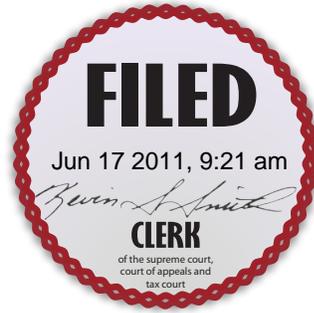


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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VIRGIL E. GRIFFIN, )  
 )  
Appellant-Petitioner, )  
 )  
vs. ) No. 46A03-1003-PC-106  
 )  
STATE OF INDIANA, )  
 )  
Appellee-Respondent. )

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APPEAL FROM THE LAPORTE SUPERIOR COURT  
The Honorable Kathleen B. Lang, Judge  
Cause No. 46D01-0111-CF-126

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**June 17, 2011**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**MAY, Judge**

Virgil Griffin appeals the denial of post-conviction relief. He presents the following issues for our review:

1. Whether his trial counsel was ineffective for failing to investigate certain exculpatory witnesses;
2. Whether his trial counsel was ineffective for failing to make an Ind. Evidence Rule 404(B) objection to testimony regarding Griffin's role in an earlier unrelated shooting;
3. Whether his trial counsel was ineffective for failing to investigate alleged juror misconduct; and
4. Whether his appellate counsel was ineffective for failing to compile a complete Record of Appeal including the opening and closing statements of counsel.

We affirm.

### **FACTS AND PROCEDURAL HISTORY**

Griffin was convicted of murder.<sup>1</sup> We set out the facts of his crime in his direct appeal:

On November 19, 2001, Kyra Simmons and Erika Murray were driving around Michigan City. At approximately 3:30 p.m., they saw Griffin standing on Michigan Boulevard, so they pulled over to see what he was doing. Griffin decided to get into the car with Simmons and Murray. While in the car, Griffin asked Simmons and Murray if they knew Delfanta Gross, and they responded they did. When Simmons and Murray asked why Griffin wanted to know, Griffin stated that he heard Gross had a “beef” with him or that Gross was looking for him.

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<sup>1</sup> Ind. Code § 35-42-1-1.

Simmons, Murray and Griffin drove down Michigan Boulevard and turned onto 10<sup>th</sup> Street, where they saw Gross talking to two women in another car on the opposite side of the street. When Simmons and Murray told Griffin that the man talking to the occupants of the other car was Gross, Griffin told Murray to pull over near the other car. Griffin then called Gross over to the car Griffin was in and told Gross that Griffin heard Gross was looking for him. Gross responded that he did not know who Griffin was, to which Griffin mumbled something. When Gross leaned into the car window and asked “Who?” Griffin shot Gross three or four times at close range. Gross turned and tried to run from the car, but he collapsed in the middle of the street. While Murray started to drive away, Griffin fired additional shots at Gross.

Gross died as a result of multiple gunshot wounds. Griffin was subsequently arrested and charged with murder, a felony.

*Griffin v. State*, No. 46A05-0304-CR-156, *slip op.* at 2-3 (Ind. Ct. App. September 23, 2003).

We affirmed Griffin’s conviction and sentence.

On April 18, 2007, Griffin filed a *pro se* petition for post-conviction relief. On September 5, 2008, he filed an amended *pro se* petition for post-conviction relief, and amended the petition again on December 15. On October 26 and December 3, 2009, the post-conviction court held two evidentiary hearings. On January 29, 2010, the post-conviction court entered an order, which included findings of fact and conclusions of law, denying Griffin’s petition for post-conviction relief.

## **DISCUSSION AND DECISION**

Post-conviction proceedings afford petitioners a limited opportunity to raise issues that were unavailable or unknown at trial and on direct appeal. *Davidson v. State*, 763 N.E.2d 441, 443 (Ind. 2002). As post-conviction proceedings are civil in nature, the petitioner must prove his grounds for relief by a preponderance of the evidence. *Id.* A party appealing a negative post-conviction judgment must establish the evidence is without conflict

and, as a whole, unerringly points to a conclusion contrary to that reached by the post-conviction court. *Id.* Where, as here, the post-conviction court makes findings of fact and conclusions of law in accordance with Indiana Post-Conviction Rule 1(6), we do not defer to the court’s legal conclusions, but “the 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.” *Ben-Yisrayl v. State*, 729 N.E.2d 102, 106 (Ind. 2000) (citation omitted). The post-conviction court is the sole judge of the weight of the evidence and the credibility of witnesses. *Fisher v. State*, 810 N.E.2d 674, 679 (Ind. 2004).

