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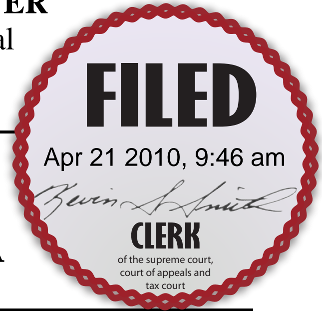

IN THE
COURT OF APPEALS OF INDIANA

OLIVER H. WILLIAMS,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 49A02-0907-PC-608
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Mark D. Stoner, Judge
Cause No. 49G06-0111-PC-220010

April 21, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Oliver H. Williams appeals the denial of his petition for post-conviction relief.

We affirm.

ISSUE

Whether Williams received ineffective assistance of trial and appellate counsel.

FACTS

The pertinent facts underlying Williams' amended petition for post-conviction relief were described as follows in our memorandum opinion on his direct appeal:

> On November 17, 2001, Virginia Williams ("Virginia") was inside her home at 2134 Gent Street in Indianapolis, while two of her children were outside fighting with each other. One child threw a rock at the other, but missed, and the rock hit a vehicle belonging to Keith Preer. Preer came across the street and cursed at the children. When Virginia and her husband, David Ross, went outside, Preer continued cursing and began arguing with Virginia. The argument culminated in Preer pushing Virginia on the forehead with his fingers. Ross then punched Preer in the face. Ross and Preer fought briefly before Preer yelled, "I'm going to get my boys now. It's on." Transcript at 163-164. Preer then left the premises and Ross, Virginia, and the children went inside their house.
>
> A short time later, Preer, along with Kory Miller and Williams, returned to Virginia's house and knocked on the front door. All three men were armed with guns. When Virginia answered the door, Miller waved a gun and demanded to know where Ross was. Miller declared that if Ross did not come out of the house, he and the two men were going to enter the house. While Virginia argued with the three men, Ross got one of his guns, loaded it, and stood in the kitchen. When all three men attempted to enter the house, Virginia closed the door.
>
> Next, Jerry Shropshire, Virginia's cousin, stepped out of the house and Miller grabbed him and swung him to the ground. The men stood over Shropshire and, as Williams was about to hit Shropshire in the face with a flower pot, Miller convinced him otherwise. The three men then

left the premises, and Shropshire went back inside the house. Later, Ross went into his bedroom, sat on the bed, and loaded a second gun.

Shortly thereafter, the three men returned to the house, kicked open the door, and began shooting. As Miller entered Ross's room, Ross shot Miller. Miller grabbed his chest and exited the house. Preer and Williams continued to fire, and a bullet fired by Williams grazed Ross. The men then left the house, but continued to fire shots into the house. A short while later, Miller died.

Stanley White, Miller's brother, witnessed the breaking and entering while he was standing in front of Preer's house, which is about fifty feet from Virginia's house. He also heard gun shots while the men were in the house, and saw his brother run out after he had been shot. Later that evening, White gave a statement to police about what he witnessed.

On November 20, 2001, the State charged Williams with felony murder, burglary, unlawful possession of a firearm by a serious violent felon, and possession of a handgun without a license. Williams waived his right to a jury trial on the charge of unlawful possession of a firearm by a serious violent felon. At trial, the State called White as a witness. When White repeatedly testified that he did not remember the contents of the statement he gave police on the night of the shooting, the State moved to admit the entire taped statement to impeach White. When Williams objected to the playing of the entire tape, the trial court ruled that the State could not play the entire tape unless White was given a chance to explain or deny each statement on the tape. The State decided to ask White about only some of the questions on the tape, and the trial court allowed the State to play the portions of the tape that corresponded to those questions. The tape was then admitted into evidence without objection from Williams.[1] The jury found Williams guilty of murder, burglary, and carrying a handgun without a license. The trial court entered judgment of conviction on those charges as well as for unlawful possession of a firearm by a serious violent felon.

