt act was presented at trial. As in Long, we find no sufficiently substantial likelihood that the jury relied on the evidence of the shooting to establish the overt act element of the conspiracy charge rather than one of

> the other two overt acts alleged. Consequently, as in Long, no double jeopardy violation occurred as a result of Ziebell's convictions for both murder and conspiracy to commit murder.

Ziebell, 788 N.E.2d at 915. Judge Sullivan disagreed, asserting that "the shooting of the victim was the heart and soul of the murder conviction and there was not only a reasonable possibility but a very real likelihood that it was the overt act focused upon by the jury with respect to the conspiracy charge." Id. at 915-16 (Sullivan, J., concurring in part and dissenting in part).

In light of Long and the majority's analysis of the evidence and manner in which the jury was instructed, we are not convinced that reversal on transfer was inevitable. Without more, Ziebell has not established that appellate counsel were ineffective for declining to seek transfer.

E. Double Jeopardy

Ziebell claims that appellate counsel were ineffective for not raising double jeopardy arguments regarding the confinement and battery convictions. Ziebell contends, "The State clearly established territorial jurisdiction in this case using the same facts that underlay the convictions for criminal confinement in Count III and battery in Count IV." Appellant's Br. p. 49. He goes on to assert that the battery and criminal confinement were factually included and comprised an element of murder and that the battery was factually included in the confinement.

Double jeopardy questions are factually and legally complex. Given the lack of factual and legal analysis supporting this claim, we decline to undertake the burden of

establishing arguments on Ziebell's behalf. "This court is a neutral arbiter of disputes and not an advocate for either party." State v. Peters, 921 N.E.2d 861, 867 (Ind. Ct. App. 2010). Without more, Ziebell has not established that this issue was clearly stronger than the other issues raised on appeal. This ineffective assistance of appellate counsel claim also fails.

F. Habitual Offender[3]

The habitual offender enhancement in this case was ordered to be served consecutive to the habitual offender enhancement imposed on the drug-related convictions. Ziebell argues that appellate counsel were ineffective for not challenging the imposition of consecutive habitual offender enhancements. Specifically, he claims that the trial court lacked statutory authority to impose consecutive habitual offender enhancements,[4] and the State agrees. See Breaston v. State, 907 N.E.2d 992, 995 (Ind. 2009) ("The statute does not expressly authorize multiple habitual offender enhancements to be imposed consecutively."). As in Breaston, we reverse the denial of post-conviction relief on this issue and remand for the post-conviction court to order the habitual offender enhancement to be served concurrent with the enhancement in the drug case.

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[3] Ziebell argues that trial counsel was ineffective for not raising this issue at sentencing. Because of our resolution of the issue, we need not analyze that claim.

[4] Ziebell does not argue that the consecutive habitual offender enhancements were improper because the murder and drug cases could have been consolidated. Cf. Farris v. State, 907 N.E.2d 985, 988 (finding ineffective assistance of counsel where trial court ordered consecutive habitual offender enhancements for charges that could have been consolidated for trial and remanding for the post-conviction court to vacate the second habitual offender enhancement). Because Ziebell only argues that the imposition of consecutive habitual offender enhancements is not statutorily authorized, we decline to vacate the subsequent habitual offender enhancement.

Conclusion

Ziebell's allegation of prosecutorial misconduct is waived because it was not raised on direct appeal. Ziebell's claims of ineffective assistance of trial counsel are unsuccessful. All but one of Ziebell's claims of ineffective assistance of appellate counsel claims also fail. As for the remaining claim, we reverse the denial of post-conviction relief on issue of consecutive habitual offender enhancements and remand for the post-conviction court to order the habitual offender enhancement in the murder case to be served concurrent with the habitual offender enhancement in the drug case. We affirm in part, reverse in part, and remand.

Affirmed in part, reversed in part, and remanded.

ROBB, C.J., and BRADFORD, J., concur.