1. Ineffective Assistance of Trial Counsel

Griffin claims his trial counsel was ineffective for failing to investigate alleged exculpatory witnesses, for failing to make an Evid. R. 404(B) objection to testimony regarding Griffin’s involvement in an earlier crime, and for failing to investigate alleged juror misconduct. We review claims of ineffective assistance of counsel under the two-part test in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), *reh’g denied*. To prevail, a claimant must show counsel’s performance fell below an objective level of reasonableness based on prevailing professional norms, *Taylor v. State*, 882 N.E.2d 777, 781 (Ind. Ct. App. 2008), and that the deficient performance resulted in prejudice. *Id.*

“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 need not consider whether counsel’s performance fell

below the objective standard if that performance would have not changed the outcome. *Strickland*, 466 U.S. at 687.

a. Failure to Investigate Alleged Exculpatory Witnesses

When reviewing a claim of ineffective assistance of counsel for failure to investigate or prepare for trial, we give great deference to the trial counsel's judgment. *Parish v. State*, 838 N.E.2d 495, 500 (Ind. Ct. App. 2005). Counsel is effective if a reasonable, thorough investigation is made, or if reasons supported by professional judgment limit the extent of investigation. *Id.* at 500. Allegations that counsel did not adequately investigate issues or interview and present witnesses do not show ineffective assistance unless the petitioner indicates what additional information could have been garnered from investigation and demonstrates how that information would have aided the preparation and presentation of the case. *Brown v. State*, 691 N.E.2d 438, 446-47 (Ind. 1998). The petitioner must prove the outcome of the case would have been different if counsel had investigated the issues or witnesses. *Boesch v. State*, 778 N.E.2d 1276, 1284 (Ind. 2002), *reh'g denied*.

Griffin contends counsel was ineffective because he did not investigate or call as witnesses Detective Scott Matzke and Tasia Oliver, whom Griffin claims could have implicated someone else as the shooter. During the post-conviction evidentiary hearing, counsel testified presentation of testimony by those witnesses would "have been unethical," as Griffin had told counsel he killed Gross. (Tr. at 21.) Instead, counsel chose to "just go with attacking the credibility of the one witness against [Griffin]." (*Id.* at 22.) Accordingly, the post-conviction court found:

Any failure to present [the testimonies of Detective Matzke and Tasia Oliver] was not error by Petitioner's counsel. [Counsel] testified that his trial strategy was based on the Defendant's admission to him that he did commit the charged murder. As a result, Attorney Snyder was ethically prohibited from asserting defenses in direct contradiction with Petitioner's admission. Presenting a defense of mistaken identity would have been such a defense.

(App. at 17.)

Griffin argues counsel lied when he testified Griffin admitted killing Gross. We decline that invitation to judge the credibility of a witness. *See Fisher*, 810 N.E.2d at 679. As counsel based his decision not to investigate or present the two witnesses Griffin suggested on his ethical concerns as an attorney, Griffin has not demonstrated counsel was ineffective.

b. Failure to Make Evid. R. 404(B) Objection

Griffin argues counsel should have objected to Detective Chris Yagelski's testimony on the ground the testimony violated Evid. R. 404(B) by creating the "forbidden inference" that he had the "propensity to commit the charged crime" based on his past behavior. *Rogers v. State*, 897 N.E.2d 955, 961 (Ind. Ct. App. 2008), *reh'g denied, trans. denied*. We disagree.