At the sentencing hearing on July 10, 2002, the trial court merged the burglary conviction with the felony murder conviction, and also merged the carrying a handgun without a license conviction with the unlawful possession of a firearm by a serious violent felon conviction. The court imposed sentences of sixty-five years for the felony murder conviction and ten years for the unlawful possession of a firearm by a

[1] The record does not indicate what portions of the tape the jury heard, but it does indicate that the duration of the portions played was seven minutes and fifty seconds. The total length of the tape was approximately sixteen minutes.

> serious violent felon conviction and ordered the sentences to run consecutively.

Williams v. State, No. 49A02-0208-CR-683, slip op. at 2-5 (Ind. Ct. App. August 8, 2003).

On direct appeal, Williams challenged the sufficiency of the evidence to support his felony murder conviction; argued that the trial court had improperly admitted a witness' prior statement; and challenged the propriety of his sentence. On August 8, 2003, in affirming the trial court's judgment, we found that (1) the evidence was sufficient to justify his felony murder conviction; (2) the challenged evidence was merely cumulative of other properly-admitted evidence; (3) the trial court did not abuse its discretion in its consideration of aggravating and mitigating circumstances; and (4) Williams' enhanced sentence was not inappropriate pursuant to Indiana Appellate Rule 7(B). We also found that given the nature and circumstances of the crime, the occurrence of "a cooling off period," and Williams' criminal history, the trial court did not abuse its discretion in imposing consecutive sentences.

On August 8, 2004, Williams, *pro se*, filed a petition for post-conviction relief, wherein he argued that his trial and appellate counsel had rendered ineffective assistance. On April 28, 2008, he filed an amended petition for post-conviction relief. The post-conviction court conducted a hearing on Williams' petition. On September 18, 2008. On February 26, 2009, it issued an order denying Williams' petition for post-conviction relief. Williams now appeals.

DECISION

Williams challenges the denial of his petition for post-conviction relief.

> The purpose of a post-conviction proceeding is to give a petitioner the limited opportunity to raise issues that were unavailable or unknown at trial and on direct appeal. Such proceedings are not super appeals through which convicted persons can raise issues that they failed to raise at trial or on direct appeal. 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.
>
> A post-conviction petitioner bears the burden of establishing his claims by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5). When reviewing the denial of a petition for post-conviction relief, we will neither reweigh the evidence nor judge the credibility of the witness. Thus, to prevail on appeal from the denial of post-conviction relief, the petitioner must show that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite to that reached by the post-conviction court. We will disturb the post-conviction court's decision only if the evidence is without conflict and leads to but one conclusion and the post-conviction court has reached the opposite conclusion.

Donnegan v. State, 889 N.E.2d 886, 891 (Ind. Ct. App. 2008) (internal citations and quotations omitted).

1. Ineffective Assistance of Trial Counsel

> Claims of ineffective assistance of trial counsel are generally reviewed under the two-part test announced in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Thus, a claimant must demonstrate that counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms, and that the deficient performance resulted in prejudice. 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. A reasonable probability arises when there is a probability sufficient to undermine confidence in the outcome.

Grinstead v. State, 845 N.E.2d 1027, 1031 (Ind. 2006) (internal citations omitted). "Although the two parts of the *Strickland* test are separate inquiries, a claim may be disposed of on either prong." *Id.* Because the "object of an ineffectiveness claim is not to grade counsel's performance, [i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." *Id.* (citing *Strickland,* 466 U.S. at 697). Isolated poor strategy, bad tactics, a mistake, carelessness, or inexperience, do not necessarily constitute ineffective assistance. *Grinstead,* 845 N.E.2d at 1036.

Williams argues that trial counsel rendered ineffective assistance by the following:

a. Failure to Communicate a Plea Offer

Williams argues that trial counsel rendered ineffective assistance by failing to adequately communicate the State's second plea offer to him. The post-conviction court made the following findings of fact from which it concluded that trial counsel's performance in this regard was not deficient:

> 20. [Trial counsel James M.] Nave has practiced law for approximately thirty-nine years. Most of his legal experience has involved handling criminal matters from both the defense and prosecution perspectives.
>
> * * *
>
> 22. Throughout the pendency of the case, [Williams] "was a person who was not waiting to be led by his attorney."[2] [Williams] appeared to be knowledgeable about criminal procedure, and he knew how he wanted the case to be handled. [Williams] evidenced a desire to reject any plea offers and to take the case to trial.

