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APPELLANT PRO SE:

CRAWFORD L. ARRINGTON
New Castle, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

J.T. WHITEHEAD
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

CRAWFORD L. ARRINGTON,)

Appellant-Petitioner,)

vs.)

No. 02A03-0606-PC-267

STATE OF INDIANA,)

Appellee-Respondent.)

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Kenneth R. Scheibenberger, Judge
Cause No. 02D04-9904-CF-190

September 28, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

In this pro se appeal, Appellant, Crawford Arrington, challenges the post-conviction court's denial of his petition for post-conviction relief. Upon appeal, Arrington claims error on the following grounds: (1) his twenty-year sentence was manifestly unreasonable and not properly supported by aggravating and mitigating factors; (2) the habitual offender phase of his trial constituted fundamental error; (3) there was insufficient evidence to support a finding of serious bodily injury; (4) the trial court's jury instruction on intoxication constituted fundamental error; (5) the post-conviction court erred in denying his petition for relief on the basis of ineffective assistance of trial and appellate counsel; (6) the trial court's restitution order was in error; and (7) there was prosecutorial misconduct at trial. We affirm.

FACTS

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

On April 11, 1999, Arrington repeatedly punched his fiancée, Carolyn Thomas, in the face. As a result of the beating, Thomas suffered a broken jaw, a pooling of blood behind the left eardrum, and a bruised and swollen face. The State charged Arrington with Class C felony battery and being an habitual offender. After a jury trial held on September 2, 1999, Thomas was convicted of battery, as a Class C felony.

Arrington v. State, No. 02A03-0004-CR-150 (Ind. Ct. App., October 31, 2000). During the second phase of the trial, the jury was unable to reach a unanimous decision as to Arrington's habitual offender status. Following the empanelment of a second jury on December 21, 1999, Arrington was found to be a habitual offender. On January 14,

2000, Arrington was sentenced to eight years for the battery conviction and twelve years for being a habitual offender.

Arrington filed a pro se petition for post-conviction relief on February 3, 2003, and he filed amended petitions on December 29, 2003 and September 13, 2004. A hearing was held on Arrington's petition on December 3, 2004. On February 2, 2006, the post-conviction court denied Arrington relief. This appeal follows.

DISCUSSION AND DECISION

In turning to Arrington's claims before us, we are mindful that the petitioner bears the burden to establish his grounds for post-conviction relief by a preponderance of the evidence. *Godby v. State*, 809 N.E.2d 480, 481-82 (Ind. Ct. App. 2004) (citing Ind. Post-Conviction Rule 1(5)), *trans. denied*. Because the post-conviction court denied relief in the case at hand, Arrington is appealing from a negative judgment and faces the rigorous burden of showing that the evidence as a whole "leads unerringly and unmistakably to a conclusion opposite to that reached by the [] court." *Id.* at 482 (quoting *Williams v. State*, 706 N.E.2d 149, 154 (Ind. 1999) (quotation omitted)). 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. *Id.*

Post-conviction procedures 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). If an issue was known and available, but not raised on direct appeal, it is waived. *Id.* If it was raised on appeal, but decided adversely, it is res judicata. *Id.* 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.*

Arrington's challenges, with the exception of his claims of ineffective assistance of trial and appellate counsel, are freestanding claims of trial court error and are not available in post-conviction proceedings. *See Lambert v. State*, 743 N.E.2d 719, 726 (Ind. 2001). In post-conviction proceedings, complaints that something went awry at trial are generally cognizable only when they show deprivation of the right to effective counsel or issues demonstrably unavailable at the time of trial or direct appeal. *Sanders v. State*, 765 N.E.2d 591, 592 (Ind. 2002). Arrington does not argue that any of his claims were demonstrably unavailable at the time of trial or direct appeal. Accordingly, we deem the following claims waived: (1) his twenty-year sentence was manifestly unreasonable and not properly supported by aggravating and mitigating factors; (2) the habitual offender phase of his trial constituted fundamental error; (3) there was insufficient evidence to support a finding of serious bodily injury; (4) the trial court's jury instruction on intoxication constituted fundamental error; (5) the trial court's restitution order was in error;¹ and (6) there was prosecutorial misconduct at trial.

¹ While the State indicated during the post-conviction hearing that the question of a possibly improper restitution order might not have been available previously, and that the State would therefore not object to the court's determination as to its propriety, the post-conviction court, in denying all of Arrington's freestanding claims, determined they were available at the time of the original trial. Upon appeal, Arrington fails to demonstrate that the evidence points unerringly to the fact that this claim was not available on direct appeal. In any event, apart from contesting the amount, he fails to point to documentation in the record demonstrating on the merits how the restitution order was in error.

With respect to Arrington's claims of ineffective assistance of trial and appellate counsel, we observe that in order to prevail upon a claim of ineffective assistance of counsel, Arrington must present strong and convincing evidence to overcome the presumption that counsel's representation was appropriate. *Wieland v. State*, 848 N.E.2d 679, 681 (Ind. Ct. App. 2006), *trans. denied*. In assessing such claims, we follow the two-pronged test enunciated in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *Id.* A defendant claiming a violation of the right to effective assistance of counsel must show that counsel's performance was deficient and that it prejudiced the defense. *Id.* To establish that counsel's performance was deficient, the defendant must show that it fell below an objective standard of reasonableness. *Id.* To establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* This same standard is applicable to claims of ineffective assistance of appellate counsel. *Id.*

While Arrington states, in the section of his brief devoted to ineffective assistance of counsel, that "appellate counsel rendered deficient performance when he failed to raise the Habitual Offender Error," apart from referring to allegedly involuntary "confessions" which he claims were inadmissible, his argument following this statement fails to indicate exactly what this alleged error was, or how appellate counsel was deficient in failing to raise it. Appellant's Brief at 23. During the post-conviction hearing, appellate counsel indicated that his review of the record showed that the only meritorious claim was a challenge to the sufficiency of the evidence, which was the basis of Arrington's direct appeal. In considering Arrington's claim of ineffective assistance of appellate

counsel, the post-conviction court found Arrington, who had “failed to show what those issues were or could have been,” had failed to carry his burden. Supp. App. at 216. We too are unable to discern Arrington’s challenge to the effectiveness of appellate counsel. We deem this claim waived. *See* Ind. App. R. 46(A)(8)(a) (requiring that the argument in appellant’s brief be supported by cogent reasoning).

We are similarly unable to discern Arrington’s challenge to the effectiveness of trial counsel. We first observe that Arrington fails to devote a separate section of his brief to his claim of ineffective assistance of trial counsel. Instead, throughout his brief, Arrington makes passing references to trial counsel’s claimed failure to object to the allegedly involuntary confessions² as well as to certain evidence admitted during the habitual offender phase of the trial. He similarly makes passing reference to trial counsel’s failure to object to a ledger allegedly introduced by the prosecutor at sentencing for purposes of calculating restitution. Arrington fails to develop these arguments or to explain how trial counsel’s failure to object was deficient, how he was prejudiced, or how the evidence leads unerringly to a conclusion opposite that reached by the post-conviction court. Accordingly we deem this claim similarly waived. *See* Ind. App. R. 46(A)(8)(a).

The judgment of the post-conviction court is affirmed.

NAJAM, J., and MATHIAS, J., concur.

² We note that Arrington also states, however, that there were timely objections to the challenged evidence at trial. Appellant’s Brief at 24.