To show ineffective assistance based on failure to make an objection, a petitioner must demonstrate the trial court would have sustained the objection. *Glotzbach v. State*, 783 N.E.2d 1221, 1224 (Ind. Ct. App. 2003). The petitioner must also establish prejudice by counsel's failure to properly object. *Timberlake v. State*, 690 N.E.2d 243, 259 (Ind. 1997), *reh'g denied*.

During direct examination by Griffin's counsel, Detective Yagelski testified about

Griffin's involvement in the earlier shooting. Counsel could not have objected to testimony he elicited, and thus Griffin's argument fails; the trial court would not have sustained any objection to that testimony.

c. Failure to Investigate Alleged Jury Misconduct

Griffin claims his trial counsel should have investigated alleged jury misconduct. Griffin's aunt testified she saw a juror speaking to a member of the victim's family, and she reported that to Griffin's counsel. Counsel testified he did not remember that exchange. Griffin's argument is an invitation for us to reweigh the evidence and judge the credibility of witnesses, which we cannot do. *Fisher*, 810 N.E.2d at 679. Nor has Griffin established the alleged juror misconduct affected the outcome of his case. Thus, Griffin has not demonstrated counsel was ineffective for failing to investigate alleged jury misconduct.

2. Ineffective Assistance of Appellate Counsel

Griffin claims his appellate counsel was ineffective because he did not obtain a complete trial record that included the opening and closing statements at trial. We review claims of ineffective assistance of appellate counsel using the same standard applicable to claims of trial counsel ineffectiveness. *Fisher*, 810 N.E.2d at 676-77. The defendant must show that appellate counsel was deficient in his performance and that the deficiency resulted in prejudice. *Id.* at 677.

Ineffective appellate assistance claims generally fall into one of three categories: (1) denial of access to an appeal; (2) waiver of issues; and (3) failure to present issues well. *Id.* We employ a two-part test to evaluate "waiver of issue" 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.*

Because counsel has considerable discretion in choosing strategy and tactics, we presume counsel’s assistance was adequate and all significant decisions were made in the exercise of reasonable professional judgment. *State v. Miller*, 771 N.E.2d 1284, 1288 (Ind. Ct. App. 2002). One of the most important strategic decisions is deciding what issues to raise on appeal. *Bieghler v. State*, 690 N.E.2d 188, 193 (Ind. 1998), *reh’g denied*.

Griffin claims the prosecutor, in opening and closing arguments, referred to an earlier incident involving Griffin and the victim. Those statements, Griffin asserts, were unfairly prejudicial and based on evidence admitted in violation of Evid. R. 404(B). Griffin’s trial counsel objected on Evid. R. 404(B) grounds to testimony about the earlier incident, but the trial court overruled his objection. Griffin’s trial counsel did not object to statements made during opening or closing arguments.

When no objection is made to a statement during opening or final arguments, the issue is waived for review on appeal. *Gasaway v. State*, 547 N.E.2d 898, 900 (Ind. Ct. App. 1989), *reh’g denied*. Because Griffin’s trial counsel did not object to the prosecutor’s statements, his appellate counsel could not present this issue. Further, we held on direct appeal that any error in admitting the testimony of the other incident was harmless because the “evidence supporting Griffin’s conviction for murder was both substantial and independent of the 404(b) evidence of the prior shooting.” *Griffin*, No. 46A05-0304-CR-156, *slip op.* at 7.

While counsel could have exercised more diligence in the preparation of the Record

on Appeal, his failure to obtain transcripts of the opening and closing statements did not affect the outcome of the case based on our decision in Griffin's direct appeal. Thus Griffin has not demonstrated appellate counsel was ineffective.

### **CONCLUSION**

Griffin has not demonstrated trial counsel was ineffective, as counsel had an ethical obligation not to present witnesses he knew would not be truthful, and counsel could not object to testimony he elicited. Nor did Griffin show how any juror misconduct would have affected the outcome of his case. Griffin has not established his appellate attorney's failure to obtain the transcripts of the opening and closing statements would have affected the outcome of his appeal. Accordingly, we affirm the denial of Griffin's petition for post-conviction relief.

Affirmed.

FRIEDLANDER, J., and MATHIAS, J., concur.