[2] The post-conviction court appears here to be paraphrasing trial counsel's testimony from the hearing on Williams' petition for post-conviction relief. (P-C. App. 24-25).

> 23. As a matter of standard practice, Nave communicates to his client any and all plea offers tendered by the State.
>
> 24. The Court finds Nave's testimony to be credible.
>
> 25. At the start of the first day of jury trial, the trial court inquired as to the State's last plea offer. *Exhibit A* at 65. The prosecutor responded that the only offer to [Williams] other than guilty as charged, was an offer made that morning for a plea of guilty to murder with a "cap of fifty." *Id.* Nave advised the trial court that [Williams] had rejected the offer. *Id.*
>
> 26. Following jury selection, the proceedings were recessed for lunch. During this break, the State made a new offer to [Williams] wherein he would plead guilty to a Class A felony burglary charge "with a cap of thirty years." *Id.* At 78-79. Upon direct questioning by the trial court, [Williams] acknowledged that he understood the terms of the new offer and had rejected it. *Id.* At 79-80.
>
> 27. [Williams] has not demonstrated that Nave failed to advise [him] of a tendered plea offer.
>
> 28. [Williams] has failed to show that the State made any plea offers other than those discussed on the record at trial.
>
> 29. [Williams] has not demonstrated that Nave failed to properly explain to him the elements of felony murder.

(P-C. App. 109-110).

The post-conviction court thus concluded that Williams was not entitled to prevail on his claim that trial counsel rendered ineffective assistance by failing to communicate a plea offer. Specifically, the post-conviction court concluded,

> 40. * * * There is no evidence before the Court to establish that Nave failed to communicate any plea offers to his client. The record demonstrates that both tendered offers were discussed with [Williams] and both were rejected by [him]. [Williams] presented no evidence to support his claim. *See Tapia v. State,* 753 N.E.2d 581, 588 (Ind. 2001) ("The total absence of evidence on any of Tapia's claims of ineffective assistance of

> counsel supports the post-conviction court's conclusion that Tapia did not meet his burden of proof.").
>
> 42. [sic] Similarly, there is no evidence to support the claim that [trial counsel] failed to explain the felony murder charge to [Williams]. As such his claim must fail. *Id.*

(P-C. App. 113) (emphasis added).

The trial record contains evidentiary support for the post-conviction court's findings and conclusions. At the beginning of the jury trial on June 10, 2002, the trial court noted for the record that Williams, trial counsel Nave, and counsel for the State were present. Subsequently, the trial court inquired about the status of plea negotiations between the parties in the following colloquy:

> THE COURT: All right. And what was the State's last offer on the case?
>
> [PROSECUTOR]: The only offer on the case other than guilty as charged was offered this morning which was guilty to the murder with a cap of fifty [years].
>
> [THE COURT]: Oh, okay. And your client has rejected that offer?
>
> MR. NAVE: Guilty to the murder with a cap of fifty, dismiss all the remaining charges.
>
> [PROSECUTOR]: And dismiss the remaining counts.
>
> MR. NAVE: Yes, he did, Judge.

(Tr. 65). Williams did not raise any objection or otherwise communicate his desire to accept this initial plea offer from the State.

Following *voir dire*, counsel for Williams and the State met to discuss an alternate plea offer during their lunch break. When trial reconvened, counsel advised the trial

court of a new offer by the State in the following colloquy, for which Williams was again present[3]:

> THE COURT: * * * It's my understanding that there were some, an[ ] additional offer made during the break since we were last hear [sic]; is that correct, Mr. Nave?
>
> MR. NAVE: <u>There was, Judge. There was an offer to allow Mr. Williams to plead to burglary . . . as an A felony, **with a cap of thirty years**. And the State would dismiss the remainder</u>.
>
> [PROSECUTOR]: That is correct. Mr. Williams is facing, by my calculations a maximum of 105 years on the charges that have been filed against him.
>
> THE COURT: No, I don't think that's right. I think he's facing 70, 85, 88. No. I think he's facing 85.
>
> [PROSECUTOR]: I think the burglary is a B, is twenty, could run consecutive --
>
> THE COURT: It's got to merge in the felony murder because the burglary is an element of the felony murder. That's a mandatory merger. But, the serious violent felon does not have to merge. He's facing 85.
>
> [PROSECUTOR]: 85.
>
> THE COURT: <u>Do you understand that?</u>
>
> [WILLIAMS]: <u>Yes, ma'am</u>.
>
> THE COURT: Okay. And the starting point on the murder, I'm just trying to make a record here, okay. The starting point on the murder is fifty-five. And they're offering you [a] cap of thirty on the A felony burglary. Do you understand what that means?
>
> [WILLIAMS]: Yes, ma'am.

[3] The ensuing colloquy occurred outside the presence of the jury.

> THE COURT: Okay. That means thirty, do fifteen. Do you understand that?
>
> [WILLIAMS]: Yes, ma'am.
>
> THE COURT: And the starting point on the murder is fifty five. Do you understand that?
>
> [WILLIAMS]: Yes, ma'am.
>
> THE COURT: Okay. And you've rejected the State's offer?
>
> [WILLIAMS]: Yes, ma'am.
>
> THE COURT: And is that your own decision?
>
> [WILLIAMS]: Yes, ma'am.
>
> THE COURT: All right. I just want to get that on the record because sometimes people, after, feel differently. I don't know how the case is going to go for you because I haven't heard the evidence myself.
>
> [WILLIAMS]: Yes, ma'am.
>
> THE COURT: I just want to make that record. All right?

(Tr. 78-80) (emphasis added).

At the hearing on the petition for post-conviction relief, Nave testified, "I do recall what I think was an attitude from [Williams], that [he] w[as] not interested in taking any [plea] offers," (P-C. Tr. 12); "I do recall in our interactions that [he] appeared to be knowledgeable of . . . the criminal justice system," (P-C. Tr. 14); and "I remember Mr. Williams as a person who appeared to know what he wanted to do with his case and who was going to be in charge of what was going to happen in his case." (P-C. Tr. 27).

In light of the foregoing colloquies, our review of the record does not lead us "unerringly and unmistakably" to an opposite conclusion than that reached by the post-conviction court. *Donnegan,* 889 N.E.2d at 891. Williams has presented no evidence that trial counsel failed to advise him of the State's more favorable second plea offer. Rather, the trial record clearly reveals that he was made aware of each of the State's plea offers; that the trial judge expressly advised him that the second offer "means thirty, do fifteen"; and that Williams repeatedly acknowledged that he understood the offers and was rejecting them of his own knowing volition. (Tr. 80).

Williams has not demonstrated that he suffered prejudice from trial counsel's performance with respect to the plea offers. Thus, the post-conviction court's finding that trial counsel did not render ineffective assistance by failing to communicate a plea offer was not clearly erroneous.

b. Failure to Explain the Concept of Felony Murder

Williams also argues that trial counsel rendered ineffective assistance by failing to adequately explain the offense of felony murder to him. Specifically, he argues that he would have accepted the thirty-year offer if he had adequately understood "what felony murder was all about"; and that trial counsel's explanation of the offense of felony murder was inadequate, given Williams' youthful age[4] and lack of "good common sense" at the time of trial. Williams' Br. at 7; (P-C. Tr. 14).

[4] Williams was twenty-two years of age at the time of trial.

The post-conviction court made the following findings of fact from which it concluded that trial counsel's performance in this regard was not deficient:

> 21. Although Nave has limited recall of the specific facts in this case, Nave recalls that [Williams] gave no outward indication of legal incompetence or legal insanity. As a result, Nave had no reasonable reason to consider the need for a competency hearing.
>
> * * *
>
> 24. The Court finds Nave's testimony to be credible.
>
> * * *
>
> 26. Following jury selection, the proceedings were recessed for lunch. During this break, the State made a new offer to [Williams] wherein he would plead guilty to a Class A felony burglary charge "with a cap of thirty years." *Id.* At 78-79. Upon direct questioning by the trial court, [Williams] acknowledged that he understood the terms of the new offer and had rejected it. *Id.* At 79-80.
>
> * * *
>
> 29. [Williams] has not demonstrated that Nave failed to properly explain to him the elements of felony murder.

(App. 109-110).

In concluding that Williams was not entitled to prevail on his claim that trial counsel failed to explain the offense of felony murder, the post-conviction court concluded,

> 42. Similarly, there is no evidence to support the claim that [trial counsel] failed to explain the felony murder charge to [Williams]. As such [Williams'] claim must fail. [*Tapia v. State,* 753 N.E.2d 581, 588 (Ind. 2001) ("The total absence of evidence on any of Tapia's claims of ineffective assistance of counsel supports the post-conviction court's conclusion that Tapia did not meet his burden of proof.").]

(App. 113).

The trial record contains undisputable evidentiary support for the post-conviction court's findings and conclusions. It reveals that Williams was present when his trial

counsel and the court discussed the details of the State's second plea offer, and that he did not express any confusion or lack of understanding with respect thereto. At Williams' jury trial, trial counsel Nave advised the trial judge that the State's second plea offer would "allow Mr. Williams to plead to burglary . . . as an A felony, with a cap of thirty years. And the State would dismiss the remainder." (Tr. 79). The trial judge then asked Williams several times whether he understood the State's second plea offer, and whether he was rejecting the same knowingly and voluntarily. Williams responded affirmatively.

Although the post-conviction record reveals a conflict[5] between the testimony of trial counsel and that of Williams on the issue of whether trial counsel adequately explained the offense of felony murder, such is a question of witness credibility, which is the province of the post-conviction court. *See Donnegan,* 889 N.E.2d at 891 (in reviewing post-conviction proceedings, we cannot reweigh the evidence or reassess the credibility

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[5] On one hand, at the post-conviction hearing, trial counsel Nave testified that he did not recall having any qualms about Williams' competence or ability to comprehend his circumstances; and that had any such concerns arisen, he would have "followed up on [those] concerns." (P-C. Tr. 27). Nave also testified as follows regarding his general approach to client representation:

> I always approached [public defender client meetings] by sitting down and almost invariably my first question was, "Do you know what you've been charged with?" Then I would go through the process of explaining each count on an information and if there was something unique or exotic about a count, I would go into a process of explaining that to them."

(P-C. Tr. 26). Williams, on the other hand, testified that

> [trial counsel] did not explain that if I accepted [the second plea offer], the State would drop all charges including Phase II of trial . . . . * * * I was confused. * * * [W]hen questioned by the Judge on rejecting this offer, I still believed I was facing fifty years, twenty for serious violent felon, on top of a thirty-year plea offer.

(P-C. Tr. 39).

of witnesses). Accordingly, we must decline Williams' invitation that we reassess the credibility of the witnesses.

Our review of the record does not lead us "unerringly and unmistakably" to an opposite conclusion than that reached by the post-conviction court. *Id.* Williams has not presented evidence that demonstrates that trial counsel failed to adequately explain the offense of felony murder and that Williams suffered prejudice therefrom. Thus, the post-conviction court's finding that trial counsel did not render ineffective assistance in this regard is not clearly erroneous.

c. Failure to Object to Final Instruction Number Fourteen

Next, Williams argues that trial counsel rendered ineffective assistance when he failed to object to Final Instruction Number Fourteen because the instruction was improper. Specifically, he argues that a self defense instruction is improper in a felony murder trial, and that by giving Final Instruction 14, "the trial court . . . same as told the jury that Williams was guilty and that [homeowner] Ross had the right to use deadly force to protect his home from those attempting to commit burglary." Williams' Br. at 11.

> Final Instruction Number Fourteen states,
>
> The defense of self-defense is defined by law as follows:
> a. A person is justified in using reasonable force against another person to protect himself or a third person from what he reasonably believes to be the imminent use of unlawful force. However, a person is justified in using deadly force only if he reasonably believes that the force is necessary to prevent serious bodily injury to himself or a third person or the commission of a felony. No person in this State shall be placed in

> legal jeopardy of any kind whatsoever for protecting himself of [sic] his family by reasonable means necessary.
> b. A person is justified in using reasonable force, including deadly force, against another person if he reasonably believes that the force is necessary to prevent or terminate the other person's entry of or attack on his dwelling or cartilage [sic].

(P-C.App. 107).

The post-conviction court concluded that Williams was not entitled to prevail on his claim that trial counsel rendered ineffective assistance by failing to object to Final Instruction number fourteen, because Williams cited no legal authority for his proposition and failed to demonstrate "that any perceived instructional error prejudiced his rights." (App. 114). Specifically, the post-conviction court's relevant conclusions are as follows:

> 43. To prevail on an ineffective assistance of counsel claim based upon counsel's failure to file motions, pursue defenses, or object on a defendant's behalf, it must be demonstrated that such motions or objections would have been successful. *See e.g. Danks v. State,* 733 N.E.2d 474, 489 (Ind. Ct. App. 2000).
>
> 44. "The purpose of a jury instruction is to inform the jury of the law applicable to the facts without misleading the jury and to enable it to comprehend the case clearly and arrive at a just, fair, and correct verdict." *Dill v. State,* 741 N.E.2d 1230, 1232 (Ind. 2001). Instructing the jury lies within the sole discretion of the trial court. *Edgecomb v. State,* 673 N.E.2d 1185, 1196 (Ind. 1996).
>
> * * *
>
> 46. [Williams] is also not entitled to his claim that counsel was ineffective for failing to object to final instruction number fourteen. [He] argues, without citation to authority, that a self-defense instruction is not proper in a felony murder trial. However, a self-defense instruction may be proper in cases such as [Williams'] in which it was reasonably foreseeable that [Williams'] criminal activity would likely create a situation where the death of one of [his] co-perpetrators would result from the victim's act of self defense or defense of his dwelling. *See Exum v. State,* 812 N.E.2d 204 (Ind. Ct. App. 2004), *transfer denied.*

> 47. [Williams] has not shown that any perceived instructional error prejudiced his rights. *See Hollowell v. State,* 707 N.E.2d 1014, 1023 (Ind. Ct. App. 1999). His counsel was not deficient for failing to object to this instruction.

(App. 113-14).

Our review of the record does not lead us "unerringly and unmistakably" to an opposite conclusion than that reached by the post-conviction court. *Donnegan,* 889 N.E.2d at 891. The post-conviction court correctly cited *Exum* for the proposition that the trial court's giving of a self-defense instruction in a felony murder case does not constitute error where, under the facts and circumstances of the case, it was reasonably foreseeable that the death of co-perpetrator could result as a natural consequence of the underlying felony offense. *See Exum,* 812 N.E.2d 204, 210 (Ind. Ct. App. 2004), *trans. denied*. Thus, given Williams' faulty legal premise and absent any citation to legal authority in support of his position, we cannot say that the post-conviction court's conclusion that trial counsel did not render ineffective assistance by failing to object to Final Instruction number fourteen was clearly erroneous.

2. Ineffective Assistance of Appellate Counsel

Finally, Williams argues that appellate counsel rendered ineffective assistance by failing to argue that the trial court erred in giving Final Instruction number fourteen.

A petitioner arguing ineffective assistance of appellate counsel based upon appellate counsel's failure to properly raise and support a claim of ineffective assistance of trial counsel faces a compound burden. *Dawson v. State,* 810 N.E.2d 1165, 1177 (Ind. Ct. App. 2004). A petitioner making such a claim must demonstrate that appellate

counsel's performance was deficient and that, but for the deficiency of appellate counsel, trial counsel's performance would have been found deficient and prejudicial. *Id*. The petitioner must establish the two elements of ineffective assistance of counsel separately as to both trial and appellate counsel. *Id*.

Williams has not met his compound burden of proof. Inasmuch as his claim of ineffective assistance of trial counsel has not satisfied the *Strickland* requirements, he cannot prevail on his claim that appellate counsel rendered ineffective assistance. We, therefore, do not reach the merits of his claim.

Affirmed.[6]

BAKER, C.J., and CRONE, J., concur.

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[6] Williams also raised the issue that the post-conviction court erred in failing to find that trial and appellate counsel rendered ineffective assistance by failing to object to Final Instruction Number Twelve; however, this issue is waived because Williams has advanced no argument in support of his position in his brief or citation to legal authority whatsoever with respect to this instruction.